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Who Makes ESG? Understanding Stakeholders in the ESG Debate

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SYMPOSIUM

WHO MAKES ESG?: UNDERSTANDING STAKEHOLDERS IN THE ESG DEBATE

WELCOME AND INTRODUCTORY REMARKS

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† This symposium was hosted virtually by Fordham University School of Law on October 23, 2020. The transcript has been edited for clarity and to provide sources, references, and explanatory materials for certain statements made by the speakers.

i. Matthew Diller is dean of Fordham Law School and the Paul Fuller Professor of Law. He is one of the nation's leading voices on access to justice issues and a prominent scholar of social welfare law and policy. Dean Diller has lectured and written extensively on the legal dimensions of social welfare policy, including public assistance, Social Security, and disability programs, and on disability law and policy. His articles have appeared in the *Yale Law Journal*, *UCLA Law Review*, *NYU Law Review*, *Fordham Law Review*, *Texas Law Review*, and *Michigan Law Review*, among other publications, and he is widely cited as an expert by the media, including *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *Bloomberg*, and the *National Law Journal*. He has taught a range of law school classes, including Civil Procedure, Administrative Law, Social Welfare Law, and Public Interest Law. In addition to his work as an administrator and scholar, Dean Diller is a member of the New York State Permanent Commission on Access to Justice and is chair of the commission's Committee on Law School Involvement. He also serves on the board of The Legal Aid Society of New York and is co-chair of the Council on the Profession at the New York City Bar Association, where he has served as a vice president and member of the executive committee. In addition, Dean Diller is a member of the Judicial Institute on Professionalism in the Law and a fellow of the American Bar Foundation. He has also served on the boards of Legal Services NYC, where he was vice chair, the National Center for Law and Economic Justice, and Volunteers of Legal Service. Dean Diller received an A.B. and a J.D., both magna cum laude, from Harvard University, where he was an editor of the *Harvard Law Review*. After clerking for the Honorable Walter R. Mansfield of the U.S. Court of Appeals for the Second Circuit, Dean Diller worked as a staff attorney in the civil appeals and law reform unit of The Legal Aid Society from 1986 to 1993. Dean Diller began his teaching career at Fordham Law in 1993 and was named the Cooper Family Professor of Law and co-director of the Louis Stein Center for Law and Ethics. From 2003 to 2008, he served as the associate dean for academic affairs. Prior to being appointed dean of Fordham Law in 2015, he served as dean at the Benjamin N. Cardozo School of Law from 2009 to 2015. Widely recognized by the legal community and beyond, Dean Diller has received numerous awards for his work and scholarship. In 1991, The Association of the Bar of the City of New York honored him with a legal services award. In 2014, the AALS Section on Pro Bono and Public Service Opportunities awarded him the Deborah L. Rhode Award for his leadership in legal education and public service. At Fordham Law

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School, he has been recognized with the Louis J. Lefkowitz Award for the Advancement of Urban Law from the *Fordham Urban Law Journal* (2000), the Eugene J. Keefe Award for outstanding contributions to the Law School (2002), and the Dean's Medal of Achievement (2009).

ii. Stephanie Betts is an Investment Specialist at M&G Investments in London. She previously worked at Citigroup, J.P. Morgan, and Lehman Brothers in New York and London. Stephanie began her career as a securities regulation lawyer with Sullivan & Cromwell in New York. Ms. Betts graduated from New York University School of Law with an LL.M. in corporate taxation & securities regulation. She also holds an MBA in corporate taxation & finance from the Institute of Political Sciences in Paris and a law degree in Corporate Law & Tax from the University of Paris II-Assas.

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viii. Professor David H. Webber teaches at Boston University School of Law, where he is the Associate Dean for Intellectual Life. Professor Webber teaches courses in securities regulation, shareholder activism, shareholder litigation, civil procedure, pensions, and capital stewardship. He has been a visiting scholar at Boston College Law School, Tel Aviv University Law School, and New York University Law School. His

book, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* (2018), received widespread coverage and was nominated for numerous awards. Professor Webber has authored numerous articles and chapters on securities regulation, shareholder litigation, and shareholder activism, and has contributed op-eds to *The New York Times*, *The Washington Post*, *The Los Angeles Times*, and the *Chicago Tribune*. Professor Webber graduated magna cum laude and Phi Beta Kappa from Columbia University with a B.A. in history. He received his J.D. from New York University School of Law, where he was an editor of the *New York University Law Review* and a Lederman/Milbank Fellow in Law and Business.

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ix. Leo E. Strine, Jr., is Of Counsel in the Corporate Department at Wachtell, Lipton, Rosen & Katz. Prior to joining the firm, Strine was the Chief Justice of the Delaware Supreme Court from 2014–2019 and Chancellor of the Delaware Court of Chancery from 2011–2014. Mr. Strine wrote hundreds of influential opinions on corporate governance, contracts, trusts & estates, criminal law, administrative law, and constitutional law. Mr. Strine has long held teaching positions at Harvard University and the University of Pennsylvania, where he teaches a diversity of courses and topics relating to corporate law, including M&A, the role of independent directors, valuation, and theories of corporate law. Mr. Strine also serves as the Michael L. Wachter Distinguished Fellow in Law and Policy at the University of Pennsylvania Carey Law School, the Ira M. Millstein Distinguished Senior Fellow at the Ira M. Millstein Center for Global Markets and Corporate Ownership at Columbia Law School and a Senior Fellow of the Harvard Program on Corporate Governance. He is a member of the American Law Institute and serves as an advisor on the Institute’s project to create a restatement of corporate law. Mr. Strine frequently speaks and writes on corporate and public law, particularly concerning the impact of business on society, and his articles have been published in *The University of Chicago Law Review*, *Columbia Law Review*, *Cornell Law Review*, *Duke Law Journal*, *Harvard Law Review*, *University of Pennsylvania Law Review*, and *Stanford Law Review*, among others. In 2000, Governor Thomas R. Carper awarded Mr. Strine the Order of the First State. In 2002, President David Roselle of the University of Delaware presented him with the University’s Presidential Citation for Outstanding Achievement. In 2006, he was selected as a Henry Crown Fellow at the Aspen Institute. In 2019, he was awarded an honorary degree from Washington College in Chestertown, Maryland. Prior to becoming vice chancellor of the Delaware Court of Chancery in 1998, Mr. Strine served as Counsel and Policy Director to Governor Carper. He also worked as a corporate litigator at Skadden, Arps, Slate, Meagher & Flom from 1990–1992. He clerked for the Honorable Walter K. Stapleton of the U.S. Court of Appeals for the Third Circuit and for Chief Judge John F. Gerry of the U.S. District Court for the District of New Jersey. Mr. Strine graduated magna cum laude from the University of Pennsylvania Law School, where he was a member of the Order of the Coif, and received his B.A. summa cum laude from the University of Delaware, where he was member of Phi Beta Kappa and a Truman Scholar.

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WELCOME AND INTRODUCTORY REMARKS

DEAN DILLER: Hello everyone. My name is Matthew Diller, the dean of Fordham Law School. Thank you so much for joining us today.

Today, we have the *Fordham Journal of Corporate & Financial Law*'s annual symposium. This year's topic is who makes ESG and understanding the stakeholders in the ESG debate.

At the outset, I want to thank Professors Caroline Gentile and Sean Griffith for their immense contributions as faculty advisors to the *Journal*. I want to thank all of our incredibly distinguished panelists and speakers today. I will give a particular shoutout to Fordham alum Scott Simpson, from the class of '82, as well as to former Chief Justice Leo Strine of the Delaware Supreme Court. I also want to thank our students, especially the members of the *Journal of Corporate & Financial Law*, and in particular Dianna Lam, the symposium editor and the architect of this event, who will be serving as moderator.

The *Journal of Corporate & Financial Law* was established in 1995 and is one of the premier student-edited business law journals in the country. It is the second-most cited specialty journal in banking and finance and among the top ten specialty journals in corporations and associations. Its articles, notes, essays, comments, and symposia are heavily relied on by academics, practitioners, executives, regulators, and judges to keep abreast of leading corporate law scholarship and emerging issues in banking, bankruptcy, corporate governance, capital markets, finance, mergers and acquisitions, securities, and tax law and practice.

Today's program is on a fascinating and important subject, and I'll talk about that in a moment. But first, let me just say that the *Journal* is really a centerpiece of Fordham Law School's involvement and engagement with business law. It has been a tremendous vehicle by which our students interact with scholars and practitioners, and both contribute to the scholarly debate and also help to focus it through publishing and editing. Fordham Law School has long placed a priority on tackling difficult issues in business law. I think we are one of the few major law schools that I know of where corporate law is a required course. I know this makes me sound really old, but when I started on the faculty, it wasn't just a required course—it was a full-year required course.

We have about 100 business law courses in the curriculum, and we draw on both a superb faculty in the field as well as an adjunct faculty drawn from many leading practitioners in the city and beyond. And so

today's program is something I'm very proud of and the school is very proud of.

The topic is of critical importance. In recent years, the role of the stakeholder in modern capitalism has been at the forefront of corporate discussion. How should corporations balance the interest of stakeholders and shareholders, particularly as they diverge? The pandemic and the social issues which have been brought into focus this year have strengthened the importance of this larger conversation, and today's program aims to foster a meaningful dialogue concerning the history, present state, and future of environmental, social, and economic governance criteria as a measure of corporate performance.

Our panels and speakers will address whether a corporation will recalibrate how they deliver upon these ESG goals, or if the burden will continue to fall on stakeholders to effectuate their desired changes. As the pandemic and the social issues recently brought into focus have galvanized a movement towards ESG, will that energy last, or will businesses return to their previous state once we return to normalcy? And what lessons can our country draw from the European Union?

Thank you for joining us today. I want to thank all of our speakers and participants, and I want to introduce Dianna Lam, the symposium editor in charge of this year's program.

PANEL ONE

AJ HARRIS: Thank you for joining us today. To start this discussion, perhaps we could take a brief overview of directors and their duties, both in the U.S. and in Europe, to start. Are there any concerns regarding liability for directors if they are not exclusively working to promote shareholder value?

MR. CORTE: Let me give, perhaps, a European overview of fiduciary duties as they relate to ESG to start the discussion; then David, you can pick up on the U.S. bit. I think as a general matter, there is not one standard that applies across Europe. The EU has not codified fiduciary duties for directors; however, generally speaking, across countries, the focus in terms of fiduciary duties of directors of European companies is on what you refer to in Europe as the corporate interest. What is meant by that is the interest of the company as a whole and all of its stakeholders, so that is shareholders, of course, but that is also employees, and to a certain degree, creditors and other stakeholders, depending on the circumstances of the company. The general principle applies across Europe. How that is interpreted in each jurisdiction differs quite dramatically and depends a little bit on the legislation of each jurisdiction.

In Europe, you go from jurisdictions where employees are required to have a seat on the board—in certain cases, at least three seats on the board—and therefore, have meaningful participation through their representatives in the actual corporate governance of the company itself. There are also situations where employees have a specific say in specific transactions, for example, merger transactions in Europe have consultation rights that employee representatives may exercise.¹ If you are moving jurisdictions of a company from one jurisdiction or another, or significantly altering the business of the company, there are requirements to consult with employees in several jurisdictions, notably France, Germany, the Netherlands, and certain Nordic jurisdictions

† Panel 1 was moderated by symposium editor Dianna Lam and symposium committee members AJ Harris and Taylor Wells.

1. See Council Directive 2002/14/EC, 2002 O.J. (L 80) 29–34 (EC).

which bring their employees into the governance of the company quite significantly.

Though you have that extreme or that reality on the one end of the spectrum, you also have jurisdictions like, I would say, the UK, where the approach to fiduciary duties, even though they are termed as the interest of the company and all of its stakeholders, has traditionally looked principally at shareholder value. The reason for that is that employees do not really have participation in the governance of the company and ultimately the directors are elected by shareholders and so naturally they will tend to look at what the shareholder interests are. But by and large, I think that there is a broader view of what the fiduciary duties of directors are across Europe.

There is a shift these days to refocusing on the actual language that describes these fiduciary duties and focusing on other aspects of the company—on the input of employees and other stakeholders—and so, I would say that given that starting point, there is far less concern with the topic of liability of directors for not exclusively promoting shareholder value. It would probably be the other way around, you would have to add even in the jurisdictions that are closest to say, Delaware, you would have to at least evaluate what the effect of decisions that you take at the board level are on employees or other stakeholders of the company. So, I do not think the issue is as significant in Europe as it might be in the States, David.

MR. SILK: This is an issue that in the States, as of late, has generated a lot of debate. Although the debate has in some respects generated more heat than light.

Let me start with a little bit of background that is helpful because it ties to the shift that Lorenzo was talking about. If you start way back in the history of time, corporations had to have some kind of a public benefit, that public benefit ran to the crown or whoever the government was. But there had to be some public benefit element to get the corporate charter. This faded over time, over hundreds of years until the point in the middle of the last century, where at least in the U.S., it had faded completely. The dominant view of corporate law was that the purpose of the corporation was solely to benefit the financial interests of shareholders.

As pendulums do, that pendulum has swung back over the last several decades to the point where the Business Roundtable recognized,

about a year ago, that corporations are really part of a larger ecosystem.² Part of the purpose of a corporation includes making positive contributions to society. That background and the revised view of purpose is important because it recognizes evolving expectations. Expectations have changed, however, the law really has not changed. It is critical to understand this divergence because the real-life decisions of directors, whether here in the U.S. or elsewhere, are very much impacted by expectations—decisions rarely flirt with the bounds of the law. Decisions that we read about in cases are those that flirted with the bounds of the law; those that flirt with the bounds of expectations are dealt with by shareholder votes, and people buying and selling stock. That is important background to what the law actually is.

Here in the United States, whether in Delaware or elsewhere, there is in fact wide deference to the board of directors. In the limited context of a sale or breakup of the corporation, it is clear, at least in Delaware, that in that context the directors' duty is to maximize the short-term value of the Corporation for the stockholders.³ In the general operational context, courts defer to the business judgment of disinterested directors and do not actually require maximization of short-term stockholder value in these ordinary course business decisions where ESG would come into effect. Now, the limit to all that is waste: Directors are not allowed to engage in waste.⁴ That being said, a board that is engaging in an ESG-type decision is likely to consider that decision in the context of the best interest of the company.

There is a lot of debate over this question of “must you attend solely to the financial benefit of stockholders, or can you consider these other things?” I think you can consider these other things, and indeed, that is not a change in the law at all. It is important that you do consider these other things, and I believe that the expectations have changed. There is a greater expectation now within the United States that people will actually pay attention to ESG type risks and opportunities in the way that they make their decisions.

2. *Business Roundtable Redefines the Purpose of a Corporation to Promote “An Economy That Serves All Americans”*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/3YH4-N3ZB>].

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

4. *See* Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).

In terms of actual liability, directors of Delaware companies, at least, have had more exposure—again in the ordinary course of operations, rather than the terminal value situation—they have had more exposure for failing to comply with or think about ESG considerations. For example, the recent *Bluebell* case,⁵ where a board did not appropriately consider the health and safety aspects of its operations and was held to be violating its fiduciary duties. A well advised board in the United States will think about the value aspects of the ESG opportunities and will generally make decisions that it considers to be in the best interests of the corporation. A component of that is going to be the long term value of the corporation.

This is where the heat versus light comes in. You do not see a board sitting around saying, “I am going to make this decision even though it is going to destroy value for the corporation.” That record just does not exist. You see directors sitting around saying, “Is this the right thing to do and what is the benefit in making the decision?”

Bottom line is, I do not think that a well-advised board is going to have to stay up at night worrying that they are going to have financial exposure or liability as a result of making ESG type decisions that are part of their ordinary-course business decisions.

MR. SIMPSON: David, if I may ask a question regarding what you and Lorenzo said: For those of us who have been practicing in Europe for the last 20 or 30 years, I think we would suggest that in the context of ESG, there is a distinct advantage to a board in Europe based on the historical reference point for European Directors, stemming from the definition around an affirmative obligation to consider the interest of all stakeholders and not just shareholders. Number one, I think that is an important distinction, and perhaps gives European companies a little bit of a head start. I accept, as you say, that for all sorts of good reasons, including big investors in the U.S. pushing boards to consider any variety of other interests in addition to short term interest—I get that. Do you think that directors would benefit in the US, from a broader definition of the corporate interest? Is it really an advantage that the European companies have, by reference, to their home jurisdictions or not?

MR. SILK: I think that the advantage is in the fact that these decisions, these types of interests, are regularly brought before European directors in a way that they might not have been regularly brought

5. *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531 (Del. Ch. July 6, 2018), *reargument denied*, 2018 WL 5994971 (Del. Ch. Nov. 13, 2018).

before U.S. directors. There are states, however, that have constituency statutes where these types of interests are specifically permitted, although rarely required, to be considered.⁶ And whether or not there is a constituency statute, I think that at the end of the day, directors think about ESG decisions in terms of what is in the best interests of the corporation itself, including in the context of long-term value. I think that most ESG decisions are evaluated in the context of what value the decision brings to the corporation. So, to get to your question, I think that there is an advantage for European companies in that there may be an educational head start that is historical.

MR. CORTE: How about the idea of employee participation on the board? That is not implemented throughout Europe in a uniform manner at all. In fact, I would still say it is probably the exception, if I think about it. There are maybe four or five prominent jurisdictions that prominently enforce that and some other jurisdictions, that on the wave of ESG, are now considering whether to implement that type of legislation and consider it from time to time. One of those is the UK actually, where this is brought up every once in a while. Do you think that would meaningfully influence the ability to consider ESG issues by a board? I will tell you my perception is that in a lot of European boards where I have seen employee representative participation, the employee representatives were not as vocal as I would have expected them to be.

MS. BETTS: Yes, I am surprised. We were talking about ESG as a big sort of lump thing. We have been talking a lot about social and obviously employee's representations, looking after your employees, which is something that obviously has come to the fore and in the context of COVID. If we step back a little bit from COVID and look at ESG as what it is—Environment, Social, and Governance—I think the United States is not as far back from Europe as everybody might think. If you look at governance, per se, and you look at the exchange requirements in particular, I think you have already got a really good set of rules and ensuring that the sort of basic governance principles are covered. You will have things, say on pay, you will have things like board representation for minorities or an effort on gender fluidity, etc. You do have a lot of good foundational blocks, if you want, in terms of the “G.”

6. See Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 865–67 (2021).

In terms of the “E,” there are going to be a lot of ways for the “E” to start. Things will come to the corporation where they will not be able to avoid it and they will have to make decisions. The boards will have to make decisions that take into consideration, whether it is “E,” “S,” or “G,” but generally on the “E” side, which will be linked to that economic interest in the short, medium, and long term. In particular, if you are going to go and try to fund a project that is deemed to be at risk from some of the insurance—suddenly, the cost of funding those projects is going to be higher. The valuation assigned to this project by the stock market is going to be lower. The cost of insuring them is going to be higher. Suddenly, you have got a cluster of incentives that are pushing the Corporation and the board of directors to take a slightly different approach to those, and I think in that sense, we will have a different shape of approach to “E,” “S,” and “G.”

As to capitalism, we are all working really hard behind the scenes, trying to bring that regulation together globally on ESG, but I think the “E” will come through different routes to different companies. I think the “S” is obviously very specific, very topical right now and I think the governance is often regulated by local jurisdiction, in particular exchange regulations, which makes for a very interesting sort of patchwork if you want.

We need to look at all of these interests for one particular company in one particular region. The challenge of ESG is that we are trying to approach it as one big thing, one big silver bullet. But in fact, it has got many facets and many ways to implement it from a board perspective. Hopefully, directors will not feel that it is a big threat to them, but, on the contrary, that it is full of opportunities for them trying to enhance shareholder value.

MR. SIMPSON: Stephanie, I fully agree that it is a multi-headed sort of issue. The one common feature about ESG is that it is different maybe than short-term shareholder value. Before you say anything else, I should probably highlight something on behalf of all of us, which is that these are our own personal views, and not views of our firms or any of our clients. So, we “take that as read,” because I am perhaps going to say things that some of Lorenzo and my partners would disagree with. I think the one common element to ESG in this debate is the fact that it is different than short-term shareholder value or arguably different. I think maybe a combination of the fact that European companies under most of the jurisdictions where they are incorporated are encouraged to look to a broader set of stakeholder interests which is a huge advantage to them.

I would make the other observation and I am sure Leo Strine may disagree later, but he gets the last statement at the end, so he can say what he wants. I think there is another big difference here that we haven't touched on. In the United States, directors are regularly brought before a court to have their conduct challenged. That is just not the case in Europe. If you have a board in Europe that actually wants to make a bold move: One, they can point to a definition of their duty which is broader and allows for stakeholder interest. Two, chances are high they are not going to get brought in front of a court anytime soon. I think that is a very powerful tool that a European board who wants to push into ESG has that a board in the United States might not have because they might not be able to point to a statute that is broad enough. They certainly will have to deal with shareholder litigation, but I don't know, David, if that is fair enough.

MR. SILK: As a practical matter, if the board, by pushing into a broad new ESG development, were actually saying to itself, this is something that we want to do for the environment, but we see no benefit to the company, that would be hard for a board to do. But in approving a project, a board would more likely conclude that the project is actually good for the company because it recognizes the need for transitioning to a lower carbon environment and moving to the next level.

Similarly, a board may recognize that social justice is important to the functioning of its business. For example, if the company is going to have its stores open and sell goods, there cannot be riots in the streets. For most ESG actions that boards want to take, there is very little real life risk that the liability framework in the United States is going to somehow interfere with it. If you get to this question of a board wanting to take a broad new step, maybe you just have a different viewpoint from a U.S. company to an EU company. However, I suspect that the board will be able to develop the kind of record that it needs, that the action that it wants to take is in the best interests of the corporation over the long term.

You asked whether employee representation on U.S. boards would make a difference? I think it would, to the extent that, presumably, that kind of representation is union-based representation. The unions here have been very active in corporate governance, in bringing shareholder proposals and whatnot. I don't think they would necessarily be wallflowers in a boardroom. I think that they probably would be active, and I think that would bring a different perspective from at least from the "S" part of ESG, or as Leo would say, the other "E" part of EESG.

MS. BETTS: It is an interesting point, David, because when we talk about diversity, and the diversity of boards, one of the things that is interesting is not to have everybody coming from the same place, whether it is NYU, Columbia, Harvard, or Fordham. You want people from different horizons because you look at the company and you think, well, I am operating in this environment. Who am I selling to? Who am I servicing? You need some form of representation of what the real world is within your board, so they have a better understanding of how to position the company going forward to benefit from all the opportunities that they are going to have. Regarding the ESG concept versus liability, I do take on board the point that the SEC is very long arm when it comes to punishing noncompliance, in the sort of executive. I understand this is going to be very useful later on in our discussion, but I think there is a very interesting point where you said, well actually, it is almost like risk management, and ultimately, you have to be able to show that you are doing this in furtherance of the economic interest of the shareholders and not everything that is short term.

Unfortunately, we have the issue that companies have to report quarterly [earnings] and sometimes that is quite hard to launch bigger programs for a year, two year, four years that might be costly and yield the benefits later on. I think in that sense, but I can see how boards can position that and say, “We are not a charity. We are not doing this just for charitable endeavors, but we think that ultimately it will benefit our company to have more diversity to put in place—for example, offering childcare because we want more women on board. We want a different outlook on things.” I am taking this as an example, but any of those things are quite valid, as are environmental issues. It is just if you learn to look at your externalities now, understand them, and try to adjust your business model, it might save you an enormous amount of taxes going down the line or actually lost sales because the one thing that we will eventually talk about on this panel is actually the power of the consumer because when the regulation, the regulator, the legislators are not quite there. I think that the consumer is moving quite quickly and that will also make companies think about the reputational risk. Also, the market rates, in terms of lost sales when products are deemed to be sort of very much against the current flow.

MR. SILK: It is value and values.

MS. BETTS: Exactly, exactly.

MR. CORTE: Perhaps one area David raised where there is a marked difference between Europe and the United States, in terms of the fiduciary duties and the liabilities of directors, is in a transactional

context. In Europe—and this is true of every jurisdiction that I have worked with in Europe, most EU jurisdictions I would say—fiduciary duties of directors do not evolve and do not flip to a short-term maximization of shareholder value. For example, in a sale context, they remain stable, and they continue to look at the interest of the corporation and all of its stakeholders, including in a sale context. In the United States, there is a Revlon duty that kicks in at some point and that probably is a significant difference that allows directors less latitude.⁷ I would suggest that that allows directors in Europe to look at other stakeholders in the company in those transactional contexts in a way that U.S. directors cannot.

MR. SILK: That is correct. A director of a Delaware company could not take a lower price to sell the company to someone who is promising to operate the company in a way that protects the environment. That is clearly a difference.

MR. SIMPSON: Can I just try something else on you guys because it cuts against everything that I was saying a little bit earlier? Just to get your reaction. So, on the one hand, I think the European director has an advantage because there is a reference point to stakeholders. In addition, I think they are insulated a little bit more from criticism because there is not the same ability to litigate so they could be bolder if they wanted to. Let me take the exact opposite argument and say since big investors like BlackRock and others have become so clear when it comes to the importance of ESG, they are pushing that agenda into the U.S. boardroom. I would argue, and Lorenzo, if you agree, but I would argue they are not able to as much because European corporations and boards are a little bit more protected. So, a little bit more insulated from that kind of immediate pressure to pay attention to what the biggest shareholders are telling them. Is that fair, or . . .

MR. CORTE: I think they are more insulated from litigation, but they are not more insulated from shareholder votes and for getting thrown out of the board. If the BlackRocks or the Vanguard or many other of these enormous asset managers decide that they are going to focus on ESG, I think their directors will have to respond to that, if they want, to continue to be directors of corporations. That is the reality of things, I think.

7. See *Revlon*, 506 A.2d at 182.

MS. BETTS: Lorenzo, sorry for interrupting, but it is a really good point. Everything hinges on voting because we can say a lot of things. All investors can say we are going to change the way we look at what directors are doing, but unless they actually vote against those directors then nothing really changes. So, I think we need to start looking at what is happening in the next proxy season and see that all these big investors and all the signatories to the Business Roundtable are actually really doing it in the trenches.

MR. SILK: You are right, and we will see, as the next proxy season comes along, how meaningful their engagement has been. Engagement is not necessarily reflected only in votes; it can also be reflected in discussions and other pressure. But it is expectations, not necessarily the limits of the law, that drive decisions of directors on ordinary course operations on ESG decisions here in the United States, I think.

MS. BETTS: I think engagement is going to be really big. I think people like the New York State Comptroller or people like the California State Comptroller. All these people have an enormous voice that they can contribute to the dialogue with not just their vote, but with their engagement; telling corporations what they are expecting to see, and as you say, you do not really see it get resolved before voting. It is just like we need to be very mindful that in terms of execution, when you look at the vote, there has been historically an awful lot of inertia and directors tend to get an endorsement of 90-92%.⁸ How do you challenge the way you do business when you get between 94 and 97% positive vote every year? We need to start seeing a little bit of action there.

MR. SILK: I would differ a little bit there. I do think that U.S. directors are very responsive to not just votes against their reelection, but also to votes in favor of shareholder proposals and other pressure from the major shareholders. U.S. companies will be quite responsive to the desires of investors like BlackRock and State Street, even if they are not actually exercising their vote against those directors, but they are threatening to do so.

8. See Theo Francis, *Corporate Board Elections Getting a Little Less Cozy*, WALL ST. J. (Oct. 8, 2019), <https://www.wsj.com/articles/corporate-board-elections-getting-a-little-less-cozy-11570532400> [<https://perma.cc/9WBN-JMQL>] (citing *2020 Proxy Season Review*, PROXYPULSE (2020), https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2020-review.pdf [<https://perma.cc/JP66-YLCU>]); Regulation 2019/2088, of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector, 2019 O.J. (L 317) 1–16 [hereinafter Regulation EU 2019/2088].

MS. BETTS: On a personal basis, I am trained initially as a U.S. lawyer, so I understand the context beyond just the pure SEC “sticks.” This is very much a more open market, in a way, and I think that in terms of ESG, we will see some really good progress there because I think, once things get going, boards and directors will be a lot more responsive a lot quicker. That is just my expectation. It is probably a bit counterintuitive, but I really think we are going to see some fast progress in the next 18 to 24 months.

MR. SILK: I would agree with that.

AJ HARRIS: How do you think the regimes in the EU differ from the United States in terms of the regulatory approach to ESG? Why do you think United States regulators have been relatively hesitant to adopt the sweeping changes we are seeing in the EU and to what extent do you think the private sector led initiatives will effectively supplant the lack of regulatory intervention?

MR. CORTE: Perhaps I should start by giving a picture of what Europe has been doing in terms of regulation. Then David can compare and contrast where the United States is moving at a very high level, because I do not want everybody to fall asleep. In terms of regulation, the EU has pursued a program that is aimed at creating some uniform standards around ESG disclosure that is critical, because investors are demanding that companies and directors respond to a demand to address ESG issues.⁹ All of the issues—environmental sustainability, social and governance factors—companies are scrambling to show that they are complying and they are responding to this request. The reality is that, already this year, we have seen massive capital reallocation as a result of the renewed focus on ESG, and so, there is a direct financial interest in showing that you have addressed the ESG issues.¹⁰ The risk has been, at least in Europe, but I think in the States as well, that some companies may be advertising ESG compliance or aspects of ESG compliance without really having meaningfully done much, or done as much as they are advertising they have done.

9. Anna Maleva-Otto & Joshua Wright, *New ESG Disclosure Obligations*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 24, 2020), <https://corpgov.law.harvard.edu/2020/03/24/new-esg-disclosure-obligations> [<https://perma.cc/9UUX-ZD97>].

10. See JON HALE, MORNINGSTAR, SUSTAINABLE FUNDS U.S. LANDSCAPE REPORT 12–13 (2020).

So, the objective of these regulations in Europe is to standardize the disclosure a little bit.¹¹ It is also very difficult to understand and compare and contrast the various statements made by various different companies, or the various initiatives advertised by companies. So, the objective is to provide some uniform standard of disclosure, to increase comparability of companies or ESG compliance, to put some order, and allow investors to better pick where they are going to allocate their capital, to the extent that some of that decision is based on ESG compliance. So, you have seen regulations, such as the taxonomy regulation in Europe, the sustainability related disclosure regulation, some of which require technical details to be implemented through the regulation. However, these regulations coming into force will begin to give some shape to the disclosure around ESG and I think that is at a European level.

I also want to add, to give a full picture in Europe that you have got actions taken by countries at a jurisdictional level independently of the EU.¹² Some countries have implemented some very interesting sort of legislation that you can agree or disagree with, but it is interesting, nonetheless.

To go back to the background that David gave at the beginning of this webinar. France has passed the law that allows companies to establish a mission, a purpose, a corporate purpose that is different,¹³ or additional to, that of creating long term value for shareholders. Which is quite interesting and kind of brings it back a couple hundred years, in that sense as David was suggesting.¹⁴ For example, Danone recently enshrined in its organizational documents, its “health through food mission”, in response to this change in legislation which means that going forward, its purpose will be to generate profit for shareholders and look after all of its stakeholders.¹⁵ But to Stephanie’s points about

11. See Regulation (EU) 2019/2088, *supra* note 8.

12. See, e.g., European Commission Press Release IP/21/224, Rule of Law: Commission Adopts Next Step in the Infringement Procedure to Protect Judicial Independence of Polish Judges (Jan. 27, 2021).

13. See Blanche Segrestin, Armand Hatchuel & Kevin Levillain, *When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose*, J. BUS. ETHICS (2020), <https://doi.org/10.1007/s10551-020-04439-y> [<https://perma.cc/NP5P-Z4DZ>].

14. Code civil [C. civ.] [Civil Code] art. 1833 (Fr.).

15. See Danone To Pioneer French “Entreprise à Mission” Model To Progress Stakeholder Value Creation, DANONE (May 20, 2020), <https://www.globenewswire.com/news-release/2020/05/20/2036111/0/en/Danone-to-pioneer-French-Entreprise->

consumers, this also benefits its consumers' health through the food products that it sells and beyond that as well. So that is an interesting sort of jurisdictional development in France.

Just to complete the picture, and then I promise I will give the speaking stick back to others: The UK is obviously in a bit of an awkward situation because of Brexit, which has taken a very long time to be implemented. We are still in the transitional phase. Now we are going to come out of the transitional phase at the end of December. Even if you took the perspective that a lot of what the European Union has done in terms of regulation is good, it is a bit awkward to just absorb all of that European regulation and national law in this very moment, when the UK is transitioning out of the EU. So, I do not think there is disagreement in the UK as to whether, for example, the taxonomy regulation or the sustainability related disclosure regulation or the amendments that are non-financial reporting directive are good. I also think the UK will come out of the EU, this transitional period will end, and then the UK will implement a lot of its rules on its own terms. Then in Europe, I think you will see in other countries as well, there have been stock exchanges that have taken matters in their own hands like the LSE which has come up with this green economy mark.¹⁶ This is kind of interesting where based on certain data driven analysis, they determine whether a company generates at least 50% of its revenues from green products or services and if it does, it is awarded this green economy mark which may attract some capital from investors that are just ESG-focused. So that is kind of a bit of a picture on what is going on in Europe, David.

MR. SILK: In the United States there are a number of different regulatory impacts, although many are taking a different direction from those in Europe. From the federal government, we are not seeing any particular movement in the direction that Europe is moving in. The federal government itself is not moving towards and, in some ways, is moving away from the sort of regulation that would promote ESG. There is no federal press for uniform disclosure. An investor advisory committee of the SEC recently issued a report requesting that SEC to

%C3%A0-Mission-model-to-progress-stakeholder-value-creation.html
[https://perma.cc/XU48-5YEW].

16. *Green Economy Mark*, LONDON STOCK EXCH. GRP. (Oct. 2020), https://docs.londonstockexchange.com/sites/default/files/documents/lseg_green_economy_mark_factsheet_issuer_oct_2020_02.pdf [https://perma.cc/SN5P-SM8E].

develop sustainability metrics, which reflects the real investor hunger for, as you say, uniform consistent ESG disclosure, but the SEC under the current administration is unlikely to take that up. Similarly, the CFTC has a subcommittee that has recently issued a report with literally scores of specific recommendations mostly directed at climate change.¹⁷ The Department of Labor (“DOL”) has proposed rules that would make it more difficult for trustees of retirement funds to invest in ESG funds and would prohibit those trustees from adopting an ESG fund as the default in a menu plan.¹⁸ Under these rules, if a participant did not choose anything else, the plan that the participant would automatically be allocated into could not be one with an ESG mandate. So, in that respect, DOL seems to be rowing against what feels like the main course of the tide.

On the other hand, there are some states that are proposing and passing legislation that is ESG-based. New York State, for example, has adopted some legislation that will require New York State and its entities using power in New York State to use solely renewable power within the next 10 years, with the plan to be in place within the next four to five years.¹⁹

There are various cross currents from Europe to the United States. One thing that is clearly consistent between the United States and Europe is the hunger of investors for consistent and comparable ESG metrics. Investors really want to be able to compare across industries and across companies within the industries on a basis that does not allow

17. *New Unit Signals CFTC Targeting ESG Issues and Financial System's Climate Risks*, JONES DAY (March 22, 2020), <https://www.jdsupra.com/legalnews/new-unit-signals-cftc-targeting-esg-6656297> [<https://perma.cc/7UX9-GL2H>]; Zachary S. Brez et al., *CFTC Panel Calls for Sweeping Climate Change Risk Regulation*, BLOOMBERG LAW (Sep. 28, 2020), <https://news.bloomberglaw.com/environment-and-energy/cftc-panel-calls-for-sweeping-climate-change-risk-regulation> [<https://perma.cc/F8VK-TZJE>].

18. *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72846 (Nov. 13, 2020). *But see* Press Release, U.S. Department of Labor Releases Statement on Enforcement of its Final Rules on ESG Investments, Proxy Voting By Employee Benefit Plans (Mar. 10, 2021), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210310> [<https://perma.cc/7WGZ-PLVN>].

19. Press Release, Governor Cuomo Announces New Competitive Program to Retain New York's Existing Renewable Energy Resources (Jan. 22, 2021), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-competitive-program-retain-new-yorks-existing-renewable-energy> [<https://perma.cc/XUL5-AMY6>]. The plan, dubbed “Competitive Tier 2,” aims to procure 70% of electricity consumed in the state from renewable energy sources by 2030. *Id.*

for greenwashing. The other area where there is some similarity is that Delaware, for example, has also adopted a statute that allows a company to form a different type of corporation, a benefit corporation, that has a purpose that is not simply the pursuit of profits, but has some other social or environmental purpose.²⁰ We have not seen a lot of those companies hit the stock exchange, but there are some, and so that theme exists in the United States as well.

MS. BETTS: Well, I agree. If you look at California as well, it is incredible how their definition of renewables is so much stricter than what we have, even in Europe. So, some companies which we deem as renewable in Europe, for let us say, green label, will actually be deemed by the State of California to not be renewable because the energy comes from different states—it is green energy, but from a different state.

I think my view, with the United States, is there is actually an awful lot happening under the bonnet in terms of ESG. Nobody really wants to necessarily put their head way above the path that we are somewhere, I think Leo will say, as we know, but the reality is there is an awful lot happening. When the gates open, I think we will see that the U.S. is probably quite a ways ahead and will suddenly bring some gravitas, and some weight to this debate.

When you look at market caps, very simply, and the importance of the U.S. exchanges, the SEC has been very clear. Even Jay Clayton, as we know, who has been appointed by the President.²¹ It has been very difficult for him to be very vocal on this, but he has made it clear that if companies report on ESG, the SEC will review it, and review the quality of the information. So, the key thing is to get those companies to report and there might be other ways to do that.

We talked about the exchanges, and I think the exchanges are in a fantastic position to actually declare that companies have to have a stable transition. You talk about to stay on pay. What about the sound transitions? That is not unthinkable, and if anything, I think that is probable.

20. DEL. CODE ANN. tit. 8, §§ 361–365 (West 2021).

21. Jay Clayton served as SEC Chairman from May 4, 2017 to December 23, 2020. See SEC. & EXCH. COMM'N, *Biography: Jay Clayton*, <https://www.sec.gov/biography/jay-clayton> [<https://perma.cc/9SBV-NP4U>] (last visited Aug. 20, 2021); Press Release, SEC. & EXCH. COMM'N, *Statement of SEC Chairman Jay Clayton Regarding the Conclusion of His Tenure* (Dec. 23, 2020), <https://www.sec.gov/news/public-statement/clayton-2020-12-23> [<https://perma.cc/GVK3-CR9D>].

MR. SILK: I agree that in the absence of government regulation, there will be organizations that will step in and in fact we do see that in the United States. We do not have the same sort of government driven standardization, but we do have NGO-driven standardization and the investors are pushing the companies to it.²² And if that is not successful then exchanges may as well.

MS. BETTS: Another truth is we do not need to all do the same thing in the same way. We like different things in different countries. We like our tea differently. I am French and I still cannot make English tea the way they like it, like Britain. I think the interesting thing about ESG—and I was talking about this with people from the accounting and an audit world—is that what matters is that the TCFD framework works for everybody.²³ TCFD and SASB,²⁴ we are going to get to a point where we are going to have a set of building blocks that everybody can take home and I think the interesting thing is, each country and each zone, will have its own jurisdictional setup, and therefore, we need to leave the implementation probably down to regional or country specificities. The overriding sense of drive has to be common.

I know we are talking about ESG, the three facets of it, but if we actually brought you into one of the questions, we have here, in terms of the architecture of priorities. It is quite obvious now that climate has to take the lead because unless we sort out climate, we will not be having these conversations in five years' time. This is a conversation we had with Mark Carney; forget 2050, it looks nice on paper, but in reality, this is a very different world we are talking about. We have to look at 2030 at the very latest, because if you look at what the scientists are telling you, between negative feedback loops and the vast unknowns, we cannot really bank on 2050.

I think for me, looking at it from the regulatory side of things and the practical implementation side of things, I think, let us stand back for a minute. What is the spirit of the law? What are we trying to achieve here? What are we trying to do? We are trying to get some form of

22. Frameworks devised by NGOs include Bloomberg, CDP, CDSB and others. See Seon Barbera, Edward Greene & Hannah Orowitz, *The ABCs of ESG: Initiatives and Organizations Issuers Should Understand*, GEORGESON (2019), <https://www.georgeson.com/us/ABCs-of-ESG-Initiatives-and-Organizations-for-Issuers> [<https://perma.cc/MC4P-SFC9>].

23. TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, <https://www.fsb-tcfd.org> [<https://perma.cc/E7CS-9EDW>] (last visited Aug. 20, 2021).

24. SUSTAINABILITY ACCT. STANDARDS BD., <https://www.sasb.org> [<https://perma.cc/FAN7-CR5K>] (last visited Aug. 20, 2021).

global movement, global compliance where companies are starting to take into account the impact of the externalities for 200 plus years, we have been growing, developing, buying cars and air conditioning and bikes in certain colors. It has been fun and nobody cared, but suddenly, it really matters. It is actually vital that we get this sorted and so if you look at this, and I would encourage anybody who is listening to these to look up someone called Jem Bendell and read that piece called *Deep Adaptation*.²⁵ It is a very extreme view, but it is a view that has to be known, because it is just the collation of all the sort of scientific views on climate and it really clearly tells you. Well, unless you do something yesterday, it is going to be very challenging.

Now hopefully we are resourceful, and there will be a lot of money put into climate tech, into people repurposing their business model. There is going to be a lot going on, but I think we need to not lose sight of the end goal, which is that we absolutely have to drastically reduce the level of emissions globally, whatever it takes in whichever jurisdiction. I know there will be lots of debate between developing and developed countries. Why is it fair that we had all this time to emit and consume as we wished, and now they can't do the same? It is tough. We will have to have those difficult discussions, and we will have to have the discussion as to the cost of it and the ultimate cost of not doing it. So, there's going to be some interesting discussion in the next 18 months or so, but I think countries and jurisdictions should have some leeway as to what works best for them.

So, what works best for the United States, what works best in the UK, we will never have uniformity of jurisdiction. In itself, that is not an issue, but what matters is that we are aligned on the overarching goal to get there. That is really what matters right now. And that is why, for us it is looking at, technically, how do we implement that? How do we make it work? And I am really convinced that at some point, once the United States gets on board officially, things will roll up much quicker than we expect.

MR. SIMPSON: So, this may be an unfair observation, but I think that we have seen in Europe, a willingness of the governments to intervene, as Lorenzo outlined. I am not necessarily a pro regulation sort of person, but in this area, I think there is an advantage currently in

25. See Jem Bendell, *Deep Adaptation: A Map for Navigating Climate Tragedy*, IFLAS Occasional Paper 2, (revised July 27, 2020), <http://www.lifeworth.com/deepadaptation.pdf> [<https://perma.cc/P6JB-VAF5>].

Europe, where the governments are prepared to intervene. I think there is a reluctance in the United States to do so. One question is whether the investment community is actually going to drive sufficient fundamental change even in the absence of government regulation.

MR. SILK: That is a fair and open question. Clearly, we are not going to have the kind of federal regulation, limiting emissions or even driving the limitation of emissions through disclosure that you see in Europe under the Trump administration.²⁶ Maybe in a Biden administration, we could see some of that. What we have seen during the Trump administration, particularly during the last two years, is significant pressure bought by the major institutional investors.²⁷ Whether that will be sufficient to drive the kind of behavior changes that you are seeing in Europe is still an open question.

MS. BETTS: I think between that and the consumer, between the big investors, the stock exchange, and the consumer, you are going to have a lot of pushing there. In France, you have Emmanuel Macron calling people.²⁸ He would call the CEOs and just said on Monday, I want you to announce this, and I would like you to do this. So, he was very driven, he is very much obviously behind all these efforts in your office. He has been very proactive and literally picked up the phone because it is France, because we have got the code Napoleon. We operate differently in France, so again, I think the implementation would be very different from country to country due to cultural differences.

MR. SILK: Our implementation was not all that different right? We had our president tweeting, instead of calling someone on the phone. It is just that he was taking the opposite end of the spectrum.

MS. BETTS: I know, fair enough.

26. See, e.g., Lisa Woll & Judy Mares, Opinion, *The Trump administration wants to discourage your 401(k) from including ESG investments options*, MARKETWATCH (Sep. 8, 2020, 5:11 PM), <https://www.marketwatch.com/story/the-trump-administration-wants-to-discourage-your-401k-from-including-esg-investment-options-2020-09-07> [https://perma.cc/ZD7J-AX6Q].

27. See Sara Bernow, Bryce Klempner & Clarisse Magnin, *From 'Why' to 'Why Not': Sustainable Investing as the New Normal*, MCKINSEY & CO. (Oct. 25, 2017), <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/from-why-to-why-not-sustainable-investing-as-the-new-normal> [https://perma.cc/8A6P-4WAJ].

28. *President Emmanuel Macron Met with 33 CEOs From Among the World's Largest Institutional Investors to Discuss Climate Action*, NET ZERO ENERGY (Nov. 26, 2020), <https://netzeroenergy.gr/2020/11/26/president-emmanuel-macron-met-with-33-ceos-from-among-the-worlds-largest-institutional-investors-to-discuss-climate-action> [https://perma.cc/L95L-KGKN].

MR. CORTE: One observation on disclosure regulation and regulation of these types of issues. What I've observed in the 20 years I've worked in this area is that disclosure regulation and the like between Europe and the United States has converged quite significantly over the years. Regulators talk to one another because ultimately the investor market, the BlackRocks, State Streets, Vanguards of this world, invest in the United States and they invest in Europe. They are the same people really and have the same policies. Ultimately, I think there will be a process of convergence between these regulations and disclosure. I do think it will take a little bit of time. I think we are at the very beginning, even in Europe in terms of regulating this area, right? The rules are coming into effect in 2021 and some of them require heaps of technical regulation to sort of make them really implementable and somewhat intelligible, so I think there will be a process of convergence, but I think it is going to take a while.

MR. SIMPSON: I fully agree, and I do not want to say anything too controversial or too negative, but look how long it took to separate the chairman role from the CEO role, assuming you think that is a good thing. It is a different issue than ESG, but look how long it took U.S. companies to align with the separation of those two positions when left to the market changing. It took a decade or more, David.²⁹ I think for that trend to really take hold and so just if that is an example in the absence of some kind of regulatory intervention, I just fear that it is going to take a long time for investors and consumers to drive the kind of change that I think the science is telling us needs to be made kind of yesterday.

MS. BETTS: I agree with you, but we actually do not have that time. I think we need to think of what is happening now, like in the olden days, you would have no seat belt. My father used to drive the car with cigar out of the window and four kids with no seatbelts happy go lucky in the middle of the night. It was brilliant. We look back thinking, "We all made it, right?" So, this is unthinkable now, but I think in a few years, it will be the same with ESG and disclosure and so on. The separation of the CEO and having a lead independent director or the

29. Charles A. Tribbett, III, *Splitting The CEO And Chairman Roles—Yes or No?*, RUSSELL REYNOLDS ASSOC'S (Dec. 1, 2012), <https://www.russellreynolds.com/newsroom/splitting-the-ceo-and-chairman-roles-yes-or-no> [https://perma.cc/ED7H-BB9D].

Chairman, these are stuck in time for a lot of reasons, cultural reasons, etc.

Also, we did not have the burning urgency. Now if I may say, when you look at what is happening in California, California is obviously burning and certain parts of Florida are getting a bit under water, as far as I can gather. You have things that are happening at a pace that we cannot cope with. When you look at what the insurers are seeing and what they say in their reports in terms of the accelerations of the incidents link to climatic, sort of the range of events. If you want, is much higher in terms, more fires of the highest severity. Same thing with the floods, it is getting harder to insure the world. Now, none of us want to live in a non-insurable world.

At some point the regulator is going to say it is taking a long time. How much time do we really have? Do we want to continue to play nice and maybe incentivize CEOs and executive in companies by telling them, "If you do good things on climate, we will tie this up to your executive compensation to the tune of, let us say, 5%?" That is a bit of a joke. So again, this is for me, a form of greenwashing, you say. When you look at companies and say how much of your executive compensation is linked to climate targets, this is obviously the next thing that is going to happen. We need to think in terms of set of incentives, we need to think of "where are we now?" We are all working in the spirit of a financial system that is fragilized by the climatic events. The system is fragile because we are trading on eggshells. A lot of the intrinsic value of these companies is challenged by climatic events, but currently they are completely insulated, and I think that is the danger.

MR. SILK: To me the question is, how are we actually going to get from the place where we are to the place that you are describing? How is that going to be? One choice is regulation, and the other choice is, as Scott notes, investor pressure. I think Scott was questioning whether investor pressure will actually get us there. To me, Scott, the contrary example to separation of CEO and Chair is the elimination of the poison pill that happened over a couple of years because that was something that investors actually cared about. I do not think that investors cared as much or still do care as much of, at least in the United States, about separation of Chair and CEO, because I think investors recognize that for different companies, you can have a different outcome.

With respect to uniform disclosure of a basic set of metrics, it is clear that many investors want it. Institutional investors are being driven by their own customers: The people who are investing their own dollars are looking more frequently for an ESG impact with respect to their

investment. As the popularity of ESG funds increases, more funds think about ways to become “ESG funds,” and more funds need uniform ESG disclosure. So, I think it is a different case than the case you suggested.

MS. BETTS: Nobody thought about a set of the right incentives; really, it is how the incentives are set up to get to the right outcomes.

TAYLOR WELLS: David mentioned a few minutes ago that President Trump tweets out policy, whereas Lorenzo mentioned that in contrast, regulators tend to talk to each other. Now it seems that there are real risks and costs to implementing these standards. Given this uncertainty, what other concerns do you have regarding the rollout of ESG standards?

MR. SILK: First of all, what will eventually be rolled out in the United States in terms of standards is unclear. I worry about inconsistency or failure to achieve the kind of consistency that investors are looking for. Personally, the most important goal is getting some kind of uniform consistent disclosure because that will allow investors to make the decisions they want to make without relying on inconsistent ratings agencies that can apply whatever weight they want to whatever questions they want. So, the thing that I am worried about is inconsistency.

MR. CORTE: Similarly, David, I think it is similarly, but what I worry about in Europe and I always worry about this in Europe is overregulation. In other words, Europe has a much more regulatory environment than the United States, which is more sort of disclosure based. My fear is that regulation is passed with certain objectives in mind on a one-size-fits-all basis where that just does not fit the range of companies that need to be thought of when you think about ESG and disclosure regulation. For some companies, the “S” and the “G” will be more important than the “E.” Take for example, a solar energy company or wind company, you’re not going to be too concerned with the “E” with that kind of company. So, whether you invest in that clean energy company as opposed to another clean energy company will probably be more about whether they are better addressing the “S” and the “G” than the other clean energy company. Since they are both clean energy companies, I am a little bit worried about one-size-fits-all regulation that causes capital to shift because labels are associated with companies that do not really reflect what efforts these companies are making and whether they are making a real impact or not. Whether that is in the environmental area or in social or governance, that is at least my worry for Europe.

MR. SIMPSON: I do not disagree. On the other hand, we have seen in recent years that deregulation, in particular, in and around environmental matters, is a real concern that has set back the ESG agenda big time in the United States. If I go back to Stephanie's point about seatbelts, how did that get fixed? The states were refusing to adopt the uniform system of regulation, so the federal government stepped in and basically said, "If you want to get money for your highways, you will have a seatbelt law," and that is what ultimately brought it. So, I do think that the markets will not drive change fast enough and we are going to need more intervention on the part of governments and regulation. Notwithstanding Lorenzo's concern about regulation or ill-conceived regulation, I just do not think we can rely on a market solution entirely.

MS. BETTS: I agree with you, Scott. We might also need to think outside the box, we might also see things that we have not seen much before like companies coming together and regulators coming together, company regulators and investors coming together. I know the Bank of England, in particular, has been very, very active in driving these sorts of subcommittees and study groups and it has been brilliant.

One of the things that I found really interesting is looking at things like SASB and GRE teams coming together, looking at things like the water coalition that started recently led by Coke and Diageo, where those big companies that are heavily reliant on water, which is the other side of carbon, have come together to try to improve the way they manage externalities; but really learning from each other, helping each other rather than competing with each other because they know together they have to increase the threshold in terms of best practice.

The other thing that seems to be interesting is that when these big companies have to rely on suppliers, suddenly they have to clean up their supply chain as well. So, you start to have almost like a domino effect where if they can work in sync with a more enlightened regulator who listens to what is happening on the ground so that the regulation is appropriate and works. So, we try to avoid too many unintended consequences which I know is probably on Lorenzo's mind and is right, there is often too many of those. But I think if we can, because of the urgency and because of the common goal that we all share at the moment.

Let us forget the non-believers for now, but I really think that we are going to see some cohesion around that goal from companies, regulators, and legislators. I think we will see some form of an

ecosystem starting to take shape with a set of incentives that are put together that will start to bring those new behaviors. I really think so.

Coming back to the point of disclosure quickly and the conformity of the disclosure, I think the big thing we will have to be wary of is obfuscation versus disclosure. Everybody has got very clever lawyers and can actually say an awful lot but not say much and we all know that. How do you make company disclose in a way that is relevant, significant, easily understandable, very clear, and easily comparable to another? I think that to some extent, when the regulation come[s], the format of that disclosure is very important, and that is where things like SASB, which is a brilliant tool, will be really handy.

I think there are a lot of ways to look at things in a very sort of almost graphic way and the companies that are doing really, really well with disclosure at the moment are giving some very good examples—people like Visa and Microsoft. You can get a really interesting example of a very graphic specific disclosure, where there is no room for interpretation. For instance, a really good example of that is if you look at diversity, companies can write two pages on diversity and how amazing they are at recruiting lots of people from everywhere. Then they say look at our board, how diverse our board is, how amazing. But actually, what you really want to see are those pyramid charts, where you see the intake. Then when you see the board, you also want to see that they nurture the people that they have taken on board, opening broader gates for diversity and that these people are being nurtured all the way through the leadership ladder.

MR. SILK: That can be addressed, right? I mean, if you require metrics, you can get metrics.

MS. BETTS: Exactly.

TAYLOR WELLS: Shifting more to the future of ESG. What would you like to see happen in the ESG space to the next, say, five to ten years and how realistic is that?

MR. SILK: Whether it is a voluntary industry driven disclosure framework or a required disclosure framework, I would expect that at least in the United States there will be substantial disclosure along some kind of a framework, such as SASB plus TCFD or the World Economic Forum's new proposal or the convergence of SASB plus GRI, but I would expect within, hopefully even sooner than five years, some kind of regular uniform disclosure. I think that would be a very meaningful and important development where these kinds of metrics that Stephanie was just talking about will be available to shareholders.

MR. SIMPSON: I mean, it is a point Lorenzo said a little bit earlier and I agree with it. I am an optimist by nature, so I did not mean my other comments to be too much of a downer, but I think we can also expect David to see the kind of cooperation with a little bit of a wind at our back, the same kind of cooperation that we saw between the SEC and the European regulators around disclosure. We have seen convergence in accounting standards. We have seen convergence around prospectus disclosure. There is no reason to not expect to see this kind of convergence around ESG disclosure and the SEC and those regulators. Its counterparts in Europe have proven their ability to kind of get that done on a transatlantic basis that sometimes it takes some time, but I think there is a big enough track record. I think a change in attitude in Washington DC for that kind of change to come quickly.

MR. SILK: Yes, I agree with that.

MR. CORTE: I think what we will see is—several companies have done this already—companies instituting governance mechanisms to ensure that there is real focus and accountability for ESG. The widespread establishment, for example, of sustainability committees in addition to an audit committee, to a nomination committee, to a disclosure committee, a focused sustainability committee, a focused chief sustainability officer. I think, by necessity, standards and incentives for management that will drive management to make decisions in favor of ESG sustainability. So, whether that is environment, whether that is social values or governance, I think companies need this. Until companies set themselves up with these types of internal infrastructures that are focused on achieving certain ESG objectives and until management is appropriately incentivized to do so, you can have board decisions, but that is kind of where it stops right?

MR. SILK: To that point, we are beginning to see increased ESG elements as part of annual bonus schemes, based on quantifiable goals and disclosures ahead of time. People actually have to meet their goals in order to get the payout. The other thing I think we will see over time is while we are now seeing a rush into ESG funds, many kinds of mainstream funds are reclassifying themselves as ESG funds by adopting an ESG mandate. I think over time, what we will see is the elimination of the ESG funds because every fund will look at ESG as just another way of evaluating risk and opportunity. It is another tool in the toolkit.

MS. BETTS: I agree with you, David. Who wants to invest in an unsustainable fund? And I agree with you that the whole ESG name will

be dropped because it is just a new set of risk metrics that you have to manage.

MR. SILK: So catchy.

MS. BETTS: The other interesting thing in terms of nudge, we are talking about incentives, you get the hardcore incentives of, for example, an exchange regulation or a compensation link to compensation in terms of ESG matrix. The other interesting one, which we have seen is companies that are giving incentives to their suppliers to do the right thing from an environmental point of view or ESG point of view. So, you get a better pricing, or you get a sort of more long-term contracts; you will have some interesting little developments like this, which will make it happen on the ground.

MR. SIMPSON: I think Dianna wants to ask a final question, if I got the cue correct. We have been going on, and Dianna, can I just say, it has been a fantastic symposium you put together and I mean congratulations, I am looking forward to listening to the rest.

DIANNA LAM: Thank you, you have had a very interesting conversation. I do want to present one of the questions that have come in. We have gotten quite a few, but we figured this one might be good to end it.

What do you all make of recent research in the review of financial studies which suggests that private companies in the United States have lower emissions than publicly traded company?³⁰

MR. SILK: I have to say, I have not seen that research and I am very interested to see it. I would have thought that as companies become disfavored by the public markets, such as coal and guns, that those would fall into private hands. I suppose a countervailing factor is that many, many private equity investors, including the pension funds that are investing directly in private equity, are pressing ESG on the private equity managers in much the same way that the index funds are pressing ESG and climate change preparedness on public companies. I suppose it is easier to pressure those privately held companies because the shareholder base is smaller and individually more influential.

MR. SIMPSON: Thank you, I would like to see the study as well. I mean another possible explanation is that for the time being certain public company boards are still whipsawed between the desire of some

30. See generally Sophie A. Shive & Margaret M. Forster, *Corporate Governance and Pollution Externalities of Public and Private Firms*, 33 REV. FIN. STUD. 1296 (Mar. 2020), <https://doi.org/10.1093/rfs/hhz079> [<https://perma.cc/G7Q2-GDZZ>].

shareholders, some important shareholders to push ESG and other shareholders who are more focused on short termism. While they are whipsawed, they are a little slower to act than as you say, David, a private company that has a core investor with a clear vision. It is the only thing I can think of and hopefully over time that whipsawing will be eliminated, and directors of public companies will follow the important ESG directives.

MR. CORTE: To Stephanie's point and to the point that is being made more generally, smaller companies do not have to report their results quarterly, right? So, they can take a very long-term view. That might be an explanation.

MR. SILK: But if whoever asked that question can send us the link to the study.

MR. SIMPSON: Yes, we would all be interested.

MS. BETTS: We are all keen to see it.

DIANNA LAM: We have it and we will definitely send it to you.

MR. SILK: Great, thank you.

DIANNA LAM: So, this concludes the first panel. Thank you all so much for coming today and providing your insight, we will break for five minutes and then we will resume with the second panel.

PANEL TWO

DIANNA LAM: The second panel will discuss Stakeholders as the driving force of ESG. Again, the last 10 minutes are reserved for the audience. Please type your questions in the chat box. I will now turn it over to the committee members who will engage in this dialogue with our panelists Carmen Lu, Lisa Fairfax, and David Webber.

AJ HARRIS: Welcome, everyone. To get started on today's panel, can we talk about some of the ways to quantifiably measure and communicate the impact of an organization's ESG efforts on its stakeholder satisfaction and retention?

MS. LU: AJ, I think there are many ways to measure, quantify and communicate an organization's ESG efforts. One of the most common methods that is currently done is to engage in ESG reporting through stand-alone ESG reports. There are a number of major frameworks, for example, SASB;¹ GRI, the Global Reporting Initiative;² and TCFD,³ which focuses on climate-related impacts. These frameworks all provide various metrics that allow companies to demonstrate how they are performing on ESG.

Another pathway for communicating ESG efforts, and which many companies are adopting, is providing disclosure on their website. On a growing number of company websites, you will see information on the company's ESG goals, such as goals relating to employees or relating to the treatment of suppliers and engagement with local communities. In addition, we are also seeing active engagement between companies and their key investors discussing critical ESG issues such as diversity and inclusion, adaptation to climate change risks, and so forth.

† Panel 2 was moderated by symposium editor Dianna Lam and symposium committee members AJ Harris, Nicole Mecca, Avery Golombek, Taylor Wells, and Marie Bogenez.

1. SUSTAINABILITY ACCT. STANDARDS BD., <https://www.sasb.org> [https://perma.cc/F899-XQWV] (last visited Apr. 21, 2021).

2. GLOB. REPORTING INITIATIVE, <https://www.globalreporting.org> [https://perma.cc/B7QN-C5ZE] (last visited Apr. 21, 2021).

3. TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, <https://www.fsb-tcfd.org> [https://perma.cc/JFG7-W323] (last visited Apr. 21, 2021).

MS. FAIRFAX: I will just weigh in, Carmen. First, I want to say thank you so much for having me here today. It has been a very engaging conversation so far, and I am so happy to be a part of this discourse.

As Carmen suggests, there are all kinds of ways in which companies communicate their efforts. I think the last statistic I saw said something like 85% or 86% of S&P 500 companies have some type of sustainability report, and I think that statistic was from two years ago—they do it voluntarily, often on their website and in other forums.⁴ I do think that one of the interesting trends that is a positive one is the effort to try to push that communication into the proxy statement. I think that one of the concerns about the voluntary reporting and the reporting in different locations is there is not as much board oversight with respect to what is going in those documents. Maybe that could have an impact on whether and to what extent boards prioritize the goals and the targets that are there. So, I do think that in terms of thinking about effective communication, one piece of it is trying to push that information into the proxy statement, especially when it is in the proxy statement that there is an overt recognition that investors also want to be communicated with about that type of information. It is not just something going out to other stakeholders.

I will also say that Carmen is right. There is so much information. One of the concerns is that it is too much, and that we are not being thoughtful enough about the nature of the information that is being produced and making sure that it is useful because, at times, it is overinclusive, and at other times, it is underinclusive. Certainly, there have been a lot of complaints about the lack of uniformity.

We know there are all kinds of ways in which we saw this on the first panel, what people mean by the “E,” the “S,” and the “G.” How are they measuring it? What does it mean for their company? Sometimes that is difficult to discern at a particular company because the lack of uniformity makes it difficult to make comparisons across companies and across industries. When we think about effective communication, it is also about trying to have some type of understanding about the

4. GOVERNANCE & ACCOUNTABILITY INST., FLASH REPORT: 86% OF S&P 500 INDEX COMPANIES PUBLISH SUSTAINABILITY/RESPONSIBILITY REPORTS IN 2018 (May 16, 2019), <https://www.ga-institute.com/press-releases/article/flash-report-86-of-sp-500-indexR-companies-publish-sustainability-responsibility-reports-in-20.html> [<https://perma.cc/VB34-7VF7>].

appropriate information and how we can at least find some uniformity with regard to that information.

This is my plug for saying that while the market has been a good source of driving information, in order to get really effective disclosure, it is probably going to require something more, so that the disclosure can be useful across companies and industries.

MR. WEBBER: I agree. Standardization is obviously critically important to developments like SASB,⁵ and others are moving things in that direction. But of course, it is always the classic problem of making the apples to apples comparisons and needing to be able to do that. The only other point I would emphasize—and I do not have much to add to what Carmen and Lisa just said—but picking up on Carmen's point about the shareholder engagement piece: look at what BlackRock and State Street have done in terms of announcing policies like gender diversity targeting, increased gender diversity in corporate boards, voting along those lines, engaging with corporate managers on those subjects. Obviously, they are big voices and they wield significant market carrots and sticks, and certain investors do indeed have a significant role to play in driving these changes inside companies. I think many other institutions follow along or take their cues from that. It will be interesting to see what new issues those institutions pick up in the coming years, and how particular issues get onto their agendas or not, because that in and of itself has a significant role in the future development of ESG in the marketplace.

MS. LU: On Lisa and David's point about the lack of standardization, it has definitely been a key source of concern for investors and various other stakeholders. The often-asked question is: How do you measure companies' performances using metrics that are not directly comparable? As a result, we have seen efforts to reach agreed-upon disclosure metrics and standards, notably from the World Economic Forum, whose recently released reporting framework aims to standardize the ESG reporting process and draws from existing frameworks, such as GRI and SASB.

It will be interesting to see what happens in the next couple of months or so, and whether companies and investors coalesce around one uniform framework. It will also be interesting to see how the disclosures are used by investors, stakeholders, various third-party ratings agencies, and proxy advisory services. How disclosures are used will in turn

5. SUSTAINABILITY ACCT. STANDARDS BD., *supra* note 1.

impact how companies choose to report their ESG performance in the long term.

MS. FAIRFAX: This question about shareholders and how they are engaging around ESG is really interesting, because they are helping to fill in the bubble as to what counts as “E,” what counts as “S,” and what counts as “G.” So there is a push around diversity, for example, that obviously has been something that has been on many stakeholders’ radars and companies’ radars, but then you start seeing larger shareholders pushing forward. All of a sudden, the bubble gets filled in a little darker as we think about normalizing the notion that is part of the ESG framework. It is very interesting to think about how those issues get shaped.

MR. WEBBER: Absolutely, if you look at the lifecycle on environmental issues and environmental shareholder proposals. In the beginning, they were brought by sort of smallish, some would say fringe, ESG investors when ESG was still considered a quixotic thing, a tiny market niche. Then you had other institutions, some of the big public pension funds and others started to pick up on it and that raised the profile of it. It also raised the kind of vote totals and shareholder proposals. We then hit 2017, and for the first time we started to see some of the biggest players in the markets vote in favor of those proposals; notably, proposals that they did not bring themselves, but they did start to vote in favor of them a little bit. We have seen a little bit more of that since and so that is one kind of interesting life cycle of how you watch an issue like this move from the periphery into the core and how it gets there. That is one pattern of how this stuff evolves, and standardization has a role to play, too, but keep an eye on that particular channel through which these issues become central.

AJ HARRIS: If I can pick up on something that David mentioned: board diversity. Lisa, you have been writing about this for over 10 years now. Could we get your thoughts on what you are seeing in today’s environment, and how it relates to the work that you have done?

MS. FAIRFAX: Yes, I have written in this area. It is a kind of glass half-empty, glass half-full situation happening. I will wear my “glass half-full optimism hat” first. There is a lot of momentum. There is a push by some of these major players. The big three—Vanguard, State Street, and BlackRock—have all kind of made diversity one of the chief considerations that they are engaging around and that they will vote around, and that has really increased the momentum, particularly with

regard to gender diversity. Last year, for the first time in history, every single company in the S&P 500 had at least one woman on its board.⁶ Last year we have seen record numbers of new directors who are women and more than any other group of people who are new directors. So, there has just been this huge momentum behind diversity efforts. But I have got to say, even with the glass half-full, I am much more pessimistic about Blacks and people of color than I am about women.

My work over 10 years has suggested that there has not really been much progress in that area, and even though it is the case that diverse directors are making up some ground with larger percentages of new directors, it is also the case that 2019 studies show that Black directors account for only 1% of the total board seats at S&P 500 companies.⁷ A full 37% of those companies had no Black directors on their board at all, and that is concerning, especially because throughout the time that I have been writing about this, there have been professions that really think this is important. Most studies say that social movements really have not moved the needle that much, so I think there is cause for concern there.

I will say two things about why I think there is real cause for concern. One is that there continues to be this pattern where Black directors and directors of color are “overboarded,” or at least holding multiple board seats in ways that white directors do not. Even when you think about the numbers in percentages, it is overcounting because they reflect a small subset of people. I saw one CNN article about a Black person who had held 14 board seats through his lifetime,⁸ and that is reflective of the insular nature of the board search process. The vast majority of people get on boards based on the people that they know. Increasing Black representation poses challenges that adding white

6. Jeanne Sahadi, *For the First Time, There's a Woman on Every S&P 500 Board. But They're Still in the Minority*, CNN BUS. (Dec. 17, 2020, 3:40 PM), <https://www.cnn.com/2020/12/16/success/women-sp-500-board-directors/index.html> [https://perma.cc/5C9U-M8NK].

7. DAVID F. LARCKER & BRIAN TAYAN, DIVERSITY IN THE C-SUITE: THE DISMAL STATE OF DIVERSITY AMONG FORTUNE 100 SENIOR EXECUTIVES, ROCK CTR. FOR CORP. GOVERNANCE AT STAN. U. No. CGRP-82 (2020), <https://ssrn.com/abstract=3587498> [https://perma.cc/QW77-Q4RL].

8. Sara Ashley O'Brien, *He's Served on 14 Boards. Now He Wants Companies to Find Other Black Candidates*, CNN BUS. (July 24, 2020, 9:35 AM), <https://www.cnn.com/2020/07/24/tech/barry-lawson-williams-black-board-representation/index.html> [https://perma.cc/XKD4-YRLF].

women may not.⁹ Most of the women elected to the boards are white and selected because they had professional connections with the white men who still dominate boardrooms.¹⁰

Similar networks between white corporate leaders and potential Black directors are less well-developed. In an interview, a prominent board member mentioned that in white America, she does not know that everyone even knows a Black person. What does that mean for this process that relies so heavily on social and informal networks? It means that we are in this loop of doing the same thing over and over again and expecting different results. Somebody told me this was insanity, but I do not think it is.

MS. LU: Just picking up on Lisa's comment regarding "overboarding" of individual Black directors, one of the big issues that companies and investors have started to realize must be tackled is the pipeline problem. One contributing factor to having overboarded women directors or overboarded Black directors is the absence of a large number of Black, of color, and female candidates moving through the ranks into senior management that prepares individuals to have the right skill set and experiences that make them ideal director candidates. As a result, you have certain individuals who are qualified, but find themselves being asked to serve on multiple boards and then finding themselves stretched thin as a result. This problem is going to continue to compound as investors and stakeholders continue to call for greater gender diversity and racial diversity on boards unless greater attention is being paid to the need to develop a credible pathway for diverse individuals to rise through the corporate ranks. I think one of the issues that investors and other stakeholders are realizing is that it is not simply enough to have board diversity. It is also important that there is workforce diversity, and that diversity also occurs in middle management and throughout the entire company. Whereas in the past, a lot of diversity and inclusion initiatives were siloed in one particular part of the corporate structure, people are now realizing that perhaps it is important to combine these efforts with the HR function in order to help create diverse boards in an organic manner over the long term.

9. Jeff Green, *After Adding More Women to Boards, Companies Pivot to Race*, BLOOMBERG QUINT (Aug. 19, 2020, 5:01 PM), <https://www.bloombergquint.com/onweb/companies-look-for-more-black-directors-after-adding-women> [https://perma.cc/2B2J-3R3X].

10. *Id.*

MR. WEBBER: So, if this issue is going to move from glass half-empty to glass half-full, I think that what we have to keep an eye out for is: Can the question of racial diversity and corporate boards follow the same path that was followed with environmental issues, and more recently with gender diversity issues?

Some investors are raising it and pushing it into the center of the agenda. It is not going to get there on its own, just like it did not get there on its own with the two issues that I just mentioned. Is there a cause for optimism? I do not know, but I would just point to a couple things. First, last week the Business Roundtable issued a statement and a set of objectives, specifically focusing on issues of race and inequality in the United States.¹¹ It did not get as much attention as last year's departure from shareholder privacy, but it is out there.

A number of companies are indeed facing a lot of controversy regarding the way they handle these issues. Companies that have a workforce that is less than 5% Black have now committed to much higher hiring targets.¹² The Black Lives Matter marches this summer pursued high-profile ways of raising this issue on social media and targeted companies for doing virtue signaling, but not actually taking any action on these issues. Many companies have announced increased hiring targets by race, so there is so much yet to be done and I am not asserting that this is going to happen tomorrow. I would like to believe that it is not just rhetoric here and that some real numbers have been targeted, but it remains to be seen. California recently adopted some targets for corporate boards along not just gender diversity, but also taking into account race and ethnicity and other criteria.¹³

11. *Business Roundtable Chairman Doug McMillon Establishes Special Committee to Advance Racial Equity and Justice*, BUS. ROUNDTABLE (June 5, 2020), <https://www.businessroundtable.org/business-roundtable-chairman-doug-mcmillon-establishes-special-committee-to-advance-racial-equity-and-justice> [https://perma.cc/8AMC-73WH].

12. *See, e.g., Julie Creswell & Kevin Draper, Adidas Pledges to Increase Diversity. Some Employees Want More*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/06/10/business/adidas-black-employees-discrimination.html> [https://perma.cc/Y629-CS4T].

13. Anne Steele, *California Lawmakers Back Mandate for Racial Diversity on Corporate Boards*, WALL ST. J. (Aug. 31, 2020), <https://www.wsj.com/articles/california-lawmakers-mandate-racial-diversity-on-corporate-boards-11598915372> [https://perma.cc/WX77-D43R].

NICOLE MECCA: I agree, and I think this is a great time to shift to a discussion of the workplace. What might signal that a company is simply virtue signaling on an ethical issue like D&I, as opposed to generating and maintaining organizational and cultural change?

MS. FAIRFAX: I think it is really important when we talk about the diversity issue. Just to address the pipeline thing that Carmen has raised—I love the way that she talked about it because she talked about the changes that needed to occur in the workforce. I actually would go a step farther and say that the so-called “pipeline problem” is a problem created by the corporations themselves, who are not doing enough to effectively hire, promote, and retain people of color in diverse workforces.

Every study, including the most recent one by the Harvard Business Review, basically says what we all know.¹⁴ There continues to be discrimination in hiring, promotion in the workforce, etc. It is problematic for companies to suggest that there is a problem and not to acknowledge that they are the problem, that they are the ones clogging the pipeline, if you will, in this area. I also think it is super important to keep in mind that the pipeline becomes self-fulfilling because too often companies do not look beyond title and do not focus enough on skill sets, despite the fact that empirical evidence suggests that boards that rely too much on CEOs actually do not perform well.¹⁵ That is not a good proxy for good board performance—and yet to suggest that this is the reason why we cannot find qualified people or why we cannot find enough does not delve deeply enough into who gets deemed qualified for these purposes. For the most part, boards can appoint anybody they want to their board. There is no corporate law or securities law, other than if you need a financial expert, that says who has to be on your board. That is why there are some boards that have family members, insiders, friends of friends, etc. So, I think we need to be mindful of how people define the problem. I also think it is important to interrogate that explanation or rather what I call “that excuse” to determine what it really means, and how it may be getting in the way of real progress.

14. See, e.g., Lincoln Quillian et al., *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARV. BUS. REV. (Oct. 11, 2017), <https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years> [<https://perma.cc/6V5P-64T8>].

15. Jeffery Sonnenfeld et al., *What CEOs Really Think of Their Boards*, HARV. BUS. REV. (Apr. 2013), <https://hbr.org/2013/04/what-ceos-really-think-of-their-boards> [<https://perma.cc/X82G-LPM2>].

NICOLE MECCA: We can also shift to how employees can hold their employers accountable to providing fair employment practices such as fair benefits compensation and quality management.

MS. LU: Thanks, Nicole. Just circling quickly back to your first question about how you can tell when companies are virtue signaling as opposed to ensuring real change is happening in their workforce—I think this is where disclosure comes into play. A lot of the information that would be useful for holding companies accountable is not currently required to be made public, but would be disclosed under the ESG disclosure frameworks. Examples of such information include information on gender diversity, employee retention rate, and how employees are being promoted through the ranks. All this data is going to be very helpful, especially when collected over the long term, for identifying which companies are truly concerned about creating real change and promoting D&I in their workforce. I think, in the long term, what disclosure also allows is for employees, as well as other stakeholders, to actively engage with companies to ensure their accountability.

We have already started to see the first examples of investor push for fairly aggressive disclosures. For example, over the summer, the New York City Comptroller and a couple of pension funds asked companies to disclose actual EEO-1 data.¹⁶ We also have ISS asking for information from company boards about their gender and ethnicity makeup.¹⁷ So as long as investors continue to push for this data to become public, I think we are going to see greater strides. At least we will be better equipped to identify those companies who are paying lip service to diversity and those who are outperformers.

MR. WEBBER: I will just add that first of all, the New York City pension funds have been at the forefront of these issues for decades, engaging the “G” really seriously about five or six years ago, and

16. SCOTT M. STRINGER, NEW YORK CITY COMPTROLLER, *Comptroller Stringer, NYC Funds Escalate Campaign Calling on Major Companies to Publicly Disclose Workforce Demographics* (Dec. 10, 2020), <https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-escalate-campaign-calling-on-major-companies-to-publicly-disclose-workforce-demographics> [https://perma.cc/FEF2-LY5W].

17. *ISS Policy Changes for 2021: Increased Expectations for Diversity and Accountability*, FENWICK & WEST LLP (2020), <https://www.fenwick.com/insights/publications/iss-policy-changes-for-2021-increased-expectations-for-diversity-and-accountability> [https://perma.cc/CG3A-GBP2].

pushing for proxy access after it was struck down by the D.C. Circuit Court of Appeals, pushing environmental issues.¹⁸

Carmen just made the point on D&I issues, and I think this also just leads into the discussion about human capital management and the SEC's recent action there.¹⁹ I would have liked to see them go further, but it was a step, I think, in the right direction. I think it raises a really important point that Lisa touched on very briefly earlier, but it is really part of the problem—the classic cliché, “you manage what you measure.” There has been so much historical emphasis on the C-suite, on executive compensation, on executive performance, on the backgrounds of executives and board members, and so on and so forth.

The securities laws emphasize disclosure of that kind of performance and compensation. Lisa suggested earlier, in some ways, the problem with that particular kind of emphasis is it reinforces a misleading narrative for investors, and a misleading political narrative—perhaps that is what really matters. “It is the five people at the top. We will tell you everything you need to know about corporate performance.” And that is just badly misleading. I think it is an artifact of the sort of ideology of the CEO as superstar that we had back from the '80s and '90s, the Jack Welch's and the “Chainsaw Al” Dunlaps, people like that, before we really had this sharper move towards shareholder activism.

I think that the human capital management idea is going to allow investors to peer much more deeply into corporate practices along all of these dimensions. For example: D&I, but also everything that you mentioned in your question too about benefits—compensation, training, how you build effective workforces that do a good job, are committed to the work, and are also rewarded for that work. So, I think there is a growing realization and some movement in the right direction. We need to be able to look more deeply. It is one thing to target board diversity along a number of dimensions, but absolutely if we are going to make these kinds of needed changes, we have to be able to peer more deeply into the organization.

MS. FAIRFAX: There is almost nothing that I can add. You have both said it right. This is what we mean by human capital management

18. See generally *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144 (D.C. Cir. 2011).

19. See Press Release, SEC. & EXCH. COMM'N, SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020), [hereinafter *Regulation S-K amendments*], <https://www.sec.gov/news/press-release/2020-192> [<https://perma.cc/3FZM-VUSZ>].

and why it is so important. You have all these studies talking about the importance of intangible assets and their growth as a percentage of a company's market value.²⁰ There is growing concern that we do not know enough about how companies pay attention to these issues. What are they doing about their D&I practices? What are they doing about their labor pool and how stable it is? What does worker turnover look like? How are they training their employees? We do not know enough about how they are developing people for promotion, and as it turns out, that is important information for us to understand. We cannot keep thinking about employees as this financial outlay; they are a critical asset that needs to be appropriately managed around all of these issues, including the diversity issue, as we think about the demographic shifts in the population. We must consider what that means for a company that is not appropriately managing its labor pool so that they can take advantage of those shifts in multiple different ways.

I agree absolutely that you cannot solve the concerns associated with the workforce by getting information about the CEO's salary, but I think the disclosure around it was intended to respond to a different concern. So it is not as if that information is not important. It is that it is not going to really drive and help this other human capital management piece, and we do need more information on that piece in order to really understand how companies are doing in this area, an area that is critically important.

NICOLE MECCA: Thank you. To continue the conversation around the term human capital management, the SEC has waded into this topic with its recent amendment to Regulation S-K.²¹ In particular, what can we expect from the SEC's latest rule?

MS. FAIRFAX: I have to fully disclose here that I was on the investor advisory committee when we recommended that the SEC focus on this issue. Certainly, the new rule falls very short of what we were hoping would happen around this.

It is a step in the right direction, but the problem is there is no real guidance and no specific disclosure requirements. There is sometimes merit to a principle-based approach, I think, but in this case, we do not really have the kind of detailed disclosure guidelines we were just

20. See, e.g., AON, 2019 INTANGIBLE ASSETS FINANCIAL STATEMENT IMPACT COMPARISON REPORT (Apr. 2019), <https://www.aon.com/getmedia/60fbb49a-c7a5-4027-ba98-0553b29dc89f/Ponemon-Report-V24.aspx> [<https://perma.cc/DW3G-C8AR>].

21. See *Regulation S-K amendments*, *supra* note 19.

talking about. There is also no direction about what kind of information is salient or important. By way of example, it would have been a good way to start in terms of thinking about what kind of information we need to know to have a really good understanding of what companies are doing in this area. While I think on the one hand, it acknowledges that human capital management is important and that we need to see information on it—in terms of doing something beyond that, I will take a wait-and-see approach.

MS. LU: Speaking generally on the SEC and its approach to ESG, I think the general approach and view taken by the SEC has been that of regulatory caution. It has very much stood by its principle of “you should disclose what is material to investors,” but the SEC has not gone so far as recommending or requiring any specific ESG-style disclosures, which is something that you actually do see across the Atlantic. EU regulators have been a lot more forthright about mandating ESG-specific disclosures and that is something that the SEC has so far declined to do. In terms of where we are going to get this information, a lot of the pressure and momentum is going to come from the private sector, namely initiatives from investors, and companies that really want to demonstrate their leadership. So we will see a lot of development coming out of the private sector in the United States rather than seeing the SEC really taking the lead on these issues for now.

EVERY GOLOMBEK: With respect to ESG in the lifecycle of a pension fund investment, could you speak to the types of conflicts that arise in ESG-related negotiations between pension funds and general partners?

MR. WEBBER: Sure, there are a lot of different ways to look at that particular question. We were just talking about the New York City Comptroller. Why don't I touch on some interesting stuff that they have done?

Recently, New York City adopted a responsible contractor policy which applies to investments in infrastructure and in real estate. The purpose of the responsible contractor policy is that when we make such investments, we expect that responsible contractors are hired to do the work; responsible contractors are those who deploy and pay prevailing wages and benefits to workers and have strong safety records. They do not have lots of litigation against them. Part of their assessment in adopting that policy was investment-driven in the sense that work sites that are run by union labor may have fewer accidents, less litigation, better training, better compensation, and so forth.

So what do you get from policies like that? The funny thing is, all this sounds very new. But the reality is ingrained in the history of the AFL-CIO housing investment trusts, the AFL-CIO Building Investment Trust, and another entity called ULLICO—the Union Labor Life Insurance Company—it was actually founded by Samuel Gompers, who also founded the AFL-CIO. Initially, it was created to write life insurance policies for workers for industrial accidents when no one else would write such policies—it is still around. It has been around for many decades and they have always had investment practices where they invest in projects where those projects hire union labor.

Right now, ULLICO is investing alongside Carlyle in building Terminal One at JFK Airport.²² These investments are going on across the country, and they are going on through and with private equity funds that are investing in these projects with them. This is part of the deal between New York City and other pension funds and P.E. firms engaged in these types of projects. I think that this is one way forward for labor and pension funds on the “S” part of ESG.

I would like to spin an optimistic scenario for a second, if we are still allowed to have any optimism. There is widespread recognition that there are serious infrastructure deficiencies in the United States, and potentially trillions of dollars of investment in that space.²³ One can tell a story in which worker pension funds can play a role of investing in those types of projects while creating union jobs, and importantly bringing new workers and new contributors into these pension funds.

I will not dwell on it, but this is where there is often a breakdown between shareholder returns over in one corner, and on environmental or social benefits being something totally different. The reality is that these things *can be* self-fulfilling and self-reinforcing, so pension funds can get there without just operating on returns. There are three legs to the stool: returns, worker contributions, and employer contributions. So those are really big issues for multi-employer pensions, for labor

22. See Press Release, THE CARLYLE GRP., The New Terminal One at JFK Continues Progress with Approval of Proposed Lease by The Port Authority of New York and New Jersey’s Board (Nov. 21, 2019), <https://www.carlyle.com/media-room/news-release-archive/new-terminal-one-jfk-continues-progress-approval-proposed-lease> [https://perma.cc/92A2-CJMX].

23. See Jim Tankersley, *Biden Details \$2 Trillion Plan to Rebuild Infrastructure and Reshape the Economy*, N.Y. TIMES (Apr. 15, 2021), <https://www.nytimes.com/2021/03/31/business/economy/biden-infrastructure-plan.html> [https://perma.cc/4DUU-ALUE].

union funds, and for public pension funds. This is one potential way to look at the model between pension fund investors and private equity funds—the point was made in the earlier panel today.

In the private equity space, these pension funds are estimated—public pension funds in particular—to constitute somewhere between a third and up to 50% of total assets under management by private equity.²⁴ That is an opportunity for these funds to exercise a lot of say over how that money is invested, how it is deployed, and importantly, how it should not be deployed. I think we are going to see more of that going forward.

MS. FAIRFAX: I want to add that I have done a lot of work around shareholder activism and engagement.²⁵ What that work has surfaced is that there are a lot of areas in which PE and pension funds are aligning where you would not classically expect. One of the reasons why the governance pushes were so successful was not just because of activist shareholders, but because of the alliances that those shareholders were able to build amongst other shareholders and the shareholder base. While it is true that shareholders may have competing and different interests, there are some ways in which they have found common ground. They have been able to work together in interesting ways and we are going to see that play out.

What these mini-cycles of financial stress have demonstrated is that everything is interconnected. It is not that what David is talking about in terms of pension fund investment is different—it means that when you name a particular shareholder, underneath that shareholder is probably other types of shareholders, who may have the ability to find some common ground around things that they are concerned about.

MS. LU: We all talk about major institutional investors—BlackRock, State Street, the major pension funds—really being at the forefront of pushing for ESG, but sometimes we forget the reason why: because, as Lisa mentioned, they are investing on behalf of ordinary people. As millennials and the generations below them enter the

24. See OECD, ANNUAL SURVEY OF LARGE PENSION FUNDS AND PUBLIC PENSION RESERVE FUNDS 6 (2019), <http://www.oecd.org/finance/survey-large-pension-funds.htm> [<https://perma.cc/9YCV-EB5U>].

25. See generally Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301 (2019); Lisa M. Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129 (2019); Lisa M. Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1 (2008).

workforce, their priorities on how their money should be invested differ from previous generations.²⁶

Institutional shareholders must align their investment strategies with the demands and concerns of their clients, and there is a major grassroots push that is driving the current wave of focus on ESG. I think we will see the trend continue to accelerate in parallel with demographic changes where millennials, women, and minorities continue to accrue greater wealth.

MR. WEBBER: I will make just one more point here about pensions, private equity, and ESG to kind of illustrate how chasing returns to the exclusion of everything else can have very perverse effects. One of the things that I looked at in some earlier work was public pension fund investments in privatization.²⁷ You had public pension funds that were investing through private equity in the privatization of prisons, privatization of schools, privatization of public school services, privatization of firefighting, privatization of police and security, all the way down the line.

I interviewed someone who worked as a custodian at a school in Massachusetts. He had been making \$20 an hour, worked there for many years, had good benefits.²⁸ His public pension was invested in a private equity pool that turned around and bought Aramark, which then came into that town and underbid the union for the school's contract. This guy, who had been making \$20 an hour, was offered his old job back for \$8.50 an hour. This was financed with his own retirement funds.

This was not an isolated case—this was a problem with public pension funds investing in private equity. You may say, “What if there were good returns on the investment?” But a lot of these workers lost their jobs. That is a loss of payments into the funds by both the workers and the employers themselves. So it is not so easy to just tease out. That is an example where even good return on investment could undermine

26. See LPL FINANCIAL, *How Different Generations Invest*, WEBSTER NEWS (July 8, 2020), <https://public.websteronline.com/articles/investments-insights/how-different-generations-invest> [<https://perma.cc/HM8B-2QGN>].

27. See David H. Webber, Opinion, *Protecting Public Pension Investments*, WASH. POST (Nov. 20, 2014), https://www.washingtonpost.com/opinions/david-h-webber-protecting-public-pension-investments/2014/11/20/85748ee6-66cb-11e4-836c-83bc4f26eb67_story.html [<https://perma.cc/VZA2-6KXS>].

28. *Id.*

the fund itself, which we think of as not being possible, but it is possible.

We increasingly see this kind of pattern emerging in other parts of ESG, in particular in the “E” space. There is increasingly a kind of collapse between returns and other forms of benefits to these funds that are making these investments.

MS. FAIRFAX: It shows that the issue is extremely complicated.

MR. WEBBER: I agree.

EVERY GOLOMBEK: One of the fiercest critics of ESG and stakeholder capitalism has been Lucian Bebchuk, who has argued that stakeholder capitalism and the tenets of ESG would reduce management and board accountability.²⁹ How should boards and management parse through different stakeholder interests and manage potential conflicts?

MS. FAIRFAX: I think that the concern that Bebchuk raises is one that often gets raised in this conversation: For whom should the board and the corporation govern? Is the obligation strictly to shareholders and their profit maximization concerns? That is a single-choice proposition, whereas obligations to groups of stakeholders involves the possibility that the board and management can play groups off of one another.

Accountable to everyone essentially means accountable to no one; that is the argument. While you can understand that concept, I think his argument ignores the reality that boards and managers are already doing this. This is actually what we expect them to do. We expect them to balance the interest of different stakeholders. If you imagine this moment right now, where corporations are struggling to decide what to do during the pandemic, they have on the one hand employees whose health and safety concerns they have to think about. On the other hand, they have consumers, but this is what they are in the business of doing. They have to be in the business of what they are doing in order to manage and oversee a large corporation, so I think the reality is that they are already doing this.

The reason why I suggest it is not a concern is that they are already doing it. What I think is important about naming the fact that they are doing it is so that we are able to spotlight it and really be able to figure out who is doing it *well*. Shedding light on best practices is the whole

29. See, e.g., Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Mar. 2, 2020) <https://corpgov.law.harvard.edu/2020/03/02/the-illusory-promise-of-stakeholder-governance> [<https://perma.cc/U3PQ-ZYG6>].

point. The business endeavor is about people making decisions, some of them that may work and others that may fall flat.

We have got to try to figure out which ones work and which ones do not. How to make tradeoffs is the whole point of this endeavor. By allowing people to engage in potentially risky tradeoffs where there is no particular right answer, you are just trying to kind of do the best by the institution. So to the extent that is concerning, of course it is, but that is business. That is my view.

MR. WEBBER: I think that the Bebchuk concern is real, but I think it is also overstated and may not even be that real—I am not so sure. Lisa already stated the premise of that critique, which is if we all know there is only one score and one metric that matters, we can hold everybody accountable to share price and that is it. If you loosen it up at all and say, we care about the environment or we did this for workers, then there goes the accountability. Realistically speaking, we tend to evaluate companies in light of their competitors, in light of other entities of the industry. If one entity's share price is getting pummeled, and they claim that they are only getting pummeled because they are doing all this great stuff for workers and for the environment—I think it is going to be looked at skeptically. It is a question of being able to balance these things to let whole industries move in particular directions.

Secondly, I think that there is more to life than just managerial accountability. The reality is it does not tell us enough about whether this is the right direction to move. There might well be a little bit less managerial accountability because they are taking other things into consideration. What we really want to know is, maybe so, but we can still benefit overall from managers being able to take other things into consideration along these other dimensions. The single-minded focus on just the issue of managerial accountability is not good enough.

There is also this artificiality to the argument that I think continues to break down, because many shareholders want this stuff. Many shareholders want more environmental accountability, more labor friendliness, labor protection, economic equality, diversity—they are concerned about these issues too. So shareholder primacy is not exactly the same thing as maximized returns.

There are so many different pieces moving here, but ultimately, I think we need to know much more even if we can see that there is a little bit less managerial accountability, which I am skeptical of anyway. If it advances these other metrics, then I think we might benefit from it.

Finally, the last point here really is there is so much inside the system as it currently exists to keep shareholder interests on the table. The quarterly reporting, the leak tables and performance and so forth, the idea that shareholder interests go out the window and managers can do whatever they want. Again, I just think it is possibly a real concern, but I think it is overstated.

MS. LU: Adding to what Lisa and David mentioned, the importance of stakeholder capitalism is also about empowering the board to act in the long term interests of the company and about creating a company that is primed for sustainable long term growth, as opposed to being focused on short term growth and high stock prices in the short term, which may serve the interests of a select number of shareholders but may not actually serve the larger company, especially in the long run. For example, if a company could easily continue to do well in the short term without taking into account the risks relating to climate change; or takes seriously its human capital policies but fails to invest in research, development, and innovation; or fails to invest in the workforce, it will not be sustainable over the long term.

If you are not capturing all the ESG risks and considering the concerns of your community, your suppliers, and your customers, you are not able to build a sustainable business. That is where stakeholder governance comes in, because it allows the board to take into account these issues and take a stance against short-termist thinking without risking punishment. That is what is really important here. I would counter the Bebchuk argument about less accountability. You would have less accountability by solely focusing on share prices because that does not account for how a company is going to perform over the medium to long run, which is what most people who are invested in companies care about. Most people are not flipping stocks, they are investing their life savings with a 10, 20, or 30-year horizon.

TAYLOR WELLS: Shifting the conversation a little bit to millennial involvement in ESG, I want to ask the classic question: Today's fight for ESG appears to pit young versus old, for example, millennials fighting to address climate change facing off against the large shareholder base of pension and retirement funds. How should the timeless problem of young versus old—here, stakeholders versus shareholders—be approached today?

MR. WEBBER: First of all, I should just say that those types of conflicts are, I think, overstated. In my opinion, it is not really true that baby boomers are saying to themselves, "Let the planet burn, I don't have much time left anyway." I do not think that this is really the baby

boomer attitude, and in any case, those types of conflicts have always existed within every single pension fund and every single investment fund.

If you look at every pension fund, if it makes an investment that pays off in 10 years, or two years, or 20 years, it is going to benefit some workers at the expense of others. There is this so-called duty of impartiality that is implied. I am talking about on the investment side, not necessarily the corporate side. This duty of impartiality really is not that muscular because of precisely the concerns just identified, unless you truly are favoring one set of beneficiaries over another. You are not really running afoul of the duty of impartiality.

I will plug a paper that I have forthcoming with Michal Barzuza and Quinn Curtis, both of the University of Virginia.³⁰ We talk about the rise of the millennials, in particular, to state the theory or hypothesis of the paper: why ESG? Why is it suddenly becoming so important now? Why has it moved from something that was once marginal, into something that is core? In particular, we focus on the big three index funds in that paper.³¹ We ask, why have they suddenly become more active voting in favor of environmental proposals and voting? Why have they started targeting board diversity and issues like that?

Our hypothesis is that it really is about the fight to manage millennial money. It is about the fight to manage millennial investment dollars.³² These entities do not compete on what they invest in. The index funds all buy exactly the same thing. Their costs have essentially been whittled down to zero. What do they compete on? What is left to compete over assets under management?

Carmen alluded to this earlier, but there is a lot of social science research that shows that the millennials have very different attitudes from baby boomers and Gen X along two dimensions. One is their actual political views and political attitudes. Millennials' view on the environment and social issues are just different in many respects from Gen X and the baby boomers. The second, and I think even more consequential attitudinal difference, is that millennials say again and again—and there is a lot of anecdotal evidence to support that they mean

30. See generally Michal Barzuza et. al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).

31. See *id.* at 1253.

32. See *id.* at 1303, 1320.

it—that they are much more comfortable living their politics, not just in the voting booth, but at the office, in the way they shop, and in the investment choices that they make. I think we are seeing that. I think that we are seeing in terms of them saying that it is important to them to work at a company that they believe is doing sustainable, socially useful work. It is important to them to buy products like that, and it is important to them to invest accordingly.

Part of our theory is that part of the reason that these investment managers are talking the ESG talk, and to some extent walking that walk as well, is over the efforts to appeal to millennials who now are predicted to be three quarters of the workforce by 2030, and who are now really making investment choices that tend to be kind of sticky.³³ If you invest in that 401(k) with one entity in your 20s, there is a decent chance that you will still be with them for years and years, whereas the boomers are already in, the Gen X people are already in. So I think that is what is driving a lot of why ESG is taking center stage now.

MS. FAIRFAX: David is absolutely right. All the evidence is showing us a lot about this generation. How are they willing to spend their money? What they are willing to spend their money on? The fact that they are willing to put their dollars in businesses and in products if they think it reflects their values; how reputation matters.

I too am resisting, as is David, this notion of us versus them. Rather, this is the evolution of a changing world and a changing economy. A changing understanding of what the long term means has got to happen when you have a generation that grew up with expectations that other generations did not have. This is a generation that grew up with expectations around concern for the environment. This is a generation that grew up with expectations about diversity, real or imagined, signaling or not. The truth is this generation has an expectation of what their workforce is supposed to look like, has an expectation about what those practices are supposed to reflect, and a generation that has proven that they will put their dollars where those expectations are. That is the key.

They have said in their consumer spending patterns, in their investment patterns, even in their kind of choice of work patterns that it matters so much to us that this is where we are going to put our resources, and you have to be cognizant of that as you think about the

33. See, e.g., Clemens Sialm, Laura T. Starks & Hanjiang Zhang, *Defined Contribution Pension Plans: Sticky or Discerning Money?*, 70 J. FIN. 805, 806–07 (2015).

long term and what it means for that generation to have control of significant assets and resources for the next 30 or 40 years.

MS. LU: If we also look at the demographics of millennials today, it is really different from previous generations. Millennials today are one of the most educated generations, so they are incredibly sophisticated and understand the investment propositions that have been put in front of them. They realize that it is a financial imperative, not just a moral imperative, to think about climate change or questions about diversity and inclusion, because all these things, ultimately, will likely have a real bottom line impact on the value of investments over a long horizon.

Millennials today are also incredibly diverse, far more diverse than prior generations. Women hold much more wealth than prior generations, so that is where diversity and inclusion becomes a real issue, because the millennials entering the workforce are realizing that the issues of the past remain today. They are asking questions about what can be done to change institutions, and many of them are using their investments to push for change. I think we are at the initial phase of a wave of change because the generation behind the Millennials is just starting to enter the workforce and they are even more educated and even more diverse.

MS. FAIRFAX: I would also add that this understanding of the impact of ESG targets on investments and on returns is something we have to unpack. I think one of the latest studies I saw was a meta-analysis of many studies, going back over a decade, from the Department of Labor (DOL).³⁴ It found that most people believe that if they invest with an ESG focus, they are going to have to sacrifice some profits.³⁵ The empirical evidence does not bear that out: most of the empirical evidence supports the proposition that investing with those types of goals and targets will have you, at the very least, on the same level as conventional investing, if not better.

I think the first panel said this—we have got to pull the ESG out. This is investing with these types of things in mind, and in fact, the evidence points to the fact that it is an investment that will give you

34. See generally DEP'T OF LAB., ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTMENT TOOLS: A REVIEW OF THE CURRENT FIELD 14 (Dec. 2017), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/ESG-Investment-Tools-Review-of-the-Current-Field.pdf> [<https://perma.cc/53PY-W84K>].

35. *Id.*

a good return. So that is something that people need to be mindful of as well.

MS. LU: ESG funds have actually performed quite well during the pandemic, and have in many instances outperformed the market.³⁶ The fact that ESG funds have proven themselves to be able to withstand severe market shocks is further evidence that taking this approach to investing is going to serve investors well, or at the very least, put them in the same position in most cases.

MR. WEBBER: You can also look at it in the negative, as not only in terms of affirmative investments in growing sustainable industries, but also avoiding industries that do not fit those criteria. Following the logic of the millennial argument here, we can look at companies that were badly hit when they handled these kinds of issues in a bad way. Whether it is Starbucks coming out and banning its employees from wearing Black Lives Matter pins, then turning around and not only reversing itself after an outcry, but buying 250,000 Black Lives Matter T-shirts, and distributing them to their workers;³⁷ or that episode at Papa John's³⁸—this conduct had a serious negative impact on each company. Sometimes ESG is depicted as painting a rosy picture of investing in the right stuff, but it is also about avoiding the harm that is caused when you really alienate your employees, your customers, or your shareholders. If you alienate your employees or your customers, it can have effects on your share price.

Again, it just underscores the point that the siloed way of looking at these things is inadequate—particularly when you have a rising generation that does not silo its politics into the voting booth alone—and decisionmakers have to take the ESG side into account here alongside the legal side and the corporate side of these issues, too.

36. Esther Whieldon & Robert Clark, *ESG Funds Beat Out S&P 500 in 1st Year of COVID-19; How 1 Fund Shot to the Top*, S&P GLOB. MKT. INTEL. (Apr. 6, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/esg-funds-beat-out-s-p-500-in-1st-year-of-covid-19-how-1-fund-shot-to-the-top-63224550> [https://perma.cc/5WB7-Y6TX].

37. See Lauren Aratani, *Starbucks Reverses Stance and Allows Staff to Wear Black Lives Matter Clothing*, GUARDIAN (June 12, 2020), <https://www.theguardian.com/business/2020/jun/12/starbucks-black-lives-matter-clothing> [https://perma.cc/DC8P-6LM4].

38. Noah Kirsch, *Papa John's Founder Used N-Word on Conference Call*, FORBES (July 11, 2018), <https://www.forbes.com/sites/noahkirsch/2018/07/11/papa-johns-founder-john-schnatter-allegedly-used-n-word-on-conference-call/?sh=7b537c214cfc> [https://perma.cc/8CGF-SV9D].

TAYLOR WELLS: Regarding millennials' investment and ESG, research has shown the millennials are the first generation that are projected to be generally less wealthy than their predecessors. How will this affect millennials' ability to implement long-lasting ESG values in mainstream corporate culture?

MR. WEBBER: I think not that much, because even if that is true, per capita, that is not true in terms of the overall size of this generation. It is a much bigger generation than my own gen, Gen X, as Larry Fink recently pointed out.³⁹ The millennials are on the threshold of inheriting somewhere from \$12 trillion to as much as \$30 trillion.⁴⁰ It is the largest intergenerational asset transfer in the history of the world, and collectively, that generation is going to be massively powerful.⁴¹ As I said, 75% of the workforce by 2030,⁴² with huge inheritances and wielding lots of market power, lots of consumer power.

So I am not sure. I am always a little bit skeptical about those types of projections, but I think even if it is true, on a per capita level, it is not true in the aggregate. I think that they are not going to be thwarted for that reason. There may be other reasons, but not that one.

MS. LU: Going off what David mentioned, I think we will hear in the press and the news about the struggles of millennials in terms of their ability to acquire wealth. I think, in many ways, the experience has also made millennials perhaps more aware and more concerned about ESG issues. Millennials have experienced significant challenges, such as mounting student debt challenges, two major recessions, and the

39. See Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RSCH. (Apr. 28, 2020), <https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation> [https://perma.cc/5UN6-Y6WH]; Julia Horowitz, *BlackRock Is Getting Ready for Millennial Investors*, CNN (Dec. 4, 2018), <https://www.cnn.com/2018/12/04/investing/blackrock-millennial-push> [https://perma.cc/V5GL-UHHC].

40. See Ben Eisen & Anne Tergesen, *Older Americans Stockpiled a Record \$35 Trillion. The Time Has Come to Give It Away*, WALL ST. J. (July 2, 2021, 10:00 AM), <https://www.wsj.com/articles/older-americans-35-trillion-wealth-giving-away-heirs-philanthropy-11625234216> [https://perma.cc/2L86-TZ3G].

41. See Liz Skinner, *The Great Wealth Transfer is Coming, Putting Advisers at Risk*, INVESTMENTNEWS (Aug. 7, 2015), <https://www.investmentnews.com/the-great-wealth-transfer-is-coming-putting-advisers-at-risk-63303> [https://perma.cc/MU6R-TYQM].

42. DELOITTE, THE DELOITTE MILLENNIAL SURVEY 2 (2014), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-dttl-2014-millennial-survey-report.pdf> [https://perma.cc/LTW2-5MR7].

accompanying career setbacks. All these experiences do fold into how they make investment decisions. As David mentioned, it is probably going to impact the overall trend and push towards ESG in the longer run.

MARIE BOGENEZ: I want to discuss the most recent proposed rule from the Department of Labor.⁴³ It seems from the rule that it would discourage managers of ERISA covered pension plans from actually considering ESG issues when making their investments. What do you think will be the long term impact of that rule, if it were to be implemented?

MR. WEBBER: It depends how long-term we are talking about here. My own view is that it will not. If it is implemented it will not linger for very long. It may not be implemented or may not even be implemented for very long, depending on the outcome of the election in a couple weeks.

In my own view and those of my co-authors on that piece—because we think that this is so important to millennials, we think that market pressures in favor of ESG will continue to be enormous, and we think that ultimately the DOL's ability to really constrain this kind of activity is going to be limited. It would be limited even if the current administration stays in business for another four years. If it does not, it will be more than just limited, it may just be eliminated and may never fully be implemented.

It is interesting to note, if you look at the many comment letters objecting to this new ESG standard, that the objections do not come from the Bernie Sanders crowd. They are coming from very, very mainstream investment managers who are opposed to this. DOL has started essentially trying to harass some investment managers by demanding all sorts of documentation in wanting to see why they made certain decisions along ESG lines and so forth, and that is a real cost and also a little bit alarming to folks who have been targeted by it.⁴⁴

I suppose we should tell the political backstory, which is that the energy industry went to the Trump White House and complained about all this ESG stuff, shareholder proposals and so forth. The White House issued an executive order to the DOL to look into this fiduciary stuff, and that is why we got a flurry of this action from DOL over the summer. There are a lot of other investors out there other than those

43. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72846–87 (Nov. 13, 2020).

44. See *id.* at 72879.

governed by ERISA, including all the public pension plans. So given the market pressures in this direction, given the demand from customers, employees, investors, and millennials, I do not expect this to be the death knell of ESG that I think some of the folks who implemented this guidance hope it will be, but time will tell.

MS. FAIRFAX: It is particularly concerning because it is based on a false premise that we have all been highlighting, which is the assumption that considerations around ESG do not align with or advance financial goals. The reason that you are getting at, David, suggests that these traditional funds and fund managers are pushing against a restriction like this is because it absolutely has an impact on financial goals. So, it is concerning to say these funds could not take that into account, recognizing that market pressure translates into money, into finances, into performance. The DOL's own study just three years ago said when you look at the meta-analysis of all of the studies around ESG investing, they show that type of investing either performs as well as or outperforms conventional investments.⁴⁵ So what are they doing right now?

It is good of David to tell the political story behind the story, but certainly the question of what type of impact we expect it to have—if it remains in the long term, I think it could have a concerning impact. I do recognize that, in fact, there is some financial hit that you will take if you are not allowed to engage around these issues.

As Carmen was suggesting, at this moment we are seeing these funds outperform the market, and researchers and analysts are saying it is because funds that invest and consider in this way are a proxy for resiliency. Sustainability is a proxy for resilience, it is a proxy for being able to weather the storm because you have taken into account some really important risk factors that other companies may have blind spots around. I think that whatever happens in November, the market will speak for itself around whether or not this makes sense. I think, ultimately, the market will demand the ability to continue to invest in the way that is most beneficial and the evidence suggests an inclusion of these types of factors.

MS. LU: Quickly adding to what Lisa and David just said, I think there are still folks out there who do not believe that ESG has a positive impact, or at least a neutral impact on investment outcomes. I think that

45. See SUMMIT CONSULTING, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTMENT TOOLS: A REVIEW OF THE CURRENT FIELD 14 (2017).

group is getting smaller and smaller over time, and if we look at the trends right now, the influx of money into ESG funds is far greater than investments into regular funds. As long as this trend continues to persist, as Lisa mentioned, the market will speak for itself. There will ultimately be market demand for access to ESG-managed funds, and so I think it is really a question of time. As long as ESG continues to outperform and do well, then I think that the data itself will become irrefutable.

AJ HARRIS: Over these last fifteen minutes, we would like to address some questions posed by the audience. The first question is: Are employee resource groups effective for promoting D&I, and if not, what can be done to make them more effective outlets within these firms?

MS. FAIRFAX: Certainly, all of the studies around the D&I work at companies suggest that it is a top to bottom, bottom to top endeavor, and that you need to have buy-in from everybody and intentionality around all of the things that you do to both kind of recognize the places where there may be inequities as a result of race and to counteract those inequities. So I think it depends. I will end with what I started with: it depends.

What is the makeup of the group? What is their charge? What we sometimes see with the groups that are tasked with D&I efforts is that companies tend to put the least powerful of the employees, with the vaguest of charges and the least amount of resources, and tell them to try to fix the problem that permeates the entire institution. Turns out, that is not going to work. But if you have a group of people who are dedicated to getting something done, who have the power and the resources to get it done, and who are willing to have difficult conversations to make difficult decisions, then yes, it could matter.

AJ HARRIS: Another question is whether an increased emphasis on diversity is potentially a way of maximizing the value for shareholders because diversity reduces support for taxes and social spending and may make it more difficult for workers to organize.

MR. WEBBER: There is a long chain of reasoning in that question that I am not sure I embrace, so I am not quite sure how to answer that. I mean, what do you mean by worker organizing—is it investors, or do you mean unions?

AJ HARRIS: I think what the audience member is asking, in the bigger picture, is: If the efforts to increase diversity at a firm are successful, you have less political pressure on other firms to make these changes, and as a result, you may face less political pressure for taxes. If you have greater diversity efforts, you have a happier workforce, and

with a happier workforce, you face less push back for, let us say, union effort.

MR. WEBBER: I see. There is a familiar argument that gets made in this space all the time, which is if you take your environmental issues, you take diversity. If you take any of these issues into the marketplace, into the corporation, does this incentivize making the changes in Washington or legislatively? Is there a sort of zero sum game? No. If you are directing your resources into one space, that does not mean you are not directing it somewhere else. It is related to a book I wrote.⁴⁶ I am not sure it focused so much on the diversity piece, but rather on how many resources a union, for example, should put into shareholder activism, versus into recruiting new unionized workers, versus into electoral politics. Institutions have to make these choices with scarce resources from my own perspective.

I think that in the world that we are living in, in the 21st century, nobody can get away. No matter what issue you care about, you just cannot ignore what is going on in the marketplace. It is just not enough. There is too much power and influence in the private sector to ignore. Some of it is a story about gridlock in Washington. Some of it is just a story of capacity. It is just not enough anymore, in my view, to focus on legislative strategies alone, or on litigation strategies alone, or on regulatory strategies alone. Particularly in a world where markets operate globally and government regulation is still local—it is a serious asymmetry. And given the fact that markets operate globally as well, investors can also operate globally in a way that the sort of traditional tools of legislation or regulation do not. So I just do not see how you can ignore this space.

If you care about the facts on the ground and almost anything happening in the real world, you cannot ignore this space. Whether and to what extent your efforts in one space may undermine or detract from your efforts is a complicated question. It is a fair question, but I think, no matter how you come out on that one, you cannot ignore the space, you just cannot.

MS. FAIRFAX: I would just add one follow-up on that, to the extent I understand the question. There is a reason why the Black Lives Matter movement turned from a movement that was about protesting and people in the streets, that focused on the criminal justice system,

46. See generally DAVID H. WEBBER, *THE RISE OF THE WORKING CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* (Harv. Univ. Press 2018).

towards pressuring the corporation and issues like that. There is a connectedness there. So David is right, these things intersect and people are sophisticated enough to understand the intersection. It cannot be viewed as a zero sum game. It is not an “either-or”; it is a “both-and.”

MS. LU: Going off briefly from what David and Lisa just said, I think if you look at the most recent Business Roundtable statement, what was interesting was that when they were talking about promoting racial equity and reducing justice, they also mentioned that aside from the private sector initiatives, they also talked about lobbying the government and proposing public policy proposals. I think that is interesting because it is an implicit recognition by the private sector that they have tremendous political influence. I think change in the private sector is particularly important, and I think any political changes will likely require cooperation from the private sector.

AJ HARRIS: I would close by asking for your future projections for the space in the next five years or so. What are some reasonable goals, and what are the realistic odds of their success in the foreseeable future?

MS. LU: I think the biggest challenge right now is creating an effective disclosure system for corporations so that there is a baseline from which people can understand how ESG is being dealt with, how risks and opportunities are being managed, and how to differentiate companies. I think we will see a lot of movement in the next couple of months because we are seeing a lot of push in the private sector for a coherent disclosure framework, and that in turn will likely trigger, hopefully, more effective disclosures from companies.

Also, to recognize companies that are outperforming their peers. I think that will be one of those critical goals. I think looking further afield, it is hard to predict where this is going to go, but if we look at recent trends in terms of investing and the scope and scale and investment in ESG, it has grown exponentially. It has not just been a steady increase, it has really dramatically exploded in the last couple months. I think if this trend continues, all the debate and old debate and skepticism may slowly erode, and what you will really see is a greater focus on how we deal with these issues. How do we calibrate risks and opportunities? How do we determine the best governance practices? Companies are looking to address this, both on the board level and also throughout management, because addressing ESG is not simply about what is happening at the top. It is also about how that gets filtered down all through the bottom, and this is particularly the case with issues such as D&I.

MR. WEBBER: I will focus quickly just on the “S.” I hope we are going to see it—it has been talked about forever. I hope we are going to do more for workers in this country and I hope we are going to see some serious infrastructure spending that could potentially put millions of people back to work or secure their current jobs, resulting also in payments into retirement funds and having all sorts of salutary effects. I think that if such an infrastructure investment plan does come down, it is not going to be just in the form of a big check from the government; hopefully, there will be a significant check from the government, but a lot of it is going to come from the private sector and from tax incentives that might be created in such a plan to make such investments.

One very positive way we might see some of the “S” in action would be for pension funds and investment funds to use their power and make these infrastructure investments to ensure that workers are getting a good, fair bargain with respect to prevailing wages and benefits when they work on such projects. That has been shown to be profitable. It has been shown to create returns, and I also think it would be good for a lot of people in this country who need it.

MS. FAIRFAX: I agree with both of those comments, in particular the focus on the workers, because I think human capital management is a very important and live issue. I am hopeful that we will make some headway on that. I think it is likely to be in fits and starts. I think disclosure is the same way, not only better and more meaningful disclosure, but some standardization. That is going to be the most helpful piece of the disclosure, and I expect fits and starts there too.

We will get to a place after finding some convergence around what people feel are best practices that the SEC will pick up from. I imagine, there will be regulation in this space, but probably not until there is some significant agreement around best practices.

The last thing I will say is the goal with regard to ESG target metrics is to obtain credible commitments. You have to move from the rhetoric to the credible commitment. If you do not measure it, it does not matter. So we need to be thinking about what credible commitments look like in this space. Is it tied to executive compensation? Is it realistic targets and goals? What is it? This is the second wave of that push. How do we hold feet to the fire and make companies have credible commitments in this space? I suspect that too will be in fits and starts.

FIRESIDE CHAT

DIANNA LAM: Welcome back everyone. We are very excited that Former Chief Justice Strine, one of the foremost authorities on Delaware law and a leading voice in ESG, has agreed to serve as our keynote speaker. Although he needs no introduction, please allow me to remind you of a few of his many, many, many accomplishments.

Chief Justice Strine served on the Delaware Supreme Court from 2014 until 2019 after previously serving as Vice Chancellor and then Chancellor of the Delaware Court of Chancery. He has written hundreds of opinions in the area of corporate law and contract law, trusts and estates, criminal, administrative, and constitutional law. His opinions are among the most influential in Delaware, and particularly in the area of corporate law everywhere. The Chief Justice holds long standing teaching positions at Harvard Law and the Penn Carey School of Law, and he also holds distinguished fellowships at both of these law schools and Columbia Law. He is a member of the American Law Institute where he served as an advisor on the project to create a restatement of corporate law. From 2006 to 2019 he served as the special judicial consultant to the ABA Committee on corporate law. He also was the special judicial consultant to the ABA Committee on mergers and acquisitions from 2014 to 2019. Among his many awards, in 2000, Governor Carper awarded Chief Justice Strine the Order of the First State. In 2002, President David Roselle of the University of Delaware presented him with the University's citation for Outstanding Achievement. In 2006, he was selected as a Henry Crown Fellow at the Aspen Institute. In 2019, he was awarded an honorary degree from Washington College in Chestertown, Maryland.

We are honored that among his many speaking engagements, he has chosen to serve as our keynote speaker. I will now turn it over to Professor Sean Griffith.

PROF. GRIFFITH: Thank you, Dianna. Chief Justice, welcome.

HON. STRINE: It is great to be with you Sean.

PROF. GRIFFITH: It is a pleasure to have you here. Well, virtually here.

HON. STRINE: So, it's virtual happy hour and I expect everybody on the phone to feel free to drink.

PROF. GRIFFITH: We are all virtually happy already. Chief Justice, I'd like to talk about some of the recent work that you have been doing, and the big picture policy proposals that you have been writing about and thinking about since leaving the bench.

My first question for you is to remark on the scope and scale of the thinking that you have been doing since you left the bench. These ideas that you have been coming up with, and the papers that you put out this summer, can really be seen as large-scale reforms of the way that capitalism might work in the United States. They are much broader in scope, as I said, than even the most wide-ranging judicial opinion. So, I would like to invite you to talk a bit about the things that you are thinking about now and how they may or may not connect to the kind of thinking that you did as a foremost jurist on the foremost corporate law bench.

HON. STRINE: Sean, I'm really glad you actually ask this question because there's nothing really new about my focus. When I was on the bench, for example, I wrote an article and I gave a lecture on these larger topics in 2006. I talked about how my hairline was a tribute to my first political hero who was running for president then. That was then-Senator Biden who was running in the primaries in the 2006–07 cycle running up to 2008. That article was called the *Shared Interest of Corporate Managers and Workers in Corporate Governance Reform*.¹ It actually turned into a symposium and people like my friend Damon Silvers, who is head of policy at the AFL-CIO, and Jack Bogle responded.² They address many of the themes that my recent work does. I've written widely throughout the century on the need to rebalance our corporate governance system. I think it's telling, though, that the work has gotten more attention recently. It's not because I'm saying anything particularly new—it's because what has been happening in our economic and corporate governance systems does not work and has created economic insecurity and inequality, and that's finally getting the attention it deserves.

1. Symposium, *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1 (2007).

2. *Id.*

It has long been a concern of mine that what the “is” is about our corporate governance system is a long way from the “ought,” and in terms of my work as a judge, it is easy to see, given where I was sitting in Delaware, the pressures under which public company managers in particular are operating. The dynamics changed profoundly even during the 21 years I was on the bench, with growing and extraordinary pressures to deliver immediate returns to the market; the pressure to squeeze other stakeholders, if necessary, to do that. Some people have said, for example, “Well, the R&D is still kind of going strong.” R&D actually is often reduced in places where activists go, but what frequently happens is, if R&D is not cut, then worker’s pay is cut. And there is offshoring and downsizing.

Look at what happened in terms of the lack of resiliency of companies in the face of the pandemic because they didn’t have the kind of reserves to even weather a month without laying off workers or stiffing their creditors. If you talk about the brittle supply chains—our prior panel, I agree wholeheartedly except, I would just say to my friends, David and Lisa, stop burying the workers in the “S” of ESG: Call it EESG. The workers deserve their own letter, and it’s not surprising they haven’t had their own letter because investors, frankly, haven’t cared that much about workers. It took really the 2016 election and things like Brexit for people to start understanding that the fabric of our nation has been torn and the social compact violated in a way that is not sustainable. That’s why the statements by the Business Roundtable (“BRT”)³ and people like Mr. Fink, which I support, both of those directions—those are symptoms of the real illness. They are not on the vanguard of history, they are responding to the realities of growing economic insecurity and inequality and its threats to our society, and their own businesses.

The BRT and the Council of Institutional Investors (“CII”) are reacting belatedly to an imbalanced corporate governance structure that can be summarized in this simple way.⁴ Stockholder power: envision a big arrow going hugely up, and then stakeholders’ power, see another

3. See generally *Business Roundtable Redefines the Purpose of a Corporation to Promote “An Economy That Serves All Americans,”* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/7DRK-9CLQ>].

4. *Council of Institutional Investors Responds to Business Roundtable’s Statement on Corporate Purpose*, COUNCIL INST. INVS. (Aug. 19, 2019), https://www.cii.org/aug19_brt_response [<https://perma.cc/48K8-DV5T>].

arrow but going way down, particularly for workers. When that happens, it's natural that more wealth flows to the group with power and comes out of the share of those who have lost power.

For a long time, I have written about the need to rebalance this, to require institutional investors to align their interest with the interest of their worker investors whose capital they hold, to constrain businesses from polluting our economy and regulatory system and denuding the protections for stakeholders. My recent work is really just pulling that together.

The larger piece about fair and sustainable capitalism came because a bunch of policymakers sort of said, "Leo, could you pull together all the different strands in one place?" So I tried to do that. But it's really been a longstanding passion of mine. What I saw in the Court of Chancery and in the Supreme Court is the power dynamics that put all the pressure on the operating companies and their fiduciaries to squeeze the lemon for the institutional investors who control them. These are the companies that make real products, they deliver real services and they employ people. We really don't and won't have shared accountability on the part of the institutional investor segment until we bring their responsibilities into alignment with the interests of their long-term worker-investors, and, frankly, restore the promise of the New Deal and European social democracy.

We're going to have too many externalities, we're going to treat workers poorly, we're not going to confront things like climate change, and we're going to be poorer for it because it does not foster sustainable economic growth for companies to compete on regulatory arbitrage and externalities, rather than on what the dimension should be: which is real innovation and quality. So, that's some more context than maybe you want, but I'm pleased to see people finally talking about workers.

As I said, however, it's not coincidental that the workers are buried in the "S." I would challenge anybody to look at sustainability conferences over the last 10 years. Until maybe the last year or two I didn't even hear much of a mention of workers, living wages, or the fair treatment of them. It was all pretty much through an investor lens. I think it took the murder of Mr. Floyd for investors to finally focus on racial inequality. The institutional investors and folks on the sustainability front were doing some stuff around gender inequality, but you can question why they weren't focusing on race until 2020, because the statistics were grimmer for Black people by far than for women. I have always supported doing something about both, and it's good they

are finally taking that position too. They were not doing anything about wage inequality until some of the things I mentioned, and I hope they will do something now.

I think when corporate America has taken another round of government bailouts—bailouts that have been hugely helpful to the money manager community by the way—and when we have seen that the essential worker class has been treated so poorly, I think we are at a moment where maybe we can rebalance things fundamentally. I have been hoping this moment would come a while back. I would applaud, for example, the people at the Aspen Business and Society program. If you look at their reports⁵—and I played a role in authoring them going back into the first decade of this century—they were talking about many of the same issues as the folks at B Lab.⁶

As you know, our friends in corporate law academia are still obsessed with sell-side takeover premiums, and things like that. I don't think we in corporate law have had a very wide lens as a community on the effect of corporations on society and the effect of institutions on how corporations behaved. I think it's long overdue that there's conferences like this, by distinguished institutions like Fordham that actually focus on things that matter to real people.

PROF. GRIFFITH: Thank you. It seems to me, if I can characterize one of the big ideas that comes through in your recent work: it is to add that extra letter to the front or to take the employees out of the “S,” as you said, and so to make it about EESG and not just about ESG. That seems to me consistent, as you said, with some of the things that you have written about in the past.

Is there anything different now? You mentioned in passing the Business Roundtable statement⁷ by the CEOs of the largest companies

5. See generally ASPEN INST., AMERICAN PROSPERITY PROJECT: A NONPARTISAN FRAMEWORK FOR LONG-TERM INVESTMENT (Dec. 2016), https://www.aspeninstitute.org/wp-content/uploads/2017/01/American-Prosperity-Project_Policy-Framework_FINAL-1.3.17.pdf [<https://perma.cc/8LNA-JNF2>]; ASPEN INST., LONG TERM VALUE CREATION: PRINCIPLES FOR CORPORATIONS AND INVESTORS (June 2007), <https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/bsp/FinalPrinciples.pdf> [<https://perma.cc/SL7K-4PDQ>].

6. See, e.g., B LAB & S'HOLDER COMMONS, FROM SHAREHOLDER PRIMACY TO STAKEHOLDER CAPITALISM: A POLICY AGENDA FOR SYSTEMS CHANGE 13–15 (2020), <https://theshareholdercommons.com/wp-content/uploads/2020/09/From-Shareholder-Primacy-to-Stakeholder-Capitalism-TSC-and-B-Lab-White-Paper.pdf> [<https://perma.cc/D6FZ-LCH3>].

7. *Business Roundtable Redefines the Purpose of a Corporation*, *supra* note 3.

in America that we should stop focusing on shareholder wealth maximization as the most important thing for corporate law. We've heard things like that in the past, of course, when the debate about employees was often about manager-employee. Managers would squeeze employees in connection with takeovers, they would seek takeovers to maximize golden parachutes or something like this and employees would get the short end of the stick as you alluded to. Your suggestion now is that we're in a different EESG space. I guess one of my questions is, do we really trust the Business Roundtable—this group of managers—to take care of employee issues, and if not, what's different now?

HON. STRINE: I have never thought that America should just trust the elite to do this. I was very appreciative of the Business Roundtable's statement. I think it was quite useful. I would say that the Chair at the time, Mr. Dimon, runs a company that is basically Delaware's largest private sector employer now. I must say, they pay very good wages to people at all levels of the company. They contribute to charities in the community and we're very lucky to have them in Delaware. So it seems to be a company that on that dimension, in many ways, is walking the talk. But do I think that you leave it to business alone? No, and I certainly wouldn't leave it to the institutional investors, either. I don't actually think it was public company managers who wanted to squeeze labor the most. I think they were told by institutional investors, "You better d-mn well do that or you won't have your job," and their pay was tied to total stock return. The labor costs, an area where the institutional investor community and the stock analyst community puts really strong pressures on companies. What's different now is that it's not sustainable, people are not going to take it anymore. It's causing racial and ethnic divisions because nativists are using the economic insecurity of white working people to divide us along lines about immigration and race. We are failing to close the race gap.

In terms of creating investor pools to sustain pension funds or retirement funds, if people do not get paid fairly, they cannot save for retirement. It is also not true, and I think it is really important to understand this, that the wage stagnation cannot be blamed on the workforce itself. The American worker is more educated than ever, more adaptable than ever. It is total bull that there's been some Darwinian evolution among money managers and CEOs in the last 50 years, where they become immeasurably smarter and deserve more of the pie. Almost every profession has more education requirements than

it used to. It's not just people who are working class who have been hit—skilled professionals have seen their wages stagnate. It's not because there hasn't been more productivity and growth, it's because the share of productive growth that has been taken by the top is huge. They have eaten all the new pie, and we need to go back to where there is fair gain-sharing. I think you can't just say "we got it now, we understand," because the businesspeople who want to do it right—the institutional investors who want to do it right—will then be undercut. You need a level playing field and government must set that.

Anybody who plays sports knows that if the referee doesn't rule the game and enforce the rules, then at the end of the game, you're up to the level of the most sportsmanlike competitors. The most sportsmanlike people are probably kicking people from behind in order to survive. So we need to restore a regulatory framework of fair stakeholder protection within which all companies compete, and in the institutional investor sector, we need to do the same so that they all have to focus. It is the opposite of what Secretary of Labor Scalia is doing. We need to go in the opposite direction and make sure that institutional investors actually have to align their voting and their stewardship with the real interest of human investors, which requires taking into account EESG.⁸

On workers in particular, there is absolutely no question that we cannot go back to a fair economy unless we restore the real promise of minimum wage laws and set a floor under bargaining. If we do not restore worker leverage in the form of revitalizing the ability to really join a union and bargain, we will not get there. We need to also experiment with other forms of worker voice, another reason I believe some reform within corporate law is critical to make sure every large company, public or private, has a board committee focused on the well-being and pay of the workforce as a whole, and not just top management. One of the real problems with just relying on external reform—if you look at the early part of the century, I was more inclined to say, let's leave to external regulation the protection of all other stakeholders, and to say don't pretend that corporate managers can balance all these things because you might weaken the force to get labor law reform or environmental reform done. But I realized that you couldn't get where you needed without rebalancing within corporate law itself. The problem is Lewis Powell and Milton Friedman and the

8. Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock* 62–63 (Columbia L. Ctr. for L. & Econ., Working Paper No. 637, 2020).

consequences of their thinking and its success: They told corporations to focus just on profits for stockholders and to go to war on the regulatory protections for other stakeholders, and that is what happened.⁹

For 50 years, there's been a use of corporate treasury funds and influence to actually pollute the regulatory framework in which corporations operate to systematically go after stakeholder protection, such as union rights and environmental protection. I am now convinced that if you do not deal with the power dynamics within corporate governance itself, in a binding way that you actually cannot get the kind of externality regulation that you want. Ideally, you do want labor law to protect workers, and you want environmental regulation to do it. You want corporate law to stick more to its own knitting, but if we have changed the corporate power dynamics—such that companies are under pressure to really deny climate change, to block environmental regulation, to block living wage legislation, to impede the ability to actually join a union, to undercut consumer laws, we basically destroyed the fuller conception of what antitrust was to do in our economy—then in order to rebalance that we actually have to temper corporate political influence and focus corporate governance on fairness to all stakeholders. There is a role for regulation there in that process as well.

PROF. GRIFFITH: I want to get to your specific corporate governance ideas. Before we leave the big picture of employment question, I just had to follow-up on the remarks that you just made. You touched on “competition is global.” The question is—aren't product markets global markets? Every time I turn on Bloomberg radio in the morning, they are talking about automation, how automation is the next thing, and how if you thought outsourcing was bad, wait until automation happens. Turning to jobs, there is no such thing as a job anymore, including for fancy law professors like myself. One question is, how can anyone deal with that if there is always an incentive for some other competitor in the product market who might not be . . .

HON. STRINE: You are absolutely right, but here it is a question of how we deal with that. People forget that historically, the New Deal in many ways was the nationalization of our regulatory structure,

9. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782–83 (1978); see also Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/632Q-UY7A>].

intended to keep up with an already nationalized economy. We already had commerce flowing across state lines. We had implications for our entire society, and we had no effective national regulatory structures to deal with them.

In terms of international marks, it was Roosevelt's vision and Churchill's that the postwar trading blocs that were established would actually embed the core provisions of the New Deal in which the New Deal in many ways inspired European social democracy.¹⁰ Clement Attlee and other folks borrowed from the New Deal. The post-War trading regimes were supposed to embed protections, not just for mobilized capital, but for workers and the environment. Product market pressures actually have already grown enormously, which is why what we did in the United States to make companies much more focused solely on stockholders made no sense. What I mean by that is, this idea that companies were not as subject to market pressures as they should be, and that we had to make them much more responsive to stockholders, ignored the huge pressure that you mentioned from international competition.

Part of one of my articles I wrote back in the early part of the century is about two "Friedmen"—about Milton Friedman, about Tom Friedman, and about the need to actually take the New Deal,¹¹ to kind of knit it together OECD-wide, so that competition is not on the wrong dimensions and we don't encourage labor arbitrage or tax havens, the inversion wave, but competition in a way that promotes virtuous cycles.

Then in the developing world. We understand that what is a living wage may be different, but the same concept of a living wage, the same concept of safe worker conditions, the same concept of being able to join a union, the same concept of no child labor, that those things would be extended there. It is often implied that it is all globalization that has caused wage stagnation and increased inequality; that it's not really about what is going on in the United States itself.

The problem with that is the evidence is just to the contrary. Lawrence Mishel at EPI has done the real leading work on this and academics need to give him more credit. He has been the one shedding

10. See generally Leo E. Strine, Jr., *Made for This Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 SEATTLE UNIV. L. REV. 267 (2019).

11. Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behavior*, 58 UNIV. TORONTO L.J. 241, 274 (2008).

the most light for the longest time on the change and gain sharing and the American economy.¹² But Larry Summers and Professor [Anna] Stansbury—I don't know if you've seen their piece this summer—but it isolates the U.S. effect, looking at globalization and looking at what matters.¹³ Their conclusion is that there's much greater growth in inequality than in equality. So there's more imbalance in the United States, there is more wealth disparity than in the OECD, and what explains it is those two arrows I talked about. The United States has been the place where stockholder power has gone up the most and where worker voice and leverage has gone down the most. It is that—and not globalization—which is the key; it is that change in the distributional split. It is what happens when companies in the United States are successful, what share goes to which constituency—that really is what is driving U.S. inequality.

I would just make a point that Germany and Scandinavia have been pretty successful in the international product markets.¹⁴ Every rich person I know has all kinds of fancy products from these “horrible socialist economies” in Scandinavia and Germany. These “crappy economies” somehow make these precision goods, and continue to do so in the face of global competition, even though they have co-determination with workers' councils from the ground up, workers on boards at the top, and stakeholder forms of corporate governance. So I don't doubt that we need to globalize our approaches. What I think, however, that we have to globalize is the thing we're proud of, and the thing we're proud of is an approach to a market economy that defeated communism, defeated fascism, and showed that a market economy could work for the benefit of the many. What we have been doing is allowing ourselves to erode the protections and the things that mean the most to our societies by having a global trading regime that only

12. See generally Lawrence Mishel, Lynn Rhinehart & Lane Windham, *Explaining the Erosion of Private-Sector Unions*, ECON. POL'Y INST. (Nov. 18, 2020), <https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion> [https://perma.cc/VXW8-5UUF].

13. See generally Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/system/files/working_papers/w27193/w27193.pdf [https://perma.cc/3WSR-9NKA].

14. See Kathleen Thelen, *Transitions to the Knowledge Economy in Germany, Sweden, and the Netherlands*, 51 COMPAR. POL. J. 295, 295–96 (2019).

really values mobilized capital, and that allows a nation like China, which is playing a mercantilist fascist game at best, to be a full participant and to put downward pressure on the ability of our societies to treat their stakeholders well.

I think we have to be hugely international going forward, but the way we'd actually bring the United States much more into alignment with the OECD would be to move in the direction that I'm talking about, and folks like Professor Fairfax and Professor Webber are, because the United States is actually more of an outlier than it is consistent with the other market economies.

PROF. GRIFFITH: Let me shift our conversation, if you don't mind, to some of your specific corporate governance reform ideas, in particular, to the reform idea around the compensation committee.¹⁵ One of your recent papers suggests that one way to accomplish the kind of goals that you have just outlined would be through reconceiving the role of the compensation committee of the board.¹⁶ Of course, normally compensation committees are tasked with setting Chief Executive Officer and another high-ranking officer pay. Under your conception, they would do much more than that. In terms of figuring out a fair ratio of pay for employees.

HON. STRINE: If you think about it—if you want the average worker to make more, then the best way to do it is to put American compensation committees on to that task. If there's any group of people who knows how to increase the pay of some group of people, it's them. Sean, I am joking, but not entirely. These people have been very good at increasing pay of a small segment of people and of boards of directors. So in terms of this, they know a lot about that. But yes, I do think that they should have a broader role.

PROF. GRIFFITH: Let me ask you about this. In your paper, you suggest that the board compensation committee needs to think not only about executive pay, but also about employee pay.¹⁷ And for companies that do outsourcing, then also the pay of the folks that are the inputs on the supply chain—if there's an outsourced supply chain for a big company. This seems to me to be sort of a microcosm of the other

15. Leo E. Strine, Jr. & Kirby M. Smith, *Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism*, 76 BUS. LAW. 31, 31 (2020–21).

16. *Id.*

17. *Id.*

constituencies' stories that you were just outlining through the compensation committee. In other words, the directors who are on the compensation committee are no longer thinking primarily about shareholders, as you suggested previously, but also about other constituencies, at least in the sense of employees, and then maybe in the context of extended supply chains of the folks who are . . .

HON. STRINE: Yes, although I would argue that they are also thinking better for stockholders because if you have an extra \$5 million in compensation and you throw it at the C-suite, the top executives can feel better when the *New York Times* report about CEO pay comes out as they will rank higher. Or you can take those \$5 million dollars and reward a much broader class of workers in a way that is very meaningful to them. What sort of productivity gains are you going to get out of that for the company itself and therefore for stockholders, and for overall economic growth? Seems likely to be greater. That sort of distribution is also more likely to create strong product and service markets that creates overall growth. I would actually say it is a much more rational way of doing business.

I am saying that it also is a much more rational way to set top executive compensation, because you can better situate where you put your dollars in terms of where they will have the most impact. Sadly, I think many boards do not understand a lot about how they compensate their workers. I think they also don't understand a lot about groups of people who are basically workers of the company, but through contractors. For example, my wife is an occupational therapist at a hospital. There's been a group of people incredibly important to keeping Americans safe and protecting lives during the pandemic: the people who clean hospitals. Think about the people who have gone to work every day during the pandemic. The people who clean the offices and the buildings. Many of them do not work for the company that they clean. They're there in that facility every day. What do they get paid? What does it mean for a company to have a commitment to living wages if they have thousands of people who are essentially fundamental parts of their supply chain on a regular basis who don't get it? So, I think if we actually want to create the right framework, the board itself has to be involved.

I also think there are important issues like racial and gender pay equity that get no board level attention. When you have a group of the board that's focused on compensation, why aren't they taking a broader human resources lens on this? Why aren't they looking at things like

#MeToo? In 2019, MeToo was important. Just because 2020 has been so sad and weird doesn't mean MeToo is not important. It's really important that you have a harassment free workplace on all kinds of dimensions. Instead of finding out that there's a problem when there's a crisis, instead of having situations where people who do the important work of human resources, anti-discrimination in companies never having a board committee that they have any regular access to, and instead of companies talking about racial equity and inclusion and talking about doing something about workers—how about having a structure that actually supports and does something meaningful about that?

Frankly, we have too many companies right now where the compensation committee does all the compensation for the C-suite, does all the compensation for the board, and then all the human resources compliance issues go to the audit committee which has huge other tasks to do, and is not necessarily skilled in any of these areas. There's no ability for the human resources people to get an adequate amount of time because of the hard work that the audit committee has to do in its core area.

This is a broader thing that we're going to talk about—we're not using the board in a very business-like way to address how companies affect society, where legal bite comes in because the company rubs up against society and its stakeholders in certain ways, and to align the corporate board and management reporting structures in a sensible way and then come up with public metrics and other ways of measuring progress that allow the board to set goals and also to communicate to the public what companies are trying to do, for them to be held accountable, and to get credit. It's striking to me how little I think many boards actually understand about their overall pay plan. I don't want them to get in the weeds. I don't want them to set individuals' pay.

But I do think it's their responsibility to have a perspective on important things like, "Are we committed to a living wage?" Look at quartiles of who gets paid and then what categories of employees they cover and if that is fair? How do we treat our contractors? And I will also say this: the "U" word and boards—why is it that that's not being discussed there? What is our attitude towards unionization? Do we have a board philosophy about that? Do we crush our American workers if they try to unionize, while we accept unions in Scandinavia and Germany because we know we have to? Those kinds of conversations could be very helpful to go along with external constraints. To go back a little bit, I think sectoral bargaining, for example, which Vice

President Biden is recommending—that is also a tool that is used in many market economies to reduce arbitrage against workers and encourage competition on productivity and quality grounds. That is something that could help businesses trying to do it right. So, I think this is something that companies could do on their own, that would be very business-like, and put them in a good position to address some of the demands that people like Lisa Fairfax talked about for companies to disclose in this area. It would enable companies to not just discuss something like a MeToo problem for the first time when it's on the front page of the newspaper, but to actually be involved in making sure the companies have really good policies that they actually walk the talk in these areas. So that's my idea.

I actually drew on the new movement in the UK that requires something similar in terms of board level focus on these issues.¹⁸ It also could be a way, if we get some experience and trust with this, where American companies could experiment in a way that the labor movement would support with forms of worker voice at companies that are non-union companies. Almost like experimenting with works councils. Because if you had a part of the board that was actually charged with doing this fairly, it might be that the union movement would trust that a little bit.

PROF. GRIFFITH: Well, it is interesting. It is very interesting. In your remarks, you mentioned that paying workers better might actually increase the productivity and the value of the product as well. That reminded me of the old *Dodge v. Ford* case where Henry Ford is on trial for being a traitor to his class for paying his workers \$5 a week instead of \$2.50, and the obvious reason that he is doing that is to get a sober regular workforce, so that he can run his assembly line.¹⁹ And so, it seems like the way to increase productivity and profit potentially . . .

HON. STRINE: Well, right, and that's why companies like Google serve—if you have ever been lucky enough to go the Google cafeteria for lunch or dinner, Taco Tuesday is pretty spectacular there, Thai

18. *Id.* at 42–43.

19. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683 (1919) (“My ambition, said Mr. Ford, is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business.”) (internal quotations omitted); *see also* Lee Schafer, *Ford Case Defined Role of Business*, STAR TRIBUNE (Aug. 23, 2018), <https://www.startribune.com/schafer-ford-case-defined-role-of-business/491505831> [<https://perma.cc/Y7MC-CEAQ>].

Thursday, the Coq Au Vin—I mean, they have got really great health and food facilities. They’re doing that, in part, because it inspires people. Henry Ford had maybe less savory motives, as we both know. I mean, well, he made those jobs horrible. People who were used to complex jobs on farms. I mean, being a farmer was hard work, but it was really interesting. Very diverse things farmers do, as you know, and then you are on an assembly line. So, if you don’t pay those people well, they quit. Ford’s problem in that case against the Dodge brothers is that he confessed and claimed he only raised wages to help workers and society.²⁰ He didn’t really fess up that it was all also great for stockholders to do that because he was branding and enhancing his and his company’s reputation. I mean, he also wanted to sell products and a lot more of them, and higher wages in society created more consumers for his cars.

This is another thing, consumers like to feel good about companies they buy products and services from. My other basic point is—just a distributional point—that if you have a certain pool of money that you are going to give out in compensation, how you allocate it could have a different effect on productivity as well. Giving extra millions to somebody who is not going to spend it, who already has more than plenty; as opposed to giving it to people for whom it really matters, and where they feel valued, and where you can help 50 to 100 to 1000 people. I often tell directors to remember that another million dollars for the C-Suite is a thousand \$1,000 bonus checks that just appear at the beginning of June and everybody says, “We know this maybe can’t fund your entire vacation, but we hope it helps you or your family in some meaningful way.”

How much pep does that put in the step of 1000 people? What if you take it to \$5 million? We haven’t really thought about that, and I do not think that it will be so negative for the stockholders we really care about—who are the diversified investors, who are “long” investors and depend on our whole economy’s growth, not that of any particular company. I actually think—you mentioned a bit about CEOs and things like that—I think a lot of CEOs would rather feel good that they are treating the people that come to work with them every day well, and there is a lot of investor pressure on them now not to do that.

I also think while we are talking about EESG, I feel—and I have felt strongly for a long time—that boards just are not allocating their responsibilities in a businesslike way, they are still sticking everything

20. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671 (Mich. 1919).

they do into the audit committee. In a couple recent cases in Chancery, companies really get caught out.²¹ One got the case dismissed, but the CEO got fired over the scandal.²² The other one, the case is going to full discovery.²³

People like Dr. Fauci can't even serve on the compliance committee of many food and pharma companies. Do you know why? Because he probably would say, I'm not really an accounting expert and if I have to serve on the audit compliance committee, that is not real comfortable for me. But we don't care if we have a former high-level KPMG accountant or a CFO dealing with environmental risk or product safety risk or pharmaceutical risk or human resource risk that is really alien to them and in which they have no expertise. We don't care that we're having a line to the audit committee and key professionals in the environmental product, safety, and human resources spaces who have no regular time with the board. It's just long overdue to fix this, and it's really sensible for companies to identify what the risks are.

How you affect society is going to line up with where you have legal risks because of how legal risk comes in—the law regulates companies where they affect society. That is where you have stakeholder concerns. The “E,” called environmental, should not be in two different places in your company. You shouldn't rotely stick the

21. Nicholas D. Mozal & David A. Seal, *Three Is Not a Trend: Another Caremark Claim Survives a Motion to Dismiss, But Does Not Reflect Change in the Law*, HARV. L. SCH. F. CORP. GOVERNANCE (May 27, 2020), <https://corpgov.law.harvard.edu/2020/05/27/three-is-not-a-trend-another-caremark-claim-survives-a-motion-to-dismiss-but-does-not-reflect-a-change-in-the-law> [<https://perma.cc/32S8-TDEM>]; Kevin LaCroix, *Another Delaware Breach of the Duty of Oversight Case Survives Dismissal Motion*, D&O DIARY (May 5, 2020), <https://www.dandodiary.com/2020/05/articles/director-and-officer-liability/another-delaware-breach-of-the-duty-of-oversight-case-survives-dismissal-motion> [<https://perma.cc/DB5H-MU69>].

22. See Alexia Elejalde-Ruiz, *Judge Refuses to Toss McDonald's Lawsuit Seeking to Clawback More Than \$37 Million From Fired CEO Steve Easterbrook*, CHI. TRIBUNE (Feb. 2, 2021), <https://www.chicagotribune.com/business/ct-biz-mcdonalds-easterbrook-motion-to-dismiss-denied-20210203-ckkjkc4tvdw7a3baqwyhydsx-story.html> [<https://perma.cc/EUL3-KJ6P>].

23. *Petty v. Gilead Scis., Inc.*, No. CV 2020-0132-KSJM, 2020 WL 6870461 (Del. Ch. Nov. 24, 2020), *judgment entered*, (Del. Ch. 2020); see also William Savitt, Sarah K. Eddy & Cynthia Fernandez Lumermann, *Section 220 as Pre-Complaint Discovery—Recent Developments*, HARV. L. SCH. F. CORP. GOVERNANCE (Dec. 15, 2020), <https://corpgov.law.harvard.edu/2020/12/15/section-220-as-pre-complaint-discovery-recent-developments> [<https://perma.cc/T78P-9DY8>].

“E” for EESG purposes in nominating corporate governance. And “E” for environmental legal compliance in audit, if environmental risk is central to your product line. You probably have an industry-specific risk committee that handles all elements of that “E,” integrating related compliance, EESG, and risk management efforts efficiently. Then you concentrate financial risk in the audit committee. With a more rational committee structure, you will be able to use diversity in all its meanings there, because you will actually get to situate talent on the board that you really need to run your business. You will be able to put diverse expertise on the board and you will have reporting relationships that make sense. Then you should align your reporting standards and have the correct committees use them to monitor progress.

One of the real challenges for the prior panel, in terms of what they were talking about the whole day, is that companies don’t know how to efficiently address these demands. Part of what I’m saying is, think like businesspeople. Align what you are doing with what you seek to accomplish, and make sure you have an allocation of talent and time management that really tracks your key business risks, which are going to track identically with how you affect society.

PROF. GRIFFITH: Chief Justice, the organizers are tickling me in the chat box to wrap it up, but I do want to ask you one more question. You alluded at the very beginning to the B Lab—I don’t know if you mentioned their white paper, but you alluded to B Lab and our common friend Rick Alexander—and they recently put out a white paper²⁴ that suggests that a number of the types of reforms that you have been talking about ought to be written into federal law. In fact, they write out a fairly elaborate statutory rewrite for different places where ESG or perhaps EESG could be a recognized in federal law using the international interstate commerce clause as a way to get into federal law.²⁵ So my last question for you, and it can be as brief or as long as you would like, should these things be mandatory or written into federal law by the new administration?

HON. STRINE: I think some of them should be. I actually have a comprehensive bill version of my paper on fair and sustainable capitalism that talks about requirements for double ESG disclosure giving the SEC an updated mandate that would allow them and require

24. Frederick H. Alexander, *Putting Benefit Corporation Statutes Into Context by Putting Context Into the Statutes*, S’HOLDER COMMONS (July 2020), <https://ssrn.com/abstract=3648137> [<https://perma.cc/84HV-E99B>].

25. *Id.*

them to consult with agencies like the EPA and the Department of Labor to develop metrics,²⁶ because I think the SEC rightly feels like it should get more of a view from subject matters expertise on those subjects. I also propose extending the SEC's mandate to require EESG disclosure from large private companies. They shouldn't have to disclose everything about their independent directors or the things that are just relevant to investors, but they should have to disclose EESG performance on a level playing field basis.

We have private large companies that pose real risks to workers, to the environment, and to others, and they should not get a free pass on no public disclosure. We have already reduced the number of public companies and thus our window in the economy. We can't continue in that direction sustainably and so I think that granting the SEC authority to require large private companies to disclose EESG metrics is clearly an area needing Federal action. I also think there needs to be a lot of action on the institutional investor front to have corresponding disclosure requirements for institutional investors around EESG that would match up with the requirement for operating companies. Then make sure that we bring 13-D disclosure into the 21st century by covering derivatives, requiring disclosure or cease trading at 5%, and 10b-5 liability for trading by fellow wolves before the lead wolf goes public.

On the benefit corporation model, Delaware has been a leader and I pushed Delaware. My friend Rick was originally an opponent, so he has been a bit of a Saul on the road to Damascus.²⁷ Rick is a wonderful person, one of the best corporate lawyers in the nation, and I am proud to call him a friend; same with Andrew Kassoy and Jay Gilbert. I am not averse to a mandate to benefit corporate governance at the federal level, as long as it is done through State law. I think it is totally unworkable as a federal level corporate form. I do not think Federal courts are ready to do fiduciary enforcement. I don't think it's their wheelhouse. I don't think there is a need for that cost. I think that there is a range of interest in Congress and benefit corporations for people like Senator Warren,

26. LEO E. STRINE, JR., TOWARD FAIR AND SUSTAINABLE CAPITALISM, ROOSEVELT INST. 8–9 (Aug. 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf [<https://perma.cc/YB2H-T3PT>].

27. *Acts* 9:3–6 (King James).

who would go the whole hog and would require it, to people more in the center, like Senator Warner from Virginia—who I have a lot of respect for, like I have respect for Senator Warren—but he has been more concerned about the “carrot” than a mandate; he would create some incentives for these things. So a lot of my friends in the B Lab and I have been largely in sync on this.

I think what we’re also saying is: if you imagine George Martin producing the Beatles—if he’s moving a bunch of knobs, but not any one knob in a radical direction, but he’s moving a lot of knobs in a way that’s harmonious and produces the outcome you want—that’s what you got to look for in corporate governance reform. Part of what I think the B Lab people and I are focused on is, what can we do to make all public and large private companies align their interests more with sustainable wealth creation for their stockholders and fair treatment of stakeholders.

And in the institutional investor space, how do we make sure their interests are similarly aligned, and then what kind of things can we do to protect our political process in the same way? For example, I support requiring stockholder approval of political spending because I think that will make it go away as no stockholders will vote for it. I think, by the way, most businesses don’t want to give, but they’re coerced into giving and they would like to be able to be say no. The investment policies, for example, I heard David telling. I have been a huge proponent, and worked for years with Aspen, and other people worked on these ideas. We didn’t call it the Green New Deal but we were talking about investments to tackle climate change, to create jobs, to invest in basic research and things that are a win-win for the productive economy and American workers.

I do think that next year, it could be a really critical year, and I would love to see a 21st century New Deal, even more, I’d like to see a global 21st century New Deal where on things like climate change, on deterring speculation and encouraging long term investment, we actually work with our OECD colleagues together to build worker protections and environmental protections into the world trading bloc to deal with exactly the international pressures you were talking about. So count me a big yes for the need for appropriate government regulation.

What I would say to my friends in the business and institutional investor community, is that you recognize that this sort of rebalancing is not at all radical, that it’s actually a restoration of the consensus that made our economies and made us proud because we defeated fascism and communism, and we spread the blessings and prosperity more widely. If we restore that, we can close the racial equality gap. We can

create more economic security, and we can tackle climate change. Business communities are going to be more respected, the institutional investment community will prosper and have more clients, and we'll have a better future. If there's resistance to change on sensible lines, what I fear is increased divisiveness, nativism, and ultimately the pressure for more extreme solutions that may not look like something like the win-win approach of the New Deal that harnessed market forces and government regulation in a way that was productive for everyone.

Absent support from business elites for a constructive agenda of that kind, I think we could end up with overreach and Balkanization among our economic allies that we will greatly regret. So it is vital how business reacts next year and whether they align their political actions with the positive attitude they have expressed in the BRT statement, the institutional investor community's recent reaction to the need to address inequality along racial and economic lines. If they walk that talk next year, then I think we're going to be in a very good place as a nation.

If they don't, then I fear that things will go to a very negative place. I am modestly hopeful and it is a real time for positive action to create a fairer economy.

Sorry for keeping everybody away from their martini and beer on Friday night.

PROF. GRIFFITH: Thanks very much. I am going to turn it over to John Torabi to wrap us up.