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## Corporate Environmental Social Responsibility: Corporate “Greenwashing” or a Corporate Culture Game Changer?

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## ARTICLES

### **CORPORATE ENVIRONMENTAL SOCIAL RESPONSIBILITY: CORPORATE “GREENWASHING” OR A CORPORATE CULTURE GAME CHANGER?**

*Hope M. Babcock\**

You know a cultural movement is real when the money men get on board. In just the past year a broad swath of financiers – venture capitalists, hedge funds, investment banks, public pension funds, and even stodgy insurers – have begun sinking billions of dollars into producers of ethanol, fuel cell superbatteries, microscopic bugs that turn glucose into plastic, environmentally friendly pesticides, anything that might tap into the green craze. Saving the planet, protecting America, doing God’s work, cynically exploiting a feel-good trend – call it what you will. Wall Street sees money to be made.<sup>1</sup>

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\* Professor of Law, Georgetown University Law Center. The ideas reflected in this paper were first presented at the Fordham Env’t. Law Review, Symposium, *Environmental Lawsuits & Corporate & Social Responsibility: The Role of Litigation in Promoting Good Environmental Practice*, held on March 5, 2010. Although I have written several articles on individual responsible environmental behavior, *see n. 5*, until now I have never tackled the topic of corporate environmental responsibility. I wish to single out for especial thanks my colleague Gregory Klass, without whose assistance the idea of using warranties as an enforcement mechanism, developed in Part VII, would never have crossed my mind. Any errors I have made in giving content to his suggestion are entirely my own.

1. Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL’Y REV. 291, 314-15 (2007) (quoting Emily Thornton & Adam Aston, *Wall Street’s New Love Affair: Why Some of the World’s Smartest Investors are Betting Billions on Clean Energy*, BUS. WK., Aug. 14, 2006, at 48).

Corporate social responsibility is a “fundamentally subversive doctrine.”<sup>2</sup>

## INTRODUCTION

This article focuses on the extent to which unenforceable voluntary initiatives undertaken by corporations can change corporate behavior to make businesses more environmentally responsible, i.e. not only comply with the law, but to do more than the law actually requires of them.<sup>3</sup> These initiatives, loosely gathered under the umbrella of a movement called corporate social responsibility (CSR), are often proposed by the government as a way to fill regulatory and enforcement gaps or by industry, often as an alternative to regulatory requirements. In each case, their goal is to improve the compliance record of businesses and, in some cases, to achieve a higher level of environmental performance. Based on a closer look at some of these initiatives and their design flaws, this article concludes that these voluntary programs, even when properly designed, should only function as supplements, not replacements, to existing regulatory programs and will only be effective if judicially enforceable by third parties.<sup>4</sup>

To develop this idea, the first part of the article very briefly discusses the regulatory problems, including the ineffectiveness of federal enforcement, that have, to some extent, spurred a turn towards corporate self-regulation and the emergence of the concept of CSR. The second part of the article looks more closely at corporate culture and asks what about it makes businesses seemingly indifferent to

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2. Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1251-52 (2002) (quoting Milton Friedman, *A Friedman Doctrine the Social Responsibility of Business Is to Increase Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine), at 32).

3. The scope of the paper is confined to suits brought against business firms for violations of federal laws and does not examine suits brought under state common law, such as nuisance suits.

4. See Robin Bravender, *Voluntary Programs Under Scrutiny as Regulatory Obligations Rise*, GREENWIRE, Feb. 5, 2010, at 1, available at <http://www.eenews.net/Greenwire/print/2010/02/05/1> (quoting Assistant Administrator Gina McCarthy as saying “[t]here are many areas where the past administrations have been less willing to move forward with regulatory requirements, and we are willing and they are the better strategy”).

being seen as "good environmental citizens." One thing that emerges from this discussion is that shame and compliance sanctions levied against the corporations are imperfect motivators when it comes to overcoming the institutional pressure on firms to make a profit for their shareholders.<sup>5</sup>

The third part of the article discusses the CSR movement more broadly, its origins and the likelihood that it is not disappearing any time soon; while the fourth part discusses some of the potential benefits of CSR programs to corporations and society as a whole, including their latent capacity to change corporate attitudes towards the environment. The fifth part of the article turns to three examples of voluntary CSR programs: information disclosure programs; voluntary performance standards; and environmental management systems (EMSs). Studies show that these programs have been largely ineffective, creating the perception that firms undertake them principally for public relations purposes and not to achieve any real change in corporate behavior let alone social benefit. This part examines three principle problems with these programs; specifically, the absence of any internal or external monitoring of their effectiveness, their lack of public transparency, and the absence of sanctions or other consequences for businesses or their employees who promise to undertake a CSR initiative and then fail to do so or only support the initiative in a half-hearted way. However, given the problems with regulatory programs set out in Part I, properly designed and enforceable CSR programs that function as supplements to existing regulatory programs may be the best way to change

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5. This part of the article draws on work I have done previously on corporate behavior as background for articles on individual environmental responsibility. See, Hope M. Babcock, *Responsible Environmental Behavior, Energy Conservation, and Compact Fluorescent Bulbs: You Can Lead a Horse to Water, But Can You Make It Drink?*, 37 HOFSTRA L. REV. 943 (2009) [hereinafter Babcock, *Responsible Environmental Behavior*]; Hope M. Babcock, *Civic Republicanism Provides Theoretical Support for Making Individuals More Environmentally Responsible*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 515 (2009); Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117 (2009) [hereinafter Babcock, *Assuming Personal Responsibility*]; Hope M. Babcock, *Global Climate Change: A Civic Republican Moment for Achieving Broader Changes in Environmental Behavior*, 26 PACE ENVTL. L. REV. 1 (2009).

corporate culture because they work within, not outside, the corporation.<sup>6</sup>

The sixth part of the article reviews possible design changes that might be made in these initiatives to overcome the flaws identified in Part V; however, as this part shows, it is unlikely that businesses, without being ordered, will change their CSR programs because of the attendant costs. Accordingly, the final part of the article discusses the importance of litigation as a means to improve the design of CSR programs and compel their implementation. Two types of lawsuits are discussed: one, the typical citizen enforcement suit, which presumes the inclusion of the company's CSR initiative into its regulatory permit when undertaken to gain the benefits of some EPA CSR program; the other, a suit brought in state court employing contract principles. Neither approach is without problems. Yet, both offer the opportunity for real reform. Indeed the mere threat of such lawsuits can induce companies to change their behavior to avoid the costs of defending against them and the unwanted publicity; once filed, there is a possibility of settlement, where structural changes can be made to the business' operation to include a more robust CSR program.

## I. HOLES IN THE REGULATORY NET

There is little question that industry continues to be a major contributor to the nation's pollutant loadings and environmental degradation,<sup>7</sup> even though recently contributions by individuals have

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6. Peter Dobkin Hall, *Business Giving and Social Investment in the United States, 1790-1995*, 41 N.Y.L. SCH. L. REV. 789, 817 (1996-1997) ("examinations of the fundamental character of capitalism – not merely as an economic system, but as a culture – offer[] a wealth of understandings about the interrelationships of economic, social, political, and governmental institutions").

7. See, e.g., ClimateWire, *Study Says Businesses Cause \$2.2 Trillion in Environmental Damage*, CLIMATEWIRE, Feb. 19, 2010, available at <http://www.eenews.net/climatewire/print/2010/02/19/7> (a recent study by a London-based consulting firm, Trucost, which based on an examination of 3,000 of the world's largest companies, estimated these companies would lose about a third of their profits, or \$2.2 trillion, "if they were held accountable for environmental damage" caused by their activities).

come under closer scrutiny.<sup>8</sup> Some of these contributions come from unregulated sources of pollution, like runoff from farms and urban areas, and others are attributable to excess consumerism, which induces industry to consume huge quantities of raw materials, energy, and water and to produce substantial waste to meet consumer demand.<sup>9</sup> Other harms result from regulatory restrictions that are too lenient<sup>10</sup> or from violations of those limits.<sup>11</sup> Distinct from less developed countries, like Mexico where "a long history of inexpensive energy, unfettered access to resources that contributed to their squandering, and the irresponsible handling of residual products and other waste matter," has left "a great deal of room for relatively 'easy' improvements to environmental outcomes,"<sup>12</sup> the pollution problems that remain in this country are expensive and difficult to control let alone eliminate.<sup>13</sup> Thus, while the country's air and rivers are cleaner, the remaining pollution continues to be a national health concern.<sup>14</sup>

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8. See, e.g., Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 119-24 (discussing the contribution of individuals to pollutant loadings and loss of natural resources).

9. *Id.* at 122-23 ("excessive consumerism").

10. Cf. Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 *LAW & SOC. INQUIRY* 307, 318 (2004) ("some social actors, typically environmental nongovernmental organizations, believe legal requirements to be inadequate to protect health and the environment, and therefore demand behavior that extends beyond legal requirements").

11. David W. Case, *Changing Corporate Behavior Through Environmental Management Systems*, 31 *WM. & MARY ENVTL. L. & POL'Y REV.* 75, 80 (2007) ("Corporate noncompliance with regulatory requirements is described as 'pervasive.' . . . More importantly, a growing body of empirical evidence demonstrates consistent and disturbing patterns of 'significant' noncompliance by firms with environmental statutes and regulations.").

12. David Barkin, *The Social and Environmental Impacts of the Corporate Responsibility Movement in Mexico Since NAFTA*, 30 *N.C.J. Int'l. L. & Com. Reg.* 895, 906 (2005).

13. Babcock, *Responsible Environmental Behavior*, *supra* note 5, at 953 (discussing how the cost of replacing traditional light bulbs with compact fluorescent light bulbs has inhibited individuals from making the change even though there would be a significant environmental benefit if they did).

14. Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 121-22 (describing the health effects of individual sources of pollution, many of which are also released by industrial and manufacturing facilities); see also ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 6,

The environmental problems created by unregulated or inadequately regulated sources of pollution are exacerbated by the Environmental Protection Agency's ineffective enforcement.<sup>15</sup> Indeed, some facility managers attribute their compliance more to the threat of a lawsuit by environmentalists than out of fear of federal enforcement.<sup>16</sup> A commonly given reason why EPA's enforcement program is broken is lack of resources;<sup>17</sup> another is the sheer quantity of regulated activities the agency must monitor, which overwhelms its enforcement capacity.<sup>18</sup> Changes in enforcement priorities to

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Fig.1.2 (6th ed. 2009) (displaying United States Environmental Protection Agency Unfinished Business Report's list of remaining environmental problems).

15. One indication of the ineffectiveness of federal enforcement is calls to give the government additional enforcement tools. *See, e.g.,* Noel Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENVTL. L.J. 283 (2002) (suggesting extension of the responsible corporate officer doctrine to civil enforcement matters to improve deterrence, and, if necessary, amending certain environmental statutes to achieve that result).

16. Gunningham et al., *supra* note 10, at 314 (quoting an environmental manager at an American pulp and paper mill, and saying, "[t]he EPA is such a monolith, it can't adapt. It takes a decade to get something to happen. The environmental community is really setting the tone. It's done far more to make companies accountable for pollution. It does more to keep me on my toes, to give me an incentive to go to my management and say, we have got to do better because the community can sue us and also give us the biggest rewards"). However, the U.S. Supreme Court has erected many barriers that environmentalist plaintiffs must surmount before they can persuade a court to hear the merits of their claims. *See* Hope M. Babcock, *The Problem with Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence*, 25 J. L. & ENVTL. LIT. 1, 8-11 (2010).

17. Case, *supra* note 11, at 81 ("Resource limitations may be the most significant problem hindering effective enforcement efforts. Congress has historically provided inadequate and unrealistic budgets to meet the overwhelming statutory mandates for environmental regulators."). One possible indication of this is the recent announcement by EPA that it is planning "to set fewer national enforcement priorities than in past years" so that it can concentrate its resources on individual industries of specific concern. Andrew Childers, *Fewer Enforcement Priorities Envisioned by EPA for 2011, 2012, 2013, Official Says*, Env't Rep., 41 ER 282 (Feb. 5, 2010).

18. Case, *supra* note 11, at 83 ("Despite the many enforcement success stories reported by the government, the number of violations overwhelm the enforcement capacity of both the federal and state governments." (quoting David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three*

reflect the agendas of different Administrations and agency capture,<sup>19</sup> as well as the increasing influence of politics on enforcement budgets<sup>20</sup> also contribute to the ineffectiveness of EPA's monitoring of permitted activities and enforcement. Even when the agency enforces against a corporation, that action can create an unintended backlash,<sup>21</sup> lessening the agency's desire to be tough.<sup>22</sup>

Less often examined is how the nature, structure, and priorities of corporations have made it difficult for government agencies to control their actions, making enforcement a slender reed on which to depend to improve the ambient environment. The sheer size and often multinational character of modern corporations, and the range

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*Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens*, 54 MD L. REV. 1552, 1558-60 (1995)).

19. Irma S. Russell, *A Common Tragedy: The Breach of Promises to Benefit the Public Commons and the Enforceability Problem*, 11 TEX. WESLEYAN L. REV. 557, 569 (2005). Russell also notes the asymmetries of Garrett Hardin's *Tragedy of the Commons* in that the burden of enforcing a public right falls unevenly on the individual who brings the enforcement action and the public – the individual enforcer bears 100 percent of the cost and only a fraction of the public benefit. *Id.* at 566.

20. Case, *supra* note 11, at 82 ("The politicization of enforcement budgets also has a negative impact on compliance monitoring and enforcement. Even when not a result of partisan politics, historically insufficient budget allocations for enforcement on both federal and state levels often decrease further in the face of lean economic times.").

21. See Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 84-85 (2003) ("enforcement actions against well-intentioned business managers can affect compliance by contributing to a 'culture of resistance' in the regulated community . . . that rather than increasing compliance, aggressive enforcement often contributes to a perception of regulatory unreasonableness, which reduces the managers' commitment to law compliance and undermines general norms of social responsibility"); see also Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC'Y REV. 591, 612-13 (2006) (discussing the efforts of big business to derail the agency's enforcement efforts by "backroom political lobbying", which "can result in legislative and administrative reform, media attention, and public critique . . . [as well as failure to reappoint people or promote particular staff member]).

22. See Tom Tyler & John Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 712 (2002) ("Some research supports the suggestion that variations in the perceived certainty and severity of punishment do shape people's compliance with the law.").



of activities in which they engage make it difficult to apply a single jurisdiction's laws to them and of having any certainty of producing an overarching effect on that company's business activities or behavior.<sup>23</sup> For many large firms, penalties are merely a cost of doing business, particularly if the penalty does not recapture for the public the benefits that inured to the company from violating the law.<sup>24</sup> Victor Flatt and others make the point that traditional penalties actually work only to the extent they affect individual corporate officers and plant managers.<sup>25</sup> But, it is extremely difficult to make

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23. See Victor B. Flatt, *Act Locally, Affect Globally: How Changing Social Norms to Influence the Private Sector Shows a Path to Using Local Government to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455, 461 (2008) ("It has long been assumed that such behemoths [i.e., multinational companies] do not necessarily submit to the legal and policy choices of any one jurisdiction. Thus, in a globalized economy, which has global environmental and other concerns, we would have to find some way to get the private sector to engage in environmental protection without the force of traditional nation-state law.").

24. *Id.* at 465 ("Economists can apply a cost-benefit analysis to this situation to determine whether it makes sense to break the law. As such, enforcement penalties that do not capture the benefit of the violation to the violator may be considered ineffective and problematic."); see also Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, at 745 (1998) ("Fines are expressively ambiguous punishments because they make it look like an offender can buy his way out of punishment, and most of us don't think criminal acts should be subject to market logic."); Dan M. Kahan, *Shaming White Collar Offenders*, 12 FED. SENT. R. 51, 1999WL 1458623, \*8 (Vera Inst. Just.) ("The public values punishments not just as cost-effective means of regulation, but as authoritative statements of shared values. Imprisonment unambiguously and potently expresses the community's moral condemnation; fines and community service on the other hand, often do not."); Daniel M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 380-81 (1999) ("The problem with fines is less the perception that they are ineffective deterrents than the perception that they are ineffective symbols of disapprobation. The public expects criminal punishments not just to protect them from harm but also to express moral disapproval of the offender's conduct. Imprisonment does this unambiguously because of the sacred place of liberty in our culture. Fines do not, because they are open to the interpretation that society is attaching a price tag to, rather than prohibiting, the punished behavior – we cannot condemn someone morally for buying what we are willing to sell, even if we are charging a high price for it."); *id.* at 381 n.39 ("If the offense was committed in the course of commercial activities, then a fine is likely to be derided as merely the 'cost of doing business.'").

25. Flatt, *supra* note 23, at 466 ("Traditional penalties . . . only work because of their effects on individual behavior. It is a person who goes to prison, not a

an enforcement case against an individual for violating environmental laws, even without a requirement for mens rea, which is why it is easier to proceed against the company under strict liability laws like the Clean Water Act.<sup>26</sup>

The ineffectiveness of government enforcement and the under-inclusiveness and leniency of current regulatory programs has left the federal government "dependent on voluntary compliance behavior by corporate environmental actors" to achieve regulatory goals,<sup>27</sup> and for such reason some academics have endorsed the need for alternative and innovative approaches to changing corporate behavior.<sup>28</sup> Moreover, EPA's enforcement against a business may not do much to change that business' attitude toward its environmental behavior, if it considers its behavior to be economically or morally justified.<sup>29</sup> The next part of the article describes the nature of corporations and corporate culture against

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corporation. Moreover, it is people who are hurt by the loss of money and income, not a disembodied legal entity. Though we think of civil and punitive penalties as deterrent-based or hard enforcement, they depend no less on human reaction to incentives than do social norms." *But see* Drew Feeley, *Personality, Environment, and the Causes of White Collar Crime*, 30 LAW & PSYCHOL. REV. 201, 206 (2006) ("Although white-collar crimes, like traditional crimes, leave a string of victims and devastation, studies reveal that the public, and even corporate criminals, overlook or underestimate the wrong in the crimes committed. Until recently, lax governmental regulation and weak penalties allowed corporate crime to grow and sent a message that the government did not consider these crimes important problems."). *See generally* Wise, *supra* note 15, 291 (arguing for application of the corporate responsibility doctrine to civil infractions of environmental laws).

26. Wise, *supra* note 15, at 320 (saying that the Clean Air Act's civil provisions hold violators strictly liable and explaining that the House committee's decision not to include a mens rea component because that would lessen the deterrent effect of the law's enforcement provisions made the law a public welfare statute enforceable under the responsible corporate officer doctrine).

27. Case, *supra* note 11, at 83.

28. *Id.* ("Innovative, alternative approaches for inducing change in corporate environmental behavior are also necessary because the existing regulatory system 'remains vastly under-inclusive, both in the types of harm it regulates and in the sources of harm it regulates,' and citing as examples "global climate change, non-point source water pollution, risks related to manufacture and use of toxic chemicals, and wasteful consumption natural resources and energy supplies.").

29. Parker, *supra* note 21, at 592 ("Simple deterrence will often fail to produce compliance commitment because it does not directly address business perceptions of the morality of regulated behavior – it merely puts a price on noncompliance.").

which the effectiveness of these approaches towards reforming corporate culture can be evaluated.

## II. THE NATURE OF CORPORATIONS AND CORPORATE CULTURE THAT MAKE THEM INDIFFERENT TO BEING A GOOD ENVIRONMENTAL CITIZEN

### A. *The Nature of Corporations and Corporate Culture*

Corporations are very powerful. Indeed: [n]o institution other than the state so dominates our public discourse and our private lives . . . [they] make almost everything we consume. Their advertising and products fill almost every waking moment of our lives. They give us jobs, and sometimes a sense of identity. They define communities, and enhance both our popular and serious culture. They present the investment opportunities that send our children to college, and provide for our old age. They fund our research.<sup>30</sup>

The sheer size and power of the larger, multinational firms has made it difficult for governmental agencies to control their actions.<sup>31</sup>

And their public image is not good—today, a not uncommon view of corporations is that they “pollute our environment. They impoverish our spirits with the never-ending messages of the virtues of consumerism. They provide a living, but often not a meaning. And sometimes they destroy us; our retirement expectations are underfunded, our investments hopes are dashed, our communities are left impoverished.”<sup>32</sup> This part of the article looks more closely at corporations and tries to identify those features of corporate structure and culture that tilt them in the direction of being poor environmental citizens. These characteristics lead some to think that the only way to

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30. Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 640 (2000-01) (quoting Laurence E. Mitchell, *Preface to PROGRESSIVE CORPORATE LAW*, at xiii (Laurence E. Mitchell ed. 1995)).

31. Testy says that corporations “rival the state, and certainly the church in institutional power and influence.” Testy, *supra* note 2, at 1228.

32. Branson, *supra* note 30, at 640-41 (quoting Laurence E. Mitchell, *Preface to PROGRESSIVE CORPORATE LAW*, at xiii (Laurence E. Mitchell ed. 1995)).

improve a business' environmental performance record is to change its basic organizational structure and culture.<sup>33</sup> The question is whether corporations can be trusted to do this or is outside persuasion necessary?<sup>34</sup>

The dominant purpose of corporations is to maximize shareholder wealth.<sup>35</sup> Although "the shareholder primacy norm is embodied neither in past or present legal standards nor in corporate practice," it continues to hold sway.<sup>36</sup> "The corporation is structured to produce goods and services efficiently and to maximize the return on investment to the shareholders"; the "corporate form" does not allow it to "internalize social responsibilities," that should be left to the political system.<sup>37</sup> The shareholder model makes it unlikely that a corporate culture, which devalues expenditures that are not focused on increasing shareholder wealth, will change any time soon.<sup>38</sup> Shareholders "are largely passive investors," and the fact that "share ownership is widely dispersed" makes it difficult for them "to overcome collective action and free rider impediments to effective corporate suffrage."<sup>39</sup> This means one cannot rely on shareholders to

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33. Case, *supra* note 11, at 101 ("Many argue that significant and long-term improvement in a firm's environmental performance requires changes in organizational structures and corporate culture.").

34. See, e.g., April Dembosky, *Protecting Companies that Mix Profitability, Values*, NPR, Mar. 9, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=124468487> (identifying efforts underway in California and Vermont to modify their corporate laws to include a social responsibility purpose).

35. Ruth O. Kuras, *Corporate Social Responsibility: A Canada- U.S. Comparative Analysis*, 28 MAN. L.J. 303, 303 (2002) ("[The] single purpose [of corporations] is shareholder wealth maximization"); see also Branson, *supra* note 30, at 612 ("the sole objective of corporate managers was to increase profits for shareholders"). Testy refers to this as "the hegemony of the shareholder primacy model." Testy, *supra* note 2, at 1230.

36. Testy, *supra* note 2, at 1231.

37. Hall, *supra* note 6, at 798 (quoting Ira Millstein).

38. See William W. Bratton, *The Case Against Shareholder Empowerment*, (Draft Paper, Jan. 26, 2010) (on file with author), for an extensive critique of the shareholder model and recent reforms to empower shareholders.

39. Testy, *supra* note 2, at 1230-31; see also Branson, *supra* note 30, at 606 ("collective action problems[, including] the simple difficulty of shareholders knowing who else owns shares in a particular company, the costs of communicating with them, . . . and costs posed by regulatory compliance," "prevent[ed] shareholders from coming together to assert, or reassert themselves" if

control environmentally harmful corporate actions, let alone raise a banner of corporate social responsibility.<sup>40</sup>

The pressure to maximize shareholder wealth restrains a company's eagerness to comply with government regulations, let alone go beyond compliance.<sup>41</sup> In most circumstances, corporate decision makers will be "more concerned about the economic consequences of a social demand than its health or environmental benefits, especially where such benefits are contested"<sup>42</sup> or uncertain, as environmental benefits often are. Neil Gunningham, and his co-authors, suggest that these constraints, what he calls a company's "economic license," "will serve[] as a brake on very costly 'beyond compliance' environmental initiatives, particularly those that could not be justified in margin-of-error or win-win terms."<sup>43</sup> The interplay

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they "thought the corporation was headed in the wrong direction, or its assets were being mismanaged"); *id.* ("the free rider problem, . . . [consisting of the non-activist reformer shareholders who] are willing to 'free ride' on the efforts of their pro-active brethren. Too many free riders will doom any collective effort").

40. *See* Branson, *supra* note 30, at 631-32 (saying while institutional activism [by shareholders] has certainly increased . . . there is . . . no doubt that the promise of institutional investor activism, was the oversold idea of the early 1990s"); *see also* Leora Falk, *Investors File 95 Resolutions Seeking Action on Climate Change Issues*, 41 ER 546 (Mar. 12, 2010); *Voting Your Shares May Start to Matter*, N.Y. TIMES, Mar. 6, 2010, at 1 (discussing ways that small shareholders can exercise greater power and quoting an associate director of a shareholder advocacy group on environmental issues as saying "[t]here have been many successes shareholders have had in changing corporate policies and practices"). *But see* BP Shareholders Want to Re-Evaluate Canadian Oils Sands Project, CLIMATEWIRE (Feb. 9, 2010), (discussing a recent resolution filed by a coalition of BP shareholders asking the company to re-evaluate its \$10 billion investment in a Canadian oil sands project prior to the company's annual meeting because of concerns about the increased costs and harm "to the company's reputation because of the project's environmental damage")

41. Gunningham et al., *supra* note 10, at 332 ("economic concerns often constrain the *degree* of beyond-compliance behavior firms are willing or able to undertake").

42. *Id.* at 334 ("where the economic costs of social demands are high, and the health and environmental benefits are small, uncertain, or contested, legal and political actors are likely to be less responsive to social pressures"); *see also*, Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 127 (discussing how cognitive dissonance affects people's understanding of the harm pollution may cause); Babcock, *Responsible Environmental Behavior*, *supra* note 5, at 954-56 (describing the confusion over mercury exposure from CFLs).

43. Gunningham et al., *supra* note 10, at 335.

"between a firm's economic license and the demands of social stakeholders helps determine how far a firm will go beyond legal compliance."<sup>44</sup>

Another economic constraint on corporations behaving better is what Gunningham says is the lack of interest by what he refers to as "the enforcers of economic license – investors, lenders, and financial analysts"—in having companies "invest in very costly environmental measures or technologies that do not improve productivity and profits unless government regulations assure that the firm's competitors will be compelled to make similar expenditures."<sup>45</sup> The same is true of the producer of "greener products" who "will not benefit if its only competitors can easily replicate the same innovation."<sup>46</sup>

The final economic factor weakening the pressure on corporations to change their behavior are the business' customers. Although most Americans like to think of themselves as good environmentalists, their environmental behavior is often poor; nowhere is that poor behavior more apparent than when they function as consumers.<sup>47</sup> This lack of concern has a direct effect on corporate behavior. As Gunningham notes in his study of paper mills "[a]s long as customers continued to care more about cost, brightness, and strength of their paper than about the pulp mills' chlorinated organic numbers, most mills used regulatory requirements as their chief guide to environmental performance" and showed no interest in doing more.<sup>48</sup> This indifference enabled companies to treat their "economic license constraints as fairly fixed," with the result that "[t]hey did not strive

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44. *Id.* at 336; *see also id.* at 334-35 ("when the harm is associated with . . . only [the] production process and not the product produced, social license demands are less effectively enforced through economic mechanisms" like boycotts). Gunningham interchangeably refers to a company's social licensees, social actors, and social stakeholders, who together constitute a company's social license, and who place "demands on and expectations for a business enterprise that emerge from neighborhoods, environmental groups, community members, and other elements of the surrounding civil society." *Id.* at 308.

45. *Id.* at 335.

46. *Id.* at 336.

47. *See* Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 122-23 (discussing personal consumption patterns of individuals).

48. Gunningham et al., *supra* note 10, at 335. *See generally* Babcock, *Responsible Environmental Behavior*, *supra* note 5, at 953-56 (discussing the obstacles to good environmental behavior caused by a products architecture, cost, and inconvenience).

to generate more customer demand for unbleached or less bright paper in order to reduce the environmental impact of unrecycled bleaching chemicals in their effluent.”<sup>49</sup> In other words, unless a firm’s customers demanded a change in product, the firm was not going to educate its customers to make that demand.<sup>50</sup> Preservation of “reputational capital”<sup>51</sup> is only of concern to companies that produce goods and services for direct public consumption, and even that concern is confined to protecting the company’s market share.<sup>52</sup>

The open hostility of some corporations to environmental regulations reflects “a pervasive distrust of regulatory solutions to economic problems, together with a concomitant faith in the righteousness of private ordering.”<sup>53</sup> Financial capital is given a “privileged status” in corporate governance, which the “obsessive focus by corporate managers and investment communities on short-term share price” reinforces.<sup>54</sup> But “[c]orporate governance of organizational environmental behavior has been largely inadequate to attain desired levels of environmental protection. American corporate law generally fails to promote environmental protection goals and is, at best, ‘environmental-neutral.’”<sup>55</sup> Marc Stanley relates

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49. Gunningham et al., *supra* note 10, at 335.

50. *But see id.* at 320 (enforcing social license demands can be realized “through the market: Customers can impose direct economic costs on noncompliant firms through boycotts, and firms that build a reputation for outstanding environmental performance sometimes can gain price premiums or enhance their position in the labor market”). At the same time, Gunningham admits that boycotts only work if the company is concerned about its reputation or the reputation of its products. *Id.* at 334 (boycotts “may be impossible to organize or less effective against companies that are less concerned about their reputation, either because they do not have a consumer market or branded identity to protect, or because the harm is not associated with a product directly, but rather with a by-product of the production process”).

51. *Id.* at 320 (explaining how reputational capital works).

52. *Id.* at 319 (“good environmental citizenship (and avoiding a reputation for bad environmental citizenship) will in the short or long run be ‘good business’”).

53. Testy, *supra* note 2, at 1228.

54. Testy adds to that list the “exponential growth in the transfer of technology and other products across national borders.” *Id.*

55. Case, *supra* note 11, at 79. Even when modern corporations do good, their motives are suspect, for example, while Hall notes that businesses in the early 1950s worked to relax the barrier to corporate giving, the reason they did that was to increase their political influence and “to maintain the free enterprise system – though such self-interested concerns were generally cloaked in philanthropic

the story of British Petroleum's horrific refinery accident at its Texas City plant that killed fifteen workers as an example of a company that balanced the risk of harm occurring against known costs the company would incur if proactive steps were taken to avoid the harm's occurrence.<sup>56</sup> He describes how the company "[r]einvented and rebranded [itself] as the model of an expanding and caring modern corporation committed to environmentalism and quality,"<sup>57</sup> at the same time as "BP executives had ordered the company to 'bank the savings'" realized from refusing to upgrade machinery and safety equipment.<sup>58</sup>

*B. The Ineffectiveness of Apologies, Norms, and Shame as Motivators of Changed Corporate Behavior*

American corporations seem to be largely impervious to many of the sanctions that work in other cultures. So, for example, apologies by the heads of companies, like those recently made by the chief executive officer of Toyota for various mechanical problems, are

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rhetoric which stressed ties between philanthropy and profitability." Hall, *supra* note 6, at 816.

56. Marc R. Stanley, *When Bad Companies Happen to Good People*, 56 DRAKE L. REV. 517, 522 (2007-2008).

57. *Id.*

58. *Id.*; see also *id.* (at the time of the 2005 accident, "BP had led the industry in the number of refinery deaths from 1995 to 2005, and over that entire decade, there was a fire a well at the Texas City plant"). The self-branding trend continues today in the form of a barrage of BP newspaper ads that immediately followed the massive oil spill resulting from the blowout and destruction of the company's deepwater drilling rig in the Gulf of Mexico. See Todd Wasserman, Brandweek, *BP Print Ad Addresses Gulf Oil Spill*, ADWEEK, June 2, 2010, available at [http://www.adweek.com/aw/content\\_display/news/strategy/e3i4811cd742d860d93ba32caa0b13dcf2c](http://www.adweek.com/aw/content_display/news/strategy/e3i4811cd742d860d93ba32caa0b13dcf2c) ("As the Obama administration opens civil and criminal investigations into the huge oil spill in the Gulf of Mexico, the party responsible for the spill, BP, has rolled out advertising addressing the crisis," the tag line of which is "We will get this done. We will make this right."). The ads have engendered wide public criticism, including from President Obama who reportedly said that "the money should be spent on cleanup efforts and on compensating fishermen and small business owners who have lost their jobs because of the spill." Jennifer Kay, Associated Press, *Apologetic BP Advertisements Draw Criticism – Not Sympathy*, ABILENE REPORTER-NEWS, June 6, 2010, available at <http://www.reporternews.com/news/2010/jun/06/apologetic-bp-ads-get-criticism-not-sympathy/>.



rarely uttered by American CEOs.<sup>59</sup> When they are, the words of an apology “are so carefully parsed, scrubbed by lawyers or picked over by public relations professions that it is unclear just how much mea is in their culpa.”<sup>60</sup> One obvious reason for the reluctance of American captains of industry to apologize is the “worry that apologies may be red meat for shareholder lawsuits.”<sup>61</sup> The sheer size of the egos of CEOs of large companies also makes it difficult for them to admit mistakes—“[y]ou don’t get to the top of a large and highly competitive organization by debasement and humility.”<sup>62</sup> One sign of this is how many of the so-called “lightning rods” of the financial

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59. Andrew Martin & Michael Maynard, *For Bankers, Saying ‘Sorry’ Has Its Perils*, N.Y. TIMES, Jan. 13, 2010, at A1 (reporting on research conducted by a management professor at Tuck School of Business at Dartmouth that showed “heads of Fortune 500 companies almost never apologize for poor performance.” In fact he found only one such company out of “100 or so companies” that “acknowledged managerial culpability”); *id.* (noting that “[t]he politics of humble [in the US] is seen in stark contrast in Japan, where executives often make wrenching public apologies for their missteps”); *see also id.* (quoting a management professor from Wharton School at the University of Pennsylvania as saying on the one hand “American culture does not put a premium on apology,” but on the other noting that “[t]he level of anger in this public in general is extremely high against those who led Wall Street into the abyss, in part because they never stepped forward to apologize for the mess they made”). *But see* Ken Belson, *Toyota’s Wrecked Image Needs the Right Bodywork*, N.Y. TIMES, Feb. 14, 2010 (The World), at 3 (discussing the recent recall of cars by Toyota, and saying that to reclaim its prior market position Toyota “has “started taking some of the necessary steps, including apologizing for its mistakes . . . but that mea culpas do not come naturally at Toyota”).

60. Martin & Maynard, *supra* note 59; *see also* Garvey, *supra* note 24, at 792 (“An apology must be the consequence of punishment and the only good apology is a sincere apology.”); *id.* (discussing “apology rituals” and saying that “[g]enuine apologies . . . can have an almost a magical character . . . [and are] a form of self-punishment that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered our claims to membership in a moral community suspect or defeasible”).

61. Martin & Maynard, *supra* note 59. One exception to this is the recent apology of the former head of Time Warner, Jerry Levin, in which he took blame for “the worst deal of the century,” described as “stunning in an environment that generally frowns on apologies as a sign of weakness.” *Id.*

62. *Id.* (quoting, Robert F. Bruner, Dean of the Darden School of Business at the University of Virginia); *see also id.* (reporting that General Motors executives “expressed no regrets” for the billions of dollars lost as a result of the company’s misguided investment in Fiat, and instead have compared the losses to “water over the dam”).

crisis have simply "stayed out of the limelight, aside from appearances at Congressional hearings;" while others have offered only "tepid apologies," like being "sad" about the state of their companies and admit to making only "some" unidentified mistakes.<sup>63</sup>

Although social norms, including the compliance with law norm, can play an influential role in decisions that individuals make about their behavior,<sup>64</sup> their influence on corporate behavior is much more problematic.<sup>65</sup> This may be because the underlying behavior that violates a social norm is not perceived by corporate officers as being wrong.<sup>66</sup> Victor Flatt makes the unsurprising point that the structure of corporations "wreaks havoc with the power of norms, as individual power must be squared with corporate incentives."<sup>67</sup> Another impediment to the influence of norms on corporate behavior may be the problem of competing norms—the norms favoring individualism and competition versus the more communal norms of cooperation and law compliance.<sup>68</sup> Yet another factor that dulls the persuasive

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63. *Id.*

64. See generally Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 134-42 (discussing the role of social norms in influencing individual environmental behavior). *But cf.* Babcock, *Responsible Environmental Behavior*, *supra* note 5, at 953-56 (discussing the limits placed on that good behavior by a products design, cost, and the inconvenience of buying it).

65. See Amir Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 *Rev. Law & Econ.* 715 (2008), for an interesting discussion of social norms and their role in influencing behavior at both the individual and societal level.

66. Kahan & Posner, *supra* note 24, at 379 ("The embezzlement of funds, the discharge of toxic wastes, violation of the Housing Code, and fraudulent steer swapping may not have seemed to be particularly immoral acts to the people who engaged in them, nor to the people in their immediate circles. They may have rationalized these actions as relatively harmless or (in the second and third cases) as reasonable responses to burdensome regulations.").

67. Flatt, *supra* note 23, at 464. *But see id.* at 455-56 (attributing the willingness of corporations to take "steps to help the environment outside the traditional regulatory system" to "changing social norms in their various incarnations: public demand, advertising, shame"). Indeed, harkening back to the good old days in which corporations believed that they had an important role in enhancing certain communal values, Flatt suggests that "good, old-fashioned engagement and community building can bridge the norm gap from a leader to the community that needs to change." *Id.* at 473.

68. See Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 152 ("within an individual there may be conflicting norms competing for control of that individual's behavior"); see also Flatt, *supra* note 23, at 464 (citing Professor Renee Jones for the proposition that "social norms alone seem unable to curb

power of norms is the pressure to make money.<sup>69</sup> The ability of widely held social norms to influence corporations depends on the public's understanding of the environmental harm caused by the corporation's activities, which can be problematic because of the complexity of environmental harms and their often less than immediate impact.<sup>70</sup>

One factor that can influence the behavior of businesses that produce items for public consumption or offer services to the public, Flatt says, is the company's reputation;<sup>71</sup> sometimes the personal reputations of their officers and managers may also be important.<sup>72</sup> However, if there is not "a *reputation* market," there will be no incentive for companies to comply with environmental regulations, let alone go beyond compliance.<sup>73</sup> At the same time, Flatt candidly admits that "the importance of corporate reputation is related to

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corporate behavior, primarily because of the complexity of competing norms and responsibility").

69. Flatt, *supra* note 23, at 464-65 (citing Rena Steinzor as saying "moral suasion as it affects individual people seems not to work as well in the corporate environment, most likely because of the enormous pressure for short-term profits").

70. See Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 168 (saying that environmental information underlying how people perceive risks "is contentious, complex, contestable, and frequently from non-credible sources"); see also Flatt, *supra* note 23, at 467 ("social norms of the general public only positively affect corporate action to the extent the public really understands the complexity of the corporate action"); András Takács-Sántra, *Barriers to Environmental Concern*, 14 HUM. ECOLOGY REV. 26, 33 (2007) (explaining that environmental problems that individuals have not experienced personally are viewed by them as more remote and less serious than those they have experienced) (2007).

71. Flatt, *supra* note 23, at 468 (saying sometimes it makes more sense to focus on personal reputation, because "[e]very person has a community and this community exerts power").

72. *Id.* ("Can a multinational corporation feel shame and peer pressure? The answer to that is obviously 'no,' but the people who run and make the decisions for these corporations can"); *id.* at 466 (identifying as a possible "vehicle" for "altering incentives related to social norms" either individual or corporate reputation).

73. *Id.* at 467 ("Depending on the private sector to alter its behavior to accommodate changing public desires does not work for everything. In some cases there may not be a *reputation* market, in which case there would be no monetary incentive for environmental compliance." (citing as examples companies that "do not sell a product, or whose products are otherwise regulated")). Flatt sees a direct link between the importance of corporate reputation and certification standards and advertising, which he claims has been increasing. *Id.* at 466.

money – for instance, being perceived as *green* may increase market share.”<sup>74</sup>

Shame may also be an uncertain motivator of corporate behavior<sup>75</sup> as it is for individuals.<sup>76</sup> However, some scholars, like Jayne Barnard, believe that “[h]igh status business leaders may be especially susceptible to shaming rituals” because as a group they are the individuals “most likely to worry about public appearances, to be vulnerable to moralistic or judgmental social groups, to defer to authority and to be relatively conventional in attitudes toward ‘law and order.’”<sup>77</sup> “They are also the people most likely to be concerned about maintaining the appearance of business competence and professional accomplishment.”<sup>78</sup> Barnard refers to this as a “‘reputational rub-off’ effect.”<sup>79</sup> However, there are so many

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74. *Id.*

75. *But see* Kahan & Posner, *supra* note 24, at 385-86 (recommending that “individual white-collar defendants . . . be subject to a special hybrid penalty consisting of a fixed shaming component and a variable fine component. The shaming component, which would be the same for all defendants, would consist of stigmatizing publicity in the form of a media announcement, paid for by the defendant, detailing in a straightforward fashion ‘the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offense.’”).

76. *See* Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 161-65 (discussing problems with shaming individuals).

77. Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 968 (1999); *see also id.* at 969 (discussing the power of what she calls “woodshed proceedings,” where corporate CEOs are publicly taken to the woodshed in front of a judge, and how doing this to individuals “who typically think of themselves as beyond public criticism and censure” can have a powerful impact).

78. *See id.* at 968; *see also* Parker, *supra* note 21, at 610-11 (“[I]n order for a business to comply with the law, it must be confronted with the fact that the reality of its own behavior does not match its ideological posture of compliance. Simple deterrence via economic penalties on its own generally will not provoke an adequate conflict about the businessperson’ or firm’s identity because penalties can be readily reconciled with a purely commercial rationality.”).

79. *See* David A. Skeel, Jr., *Corporate Shaming Revisited: An Essay for Bill Klein*, 2 BERKELEY BUS. L.J. 105, 110 (2005) (noting that Stephen Cutler, former director of enforcement at the SEC, made a speech in which he suggested “that the [offending] companies themselves should engage in internal shaming,” and in his speech, which he gave throughout the country, “he named names, holding up wayward executives and companies to informal condemnation”); *see also* Barnard, *supra* note 77, at 969.

problems with using shame as a motivator of good behavior that there is no reason to believe that those problems could be overcome, especially when shame is applied to a corporation or its leadership, given at least the leadership's capacity to tell a counter story.

The BP story told earlier illustrates the harm that a company can cause when it is indifferent to the need to be environmentally responsible. This harm "makes it unacceptable simply to wait and fix things after the fact. Thus, there is a need to channel business activity constructively and to identify and address problems before they become catastrophic."<sup>80</sup> But, the size and power of corporations, the dominant ethos of shareholder wealth maximization, and the ineffectiveness of social pressure, norms and other common motivators of behavior that affect them, make any change in corporate behavior a challenge. It remains to be seen if the CSR movement, which arose in response to social pressure and runs counter to the wealth maximization ethos, can truly change corporate behavior.<sup>81</sup> It is time to turn to that movement.

### III. THE ORIGINS OF THE MODERN CORPORATE SOCIAL RESPONSIBILITY MOVEMENT AND SOME INDICATIONS OF ITS DURABILITY

The concept of corporate social responsibility probably has as many different definitions as it has initiatives gathered under its rubric. For example, Ruth Kuras defines corporate social responsibility as corporations "spending corporate funds, at the discretion of corporate management, on doing 'good works' for the community or as refraining from doing 'bad works.'"<sup>82</sup> She also says that it has been described "as denoting the 'obligations and inclinations, if any, of corporations organized for profit, voluntarily to pursue social goals that conflict with their presumptive shareholder desire to maximize profit.'"<sup>83</sup> For purposes of this article, the

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80. Jay G. Martin, *Implementing Effective Corporate Legal Compliance Programs*, 11 NAT. RESOURCES & ENV'T., Spring 1997, at 14, 14.

81. See Gunningham et al., *supra* note 10, at 325 ("environmental management style – the attitudes and modes of thought that guide corporate and mill-level policy, not social pressure alone – is a key variable in determining the capacity of social pressures to shape corporate environmental performance").

82. Kuras, *supra* note 35, at 303-04.

83. *Id.* at 304.

concept is limited to initiatives that corporations undertake to improve their regulatory compliance or go beyond what regulations require either to reduce emissions below mandated levels or limit their activities in areas that are not currently regulated. Examples of this latter category might be regulating nonpoint source pollution, reducing energy or water consumption, or reducing the amount of waste material the business produces.

The concept of corporate social responsibility is not new; however, an actual movement promoting it is. In the mid to late 19<sup>th</sup> century, there was a "traditional ethos of corporate citizenship"; what is surprising is how quickly it disappeared.<sup>84</sup> According to Peter Dobkin Hall, in an article on the changing patterns in corporate charitable giving, the traditional role of business leaders before the Depression was to be involved in "changing and improving American living standards."<sup>85</sup> Business leaders recognized that "economic growth depended on a variety of non-economic 'quality of life' factors: the availability and cost of housing, a skilled and contented workforce, up-to-date public utilities, recreation, and freedom from political corruption."<sup>86</sup> Businesses "fostered the growth of civil society and the accumulation of social capital, working through chambers of commerce, trade associations, service clubs, organized charities, and local institutions of higher education."<sup>87</sup> During this period, it was not "good business for corporations 'to take substantial benefits from their membership in the economic community while avoiding the normally accepted obligations of citizenship in the social community.'"<sup>88</sup>

Douglas Branson finds "the beginnings" of the modern corporate social responsibility movement in various initiatives that arose in the middle of the last century, like "the 'good governance' movement; the stakeholder versus stockholder debate; renewed calls for

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84. Hall, *supra* note 6, at 794 (referring to "[t]he wholesale abandonment of the traditional ethos of corporate citizenship").

85. *Id.* at 812.

86. *Id.*; see also Licht, *supra* note 65, at 735 ("[business'] proclivity towards entrepreneurship is negatively related to cultural harmony." This is consistent with harmony's "de-emphasis on venturing, assertive action, and risk taking" (citations omitted)).

87. Hall, *supra* note 6, at 812.

88. *Id.* at 795 (quoting testimony by various corporate leaders in *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 583 (N.J. 1953)).

corporate social accounting and disclosure; the ‘green’ movement in manufacture and advertisement of products; advocacy of communitarian models of the corporation and of ‘progressive’ corporate law; and a newly strengthened environmental movement.”<sup>89</sup> The overall movement’s:

[T]he thesis was that, in order to solve the ills of society thought in large part to be the product of corporate behavior (in turn thought to be the result of the separation of ownership from control), some sort of government intervention was necessary to make large corporations and their managers again accountable, if not to the owners of such corporations, then to the society as a whole.<sup>90</sup>

The environmental part of the modern CSR movement “[r]oughly coincide[d] with Earth Day, in April, 1970.”<sup>91</sup> One subset of the environmental wing of the CSR movement is the so-called “green movement,”<sup>92</sup> with its “green advertising,”<sup>93</sup> “green product manufacture and competition, and green management.”<sup>94</sup>

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89. Branson, *supra* note 30, at 605-06; *see also id.* at 605 (“One subset of proposed reforms” arose in the 1970s, and consisted of reformers urging “governmental intervention which, as a matter of general corporate law, would expand corporate responsibility from primarily shareholders, to workers, consumers, suppliers, communities in which the corporation had a significant presence, clean air, clean water, and other constituencies.”); *id.* at 641 (explaining that the role of the “large activist institutional investors” changed in the 1990s when they “placed corporate social responsibility on their agendas” “[i]n selecting and then monitoring their investments”).

90. *Id.* at 611; *see also id.* (“Corporations were so large, and their behavior affected so many in society, that the law should regard them as public, or quasi-public, institutions and regulate them as such.”).

91. *Id.*

92. *Id.* at 646 (“The green movement forms a principal part of the new corporate social responsibility movement.”).

93. *Id.* at 645-46 (saying the least effective of these is green advertising because it’s claims are often “misleading”). Indeed, the Federal Trade Commission’s recently announced that it is updating its environmental marketing guidelines (Guides for the Use of Environmental Marketing Claims or Green Guides) “[i]n response to the explosion of green marketing,” reflecting some concern about the accuracy of environmental assertions companies are making about their products. Gabriel Nelson, *FTC Moves May Signal Start of ‘Greenwashing’ Crackdown*, GREENWIRE, Feb. 3, 2010, (Bus.), at 1, available at

However, this first iteration of the modern CSR movement's affect on corporate behavior and culture did not last. One reason for this is that in the late 1960s, when businesses reacted to growing public agitation about race, poverty, and the environment by allowing social concerns to influence managerial and marketing choices, these decisions, which were not proactive, "often lacked any demonstrable connection to productivity, profitability, or the other core purposes of business firms."<sup>95</sup> Then, in the 1970s, when "political liberalism" lost favor, "the weakly reasoned rationale for corporate social responsibility became ever harder to defend."<sup>96</sup> Another reason is

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<http://www.eenews.net/Greenwire/print/2010/02/03/4>. Although section 5 of the Federal Trade Commission Act authorizes the FTC to take action against companies that "are misrepresenting their practices to clients," the agency has only infrequently initiated such actions against fraudulent environmental claims in the past, but the hope is that the issuance of stricter Green Guidelines may "signal an intention to step up enforcement." *Id.* at 2; *see also* Branson, *supra* note 30, at 645 (commenting on the "duplicity of consumers who claim that "they consider a product's environmental reputation in purchasing decisions," while much fewer of them "select more expensive products because of the products' environmental benefits"); *id.* (saying consumers may also be "environmentally 'penny wise and pound foolish,' using recycled paper and composting coffee grounds, while driving a Ford Expedition or some other environmentally unfriendly SUV"). Although perhaps not "duplicitous," the Edison Electric Institute opined with respect to carbon offsets or renewable energy credits that most consumers buy them "as a feel-good sort of thing." Nelson, *supra*, at 3.

94. Branson, *supra* note 30, at 644-45; *see also id.* at 646 ("Green product introductions and green product competition [as forming] a bridge between green advertising and green management.").

95. Hall, *supra* note 6, at 816; *see also* Branson, *supra* note 30, at 638 ("Uniformly in the 1970s, corporate executives' response to corporate social responsibility advocates was a Calvin Coolidge's retort that 'the business of business is business.'"); *id.* at 639 ("Ten years later, when their [managers'] high price jobs were potentially at stake in the takeover wars, U.S. corporate managers sang a different tune. In defending against takeover bids, they pompously intoned that they had a grave responsibility to consider all of the stakeholder interests bundled together in the large modern corporation."); *id.* at 639 ("Stakeholder advocacy wasn't the first, nor will it be the last, time in which corporate America has been hypocritical but this particular hypocrisy stands out for its clarity"). Branson blames the law and economics movement with its emphasis on "an efficient allocation of investor and managerial resources" for swiftly eclipsing the earlier corporate social responsibility movement. *Id.* at 605 ("Seldom in the annals of jurisprudence has one jurisprudence ascended so quickly, while the one it supplanted simultaneously faded into oblivion.").

96. Hall, *supra* note 6, at 816.



that the initiatives stepped away from corporate law as the governing mechanism in favor of outside regulation by the government.”<sup>97</sup> However, Branson notes that the movement’s:

[E]mphasis on ‘good corporate governance’ [encompassing the idea of a majority of independent directors, “intense scrutiny of governance in large corporations,” a view of “governance “as a matter of structure and focus or mission”] . . . will occupy center stage for some years to come. It forms one of the principal props of the ‘new’ corporate social responsibility movement.<sup>98</sup>

What makes the CSR movement different, and perhaps of greater durability, this time is that it has a “more muted, less shrill, and therefore more sustainable, tone.”<sup>99</sup> Another reason the movement may last is because it is:

[C]onverging with, rather than diverging from, broader trends in corporate governance. The ‘good governance’ and stakeholder versus shareholder movements are not apart from but may be viewed as yet another element of the new corporate social responsibility movement. Looking through the lens the other way, the new corporate social responsibility movement is but an element of good corporate governance.<sup>100</sup>

For example, traditional corporations see calls for “corporate social accounting and SEC mandated disclosure of annual corporate social results,” “as less intrusive proposals” than proposals for weighted voting and public interest directors, which came out of the earlier

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97. Branson, *supra* note 30, at 630.

98. *Id.* at 626, 630; *see also id.* at 618 (saying that “at the same time some of the more ardent corporate reformers rejected proposals like federal minimum corporate standards because they “merely reinforced existing notions of responsibilities of corporations and their managers to shareholders.” These “reformers wanted to create as a matter of general corporate law, and not merely discrete federal laws on various subjects, direct corporate responsibility to workers, consumers, communities, regions, and clean air and water”).

99. *Id.* at 647.

100. *Id.*

reform movement.<sup>101</sup> And for those who always believed that “managerial powers were held in trust for the entire community, and not just for shareholders,” it is public opinion that has finally changed to the extent that it is more accepting of the fact that a corporation is “an economic institution which has a social service as well as a profit-making function.”<sup>102</sup>

Yet some scholars describe the CSR movement as “the most aggressive, and arguably progressive, of the . . . counter-accounts of shareholder primacy and relentless short-term wealth maximization.”<sup>103</sup> As proof of this they point toward the “broader net” various theories of corporate social responsibility cast, which emphasizes “all of the social costs of corporate activity, and therefore embrace, for example, environmental or political concerns as well as stakeholder interests.”<sup>104</sup> One “subgroup of participants in

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101. *Id.* at 613; *see also id.* at 614 (describing another acceptable “social accounting proposal[,]” “super audits,” [where] “a corporation would attempt to quantify every adverse impact the corporation had on environments in which the corporation operated, along with corporate efforts to ameliorate them”); *id.* at 644 (attributing the success of “calls for corporate . . . accounting” to the fact that they “are more muted and thus more sustainable than cries for more drastic, intrusive social responsibility reforms such as federal chartering or mandatory public interest directors. They are at the core of the new corporate social responsibility movement”).

102. Kuras, *supra* note 35, at 305 (“[P]ublic opinion, which ultimately makes law . . . is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function. . . .” (quoting E.M. Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932))). *But see id.* at 303 (questioning whether the structure of U.S. corporate law contains “a legal obligation for a corporation to be ‘socially responsible’ by acting in the best interests of shareholders”).

103. Testy, *supra* note 2, at 1238. *But see* Kuras, *supra* note 35, at 319 (“In the United States, the traditional corporate law standard of shareholder wealth maximization continues to be the governing principle . . . . Individual state constituency statutes, enacted as a response to hostile takeovers in the 1980’s, are an explicit recognition of non-shareholder interests by state legislatures. However they have failed to create a mandatory obligation to consider stakeholder interests in corporate law.”).

104. Testy, *supra* note 2, at 1238 (quoting David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 88 VA. L. REV. 1001, 1002 n.5 (2000)). *But see id.* at 1236-37 (criticizing “the stakeholder theory,” which says corporate managers should consider all “the “related, but separable interests in the manner in which a corporation exercises its

the progressive corporate law movement”<sup>105</sup> are communitarians, who “believe that corporations have a duty to stakeholders in addition to duties mandated to shareholders . . . [who] view social responsibility as encompassing many areas including general charitable giving, contributions toward the community and the environment, behaviour toward employees and suppliers, and behaviour toward consumers.”<sup>106</sup>

This new duty, what Gunningham refers to as a “social license,”<sup>107</sup> consists of “the demands on and expectations for a business enterprise that emerge from neighborhoods, environmental groups, community members, and other elements of the surrounding civil society.”<sup>108</sup> His study of paper mills<sup>109</sup> confirmed the role of a

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power” because it “risks creating a free-for-all among stakeholders in the quest for control of the corporate enterprise, a free-for-all in which the already powerful are likely to continue to prevail,” and also noting that “the ambiguity in defining who is and who is not a ‘stakeholder’ will actually increase the power and discretion of management, because they will be beholden to no one in particular” (citations omitted).

105. Branson, *supra* note 30, at 639 (referring to these reformers, and saying that they “advocate a ‘communitarian’ model of the corporation, which ‘focuses on the sociological and moral phenomenon of the corporation as community, in contrast to the individualistic, self-reliant’ group of purely economic actors”).

106. Kuras, *supra* note 35, at 306.

107. Gunningham et al., *supra* note 10, at 308 (discussing a company’s “social license” which constrains it “to meet the expectations of society and avoid activities that societies (or influential elements within them) deem unacceptable,” and defining it “as the demands on and expectations for a business enterprise that emerge from neighborhoods, environmental groups, community members, and other elements of the surrounding civil society”).

108. *Id.*; see also *id.* at 309 (referring to a firm’s customers, shareholders, neighbors, and environmental groups as empowered “institutions of civil society”). The authors explain how the unique interplay between a company’s “legal license” (i.e., its operating permit) and its social license can lead to tighter regulatory restrictions if the company ignores the demands of its social licensees and regulators and political actors are activated. *Id.* at 331; see also *id.* at 322 (“In addition to increasing the vigilance with which existing rules are enforced, the demands of social actors can also tighten legal requirements.”); *id.* at 330 (saying, other laws, such as those that “grant citizens standing to sue either a company or a regulatory agency, expand access to information, require companies to consult with local communities, or invite advocacy groups to participate in the regulatory or legal decision-making process,” are other examples of how the terms of the legal license expand the social license).

109. See generally Gunningham et al., *supra* note 10, at 328.

company’s social license<sup>110</sup> in the company’s beyond compliance behavior.<sup>111</sup> Sometimes companies are so sensitive “to the messages they send to local communities<sup>112</sup> that they are willing to compromise substantially on the terms of their legal license and permit conditions.”<sup>113</sup> The “interactions among the regulatory, economic,

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110. *Id.* (explaining that this social license gives “corporate officials an additional incentive to comply or even overcomply with the terms of their regulatory license, for legal compliance often serve[s] as an important benchmark of company cooperativeness or commitment in the minds of social license enforcers”). Disclosure laws can also empower local activists to demand a higher level of compliance by industries in their communities; *see id.* at 330 (“Laws requiring firm-wide disclosure of environmental information, can also empower local communities, albeit indirectly,” citing TRI as an example of “the potential power of informational regulation.”); *see also id.* (quoting a Canadian pulp mill manager as saying that a Canadian environmental scorecard that outlined “environmental performance indicators and major infringements of regulations, was . . . ‘a pretty effective tool. . . . It keeps you in compliance because public pressure is more demanding than the regulatory agencies . . . . [A]gencies are more forgiving”).

111. *Id.* at 330 (“[C]ompliance with regulation often will not in itself satisfy broader community concerns, which often extend well beyond the standards embodied in regulation or facility permits.”).

112. *Id.* at 331; *see also id.* at 319 (saying the new desire of corporations “to be a good neighbor” and “agree to engage in some behavior not legally required” comes from the realization that it is “local stakeholders that give [corporations] the right to operate”).

113. *Id.* at 331; *But see id.* at 320 (“social license demands, if not met, can be translated into new legal requirements” – i.e. “result in a tightening of the regulatory license”); *id.* at 329 (explaining how “the legal license can also be expanded as a result of interaction with the social license – for example, as social pressure on legislators feed through in terms of enactment, monitoring and enforcement of regulation”); *id.* at 329 (explaining that direct empowerment includes legislation that enables local communities “to participate in decisionmaking” about some industry’s future plans, e.g. public notice/comment, hearings. Such legislation “created an environment in which mills had a strong incentive to listen and respond to community concerns; if they failed to do so they risked delays, possibly for years, in obtaining the consents they needed to introduce technological and other changes.”). Gunningham also found that “the way enforcement agencies exercise their discretion may be influenced substantially by community mores and expectations.” *Id.* at 331. What Gunningham refers to as the “regulatory license,” a company’s permit or authorization to operate, can extend “the reach and impact of the social license, either directly empowering social licensors, or by giving them access to information, which they can then use to pressure target enterprises.” *Id.* at 329.

and social strands of the [company's] license to operate often intensify the overall constraints under which companies operate. In other cases, however, tensions between the economic, social, and regulatory forces may pull firms in different directions."<sup>114</sup> For example, the economic license which can direct businesses to reduce or even eliminate environmental expenditures may be in direct conflict with the social license which would like to see the company increase those expenditures.<sup>115</sup>

The traditional view of corporate environmental behavior was that:

[C]orporations complied with law only for instrumental reasons (to avoid legal penalties) or because, 'regulations are taken to be a measure of societal expectations, and thus interpreted as a guide to an organization's moral and social duties.' From this traditional point of view, corporations could be expected to take actions that went 'beyond compliance' only where they saw some financial self-interest in doing so, such as increasing profit, usually over the short term."<sup>116</sup>

There are some indications that this view may be changing, in part as a result of a generational "shift in power from the post-war generation to the baby boom and post-baby boom generations," which has brought into the work place young managers and workers with a depth of knowledge about environmental issues that the prior generations did not have, who want to be "part of an admirable organization," and who are themselves agents for change within the company.<sup>117</sup> A new willingness to go beyond compliance even when

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114. *Id.* at 329.

115. *Id.* ("The economic license . . . often calls for limits on or even reductions in environmental expenditures, while the terms of the social license push for an increase.").

116. *Id.* at 308 (citations omitted); see Stephanie Rosenbloom, *Wal-Mart Plans to Make its Supply Chain Greener*, N.Y. TIMES, Feb. 26, 2010, at B3, available at <http://www.nytimes.com/2010/02/26/business/energy-environment/26walmart.html> (reporting criticism of Wal-Mart's recent announcement that it could cut approximately 20 million metric tons of greenhouse gas emissions from its supply chain because "rather than change its business model" it was pressuring its "suppliers to change theirs").

117. Bernard, *supra* note 1, at 310-11.

it may not be profitable may also be due to the infusion into these companies of "an amorphous group of middle and senior managers, engineers, and scientists" whose goals are "no longer confined to profit maximization," but are more aligned with social goals, and with their company serving some social purpose, "the growing sophistication and coalition-building skills of the social investment community" as well as the increasing "sophistication and political savvy of environmental activist groups,"<sup>118</sup> changes in the investment markets,<sup>119</sup> such as "independent and credible benchmarking programs such as the Dow Jones Sustainability Index" and "growing support among venture capitalists and hedge funds for 'clean energy' and related technologies that make being 'green' look sexy, new, and above all, alluring for investors,"<sup>120</sup> and the growing realization that "any hazards and harms that their enterprise engenders, even if not clearly illegal today, will sooner or later be subject to public censure,

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118. An example of the effectiveness of environmental activists at pressuring companies to stop engaging in environmentally destructive activities even when laws do not require that they do so, is the decision by Unilever to drop PT Smart, a supplier of palm oil, after the company's violations were brought to the attention of Unilever by Greenpeace. See *Unilever Drops Palm Oil Supplier Over Rain Forest Destruction*, CLIMATEWIRE, Feb. 24, 2010, available at <http://www.eenews.net/climatewire/print/2010/02/24/8>. The company dropped a second palm oil supplier after the BBC filmed its employees clearing a protected rain forest for palm plantations. *Id.*

119. See Joel Kirkland, *Business: Road Map to Sustainability Rests on Corporate Governance*, CLIMATEWIRE, Mar. 11, 2010, at 2, available at <http://www.eenews.net/climatewire/print/10210/03/11/3> (reporting that the CEO of California's Public Employees' Retirement System's \$200 billion asset portfolio "considers environmental issues a core part of the equation when it comes to corporate performance").

120. Barnard, *supra* note 1, at 301; *id.* (listing as yet more factors leading to this change in attitude "the increasing role of 'cover'-providing alliances that facilitate environmental reforms without requiring a company to be the first mover; . . . increasing support for environmental best practices by mainstream investors; . . . globalization; . . . rising oil prices; . . . climate change;"); see also *id.* at 306 (alliances are valuable because "(1) they provide a mechanism for promoting change that does not require a participant to step forward as a first-mover or to act alone; (2) they provide credibility by publishing data, offering informed interpretation, and awarding prizes for selected performers; and (3) they provide a forum for the exchange of information and mutual reinforcement").

government action, and legal liability.”<sup>121</sup> These internal and external changes may mean that the new corporate environmental responsibility movement has more fertile ground in which to grow.

Barnard believes that the corporate social responsibility movement will endure this time because she finds evidence of “the emergence of a new language of social responsibility – and uniform disclosure practices – that business leaders can embrace” (e.g. change from global warming to climate change), and the emergence of high-profile corporate officers as spokespeople for environmental CSR programs.<sup>122</sup> She finds instances where corporate boards have redefined “their long-term objectives to take into account the possibility of increased government regulation” as well as their recognition of “the increasing risk of a costly response to changing environmental conditions . . . and growing consumer preferences for products sold by companies that are good corporate citizens.”<sup>123</sup> This

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121. Gunningham et al., *supra* note 10, at 308. Going beyond compliance in these circumstances can sometimes take the form of companies building a “margin of safety” into their activities. *Id.* at 310.

122. Barnard, *supra* note 1, at 301; *see also id.* at 302 (making the point that phrases such as “corporate social responsibility” and “corporate social accounting” “has passed through boardrooms without stopping, as boards insisted on cutting costs, off-shoring production, and managing earnings – all to the end of maximizing shareholder value”). Barnard notes that “[h]aving a common language and format achieves three objectives: (1) greater transparency; (2) consistency over time; and (3) comparability across industries and firms.” *Id.* at 302-03; *see also* Branson, *supra* note 30, at 640 (“[N]ew corporate social responsibility, or progressive corporate law, movement promises to grow and occupy center stage in the coming decade.”); Testy, *supra* note 2, at 1238 (saying with respect to the stakeholder theory of CSR that it “has made its way into business school classrooms,” where “future managers are taught that it is good for the corporation to consider all stakeholders and that such inclusiveness is part of a corporation’s best practices. Accordingly, taken at the level of discourse, the stakeholder (or ‘communitarian’) approach to corporate governance has had substantial effect and promises to continue to thrive, at least in this norm-creation and norm-modification sense”).

123. Barnard, *supra* note 1, at 291; *see also id.* at 302 (saying boardrooms are finding much more appealing “the triple bottom line” concept which embodies “a balance between shareholders values and stakeholder values”); Kirkland, *supra* note 119, at 1 (quoting a recent report by Ceres on initiatives by various companies to adopt sustainable practices, as saying “corporate scandals and the current economic crisis have heightened demands for new approaches to governance, particularly in relation to executive compensation and risk management. . . . As

change in concerns has percolated down to corporate managers who are:

[N]ow anticipating and shaping ways to (1) minimize regulatory encroachment on their activities; (2) profit from the changing regulatory regime; (3) reduce their exposure to climate change effects; (4) sell products that can profit from climate change and its consequences; and (5) attract customers for whom environmental impact ("green-ness") is a salient feature of purchase decisions.<sup>124</sup>

Assuming *arguendo* that Barnard and Branson are right that the corporate social responsibility movement will be around for some time then it is important to learn who actually benefits from it – corporations or society as a whole. It is to this task that the article next turns. Of special interest in the following discussion is whether the benefits that corporations receive are strong enough to motivate businesses who have implemented CSR initiatives to redesign them without external compulsion to make them more effective.

#### IV. BENEFITS PERCEIVED AND OTHERWISE FROM VOLUNTARY ENVIRONMENTAL CSR PROGRAMS

There are clear benefits to companies as well as to society in general when businesses not only comply with regulatory requirements, but go beyond compliance. However, society's benefits depend in large part on whether CSR programs will actually meet their proclaimed goals. But, before looking more closely at that question, this part of the article attempts to identify what those benefits are, as it may be much harder to realize benefits to society at

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sustainability has risen up the corporate, investor and public policy agendas, it has become more fully integrated into these governance expectations.'").

124. Barnard, *supra* note 1, at 291; see also Sara Standish, *Business and Climate Change: Examining Drivers for Action*, 5 SUSTAINABLE DEV. L. & POL'Y 9, 11 (2005) (commenting that "employees of companies who have jumped the regulatory gun to achieve a higher level of emission control will already be trained to manage the new more stringent emission controls when they come into effect, which will make compliance with the new regulations easier." They will also have the hands-on experience "to adapt more easily to future regulations").



large through CSR initiatives than to achieve businesses' goals, which are more direct and immediate.

*A. Potential Social Benefits from Properly Constructed CSR Initiatives*

It makes sense to think that CSR programs will fundamentally change corporate environmental behavior because they call for increased awareness of environmental actions, which should, in turn, influence organizational decision-making on matters affecting the company's environmental performance.<sup>125</sup> Greater attention to a company's environmental performance might improve its compliance record,<sup>126</sup> which would be a social good, as would any movement by the company to achieve a higher threshold of compliance than regulations demand or fill some regulatory gap. "The effort to encourage organizations to achieve environmental performance that exceeds the minimum requirements of environmental law[s] . . . is in

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125. Case, *supra* note 11, at 109 ("[T]he realignment of organizational structures and culture in order to focus more specifically on environmental concerns will result in behavioral change through increased awareness of environmental impacts. This enhanced knowledge base will potentially lead to more effective organizational decision-making regarding environmental performance and outcomes."); see also Gunningham et al., *supra* note 10, at 339 ("[C]orporate environmental behavior cannot be explained purely in terms of instrumental and moral obligations to comply with the law. On the contrary, in an increasing range of circumstances, at least in reputation-sensitive industries, corporations contemplate going beyond compliance for reasons more closely connected with the perceived terms of their social license, even if the extent to which they do so may be constrained by economic considerations."). Even Testy, although deeply skeptical about CSR programs, admits that they appear to fall closest to his "goal of transforming corporations, "and by "changing the relationship between corporations and society," they "might further progressive causes." Testy, *supra* note 2, at 1243, 1246.

126. Barkin explains that the recent movement in Mexico by the government "in "the direction of market directed incentives" and "rewarding self-compliance" "can only be understood in light of the systematic private sector efforts to gain credibility and build capacity for corporate self-regulation, both as an acceptable method for compliance with environmental norms and as an alternative to government regulation." Additionally, he notes that business "leaders are carefully negotiating a new relationship with the public sectors [one that] deliberately avoid[s] conflicts between the public sector mandate of establishing a normative framework for regulation and the private sector's objective of assuming responsibility for compliance." Barkin, *supra* note 12 at 905.

significant part an indirect means of addressing the under-inclusiveness problem of the existing regulatory regime."<sup>127</sup> Reducing reliance on EPA's broken enforcement program would also be a good thing.

The public benefits from CSR initiatives that might make industry's production processes "greener" or motivate companies to produce "greener" products.<sup>128</sup> For example, General Electric's "Ecomagination" Program promises to improve "efficiency by 30 percent by 2012" and reports that its sales of eco-friendly products, like solar energy, will double by 2010 with improved company profitability.<sup>129</sup> Goldman Sachs has adopted "environmentally-friendly policies in deciding where to deploy its financing expertise" and AIG' has created an office focused only on addressing insurance risk created by climate change.<sup>130</sup> Additionally, information generated through green management programs, like environmental management systems,<sup>131</sup> "has the potential to change corporate behavior by 'providing feedback directly to'" managers on ways "to reduce environmental impacts and risks"<sup>132</sup> and help a company's stakeholders (its consumers, investors, local communities, and environmental activists) bring "post-disclosure public and market-based pressures" on companies to change their behavior.<sup>133</sup>

But engaging in green management practices holds out particular challenges for companies because "developing greener products and processes requires innovative, creative efforts by companies, as well as consistent, sustained financial and other support throughout the

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127. Case, *supra* note 11, at 83-84.

128. "Green management also holds out some hope of changing corporate behavior because it can include the appointment of directors and facility managers with specific environmental responsibilities and encourage corporate policies that promote "sustainable use of natural resources, reduction and disposal of waste, [and] wise uses of energy." Branson, *supra* note 30, at 646.

129. Barnard, *supra* note 1, at 297.

130. *Id.* at 300.

131. See *discussion infra* Part V.C. (discussing EMSs).

132. Case, *supra* note 11, at 103.

133. *Id.*; see also *id.* at 104 ("Considerable policy benefits can occur if such information is disseminated to third parties, such as workers, consumers, shareholders, regulators and the general public.").

decisionmaking levels of the organizations.”<sup>134</sup> Product or process redesign “requires sustained creative effort, sustained financial commitment, and a willingness to confront the substantial business risks that are presented by the processes. These requirements must have support within the facility, but they also require top management support at the national level.”<sup>135</sup> Gunningham’s paper mills study “offer[s] substantial conceptual support for the idea that green products and green processes grow out of deeply imbedded characteristics of a particular managerial culture and that adopting an EMS [green management], while useful, is by itself not likely to lead to such changes.”<sup>136</sup>

There are other concerns that may undercut the perceived public benefits from environmental CSR programs. Since most companies adopt environmental CSR initiatives to improve their bottom line,<sup>137</sup> this raises the serious “concern that corporate social responsibility will become just another commodity that businesses sell in the service of short-term shareholder wealth maximization; rather than the basis for any substantive change in the way business is done.”<sup>138</sup> Even Branson, who is agnostic on the issue of who benefits from the CSR movement, observes that while “the debate” over whether:

[C]orporations [should] be recognized as ‘public institutions with public responsibilities’ . . . has ebbed and flowed since the 1930s . . . [t]he difference today is that

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134. Kurt A. Strasser, *Do Voluntary Corporate Efforts Improve Environmental Performance?: The Empirical Literature*, 35 B.C. ENVTL. AFF. L. REV. 533, 543 (2008).

135. *Id.* at 544.

136. *Id.* at 545.

137. Testy, *supra* note 2, at 1239 (complaining that “most commitments to [the] idea [of social responsibility] are increasingly cast in terms of improving profits rather than improving the societal conditions that first spurred the progressive corporate law movement”); *see also* Flatt, *supra* note 23, at 477 (noting that when Houston’s mayor suggested that the “city begin purchasing large amounts of wind power . . . [he] gave as a public reason that it was cheaper and more reliable, i.e., better for business, while secondarily touting its benefits to the environment”).

138. Testy, *supra* note 2, at 1239; *see also id.* (noting business’s “enormous capacity for commodification”). Testy also questions whether corporate managers who are neither “elected officials” nor “a particularly diverse. . . group,” and who “under the current structure of corporate law . . . enjoy virtually unchecked power and discretion” will actually change anything. *Id.*

many corporate managements [who] have wrapped themselves in the banner of corporate social and public responsibility . . . have done so . . . with a mixed or hidden agenda.<sup>139</sup>

*B. Possible Benefits to Businesses from CSR Programs*

The prior discussion of societal benefits from the implementation of CSR programs raises at least the possibility that, while potentially meaningful, their realization may be less than complete in all instances. There is no question, however, about the large benefits that corporations receive from the environmental CSR movement, as this next part of the article shows.

For companies concerned about their reputations, adoption and implementation of CSR initiatives can pay big dividends. A company's "reputation capital"<sup>140</sup> can help reduce "the risk of adverse social campaigns"<sup>141</sup> and blunt their impact on the company's sales, its share price, and access to investment capital.<sup>142</sup> A company's stakeholders can deplete its "reputation capital," through "criticism or expand [it] with praise."<sup>143</sup> Communities and environmental groups often use a company's compliance record to judge its "compliance with the broader social license leading companies to fear enforcement not because of the penalties they may

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139. Branson, *supra* note 30, at 635-36; *see also* Katherine E. Kenny, Note, *Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers*, 27 NW. J. INT'L L. & BUS. 453, 457 (2007) ("codes of conduct arose either as a direct result of private campaigns or in anticipation of such campaigns," and that "[c]ompanies saw codes of conduct as a means to garner public favor by appearing as if they were cleaning up their acts").

140. Gunningham et al., *supra* note 10, at 319.

141. *Id.* at 326; *id.* at 320-21 (reporting that one paper mill environmental manager said that "building reputation capital is a good economic investment" because they were most concerned about informal sanctions imposed on the company by the public and the press, and "avoiding 'anything that could give you a bad name'").

142. *See id.* at 323; *see also id.* ("[b]ad publicity generated by carefully staged media events . . . can impact directly on corporate image and sales and indirectly on share prices and access to investment capital").

143. *Id.* at 319.

receive but because of the attendant adverse publicity.<sup>144</sup> A good reputation can also “lubricate[s] the regulatory process,” by giving those companies entrée to political actors and regulators, sometimes enabling them to win regulatory flexibility, thereby earning a distinct competitive advantage.<sup>145</sup>

CSR initiatives, like those that encourage voluntary disclosure of information about their greenhouse gas releases, may create competitive or other advantages for the disclosing company, as those businesses may be seen “as early adopters” and thus “curry[ing] investor favor in international markets as the global awareness of industry’s role in climate change deepens.”<sup>146</sup> Some “investors perceive strong environmental performance as an indicator of superior business management, resulting in a premium on the stock price and a lower cost for capital”; these companies earn “higher stock ratings from ‘socially responsible investment (‘SRI’) analysts, resulting in more stock purchases by SRI investors.”<sup>147</sup> Companies that change their product processes or their products can get a jump on anticipated regulations, gaining an advantage over their

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144. *See id.* at 330 (saying that the fact that communities and environmental groups “use compliance (or noncompliance) with regulations to judge a company’s compliance with the broader social license . . . [leads] some companies [to] fear enforcement not so much because of any penalty the regulator is likely to inflict but rather because enforcement actions generate adverse publicity and, as a consequence, informal sanctions imposed by the public, the media, and perhaps also by markets”).

145. *See id.* at 326 (“Building reputational capital also gives companies far greater control over their destiny. . . . [Leading] a number of companies to develop proactive strategies for dealing with communities, ENGOs [environmental nongovernmental organizations], and governments.”).

146. Leslie Kaufman, *Industries Disclose Emissions to Claim the High Ground*, N.Y. TIMES, Dec. 29, 2009, at B1; *see also id.* (reporting that some investment analysts “now laud the program [CDP] as an innovative way of encouraging investors to factor industry emissions into assessments of corporate performance”).

147. Standish, *supra* note 124, at 11. *But see* Branson, *supra* note 30, at 635 (describing the role of institutional investors and saying that “[i]nstitutional investor activism has certainly increased. Today there is no doubt that activism, or the threat thereof, is a factor in the good governance movement, and from time to time, in the forced removal of a CEO by a board of directors. There is also not doubt, however, that the promise of institutional investor activism was *the* oversold idea of the early 1990s . . . . [I]nstitutional investor activism never has been and never will be the panacea that legal and other academics made it out to be”).

competitors who have not yet done so.<sup>148</sup> This can create a market advantage for these companies, as "some investors are now using environmental proactivity as a proxy for outstanding management of other issues."<sup>149</sup>

Companies who adopt CSR initiatives to improve their performance beyond what regulations require may find favor with environmentally conscious consumers by creating an environmentally friendly corporate brand, thus helping "the companies' bottom lines."<sup>150</sup> Taking additional steps to reduce emissions that "entail expenditures which are not justified in terms of traditional, quantitative analyses for assessing likely profitability," can enhance "the firm's reputation for good environmental citizenship," which is be good for business.<sup>151</sup> Firms can use the affect of "[s]trong environmental performance" to recruit and retain employees and even encourage higher productivity.<sup>152</sup> The affect of being

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148. Barnard, *supra* note 1, at 308; *see also* Flatt, *supra* note 23, at 467 (noting that some companies who have changed their positions or processes to reduce climate change have done so "because of the likelihood of regulation"); Sara Standish, *supra* note 121, at 11.

149. Barnard, *supra* note 1, at 308 ("[C]orporations are coming to understand that '[a] company that is really good at managing its environmental footprint or taking proactive steps to keep pollution out of landfills or out of airsheds or watersheds is going to be better positioned almost no matter what for any new environmental legislation that comes down the pike."); *see also* Stanley, *supra* note 56, at 528 (addressing global investment patterns in response to corporate corruption and quoting the former head of an investment organization as saying "[e]thical conduct attracts capital, and capital allows for wealth-producing investment. In the global economy, capital is mobile and risk is priced. As investors perceive more risk of being cheated, they will charge more for others to use their capital and likely offer less of it. Therefore, investors have good reason to seek out countries with less corruption."). The same might be said of the response to environmental irresponsible behavior and the risks it creates.

150. Flatt, *supra* note 23, at 467 ("Even changes in anticipation of regulation may be seen as a way of preemptively appealing to the marketplace in advance of being forced to act."); *see also* Standish, *supra* note 121, at 11 (saying one reason companies create greenhouse gas strategies is to create a public perception of "the corporate brand as environmentally friendly, leading to improved public relations").

151. Gunningham et al., *supra* note 10, at 319.

152. Standish, *supra* note 124, at 11; *see also* Gunningham et al., *supra* note 10, at 320, n.17 (noting the importance of personal relationships, such as a "plant managers' feelings of personal pride or pressure from friends concerning their

environmentally responsible before being required to be so additionally “gives the company greater credibility with government regulators and thus a greater voice in policy discussions and an opportunity to influence policy outcomes,” such as the set point of any new regulations.<sup>153</sup> Firms who go beyond extant regulatory requirements may well see their permit applications fast-tracked and may avoid future challenges to plant expansions as well as other disruptions caused by environmentalists and the local community.<sup>154</sup> Indeed, Gunningham’s paper mills study reveals that “mills sometimes use compliance with the social license to gain respite from the terms of the regulatory license,” citing one mill manager as saying “[i]f you can sell something to the local community, they will stand in front of the regulators on your side.”<sup>155</sup>

For these reasons, expenditures supporting over-compliance cannot “be viewed as economically irrational”; indeed, in certain circumstances firms would be unwise not to undertake them.<sup>156</sup> But, how many companies will be willing to assume the substantial costs and business risks these CSR activities create, e.g. the “steep learning curve” the company must undertake when it takes early action to regulate an activity that is at present unregulated or under-regulated, as well as “capital costs and potential penalties” for being a “first mover[s],”<sup>157</sup> especially when there is uncertainty about what the agency will actually do?

The perception that businesses gain more from the environmental CSR movement than the public becomes stronger when specific CSR programs, and their design flaws, are examined, as the next part of the article proposes to do.

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plants’ environmental performance” as a motivator of responsible firm environmental behavior).

153. Standish, *supra* note 124, at 11.

154. Gunningham et al., *supra* note 10, at 321; *see also id.* at 323 (pointing out that environmental groups “seek to influence *customer* preferences, sensitizing them to the environmental consequences of the products they buy and urging and orchestrating consumer boycotts”).

155. *See id.* at 331.

156. *Id.* at 321 (noting that this is the obverse of what “an economic rationalist might argue [namely] that firms which overcomply cannot continue to operate in a competitive industry (since firms that comply exactly would underprice them) . . . in certain circumstances, they cannot afford to do otherwise”).

157. Standish, *supra* note 124, at 10.

## V. THREE CSR ENVIRONMENTAL INITIATIVES

Information disclosure, voluntary performance standards, and environmental (or green) management systems (EMSs) are three widely adopted environmental CSR programs. The explicit goal of each is to change corporate behavior so that not only businesses that implement them improve their regulatory compliance records, but also are more willing to go beyond compliance and achieve a higher level of ambient environmental quality than required by law. This part of the article describes the design features of each of these initiatives as well as their flaws in order to determine in the next part of the article how those flaws might be corrected to increase the likelihood that they might achieve their self-proclaimed goals.

A. *Voluntary Information Disclosure*

The idea behind corporate social transparency is corporate accountability about the "social, political, and environmental" impacts of a company's activities.<sup>158</sup> This information can help non-governmental organizations and political activists inform the regulatory process, and can "create the political conditions necessary to enact" additional regulations.<sup>159</sup> Consumers and investors benefit from greater disclosure of a company's environmental performance as it gives them better information on which to base their purchasing<sup>160</sup> and investment choices,<sup>161</sup> and has wider "financial

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158. Cynthia Williams, *Text of Remarks on Panel: "Codes of Conduct and Transparency,"* 24 HASTINGS INT'L & COMP. L. REV. 415, 416 (2000-2001); see also *id.* ("The concept of corporate social transparency is based on the idea that investors and members of society should have consistent, high quality, accurate information available about the social, political and environmental effects of corporate action both here and around the world."). Williams believes so strongly in the value of public disclosure of corporate environmental behavior that she argues for mandatory disclosure. *Id.* at 415. Her principal thesis is that there should be greater "corporate social transparency in the capital markets comparable to the financial transparency that now exists, and that the means to achieve corporate social transparency is to require public reporting companies to disclose more information about the social, political, environmental and human rights implications of their actions" and she argues that this can be done through federal security laws. *Id.*

159. *Id.* at 419.

160. *Id.*



implications” for the company.<sup>162</sup> Facility managers, who know that information on their performance is publicly available, may improve their performance.<sup>163</sup> Information enables companies and their stakeholders to communicate about appropriate norms of corporate environmental behavior, helping executives and managers integrate social and environmental goals into their business plans, thus potentially transforming their business’ culture.<sup>164</sup> And disclosure of information allows for external comparisons among companies and across industries about how well these initiatives are performing on a per company basis, providing incentives to the best performers to do better and the worst performers to improve.<sup>165</sup> Indeed, companies

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161. *Id.* at 418 (“[S]ocial, political and environmental information is material *per se* to socially responsible investors” and “socially screened funds and investments generally are some of the fastest growing sectors of money under management”); *see also* Barnard, *supra* note 77, at 298 (reporting that the 2005 Institutional Investor Summit on Climate risk focused on “the continuing dialog with the SEC about the need for more environmental disclosures”).

162. Williams, *supra* note 158, at 418-19 (citing as an example California Public Employees Retirement Fund’s (the largest such fund in the country) recent decision to “screen all of their international investments for the human rights records of the company in which they were being asked to invest [in]”); *see also id.* at 419 (“expanded social disclosure is necessary to meet the information requirements of [socially responsible investors], and it is useful to economic investors because of the financial implications from how companies manage important social relationships”).

163. *Id.* at 419 (saying there would also be benefits “to the public generally from requiring this disclosure, given the potential effects on managers from acting with the knowledge that the results of their actions are going to be made public,” and citing the positive effect of Proposition 65 and the Toxic Release Inventory).

164. Case, *supra* note 11, at 106 (“Without sufficient information, communication between the organization and societal stakeholders about appropriate norms of corporate environmental behavior cannot occur. Absent such communication, societal environmental goals are not internalized by corporate actors and thus integrated into corporate decision-making. Ultimately, the primary objective of reflexive environmental law approaches, the ‘transformation of business culture,’ will not take place.” (citations omitted)).

165. Gunningham et al., *supra* note 10, at 338-39 (“Explicitly comparative information dramatically increases the social meaning of environmental information because it identifies both the leaders in an environmental arena and the laggards. It therefore provides incentives to the best performers to do better, and to the worst performers to improve because leaders can be rewarded for their excellence while laggards can be punished.”); *see also* Barnard, *supra* note 77, at 313 (“competition is often a good motivator for change,” citing as an example of this “the emergence not only of endorsements from social or ‘green’ investment

may benefit directly "from engaging in the reflective process necessary to collect social and environmental information systematically, evaluate it and make it public."<sup>166</sup> For example, the Carbon Disclosure Project (CDP), which requires its members to post their carbon emissions on the project's website, provides "a roadmap" for businesses enabling them to measure their emissions in comparison with "their peers"; in some cases "persuading companies to change their energy practices well before many governments step in to regulate emissions."<sup>167</sup> If, as Williams says that "'you manage what you measure,' then requiring companies' social, political and environmental impacts to be more precisely measured will help them

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funds but more recently of media 'sustainability' rankings, [which have] for many stimulated a desire for inclusion and visibility"). Barnard cites as examples of "these ranking schemes" "*Fortune*, which "ranks the Fortune Global 100 companies on measures of corporate responsibility and accountability," and *Business Week*, which identifies "a list of top carbon cutters and environmental leaders," noting that "the lure of 'first' or 'best' remains powerful in the corporate world." *Id.* at 314; *see also* Branson, *supra* note 30, at 645 (describing how "[t]he European Union now awards ecolabels (a small flower) to twenty to thirty percent of a product group based upon the lowest environmental impacts in the group. The EU staff reviews the award status every three years"). However, the accuracy of these rankings and comparative schemes depends on the accuracy of the data and the commonality of their metrics and is confounded by the environmental challenges and "social forces" that confront each business as well as the responses to these that each business makes, making comparisons among businesses impossible. Gunningham et al., *supra* note 10, at 310 (discussing the decision to take a "sector-specific approach" rather than looking at business firms in a variety of industries in his study of why businesses go beyond compliance).

166. Williams, *supra* note 158, at 420-21 (citing Ford as an example of a company that identified "numerous ways both to save money and to reduce their environmental impact," "to open "up new channels of communications in the company," and "promote a greater willingness to be self-critical within the company"). Williams considers expanded corporate social transparency "a mechanism of social accounting" the goal of which "is to create a format for social auditing." *Id.* at 416. One virtue of which, according to Branson, is that at least in the form of "process audits," they enabled "corporations to decide for themselves what, beyond profit maximization, was important to them, followed by expenditure of some corporate resources in the directions identified." Branson, *supra* note 30, at 614 ("[o]ver time, as employees, managers, and shareholders reacted to annual social audit results, the mix of corporate social responsibility activities might change, with some sort of equilibrium being reached").

167. Leslie Kaufman, *By Degrees: Coming Clean About Carbon*, N.Y. TIMES, Dec. 29, 2009, at B1.

to be more intelligently managed. . . . In some cases this will even enhance profitability.”<sup>168</sup>

Some, like David Case, believe that “[i]nformation has emerged as a potential success story in the search for effective and efficient alternatives to traditional environmental regulatory approaches.”<sup>169</sup> He contends that empirical research, although limited, shows that the disclosure of information about a company’s performance can improve the performance of regulated firms, in part because the information can be used “to enlist the aid of social institutions such as economic markets and public opinion to create incentives for firms to engage in self-regulatory behavior.”<sup>170</sup>

Despite the public benefits from companies collecting and publicly disclosing information about their environmental performance and the importance of doing this to change corporate culture,<sup>171</sup> many companies lack the incentives to gather and then publicly disclose information that might improve their environmental performance,<sup>172</sup> as discussed in greater detail in Part V. Hence the appearance of CSR information disclosure programs to encourage this happening.

There are several public and private initiatives that encourage, in some cases require, businesses to report to the public on their performance. For example, EPA’s Project XL and the Environmental Leadership Program “make corporate reporting to and consultation with local communities a condition of providing a facility greater regulatory flexibility.”<sup>173</sup> Examples of private reporting initiatives include the Business Roundtable’s “SEE Change” Initiative.<sup>174</sup> That program reports on “some of the resource consumption reductions of

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168. Williams, *supra* note 158, at 421.

169. Case, *supra* note 11, at 101.

170. *Id.* at 100; *see also id.* at 109 (one of “the most significant potential driver[s] of corporate environmental behavioral change . . . may be the opportunity to link the substantial information-generating capabilities of formal EMSs [environmental management systems] with public information disclosure mechanisms”); discussion *infra* Part V.C.

171. Case, *supra* note 11, at 103-04 (“investment in the generation of information on environmental impacts, risks, and performance alternatives is the ‘key’ to internal, management-directed corporate behavioral change”).

172. *Id.* at 103 (“Firms may lack adequate incentives to gather information necessary to identify opportunities to improve environmental performance.”).

173. Gunningham et al., *supra* note 10, at 338.

174. Barnard, *supra* note 76, at 299. SEE “stands for changes in ‘social environmental and economic priorities.’” *Id.*

major companies like DuPont, as well as Ford and General Motors' commitment to develop ethanol fueled vehicles, Dell Computer's commitment to increasing "product take-back' by fifty percent," Sony's green procurement program, and Citigroup's commitment to reduce greenhouse gas emissions globally by 10% by 2011.<sup>175</sup> In 2009, the National Association of Insurance Commissioners adopted internal rules requiring member companies to report on how global climate change affects their businesses decisions.<sup>176</sup> Under these rules, starting May 2010, insurers must "publicly disclose climate risks to regulators and shareholders."<sup>177</sup>

There are also a variety of voluntary private international reporting programs, such as, CERES<sup>178</sup> Report on "Value at Risk" and the "Global Reporting Initiative," which is a collaborative effort between CERES and United Nations Environmental Program (UNEP) setting out guidelines for reporting on environmental and other indicators.<sup>179</sup> The Carbon Disclosure Project (CDP) is another private voluntary international reporting program administered by a small London nonprofit organization whose members disclose their carbon releases on the project's website.<sup>180</sup> CDP persuaded major investors like the California pension program (CALSTRS), the second largest pension program in the country, and Bank of America Merrill Lynch to co-sign letters on the Project's behalf encouraging other companies to

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175. *Id.* at 300.

176. Joel Kirkland, *Risk: SEC to Take Up Climate Disclosure*, CLIMATEWIRE, Jan. 25, 2010, at 1, available at <http://www.eenews.net/climatewire/2010/01/25/5/>.

177. *Id.*

178. CERES is a coalition of "primarily American social investors, foundations, and environmental activists." Barnard, *supra* note 77, at 292.

179. *Id.* at 292-301. Ceres just released a new report, *Corporate Reporting on Water Risk: A Benchmark Study of 100 Companies*, which was prepared for the Investor Network on climate Risk. The industry sectors, in which Ceres studied and evaluated the performance of individual firms, included the beverage, chemical, electric power, food, home building, mining, oil and gas, and semiconductor industries. The report concluded that companies should disclose more information about overall water use and scarcity concerns because of the enormity of the "growing global challenge" to water supplies from climate change, and propose strategies for responding to these risks well beyond "the vague boilerplate language" that appears in annual reports. See Linder Roeder, *Companies Facing Water Scarcity Problems Fail in Disclosing Investor Risk, Report Says*, 41 ELR 384 (Feb. 19, 2010). A full copy of the report can be found at <http://www.ceres.org>.

180. Kaufman, *supra* note 167.

participate in it.<sup>181</sup> One reason for that program's apparent success with investors is that it "sends a message that a company that moves to curb emissions now is girded for the future and therefore worthy of investment."<sup>182</sup>

Despite the belief of some investors and company executives that until carbon emissions are regulated, "voluntary reporting programs like the Carbon Disclosure Project may be the best way to leverage market forces to change,"<sup>183</sup> there are major flaws with these types of disclosure initiatives. For example, critics of CDP complain that there are no requirements to verify emission numbers reported to CDP through external audits, unlike the audits of financial numbers disclosed by publicly traded companies, that the program rewards companies that would have reduced carbon emissions anyway, and that it has no influence over companies that do not participate.<sup>184</sup> Even the founder of the CDP acknowledges that the project, while a "frictionless path toward reining in emissions," "is no substitute for muscular government regulation."<sup>185</sup> As is true with many programs that simply require disclosure of information, there are no follow-up requirements, like a demand, let alone a suggestion that emissions be reduced, if high levels are revealed, and there are no sanctions for failing to disclose information under any of these programs or for reporting inaccurate information. As one critic complained, "[t]here's disclosure, and then so what," comparing the project's request that companies report on their emissions performance to

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181. *Id.*; see also Nathaniel Gronewold, *Big Companies Push More Suppliers to Track Emissions*, CLIMATEWIRE (Feb. 2, 2010) (saying that CDP reports that "[t]he number of corporations pushing greenhouse gas emissions reporting and reduction strategies onto their suppliers is quickly growing and will likely triple in the next five years").

182. Kaufman, *supra* note 167; see also *id.* ("With the regulatory framework changing, how companies handle carbon is a core risk factor . . . . Smart companies will take C.D.P. information and realign their strategies." (quoting Jack Ehnes)).

183. Kaufman, *supra* note 146; see also *id.* (reporting that CDP's founder has "real confidence that the corporations of the world are going to outperform government in terms of dealing with climate change . . . . In fact, they are already."); *id.* (reporting on one executive of a major investment company comparing the CDP "to the advent of general accounting principles, which enabled investors to compare financial performance and move dollars accordingly").

184. *Id.*

185. *Id.*

dipping a "toe in the water . . . but not very far."<sup>186</sup> It appears that the concept of environmental "corporate social accountability," which has as its touchstone information disclosure, does not do much. At most, it imposes only a flawed duty of "enhanced disclosure" on companies about their environmental performance; even then, it only "expands the list of items" that large companies must disclose under federal securities law.<sup>187</sup>

Even assuming for a moment that a company's reluctance to publicize its poor environmental record when threatened with external disclosure may lead it to behave better, this type of behavior moderating influence depends on managers believing in the likelihood of enforcement<sup>188</sup> or even that their stakeholders will sanction them if they are caught, both of which appear unlikely. This behavioral change, if it occurs, Gunningham says, happens as an exercise in risk management because "[f]acility and company managers believe that not meeting the requirements of the social license will ultimately result in increased regulation or greater economic costs to the company."<sup>189</sup> However, the accuracy of the company's assessment of risks depends on the accuracy of the data informing the process, how risks are discounted, and how various

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186. Kaufman, *supra* note 146 (quoting a co-founder of a financial research firm that gathered information for the CDP); *see also id.* (reporting some companies complain that "reporting is cumbersome and could allow competitors to learn too much about their manufacturing processes").

187. Testy, *supra* note 2, at 1235 (saying corporate social accountability "avoids imposing substantive duties on corporations other than one of enhanced disclosure. Because large public corporations are already under substantial duties of disclosure under federal securities laws, this does not add a duty as much as it expands the list of items that are subject to it").

188. *See* discussion, *supra* Part II.

189. *Id.* at 336 (noting, however, although "the extent to which they believe this and their estimates of costs might vary"); *see also id.* at 326 (describing a firm's positive response to social license demands as "risk management, quoting one senior corporate officer as saying "[w]e became responsible environmental stewards because it's not in our financial interest to risk operations being closed down," and another as saying "[a]nything that could give you a bad name is an unpredictable risk").

factors are weighted.<sup>190</sup> Thus, at any given facility or at any given point in time the assessment of future risks may change.<sup>191</sup>

“Only if disclosure convinces investors not to become shareholders, workers not to become employees, and communities not to become hosts will it have the requisite effect”<sup>192</sup> on corporate behavior. But, information can be an imperfect motivator of corporate behavior to the extent that it depends on a business’ stakeholders’ ability to understand and react to that information in the form of a social demand.<sup>193</sup> “[S]ocial actors must be able to determine that a harm has or might well occur and must also have the organization competence to develop and effectively articulate demands to address the harm.”<sup>194</sup> Some environmental harms “are less detectable or harder to trace to particular businesses. . . . [E]ven if those data are available, much depends on the social interpretation of their meaning.”<sup>195</sup> The public has problems understanding,

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190. *Id.* at 336 (noting that “the extent to which they believe this and their estimates of costs might vary”); see Babcock, *Assuming Responsibility*, *supra* note 5, at 126-27 (discussing how cognitive dissonance plays a role in assessing risk).

191. Gunningham et al., *supra* note 10, at 336.

192. See Testy, *supra* note 2, at 1245-46 (noting in addition that “this theory depends on a strong presumption that all of those groups have a choice”).

193. See *id.* at 1236 (saying for the corporate social “accountability [approach] to work, the information must make its way to the market in a manner that allows for its incorporation and dissemination there. Moreover, market participants must be willing and able to access that information and to act upon it”); see also Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 *CAP. U. L. REV.* 21, 136 (2001) (“Information strategies rely entirely on stakeholders to act on the information.”).

194. Gunningham et al., *supra* note 10, at 332; see also *id.* at 325 (noting that the unpredictability and lack of knowledge about health effects can give “rise to uncertain public expectations”); Stewart, *supra* note 193, at 141 (“Even if perfectly collected and disseminated, [information as a regulatory tool] depends on the willingness and ability of individuals to properly process the information provided accurately and act on it. People have limited time, energy, and attention.”).

195. Gunningham et al., *supra* note 10, at 332; see also Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 166-70 (discussing the problems relying solely on information to motivate personal behavior); see also Babcock, *Responsible Environmental Behavior*, *supra* note 5, at 957-63 (discussing ineffectiveness of smart meters to the extent they rely on information to motivate behavioral change); Stewart, *supra* note 193, at 141 (“Environmental problems are inherently complex and are often characterized by significant uncertainties. Yet, efforts to communicate fully such complexities and uncertainties would produce information overload, leading people to simply disregard or discount the

correctly interpreting, and then determining a course of action based on something that they have read or heard about an environmental risk.<sup>196</sup> Serious cognitive dissonance comes into play when the information pertains to a future risk, even if the risk is of catastrophic harm.<sup>197</sup> The seriousness of the harm, even the question whether it exists or not, "may also be contested."<sup>198</sup> "[T]he ability to come to an agreement as to what the harm is and what the appropriate demands in response to it should be requires a degree of organizational competence that may be absent in more marginal, disorganized communities," like low income and some minority communities.<sup>199</sup> "[O]nce developed, demands must be articulated in a manner that encourages other social, legal, and economic actors to understand and respond to them. Incompetent articulation of demands can result in delegitimation of social demands as extremist or irrational, and poor communities can be disadvantaged in this regard too."<sup>200</sup> If the information they receive motivates them to take steps to avoid the disclosed harms, like boycotting goods produced by a company with a blemished environmental performance record, unless the aversive action is costless or only of minimal cost and inconvenience, studies show that if indeed the public does react, that reaction will be short lived.<sup>201</sup>

There are also a variety of extraneous factors, which can limit the strength of a company's social license, regardless of what its

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communication or distort it through simplification."); Testy, *supra* note 2, at 1246 ("[S]ignificant concerns remain as to whether even required disclosures reach those groups in a manner in which they can be understood").

196. Stewart, *supra* note 193, at 141 ("[P]eople use heuristics, including those based on their prior experiences, to process information and deal with uncertainty. Their perceptions of risks are affected by socioeconomic variables, and by their psychological saliency and accessibility may produce significant distortions").

197. Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 870-75 (2005) (explaining that people usually treat the risk of even a catastrophic harm "as essentially zero," and are reluctant to take precautionary steps, especially when the benefits of doing so "will not be enjoyed until decades later").

198. Gunningham et al., *supra* note 10, at 334.

199. *Id.* at 333.

200. *Id.*; see also *id.* at 332 ("[L]egal and political actors must be reasonably responsive to social actors' demands; that is, they must see the demands of social actors as both important and legitimate."); *id.* at 333 ("[W]here agencies have been captured by industry, the demands of social actors may go unheeded.").

201. Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 156-59.



stakeholders learn about the company's performance. Examples of such factors are the community's dependence on the local company ("the company town syndrome")<sup>202</sup> that is causing the environmental harm,<sup>203</sup> the serendipity of which issues revealed by disclosure will motivate a community to put pressure on that company to reform its behavior, and whether alliances form with more sophisticated, politically powerful outside groups.<sup>204</sup> A company's size and ability to withstand sales losses can determine how responsive it will be to social pressure to reform its environmental behavior generated by disclosure of some negative information.<sup>205</sup> Companies can mute negative information by "buying off" the local community's objections" through providing some desired amenity, like a town park or community center, or "by trying to 'win the hearts and minds' through public relations campaigns in local schools and with local community organizations."<sup>206</sup>

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202. Gunningham et al., *supra* note 10, at 333 ("[t]he imbalance of *economic* power between companies and local communities may also weaken social license pressures," citing as an example "the company town syndrome").

203. *Id.* at 324 ("the pressure on a company to be environmental responsible will be substantially less when the community is dependent on the industry that is causing the environmental problems").

204. *Id.* at 325 (saying it is hard to predict which issues "will concern nearby residents, the special interest groups that will form in a particular location, the strength of those groups, and the alliances they may make," any one of which can influence the strength of local pressure on a company to reform its environmental behavior). Gunningham also describes the problem that outlier opponents of a particular company might sue or cause other problems, or a national environmental group might demand additional changes to some negotiated agreement between a facility and a local community or environmental group. *Id.* at 326. Either of these events could disrupt whatever fragile accommodation the community has made with a local firm to gain some improvement in its environmental performance. But Testy probably would denounce these local arrangements to the extent that "the redesign efforts accept the values and goals of the structures they seek to alter, then the new corporate responsibility movement risks becoming domesticated and failing to mount a significant challenge to the status quo." Testy, *supra* note 2, at 1229-30.

205. Gunningham et al., *supra* note 10, at 324-25 n.23 (noting that the "laggard mill," *i.e.* one not responsive to social pressure "was part of a larger corporation with more economic depth" than the one that was more responsive).

206. *Id.* at 326. Gunningham also worries that while programs which enhance the procedural power of social actors, like those that require firms "to respond formally to community concerns" or trigger judicial review, can influence a corporation's environmental behavior, they run the risk of being "hijacked by small

In the final analysis, while the public disclosure of a company's environmental performance may be of sufficient importance to warrant the development of programs to encourage its happening, the flaws in those programs and the constraints on the company's stakeholders to use that information to improve the company's performance makes information as a motivator of improved corporate environmental behavior problematic at best. These programs also do little to inculcate an environmental ethic into the corporate mindset.<sup>207</sup>

### B. Voluntary Performance Standards

Voluntary performance standards can be sponsored by the government, like EPA's National Environmental Performance Track Program,<sup>208</sup> or by industry trade association, like the chemical industries' Responsible Care Program and the forest product industry's Sustainable Forestry Initiative; and can be undertaken by individual companies.<sup>209</sup> The intent behind EPA's Environmental Performance Track is to identify and recognize those corporate leaders with the best environmental records.<sup>210</sup> Both government and industry trade association programs encourage companies to commit to improve their environmental performance by applying environmental performance standards. Industry trade associations require companies who participate in their programs to "commit to environmental performance standards, usually stated qualitatively rather than quantitatively, as a condition of membership in the

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extremist elements, able to delay actions that most in the community or the country support," or "by "well-meaning incompetents, more concerned with phantom threats than real ones, or with impossibly expensive demands." *Id.* at 337-38. However, he notes that either scenario would "encourage companies to invest in community relations" and thus gain "sufficient reputational capital" to counteract these possibilities from occurring). *Id.* at 338.

207. Testy, *supra* note 2, at 1236 (saying the social accountability approach only gives "[p]ower to the shareholders, not principles for the managers").

208. According to Robin Bravender, EPA operated 46 voluntary programs in 2008, half of which were administered out of EPA's air office. Bravender, *supra* note 4.

209. Strasser, *supra* note 134, at 546-47.

210. *Id.* at 546-47 (containing a description of the program).

sponsoring organization,”<sup>211</sup> unlike EPA which uses quantitative metrics.<sup>212</sup> Participants receive awards, offers of technical assistance and advice, and, with respect to EPA’s programs, in some cases, fewer regulatory inspections.<sup>213</sup> As companies who perform well are publicly recognized, they and their industries receive a public relations benefit of an improved environmental image.<sup>214</sup> Occasionally, companies on their own adopt performance standards committing to a specific level of environmental performance beyond what is required.<sup>215</sup> Although the latter type of voluntary performance standards appears to be increasing, there are no studies of their effectiveness.<sup>216</sup> However, there are many studies of government and trade association sponsored performance standards programs, the results of which almost uniformly show that they “are not associated with better environmental performance.”<sup>217</sup>

The consensus explanation of why programs like the chemical industry’s Responsible Care<sup>218</sup> and EPA’s Sustainable Slopes

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211. *Id.* at 547 (discussing trade association voluntary performance standards programs).

212. *Id.* at 546-47 (“Participants [in Performance Track] make a commitment to environmental performance improvement as measured by one or more specific metrics . . . [which] require quantified improvement in some aspect of performance.”).

213. *Id.*

214. *Id.* at 547.

215. *Id.* (discussing company specific voluntary performance standards programs).

216. *Id.* (saying so far, there has been “no systematic empirical evaluation of their environmental performance effects”).

217. *Id.* at 548. This part of the article is largely dependent on Kurt Strasser’s analysis of these programs. Strasser apparently did not study the effectiveness of the Equator Principles (international banks framework of evaluating debt financing of major public and private projects) or the financing principles adopted by three major US banks (Citigroup, Bank of America, JPMorgan Chase & Co), which embrace some elements of the Equator principles, Investor Network on Climate Risk (CERES & UN Foundation) programs that Barnard listed as indicative of the fact that corporate environmental responsibility is becoming more of a fact in corporate life. Barnard, *supra* note 77, at 291.

218. Strasser, *supra* note 134, at 548-49 (saying authors of a “study of the chemical industry’s Responsible Care program” hypothesized that its ineffectiveness was the result of the program not requiring either “monitoring nor enforcement”).

Program,<sup>219</sup> intended to encourage ski areas to voluntarily improve their environmental performance, failed so spectacularly is the absence of effective monitoring and sanctions.<sup>220</sup> Firms that joined such programs actually performed at a lower level than the average performance level of their industry.<sup>221</sup> Weak standards are another problem and explain why participants in EPA's Strategic Goals program for the metal finishing industry reduced their toxic emissions<sup>222</sup> – there, the standards were lower than those set by the industry's best practices group.<sup>223</sup> Companies can join government or trade association sponsored voluntary performance standards programs "without either a demonstrated history of real environmental effort or a real contemporary commitment to sustained environmental improvement in the future."<sup>224</sup> Some studies show that companies who join these programs early might well improve their performance because "as a group, they had undertaken more emission reduction efforts prior to joining, and they were subject to greater political pressure regarding their emissions."<sup>225</sup> However, these favorable results for early joiners are often "swamped by a larger group of free riders who subsequently join."<sup>226</sup>

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219. *Id.* at 549 (saying a study hypothesized that "the program's poor results flowed from its lack of either third-party monitoring or sanctions for violations").

220. *Id.* at 553.

221. *Id.* at 553-54 (citing the chemical industries' Responsible Care program as an example of such a program). Strasser interestingly found that companies that pollute less join programs that monitor and sanction violators with expulsion, like the forest products industry's Sustainable Forestry program. One conclusion that Strasser draws from this last study is that program design can be extremely important to its effectiveness. *Id.* at 554 (saying the study also showed that "firms choose programs" in which they are going to participate and that "program design may be quite important to observed environmental performance results").

222. *Id.* at 552-53.

223. *Id.* at 553 n.67 (also noting that the "program back dated its baseline performance period . . . in effect counting as improvements many gains that were achieved before the Strategic Goals Program began"). Strasser also notes that the program was discontinued because of low participation and failure to meet the program's overall goals. *Id.* at 553.

224. *Id.* at 553 ("When real effort is required to improve environmental performance, there is insufficient company commitment for the program to succeed.").

225. *Id.* at 551.

226. *Id.*

Data on their effectiveness also strongly suggest that “participation in voluntary programs depends to a considerable extent on the existence of a regulatory framework that would impose penalties on firms that do not undertake proactive measures for self-regulation.”<sup>227</sup> In other words, companies only participate in voluntary performance standards programs if they think they are avoiding a specific regulatory hammer, not because their corporate environmental culture has changed. For example, a study evaluating the Department of Energy’s Climate Challenge program reported that “voluntarism seems to either have no effect . . . or to contribute negatively to emission reductions.”<sup>228</sup> The authors of the study “hypothesized that the weak regulatory program for CO<sub>2</sub> emissions was the culprit, making emissions reduction an environmental performance criterion that did not receive serious attention by the companies.”<sup>229</sup> As Kurt Strasser notes, if “this hypothesis is correct, it substantially undercuts the idea that voluntary programs can improve environmental performance beyond regulatory requirements.”<sup>230</sup> Similarly, “firms were more likely to join EPA’s 33/50 voluntary [standards] program when confronted with the prospect of regulatory controls as an alternative.”<sup>231</sup> A study of this latter program concluded that “[e]xpected gains due to public recognition and technical assistance offered by the program and the potential to avoid liabilities and high costs of compliance in the future under mandatory environmental regulations provided incentives for participation in the program.”<sup>232</sup> One obvious conclusion that can be drawn from both the Climate

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227. *Id.* at 552 (citations omitted); *see also* Gronewold, *supra* note 181, at 1 (The CDP reports that “the vast majority of companies are still waiting for governments to come up with new domestic and international carbon control regimes before making any longer-term commitments of their own,” and saying further that, “[f]ear of future regulation still seems to be the determining factor in cases where smaller supply chain companies are following their major corporate customers in paying attention to greenhouse gas output.”); Flatt, *supra* note 23, at 463 (“it seems that public-private programs” can only work when there is a “threat of enforcement or regulation, or some other incentive to comply;” a conclusion that “does not bode well for the idea that the private sector can be trusted to accomplish environmental policy initiatives without oversight”).

228. Strasser, *supra* note 134, at 548.

229. *Id.*

230. *Id.*

231. *Id.* at 551.

232. *Id.* at 552.

Challenge and EPA 30/50 program is that "[v]oluntary programs are likely to be less effective without the backstop of mandatory regulation."<sup>233</sup> EPA's Performance Track Program fared no better according to an Inspector General's study of some of the companies in the program.<sup>234</sup> This is a "particularly discouraging [result] for a program that . . . consciously targeted environmental leaders."<sup>235</sup>

After reviewing the empirical data on the effectiveness of government and industry-sponsored voluntary performance standards programs, Strasser advocates a "go slow posture" towards their inclusion in "public regulatory system for containing environmental risks" because the data are not yet there to support that they actually improve a company's environmental performance.<sup>236</sup> At minimum, he suggests that their design should be improved with the inclusion of "real monitoring and performance sanctions."<sup>237</sup> Flatt is highly critical of voluntary performance standards, finding that "[t]he record for pure voluntary compliance or compliance without enforcement oversight from any level of government is abysmal."<sup>238</sup> Given the failure of social norms to induce compliance with regulatory requirements, let alone move beyond compliance, the likelihood that these flawed voluntary performance standards programs without

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233. *Id.*; see also Case, *supra* note 11, at 111 ("[L]egal mandates, rather than market forces or voluntary self-regulatory behavior, are often the most important motivation underlying corporate environmental behavior.").

234. Strasser, *supra* note 134, at 549.

235. *Id.* at 550. Perhaps this is why one of the first things the new Administrator of EPA, Lisa Jackson did was to halt the Performance Track Program, which environmentalists had condemned "as a public relations stunt." Bravender, *supra* note 4, at 1. Indeed, the agency announced that it may reduce a number of its voluntary programs and divert the resources supporting them to the agency's regulatory efforts. *Id.* (reporting that Assistant Administrator for Air, Gina McCarthy, said that "I believe that we've made tremendous progress with the voluntary programs, but if we're going to begin to regulate more effectively, some of the voluntary programs may no longer be the priority issues and we may want to shift resources").

236. Strasser, *supra* note 134, at 555 (advocating a policy of "benign neglect").

237. *Id.*

238. Flatt, *supra* note 23, at 462 (at best "[t]he record of engaging the private sector on environmental protection other than as a regulated entity shows mixed success").

additional incentives will improve the environmental performance of businesses seems extremely unlikely.<sup>239</sup>

### C. Environmental Management Systems

Environmental management systems (EMSs) seem to hold out the greatest promise of actually reforming corporate behavior because they work within and make adjustments to the corporation's existing organizational structure so that the company can do a better job of minimizing the environmental impacts of its activities.<sup>240</sup> Because successful implementation of EMSs requires that the entire program be integrated into "the company's existing internal governance systems," making it part and parcel of "all other primary corporate functions,"<sup>241</sup> they "can have a fundamentally transformative effect on a firm's organizational architecture and culture."<sup>242</sup> Companies

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239. *Id.* at 465 ("environmental programs that are purely voluntary, with no other incentives, seem unable to depend on social norms alone to create compliance," which makes them problematic").

240. Case, *supra* note 11, at 86 (an EMS can be thought of as "process established to manage, control and minimize the environmental impact and effects of an organization's activities and operations"); *see also id.* at 78 (defining an EMS as "[a] regulatory strategy to encourage or mandate adoption of EMSs seeks to change the behavior of organizations through the use of basic management practices in order to 'align their actions and outcomes with broader [environmental protection] objectives'"). For this reason, they are "included within a 'family of legal instruments that reflect an emerging . . . 'reflexive law' conception of regulation," the underlying theory of which "argues that complex social problems caused or exacerbated by business activities are often beyond the capacity of legal institutions alone to satisfactorily resolve." *Id.* at 105. Since "'the complexity of environmental problems undermines both command and control and market mechanisms as regulatory tools' . . . 'fundamental structural change in the everyday life of business institutions' is necessary to overcome the limitations of traditional regulatory methods to induce socially desirable behavior." *Id.* at 105-06. "Reflexive law strategies seek to shift regulatory efforts away from direct regulation of firm behavior towards creation of structural processes that promote self-regulatory behavior. These structural processes are intended to stimulate communication between firms and societal stakeholders creating incentives for corporate internalization of important societal norms." *Id.* at 106.

241. *Id.* at 101.

242. *Id.* (saying that this should result in "cultural changes" in the corporation's behavior that "will beneficially impact the firm's environmental performance and outcomes"); *Id.* at 101-02 ("the very nature of EMS design and implementation is to 'embark on a prolonged and fundamental program[] of [organizational] change.'")

like EMS programs because they involve "the application of well-accepted business principles to environmental protection," which may explain why industry is their biggest proponent.<sup>243</sup> EMS programs can help companies avoid serious penalties, including criminal penalties against their executives and managers,<sup>244</sup> help promote a model of industry self-regulation, especially attractive to companies in heavily regulated industries,<sup>245</sup> possibly help protect against more stringent regulations,<sup>246</sup> and help them gain reputational benefits from being able to signal to their stakeholders, also the media, that they are an environmentally responsible company and their products and production processes are to be trusted.<sup>247</sup> These green management programs can also help a company coordinate environmental management across separate business units, which can

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Thus, a 'fully operational' EMS is expected to 'exert a powerful influence' over the perceptions, actions and decision-making of managers and employees" (alteration in original)).

243. *Id.* at 86 ("much of the momentum towards the widespread adoption of voluntary, formal EMSs has been industry-driven"); *see also id.* at 87 (noting that several prominent industry trade associations have required their members to adopt environmental practices codes, such as those found in American Chemistry Council's *Responsible Care* program and in the American Petroleum Institute's *Strategies for Today's Environmental Partnership* program). Given the problems with the *Responsible Care* Program, this may not be advancing the environmental performance of those companies much.

244. *Id.* at 91-92 (saying also that another incentive for a company adopting a self-auditing program as part of its EMS is the possible "waiver "of civil and criminal penalties for regulatory violations discovered through regular environmental audits if self-reported and promptly corrected."); *see also id.* at 92-93 (saying that the presence of an EMS can influence prosecutorial discretion as to whether to bring criminal enforcement action or use it as potential mitigation at sentencing). *But see* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271 (2008-09) (generally arguing against the use of criminal sanctions against business entities because of the collateral damage such penalties can have and because entity criminal liability can work against companies engaging in *ex ante* monitoring to detect violations).

245. *Case, supra* note 11, at 95.

246. *Id.* at 96 (such industries hope to use EMSs to "'preempt more stringent environmental regulation,' as well as to encourage consideration of self-regulation through formal EMSs as a viable alternative to government regulation").

247. *Id.* (saying "not to be ignored are "market pressures from consumers, customers, and competitors, as well as social pressures, developed through 'environmental groups, citizen groups and the media'").



lead to “innovation” and “unexpected efficiencies,”<sup>248</sup> even to “immediate and direct cost savings.”<sup>249</sup>

But, adopting an EMS program can be a major time consuming, resource intensive, expensive undertaking, involving all levels of the company<sup>250</sup> that few companies are willing to take seriously.<sup>251</sup> Studies reveal that few of these programs establish goals beyond what the company is already achieving, few require monitoring or public disclosure of how they are working, and few impose sanctions.<sup>252</sup> Not surprisingly, these design lapses make the record of regulatory compliance by individual companies with EMS programs

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248. Standish, *supra* note 124, at 11.

249. Strasser, *supra* note 134, at 542. *But see id.* at 543 (expressing the concern that “such “performance improvements may be a one-time result of directed management attention, rather than an indicator of future improvements”).

250. Case, *supra* note 11, at 102 (“employees at all levels, from top management to front line workers” must be “involved in design and implementation of the EMS”); *see also id.* (“the existing attitudes and commitments of firm managers towards environmental concerns may well be an independent variable affecting the ability of formal EMSs to induce positive corporate behavioral change”); Strasser, *supra* note 134, at 545 (Gunningham’s study of paper mills seems to confirm that result in that “the style of environmental management was the most important factor [in companies going beyond regulatory compliance], more important that the national regulatory regime, the mill’s corporate size, or it earning”).

251. Case, *supra* note 11, at 89-90 (explaining that some elements of an effective EMS program include: (1) “a written environmental policy. . . ;(2) a process for identifying the ‘environmental aspects and impacts of [the organization’s] operations,” which should include applicable regulatory requirements; (3) a system for establishing “priorities, objectives, and ‘targets for continuous improvement’” in the company’s environmental performance “based on ‘the environmental aspects and impacts’” of its operations. This system should: (1) “create an organizational understanding of what implementation of the EMS is expected to achieve;” (2) “assign clear responsibilities for [system] implementation, training, monitoring [system performance, and [for the undertaking of] corrective action;” and (3) provide for “a process of periodic evaluation and refinement”).

252. *See* Case, *supra* note 11, at 89 (listing as important to the effectiveness of EMSs “the ambitiousness of the environmental objectives” managers are required to establish, the level of monitoring required, whether meaningful sanctions are imposed on companies that either do not perform well or that have weak ineffective programs, and “the transparency of the EMS and of the organization’s performance to the public”). *See generally* Strasser, *supra* note 134 (describing and evaluating environmental management systems and voluntary performance standards).

poor.<sup>253</sup> While there are some data about the possible effectiveness of EMS programs,<sup>254</sup> there is not yet a robust empirical answer to whether implementing one actually improves a company's record of regulatory compliance.<sup>255</sup> With respect to making a company's production processes greener and encouraging it to produce greener products, one study concluded that the rigidity and specificity of EMS programs impeded a company from engaging in this "turbulent process."<sup>256</sup>

Case warns that "the promise of an EMS-based approach to environmental regulatory reform should not be overblown. Not

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253. Strasser, *supra* note 134, at 546 (noting that while EMS programs "are generally associated with better environmental performance on regulated discharges and on nonregulated resource use," the record of regulatory compliance by specific companies that have implemented them is decidedly "less positive"). Strasser also notes that EMS programs are not generally responsible for the production of greener products or processes. *Id.* at 543.

254. *Id.* at 540; *see also id.* at 537 ("[m]ost of the empirical studies find that implementation of an EMS is associated with better performance on regulated discharges"); *id.* (reporting that a leading study by the National Database on Environmental Management Systems found that the "introduction of an EMS can be expected to be at least somewhat beneficial to the environmental performance of most facilities, as well as to their operating and management efficiencies, and in some cases to their regulatory compliance patterns" (quoting NAT'L DATABASE ON ENVTL. MGMT., SYS., DEPT. OF PUB. POLICY, UNIV. OF N.C. AT CHAPEL HILL, ENVIRONMENTAL MANAGEMENT SYSTEMS: DO THEY IMPROVE PERFORMANCE?, PROJECT FINAL REPORT, EXECUTIVE SUMMARY, at ES-25 (2003))).

255. Strasser, *supra* note 134, at 541-42 ("while currently there is a significant amount of intriguing data, a workable empirical answer to whether implementing an EMS is associated with improved regulatory compliance is not yet available"). Strasser does note that "[f]irms with more comprehensive EMSs tended to have greater improvement in overall environmental performance." *Id.* at 538; *see also id.* at 539-40 (reporting that on two studies that "found that EMS adoption was the important factor for environmental performance, and that certification [for ISO compliance] was not associated with further improvements" because certification of compliance with the [ISO] standard "is done primarily as a representation to the outside stakeholders, while it is adoption of the EMS that actually impacts performance").

256. *Id.* at 544. Strasser finds this conclusion unsurprising because of the "individual and institutional thinking required for far-reaching product redesign innovation," and because "[t]he focus of attention in implementing an EMS is on the particular facility, because it is within a particular facility that most of the real work for an EMS takes place;" whereas the changes required to innovate a production line or process are more likely to be companywide. *Id.*

nearly enough is known about potential causal links between formal EMS implementation and corporate environmental performance improvements, or whether the social benefits of EMS-based strategies will exceed their social cost.”<sup>257</sup> The data do, however, make clear that green management programs should never be considered a substitute for “direct legal controls on corporate environmental behavior.”<sup>258</sup>

Studies of each of the three environmental CSR initiatives – information disclosure, voluntary performance standards, and EMS programs – not only show that they have been largely ineffective, but also that they have significant design flaws.<sup>259</sup> These design flaws may explain why their benefits inure more to businesses than to society as a whole and why they appear to be “pseudo events” and not reflective of a “true paradigm shift” in corporate behavior.<sup>260</sup> The record with EMS programs on improving a firm’s regulatory compliance is probably the clearest and most positive. Yet even it yields conflicting results.

Assuming for a moment that there might be a public benefit in properly designed environmental CSR programs, the next part of the article identifies what such design changes might look like. It concludes, however, that no matter how these three initiatives are improved unless they are made mandatory and thus enforceable by the government or third parties, they will not reform corporate behavior. How that might be done is the subject of the last part of the article.

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257. Case, *supra* note 11, at 109.

258. *Id.* (“[a]n EMS-based regulatory strategy is unlikely to ever be a feasible substitute for direct legal controls on corporate environmental behavior”).

259. See Kenny, *supra* note 139, at 459 (saying with respect to corporate codes of conduct that the principal criticisms against them are that they are “self-imposed, self-regulated, and voluntary, and thus lacked a definitive enforcement mechanism”); *id.* at 458 (“[T]here is no neutral party to ‘blow the whistle on human rights violations’ and therefore, no assurance that the monitors will not be unduly influenced by corporate pressure on inspection reports. As a result, many similarly situated external codes have been largely ineffective.”).

260. Barnard, *supra* note 1, at 291.

## VI. WAYS TO REDESIGN ENVIRONMENTAL CSR PROGRAMS TO BE MORE EFFECTIVE

Given the problems with environmental regulations and their enforcement, it may well be that effective environmental CSR initiatives could fill current regulatory gaps and provide a more pervasive and higher level of protection from harm than the current programs do. Therefore, it is worth examining whether these initiatives can be redesigned to serve as a useful supplement to existing regulatory requirements. The review of CSR initiatives in the previous part of this article indicates that there are three major areas for improvement: self-audits of the effectiveness of CSR initiatives, public disclosure of the results of those audits, and sanctions for companies, their employees and officers, who promise to undertake a CSR initiative and then fail to do so, or only support the initiative in a half-hearted way.<sup>261</sup> However, a closer look at the cost-benefit balance that a company will engage in before it obligates itself to make these changes without fail tilts towards the company doing nothing.

### *A. Require Monitoring (Auditing) of Corporate Implementation of CSR Initiatives*

One of the frequent criticisms of CSR initiatives is that companies, or better yet outside neutral observers, do not systematically monitor their implementation or performance.<sup>262</sup> Thus, there is no way for the

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261. Beyond the scope of this article are proposals to change the structure of corporations, such as the team production model (TPM) proposed by my former colleagues Lynn Stout and Margaret Blair. Their ideal corporate model "conceptualizes corporate participants – including managers, shareholders, employees, creditors, and local communities – as a team" that distributes "the collective production (or rents) . . . through some allocative method." See Testy, *supra* note 2, at 1233-35. Testy criticizes this model because "[w]hen rights are allocated on the basis of what one can bargain and pay for, those with more resources will always come out ahead. And they will stay ahead too." *Id.* at 1234. However, a plus to the TPM approach is that it "does envision the corporation as a collective enterprise, it holds out substantial potential for recasting the duties the stewards of that enterprise might owe to those nonshareholder constituents affected by its reach." *Id.* at 1234-35.

262. Williams, *supra* note 158, at 416 ("the goal [of corporate social disclosure] is to create a format for social auditing that would permit the dissemination of an accurate synopsis of a company's social, political, and environmental actions.");

public to judge how well the programs are performing, let alone to develop comparative information, which could encourage companies to improve their performance.<sup>263</sup> While there a lot of groups that informally monitor corporate behavior, like environmentalists, the media, competitors, government regulators, local communities, and economic markets,<sup>264</sup> and who “enforce the terms of the social license directly (e.g., through shaming and adverse publicity) and the terms of the economic license (e.g., generating consumer boycotts of environmentally damaging products), and the regulatory license (e.g., through citizen suits or political pressure for regulatory initiatives),”<sup>265</sup> that oversight is an incomplete “patchwork.”<sup>266</sup>

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*see also id.* (“Expanded social disclosure to create such transparency would generally include specific information on the products companies produce and where that production takes place; on the companies’ law compliance structures; on their labor relationships, both directly and through subcontractors; on their domestic and global environmental effects; and on corporate charitable and political contributions.”).

263. *See, e.g.,* Gronewold, *supra* note 181 (reporting that 89% CDP members indicated that they intended to calculate the carbon footprints of their suppliers and to inform them of strategies to reduce their emissions, only 20% of the 2,2000 companies who participate in the project “say that they have the ability to accurately measure or estimate their suppliers’ output of greenhouse gas pollution”). This inability to monitor makes meaningless the threat by 56% to drop companies from their list of suppliers if the companies do not calculate their emissions or adopt the suggestions of how to reduce them. *Id.* (reporting on the number of companies prepared to drop suppliers).

264. *See* Branson, *supra* note 30, at 642 (“the number of third party monitors, whether journalists or organizations, has spread beyond the investment community”); *see also* Case, *supra* note 11, at 104 (referring to Karkkainen’s article, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001), and saying “the informal monitoring regime, triggered by public information disclosure imposes diverse forms of social and market-based pressure on corporate environmental behavior . . . [which] includes self-monitoring from firm managers and external monitoring performed by industry competitors, government regulators, local communities, and economic markets”).

265. Gunningham et al., *supra* note 10, at 336.

266. *See* Branson, *supra* note 30, at 643-44 (“All of these initiatives in monitoring of social performance nonetheless result in a patchwork. The array of information available thus is incomplete and is also dependent upon the sophistication, industriousness and research tools available to the investor or monitor.”); *see also id.* at 643 (“The information revolution and the Internet have added to the corporate social responsibility data that are available to monitors of

An effective program that monitors the implementation and performance of a CSR initiative<sup>267</sup> should be supported by "adequate resources, report[s] at a sufficiently high level in the corporation, and [consist of] . . . a program that will reasonably discover violations of law or corporate policy."<sup>268</sup> It should have "the support and involvement of senior management" and require that senior management "communicate to employees the company's commitment to compliance."<sup>269</sup> Compliance with internal audit programs should "be the assigned responsibility of high-level corporate management," and these programs should be periodically reviewed and adjusted as necessary to make improvements.<sup>270</sup> Establishing such a program is no trivial undertaking for a business.<sup>271</sup>

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social performance, whether they be third party monitors or investors themselves.").

267. Although the elements of an effective self-audit program are drawn from internal legal compliance programs, the principal goal of which is to identify regulatory violations before they occur, many of the elements of these programs are easily transferrable to programs designed to audit the effectiveness of CSR initiatives.

268. Martin, *supra* note 80, at 18.

269. *Id.* at 16; *see also id.* at 18 (saying communications by corporations about internal audit programs and the company's expectations must have "the right tone," meaning that it must "originate with individuals in the corporation who are correctly placed to send a message that has authority behind it," as they are an essential element of an effective legal compliance program).

270. *Id.* at 19.

271. *Id.* at 17 (listing among the elements of an adequate compliance program under the Guidelines, the need for a company "to establish compliance standards and procedures," "assign specific high-level personnel overall responsibility to oversee compliance" with those standards, institution of "steps to communicate its standards and procedures to all employees effectively," citing as examples required participation in training programs or by dissemination easily understood information, "reasonable steps to achieve compliance with its standards, by utilizing monitoring and auditing systems reasonable designed to detect criminal conduct . . . and by having in place and publicizing a reporting system whereby employees and other agents can report criminal conduct by others in the organization without fear of retribution," and the institution of "appropriate disciplinary mechanisms"); *see also id.* at 18 (saying a reviewer of the adequacy of such programs should ask "has the corporation identified risk areas that deserve internal audit attention? Does the internal audit plan reemphasize these risk areas? Does the corporation have a means of judging whether it is complying with laws on a regular basis?").

Although companies can benefit from monitoring the performance of their CSR programs, like gathering information about how to make their operations more efficient<sup>272</sup> and regulatory compliant,<sup>273</sup> and improve relations with their stakeholders, there are also significant costs, such as the need to develop “a significant and very costly bureaucracy” of lawyers, trainers, and environmental experts.<sup>274</sup> Time and money spent on monitoring and analyzing the results is diverted from production, sales or other necessary profit-making activities of the company, which can increase the price of its products or reduce profits.<sup>275</sup> Information collected through these programs may require expensive changes in how the facility is operated, perhaps requiring that it be shut down while “environmental or safety fixes” are made—some of these expenditures may be “to remedy violations that might otherwise have remained undiscovered.”<sup>276</sup> A company that discovers a regulatory violation through an EMS audit may face fines, adverse publicity that negatively affects “consumer perceptions and stock prices, large litigation expenses, and potential debarment from government business,” as well as “a hostile litigation environment in which those good faith efforts are viewed as mere tools for adversaries to exploit” and where the discovery of a potential violation becomes a “roadmap for further discovery” in the hands of its adversaries.<sup>277</sup> A company that effectively audits the performance of its CSR program may also handicap itself when compared to a company that does not do this, enabling the other

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272. *Id.* at 16 (saying a fully integrated monitoring or self-audit program in addition “will enhance teamwork communication and understanding between the legal and operations functions”).

273. *See id.* (“A compliance program supported by both management and employees throughout the company will help to fully integrate compliance in the company’s operations.”). Improvement in a company’s regulatory compliance record will also obviously help it avoid fines, the possibility of contractual disbarment, and the cost of defense counsel and may gain leniency from prosecutors. *Id.* at 15-16.

274. *Id.* at 15.

275. *Id.* (“every hour and every dollar devoted to compliance programs are diverted from production, sales, or other necessary profit-making activities of the company,” which are “reflected in the prices of the company’s products or absorbed as a reduction of profits,” which, “in turn, has an impact on a company’s long term ability to compete, pay its employees and hire new employees”).

276. *Id.*

277. *Id.*

company to seize "a competitive advantage"<sup>278</sup> by being able to ignore the ineffectiveness of its CSR initiatives while still reaping their benefits. Finally, internal audit programs can change the culture of a company, creating "an austere, overly rigid working environment," which may conflict with efforts to inculcate a "cooperative team approach,"<sup>279</sup> making the company a less attractive place in which to work.

Given the substantiality of the costs a company may incur from adopting an effective internal monitoring program balanced by its more limited benefits it is unlikely that the company will adopt this improvement to its CSR program on its own initiative. Even if companies could be persuaded to build into their CSR programs an effective self-auditing program, such programs "are not ends in themselves; they are risk-management tools to help the company achieve its broader goals of enhancing shareholder value and profitability by being a responsible corporate citizen on a long-term basis."<sup>280</sup> As such, they do little to change a corporation's mindset about its environmental responsibilities to society at large.

*B. Require Public Transparency on the Effectiveness of CSR Programs*

Closely related to the first suggested improvement is requiring companies to publicly disclose information on the effectiveness of their CSR initiatives. The company's customers and investors have a legitimate interest in knowing whether a business' representations about the benefits of its environmental CSR programs are correct as that knowledge will inform them about the company's environmental behavior and the extent to which they should buy the company's products or invest in it. Greater public transparency about a company's environmental performance gives the company's stakeholders, particularly community and environmental activists and

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278. *Id.*

279. *Id.* at 15-16 (noting in addition that these programs "appear to require an internal criminal justice system approach that can risk defaming employees, seemingly invading their privacy and triggering other labor relations problems").

280. *Id.* at 16; *see also id.* at 18 (recommending in addition that firms develop "a code of ethics or business conduct" which "should include aspirational goals of the corporation as well as standards of business conduct related both to legal compliance and general organizational requirements.")



the media, the information they need to act as “effective watchdogs and de facto regulators, shaming and otherwise pressuring companies into beyond-compliance environmental performance”<sup>281</sup> and to improve their environmental record. As Cynthia Williams points out, “there is a ‘shrinking quality’ to harmful actions people will take if they are required to expose those actions to the ‘disinfectant’ of full public disclosure.”<sup>282</sup>

However, there are also obvious disincentives for companies when it comes to disclosing their environmental performance, not the least of which is the possibility of litigation.<sup>283</sup> There is also the possibility that a company that discloses the lack of success of its CSR initiatives will lose customers and risk damaging its “reputational capital.” Such negative exposure might also trigger an adverse reaction by financial markets, particularly with socially responsible investors.<sup>284</sup> And most companies do not want to expose themselves to community pressure to change their business operations or practices and to the negative publicity that might flow

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281. See Gunningham et al., *supra* note 10, at 336-37 (noting the importance of information disclosure provisions, such as the Toxic Release Inventory); see also Branson, *supra* note 30, at 645 n.97, (“individuals can exert a greater force for environmental good by pressuring corporations and governments than by lecturing their Navigator-driving friends. Or by spending two years in a tree [sic]” (alteration in original) (quoting Sharon Begley, *The Battle for Plant Earth*, NEWSWEEK, Apr. 24, 2000, at 50)).

282. Williams, *supra* note 158, at 420.

283. Information disclosure may also have the perverse result of discouraging companies from participating in other environmental CSR initiatives, like EMS programs, if those programs require significant public information disclosure. Case, *supra* note 11, at 111 (“[T]o the extent that linking formal EMS adoption with public information disclosure mechanisms is deemed important to maximize the potential of management-based regulatory strategies to foster positive corporate behavioral change, the ‘under-inclusiveness problem’ inherent in voluntary programs may become even more pronounced. . . . Thus, notwithstanding the public policy benefits that could result from such disclosure, firms may be less likely to voluntarily participate in incentive-based EMS programs, if significant formal public information disclosure is required.”).

284. Kirkland, *supra* note 176, at 1 (“concern about corporate disclosure has become a hot-button issue for environmental and investor advocacy groups” and that “SEC is reexamining shareholder concerns that companies are sidestepping requirements to disclose climate-related liability they face from greenhouse gas emissions, regulations, rising commodity prices, potential property damage and the long-term costs associated with replacing equipment and infrastructure”).

from being unresponsive to such requests. Once again, the balance seems to tilt in favor of companies being disinclined to provide information on how their environmental CSR initiatives are actually performing and thus, against companies redesigning their CSR programs to include a public disclosure element.<sup>285</sup>

*C. Require Sanctions for False Representations and Noncompliance with CSR Programs*

As currently designed, there are no external or internal sanctions for companies, or their employees and officers,<sup>286</sup> who make false

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285. Recognizing that business will not release information about their environmental performance voluntarily, Cynthia Williams recommends using federal security law to assure the disclosure of such information. Williams, *supra* note 158, at 421 ("If one believes that the possibility of liability is an important motivator, for some companies, to comply with the law, it is also potentially useful that there could be liability consequences under the federal securities law for misleading disclosure, or misleading non-disclosure"). Indeed, in response to petitions from environmental and investor groups, like the \$200 billion CALPERS, the Securities and Exchange Commission (SEC) recently issued new guidelines on disclosure of climate change information. See Joel Kirkland, *SEC Issues Climate-risk Guidance Despite Tough Political Environment*, CLIMATEWIRE, January 28, 2010, at 1, available at <http://www.eenews.net/climatewire/print/2010/01/28/3> (reporting on the SEC's issuance of a disclosure guidance document, which although "doesn't carry the same force of law as a formal regulation, . . . public companies consider it binding"). The guidance document requires companies to "consider whether existing laws or pending legislation and regulations are a risk, and whether climate accords carry some financial risk. It also directs companies to consider whether actual and potential physical impacts should be disclosed, including whether there is a risk of increasing insurance claims in coastal areas due to severe weather or sea level changes." *Id.*; see also John Broder, *S.E.C. Adds Risk Related to Climate to Disclosure List*, N.Y. TIMES Jan. 28, 2010, at B1 (reporting that "[t]he commission said that companies could be helped or hurt by climate-related lawsuits, business opportunities or legislation and should promptly disclose such potential impacts. . . . and that including climate risks among other disclosures was a logical step."); Kirkland, *supra* note 176, at 1 (saying the guidance document also says "[b]usiness trends matter, too. 'Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies . . . [and] companies shouldn't ignore how climate change affects their competitive positions,' such as 'less demand for energy-intensive goods that result in heavy industrial emissions or, on the flip side, rising demand for 'green' goods and services that produce less emissions'").

286. See Hamdani & Klement, *supra* note 244, at 295 ("Individuals . . . are more likely to commit misconduct when they derive a *personal* benefit from doing so.").

representations about the effectiveness of their environmental CSR programs, let alone who fail to disclose information to the public, meet voluntary performance standards, or implement green management programs as promised. As these are private undertakings by corporations, the government cannot enforce against such lapses. While “social license demands can be enforced by augmenting legal enforcement mechanisms, such as pressuring regulators to enforce more vigilantly and more directly by filing citizen suits,”<sup>287</sup> these actions are ineffective against non-legally mandated CSR programs. Therefore, while “[s]ocial actors thereby lend extra enforcement energy and weight to existing regulatory and legal license requirements, pushing regulated enterprises toward full legal compliance—and even to invest in beyond-compliance measures that provide a margin of safety against violations,”<sup>288</sup> none of this is relevant, if the initiative does not have a regulatory foundation. Meaningful internal sanctions against acts of omission or malfeasance by a company’s managers and employees, especially if their imposition is publicized and the company is concerned about its “reputational capital,” could function as a good substitute.<sup>289</sup>

Failure to punish lax employees can send a negative message to other employees about the importance of the environmental CSR program and will not encourage the poorly performing employee to improve her performance. Punishment says the offender’s act was wrong and will not be tolerated.<sup>290</sup> Being sanctioned can also shame an employee before her peers, the possibility of which, together with other sanctions, like fines, pay reductions, or loss of leave, may motivate better performance.<sup>291</sup> If a way could be found to sanction

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287. Gunningham et al., *supra* note 10, at 319.

288. *Id.*

289. This may explain why some of the better performing companies opt to join trade association programs that have real sanctions for non-compliance with their rules. See discussion *supra* at Part V.B.

290. Garvey, *supra* note 24, at 741 (“[T]he expressive dimension of punishment” and saying “Punishment . . . is a form of language . . . [, which] [a]t the very least . . . says that the offender’s act was wrong and will not be tolerated. In a word, punishment, unlike civil sanctions, condemns. It is ‘a conventional device for the expression of attitudes of resentment and indignation.’”).

291. See Barnard, *supra* note 1, at 297 (saying General Electric, which holds its managers accountable and stakes “raises and promotions on the successful achievement of internal environmental goals,” is an example of a company that has an effective internal monitoring program); see also *id.* at 301 (reporting on the

the head of the company, the resultant shame and loss of "reputational capital" for the individual and her company could be significant.<sup>292</sup> But, it seems unlikely that a company will be willing to do this, let alone impose sanctions against lower level employees and managers precisely because of the possibility of adverse publicity when sanctions are revealed and the resultant economic and reputational harm to the company.<sup>293</sup>

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insurance company Swiss Re "beginning to ask questions about environmental practices when deciding whether to sell or renew directors' and officers' insurance policies").

292. See Vandenberg, *supra* note 21, at 132 ("The impact of negative publicity on the managers' self-esteem was a more effective deterrent than formal sanctions"); see also Barnard, *supra* note 77, at 968 ("High status business leaders may be especially susceptible to shaming rituals. 'They are the people most likely to worry about public appearances, to be vulnerable to moralistic or judgmental social groups, to deter to authority and to be relative conventional in attitudes toward law and order.'") (emphasis added) (quoting Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1934 (1991)); *id.* ("They are also the people most likely to be concerned about maintaining the appearance of business competence and professional accomplishment. Also, because they regard themselves as participants in a 'culture of honor,' they are especially sensitive to the opinions of peers."); *id.* at 969 (calling the result of discomfiting public exposure a "reputational rub-off" (quoting V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1510 (1996)). But see *id.* at 999 (warning that "woodshedding" and the "corporate icon procedure" where the CEO appears in court "is likely to have a measurable impact on lower- to mid-level employees where deterrence would really count").

293. There is a substantial literature on figuring out what the appropriate sanction should be for deviant behavior, especially when the sanction is imposed externally, which could have some bearing on internal sanctions, especially if they are publicized. See, e.g., Feeley, *supra* note 25, at 209 ("Advocates of increased sentencing hope that corporate wrong-doers 'respond to what they see' in cases like Bernard Ebbers – sentenced to twenty-five years in prison for accounting fraud – and refrain from crime"); Hamdani & Klement, *supra* note 244, at 274 (saying firms faced with losing their permits or being barred from government contracts or that suffer "irreparable damage" to their reputations can go out of business); *id.* at 298 (saying when a firm goes out of business there is an additional risk of collateral damage to innocent parties, "such as the firm's employees, suppliers, and even entire communities."); *id.* at 276 ("When they cannot eliminate misconduct, firms might respond to the threat of harsh sanctions by *reducing* their monitoring effort. After all, if the firm is about to unravel regardless of its investment in compliance then why bother?" More precisely, the marginal reduction in expected liability might be too low to justify additional monitoring efforts); Richard A. Posner,

Since there will be serious problems getting companies voluntarily to audit the effectiveness of their environmental CSR initiatives, let alone disclose the results of those audits or impose sanctions on themselves when these initiatives fail to meet what are probably considered to be only aspirational goals, it seems highly dubious that any of them will achieve real change in corporate behavior or improve the environment. Yet, if companies could be compelled to have effective environmental CSR programs and then be held accountable for their representations about their benefits, there might be a positive effect on the environment. Not only do these programs hold out hope of filling gaps in the regulatory framework, but also because they actually work within the corporate structure to reform it, they have a good chance of transforming corporate environmental behavior for the better.

#### VII. COMPELLING COMPLIANCE WITH CSR INITIATIVES

Cynthia Williams says that while well-designed voluntary initiatives “are extremely important self-regulatory mechanisms . . . ultimately, . . . mandatory approaches will be necessary to address concerns of corporate accountability under conditions of economic globalization.”<sup>294</sup> One way to achieve corporate accountability for environmental CSR initiatives is to incorporate them into regulatory permits<sup>295</sup> or compliance agreements. Doing this would make them

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*Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT’L REV. L. & ECON. 369, 372 (1999) (“A sanction should be one of the appropriate magnitude; if it is too severe, people will be overdeterred and refrain from efficient actions. A sanction should not be too costly; the cost will depend largely on how often it has to be administered, that is, on the frequency of the violation of the norm.”); Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 IN. L.J. 1231, 1276 (2000) (discussing enforcement of the non-smoking norm, and saying “[w]hat is required for the inducements not to backfire is that punishments be proportional and that there be alternatives or accommodation for smokers.”). *But see* Hamdani & Klement, *supra* note 244, at 290 (“[T]he threat of going out of business can compel firms to make an effort – perhaps even an excessive one – to prevent their agents from breaking the law.”).

294. Williams, *supra* note 158, at 422.

295. Although it seems counter-intuitive to think that some companies may agree to the conditioning of their permits to include some or all of these programs, it is

enforceable not only by the government, but by third parties like environmental organizations. EPA could insist on this happening when a company agrees to participate in a government sponsored CSR program, like EPA's Performance Track Program, in exchange for its receiving some form of regulatory relief or positive public recognition. Since the business benefits from participating in the government program, EPA would also be in a strong position to require that the company monitor and disclose to the public the results of its participation and impose sanctions on officers and managers who fail to comply with the program's terms. However, this is clearly not a perfect solution, given the need to rely on follow-up federal enforcement, which will be problematic at best, and the barriers to private enforcement litigation.<sup>296</sup>

Another way to compel a company to implement its CSR programs and fulfill the representations made in them about their environmental benefits would be to view the representations that the company has made about their effectiveness and the company's good environmental behavior as warranties; promises that create both a contractual and moral duty of performance on the company.<sup>297</sup> The company's stakeholders rely on these warranties (promises) when they purchase that company's products or invest in it, and the company breaches them when the programs and the companies do not perform as promised.

"The traditional definition of the term contract is 'a promise or set of promises for breach of which the law gives a remedy, or the performance which the law in some way recognizes as a duty.'"<sup>298</sup> In turn, a promise is depicted as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made,"<sup>299</sup> and "may be

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possible that they might of the internal benefits to them of CSR programs previously noted.

296. Babcock, *supra* note 16, at 11-12 (discussing the barriers facing environmental plaintiffs, particularly establishing Article III standing).

297. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 1.2 (4th ed. 2007) ("[T]he term 'promise' includes not only the physical manifestations that give rise to an assurance – the parties' words or conduct – but also the moral duty to make good the assurance by subsequent performance.").

298. *Id.* at § 1.1.

299. *Id.* at § 1.2.

expressed in the form of a warranty.”<sup>300</sup> A seller’s promise or warranty about the goods she is selling, whether the soundness of a horse or, in the case of a business firm, the effectiveness of its environmental CSR initiatives and its own reputation as a good environmental citizen, “becomes part of the basis of the bargain,” which courts will treat as a constructive promise – “an obligation imposed by law that is treated *as if it were* a promise.”<sup>301</sup> The promisor (warrantor) “has assumed responsibility” for these statements of fact and can be held accountable if the facts turn out to be untrue and someone has relied on these representations to their detriment.<sup>302</sup> A customer or investor who believes that she is engaging in socially responsible behavior when she patronizes or invests in the company based on the company’s self-proclaimed good environmental behavior and/or employment of good environmental practices, in some cases even paying higher prices for the company’s products believing that they have been produced by an environmentally conscious company, is injured when that representation turns out to be untrue. The law recognizes that injury and provides a remedy for it.<sup>303</sup>

Alternatively, a firm’s stakeholders could sue as third party beneficiaries of a contract between EPA or an industry trade association, and a company, where a company promised to undertake certain initiatives to improve its environmental performance in exchange for benefits, such as an enhancement of its “reputation capital” or a reduction in government oversight inspections, and then does not perform. The injury to the company’s stakeholders who have relied on these representations in their choice of products

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300. 1 ARTHUR L. CORBIN & JOSEPH M. PERILLON, CORBIN ON CONTRACTS § 1.14 (rev. ed., West Publishing Co. 1993); *see also id.* (“A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the facts . . . .” (quoting J. Hand, *Metropolitan Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946))).

301. *Id.*

302. *Id.*; *See also* WILLISTON & LORD, *supra* note 297, at § 1.1 (“Contract law is designed to protect the expectations of the contracting parties.”).

303. WILLISTON & LORD, *supra* note 297, at § 1.1. (“[W]hen a promisor warrants that goods are of a particular quality, when in fact they are not; the promisor’s manifestation in such a case operates as a commitment or promise that the promisor will be responsible if the facts are not manifested.”).

produced by that company or in deciding to invest in it would be the same as in a breach of warranty situation.<sup>304</sup>

Assuming that these arrangements between the companies and either EPA or the trade association are contracts – i.e. there has been an offer, an acceptance of the offer, and, consideration<sup>305</sup> – there remains the matter of establishing that the company's stakeholders are the intended beneficiary of those agreements.<sup>306</sup> One way of demonstrating that parties are the intended beneficiaries of a contract is to focus on "the ultimate benefit for the third party."<sup>307</sup> Under this approach, one could argue that the company's stakeholders are the

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304. Other possible approaches include filing complaints with the FTC under section 5 of the FTCA alleging fraudulent misrepresentation or compelling the government to condition its procurement practices in favor of companies that have taken meaningful steps to improve their corporate behavior. See Kenny, *supra* note 139, at 470 (also discussing how some cities, such as San Francisco have enacted anti-sweatshop ordinances restricting the use of contractors to those who commit to safe work environments). However, both these alternatives are beyond the scope of this article, which looks at litigation, not administrative approaches to compelling implementation of CSR programs.

305. Perhaps the most problematic of the three elements to establish under these circumstances is what the consideration is for the bargained for agreement between the business firm and either EPA or the trade association. The company's consideration might be the cost it undertakes to implement the specific CSR initiatives, which are required for its entry into the government or trade associations CSR program and for the government or trade association the effort it made to design a program that would attract the company.

306. Joseph Siprut, *Third-Party Beneficiary Basics: When Can Noncontracting Parties Sue for Breach?*, 93 ILL. B.J. 462, 463 (2005); see also *id.* (saying incidental beneficiaries have no rights under the contract). See generally Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 New Engl. L. Rev. 63 (1989) (discussing the evolution of the intent standard, the various evidentiary tests that both courts and scholars have placed on it, and its increasing liberalization); *id.* at 111 (worrying that the way the doctrine has evolved has "detach[ed] this field of contract law [third party beneficiary law] from its natural context – that of bargaining and of consensual liability"); *id.* (attributing the transformation of "what is essentially a consensual liability field into an imposed liability field," in part because "courts are tempted to use third party beneficiary law as a tool for implementing desired social and economic policies, even when to do so thwarts the parties' intentions").

307. Paglin, *supra* note 306, at 69-70 (noting also that this test was favored by Corbin, citing 4 A. CORBIN, CONTRACTS § 777, at 24-25 (1951 & Supp. 1971), although noting that Corbin's analysis "overlooks the complications inherent in third party beneficiary contracts").



intended beneficiaries of contacts between companies and EPA or industry trade associations because the ostensible reason the principal parties entered into these agreements—to achieve a cleaner environment—is of direct benefit to its environmentally conscious customers and investors for whom the achievement of a clean environment is a primary goal.<sup>308</sup> Some courts do not even bother to try to divine the intent of the principal parties and “instead look at which decision will best “accommodate particular policies,” such as a desired social or economic policy.<sup>309</sup> Thus, the clear social benefit behind policies to protect the environment might provide an alternative way to establish the necessary contractual intent to benefit the company’s environmentally conscious stakeholders.

Courts also look closely at the language of agreements for clear promissory language that runs in favor of third parties,<sup>310</sup> and with respect to employment contracts, find publication of the terms of the agreement “in a manner that the employees knew of its contents and reasonably relied on it,” and then either began to work or continued working, thereby accepting the offer, to be sufficient.<sup>311</sup> The parallels are clear—companies flaunt the existence of their CSR

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308. *See id.*, at 74-75 (saying that a popular test of determining the intent of the contracting parties to benefit a third party is “whether the promisor has undertaken to render a performance directly to the third person[,]” and saying that this test should not refer to whom performance was promised, but to “the subject of the promised performance”). This test would also seem to favor the inclusion of the public as third party beneficiaries of any contract between companies and another party because the subject of the promised performance again directly benefits the public.

309. *Id.* at 80. Clear examples of programs of social import where a court may “easily” discern “a supportive ‘intent to benefit’” are statutory welfare programs. *Id.* at 81; *see also id.* at 112 (describing how courts use the process of supplementation and public policy considerations to resolve disputes about third party beneficiaries and disguise this process “as a quest for the parties’ intentions . . . even when the true rationale for their decision has nothing to do with this criterion. Only rarely do the courts admit that they police the parties’ agreements in order to carry out social or economic policies”).

310. *See Kenny, supra* note 139, at 460 (analyzing the question in the context of employment contracts); *see also Paglin, supra* note 306, at 64 (discussing the role of intent in determining the existence of a contract, and when intention cannot be revealed from the contract’s terms or the circumstances surrounding its execution, the court may impose non-consensual liability for reasons of justice and efficiency).

311. *Kenny, supra* note 139, at 463.

programs through advertisements or product displays, and environmentally conscious company stakeholders rely on those public representations when they engage in the behavior solicited by them by buying the company's products or investing in them.<sup>312</sup>

Third party beneficiary status can be denied if the claimants could have protected their interest by participating in the formation of the contract.<sup>313</sup> However here, where the company's stakeholders did not have an opportunity to bargain with the company, the trade association or the government on the design of a CSR program, let alone their rights under such programs, that rationale should not be a basis for denying them third party beneficiary status. More problematic for using a third party beneficiary approach is that there are no consequences (i.e. sanctions) for the company that fails to comply with the terms of its CSR programs<sup>314</sup> and the company has not conveyed to its stakeholders that it intended the terms, let alone the goals of its CSR initiative, to be legally binding on it.<sup>315</sup>

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312. *But cf.* Paglin, *supra* note 306, at 84 (discussing the problems with relying on the reliance doctrine as a "rationale[] underlying the right to enforce promises" for third party beneficiaries). These problems include the reasonableness of the third party beneficiary's reliance on the promises made by the promisor, and "the promisor's ability to *foresee* the reliance, the form it assumes, and most importantly, the identity of the third party who relies on his promise." *Id.* at 89-90, 96 (emphasis added). Again, assuming use of reliance to identify legitimate third party beneficiaries each of these problems seems surmountable in the case of a company's promises to improve its environmental performance by adopting certain programs.

313. *See id.* at 97 ("whenever the third party is capable of protecting his interests in the relationship with the promisee, without substantially increasing transaction costs or otherwise adversely affecting his interests, he should not be awarded relief as a third party").

314. Some trade association information disclosure programs threaten to expel members who do not comply with the initiatives' requirements. Even the government sponsored programs do not have sanctions for failing to perform. *See* Strasser, *supra* note 134, at 551-54.

315. Kenny, *supra* note 139, at 467; Paglin, *supra* note 306, at 93 (saying that another reason why substituting the reliance test for intention is problematic is that even though "the promisor may foresee *some* act of reliance by a third party" on his representations, "he does not contemplate his own liability as a result"). Not discussed in this article is yet another problem that flows from the promisor's lack of foreseeability about his own liability to a third party is that affect of holding the company liable will have on "the *future* bargaining behavior of similarly situated parties," for example the effect on transaction costs. *See id.* at 105 (applying an economic model of enforcing promises that looks at "the adaptive behavior of

However, given that contract law favors construction of contracts in a way that fulfills their public interest objective<sup>316</sup>—here the public interest in a clean environment—then perhaps a court would not allow this latter concern, the principal purpose of which is to shield the contracting party from a liability that she did not know she had, to bar a stakeholder from enforcing these agreements.<sup>317</sup>

An appeal of using contract principles to compel compliance with representations by business about the effectiveness of their CSR programs and their good environmental behavior is the unambiguous public purpose norm behind enforcement of contracts.<sup>318</sup> There is a

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promisors and promisees in response to distinct rules of liability” to see if the model offers better “criteria for the recognition of a third party’s right to enforce a contract”).

316. 5-24 CORBIN ON CONTRACTS § 24.25; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 207 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.”).

317. *See also* Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1209 (1985) (pointing out that the third party beneficiary rule is an evolutionary rule that has both revolutionized and socialized contract law. “The eventual triumph of the third party beneficiary idea may be looked on as still another instance of the progressive liberalization or erosion of the rigid rules of the late nineteenth century theory of contractual obligation . . . . To the nineteenth century legal mind the propositions that no man was his brother’s keeper, that the race was to the swift and that the devil should take the hindmost seemed not only obvious but morally right. The most striking feature of nineteenth century contract theory is the narrow scope of social duty which it implicitly assumed. In our own century we have witnessed what it does not seem too fanciful to describe as a socialization of our theory of contract. The progressive expansion of the range of non-parties allowed to sue as contract beneficiaries as well as of the situations in which they have been allowed to sue is one of the entries to be made in this ledger.” (quoting F. KESSLER & G. GILMORE, *CONTRACTS, CASES & MATERIALS*, 1117, 1118 (2d ed. 1970))). In many ways, this “socialization” of contract theory parallels the second iteration of the CSR movement, in which the moral obligation on business to be a good corporate citizen became once again a norm. *See supra* Part III (discussing the origins of the modern corporate social responsibility movement).

318. Russell, *supra* note 19, at 572 (“[E]nforcement for “breach of private promises creates an incentive for the parties to perform their promises.”). In contrast, *see* Babcock, *Assuming Personal Responsibility*, *supra* note 5, at 151-52 (discussing the possibility that “the abstract environmental protection norm may not be sufficiently robust or widely enough held” to surmount other barriers to responsible environmental behavior).

clear societal benefit from promises being kept<sup>319</sup> because when “contracts are secure . . . markets flourish, maximizing wealth as well as robust exchanges.”<sup>320</sup> The strong possibility that a suit for breach of contract will be brought by the injured party makes compliance with the terms of the contract more likely, and “the injured party . . . a good surrogate for the public interest in contracting.”<sup>321</sup> “[T]he law depends on an injured party” in a breach of contract situation “to enforce his own rights, and thus protect not only his own interest, but also the incentives of all to contract and to perform their contractual commitments.”<sup>322</sup> Promises that have been made to the company’s stakeholders, such as the promises made in these CSR initiatives, serve an additional underlying public purpose, as noted previously, making these agreements of even more importance than contracts between two private parties.<sup>323</sup> State courts are open to such lawsuits, and, unlike third party suits to enforce federal regulatory permits, which face multiple jurisdictional barriers before a court will reach the suit’s merits, the hurdles in a suit for breach of contract are largely restricted to the merits of maintaining such an action.

The mere threat of bringing one of these lawsuits might reform corporate behavior.<sup>324</sup> Businesses are generally litigation adverse because of the unnecessary expense of defending against them in court as well as the unwanted public attention that such lawsuits

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319. Russell, *supra* note 19, at 573 (“The public purpose in enforcing contracts is clear.”)

320. *Id.*; *see also id.* (“The payoff for society is not the enhanced wealth of a particular transaction, but rather, the reliability of commitment and the enhanced wealth that flows from flourishing markets.”); *id.* at 57 (“Enforcement of private contract produces a derivative effect of belief in the power of contracts, and, thus, a robust economy.”).

321. *See id.* at 574 (“[T]he law enforces promises by respecting the allocated benefits of the deal”).

322. *Id.* at 573.

323. *Id.* at 575 (such contracts are “of greater significance than contracts between two individuals”).

324. Kenny, *supra* note 139, at 469 (describing the response of Wal-Mart to a class action lawsuit brought by foreign workers for breach of contract as third party beneficiaries of the store’s contracts with garment suppliers in the respective countries where the company’s CEO warned suppliers that Wal-Mart would start holding them “more accountable for environmental and social standards at foreign factories as public expectations in the United States rise”).

generate.<sup>325</sup> “The mere lodging of allegations in the complaint creates results because the allegations garner public and private attention.”<sup>326</sup> When the complainant is a grassroots organization, the lawsuit “can have the double effect of changing public opinion while also hitting the corporation where it truly matters—in its pocket books.”<sup>327</sup> A lawsuit also raises the possibility of settlement where structural changes can be made in a business’ operations to include more robust CSR programs.

If environmental CSR programs were properly designed and enforced, they might well improve the regulatory compliance record of firms that use them and even induce some firms to go beyond compliance. But their design defects mean that the programs will do little to reform corporate environmental behavior, and that the public will receive minimal, if any, benefit from their existence; instead their benefits will primarily inure to the businesses that employ them. Since there is a low probability that companies have a sincere interest in truly effective CSR programs because of the substantial costs associated with improving their design, only external compulsion creates any chance that these initiatives could be a meaningful supplement to existing regulatory programs. This part of the article has proposed a rationale for EPA incorporating CSR programs into regulatory permits, which will allow the agency to cure their design defects and make the programs judicially enforceable. Alternatively, contract principles, especially warranty, are offered as an alternative way to achieve these same results. These proposals are novel, to say the least; the intent in proposing them is to start a discussion. But, if environmental CSR initiatives cannot be improved and cannot be made enforceable, then they should be exposed for what they are—

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325. *See id.* at 473 (“[E]ven when a company denies wrongdoing, the mere continued threat of litigation and the negative stigma it creates can be enough to settle a case.”).

326. *Id.* at 469-70. One possible negative reaction to the threat of litigation is that companies who adopted these various CSR initiatives “as public relation devices,” with no intent that they be binding or create any legal liability, may amend the initiatives to make this fact clear by expunging any language that could create the counter impression. *See id.* at 455 (saying that lawsuits, such as the class action lawsuit filed against Wal-Mart, are “likely to cause alarm” because companies who have such codes “never expected that some one would take . . . [it] seriously and use it as an affirmative tool to actually make them do what they promised to do”).

327. *Id.* at 473.

corporate flim-flam—and should not receive any government encouragement or public support.

### CONCLUSION

This article has examined the concept of corporate social responsibility as it applies to the environmental activities of businesses. The idea behind the broader concept is that companies voluntarily reform their behavior by engaging in socially beneficial activities and refraining from behavior that has negative social impacts. The CSR movement has put down roots in the environmental area, but there is suspicion about the genuineness of the movement and concern that it may be a not-so-transparent attempt to replace regulatory requirements. However, if environmental CSR programs could fill the gaps in the regulatory net and take some of the pressure off of inadequate government enforcement programs by inducing companies not only to meet regulatory requirements, but also to go beyond them, then this article suggests that they are worth looking at more closely.

The article does that by examining three environmental CSR initiatives—information disclosure, voluntary performance standards, and environmental management systems—and discusses what each might achieve. However, it is clear from independent studies of their efficacy that claims of their effectiveness are way over-blown. From these studies, the article identifies three design flaws of particular concern—the absence of monitoring of program performance, the lack of public transparency about their effectiveness, and the dearth of sanctions for non-compliance with them— and shows why it is unlikely that companies will redesign them without some external compulsion. But unless these design flaws are corrected, their promise of reforming corporate environmental behavior and improving the extant level of environmental protection will be a chimera; a public relations coup for businesses.

The article suggests that external compulsion might come from the government requiring companies to incorporate well-designed CSR initiatives into their environmental permits as a condition of receiving the benefits of participating in a government sponsored CSR program. This, in turn, would make the programs enforceable by the company's stakeholders, including local communities and environmental organizations. Another possible way to secure their

enforcement, and possible reform, is through the application of contract principles to them. Although neither approach is problem free, the mere threat of litigation, which each offers, and the resultant costs and reputational harm to the company whose fraudulent behavior will be thus publicly exposed, might move businesses to adopt and actually implement programs that are more meaningful. Once reformed, environmental CSR programs, such as those discussed in the article, may in fact change corporate environmental behavior and improve the quality of the environment, thus benefitting society at large and earning for the companies the right to wear the corporate social responsibility label.