Environmental, Social, and Governance Theory

Defusing a Major Threat to Shareholder Rights

BY RICHARD MORRISON

COMPETITIVE ENTERPRISE INSTITUTE

PROFILES IN CAPITALISM
MAY 2021 | NO. 6

Environmental, Social, and Governance Theory

Defusing a Major Threat to Shareholder Rights

By Richard Morrison

COMPETITIVE ENTERPRISE INSTITUTE

Competitive Enterprise Institute
2021

EXECUTIVE SUMMARY

The concept known as environmental, social, and governance (ESG) theory has a long history of similar, predecessor concepts both in academic literature and in the business world. For over a century, critics of the market economy, largely inspired by progressive political goals, have argued that for-profit corporations should not limit themselves to seeking profits for their shareholders, but should engage—or be required to engage—in various sorts of activism to address social problems and concerns. This movement grew up alongside evolving expectations of social responsibility within the business community that motivated many managers and executives to provide a range of services voluntarily to employees and to their local communities.

Some of the progressive-minded reforms of yesteryear have been beneficial, some have had little observable effect, and some have been disastrous. Many others have simply been superseded by evolving social attitudes that eventually rendered previously cutting-edge theories out of date, including cases in which the benefits bestowed by corporate benefactors were soundly rejected by subsequent generations of intended beneficiaries.

More recently, the ESG framework has been embraced by government agencies, quasi-government entities such as those affiliated with the United Nations, non-profit advocacy groups, financial ratings firms, and influential policy organizations like the World Economic Forum. Many of these organizations have taken it upon themselves to create complex sets of principles and rating systems for all the various environmental, social, and governance priorities companies should ostensibly be pursuing.

Advocates often cite the proliferation of various ESG implementation schemes as evidence of the popularity of the movement, but the actual result has been one of confusion. These competing frameworks sometimes agree on what topics should be considered—limiting and mitigating the impacts of anthropogenic climate change, for example—but rarely provide any useful guidance for which goals to prioritize as the most important or how to reconcile the conflicting demands of multiple stakeholders.

This should not be surprising, though, because ESG means very different things to different people. Some advocates want to advance specific environmental or labor policy outcomes. Some are individual investors who want a competitive rate of return but want to minimize their carbon footprint. Others are professionals looking to sell ESG-themed financial products and consulting services or to carve out a lucrative niche for themselves in a burgeoning field.

With every major public policy issue potentially coming under the umbrella of ESG, it also should not be surprising that implementing such a management and investment strategy yields mixed results.

Proponents routinely cite research findings that claim to validate ESG as a comprehensive theory, but detailed analysis reveals that only governance reforms—the most traditional and least controversial—generally yield improved business performance. But even those findings are suspect, given the inability of professional research firms to agree on what constitutes compliance with environmental, social, and governance goals in the first place. Auditing the results of leading finance ratings firms reveals a shockingly low level of agreement, even when the topics being examined are objective and specific.

The problematic nature of ESG demands goes even further, however. Many assessments simply assume that the progressive policy positions called for are universally desirable, and focus on how those can be integrated into the operations of a firm or investment portfolio without costing shareholders too much money. But many of the goals specified are highly controversial and far from universally accepted. For instance, the expectation that all employers include abortion in health coverage would offend religiously observant shareholders. Demands to end child labor internationally could force many people in developing countries into more dangerous living conditions. Requiring firms to invest only in politically popular renewable energy sources, like windmills and solar panels, could hurt nuclear power development and slow the creation of a low-carbon economy.

Despite the significant problems with inconsistent definitions and controversial policies, many proponents now suggest that ESG goals should be mandated by government policy. Recent legislation proposed by members of Congress, including Sen. Elizabeth Warren (D-MA), and regulatory proposals advanced by the current leadership of the Securities and Exchange Commission would require that U.S. corporations move from the longstanding legal presumption of shareholder primacy to one in which government agencies manage the priorities of business entities, but bear none of the cost for their mandates. This shift would constitute a major threat to the property, due process, and association rights of investors.

However, there is another way. Many of the conflicts described above can be avoided if policy makers embrace a voluntary system of "benefit corporation" charters, augmented by private certification standards. Legally binding corporate charters that elevate other stakeholders above shareholders are available to those founders and board members who want to embrace them, as are the private, voluntary standards that publicly certify a similar balance of priorities. If the wave of enthusiasm for ESG investing is anywhere as significant and broad-based as its proponents claim, these non-coercive alternatives should be sufficient for the enlightened investors and managers of the 21st century to structure their commitments.

Conversely, a legally mandatory process—in which detailed lists of rules for all firms are drawn up and enforced by the federal government—would be expensive, time-consuming, and afflicted by the same problems that beset most regulatory policy. Regulatory capture, privileging of incumbent firms, and negative effects on growth and innovation would likely all result from the policy making and enforcement processes. Moreover, flawed rules would become entrenched and become extremely difficult to change once regulated entities start spending money and making long-term compliance plans. This would achieve few of ESG advocates' progressive goals and leave dominant firms even more powerful than before.

INTRODUCTION

The ESG construct is less serious and more problematic than it appears.

Over the past decade and a half, the idea that businesses need to expand their priorities from delivering profits to shareholders to encompass various environmental, social, and governance (ESG) goals has become increasingly popular. Since 2004, when the term "ESG" was first used in a report published by the United Nations Global Compact, there has been an explosion of interest in the concept, including in corporate boardrooms.[1] The Global Compact, in a follow-up report the next year, described the emergence of ESG corporate policies as a "powerful and historic convergence … between the objectives and concerns of the United Nations (U.N.) and those of the private sector."[2] By 2021, an entire secondary industry of finance research, ratings, and investment products has grown up, with several hundred mutual funds and ETFs claiming to have an ESG focus[3] and over $100 trillion in investments managed by firms that have signed on to the U.N.'s Principles for Responsible Investment.[4]

On paper, this seems like a major change in the world of investing and business. But the ESG construct is less serious and more problematic than it appears. Its proponents routinely invoke it without providing a meaningful definition of what it entails, while academics and ratings experts deploy detailed and complex definitions that rarely agree with one another. Despite all this, much mainstream media treatment of the topic suggests that ESG-guided entities represent an "enlightened," "socially responsible," or more virtuous way of managing companies and of making money.

Advocates for ESG-style management tend to present it as something that is new, revolutionary, and novel. Yet, they rarely cite the long history of its antecedent theories, including "corporate social responsibility," "corporate social performance," "socially responsible investing," "stakeholder capitalism," "shared value creation," the "triple bottom line," and "impact investing," among others. Moreover, the current enthusiasm for ESG relies on a skewed view of business ethics that suggests that corporations routinely engage in immoral and illegal behavior unless they explicitly endorse public declarations to the contrary.

The single most consistent feature in the long history of ESG and its precursor concepts—in both academic literature and industry analysis—is the repeated distress voiced by management, finance, and economics experts at the confusion they engender.[5] Advocates claim that long history is one of gradual refinement and improvement toward an increasingly better system, but it would be more accurate to say that its various versions have yet to point in any clear direction.[6, 7]

ESG theory is gaining popularity among policy makers, the news media, and other elite constituencies, if the frequency with which it is invoked and discussed is any indication. Yet, the lack of rigorous agreement on what it actually requires and seeks to accomplish has made its meaning subject to different interpretations by different constituencies. In the rare cases where particular goals and outcomes are specified, those specifics are often either highly controversial, applicable only to a particular set of circumstances, or so obvious as to be conventional wisdom.

Consider some examples. Requiring employers to pay for health insurance that covers contraception and abortion,[8] a controversial premise that became part of the Patient Protection and Affordable Care Act, has already generated nearly a decade of legal challenges.[9] Climate-related goals calling on all firms to work toward reducing greenhouse gas emissions have dramatically different impacts on financial firms compared to manufacturing companies.[10] Divestment strategies for politically disfavored firms, popular for decades, call on investors to eschew holdings in politically incorrect industries like tobacco and weapons manufacturing, but otherwise leave one's hands free.[11] Finally, some provisions are so non-controversial that they rarely change anything in practice. For example, many codes of behavior, like the "Purpose of a Corporation" statement endorsed by the members of the Business Roundtable in 2019, include such pledges as "delivering value to our customers" and "dealing fairly and ethically with our suppliers."[12] Companies publicly refusing to deliver value to consumers or to deal fairly with suppliers are, understandably, rare.

ESG advocates tend to group disparate—often antagonistic—parties together as if they made for a cohesive movement working toward a specific set of goals. But not only do all the entities that fall under the ESG umbrella not have the same long-term goals in mind, they rarely even agree on the substance of the concept under discussion. In fact, advocates are unable to agree whether ESG theory is consistent with profit-driven capitalism, a more enlightened replacement for it, or the antithesis of it. Nor do they agree on how to measure success.

For instance, a corporate executive who endorses voluntary guidance for public companies can be part of the ESG movement. But so can an anti-corporate activist who sees industry self-policing as dangerously insufficient, and considers it merely the first step toward stricter government regulation. The founder of an organic food company might see a branding and marketing opportunity in adopting ESG goals. A finance executive might see an opportunity to launch new ESG investment products—which might require higher management fees to certify their compliance status.[13] And consultants specializing in "sustainability" will see new opportunities to sell their services.

Most ESG rules are currently voluntary, and call only for disclosure of corporate behavior, rather than prescribe specific actions and outcomes. However, for the practitioners, consultants, and managers employed in the field, implementing ESG theory has become a big business, with lucrative contracts for companies offering ESG-related services and financial professionals selling the concept.[14] The market for ESG data and ratings alone has been forecast to reach $1 billion by 2021.[15] Notably, prominent advocates for non-profit ESG efforts often pursue linked for-profit work.[16] For example, Ryan Honeyman and Tiffany Jana, coauthors of a recent book on ESG-style management and voluntary, non-profit certification, are also proprietors of their own for-profit consulting firms.[17] Whatever their merits, none of these practices seem to conflict with the free market.

However, taking ESG to its logical conclusion does present dangers. That is because the alleged moral necessity of ESG suggests that its requirements should eventually be required by law. If diversity goals, carbon reductions, and "living wage" guarantees are as important as ESG advocates claim, it would be negligent for them *not* to be made mandatory. Accepting that view, CEOs and other corporate managers who sign up their firms to a voluntary statement of high-minded principles but balk at expensive implementation efforts will have little moral authority for opposing the eventual burdens.[18]

Not every booster of voluntary ESG guidelines today will support mandatory regulations. Many investors would likely end up worse off under such a regime as the focus on shareholder profits is downgraded. There will be winners, though: activist groups whose goals have been adopted as mandatory, professionals trained to work as ESG compliance officers, government officials writing and enforcing the new rules, and firms that have already arranged their operations to comply with the new requirements.

That big players in finance support the movement in its current, mostly voluntary, iteration does not mean ESG will remain voluntary in nature. Future policy makers will not be limited by the boundaries of the current debate. Once industry standards are set, "sustainability" reporting will likely become an industry norm, and more money will be invested to comply with and promote ESG frameworks.

The inescapable logic of ESG priorities—whereby firms must routinely forswear otherwise legal and profitable business opportunities—will result in "virtuous" companies having potential profits poached by "rogue" non-ESG compliant rivals. That, in turn, will fuel calls to make ESG principles binding. If all of the firms in a particular industry or all of the players in a market are equally burdened by ESG compliance, those requirements simply get priced into the cost of doing business. But when a rival firm is able to cut its costs significantly by not joining a voluntary operational framework, that puts a painful burden onto the backs of those firms that have agreed to attain the ESG goals in question. Lobbying for mandatory regulation on ESG issues thus becomes both an offensive and defensive strategy, both for individual firms and for entire industries.

The natural logic of most ESG demands is not to attain an objective standard of good behavior but to adopt a compliance metric that gradually grows more strict—and expensive—over time.[19] A company that proudly announces a modest 3 percent reduction of its carbon footprint in its first year will be subsequently greeted with demands for increasingly expensive reductions of, say, 5 percent, 8 percent, and 15 percent in future years, or risk being labeled a climate criminal. This ratchet effect comes with increasing marginal costs that could quickly dissipate a firm's initial reputational advantages. Prominent proposals for increasing government oversight over ESG goals also include legal changes that would radically curtail long-established property and due process rights.[20]

There may be a way to head this off at the pass, however. Corporate governance law in the United States calls for boards of directors to manage their companies to maximize returns for shareholders.[21] That has prompted some pro-ESG investors, directors, and founders to say that they need changes to the law, so shareholders cannot litigate corporate decisions to spend money on things like diversity and environmental advocacy rather than on increasing dividends.[22] Normally, this would lead activists to demand more law and regulation to enforce an ESG-style framework, and most shareholders to oppose them via lobbying and advocacy expenditures.

THE BENEFIT CORPORATION AND PRIVATE CERTIFICATION OPTIONS

The same goals should be available, with none of the threat to existing shareholder rights, through the alternate legal framework of the "benefit corporation" and private certification. The option of incorporating a new company, or reincorporating an existing one, as a benefit corporation is currently available in 35 U.S. states—including corporate-chartering favorite Delaware—and the District of Columbia and Puerto Rico, and internationally in Italy and Colombia.[23]

The benefit corporation designation—or "public-benefit" corporation, as it is known in some jurisdictions—calls for company directors to "take the interests of a broad range of stakeholders into account, eliminating the concept of shareholder primacy," according to corporate law expert Frederick Alexander.[24] This eliminates the threat of shareholders of a benefit corporation suing its management for using the firm's resources to pursue goals that benefit other stakeholders, thus giving CEOs and directors the green light to shift resources away from maximizing profits and toward other ESG-related goals.

The provisions of current state benefit and public-benefit corporation laws go significantly farther than a previous generation of laws that were passed with a similar goal, the "constituency statutes" that were adopted by 34 states between 1984 and 2006.[25] Those laws attempted to shield directors from shareholder complaints in the same way, by explicitly allowing them to consider non-shareholder welfare when making management decisions. Unlike the benefit corporation laws, however, the state constituency statutes of the 1980s and 1990s did not require, but merely allowed, directors and managers to prioritize non-shareholders interests.[26]

Contemporary state benefit corporation laws treat consideration of non-shareholder interests as an enforceable commitment, albeit one voluntarily entered into by virtue of choosing to incorporate under a benefit corporation charter. The Model Benefit Corporation Legislation (MBCL), upon which many current state laws are based, includes the requirement that "directors of a benefit corporation *must* consider the effect the corporation has on shareholders, employees, customers, the community where the corporation operates, the local and global environment, and its ability to create a material positive impact of society and the environment."[27] [Emphasis in original]

That commitment to broad stakeholder consideration is also legally reviewable. Even if a benefit corporation's actions cannot be construed as harming any relevant stakeholders, its management can still be challenged if they provide insufficient consideration to a given stakeholder group. Frederick Alexander clarifies that the MBCL (and state laws based on it) "allows corporate action to be challenged as not adequately addressing stakeholder interests, even if the directors have satisfied their obligations with respect to all stakeholders."[28]

In addition, or as an alternative to legally incorporating as a benefit corporation, companies can pursue private certification attesting to their compliance with ESG standards. The most popular current standard is administered by the non-profit group B Lab, which designates companies that meet its requirements as "Certified B Corps." Companies that wish to attain this certification must complete a detailed questionnaire on corporate operations and management and subject themselves to auditing of their responses by B Lab. Companies that display a high enough score on B Lab's assessment tool are invited into the "B Corp community" and allowed to display a registered trademark on their packaging and in advertising materials, among other benefits.

Existing ESG ratings by industry analysts, though flawed in some ways, could also develop to provide more detailed and reliable reputational signals for ESG-motivated investors.

With both legally binding and voluntary institutions already in existence—and the field open for more to be developed in the future—it is relatively easy for firms to publicly embrace ESG management and investing theory. Given those alternatives, the argument that new law and regulation is required to meet the needs of socially responsible investors is weak. To the extent that the status quo is insufficient, benefit corporation law can be extended and additional voluntary certification bodies can be created.

There is far too much money already sunk into ESG-themed investments to assume that the activists involved will be content to keep things on a voluntary path.

If existing corporations and investors decide that these voluntary options do not generate value as claimed, then any move to impose ESG standards must proceed democratically through the legislative process, where it can be evaluated and debated openly. Hopefully, it will not come to that.

Investors, whether institutional or retail, should be under no illusions about the potential legal and political fight they are facing. There is far too much money already sunk into ESG-themed investments to assume that the activists involved will be content to keep things on a voluntary path. Advocates for property rights and the market economy likely have a generation of defensive work ahead of them.

HISTORY

The construct known as ESG is only the latest iteration in a long series of similar concepts, such as corporate social responsibility, socially responsible investing, extended stakeholder management, and the triple bottom line, that have risen and fallen in popularity over the years. Some of these concepts have been widely discussed by multiple scholars and practitioners, while others are proprietary frameworks created and marketed by specific authors, investors, and consultants.[29] They all attempt to refute the presumption that maximizing profit for shareholders should be a business enterprise's most important goal, and attempt to substitute various alternate goals to ostensibly shift benefits from a firm's owner to other "stakeholder" groups, such as employees, charitable institutions, environmental activist groups, and society in general.

While advocates of ESG and other modern social responsibility theories tend to posit that American capitalism would be a wasteland of greedy exploitation absent their civilizing theories, advocacy for business ethics—beyond simple compliance with existing law—has been a robust part of U.S. corporate culture for a long time. While the term "business ethics" did not come into popular use until the early 1970s, many widely read figures wrote about the responsibilities of a firm and how its managers should discharge their responsibilities. Corporate management scholar Archie Carroll has written that, "In spite of its recent growth and popularity, one can trace for centuries evidence of the business community's concern for society."[30]

In the 19th century, companies offered an array of benefits for employees and the communities where they did business. These often took the form of philanthropic donations—and sometimes direct provision of social services—by owners and managers. Companies provided medical clinics, bathing facilities, lunch rooms, profit sharing, recreational facilities, and other benefits.[31] Carroll highlights National Cash Register founder John H. Patterson (1844-1922) as an example of the emerging "industrial welfare" movement in which employers embarked on ambitious campaigns to improve the living and working conditions of their employees.[32] For decades, Patterson created and implemented innovative projects for community betterment, including some of the first corporate employee benefits programs in the nation, including low-cost hot lunches, on-site health care, and continuing education opportunities.[33]

Toward the turn of the 20th century, the idea that successful business-people had an ethical responsibility to donate some of their gains to educational and social welfare charities—an expectation that goes back as long as human beings have been accumulating wealth—received a modern, systematic treatment by one of the era's most successful capitalists, Scottish-American steel magnate Andrew Carnegie.[34] In his essay "The Gospel of Wealth," Carnegie emphasized the need for those who had become wealthy to support charitable institutions with donations, while also defending capitalism's socially disruptive nature and the necessarily unequal distribution of its material rewards.

While some have treated it as a sort of proto-ESG tract, Carnegie's essay on wealth and philanthropy is consistent with the classical liberal understanding of capitalism, which recognizes that voluntary economic transactions are inherently moral and wealth-producing. In this view, the legal infrastructure by which modern business is organized—

including such concepts as property rights, limited liability investment, and corporate personhood—is a way to enable individuals, in collaboration with like-minded others, to pursue their own personal and professional interests. Thus, no underlying social debt is created by a profitable enterprise in a capitalist economy. The late economist David Henderson summarized this view well:

> In a well-functioning market economy, enterprise profits are performance-related: they can only be earned by providing customers of all kinds with products and services that they wish to buy, and doing so in a resourceful and innovative way. Profits can thus serve as an indicator of each enterprise's contribution to the welfare of people in general; and as such, they provide an indispensable economic signaling function. How well they serve this purpose depends on how far they are in fact performance-related.[35]

Individual business owners or corporate officers may be under any number of ethical obligations, depending on their status—as a citizen, parent, Christian, environmentalist, Freemason, or volunteer leader—but those roles and responsibilities are independent of the status of the firm. Thus, the traditional understanding of the corporation allows it to focus on the purpose for which it was constituted—profitably producing goods and services within a common legal framework—while allowing each of its shareholders and employees to use their own resources of time and capital to advance whatever personal objectives they value. This includes ethically discharging their business duties as a director or manager within the context of the firm's operations.

Social responsibility and ESG thinkers were not the first to worry about the ethical behavior of people in business. In fact, they were not even the first to suggest that the interest of shareholders should not be corporate management's paramount concern. As early as 1933, General Motors President Aldred P. Sloan, Jr. insisted in his company's annual report that "all company policies would, to the fullest possible extent, be subjected to the test of public interest." In 1936, Paul W. Litchfield of the Goodyear Tire and Rubber Company warned, in a speech to fellow business leaders, that "More and more, the attitude of the public toward business is going to be influenced by the attitude of business toward its social responsibilities."[36]

More famously, Johnson & Johnson CEO Robert Wood Johnson II wrote the company's "Credo" of beliefs in 1943, detailing the firm's commitment to customers, employees, "the communities in which we live and work," and lastly to shareholders.[37] Like many current management writers, he emphasized that rather than prioritizing other commitments above shareholders value *per se*, honorable conduct toward a company's other stakeholders was the best practical path to being financially successful: "When we operate according to these principles, the stockholders should realize a fair return."[38]

Johnson's approach, which has been widely cited in the corporate social responsibility literature, makes it clear that most contemporary ESG theory is neither new nor revolutionary. His original Credo might not have included a reference to environmental objectives (it has since been updated), but it makes explicit references to the traditional stakeholder groups referenced in most current ESG discussions.[39]

Perhaps the biggest shift during the 20th century is that from the presumption that ethical concerns are a matter of individual conscience to their being a collective priority.

Recent calls for "treating stakeholder groups with respect" imply that previous generations of business leaders refused to meet even this rhetorically low bar, but that is hardly the case. Particular examples of poor conduct notwithstanding, only the most shortsighted business owner would openly declare to have no respect for workers, suppliers, or the local community.

Perhaps the biggest shift during the 20th century is that from the presumption that ethical concerns are a matter of individual conscience to their being a collective priority. Scholars increasingly came to view ethics through a "social" framework and emphasized interactions between institutions and groups rather than based on the decisions and responsibilities of individuals. The rise of sociology as a discipline in the early 20th century, pioneered by writers like Émile Durkheim in France and Max Weber in Germany, was part of this trend. The rise of progressive political theory in the United States, popularized by writers like Herbert Croly and Walter Lippmann, focused on the goal of regulating relationships between large groups and institutions in society rather than on improving the moral character or punishing the transgressions of individuals.[40]

Meanwhile, many earlier writers would have been taken aback at the very idea of "business ethics" as a discipline separate from ethical conduct in general.[41] We can see this conflict between the traditional conception and the new social application in a 1981 article by renowned management guru Peter F. Drucker:

> To the moralist of the Western tradition "business ethics" would make no sense. Indeed, the very term would to him be most objectionable, and reeking of moral laxity. The authorities on ethics disagreed, of course, on what constitutes the grounds of morality—whether they be divine, human nature, or the needs of society. […]
>
> All authorities of the Western tradition—from the Old Testament prophets all the way to Spinoza in the 17th century, to Kant in the 18th century, Kierkegaard in the 19th century and, in this century, the Englishman F.H. Bradley (*Ethical Studies*) or the American Edmond Cahn (*The Moral Decision*)—are, however, in complete agreement on one point: There is only one ethics, one set of rules of morality, one code, that of *individual* behavior in which the same rules apply to everyone alike.[42] [Emphasis in original]

The shift in emphasis from the individual conduct of executives and managers to the policies of the firm itself reoriented how critics of corporate America framed their arguments.

The shift in emphasis from the individual conduct of executives and managers to the policies of the firm itself reoriented how critics of corporate America framed their arguments. At the same time that the individual ethical decisions of corporate leaders were deemphasized, measuring their impact on specific individuals became less important. Even if a company could not be shown to have acted with animus in any particular hiring decision, an unacceptable outcome (such as too few non-white applicants being hired), could be taken as evidence of a failing to provide equitable employment opportunity. Thus, grievous ethical lapses could be laid

The ethical customs of any age are a product of their times, and necessarily evolve.

at the feet of the business world without any specific perpetrator or victim ever being identified.

At the same time that business ethics theory shifted toward a "social responsibility" frame, some classical liberal thinkers were pushing back. Milton Friedman famously wrote in his 1962 book *Capitalism and Freedom* that the only social responsibility of business is to "use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[43]

Several years later, in an article for *The New York Times Magazine* that is still frequently referenced in debates over corporate governance, Friedman expanded on his aversion to the idea of a "social responsibility" for corporations, writing that the responsibility of corporate executives is to conduct business according to the desire of the firm's shareholders, "which generally will be to make as much money as possible while conforming to their basic rules of the society, both those embodied in law *and those embodied in ethical custom.*"[44] [Emphasis added]

While Friedman countered the intellectual progenitors of today's ESG theory, his definition of appropriate business conduct is not as absolute as some of his critics have alleged.[45] The ethical customs of any age are a product of their times, and necessarily evolve. Some of the demands of contemporary ESG theory, like opposing forced labor[46] and sex trafficking, are uncontroversial and would be in accord with the ethical customs of many eras of human history.[47] Some, like providing transgender-inclusive health care coverage to all employees[48] and requiring gender and ethnicity quotas for corporate board membership, have less universal support and are promoted by their advocates in the hope that they become the uncontroversial customs in the future. [49]

Critics of free-market economics frequently suggest that their vision of a better world is in fundamental conflict with a market economy because current corporate governance law makes it impossible for even well-intentioned public companies to contribute to the greater good, lest they violate their requirement to hold shareholder returns above all other concerns.[50] But even the allegedly strict guidance of someone like Friedman makes reasonable allowances to generally accepted standards, as does relevant corporate governance precedent in U.S. courts.

Corporate directors enjoy wide latitude, under the "business judgment" rule, to spend money and pursue corporate initiatives as long as they are legal, undertaken in good faith, and do not represent personal conflicts of interest for the corporate directors involved.[51] This includes donations to charitable causes, as long as they are justified as providing some tangible benefit like lowered tax liability or a longer-term intangible benefit like enhanced corporate reputation or improved workplace morale.[52]

What contemporary corporate governance standards do not do is make allowances for the categorical adoption of an entirely new hierarchy of priorities by which constituencies outside of a company stake a claim on the firm's resources. It is certainly possible that the demands of today's ESG advocates will become the unquestioned expectations of the future, but we need not take their word for it. Nor should we worry so much about being thought of as old-fashioned that we rush to embrace whatever new scheme claims to be on the cutting edge of history.

It is possible that the demands of today's ESG advocates will become the unquestioned expectations of the future, but we need not take their word for it.

Modern capitalists like Ben Cohen and Jerry Greenfield of Ben & Jerry's and the late Anita Roddick of The Body Shop were far from the first corporate founders to profess a public commitment to socially enlightened management. Some of the ethical responsibilities of business owners from the pre-"social responsibility" age—once held up as the highest examples of moral rectitude—have aged poorly, and there is no reason to think that today's trends will be immune from the same hazard. The last two centuries of Anglo-American business history are filled with quirky free thinkers and high-minded theorizers who were driven by their own vision of business virtue, though many of their expectations would clash with modern standards.[53]

For instance, in the 19th century some employers displayed their social concern by encouraging their workers to attend religious services and forswear the consumption of alcohol, both for their own benefit and to make them more productive and conscientious employees.[54] Corporate leaders like William Lever of Lever Bros. (today's Unilever) encouraged employees to live in company-planned and -controlled towns where residents were subject to rules similar to those of an unusually strict homeowner's association.[55] Lever declined to hand out the traditional rewards of a Victorian employer, such as "bottles of whisky, bags of sweets, or fat geese at Christmas," and instead decided for himself what his employees needed in their company town, such as an art gallery and "healthy recreation."[56]

Milton Hershey, who built a company-controlled town for his chocolate factory workers in the early 20th century (including parks, but no saloons), was often criticized for his overbearing and paternalistic attitude toward employees, even as he spent significant amounts of his and his company's capital on what he considered their benefit.[57] Fellow chocolatier George Cadbury, in the United Kingdom, followed a similar path, banning any alcohol from his family's model village of Bournville, south of Manchester, initially inhabited by Cadbury employees in 1879. The first retail license to sell alcoholic beverages in Bournville was finally granted in 2015.[58]

These early employee benefits received mixed reviews from employees and labor organizers through the late 19th and early 20th century. Some employees objected to specific restrictions and requirements, such as the lack of access to alcohol, while labor leaders complained employers granted benefits only to head off union organizing drives and calls for more expensive benefits.[59] As the examples of Lever, Cadbury, and Hershey highlight, such paternalistic programs—in some ways the progenitors of contemporary ESG expectations for expanded employee benefits—were adopted on case-by-case basis by individual firms, though they were inspired by larger social trends regarding religious virtue, educational opportunities for the working class, and healthy living.[60]

In the first half of the 20th century, American corporations expanded both their direct benefits and philanthropic giving, and social service organizers worked with them to systematize and professionalize the support of community services. Corporate executives directed large donations to organizations like the Young Men's Christian Association (YMCA), which established an "industrial department" in 1903 to work with railroad workers, miners, and lumbermen, and to assist immigrants.[61] In several cities, local business leaders formed civic associations and chambers of commerce, which often contributed to institutions like local hospitals, or raised money to respond to particular crises and emergencies. Fraternal organizations like the Kiwanis and Rotary clubs, whose memberships were comprised mostly of businessmen and professionals, also functioned as ways for individuals working for corporations to support charitable causes in their community.[62]

During the 1910s and 1920s, many charity-minded businessmen became organizers and supporters of the new "community chest" movement, which entailed charitable donations being collected from a variety of donors and then deployed by a dedicated staff to particular organizations and efforts. This style of fundraising was popularized under the term "federated giving." Individual city-based community chests, the first having been founded in Cleveland, Ohio in 1913, began joining together in 1918 as part of the American Association for Community Organizations (later renamed the Association of Community Chests and Councils).

Leaders in the world of federated giving, many of them prominent business executives themselves, oversaw an increase in corporate charitable donations from over $2.5 million in 1920 to almost $13 million in 1929 (around $200 million in current dollars).[63] Many of the original, local community chests across the country eventually merged to form United Way of America, though the local grantmaking previously carried out by the chests is largely done today by organizations known as community foundations, which still collect pledges from businesses. Community foundations in the U.S. collectively donate more than $6.5 billion each year, according to data published in 2019 by the Community Foundation Public Awareness Initiative.[64] Total corporate giving in the United States was over $21 billion in 2019, a 13.4 percent increase from the previous year.[65]

By the second half of the 20th century, the field of business ethics and the academic theory of "corporate social responsibility" and related disciplines began to take off. The field was pioneered by Howard Bowen, an American economist whose book *Social Responsibilities of the Businessman* was published in 1953. Scholars like Archie B. Carroll[66] and Debra J. Wood[67] made significant contributions to the field, suggesting frameworks for evaluating why and how corporations should consider and implement policies designed to address their ostensible social responsibilities.[68]

Early attempts at implementing academic social responsibility theories into investing practice started in the 1970s and 1980s with small funds that screened out disfavored companies. A fund manager would identify firms to invest in through normal analytic criteria, but then eliminate any prospects that were involved in a short list of unacceptable

Amherst College Archives and Special Collections (CC BY-NC 4.0).

Over time, the narrow focus on discouraging investment in specific pariah industries broadened to create an affirmative set of ethical guidelines that every company should aspire to and implement.

commodities, such as weapons manufacturing, tobacco, or nuclear energy.[69] During the Cold War, the international peace movement, focusing on nuclear disarmament, was especially influential on the nascent corporate social responsibility movement, leading to a strong focus on the desire to prevent armed conflict. Divestment from South Africa was perhaps the single most high-profile ESG-type issue of the 1980s. It included parallel efforts to isolate the regime and defend racial equality, including efforts by international sports leagues to refuse participation by racially segregated teams. However, Divestment and official economic sanctions were controversial, even among anti-apartheid activists.[70] Current ESG concerns are more likely to center on issues like climate change and gender diversity.

Over time, the narrow focus on discouraging investment in specific pariah industries broadened to create an affirmative set of ethical guidelines that every company should aspire to and implement. In the spirit of what today we would call intersectionality, the number of areas in which firms were expected to show their ethical bona fides increased, and yielded a sort of theory-of-everything for corporate conduct—leading to today's environmental, social, and governance movement.[71] Some of these issues proscribe actions by the firm that would have damaging effects, such as polluting the air and groundwater (the "E"). Other guidelines address long-term trends and demographic effects, like ethnic and gender discrimination (the "S"). And some prescribe specific procedures that will allegedly create a better managed enterprise (the "G").

DEFINITIONS AND STANDARDS

Some strains of corporate social responsibility theory have developed into what has become known as ESG investing. As noted, business owners have long worried about the ethical behavior of their managers and the impact of their operations on employees and surrounding communities. Boards of directors have long considered how to best govern their firms, and concerns about long-term environmental impact have been mainstream corporate issues for at least half a century. On the other hand, corporate managers have not always shared the specific values and priorities of today's ESG advocates. Many of those advocates seek to impose their moral judgements and values on the corporate world to bring ethical business guidance into what they view as a more enlightened age.

The first and perhaps most important distinction between traditional concepts of ethical business conduct and ESG theory is the degree to which investments are expected to be concessionary—that is, to what extent individuals and firms are expected to give up rewards they would otherwise reap absent ESG considerations. If there is a given universe of potentially profitable and legal business opportunities, but some are forbidden because they are considered unethical under an ESG framework, one would assume that investing under such guidance will limit one's potential returns.[72] An investment portfolio that excludes tobacco and weapons manufacturing, for example, will necessarily miss out on any returns from those sectors. Similarly, if a

Any set of goals needs to be prioritized, and not every goal will get to be number one.

firm is expected to raise wages and increase benefits to some higher, ethically superior level, we can expect the value of that increase to negatively impact shareholder returns by increasing the firm's labor costs.

Much analysis of CSR and, later, ESG investing has been premised on whether following such guidelines can be expected to result in lower average investment returns, and, if so, by how much. Many observers and researchers have approached the question with the assumption that if ESG investing is shown to be inherently concessionary it will remain a fringe movement embraced by only a small minority of investors, while evidence that it is not will signal its eventual widespread adoption. To a significant extent, the latter seems to have been the case, as a significant body of research has suggested that ESG-identified investment vehicles approximate the wider market's performance.[73]

Many current ESG advocates would insist that such findings are to be expected, as modern versions of "responsible investing" were never meant to be concessionary.[74] The U.N.'s Principles for Responsible Investing (PRI), for example, insists that integrating ESG factors into one's investing strategy "does *not* mean that portfolio returns are sacrificed to perform ESG integration techniques."[75] [Emphasis in original] It is certainly possible for any given fund or firm to operate that way, if it were to prioritize ESG goals only when they are consistent with maximizing profits. But ultimately, any set of goals needs to be prioritized, and not every goal will get to be number one. If a firm or fund has made a non-trivial commitment to advancing ESG goals, its managers will frequently face decisions in which one path honors that commitment and a diverging one increases profits.

Making the moral case for the corporation should not be difficult for those working in a firm—or anyone involved in business.

Moreover, underlying the logic of why firms should prioritize the interests of multiple stakeholders, rather than just those of shareholders, is the idea that shareholders unfairly receive too large a share of the profits from business. ESG theory has been justified as an exercise in redistribution—or, occasionally, "predistribution"—from shareholders to employees, community members, and other social and environmental priorities. Thus, while ESG management and investing may be consistent with profitability, it is also generally assumed to be consistent with a smaller share of total wealth flowing to shareholders than would otherwise be the case. Furthermore, ESG-compliant policies are often presented as an alternative to income redistribution via higher taxes and more generous government benefits.[76]

When it comes to specific actions recommended by advocates of ESG management, there are generally three levels of commitment, in increasing order of significance:

- Public endorsement of a set of principles
- Disclosure of firm-level data signaling compliance with principles
- Achievement of specific outcomes in harmony with principles

Most ESG methodologies expect that firms will embrace the first two, though the final demand is, as yet, less often heard. For example, public declarations by companies that they are prioritizing certain issues under the ESG umbrella are common, as is some level of voluntary disclosure of statistics associated with those goals. Auditing and verification of those claims is still in its infancy. The government and quasi-governmental efforts are led mostly by multilateral institutions, such as various U.N.-chartered agencies like Principles for Responsible Investment and the U.N. Global Compact,[77] the Organisation for Economic Co-operation and Development (OECD),[78] and the World Bank.[79] Independent ratings agencies provide detailed analysis of companies' claims and alleged risks, but, as we will see, those seemingly rigorous numerical scores are not nearly as robust as the firms that produce them like to suggest.

Because there is no single agreed upon definition of what topics fall under or should be part of ESG, much less what specific actions an ESG-compliant firm is expected to undertake, there is no single validating factor for the claims of any particular firm or investment product. However, when journalists and policy advocates make the argument that ESG is a validated and significant concept, they often cite the trillions of dollars that are said to have been invested in "responsible assets" or "according to ESG principles"or some similar concept.[80]

United Nations Principles for Responsible Investing

Most frequently, writers will include a reference to the Principles for Responsible Investment (PRI), which is the name of both a document that lists said principles and the United Nations-funded agency tasked with promoting them.[81] *Bloomberg Green* reporter Alastair Marsh describes its mission thusly:

> The Principles for Responsible Investment is asking its more than 3,000 member firms, which together manage over $100 trillion of assets, to look beyond the financial returns of their investments and pay greater attention to their impact on issues such as human rights, climate change, and social inequality.[82]

Principles for Responsible Investment, launched in 2006, promotes six principles.[83] The thousands of signatories have agreed to the following:

1. We will incorporate ESG issues into investment analysis and decision-making processes.
2. We will be active owners and incorporate ESG issues into our ownership policies and practices.
3. We will seek appropriate disclosure on ESG issues by the entities in which we invest.
4. We will promote acceptance and implementation of the Principles within the investment industry.
5. We will work together to enhance our effectiveness in implementing the Principles.
6. We will each report on our activities and progress towards implementing the Principles.

So, thousands of investors managing $100 trillion in assets now use ESG principles to guide their investment decisions. They do this by signing on to the Principles for Responsible Investment, which requires signatories to "incorporate ESG issues into investment analysis." This may leave a curious observer looking for PRI's list of ESG-relevant issues. A basic definition is surprisingly difficult to come by.

If we start on the PRI website, we can easily find information on signatories and their responsibilities, which brings us to a page describing minimum requirements for membership. That takes us to the "Reporting Framework" instructions. The Reporting Framework contains links to several other documents to assist potential signatories in completing the PRI disclosure and certification process. On page 59 we find a link to a document called the "PRI Impact Investing Market Map." In Appendix I of the Market Map, on page 92 of 112, we finally find less than 100 words of definitions of what PRI considers to be ESG issues.

> **ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG)**
> The environmental, social, and governance metrics that investors apply to measure the sustainability of, and risk associated with, their investments. These factors are:
> **Environmental**: issues such as those connected to global warming, energy usage, and pollution.
> **Social**: factors such as how a company treats its workers, health and safety considerations, and community outreach.
> **Governance**: topics including business ethics, board structure and independence, executive compensation policies, and accounting.[84]

Even that seemingly concise definition is very loose, given that the three topics are presented as "including" issues "such as" those listed. How many companies ignore their energy use, pay no attention to health and safety considerations, or have no executive compensation policy? Surely even the companies that would be rated poorly by the ESG authorities have at least measured and considered these topics. Even PRI—which is often cited as a guide for companies operating within an ESG framework—makes little effort to provide a functional definition of which topics are covered. That is consistent with the general vagueness prevalent throughout the world of "responsible" investment.

As it turns out, a lot of current ESG guidance mainly involves writing policies and "considering" issues. Starting in 2018, PRI introduced minimum requirements for signatories, along with procedures for delisting entities that fail to meet the requirements. Whereas the six principles are very general (and half are self-referential), the reporting paperwork is detailed and complex. The three basic requirements for being a PRI signatory are:

1. An investment policy that covers the firm's responsible investment (RI) approach.
2. Internal/external staff responsible for implementing RI policy.
3. Senior-level commitment and accountability mechanisms for RI implementation.[85]

These three requirements seem straightforward, but completing them requires reading the aforementioned Reporting Framework, a 75-page document that includes dozens of detailed questions.[86]

Answers to the questions are either a) voluntary, b) mandatory to report to PRI but voluntary to disclose to the public, or c) mandatory to both report to PRI and disclose to the public. Disclosure requirements are subject to change, as the 2019 "Summary of updates" specifies indicators that have been updated since the previous year's guidelines, including several voluntary ones that have been changed to mandatory.

So far we have six principles. In order to be certified as embracing those principles, a firm must meet three requirements. To fill out the paperwork necessary to comply with these requirements, PRI tells prospective members that "[t]he Reporting Framework is split into 12 modules,"[87] though it includes 19 categories of questions and disclosures. The Reporting Framework document refers the reader to several other documents that will be needed to understand or complete the framework. Altogether, these total 735 pages of additional documentation, background, and instruction, plus one spreadsheet with 14 tabs.[88]

With all of that detail, surely we have an effective tool for improving the environmental, social, and governance outcomes in the world? Unfortunately, anyone reviewing the PRI compliance paperwork will find that tracking any actual impact is a second priority to bureaucracy-building and box-checking. Companies are asked to specify whether they have adopted "Responsible Investing" policies, "conducted dialogue with public policy-makers or standard-setters," "[p]rovided financial support for academic or industry research on responsible investment," or "[e]ncouraged the adoption of the PRI." There are also questions about who approves a firm's policies, when they were approved, how often they are reviewed, and by what bodies.

PRI puts a heavy emphasis on identifying statements of policy and procedure and on tracking their evolution within a corporation's flow chart, but relegates what it calls “Real Economy Influence” to one sub-topic among many.

This focus on paperwork and internal guidelines seems strange if the goal is social change and improving environmental quality. If one’s policies and operations were having a significant desirable outcome—by, say, actually reducing greenhouse gas emissions—one might assume that would be considered more important than all the bureaucratic processes put together. But that is not how the PRI process works. The minimum requirements devote two of their three prongs to identifying which corporate staff are writing and implementing a company’s policy rather than any desirable outcome they might produce.

The PRI leadership, in 2018, finally began the multi-year process of auditing and threatening to remove corporations with insufficiently robust ESG commitments from its list of signatories.[89] The *Financial Times* reported in June 2019 that a total of 180 companies were initially put on notice that their membership was in question and given time to rectify their management procedures and disclosures. Fifty companies, with $1 trillion in assets, were still in peril of losing their membership a year later in 2019.[90] In September 2020, PRI announced that it had delisted five firms for failing to meet its requirements. In addition, 23 signatories on the initial non-compliance list from 2018 “have since either voluntarily delisted or been delisted for failure to submit their annual PRI report.”[91]

This seems more like a mechanism for creating an elite consensus and building an organizational infrastructure than anything else. The world of global policy makers and their respective organizations is a tightly interlocking one. The PRI membership requirements are written to incorporate multiple other international bodies and codes, such as the Financial Stability Board's Task Force on Climate-related Financial Disclosures, the OECD's Responsible Business Conduct for Institutional Investors, and the International Corporate Governance Network's Global Stewardship Principles. PRI applicants must also endorse these bodies' assumptions and policy guidance. Are they all valid and reasonable? A huge amount of detailed research is needed for anyone seeking to investigate and assess rather than reflexively embrace them.

Just as importantly, compliance appears to be less than rigorous. In subsection SG 01.8 CC, for example, a would-be PRI signatory firm is asked to check whether the company publicly supports the Task Force on Climate-related Financial Disclosures, and is given 200 words' worth of space to explain itself in the event of a negative response. The instructions do not specify what would constitute an acceptable explanation. Companies are also asked to list other similar organizations to which they belong or participate in, among them 35 specific organizations from a provided list, including the Australian Council of Superannuation Investors, the Extractive Industries Transparency Initiative, and the Local Authority Pension Fund Forum.

While the dizzying complexity of its documentation and disclosure requirements may require a significant commitment on the part of companies seeking to bolster their ESG bona fides, the Principles for Responsible Investing offer little guidance on what steps to take to advance any actual environmental and social goals.

Applicant companies are also asked if the firm has an investment policy that covers "[y]our organisation's definition of ESG and/or responsible investment."[92] If ESG theory is still at the stage at which every firm is entitled to its own interpretation, it seems to lack the prescriptive rigor necessary to solve the large, complex real world problems that it aims to tackle, whether those are climate change, worker rights, or a lack of employment diversity.

Private ESG Rating Firms

While they are often cited as the single biggest signifier of ESG investing, the Principles for Responsible Investment are not the only game in town. Many firms, including MSCI, Sustainalytics, RepRisk, and Institutional Shareholder Services, provide ratings for tens of thousands of companies and securities using their own proprietary methodologies and assist clients to help guide them through ESG-compliant investment decisions.

Unlike PRI, the ratings firms provide a membership-based group for their clients. They also provide numerical or alphabetic scores comparing one company's performance against another. However, the scores assigned by different ratings firms often diverge significantly. That seems to suggest that MCSI, et al. are either measuring different things or measuring the same things in such an imprecise manner that their numerical and letter-based scores do not correspond to any objective reality.

The *Financial Times* reported in 2018 that, "While the credit ratings assigned by S&P and Moody's for companies and other borrowers are closely aligned—with a correlation of 0.9—CSRHub, a data provider for the sustainability industry, calculates that the correlations between MSCI and Sustainalytics for ESG ratings are much lower at 0.32."[93] In other words, the ratings of the same companies by the two most prominent firms agree less than a third of the time. That would not present much of a problem if the two firms' offerings were clearly differentiated and represented two different products or areas of focus, but when managers are supposed to use each firm's data for the same purpose—manage investment risk based on ESG factors—that divergence does little to instill confidence in the robustness of their methodologies.

While not always singling out specific firms, critics of ESG and other "sustainable" or "impact" ratings have focused on such weaknesses, in both concept and execution. The American Council for Capital Formation's Timothy Doyle in 2018 identified three major biases—based on firm size, geographical location, and industry weighting and company alignment. He also addressed the box-checking inherent in the process:

> [C]ompanies find themselves building and adjusting disclosure resources, not to mention answering countless ESG surveys, to meet the many needs of the rating agencies. Given that disclosures are unaudited, unlike financial statements used for investment analysis, there is a large incentive for companies to pander to rating methodologies. This inevitably leads to the use of boilerplate language in response to ESG inquiries, to merely increase one's rating score.[94]

Jon Sigurdsen, a portfolio manager at DNB Asset Management, wrote in 2019 that even sophisticated investment professionals can make environmentally problematic choices because of reasonable, but ultimately incorrect, assumptions about which technologies and products have superior ESG attributes. He cites the example of a fund manager who declines to invest in an oil company, opting for a biodiesel manufacturer instead. While our notional fund manager assumes that biofuels are, by definition, environmentally superior to fossil fuels, Sigurdsen reminds us that, "Some biodiesel companies that use food crops to produce diesel have a carbon footprint larger than oil companies."[95]

ESG raters can disagree even on simple matters of fact.

A January 2020 study from investment strategy firm Research Affiliates found a lack of consistency and clarity among different ESG rating sources. The authors found that:

- ESG ratings vary significantly by provider.
- ESG portfolios constructed using the ratings of two well-known providers yield large performance dispersion and low correlation of returns.
- Differences in how ratings providers calculate ESG scores can result in the same company being ranked highly by one and poorly by another.[96]

The authors emphasize that even "well-known, well-established providers with robust methodologies" can provide very different scores to the same company being rated on ostensibly the same issue. When looking at the environmental performance of a high-profile corporation like Facebook, they find the company was "rated as a top firm by one provider and a below-average firm by the other provider."[97]

Worse, ESG raters can disagree even on simple matters of fact. London Business School Finance Professor Alex Edmans notes that, in the

Research Affiliates study, "Whether a company is a member of the UN Global Compact has a correlation of 0.86. Whether the CEO is the same as the Chairman has a correlation of only 0.56."[98] If two ESG rating firms can only agree half of the time who is the chairman of a public company, then more detailed ratings deserve much closer scrutiny.

Another recent paper by Florian Berg, Julian F. Koelbel, and Roberto Rigobon of the Massachusetts Institute of Technology's (MIT) Sloan School of Management explores what factors contribute to these differences in ESG ratings. They find four different relevant effects:

- **Measurement divergence**. Different raters measure the performance of the same firm in the same category differently.
- **Scope divergence**. Some raters consider certain categories that others do not.
- **Weights divergence**. There is disagreement about the relative weight of different categories.
- **Rater effect**. Raters' assessments appear to be correlated across categories, so when a rating agency gives a company a good score in one category, it tends to give that company good scores in other categories as well.[99]

Each of these effects contributes to the unreliability of ESG ratings in different ways and are potentially susceptible to remediation via different interventions or changes in methodology. Despite their significance, the authors note that divergent ratings might not always be a problem, since different analysts might reasonably prioritize some values over others. They do concede, though, that, "Measurement divergence is problematic, however, if one accepts the view that ESG ratings should ultimately be based on objective observations that can be ascertained."

Given that ESG ratings are generally marketed by their firms and promoted by third parties as being objective and based on quantitative, or at least quantifiable, data inputs, their measurement divergence is problematic. Yet even Philipp Aeby, the chief executive of RepRisk, which issues ESG ratings, told the *Financial Times* in 2018, "The fundamental problem is that it is still unclear exactly what ESG should stand for."[100]

Certifications and ratings are further complicated by the fact that environmental, social, and governance analysis is frequently combined into a single rating or score.[101] Sustainalytics provides a "Total ESG Risk" score for companies on a scale of zero to 100. RepRisk provides a similar "RepRisk Index" on the same scale, but also uses alphabetical ratings, similar to corporate credit and bonds ratings, for its "RepRisk Rating" on a scale of D to AAA.[102]

This can be misleading, since companies frequently have divergent scores on their E, S, and G subcategories and even on particular topics within each. The MIT Sloan study found that the differences between ratings agency scores "occurs not only at the aggregate level but is actually even more pronounced in specific sub-categories of ESG performance, such as Human Rights or Energy. This situation presents a challenge for companies, because improving scores with one rating provider will not necessarily result in improved scores at another."[103]

This issue is particularly relevant to the voluminous literature on whether investors in ESG-compliant equities and securities can expect to sacrifice returns that might otherwise accrue to a non-ESG allocation. Many studies, including multiple meta studies of existing research, have suggested that ESG-rated investment vehicles do not significantly reduce expected returns, though it is less clear whether they can be expected to exceed returns.[104]

More detailed research that breaks out E, S, and G components finds that positive correlations with returns is associated mostly with sound governance policies, while high scores on environmental and social components are unrelated or even inversely related with performance.[105] This suggests that the most traditional or "conservative" elements of ESG—internal oversight, transparency, and anti-conflict of interest measures—are the only elements of the bundle that yield actual returns. The newer, more progressive-inspired elements of ESG theory—climate disclosures, diversity mandates, and "fair trade" commitments—do not generate the "win/win" advantages to firms that their proponents frequently claim.

CONSTITUENCIES

Given the lack of clarity and agreement on what ESG principles are and how they are measured, it is worth asking *whom* ESG is for and what uses its constituencies are expected to make of it.

Activists

To activists seeking to advance a set of particular policies and outcomes, the ESG investing framework can be useful for getting otherwise indifferent institutions to embrace one's goals. Particularly in the case of frequently referenced hot topics like climate change, their being perceived as part of the bundle of ESG issues is highly advantageous for advocates for action on those issues.

However, corporate managers and investors should understand that activist groups can only be expected to support the kinds of ESG actions that most serve their own goals. That may include convincing large corporations and asset managers to adopt a public ESG framework like the U.N.'s Principles for Responsible Investment or giving awards to the most progressive or environmentally aware companies. But it might also mean organizing boycotts of companies with insufficiently robust policies or lobbying for laws and regulations to force compliance with goals like greenhouse gas reduction targets.

In this manner, ESG theory can serve as a means for advancing activist campaigns. From the activist perspective, any positive side effects for corporate managers and shareholders are incidental, and therefore expendable. Corporations can be lured into adopting "socially responsible" policies by the prospect of attaining a public relations halo and positive news coverage. But if the same legitimating activist organizations decide in the future that a given company's operations are no longer advancing the activists' policy goals, they will not hesitate to push the now-unfashionable firm onto the tracks of increased political risk and reputational peril. The usual one-way ratchet of increasingly strict activist demands makes this increasingly likely over time.

It is also important to assess the activist strategy by which anti-corporate entities presume to warn firms and asset managers against political risks they themselves have worked to create. Environmental activist groups will simultaneously work to make law and regulation inhospitable to certain industries and firms, then claim that investors

ESG theory can serve as a means for advancing activist campaigns.

must pressure the same industries and firms to change their operations, all the while claiming to be "protecting shareholder value" or providing some similar justification.[106] Such actions constitute an activist strategy for attacking disfavored firms and creating political risk, not an investment strategy for protecting shareholders by minimizing risk.

Many environmental, labor, and other activist groups have taken to shareholder activism to pressure public companies to adopt certain policies. Activist shareholder resolutions, aimed at forcing corporate boards to adopt ESG-style policies, have been around for decades but have exploded in effectiveness in recent years.[107] *The Wall Street Journal* reported in 2019 that the median level of support for environmental and social shareholder proposals, as a percentage of votes cast, rose from the middle single digits between 2000 until 2008 to 24 percent in 2018. The *Journal*'s John Stoll went on to point out that the more impressive figure was the record 48 percent of ESG proposals that were filed and then withdrawn in 2018, up from an average of 38 percent over the previous seven years. Such withdrawals are often a sign that company management has privately agreed to meet at least some of the activist demands without a vote being taken.[108]

The ESG activist investor class, while active and highly motivated, consists of a very narrow group of shareholders. A recent Manhattan Institute analysis found that "in 2019, 45% of all proposals [were] introduced by 'social investing' funds, public-policy groups, and religious orders—institutional investors with an agenda other than shareholder wealth maximization." Pension funds affiliated with public employees or labor unions introduced 13 percent of all shareholder proposals in 2019, while individual investors (outside of three unusually prolific filers notorious for their resolution activism) sponsored just 3 percent of all shareholder proposals. While activists filing shareholder proposals frequently claim their ESG-themed resolutions are ultimately aimed at addressing investment risk and building long-term shareholder value, institutional investors without a tie to a labor organization or a social, policy, or religious purpose sponsored none of the 2019 shareholder resolutions.[109]

Finally, while many conservative and free-market critics consider ESG activism to be hostile to property rights, a significant number of left-of-center activists oppose most of the institutions of ESG activism because they consider them to be insufficiently radical and too accommodating of traditional business forms.[110]

An editor for the socialist magazine *Jacobin* wrote in 2019 that green investing was a "sham" and that "ESG metrics and impact investing are mostly hype." In this view, large institutional investors like BlackRock, Vanguard, and State Street, despite claims of significant commitment to goals like addressing climate change, are merely engaged in "greenwashing"—applying an ecological veneer to longstanding investment practices aimed at increasing profits rather than addressing environmental concerns.[111] The same editor has pointed out that recent announcements from BlackRock CEO Larry Fink, for example, may be less significant than they appear, applying a divestment in coal only to BlackRock's actively managed portfolio, which constitutes only about a quarter of its total holdings. The magazine's verdict remains that "BlackRock remains a huge investor in dirty energy," and that it is "highly doubtful that [the company's] recent moves will add up to anything meaningful for the environmental movement."[112]

Finance insiders with an activist mindset have been caustic in their assessments as well. Chamath Palihapitiya, CEO of venture capital fund Social Capital and a billionaire former Facebook executive, has called ESG investing a "complete fraud" and a "joke" that generates positive publicity and business opportunities for firms but does not provide the environmental and social benefits its advocates claim.[113] He has also claimed that pledges from banks like JPMorgan to limit lending to fossil fuel companies are motivated by preferential lending rates offered by the European Central Bank and not indicative of a genuine commitment to climate change activism.[114] Similarly, Chrysalix Venture Capital CEO and "cleantech" investor Wal van Lierop has written that despite the increasing popularity of current ESG investing, "it is delusional to believe that we can win the war on carbon without more fundamental Social and Governance changes."[115]

Firms

Because ESG covers so many dissimilar topics, different firms may embrace elements of it for different reasons. Companies with an existing "socially responsible" brand identity may feel the need to position themselves at the forefront of the movement and display the most impressive environmental or socially responsible credentials. Some firms will see ESG compliance as a way to cultivate a virtuous public reputation for a relatively small cost of increased paperwork and disclosure. Other firms may see ESG certification as a strategic tool for handling future crisis communications situations, such as when they must answer criticism from hostile political advocacy groups, regulators, or other sources of negative media attention.[116]

Some elements of ESG guidance will already be familiar to managers as unremarkable and expected. For example, philanthropy by a corporate foundation benefiting social service non-profit groups would fall under most definitions of ESG-inspired stewardship, even if the corporate philanthropy in question long predates the coining of the phrase. Many companies also have been operating employee stock ownership plans and continuing education or scholarship programs for far longer than ESG has existed as a concept.

It is not surprising to find that there are positive returns correlated with firms adopting well thought-out governance structures. But that has more to do with sound business practices than with any ESG-led innovation. In fact, the "G" component addresses issues that any corporation has always had to consider. Every firm has to make important decisions about internal structure and governance, regardless of how managers may feel about "E"- and "S"-type issues. And there is already a highly developed area of law concerning corporate governance disclosures and compliance, including, in the U.S., extensive federal regulations promulgated by agencies like the Securities and Exchange Commission (SEC).

In addition to governance measures adopted independently by firms, government requirements and their compliance burdens have expanded significantly in the last 20 years due to implementing regulations of the Sarbanes-Oxley Act of 2002[117] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[118] Some of these mandates cross over from governance into the social and environmental realms, such as the Dodd-Frank requirement to disclose any "conflict minerals" used in manufacturing[119] and the 2010 Dodd-Frank-related SEC regulation on climate-related business risks.[120]

A firm may also already be engaged in activities that would fall under the ESG aegis via membership and support for various industry groups, trade associations, and other coalitions. When 181 CEO-members of the Business Roundtable signed their much-discussed public statement in 2019 that sought to "redefine the purpose of a corporation," each company could claim credit for the sentiments expressed by its CEO in the statement, which appeared written to be in line with current ESG theory.[121] Other expressions of ESG principles—such as membership in or partnership with organizations like Chief Executives for Corporate Purpose, the Climate Leadership Conference, or the Fair Trade Federation—might also be perceived as advantageous for reasons particular to a given firm.

Finally, for many firms, ESG presents a new business opportunity. Firms like MCSI and Sustainalytics do a robust business in selling their data and analysis to asset managers and individual investors. Consulting firms like Boston Consulting Group and Deloitte help clients with "Unlocking Tomorrow's ESG Opportunities"[122] and "Creating value through ESG and sustainability reporting."[123] Many of the individual proponents of ESG-style management play multiple roles within the movement.

As noted, Ryan Honeyman and Dr. Tiffany Jana, coauthors of the second edition of *The B Corp Handbook*, write at length about how businesses should incorporate social responsibility goals into their operations and seek non-profit certification for their efforts.[124] While they appear sincere, they are also both proprietors of their own for-profit consulting firms that charge clients for advice on how to incorporate social responsibility goals into their operations. As they note in their book, “There is a growing community of B Corp consultants who can help your business navigate this process.”[125]

There is also already a precedent of government preference for companies that embrace an ESG orientation. In 2011, the Small Business Administration (SBA) expanded its Small Business Investment Company (SBIC) program, which makes loans to investment companies at preferential rates on the condition that they use the funds “to make equity and debt investments in qualifying small businesses.”[126] That expansion included the creation of the SBIC Impact Fund, which the SBA described as “a $1 billion pilot initiative to capitalize investment funds that seek both financial and social return.”[127] The Impact Investment program was discontinued in 2017, but the SBA, in its announcement of the decision, stated that it “remains committed to licensing qualified applicants intending to finance small businesses located in underserved areas or applicants that otherwise employ an investment strategy focusing on social, environmental, and/or economic impact.”[128]

Retail Investors

Advocates claim there is considerable enthusiasm among retail investors for ESG-themed investment products, but that enthusiasm drops significantly if such products can be expected to underperform compared to non-ESG alternatives.[129] As with consumer products like Energy Star appliances, compact fluorescent bulbs, and food with environmentally friendly claims on their labels, consumers exhibit significant enthusiasm if price and performance are comparable to existing alternatives, but are much less motivated to purchase if they perceive a tradeoff on value or effectiveness.[130]

In general, retail investors seek to maximize returns while minimizing volatility and long-term risk. But most individuals who are not finance professionals seek those results while also minimizing their own investment in time. In that sense, ESG ratings can provide a valued heuristic for investors who want to express their enthusiasm for, say, limiting the future effects of anthropogenic climate change, without having to do the kind of detailed research on individual companies usually done by analysts.

As long as an investor has enough confidence to place her money in a declared ESG vehicle in the first place, she likely will not be able to detect or understand the underlying rating's lack of validity. Of course, it might be possible for a highly motivated individual to gain some insight by her own analysis of different ESG scores assigned by different analysts, but it is difficult to imagine most retail investors making that effort. In their 2019 paper, Berg, Koelbel, and Rigobon of MIT Sloan offer this suggestion of the divergence of various professional ESG ratings:

> [I]nvestors could reduce the discrepancy between ratings by obtaining indicator-level data from several raters and imposing their own scope and weights on the data. The remaining measurement divergence could be traced to the indicators that are driving the discrepancy, potentially guiding an investor's additional research.[131]

This may be worthwhile for a large institution, but it is a heavy lift for most individual investors.

On the other side of the retail coin are individuals who are joint holders of assets chosen for their ESG compliance by a third party, by virtue of their being a passive beneficiary of a trust or fund. In this case, the trustee's fiduciary duty, as in a pension fund, becomes the most important legal and ethical consideration. Should a trustee invest beneficiaries' capital in an ESG-certified vehicle based, even in part, on the idea that by so doing she is serving the "greater good" of society rather than maximizing returns? Some legal scholars take a dim view of this. In a recent *Stanford Law Review* article, law professors Max M. Schanzenbach of Northwestern University and Robert H. Sitkoff of Harvard write that "a trustee's use of ESG factors, if motivated by the trustee's own sense of ethics or to obtain collateral benefits for third parties, violates the duty of loyalty."[132]

This question of fiduciary duty was also the subject of a rule published at the end of 2020 by the Department of Labor amending the existing "investment duties" regulation under Title I of the Employee Retirement Income Security Act (ERISA). The amendments "require plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action." The proposed rule specifically addresses "pension plan investments selected because of the non-pecuniary benefits they may further, such as those relating to environmental, social, and corporate governance considerations."[133] In a June 2020 *Wall Street Journal* op-ed, then-Secretary of Labor Eugene Scalia underscored the point that "under

There are bureaucratic and self-interested reasons why large institutions might embrace an ESG framework.

Erisa one 'social' goal trumps all others—retirement security for American workers."[134]

Institutional Investors

Just as there is genuine enthusiasm among individual investors to "do the right thing" while also pursuing market returns, there is also a legitimate, idealistic enthusiasm for the same goal among people in the world of professional finance and investing. However, there are other bureaucratic and self-interested reasons why large institutions might choose to embrace an ESG framework, including ones that are clearly inconsistent with the activist perspective.[135]

In the same way that an individual firm hopes to attract new shareholders and positive ratings with its ESG emphasis, an asset management firm may hope to attract socially responsible investors with a product-specific or portfolio-wide emphasis on ESG assets. Asset managers also have wide discretion to launch and market new investment products with an ESG emphasis.[136] In the roughly 15 years that the term has been in use, CNBC estimated that companies have launched over 300 ESG funds with holdings of over $137 billion.[137]

Naturally, some of these funds are more expensive to administer than index funds or other holdings with more objective characteristics. As a result, the literature suggests that returns on ESG investment vehicles are often lower than those for similar offerings not because the companies selected underperform, but because the higher-than-average fees consume a disproportionate share of the realized gains.[138]

Very large firms may also have sufficient clout to act as market movers within the industry on disclosure and compliance. For example, BlackRock, the world's largest private asset manager, has outsized influence not only in the finance industry, but also on the CEOs of the companies in which it invests. The Institute for Pension Fund Integrity has pointed out that "BlackRock is among the top five owners in nearly every major global company—and thus holds among the top five voting blocs of shares in those companies."[139] That enables the firm to influence ESG compliance and disclosure in ways that are amenable to its own policy preferences, customers, and shareholders.

Moreover, the move of a firm like BlackRock into ESG-focused investment products and advocacy for stricter ESG compliance can present a lucrative business opportunity. Traditional index investing, which currently accounts for three-quarters of BlackRock's business, is an extremely competitive, low-margin market, and the higher fees make ESG funds more desirable for asset managers. For example, BlackRock's iShares Global Clean Energy ETF, one of the largest ESG funds in the world, carries an expense ratio 11.5 times as great as that of BlackRock's S&P 500 ETF.[140]

Moreover, BlackRock's size and diversification—which provide a built-in hedge against potential underperformance by any ESG-compliant subset of holdings—help boost the firm's ESG engagement strategy. With approximately $7.4 trillion in assets under management, BlackRock holds virtually every public company. And as explained in his much-publicized January 2020 letter to CEOs, BlackRock CEO Larry Fink's outlook on enforcing ESG objectives is not one of divestment, but of activist engagement. He wrote that the company "will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress."[141] So, rather than sell off shares of ESG pariah firms that are still profitable, BlackRock will continue to hold them while voting against disfavored directors and board resolutions.

Policy Makers

Similar to activists, many policy makers see ESG goals, which are currently voluntary, as a way to reinforce existing commitments to various environmental and social policy goals. Passing new laws and enacting new regulations can be slow, controversial, and generate backlash from industry. An approach that praises companies for action taken of their own initiative, rather than punish them for violating a set of rules, reduces conflict. Yet a policy guided by official encouragement, industry peer pressure, and news media coverage is less able to make specific demands for compliance and outcomes than is a specific set of guidelines or rules.

Therefore, some policy makers and advocates support a still-voluntary framework that is more detailed and comprehensive, while others support mandatory enforcement. The effort by the Sustainability Accounting Standards Board to get the Securities and Exchange Commission to adopt its ESG disclosure standards is an example of the latter.[142]

For policy makers who would like to see future law and regulation enforce ESG priorities, the gradual market adoption of voluntary frameworks could serve as a strategic precondition for the enactment of such policies in the future. Firms are much less likely to lobby against changes they have already adopted, especially when making them mandatory gives them a competitive advantage over market rivals that have declined to make such changes.

DISAGGREGATING E, S, AND G

Some of its promoters help create the misleading impression that ESG is a single, identifiable body of knowledge and methodology, and that said methodology can be relied on to classify corporations, securities, and even entire countries' financial systems as categorically "ESG compliant" or not.[143] But as many recent studies, including those cited above, have shown, even the leading firms that sell their expertise to financial institutions do not agree on how to measure individual components of ESG standards, much less agree on a single, comprehensive standard.

Researchers like Edmans and others have made the case that there is nothing wrong with different rankings and methodologies, because in an area as far-reaching as ESG, different individuals and groups will inevitably disagree about the value and relevance of the topics being rated.[144] The CEO of ESG ratings firm Sustainalytics also rejects the idea that ratings should be uniform across the industry, insisting that it would be "the height of lunacy."[145]

After offering complex advice for how investors can potentially analyze scores from competing ESG ratings firms, Berg, Koelbel, and Rigobon suggest a simpler option: "Alternatively, investors might rely on one rating agency, after convincing themselves that scope, measurement, and weights are aligned with their objectives."[146] This effectively acknowledges that different investors can legitimately have different objectives, rather than have their objectives defined for them by the United Nations or some other overarching entity.

Some may be more interested in "doing good" in developing countries, while others will want to work to lighten the environmental impact of the world's largest economies. For instance, one investor may decide to focus on minimizing carbon footprints (E), another will look for ways to promote women-owned businesses in the developing world (S), while another may seek to bring greater transparency to corporate decision making (G).

Even some of the companies and entities most deeply involved in ESG have acknowledged that treating every imaginable environmental, social, or governance issue as equally important is neither reasonable nor desirable. Patagonia—a darling of the ESG movement that has been lauded as "leading the way in sustainability,"[147] with its CEO hailed as a "C-suite sustainability champion"[148]—restricts its corporate charity to environmental, and not social or governance-related, causes.[149]

Much research and analysis on corporate philanthropy and community engagement has emphasized the need for such efforts to be focused, professionally managed, and closely related to a company's core business in order to be effective.[150] This strategy of "tightly integrating the management of philanthropy with other company activities," as recommended by Harvard Business School's Michael Porter and Mark Kramer, seems to justify a more dispersed, firm-by-firm approach than one in which every company is jointly and severally responsible for engaging on every environmental and social issue.[151]

Not only have some companies chosen to narrow and tailor their ESG efforts to specific areas, but firms that provide only ESG-wide reporting are being criticized for not breaking out their efforts into different areas. *The Guardian*'s Jeff Leinaweaver interviewed several corporate leaders on this topic in 2015:

> Many companies are producing reports that fail to connect with a broadening audience. "Many of the intended stakeholders have quite specific interests," [Novo Nordisk Vice President of Corporate Sustainability Suzanne] Stormer says. "For example, issue-interested NGOs. Their information needs may be more specific than what is conveyed in a sustainability report that, by default, will have to paint a picture in broad strokes." Carrie Christopher of Albuquerque-based consulting company Concept Green agrees, saying many reporting companies "have lost their way," producing reports "written for everybody and nobody at the same time."[152]

New corporate reporting procedures and different analytical products can supply those differing informational needs, and, to some extent, some already do. But competing ratings and reporting standards are a double-edged sword. Producing targeted and well-defined measurements for specific audiences can serve those additional audiences well. But the proliferation of ESG surveys that presume to cover all relevant bases has led to confusion, that, as Leinaweaver explains, "may in part be due to a confusing glut of standards and frameworks, such as the Global Reporting Initiative (GRI), the International Integrated Reporting Council (IIRC), and the Sustainability Accounting Standards Board (SASB)."[153]

It is misleading to think of most policy issues as constituting a binary choice. By the same token, analysts, policy makers, and the news media need to stop thinking of ESG as a binary concept with an approved set of virtuous policies that firms either embrace or not. For example, scholars disagree strongly about which social policies can best help reduce poverty, increase educational opportunity, or promote racial and gender equality. Why should an ESG score pick one side and award demerits to someone who picks another?

The conventional environmental analysis for addressing climate change, for example, calls for eliminating energy production from fossil fuel sources and rapidly deploying renewable sources like wind and solar. There is a dramatic gulf of disagreement, however, over whether nuclear power should be part of that process.[154] Many prominent voices in the environmental activist movement insist that nuclear energy should have no role in a post-fossil fuel world. Physicians for Social Responsibility declares that nuclear is "a dirty, dangerous, and expensive form of energy that poses serious risks to human health."[155] Prominent activists like Naomi Klein[156] and Leonardo DiCaprio—and analysts employed by his charitable foundation—insist that the risk from expanding nuclear energy is unacceptable, even to confront catastrophic climate change.[157]

At the same time, there are many high-profile advocates of expanding nuclear energy in the interest of addressing climate change, including the scientist James Hansen, long considered the "father of climate change awareness."[158] In a 2013 open letter on the topic, Hansen and three scientific colleagues declared that "there is no credible path to climate stabilization that does not include a substantial role for nuclear power."[159] Hansen later coauthored a much-discussed op-ed with Michael Shellenberger, the president of the non-profit group Environmental Progress, insisting that, "Anyone seriously interested in preventing dangerous levels of global warming should be advocating nuclear power."[160] Shellenberger's support for expanding nuclear capacity is shared by prominent like-minded researchers like *Skeptical Environmentalist* author and Copenhagen Consensus Center President Bjorn Lomborg.[161]

These disagreements—about one of the most important environmental issues and most frequently invoked ESG topics—highlight the difficulty of assigning simple scores and classifications to companies and particular investment strategies. The same decision, to invest in nuclear energy production, would be given either an extremely low or extremely high rating, depending on whether the analyst in question was operating under Leonardo DiCaprio's assumptions or James Hansen's.

This problem goes beyond the frequent complaints in the world of ESG analysis regarding inconsistent disclosure and incomplete information about how much progress firms are making toward acknowledged goals. This is about experts in their respective fields fundamentally disagreeing about what our environmental, social, and governance goals should be in the first place. These conflicts cannot be solved by enhanced disclosure agreements or requiring firms to simply "have a policy on" or "consider" the topics in question.

This understanding dismantles the argument that ESG represents a single concept or a readily definable set of "responsible" positions or priorities. If thoughtful and responsible investors can disagree on ESG themes, then it makes no sense to describe any rated entity as “pro-ESG” or “anti-ESG” or even as being “ESG compliant.” Any system that seeks to arrive at a one-size-fits-all definition of what ESG should be will either have to focus on value-neutral compliance behaviors (like PRI’s detailed disclosure requirements) or require specific policies and goals that are sufficiently contentious and controversial to make agreement impossible.

Current ESG ratings, especially the single number (57 out of 100) or alphabetic code (BB out of AAA) signifiers, attempt to condense an extremely complex universe of information into a simple, digestible index value. That makes it easier for analysts and individual investors to consider multiple other values (p/e ratio, buy/sell recommendations) alongside it when making investment decisions. The problem is that those ratings rarely correspond to any objective criteria or provide the accurate “good company vs. bad company” signifier they imply. The ratings industry itself will need to take the lead in disabusing investors of the misleading notion that a single-value ESG score means much at all.

THE FUTURE: VOLUNTARY VS. MANDATORY

If ESG goals are truly voluntary and only to be pursued when consistent with shareholder profit, they would pose no long-term threat to property rights and a market economy.[162] But that will only be true if its proponents who currently support a voluntary framework are arguing in good faith and if corporate leaders are able to control the future of public policy related to ESG activism. Unfortunately, there is no reason to think that either will prove to be the case.

Before considering whether current supporters of voluntarism might change their position in the future, we must attend to the vocal advocates who insist that the status quo is insufficient for obtaining the environmental, social, and governance-related goals they seek.

Today the ESG world is a sometimes-coordinated effort by private non-profit organizations, quasi-governmental entities, and agencies within national governments and the United Nations to motivate voluntary disclosures and initiatives by corporations, especially by publicly traded companies. For those whose ambition is to "save the world" via the ESG construct, that loose confederation of interests has proved unsatisfying and insufficient. In trying to push toward less flexibility, advocates have relied on appeals to idealism, potential regulatory and financial benefits for early adopters, Thanos-like claims of inevitability,[163] and admonitions that laggards will be punished in the future regime.[164]

There is a significant movement of activists, academics, and policy makers advocating for a future of mandatory ESG compliance regulation, the existence of a large number of voluntarist "ESG moderates" notwithstanding (see sidebar). While the direct efforts of such individuals are important, other factors may prove even more potent in leading away from a voluntary framework.

One such factor is the need for ESG to defy market forces in some instances. The logic of ESG guidance, by which firms forswear otherwise profitable operations and investments because they do not comply with ESG ideals, will lead to "good" companies having potential profits poached by non-ESG compliant rivals. If investing in,

The Chorus for Mandatory ESG Regulation

"Both investors and the broader public need clear information about how businesses are contributing to greenhouse gas emissions, and how they are managing—or not managing—climate risks internally. Realistically, that can happen only through mandatory public disclosure."[165]

— Securities and Exchange Commission Commissioner Allison Herren Lee (2020)

"I was [previously] not a fan of mandatory disclosure. But now I have shifted. We have passed the time of voluntary disclosure mechanisms."[166]

— Sustainalytics CEO Michael Jantzi (2020)

"The [2018] petition [by law school professors Cynthia Williams of York University and Jill Fisch of the University of Pennsylvania] asks the SEC to develop a 'comprehensive framework for clearer, more consistent, more complete, and more easily comparable information relevant to companies' long-term risks and frameworks' on ESG reporting for U.S. public companies; additionally, the petition argues that ESG disclosures should be required under the existing SEC reporting framework because such disclosures are per se material to the decision-making of investors."[167]

—Alana L. Griffin, Michael J. Biles, and Tyler J. Highful, American Bar Association (2019)

"Sustainable investment is an unstoppable train."[168]

—Willis Towers Watson, "Sustainable investment" (2018)

for example, coal and tobacco is still profitable but off-limits to any firm with a public ESG commitment, the resulting asymmetry of available capital will create an attractive opportunity for firms willing to eschew the ESG social responsibility halo. The social pressure to be part of the pro-ESG elite consensus may keep many major firms on the sidelines, but that dike will have leaks. There will always be renegade capital managers who are indifferent or hostile to an ESG framework, even a voluntary one, and who will be quite willing to pursue those returns.

The only way to stop these losses by the virtuous U.S. firms will be for ESG mandates to be either adopted as binding by the SEC and other regulatory agencies, enacted by statute, or implemented via a "regulatory harmonization"-style international agreement. For example, the European Union has had mandatory reporting requirements for "Non-financial and Diversity Information" since 2018,[173] and will implement new regulations on "Sustainability-Related Disclosures" in 2021, applicable to EU and U.K. firms as well as U.S. firms that market their investment products in the U.K. or EU.[174] As mandatory requirements become entrenched in one major investment market, pressure will build to bind all major players to the same standard.

For instance, in 2010, CSR Insight LLC submitted a comment to the Securities and Exchange Commission predicting that ESG financial disclosure requirements would eventually produce a "global harmonization of ESG financial disclosure" that would establish "consistent policies,

"The Investor Advisory Committee of the U.S. Securities and Exchange Commission recently recommended that the SEC promulgate specific disclosure policies regarding environmental, social, and governance topics and incorporate them into the integrated disclosure regime for SEC-registered issuers."[169]
—Jones Day (2020)

"The pressure on companies and organisations to act, as well as think, in sustainable ways is building. It will soon be irresistible. […] Many of the sustainable economy rules, its ecosystems and key players are still to be defined. But it's already clear—in the attitudes of the public and investors alike—that the time for waiting to see is over."[170]
—Caroline Haas, Managing Director and Head of Sustainable Finance, NatWest (2019)

"The economically advanced nations of the world are transitioning toward mandatory broad ESG disclosures, and this is a transition the United States, however reluctantly, is likely to make in time."[171]
—Leonard W. Wang, former Assistant Director, Division of Enforcement, U.S. Securities and Exchange Commission (2019)

"The bottom line is that stakeholders have come to expect ESG disclosures. This means companies can voluntarily report on such topics now—and proactively communicate their progress on ESG-related issues—or scramble to catch up with those already reporting if and when such issues become mandatory in the future."[172]
—Jessica Lyons Hardcastle, *Energy + Environment Leader* (2016)

standards, terminology, definitions, and metrics." In 2012, addressing the Atlantic Council in Washington, D.C, David Wright, then-Secretary General of the International Organization of Securities Commissions, insisted that "the global agenda" for financial policy reform did not "sufficiently take into account the crucial need to change behavior, ethics, and incentives in firms."[176] Legal scholars have noted the enthusiasm of such influential policy makers for global mandates on non-financial factors of corporate governance. Law professor Jennifer Hill of Monash University in Australia has written that, "The increasing international focus on corporate culture, ethics, and ESG issues suggests that [Wright's 2012] comments were prescient and indicative of an important future direction for supranational regulatory cooperation."[177]

We also already know that at least one of the two main political parties in the United States is willing to advance major policy changes via international agreements without the expectation that they be ratified as treaties. When President Barack Obama agreed to commit the United States to the Paris Climate Agreement, negotiated pursuant to the United Nations Framework Convention on Climate Change, the administration implemented the agreement without submitting it to the Senate for ratification, arguing that it was an "executive agreement" that could be ratified via executive order.[178] Complying with the agreement will likely require dramatic changes in U.S. domestic energy policy and will bind the U.S. to increasingly strict limits on greenhouse gas emissions, but the Obama administration did not consider that burden to be significant enough to solicit the input of Congress.[179] (Donald Trump withdrew the U.S. from the treaty in 2017 and Joe Biden has now re-enrolled the nation as a signatory.) Many ESG advocates would be willing to attempt a similar undemocratic process for imposing new standards of corporate governance.

While there appear to be strong forces in the United States pushing for more rules—and fewer choices—when it comes to a voluntary guidance vs. a mandatory ESG framework, there are two important issues to consider before enacting binding regulation. First, would any potential mandatory approach be legally and constitutionally sound, and would it respect the property rights and due process of asset owners? Second, would a mandatory framework serve the interests and goals of its proponents? There are reasons to think that neither condition is likely to be met, at least by any system that would emerge from the political and administrative processes that presently exist in the United States.

If binding ESG mandates were to emerge from the U.S. policy process, they would likely embody the worst aspects of existing voluntary reporting and current mandatory finance and governance rules. Formalistic guidelines that merely require a company to confirm it has an ESG policy and that it has "considered" various E, S, and G factors would create a large compliance bureaucracy and impose massive paperwork costs without necessarily accomplishing anything in furtherance of those goals—even assuming that policy makers could agree on what those goals should be.

Federal regulatory policy already requires companies to go through what could be called symbolic compliance theater, as in the case of Public Company Accounting Oversight Board's (PCAOB) "internal control" mandate.[180] These rules, part of the implementation of the Sarbanes-Oxley Act of 2002, were costing companies $35 billion per

It is difficult to imagine a regulatory or legislative process that would not be dominated by industry players.

year as of 2010 and involved auditors micromanaging details like the possession of office keys and the number of letters in employee passwords.[181] The PCAOB admitted in a SEC 2007 filing that, in implementing its internal control auditing standards, "Costs have been greater than expected and, at times, the related effort has appeared greater than necessary to conduct an effective audit of internal control over financial reporting."[182]

Moreover, a regulatory structure controlling ESG disclosure—let alone performance—would be subject to the same institutional and behavioral pitfalls as all regulation, including rent-seeking and capture by regulated entities. Given that much of the corporate enthusiasm for ESG initiatives is currently being led by finance firms, their professional associations, and quasi-governmental bodies of which they are members (like the U.N.'s PRI), it is difficult to imagine a regulatory or legislative process that would not be dominated by industry players.

Stricter standards and more expensive requirements would privilege incumbents over new entrants, larger firms over smaller firms, and firms that already have larger legal, regulatory compliance, and lobbying departments. Current ESG ratings are already biased in favor of larger firms, and heightened burdens would only reinforce that effect.[183] As JPMorgan Chase CEO Jamie Dimon noted in 2013, the regulatory requirements of the Dodd-Frank Act, rather than restrain or discipline large firms like his, simply helped build a "bigger moat" against its smaller competitors.[184]

In the big picture of the U.S. and global economy, accumulated regulatory burdens slow economic growth and rates of innovation.[185] Every U.S. company is already working under a under a heavy weight of federal and state regulation designed for its particular industry, as well as the economy-wide regulations that apply to every company. That accumulated, "vertical" burden has significant economic effects on individual firms, particular industries, and the U.S. economy as a whole. The Competitive Enterprise Institute's Wayne Crews estimates that the current total cost burden of U.S. federal regulation comes to $1.9 trillion per year, or over $14,000 per household.[186] Scholars at the Mercatus Center at George Mason University have also found that higher regulatory burdens worsen income inequality—a frequently cited ESG "social" concern—by obstructing entrepreneurship, slowing employment growth, and increasing poverty.[187]

Current ESG ratings are already biased in favor of larger firms, and heightened burdens would only reinforce that effect.

The prospect of an ESG disclosure mandate is not nearly as far off as many observers had imagined until recently. A movement is gathering steam calling for the Securities and Exchange Commission to either adopt regulations based on recommendations from the non-profit Sustainability Accounting Standards Board or create a system that aligns with other frameworks like the Global Reporting Initiative (GRI).[188] News media and industry reports often include comments from institutional investors and analysts complaining about a lack of consistent, comparable data on public companies under the current, mostly voluntary, disclosure regime.[189]

Those complaints were already acknowledged by previous agency leadership, including former SEC Chairman Jay Clayton, who in July 2019 acknowledged there is a "growing drumbeat for ESG reporting standards."[190] Current agency leadership appears poised to respond to that drumbeat. SEC Commissioner Allison Herren Lee, appointed by President Biden in 2021 to serve as the agency's acting chair, wrote in a September 2020 *New York Times* op-ed that public knowledge about corporate greenhouse gas emissions "can happen only through mandatory public disclosure."[191] The SEC's Asset Management Advisory Committee issued a report in December 2020 that recommends for the agency to "require the adoption of standards by which corporate issuers disclose material ESG risks," among other significant changes.[192]

In another sign that U.S. policy makers are looking to intervene, in July 2020 the Government Accountability Office (GAO) delivered a report to the Office of Sen. Mark Warner (D-VA) on ESG disclosures. The GAO report said that "most investors told us they seek comparable information across companies." It also suggested that "requiring ESG disclosures in companies' regulatory filings—rather than across multiple locations—could reduce information disparities between large and small investors." In addition, the GAO found that "market observers recommended that SEC issue a new rule endorsing one or more comprehensive ESG reporting frameworks, such as SASB or GRI, for companies' reporting of material ESG issues."[193]

Meanwhile, members of Congress have not been waiting for the SEC to act or for any particular ESG reporting framework to emerge as a consistent favorite. The GAO report "identified several bills recently introduced in the House and Senate that would require certain companies to disclose additional ESG information."[194] None of those bills have become law as of this writing, but piecemeal attempts at imposing similar requirements, many of them governance-related, have been inserted into multiple bills that have been passed and others that are considered top prospects for passage by at least one major party.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, which provided funding to companies to help them maintain payrolls during the coronavirus pandemic and the resulting business closures, among other goals, imposed multiple restrictions similar to those frequently sought by ESG advocates. Various provisions of the CARES Act imposed restrictions on executive compensation, stock buybacks, dividends, employee retention, collective bargaining agreements, and loan forgiveness.[195] U.S. airlines that received CARES Act bailout funds faced particular requirements.[196] At least one ESG investing analyst has suggested that officials in both the U.S. and Europe singled out specific companies for stringent limits on dividend payments and share buybacks because those companies had a history of high dividend payments and buybacks in recent years, a practice discouraged by ESG advocates.[197]

In addition, some recent legislation applies ESG criteria to local and state governments. The Moving Forward Act (H.R. 2, 116th Congress), passed by the House of Representatives in July 2020, would have provided billions of dollars for green infrastructure projects, and includes a greenhouse gas emissions tracking and reduction requirement on states and Metropolitan Planning Organizations (MPOs) that receive transportation funding.[198] This policy is supposed to "encourage" planning officials to direct funds to mass transit projects and away from building new roads.[199] Similarly, one publication focused on asset management has described the Green New Deal, with its emphasis on climate change, green infrastructure spending, and "justice and equity for all," as "ESG's moon landing."[200]

Many prominent U.S. political figures are putting economic policy changes that would advance ESG goals at the center of their agendas.[201] The Accountable Capitalism Act (H.R. 2506, S. 3215),[202] sponsored by Rep. Ben Lujan (D-NM) and Sen. Elizabeth Warren (D-MA), would require that at least 40 percent of each company's directors be selected by the company's employees and institute a 75 percent supermajority voting requirement for a company's board to authorize "engaging in political expenditures." The legislation would also introduce a national charter for corporations with over $1 billion in annual revenue, which could be revoked by an official at the Department of Commerce if said official disagrees with the company's conduct.[203]

Sen. Bernie Sanders (I-VT) and Rep. Ro Khanna (D-CA) have also cosponsored the Stop WALMART (Welfare for Any Large Monopoly Amassing Revenue from Taxpayers) Act, which would prohibit stock buybacks unless all of a company's employees were paid at least $15 an hour and granted seven days of paid sick leave a year. It would also cap CEO compensation at 150 times the median pay of all employees.[204] Stock buybacks and "excessive" CEO compensation may be anathema for progressive politicians, but recent finance and management research validates that both can be associated with long-term growth, increased innovation, and increased employee satisfaction, as well as with higher returns for shareholders.

London Business School Finance Professor Alex Edmans, in his 2020 book *Grow the Pie: How Great Companies Deliver Both Purpose and Profit*, provides a convincing refutation of the attacks on buybacks, high CEO pay, and the alleged evils of private equity ownership. Contrary to ongoing criticism from stakeholder advocates, he argues, these aspects of corporate management, if properly implemented, can be consistent with long-term growth and shared prosperity. Edmans tracks the performance of public companies that have increased CEO compensation, bought back shares, and received significant stewardship attention from private equity shareholders, and finds the alleged evils of short-termism and short-changing workers are not a necessary result.[205]

As research from Edmans and other scholars shows, many of the demands of ESG advocates are rhetorical cudgels wielded to advance interventionist economic policies, not widely applicable guidance that all corporate managers should embrace. Stakeholder proponents like to suggest that their preferred policies would simply accelerate the adoption of already popular win/win propositions, but a closer look reveals a disconnect between their proposed one-size-fits-all mandates and the unique contours of each firm and industry.

In part because of that disconnect, a government-enforced version of ESG theory—if it were substantive and included provisions like the ones Warren and Sanders have championed—would represent a huge regulatory taking that would severely undermine property rights throughout the United States. It would put massive power into the hands of a handful of policy makers tasked with implementing such a system.

Requiring firms to accommodate a large share of directors chosen by employees, rather than shareholders, and putting them in legal peril of extinction at the whim of Department of Commerce bureaucrats would mean the end of due process for for-profit corporate entities.[206] Not only would shareholder supremacy cease to be the default legal obligation of for-profit corporations, it could be abolished entirely in favor of a confusing, non-transparent system of ad hoc administrative governance and regulation by enforcement action.[207]

ALTERNATIVES

Many corporate critics insist that the reforms they propose are necessary because current U.S. corporate law cannot accommodate what firms should be doing or even what an increasingly large number of investors want their firms to do.[208] To the extent that this is true, evolving legal structures, like benefit corporation charters[209]—which, as noted, are currently available in 35 states (including Delaware) and the District of Columbia[210]—can easily be implemented or expanded to accommodate the growth of interest in stakeholder-oriented entities. State laws that provide for benefit corporation recognition also allow existing, traditional for-profit firms to reconstitute themselves as benefit corporations.[211]

The Model Benefit Corporation Legislation, which is the basis for the benefit corporation laws in several states, calls for such firms to have "a material positive impact of society and the environment." It lists several stakeholders that directors must consider when making management decisions, including shareholders, employees, customers, community, and "the local and global environment." Directors are further instructed that they "need not give priority to a particular interest or factor" among those listed, and may consider "any other 'factors or interests' the board deems 'appropriate.'"[212] While under this framework shareholders are no longer the primary beneficiaries of a firm's operations, they retain the sole ability to legally challenge the board over its management decisions. No independent right of action is granted to employees, customers, or representatives of the community to enforce the requirements of its benefit status.

Several other U.S. states, including Delaware, have a similar law, known as a Public Benefit Corporation (PBC) statute. A PBC is similar to the MBCL in its requirements for pursuing a general public benefit by mandating consideration of multiple stakeholders, as it also requires a firm to choose and disclose a specific public benefit. However, the PBC does not require companies to demonstrate their public benefit via evaluation by a third party standard, a key element of benefit governance in MBCL states. Corporate directors in PBC states are also less exposed to litigation over their benefit status, as not even shareholders are able to bring substantive claims that a corporation has failed in its obligation to pursue or create a public benefit.[213]

Another alternative is the creation of additional, competing private certification bodies with rigorous standards and clear goals. The "B corp" certification, created by the non-profit organization B Lab, does a good job of putting meat on the bones of the conventional ESG outlook, which lacks a compliance framework like that of the United Nations Principles for Responsible Investment. Disclosures to B Lab are evaluated in detail and require the adoption of specific policies that advance the goals the organization has prioritized, rather than simply asking firms whether they have some sort of procedure or policy in place.[214]

However, this terminology has led to some confusion, since shorthand for other corporate forms that follow the same pattern—such as “C corp” and “S corp”—refers to legal structure and status. Meanwhile, the term “B corp” has been used to refer both to companies that are benefit or public-benefit corporations according to the laws of the state in which they are incorporated, as well as to companies that have received the non-profit B Lab seal of approval but are not bound by the terms of an MBCL or PBC statute. For the purposes of the present discussion, we will refer to the later as “Certified B Corps.”[215]

While different in important ways, benefit corporation laws and the B Lab framework are linked. For states operating under an MBCL statute, which requires compliance with a third-party standard, a detailed assessment like B Lab’s would be consistent with compliance.[216] From the other direction, B Lab requires existing firms that wish to become Certified B Corps to reincorporate as benefit corporations if the firm in question is based in a jurisdiction that has that option.[217]

Many investors and managers are clearly happy with the B corp model and the organization that created it. But many people of goodwill who do not embrace the same ethical framework and priorities have their own vision of socially responsible commerce. Expanding the number and scope of private business certification programs would allow the ideas behind ESG to flower—not restricted to what a handful of staffers at a United Nations agency or a progressive non-profit organization have decided is the optimal ethical construct.

The world of socially conservative investing already has the developing structure of Biblically Responsible Investing (BRI), which aspires to evaluate investment options in a way that is in alignment with Christian investors' faith.[218] The ethical actions called for by adherence to biblical commandments is itself a contested area. Given that, one can also choose to follow the investing advice of Roman Catholic investment funds that have taken Pope Francis's guidance to prioritize impact investing, which according to one Catholic foundation, "is directed by Catholic teachings about social justice and giving dignity to the poor."[219] Many financial institutions have also created investment products that are consistent with Islamic law, such as BlackRock's iShares MSCI World Islamic UCITS ETF.[220]

There are also voluntary certifications and guidelines for organic, fair trade, and non-GMO agricultural products, sustainable seafood, and kosher food products. Contrary to experts who insist that consumers and investors will eventually need a single, government-enforced ESG framework to simplify and clarify standards, kosher food certification globally is overseen by hundreds of different bodies, each with its own requirements and guidelines.[221]

While voluntary projects like those above can be considered defensive efforts to channel ESG enthusiasm into more constructive directions, property rights advocates should consider going on the offense as well. Current attempts by anti-corporate critics to weaponize disclosure requirements against non-favored public companies can be appropriated in the opposite direction. Corporations that lessen shareholder leverage by virtue of their ESG policies could be challenged to define how far they are willing to go to accommodate other stakeholders. Moreover, as the recently published Department of Labor rule on ERISA fiduciaries suggests, longstanding legal and ethical expectations of trustees, like pension fund managers, should arguably require them to screen out companies that insist on not honoring shareholder primacy as a matter of policy.[222]

CONCLUSION

Business leaders have faced the same questions about their companies since the earliest joint stock corporations. How do we structure our company? How will we pay our workers? Where will we get our supplies? To whom will we sell? The answers have varied in different times and places as societal expectations have changed.

In the United States, government regulation of business has attempted to address some of those concerns since the late 19th century. Some laws and regulations forbid behavior that would be unacceptable in any situation: theft, fraud, and failing to prevent physical injuries. Yet, during most of that time corporate managers were mostly left to their own devices in making most business decisions—when to award raises and bonuses to executives, what health care costs to cover as part of a worker's benefit package, whether to offer profit-sharing or stock options, and many others. These are the sort of things that ESG advocates claim are of vital policy making importance today.

The same evolving expectations about American standards of living and the good life that influenced politics also influenced the business world.[223] At the same time that some political leaders were pushing for greater regulation, managers were responding to similar concerns, mainly by funding charitable programs to address community concerns and implementing training, safety, and benefit programs at their companies.

The same evolving expectations about American standards of living and the good life that influenced politics also influenced the business world.

The laws and regulations that companies have had to follow since the late 19th century have not included such nebulous and contested ideas as those found in contemporary ESG theory. On the most basic level, ESG theorists define their goals as making firms more ethical and "responsible," a premise no one will disagree with. A group called "Corporate Executives for Irresponsible Business" will never garner much of a following. But policy advocates cannot be expected to be taken seriously when their main talking point is a tautological insistence that "good companies should be doing good things." Eventually, they will have to define what those things are, and when they do, there will be inevitable disagreements about whether their proffered recommendations are, in fact, reasonable or good.

The spirit of ESG guidance is simply to declare one decision good and the other bad, regardless of the competing priorities at play.

Imagine a board of directors meeting where the attendees ask themselves: How much capital should we move from the research and development budget to the diversity and inclusion budget? How much extra can we afford to pay for all-renewable energy to run our manufacturing facilities? Will our customers be willing to pay the new price premium when we shift to fair-trade food imports? Will making our internal accounting transparent to employees result in our competitors gaining access to trade and operational data that we should keep secret? Each of those tradeoffs is bound to be contentious, and possibly expensive. But the spirit of ESG guidance is simply to declare one decision good and the other bad, regardless of the competing priorities at play.

Popularizers of ESG theory, especially within the world of investing, insist that critics have it all wrong—that they are just proposing a smarter way of evaluating financial risk. They insist that they do not want to undermine managers' ability to manage profitable firms or the ability of shareholders to profit from their investments. This is just the next, smarter evolution of capitalism, not a threat to it.

If that were true, then we would not need a mandatory government policy to implement or regulate it. If managing and investing according to ESG theory is simply the smarter way to do business, then we can expect tomorrow's business school graduates and entrepreneurs to adopt it on their own.

If, of the other hand, much of ESG activism has to do with pressuring companies to undertake policies and divide their profits in a way that runs counter to shareholder primacy and property rights—to do things they would not normally consider doing—then it probably can *only* exist under a government mandate. This is not yet clear to everyone because the requirements for embracing the ESG framework have yet to be drawn clearly enough. If being on the right side of history only requires having a board committee that reviews the firm's one-page statement on "responsible investment" every two years, many firms will be happy to sign up to that club. However, the scope and ambition of ESG theory's strongest supporters will not allow any firm to rest there for long.

Many ESG supporters have focused on the first two rungs of the ladder: 1) publicly embracing a general set of ideals and 2) publicly disclosing firm-level information that is supposedly relevant to those ideals. But increasingly, firms are expected to step up to the third rung: 3) adopt specific policies and achieve specific outcomes. Being "socially responsible" is in the eye of the beholder. Therefore, while much of the debate over the "business case" for ESG has focused on whether those policies can be implemented without a company losing too much money, the real question is whether the goals and policies suggested by activists are even desirable in the first place.

We do not need to engage in hypothetical speculation about the future to consider this question. Some of the most admired business leaders of the last two centuries championed and implemented policies that would today be considered paternalistic, arrogant, and even bigoted. If those enlightened industrialists of a previous era—the cutting-edge social progressives of their day—had managed to implement a binding ESG code of conduct, everyone today would be living in a small town controlled by their employer, be expected to show up to prayer services on Sunday, and be liberated from the baleful influence of demon rum. The scourge of women working outside the home would have been eradicated, and everyone would have the opportunity to enjoy the recreations selected for them as the most healthful and beneficial (model ship building, outdoor calisthenics, and piano playing, most likely).

Obviously those are not the job benefits most workers value and expect today—nor are they limitations on their behavior they would accept—so it is a good thing the right-thinking progressives of the industrial reform era did not get their hands too firmly on the federal regulatory process. Yet, we face a similar moment today. The activists of the 21st century and their allies in the corporate world are convinced that their list of priorities is the right one. "Treating workers with respect" has been something employers have been exhorted to do as long as there have been employees, but every generation has a different idea about what that means in practice.[224] What job benefits should workers have? How high should the minimum wage be? Should there even *be* a minimum wage?

And one need not reach back to the Gilded Age magnates to see that proclaimed "ethical" choices are more controversial that they are suggested to be. Climate change activists demand an end to financing for all fossil-fuel energy projects. But what about a developing country where people are making the transition away from burning animal dung and wood for the first time? They need the most affordable energy possible—both to fuel economic growth and to cut down on illness from breathing indoor air pollution. A coal- or natural gas-fired power plant would deliver the best, quickest, and most affordable results, but a public ESG commitment would likely mean no American or European company with the required expertise could finance or build it.

Companies around the world are looking to improve employee health outcomes and minimize out-of-pocket spending on related costs. For decades, health care companies and consultants have presented them with a classic ESG "win/win" suggestion—offer a health and wellness program to employees that will motivate them to lose weight and adopt healthier lifestyle habits. Your company's long-term health care costs will decline, they are told, while employee health outcomes will increase. That sounds great—until you read what disability advocates and eating disorder survivors have written about workplace policies that publicly shame people for their weight and body composition. One person's workout buddy is another person's trauma-triggering bully.[225]

Surely, though, companies should avoid trafficking in "conflict minerals" or doing business in countries where children are employed doing manual labor. That sounds like common sense, until one realizes that many of these policies simply outlaw the only means that some of world's poorest people have to feed themselves.[226] Making it impossible for a Bangladeshi 13-year-old to work in a textile factory will not magically transport that child to an American-style junior high school. It is much more likely to leave her poorer, with only options that are even more dangerous and degrading. Liberating a developing world child from a sewing machine only to put her in the hands of a pimp does not seem like a noble ESG goal, but moral absolutism combined with utopian thinking have created exactly such results in the real world.[227]

Activists and business theorizers are free to advocate for the corporate policies they believe are the most morally desirable, and the rest of us are free to point out the flaws in their arguments. Sometimes ESG promoters will make an important discovery or suggest an advantageous policy, and sometimes they will be wrong. This dynamic churn of management and social welfare thinking is analogous to the "creative destruction" of capitalism itself, in which firms wax and wane, and sometimes entire industries disappear because of technological developments or changes in consumers' tastes. Over the long term, in a peaceful society that protects the rights of property holders, we can reasonably expect a positive sum result, in which overall wealth and consumer satisfaction increases, even as once-dominant firms—or ideas—fall by the wayside.

A list of environment, social, and governance policies that every company must adopt would short-circuit this productive evolution and kill off the massive surplus value it creates. It would also lock in the priorities of today. With forces like globalization, digital communications technology, and a growing openness to diversity and inclusion changing our world faster than ever, this is one of the worst times to codify the priorities of the moment into a required, unchanging code of conduct.

The advocate who wants the greatest possible change should not want to settle for a permanent set of rules based on what is politically palatable at the present moment.

This is true for progressives as much as for conservatives. Fans of the status quo may balk at any change at all, but the advocate who wants the greatest possible change should not want to settle for a permanent set of rules based on what is politically palatable at the present moment. Laws and regulations are difficult to amend or repeal once implemented—especially when the major institutions of society have made large investments and long-term plans based on their requirements. Voluntary agreements between private institutions will always be more nimble and amenable to reform than statutes.

Ultimately the question is not "Should corporations function in a responsible manner?" but "Who decides what 'responsible' is?" In a free society where we are free to work or not work for any given company, invest or refuse to invest in any particular fund, and buy or boycott any products we want, the answer to the latter question is "each of us." Thus, it is puzzling to hear from policy advocates who claim that corporate interests exert too much control over law and regulation that the path toward "true" economic democracy is through more regulation of market behavior.

Big corporations may have large advertising budgets, but they are powerless before consumers who decline to buy their products. Governments, on the other hand, have every power that they choose to arrogate to themselves (subject only to a too-infrequent judicial review of their actions). A new law can order a company to make or stop making a product, implement or retract worker benefits, or pay into a fund for whatever "social" goal a majority of politicians decide is advantageous at any given time. But a majority of votes, in Congress or a general election, does not automatically make for a morally righteous decision.

A company officially considered "socially responsible" in South Carolina in 1850 would likely have been strictly compliant with the Fugitive Slave Act. In 1917, a printing company that turned anarchist manuscripts over to officials enforcing the Espionage Act might have been given an award by President Woodrow Wilson's administration. The bus company that drove Japanese-Americans to internment camps pursuant to President Franklin Roosevelt's executive order 9066 may well have been commended for its contribution to fighting World War II.

Not every bad government policy in the future will be so dramatic and obvious, but any student of political history can predict that there will be bad policies in the future. To keep ourselves and our fellow citizens from grave error and moral peril, we need to take the state out of as much decision making as possible.

Fortunately, a well-functioning market economy is well positioned to channel the values and social ambitions of a diverse population into reality, while avoiding political conflict. The freer people are to buy from, work at, and invest in any company they choose, the better and faster those companies will respond to the demands of their customers, employees, and shareholders.

That freedom will also allow them to change when their stakeholders decide yet another, newer, set of demands is more worthy of consideration. No law or regulation will ever be so responsive.

NOTES

1 Georg Kell, "The Remarkable Rise Of ESG," *Forbes*, July 18, 2018, https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#35780fa41695. Kell states that the term ESG originated with the 2005 "Who Cares Wins" report, but it actually first appeared in the previous 2004 report of the same name. "Who Cares Wins: Connecting Financial Markets to a Changing World," United National Global Compact, December 2004, https://www.scribd.com/document/16876740/.

2 "Who Cares Wins 2005 Conference Report: Investing for Long-Term Value" U.N. Global Compact, Federal Department of Foreign Affairs Switzerland, and International Finance Corporation, October 26, 2005, p. iii, https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_report_whocareswins2005__wci__1319576590784.

3 Jon Hale, "The Number of Funds Considering ESG Explodes in 2019," Morningstar, March 30, 2020, https://www.morningstar.com/articles/973432/the-number-of-funds-considering-esg-explodes-in-2019.

4 Sophie Baker, "PRI publishes 5-point plan for meeting sustainability goals," *Pensions & Investments*, June 15, 2020, https://www.pionline.com/esg/pri-publishes-5-point-plan-meeting-sustainability-goals.

5 Max Clarkson of the University of Toronto wrote, in 1995, after spending a decade " develop[ing] a framework and methodology … for analyzing and evaluating corporate social performance" that, "A fundamental problem in the field of business and society has been that there are no definitions of corporate social performance (CSP), corporate social responsibility (CSR1), or corporate social responsiveness (CSR2) that provide a framework or model for the systematic collection, organization, and analysis of corporate data relating to these important concepts. No theory has yet been developed that can provide such a framework or model, nor is there any general agreement about the meaning of these terms from an operational or a managerial viewpoint." Max Clarkson, "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance," *Academy of Management Review*, Vol. 20, No. 1 (Jan., 1995), p. 92, https://www.jstor.org/stable/258888. Florian Berg, Julian F. Koelbel, and Roberto Rigobon, "Aggregate Confusion: The Divergence of ESG Ratings," MIT Sloan School Working Paper 5822-19, May 17, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533. Investment analysts John West and Ari Polychronopoulos of Research Affiliates find that "many investors desire to take personal action by incorporating environmental, social, and governance (ESG) considerations into their investment portfolios. Unfortunately, they are confronted by a confusing ESG landscape with conflicting claims." John West and Ari Polychronopoulos, "Is ESG a Factor?" Research Affiliates, July 2020, https://www.researchaffiliates.com/en_us/publications/articles/813-is-esg-a-factor.html. Jacqueline Poh "Conflicting ESG Ratings Are Confusing Sustainable Investors," Bloomberg, December 11, 2019, https://www.bloomberg.com/news/articles/2019-12-11/conflicting-esg-ratings-are-confusing-sustainable-investors?sref=xIpK9uDK.

6 A 2006 academic review of the closely related term "corporate social responsibility" (CSR) found that, "[S]ince the CSR concept adds nothing of value to existing frameworks in the field of management and organization, such as the economizing and legitimizing perspectives, it is best to discard it altogether." J. (Hans) van Oosterhout and Pursey Heugens, "Much Ado About Nothing: A Conceptual Critique of CSR," ERIM Report Series Reference No. ERS-2006-040-ORG, August 16, 2006, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=924505.

7 Donna J. Wood, a widely published scholar in the ESG-adjacent areas of "corporate social responsibility" and "corporate social performance," wrote, approximately 20 years after her first major paper in the field, "Corporate social performance (CSP) and its sister concepts—corporate social responsibility, corporate social responsiveness, corporate citizenship—have been present in management scholarship for about 45 years. Notwithstanding this longevity, the CSP domain has remained controversial, fluid, ambiguous and difficult to research." Donna J. Wood, "Measuring Corporate Social Performance: A Review," *International Journal of Management Reviews*, January 15, 2010, p. 50, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2370.2009.00274.x.

8 "Companies are experiencing greater scrutiny across a range of environmental, social, and governance (ESG) issues, and reproductive health is no exception. Stakeholders, from investors to employees to consumers, are recognizing the power of the private sector to affect social change and have already begun to raise issues of reproductive health. Companies need to be prepared with a response." Neeraja Bhavaraju, et al., "Hidden Value: The Business Case for Reproductive Health," Rhia Ventures, January 2020, https://rhiaventures.org/wp-content/uploads/2020/01/Hidden-Value_The-Business-Case-for-Reproductive-Health.pdf. "The reality is that in today's legal and enforcement environment, employers who have refused to adopt broader policies [on transgender inclusion] must reconsider their position or face the possibility of legal action and reputational harm." Ingrid Fredeen, "A Culture of Inclusion: Transgender-Friendly Workplaces on the Rise," NAVEX Global, February 10, 2016, https://www.navexglobal.com/blog/article/culture-inclusion-transgender-friendly-work-places-rise/.

9 Katie Keith, "Supreme Court Upholds Broad Exemptions to Contraceptive Mandate—For Now," *HealthAffairs*, July 9, 2020, https://www.healthaffairs.org/do/10.1377/hblog20200708.110645/full/.

10 "The relevance of ESG issues varies industry to industry, company by company. For example, fuel efficiency has a bigger impact on both the carbon footprint and the bottom line of an airline than it does for an investment bank. If a bank says it has reduced fuel consumption by 50%, ESG investors should not hold their breath waiting for the bank's share price to go up." Emily Steinbarth, "Don't Be Fooled by Most ESG Rankings. Focus on Materiality Instead," *Advisor Perspectives*, April 8, 2020, https://www.advisorperspectives.com/commentaries/2020/04/08/dont-be-fooled-by-most-esg-rankings-focus-on-materiality-instead.

11 Daniel C. Apfel, "Exploring Divestment as a Strategy for Change: An Evaluation of the History, Success, and Challenges of Fossil Fuel Divestment," *Social Research*, Vol. 82, No. 4 (Winter 2015), pp. 913-937, https://www.jstor.org/stable/44282147.

12 "Statement on the Purpose of a Corporation," Business Roundtable, August 19, 2019, https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf.

13 Nicolas Rabener, "Why pension funds and millennials should avoid ESG," *ETF Stream*, November 26, 2019, https://www.etfstream.com/features/why-pension-funds-and-millennials-should-avoid-esg/.

14 According to the *Financial Times*, "Specialists in responsible investing are hot property," with "remuneration packages offered by European asset managers [increasing] between 20 and 50 per cent" in the 18 months leading up to October 2018. Higher salaries also signal "the role that person occupies within the hierarchy of the firm." Jennifer Thompson, "Battle to recruit ESG specialists intensifies," *Financial Times*, October 14, 2018, https://www.ft.com/content/9b6ef052-c0a3-11e8-84cd-9e601db069b8.

15 Hazel Bradford, "ESG data market poised to hit $1 billion in 2021—report," *Pensions & Investments*, March 10, 2020, https://www.pionline.com/esg/esg-data-market-poised-hit-1-billion-2021-report.

16 Ryan Honeyman and Dr. Tiffany Jana, *The B Corp Handbook*, 2nd Edition, (Oakland, CA: Berrett-Koehler Publishers, Inc., 2019).

17 Ibid., pp. 218-220.

18 Kim Elsesser, "Elizabeth Warren Demands Accountability From 181 CEOs and Calls their Promises 'Empty,'" *Forbes*, September 18, 2020, https://www.forbes.com/sites/kimelsesser/2020/09/18/elizabeth-warren-demands-accountability-from-181-ceos-and-calls-their-promises-empty/?sh=643da4814728.
Sen. Elizabeth Warren (D-MA), "Letter to the Business Roundtable re one-year anniversary of their Statement of Principles," U.S. Senate, September 17, 2020, https://www.warren.senate.gov/imo/media/doc/2020.09.17%20Letter%20to%20the%20Business%20Roundtable%20re%20one-year%20anniversary%20of%20their%20Statement%20of%20Principles.pdf.

19 For example, the Paris Climate Agreement, a United Nations climate change treaty frequently referenced by ESG proponents, requires signatory nations to submit new emissions targets (Nationally Determined Contributions) every five years, with each target becoming increasingly strict. "The Paris agreement is generally considered by scholars to contain a one-way ratchet, allowing only for increases in [emissions reduction targets]." David Roberts, "The Paris climate agreement is at risk of falling apart in the 2020s," *Vox*, November 5, 2019, https://www.vox.com/energy-and-environment/2019/11/5/20947289/paris-climate-agreement-2020s-breakdown-trump.

20 Richard Morrison, "Biden Brain Trust: Forget the Billionaires, Guillotine the Corporations," *National Review*, November 23, 2020, https://www.nationalreview.com/2020/11/biden-brain-trust-forget-the-billionaires-guillotine-the-corporations/.

21 Many legal writers and policy advocates argue that directors should not be required to manage with the sole goal of maximizing shareholder benefit, but even those critics acknlowedge that such a focus is the generally accepted and longstanding expectation. “Shareholder primacy is the most fundamental concept in corporate law and corporate governance. It is widely embraced in the business, legal, and academic communities. Economic analysis and policy arguments advance a normative theory that corporate managers should maximize shareholder wealth. Academic literature invariably describes shareholder primacy as a ‘norm.’” Robert J. Rhee, “A Legal Theory of Shareholder Primacy,” University of Florida Levin College of Law Working Paper, 2017, p. 1, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1004&context=working.

22 “[C]onventional corporate law makes it difficult for corporations and investors to implement strategies that rely on commitments to stakeholders and that seek to manage critical social, environmental, and economic systems.” Frederick H. Alexander, *Benefit Corporation Law and Governance: Pursuing Profit with Purpose*, (Oakland, CA: Berrett-Koehler Publishers, 2018), p. 63.

23 “State by State Status of Legislation,” benefitcorp.net, accessed July 30, 2020, https://benefitcorp.net/policymakers/state-by-state-status. Honeyman and Jana, p. 190. Ryan Honeyman, “Key Developments in the B Corp Movement (Since the First Edition),” LIFT Economy, April 24, 2019, https://www.lifteconomy.com/blog/2019/4/24/key-developments-in-the-b-corp-movement-since-the-first-edition. For a variety of reasons, Delaware is an extremely popular state for business incorporation, so the state’s corporate governance laws are highly influential. “Delaware has been the premier state of formation for business entities since the early 1900s. Today, more than one million business entities have made Delaware their legal home. … [M]ore than 60 percent of the Fortune 500 companies are incorporated in Delaware.” “Why Businesses Choose Delaware,” delaware.gov, accessed August 17, 2020, https://corplaw.delaware.gov/why-businesses-choose-delaware/.

24 Alexander, p. 109.

25 Caroline Flammer and Aleksandra Kacperczyk, “In Search of Spark: The Impact of Stakeholder Orientation on Innovation,” *Management Science*, Volume 62, Issue 7, November 12, 2015, https://doi.org/10.1287/mnsc.2015.2229.

26 Brett McDonnell, “Corporate Constituency Statutes and Employee Governance,” 30 *William Mitchell Law Review* 2004, p. 1231, https://scholarship.law.umn.edu/faculty_articles/124.

27 Alexander, p. 69.

28 Ibid., p. 72.

29 The “Total Corporate Responsibility” approach, created by business consultant Frank Dixon in 2003, is an example of a proprietary social responsibility theory. Frank Dixon, “Total Corporate Responsibility: Achieving Sustainability and Real Prosperity,” *Ethical Corporation*, December 2003, http://globalsystemchange.com/total-corporate-responsibility-achieving-sustainability-and-real-prosperity/.

30 Archie B. Carroll, "A History of Corporate Social Responsibility: Concepts and Practices," in Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon, and Donald Siegel, eds. *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2007), p. 19.

31 Ibid., p. 21, referencing Daniel A. Wren, *History of Management Thought* (Fifth Edition), (New York: John Wiley and Sons, 2005), pp. 269-270.

32 Carroll, 2007, p. 21.

33 George E. Biles, "John Henry Patterson's Contributions to Industrial Welfare," *International Journal of Public Administration*, Vol. 16, Issue 5 (1993), pp. 627-647, https://www.tandfonline.com/doi/abs/10.1080/01900699308524815.

34 Andrew Carnegie, "The Gospel of Wealth," (New York: Carnegie Corporation of New York, 2017, first published in 1889, https://www.carnegie.org/about/our-history/gospelofwealth/.

35 David Henderson, *The Role of Business in the Modern World*, (Washington, D.C.: Competitive Enterprise Institute, 2004), p. 19.

36 Heald, p. 193.

37 Johnson & Johnson, "Our Credo," accessed July 21, 2020, https://www.jnj.com/credo/.

38 Many writers have emphasized the listing of shareholders last as an important part of the Credo and consistent with Johnson's idea of reciprocal shareholder benefit from addressing what are known today as "stakeholder concerns." Theodore Roosevelt Malloch, *Practical Wisdom in Management: Business Across Spiritual Traditions*, (New York: Routledge, 2015), p. 68. William B. Werther, Jr. and David Chandler, *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (Thousand Oaks, California: Sage Publications, 2011), p. 43.

39 "In 1979, wording was added to outline the company's responsibility to 'protecting the environment and natural resources,' which reflected larger changes in the world at that time." Erika Janes, "8 Fun Facts About Our Credo—Johnson & Johnson's Mission Statement," Johnson & Johnson, February 5, 2018, https://www.jnj.com/our-heritage/8-fun-facts-about-the-johnson-johnson-credo.

40 Political scientist Kevin O'Leary writes of Croly's political theory that his "progressive revision [of 18th century American republicanism] … is more receptive to large-scale organizations, industrialization, and nationalism than traditional Jeffersonian republicanism" and favored "large-scale organizations and national government." Kevin C. O'Leary, "Herbert Croly & Progressive Democracy," *Polity*, Vol. 26, No. 4 (Summer 1994), p. 534, https://www.jstor.org/stable/3235094?seq=1.

41 Far from "business ethics" being its own discipline separate from a wider ethical framework, at least two scholars have used the figure of the entrepreneur as a "moral hero" exemplar to describe universally applicable ethical conduct. Douglas J. Den Uyl and Douglas B. Rasmussen, "The Entrepreneur as Moral Hero," in *The Perfectionist Turn: From Metanorms to Metaethics*, (Edinburgh, UK: Edinburgh University Press, 2016), pp. 284-319.

42 Peter F. Drucker, "What Is 'business ethics'?" *National Affairs*, spring 1981, https://www.nationalaffairs.com/storage/app/uploads/public/58e/1a4/d0a/58e1a4d0a8b2b007619680.pdf.

43 Milton Friedman, *Capitalism and Freedom: 40 Anniversary Edition*, (Chicago: University of Chicago Press, 1962, 2002), p. 133.

44 Milton Friedman, "The Social Responsibility of Business Is to Increase its Profits," *New York Times Magazine*, September 13, 1970, http://umich.edu/~thecore/doc/Friedman.pdf.

45 Julian Morris, "Milton Was Right, Corporate Governance Matters," *IFC Review*, April 16, 2020, https://www.ifcreview.com/articles/2020/april/milton-was-right-corporate-governance-matters/.

46 "Forced labor—whether in fishing, palm oil plantations, construction, or other work—may pose an ESG risk in the supply chains of global companies." Marion de Marcillac, Matt Crossman, Meggin Thwing Eastman, Mike Lombardo, and Valentina Gurney, "Modern Slavery: Shedding Light on Forced Labor Risk in the Global Supply Chain," MSCI, December 2, 2015, https://www.msci.com/www/webcast/modern-slavery-shedding-light/0270697773.

47 Nick Pelosi and Rebecca Adamson, "Managing the 'S' in ESG: The Case of Indigenous Peoples and Extractive Industries," *Journal of Applied Corporate Finance*, Vol. 28, No. 2 (Spring 2016), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/managing_the_s_in_esg.pdf.

48 "B Corps are 81% more likely to have transgender-inclusive health care coverage." "Job Seeking and Hiring Resources: Working at a B Corp Company," B Local PDX, accessed August 4, 2020, https://www.blocalpdx.com/jobs.

49 "[M]arkets [outside the EU and UK] demonstrate that the absence of any [sort of] regulations may prevent the country from progressing in gender diversity. This is the case in the United States, China, Russia, Greece, South Korea, and Japan; in a number of these countries, gender diversity remains very low." Institutional Shareholder Services, Inc., "Gender Parity on Boards Around the World," Harvard Law School Forum on Corporate Governance, January 5, 2017, https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/.

50 Lynn A. Stout, "The Problem of Corporate Purpose," Issues in Governance Studies Number 48, Brookings Institution, June 2012, https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf. Stout goes further, arguing that the widely accepted legal precedent and dicta requiring shareholder primacy in corporate governance was either wrongly decided or has been wrongly interpreted, and therefore the mainstream legal interpretation that calls for managers and directors to maximize shareholder value is flawed and should not be followed.

51 While the decisions in *Dodge v. Ford Motor Co.* (1919) and similar cases established the requirement that corporate boards must manage with the primary goal of increasing shareholder value, many subsequent decisions have granted wide leeway to managers making expenditures for charitable, scientific, and educational purposes not immediately tied to shareholder profit. David G. Yosifon, "The Law of Corporate Purpose," *Berkeley Business Law Journal*, 2014, pp. 222-223. Yosifon emphasizes that legal observers should not confuse what directors can effectively get away with thanks to lax enforcement with what they are explicitly permitted to do.

52 John A. Pearce II, "The Rights of Shareholders in Authorizing Corporate Philanthropy," *Villanova Law Review*, Vol. 60, Issue 2 (2015), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3271&context=vlr.

53 James O'Toole, *The Enlightened Capitalists: Cautionary Tales of Business Pioneers Who Tried to Do Well by Doing Good*, (New York: Harper Business, 2019).

54 British chocolate entrepreneur and observant Quaker George Cadbury famously supported both evangelism and temperance among his employees. "Morning prayers and daily [B]ible readings [by Cadbury employees], first started in 1866, helped preserve the family atmosphere and continued for another 50 years, until the workforce grew too large for such an assembly." "About Bournville," Mondelez United Kingdom, accessed August 5, 2020, https://www.cadbury.co.uk/about-bournville.

55 "In [William] Lever's day, strict rules [at company town Port Sunlight] meant tenants were made to keep their homes in good shape (helped of course by the threat of random inspections at any point)." "Comfortable workers housing at Port Sunlight," *Past in the Present*, August 7, 2014, https://pastinthepresent.net/2014/08/07/houses-in-which-our-work-people-will-be-able-to-live-and-be-comfortable-living-history-at-port-sunlight-model-village/.

56 Anna Sella, Sean Illing, and Helen Coombes, "Back to the Future of Paternalistic Capitalism?" Future of Work Hub, March 31, 2016, https://www.futureofworkhub.info/comment/2016/3/31/back-to-the-future-of-paternalistic-capitalism.

57 O'Toole, pp. 92-93.

58 Andy Richardson, "120 year booze ban in Bournville ends after newsagent given permission to sell alcohol," *Birmingham Mail*, September 29, 2015, https://www.birminghammail.co.uk/news/midlands-news/120-year-booze-ban-bournville-10159058.

59 In 1919, the Secretary of the Bolton Branch of the British Engineers' Union wrote to William Lever regarding his compensation plan: "The profit-sharing scheme not only enslaves and degrades the workers, it tends to make them servile and sycophant." Jeremy David Rowan, "Imagining corporate culture: the industrial paternalism of William Hesketh Lever at Port Sunlight, 1888-1925," LSU Doctoral Dissertation, Louisiana State University, 2003, p. 137, https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5085&context=gradschool_dissertations. Despite his ostensibly enlightened management theories, Milton Hershey's workers voted overwhelmingly to join the Congress of Industrial Organizations in 1937, striking, shutting down production, and occupying the company's factory, O'Toole, p. 87. "In general, unions have opposed such managerial initiatives as profit sharing, employee engagement in the design and management of their work tasks, and employee participation in company-wide decision making," O'Toole, p. 106.

60 "In addition to concern for employees, *philanthropy* was appearing on the scene in the late 1800s, but it was often difficult to determine whether the philanthropy of such individuals as Cornelius Vanderbilt or John D. Rockefeller was *individual* philanthropy or *business* philanthropy." [Emphases in original] Carroll, p. 21. In the 19th century "individual entrepreneurs and business owners for years gave of their own money to support social causes that today might be categorized as socially responsible." Carroll, p. 22.

61 "History—1900 to 1950s," YMCA, accessed January 15, 2021, https://www.ymca.net/history/1900-1950s.html. See also the discussion of business support, in particular from rail companies, for the YMCA in Morrell Heald, "Responsibility and Philanthropy in Nineteenth-Century Business," in *The Social Responsibilities of Business: Company and Community*, 1900-1960 (Cleveland, Ohio: The Press of Case Western Reserve University, 1970, 1988), pp. 12-13.

62 Kiwanis was originally founded as a business networking and fraternal organization before pivoting to a community service and fundraising organization. "Our History," Kiwanis, accessed January 15, 2021, https://www.kiwanis.org/about/history. Rotary was originally formed "so professionals with diverse backgrounds could exchange ideas and form meaningful, lifelong friendships." "Our History," Rotary International, accessed January 15, 2021, https://www.rotary.org/en/about-rotary/history. In its 2018-2019 annual report, Rotary International and the Rotary Foundation documented $850 million of community service performed by members and over 1,400 charitable grants worth almost $100 million. "Annual Report: 2019-2019," Rotary International, https://my-cms.rotary.org/en/document/annual-report-2018-19.

63 Morrell Heald, "The Community Chest Movement: 1918-1929," in *The Social Responsibilities of Business: Company and Community*, *1900-1960*, (New York: Routledge, 2017; first published 1988 by Transaction Publishers), pp. 117-147.

64 "Mission: Community," Community Foundation Public Awareness Initiative, https://www.commfoundations.com/communityfoundations, accessed March 5, 2021.

65 "Charitable Giving Statistics," National Philanthropic Trust, accessed January 15, 2021, https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics.

66 For early contributions, see Archie Carroll, "A Three-Dimensional Conceptual Model of Corporate Performance," *The Academy of Management Review*, Vol. 4, No. 4 (October 1979), pp. 497-505, https://www.jstor.org/stable/257850?seq=1#metadata_info_tab_contents.

67 Donna J. Wood, "Corporate Social Performance Revisited" *Academy of Management Review*, Vol. 16. No. 4 (1991), pp. 691-718, https://www.jstor.org/stable/258977?seq=1#metadata_info_tab_contents.

68 Association of Corporate Citizenship Professionals, "Corporate Social Responsibility: A Brief History," accessed June 26, 2020, https://www.accprof.org/ACCP/ACCP/About_the_Field/Blogs/Blog_Pages/Corporate-Social-Responsibility-Brief-History.aspx.

69 Jennifer Thompson, "Sustainalytics chief: 'We are past the time of voluntary disclosures'" *Financial Times*, February 16, 2020, https://www.ft.com/content/8b73bad7-adcb-495d-8686-3ccc70658b5b.

70 For contemporary news coverage, see "Zulu Leader Criticizes Anti-Apartheid Economic Sanctions," Associated Press, August 4, 1985, https://apnews.com/ff753d0e4f64ff28f2a5ed295d7e2f23. Alan Cowell, "South African Opposition Splits over Divestment," *New York Times*, June 3, 1986, https://www.nytimes.com/1986/06/03/world/south-african-opposition-splits-over-divestment.html.

71 The ESG model's premise that firms should unilaterally prioritize advantageous outcomes for various stakeholder groups is different from the traditional "business ethics" construct in which multiple parties try to minimize transaction costs by agreeing to adhere to a mutually understood code of conduct and avoid, among other perils, the one-sided "opportunism" identified by economist Oliver Williamson. Chris Moore and Anne de Bruin, "A Transaction Cost Approach to Understanding Ethical Behaviour," World Congress of Social Economics, June 2004, https://pdfs.semanticscholar.org/d3e1/be3cddf7d4f2ae49d8cb9db353943c2f100b.pdf.

72 Cliff Asness, "Virtue Is its Own Reward: Or, One Man's Ceiling Is Another Man's Floor," AQR, May 18, 2017, https://www.aqr.com/Insights/Perspectives/Virtue-is-its-Own-Reward-Or-One-Mans-Ceiling-is-Another-Mans-Floor.

73 A 2019 study by investment firm Morgan Stanley found that, "The returns of sustainable funds are in line with those of traditional funds, while also offering lower downside risk for investors." From "Sustainable Reality: Analyzing Risk and Returns of Sustainable Funds," Morgan Stanley, 2019, https://www.morganstanley.com/content/dam/msdotcom/ideas/sustainable-investing-offers-financial-performance-lowered-risk/Sustainable_Reality_Analyzing_Risk_and_Returns_of_Sustainable_Funds.pdf.

74 "[ESG-guided investing] is not in any way concessionary to returns. We actually think it's going to improve returns because it's going to help us select better companies to invest in," said Blue Harbour Group founder Cliff Robbins at an industry conference in September 2019. Quoted in Pippa Stevens, "Your complete guide to investing with a conscience, a $30 trillion market just getting started," CNBC, December 14, 2019, https://www.cnbc.com/2019/12/14/your-complete-guide-to-socially-responsible-investing.html.

75 "What is ESG integration?" Principle for Responsible Investment, April 25, 2018, https://www.unpri.org/what-is-esg-integration/3052.article.

76 "Robin Hood and Thomas Piketty think that redistribution of wealth is the way forward. Yet there's a better way for capital to have a positive impact on the world." Lynn Forester de Rothschild, "How Capitalists Can Do Well While Doing Good," *The Wall Street Journal*, June 25, 2015, https://www.wsj.com/articles/how-capitalists-can-do-well-while-doing-good-1435257351.

77 "A Practical Guide to ESG Integration for Equity Investing," U.N. Global Compact and UNEP Finance Initiative, 2016, https://www.unpri.org/download?ac=10.

78 "Investment governance and the integration of environmental, social and governance factors," Organisation for Economic Co-operation and Development, 2017, https://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf.

79 "World Bank Launches Sovereign ESG Data Portal," World Bank, October 29, 2019, https://www.worldbank.org/en/news/press-release/2019/10/29/world-bank-launches-sovereign-esg-data-portal.

80 "Funds that use so-called ESG principles … captured $51.1 billion of net new money from investors in 2020." Greg Iacurci, "Money invested in ESG funds more than doubles in a year," CNBC, February 11, 2021, https://www.cnbc.com/2021/02/11/sustainable-investment-funds-more-than-doubled-in-2020-.html. "According to a new report from non-profit foundation US SIF: The Forum for Sustainable and Responsible Investment, there were $17.1 trillion in responsibly invested assets in the U.S. at the start of 2020." Ann Senne, "Women could pave the way for ESG investing in the U.S.," MarketWatch, March 5, 2021, https://www.marketwatch.com/story/women-could-pave-the-way-for-esg-investing-in-the-us-2021-03-05.

81 "[Sustainalytics CEO Michael Jantzi] credits the emergence of the UN-backed Principles for Responsible Investment in 2006 with helping catapult ESG investing into the mainstream." Jennifer Thompson, "Sustainalytics chief: 'We are past the time of voluntary disclosures,'" *Financial Times*, February 16, 2020, https://www.ft.com/content/8b73bad7-adcb-495d-8686-3ccc70658b5b.

82 Alastair Marsh, "Investors Must Consider Climate, Social Equity, Not Just Returns," *Bloomberg Green*, June 15, 2020, https://www.bloomberg.com/news/articles/2020-06-15/investors-must-consider-climate-social-equity-not-just-returns?sref=xIpK9uDK.

83 Principles for Responsible Investment, "What are the Principles for Responsible Investment?" accessed June 28, 2020, https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment.

84 "Impact Investing Map," Principles for Responsible Investing, 2018, https://www.unpri.org/download?ac=5426, citing "Sustainable investing and bond returns: Research study into the impact of ESG on credit portfolio performance," *Impact Series 01*, Barclay's, 2016, https://www.investmentbank.barclays.com/content/dam/barclaysmicrosites/ibpublic/documents/our-insights/esg/barclays-sustainable-investing-and-bond-returns-3.6mb.pdf.

85 Principles for Responsible Investment, "Minimum requirements for membership". accessed June 26, 2020, https://www.unpri.org/signatories/minimum-requirements.

86 Principles for Responsible Investment, "PRI Reporting Framework 2020: Strategy and Governance," November 2019, https://d8g8t13e9vf2o.cloudfront.net/Uploads/o/k/u/02a.sgcc2020_35086.pdf.

87 Principle for Responsible Investing "Reporting for signatories," accessed June 28, 2020, https://www.unpri.org/reporting-and-assessment/reporting-and-assessment-archive/6567.article.

88 Material includes the 88-page PRI report "Fiduciary Duty in the 21st Century," 74 pages of the "Recommendations of the Task Force on Climate-related Financial Disclosures," the Intergovernmental Panel on Climate Change's 167-page "Climate Change 2014 Synthesis Report," PRI's 112-page "Impact Investing Market Map," and the eight-page "Responsible Investment Due Diligence Questionnaire for Hedge Funds," among others.

89 "Minimum requirements for membership," Principle for Responsible Investment, https://www.unpri.org/reporting-and-assessment-resources/minimum-requirements-for-membership/315.article, accessed August 17, 2020.

90 Jennifer Thompson, "UN responsible investing body set to delist 50 groups next year," *Financial Times*, June 17, 2019, https://www.ft.com/content/ad38f37f-bd9c-34f1-848d-e5773be45b80.

91 "Signatories delisted for not meeting the minimum requirements," Principles for Responsible Investment, September 27, 2020, https://www.unpri.org/reporting-and-assessment/signatories-delisted-for-not-meeting-the-minimum-requirements/6480.article.

92 Principles for Responsible Investment, "Investment Policy: Process and Practice," 2016, https://www.unpri.org/download?ac=1605.

93 Robin Wigglesworth, "Rating agencies using green criteria suffer from 'inherent biases,'" *Financial Times*, July 20, 2018, https://www.ft.com/content/a5e02050-8ac6-11e8-bf9e-8771d5404543.

94 Timothy M. Doyle, "Ratings That Don't Rate: The Subjective World of ESG Ratings Agencies," American Council for Capital Formation, July 2018, https://accfcorpgov.org/wp-content/uploads/2018/07/ACCF_RatingsESGReport.pdf.

95 Jon Sigurdsen, "Buyer beware: ESG screening has its faults," *Financial Times*, April 25, 2019, https://www.ft.com/content/682d4f63-23e3-3aaa-9283-b06de2de4589.

96 Feifei Li and Ari Polychronopoulos, "What a Difference an ESG Ratings Provider Makes!" Research Affiliates, January 2020, https://www.researchaffiliates.com/en_us/publications/articles/what-a-difference-an-esg-ratings-provider-makes.html.

97 Ibid.

98 Alex Edmans, "The Inconsistency of ESG Ratings: Implications for Investors," alexedmans.com, April 10, 2020, https://alexedmans.com/blog/responsible-business/the-inconsistency-of-esg-ratings-implications-for-investors/.

99 Florian Berg, Julian F. Koelbel, and Roberto Rigobon, "Aggregate Confusion: The Divergence of ESG Ratings," MIT Sloan School Working Paper 5822-19, May 17, 2020, p. 32. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533.

100 Wigglesworth.

101 Timothy J. McClimon, "The Impact of Environmental, Social And Governance (ESG) Issues on Companies Today," *Forbes*, June 29, 2020, https://www.forbes.com/sites/timothyjmcclimon/2020/06/29/the-impact-of-environmental-social-and-governance-esg-issues-on-companies-today/#7873896a5d2a.

102 Betty Moy Huber and Michael Comstock, "ESG Reports and Ratings: What They Are, Why They Matter," *Harvard Law School Forum on Corporate Governance*, July 27, 2017, https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/.

103 Berg, Koelbel, and Rigobon, p. 32.

104 Gunnar Friede, Timo Busch, and Alexander Bassen, "ESG and financial performance: aggregated evidence from more than 2000 empirical studies," *Journal of Sustainable Finance & Investment*, Vol. 5, No. 4 (December 15, 2015), pp. 210–233, https://www.tandfonline.com/doi/pdf/10.1080/20430795.2015.1118917.

105 Joscha Nollet, George Filis, and Evangelos Mitrokostas, "Corporate social responsibility and financial performance: A non-linear and disaggregated approach," *Economic Modelling*, Vol 52 (B) 2016, pp. 400-407. Pedersen, Fitzgibbons, and Pomorski of AQR write: " Empirically, we find that when ESG is proxied for by a measure of governance, the maximum [Sharpe ratio] is achieved for a relatively high level of ESG." Lasse H. Pedersen, Shaun Fitzgibbons, and Lukasz Pomorski, "Does ESG Help or Hurt Returns?," AQR Capital Management, December 7, 2020, https://www.aqr.com/Insights/Research/Working-Paper/Does-ESG-Help-or-Hurt-Returns.

106 Richard Morrison, "Comment on Employee Benefits Security Administration Proposed Rule 'Financial Factors in Selecting Plan Investments,'" Competitive Enterprise Institute, July 29, 2020, https://cei.org/content/comment-employee-benefits-security-administration-proposed-rule-financial-factors-selecting. Citing Marlo Lewis, Jr. "Trump Must Show Energy Companies He Will Fight Politics of Plunder," *OpenMarket*, Competitive Enterprise Institute, May 15, 2017, https://cei.org/blog/trump-must-show-energy-companies-he-will-fight-politics-plunder.

107 Cydney Posner, "Have we reached an inflection point on environmental and social shareholder proposals?" Cooley PubCo, January 31, 2019, https://cooleypubco.com/2019/01/31/inflection-point-es-shareholder-proposals/. Posner summarizes and quotes Kosmas Papadopoulos, "The Long View: US Proxy Voting Trends on E&S Issues from 2000 to 2018," *Harvard Law School Forum on Corporate Governance*, January 31, 2019, https://corpgov.law.harvard.edu/2019/01/31/the-long-view-us-proxy-voting-trends-on-es-issues-from-2000-to-2018/.

108 John D. Stoll, "This Proxy Season, It's Revenge of the Nurdles," *The Wall Street Journal*, April 12, 2019, https://www.wsj.com/articles/this-proxy-season-its-revenge-of-the-nurdles-11555074005.

109 James R. Copland, "Proxy Monitor 2019: Social Activists More Active than Ever this Proxy Season," Manhattan Institute, June 11, 2019, https://www.manhattan-institute.org/proxy-monitor-2019-proxy-season-scorecard-activists.

110 For a detailed explanation of one prominent conservative group's perspective on ESG-related shareholder activism, see Justin Danhof, "Investor Value Voter Guide 2020," National Center for Public Policy Research's Free Enterprise Project, May 15, 2020, https://nationalcenter.org/investor-value-voter-guide-2020/.

111 Nicole Aschoff, "Green Investing Is a Sham," *Jacobin*, October 17, 2019, https://www.jacobinmag.com/2019/10/green-investing-climate-change-environment-corporate-social-responsbility.

112 Nicole Aschoff, "Wall Street Can't Fix the Environment," *Jacobin*, February 9, 2020, https://jacobinmag.com/2020/02/larry-fink-blackrock-environment-wall-street-sustainable-capitalism-fossil-fuels.

113 Pippa Stevens, "ESG investing is a 'complete fraud,' Chamath Palihapitiya says," CNBC, February 26, 2020, https://www.cnbc.com/2020/02/26/chamath-palihapitiya-esg-investing-is-a-complete-fraud.html.

114 "'JPMorgan, by saying what they said, will be able to borrow billions of dollars from the ECB at negative rates ... it doesn't have to work, they don't need to do anything, they are now getting free money from Europe for basically being able to say this,' [Palihapitiya] said." Stevens, 2020.

115 Wal van Lierop, "Most ESG Investing Makes A Charade Of Fighting Climate Change," *Forbes*, July 14, 2020, https://www.forbes.com/sites/walvanlierop/2020/07/14/most-esg-investing-makes-a-charade-of-fighting-climate-change/#526b0cd27057.

116 The prospectus of Laureate Education, a for-profit benefit corporation, claims that its ESG-aligned corporate status "will cause it to be viewed more positively by regulators than would an entity driven by shareholder primacy." Alexander, p. 47.

117 John Berlau, "Free Smaller Companies to Go Public by Rolling Back Burdensome Sarbanes-Oxley Accounting Rules," in *Liberate to Stimulate: A Bipartisan Agenda to Restore Limited Government and Revive America's Economy*, Competitive Enterprise Institute, January 19, 2011, https://cei.org/agenda-congress/free-smaller-companies-go-public-rolling-back-burdensome-sarbanes-oxley-accounting-r. John Berlau, "SOXing It to the Little Guy: How Sarbanes-Oxley Hurts Small Investors and Entrepreneurs," *OnPoint* No. 112, Competitive Enterprise Institute, June 7, 2007, https://cei.org/studies-point/soxing-it-little-guy.

118 Iain Murray, "The Case against the Consumer Financial Protection Bureau: Unconstitutionally Structured and Harmful to Consumers," *Issue Analysis* 2017 No. 9, Competitive Enterprise Institute, September 21, 2017, https://cei.org/content/case-against-cfpb.

119 "Conflict Minerals," Securities and Exchange Commission, SEC-2012-1495-0001, September 12, 2012, https://beta.regulations.gov/document/SEC-2012-1495-0001.

120 "Commission Guidance Regarding Disclosure Related to Climate," Securities and Exchange Commission, February 8, 2010, https://www.sec.gov/rules/interp/2010/33-9106.pdf.

121 Business Roundtable, "Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans,'" businessroundtable.org, August 19, 2019, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

122 Veronica Chau, Vinay Shandal, Douglas Beal, Leonore Tauber, Wendy Woods, and David Young, "Unlocking Tomorrow's ESG Opportunities," Boston Consulting Group, April 7, 2020, https://www.bcg.com/publications/2020/future-esg-environmental-social-governance-opportunities.aspx.

123 "Seek and you may find: How CFOs can manage sustainability risks and create long-term value," Deloitte Touche Tohmatsu Limited, accessed July 2, 2020, https://www2.deloitte.com/global/en/pages/risk/articles/gx-cfo-esg-sustainability-reporting.html.

124 Honeyman and Jana.

125 Ibid, p. 65.

126 Alexander, p. 101. "Apply to be an SBIC," Small Business Administration, accessed August 20, 2020, https://www.sba.gov/partners/sbics/apply-be-sbic.

127 “SBA Expands Impact Investment Fund,” PR Newswire, September 25, 2014, https://www.prnewswire.com/news-releases/sba-expands-impact-investment-fund-277123821.html.

128 “Termination of 2011/2012 SBIC Initiatives: Impact Investment Fund Policy and Early Stage SBIC Program,” Small Business Administration, September 28, 2017, https://www.sba.gov/sites/default/files/SBA_Update_on_Impact_Policy_and_Early_Stage_SBIC_Program.pdf.

129 A 2020 survey of high net worth investors found that 79 percent of investors “indicate that they want their investments to advance environmental sustainability,” but that, among the same sample, 85 percent “agree that they will only invest responsibly if the returns are the same or better [as conventional, non-ESG investments].” “Fifth Annual Responsible Investing Survey,” Nuveen, June 17, 2020, https://www.prnewswire.com/news-releases/returns-drive-adoption-of-esg-and-impact-funds-finds-nuveens-fifth-annual-responsible-investing-survey-301078565.html. Accompanying news release: “Returns drive adoption of ESG and impact funds, finds Nuveen’s Fifth Annual Responsible Investing Survey,” PR Newswire, June 17, 2020, https://www.prnewswire.com/news-releases/returns-drive-adoption-of-esg-and-impact-funds-finds-nuveens-fifth-annual-responsible-investing-survey-301078565.html.

130 “[P]roducts’ price, availability, performance and quality have the highest impetus on consumers’ intention to pay the green price premium. Thus price and quality concern are the major antecedents for the market augmentation of green products.” Aindrila Biswas, “ A Study of Consumers’ Willingness to Pay for Green Products,” *Journal of Advanced Management Science* Vol. 4, No. 3 (May 2016), p. 211.

131 Berg, Koelbel, and Rigobon, 2019.

132 Max M. Schanzenbach and Robert H. Sitkoff, “Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee,” *Stanford Law Review*, Vol. 72 (February 2020), p. 381, https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/02/Schanzenbach-Sitkoff-72-Stan.-L.-Rev.-381.pdf.

133 Department of Labor, Employee Benefits Security Administration, “Financial Factors in Selecting Plan Investments,” *Federal Register*, Vol. 85, No. 220 (November 13, 2020), https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments.

134 Eugene Scalia, “Retirees’ Security Trumps Other Social Goals,” *The Wall Street Journal*, June 23, 2020, https://www.wsj.com/articles/retirees-security-trumps-other-social-goals-11592953329.

135 One large investment firm clarifies for its clients that, “Sustainable investing is about long-term, finance-driven strategies—*not to be confused with ethical investing*. It is central to successful long-term investment outcomes and should be a key part of all asset owners’ investment approaches.” [Emphasis added] Willis Towers Watson, “Sustainable investment: Time for everyone to translate thinking into action,” willistowerswatson.com, 2018, https://www.willistowerswatson.com/-/media/WTW/Insights/2018/06/WTW-INV-2018-Sustainability-Investment-Asia.pdf.

136 The Securities and Exchange Commission issued a request for public comment on fund names in March 2020 that suggests the agency may be looking to issue guidance on use of terms like "ESG," "clean," "environmental," "impact," "responsible," "social," or "sustainable" in fund names. "Request for Comments on Fund Names," Securities and Exchange Commission, RIN 3235-AM72, March 2, 2020, https://www.sec.gov/rules/other/2020/ic-33809.pdf. "SEC Issues Request for Comment on ESG Fund Names," *Sustainable Investing*, accessed August 20, 2020, https://www.sustainableinvest.com/sec-seeks-comment-esg-fund-names/.

137 Greg Iacurci, "Money moving into environmental funds shatters previous record," CNBC, January 14, 2020, https://www.cnbc.com/2020/01/14/esg-funds-see-record-inflows-in-2019.html.

138 A 2019 report from the Pacific Research Institute found that "the average expense ratio was 0.69 percent for the 30 ESG funds examined compared to the expenses associated with a broad-based S&P 500 index fund of 0.09 percent." Wayne Winegarden, "Environmental, Social, and Governance (ESG) Investing: An Evaluation of the Evidence," Pacific Research Institute, May 2019, p. 5, https://www.pacificresearch.org/wp-content/uploads/2019/05/ESG_Funds_F_web.pdf.

139 "Behind BlackRock's ESG Shift," Institute for Pension Fund Integrity, May 2020, p. 2, https://ipfiusa.org/wp-content/uploads/2020/05/Behind-BlackRocks-ESG-Shift.pdf.

140 Ibid., p. 6.

141 Larry Fink, "A Fundamental Reshaping of Finance," BlackRock, January 16, 2020, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

142 "SASB's ultimate goal is for the SEC to adopt its standards." Editorial, "Bloomberg's Business Nanny," *The Wall Street Journal*, March 6, 2020, https://www.wsj.com/articles/bloombergs-business-nanny-11581975748.

143 MSCI ESG Research, Inc., "MSCI ESG Government Ratings," 2016, https://www.msci.com/documents/10199/e092c439-34e1-4055-8491-86fb0799c38f.

144 Edmans, 2020. Berg, Koelbel, and Rigobon, 2019.

145 Thompson, 2020.

146 Berg, Koelbel, and Rigobon, 2019.

147 Blake Morgan, "11 Fashion Companies Leading the Way in Sustainability," *Forbes*, February 24, 2020, https://www.forbes.com/sites/blakemorgan/2020/02/24/11-fashion-companies-leading-the-way-in-sustainability.

148 Elsa Wenzel, "20 C-suite sustainability champions for 2020," *GreenBiz.com*, January 6, 2020, https://www.greenbiz.com/article/20-c-suite-sustainability-champions-2020.

149 The company states that "Patagonia supports only environmental work." "We're in business to save our home planet," Patagonia, accessed July 1, 2020, https://www.patagonia.com/activism. After the widespread protests over the deaths of George Floyd and Breonna Taylor in the summer of 2020, Patagonia published a statement regarding its efforts to "become an antiracist company," but even that statement brought the issue back to the environment, with the company pledging to "amplify the true leaders on justice and equity in the environmental movement and outdoor industry" and insisting that, "We must focus on those most impacted by the environmental crisis and follow their lead." "Our Acknowledgment," Patagonia, https://www.patagonia.com/stories/our-acknowledgment/story-91580.html, accessed January 8, 2021.

150 Heike Bruch and Frank Walter, "The Keys to Rethinking Corporate Philanthropy," *MIT Sloan Management Review*, October 15, 2005, https://sloanreview.mit.edu/article/the-keys-to-rethinking-corporate-philanthropy.

151 Michael E. Porter and Mark R. Kramer, "The Competitive Advantage of Corporate Philanthropy," *Harvard Business Review*, December 2002, https://hbr.org/2002/12/the-competitive-advantage-of-corporate-philanthropy.

152 Jeff Leinaweaver, "Is corporate sustainability reporting a great waste of time?" *The Guardian*, January 6, 2015, https://www.theguardian.com/sustainable-business/2015/jan/06/corporate-sustainability-reporting-waste-time.

153 Ibid.

154 Brad Plumer, "Environmentalists and Nuclear Power? It's Complicated," *The New York Times*, April 18, 2018, https://www.nytimes.com/2018/04/18/climate/climate-fwd-green-nuclear.html.

155 "Dirty, Dangerous and Expensive: The Truth about Nuclear Power," Physicians for Social Responsibility, June 2018, https://www.psr.org/wp-content/uploads/2018/06/dirty-dangerous-and-expensive.pdf.

156 "Naomi Klein on nuclear power," *Nuclear News*, December 15, 2014, https://nuclear-news.net/2014/12/15/naomi-klein-on-nuclear-power/.

157 Mark Z. Jacobson, "The 7 reasons why nuclear energy is not the answer to solve climate change," Leonardo DiCaprio Foundation, June 20, 2019, https://www.leonardodicaprio.org/the-7-reasons-why-nuclear-energy-is-not-the-answer-to-solve-climate-change/.

158 Oliver Millman, "James Hansen, father of climate change awareness, calls Paris talks 'a fraud,'" *The Guardian*, December 12, 2015, https://www.theguardian.com/environment/2015/dec/12/james-hansen-climate-change-paris-talks-fraud.

159 Robert Bryce, "Environmentalists Foolishly Go to War Against Nuclear Power," *New York Post*, June 13, 2018, https://www.manhattan-institute.org/html/environmentalists-foolishly-go-war-against-nuclear-power-11292.html. Original letter: Dr. Ken Caldeira, Dr. Kerry Emanuel, Dr. James Hansen, and Dr. Tom Wigley, "Top climate change scientists' letter to policy influencers," CNN, November 3, 2013, https://www.cnn.com/2013/11/03/world/nuclear-energy-climate-change-scientists-letter/index.html.

160 James Hansen and Michael Shellenberger, "The Climate Needs Nuclear Power," *The Wall Street Journal*, April 4, 2019, https://www.wsj.com/articles/the-climate-needs-nuclear-power-11554420097.

161 Calum Chance, "'False Alarm' By Bjorn Lomborg—Book Review," *Forbes*, August 3, 2020, https://www.forbes.com/sites/calumchace/2020/08/03/false-alarm-by-bjorn-lomborg--book-review/#47f5c2092724.

162 For example, two prominent management experts have defined impact investing as "looking for companies that make a positive impact on an ESG issue while still earning a market return." Robert G. Eccles and Svetlana Klimenko, "The Investor Revolution," *Harvard Business Review*, May–June 2019, https://hbr.org/2019/05/the-investor-revolution.

163 In the climactic scene of the film *Avengers: Endgame*, supervillain Thanos announces "I am inevitable," at his supposed moment of triumph, only to realize his plans have been foiled, brought down in part by his own hubris.

164 Principles for Responsible Investment, "What is the Inevitable Policy Response?" United Nations Principles for Responsible Investment website, accessed July 2, 2020, https://www.unpri.org/inevitable-policy-response/what-is-the-inevitable-policy-response/4787.article.

165 Allison Herren Lee, "Big Business' Undisclosed Climate Crisis Plans," *The New York Times*, September 27, 2020, https://www.nytimes.com/2020/09/27/opinion/climate-change-us-companies.html. Commissioner Lee was subsequently named by President Biden to be Acting Chair of the Securities and Exchange Commission.

166 Thompson, 2020.

167 Alana L. Griffin, Michael J. Biles, and Tyler J. Highful, "Institutional Investors Petition the SEC to Require ESG Disclosures," American Bar Association, January 16, 2019, https://www.americanbar.org/groups/business_law/publications/blt/2019/01/investors.

168 Willis Towers Watson, 2018.

169 "SEC Again Urged to Regulate ESG Disclosures," Jones Day, June 2020, https://www.jonesday.com/en/insights/2020/06/sec-again-urged-to-regulate-esg-disclosures.

170 Caroline Haas, "Sustainability is the new mandatory," NatWest, November 20, 2019, https://www.nwm.com/insights/articles/sustainability-is-the-new-mandatory/.

171 Leonard W. Wang, "INSIGHT: ESG Disclosures—Prospects for the Future," *Bloomberg Tax*, August 30, 2019, https://news.bloombergtax.com/financial-accounting/insight-esg-disclosures-prospects-for-the-future.

172 Jessica Lyons Hardcastle, "Should Corporate ESG Disclosures Be Mandatory?" Energy + *Environment Leader*, August 10, 2016, https://www.environmentalleader.com/2016/08/should-corporate-esg-disclosures-be-mandatory/.

173 "Member State Implementation of Directive 2014/95/EU," GRI and CSR Europe, 2017, https://www.accountancyeurope.eu/wp-content/uploads/1711-NFRpublication-GRI-CSR-Europe.pdf.

174 Anna Maleva-Otto and Joshua Wright, "New ESG Disclosure Obligations," Harvard Law School Forum on Corporate Governance, March 24, 2020, https://corpgov.law.harvard.edu/2020/03/24/new-esg-disclosure-obligations/.

175 Linda M. Lowson, "Re: File No. 265-25-04, SEC Investor Advisory Committee Meeting," CSR Insight™ LLC, May 10, 2010, https://www.sec.gov/comments/265-25-04/2652504-8.pdf. Responding to "Notice of Meeting of SEC Investor Advisory Committee," Securities and Exchange Commission, Release Nos. 33-9120; 34-61982; File No. 265-25-04, April 26, 2010, https://www.sec.gov/rules/other/2010/33-9120.pdf.

176 David Wright, "Remarks by David Wright, Secretary General of IOSCO," December 10, 2012, https://www.iosco.org/library/speeches/pdf/20121210-Wright-David.pdf.

177 Jennifer G. Hill, "Regulatory Cooperation in Securities Market Regulation: Perspectives from Australia," Blog of the University of Oxford Faculty of Law, May 27, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/regulatory-cooperation-securities-market-regulation-perspectives.

178 Tonya Somander, "President Obama: The United States Formally Enters the Paris Agreement," obamawhitehouse.archives.gov, September 3, 2016, https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement.

179 Christopher C. Horner and Marlo Lewis, "The Legal and Economic Case Against the Paris Climate Treaty," *Issue Analysis* 2017 No. 6, Competitive Enterprise Institute, May 2017, https://cei.org/content/legal-and-economic-case-against-paris-climate-treaty.

180 "AS 2201: An Audit of Internal Control over Financial Reporting that Is Integrated with an Audit of Financial Statements," Public Company Accounting Oversight Board, June 12, 2007, https://pcaobus.org/oversight/standards/auditing-standards/details/AS2201.

181 Sam Kazman, Hans Bader, and John Berlau, "Supreme Court Strikes Down Key Sarbanes-Oxley Provisions," news release, Competitive Enterprise Institute, June 28, 2010, https://cei.org/content/supreme-court-strikes-down-key-sarbanes-oxley-provisions.

182 Public Company Accounting Oversight Board, "SEC Filing Form 19b-4: Auditing Standard No. 5, An Audit of Internal Control over Financial Reporting that Is Integrated with an Audit of Financial Statements," Docket 021, May 29, 2007, https://pcaobus.org/Rulemaking/Docket%20021/AS5_19b-4.pdf.

183 Doyle, p. 10.
184 Joe Weisenthal, "The 4 Things that Worry Jamie Dimon...," *Business Insider*, February 4, 2013, https://www.businessinsider.com/the-four-things-that-worry-jamie-dimon-2013-2.
185 Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, "Regulatory Accumulation and Its Costs: An Overview," Policy Brief, Mercatus Center, November 2018, https://www.mercatus.org/publications/regulation/regulatory-accumulation-and-its-costs.
186 Wayne Crews, *10,000 Commandments 2020: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, May 27, 2020, p. 5, https://cei.org/sites/default/files/Ten_Thousand_Commandments_2020.pdf.
187 Dustin Chambers and Colin O'Reilly, "Regulation and Income Inequality in the United States," *Mercatus Working Paper*, Mercatus Center, June 17, 2020, https://www.mercatus.org/publications/regulation/regulation-income-inequality-united-states.
188 Richard Morrison, "Sustainability Disclosures, Meant to Protect, Could Create Additional Risk for Investors," *OpenMarket*, Competitive Enterprise Institute, February 21, 2020, https://cei.org/blog/sustainability-disclosures-meant-protect-could-create-additional-risk-investors.
189 Cydney S. Posner, "GAO finds lack of consistency in ESG disclosure—how will the SEC respond?," Cooley LLP, August 10, 2020, https://www.lexology.com/library/detail.aspx?g=6f877086-8e60-4d3e-96b8-e23df4e7292c.
190 Eve Tahmincioglu, "SEC Chief Takes on Short-Termism and ESG," *Directors and Boards*, July 2019, https://www.directorsandboards.com/articles/singlesec-chief-takes-short-termism-and-esg.
191 Lee, "Big Business' Undisclosed Climate Crisis Plans."
192 Asset Management Advisory Committee, "Potential Recommendations of ESG Subcommittee," Securities and Exchange Commission, December 1, 2020, https://www.sec.gov/files/potential-recommendations-of-the-esg-subcommittee-12012020.pdf.
193 "Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them," Government Accountability Office, GAO-20-530, July 2020, pp. 38-40, https://www.gao.gov/assets/710/707949.pdf.
194 Ibid., p. 38.
195 Reena Agrawal Sahni, John J. Cannon, Doreen E. Lilienfeld, Gillian Emmett Moldowan, J. Russell Denton, and Matthew Behrens, "Compensation and Governance Restrictions on CARES Act Stimulus Recipients," Shearman & Sterling, July 27, 2020, https://www.shearman.com/-/media/Files/Perspectives/2020/10/Compensation-and-Governance-Restrictions-on-CARES-Act-Stimulus-Recipients100220.pdf?la=en&hash=A50DCE2B7243864204B88355DCBF0B86EBBD0383. Text of bill: H.R. 748 – "Coronavirus Aid, Relief, and Economic Security Act," 116th Congress, Second Session, March 27, 2020, https://www.congress.gov/bill/116th-congress/house-bill/748.
196 U.S. Department of the Treasury, "Treasury Implementing CARES Act Programs for Aviation and National Security Industries," news release, April 25, 2020, https://home.treasury.gov/news/press-releases/treasury-implementing-cares-act-programs-for-aviation-and-national-security-industries.

197 MSCI Inc. Senior Associate Florian Sommer, quoted in the podcast episode “Airlines Are Bailed out by ESG, and People Are Sanctioned by Companies,” *The ESG Weekly*, Episode 93, July 23, 2020, https://www.stitcher.com/podcast/esg-now/e/76409058.

198 Hazel Bradford, “House passes ‘green’ infrastructure bill that faces uncertain future,” *Pensions & Investments*, July 2, 2020, https://www.pionline.com/legislation/house-passes-green-infrastructure-bill-faces-uncertain-future. Text of bill: H.R.2 – “Moving Forward Act,” 116th Congress, Second Session, June 11, 2020, https://www.congress.gov/bill/116th-congress/house-bill/2.

199 Jonna Hamilton, “The Moving Forward Act: Ten Ways the House Infrastructure Proposal Will Increase Electric Vehicles, Clean Energy, and Resilient Transportation,” Union of Concerned Scientists, July 1, 2020, https://blog.ucsusa.org/jonna-hamilton/the-moving-forward-act.

200 Mark D. Sloss, “Why the Green New Deal could be ESG’s moon landing,” *Citywire*, April 4, 2019, https://citywireusa.com/professional-buyer/news/why-the-green-new-deal-could-be-esg-s-moon-landing/a1212961.

201 Witold Henisz, “For sustainable capitalism, investors should consider Warren’s bill,” *The Hill*, August 17, 2018, https://thehill.com/opinion/finance/402231-for-sustainable-capitalism-investors-should-consider-warrens-bill.

202 “Accountable Capitalism Act,” 116th Congress, Second Session, January 16, 2020, https://www.congress.gov/bill/116th-congress/senate-bill/3215.

203 Office of Sen. Elizabeth Warren, “Assistant Speaker Lujan and Senator Warren Announce Plan to Introduce the Accountable Capitalism Act,” news release, October 4, 2019, https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-house-assistant-speaker-lujn-announce-plan-to-reintroduce-the-accountable-capitalism-act. Bill text: S. 3215–Accountable Capitalism Act, 116th Congress, Second Session, January 16, 2020, https://www.congress.gov/bill/116th-congress/senate-bill/3215/text?q=%7B%22search%22%3A%5B%22Accountable+Capitalism+Act%22%5D%7D&r=2&s=2. H.R. 6056 - Accountable Capitalism Act, 116th Congress, Second Session, January 16, 2020, https://www.congress.gov/bill/116th-congress/house-bill/6056/text?q=%7B%22search%22%3A%5B%22Accountable+Capitalism+Act%22%5D%7D&r=1&s=2.

204 Maureen Milford, “Forcing ESG,” *Directors & Boards*, July 22, 2019, https://www.directorsandboards.com/articles/singleforcing-esg.

205 Alex Edmans, “Part II: What Grows the Pie?” in *Grow the Pie: How Great Companies Deliver Both Purpose and Profit*, (Cambridge, UK: Cambridge University Press, 2020), pp. 97-184.

206 Walter Olson, “The Warren Plan and the History of Corporate Chartering,” *Cato at Liberty*, Cato Institute, August 22, 2018, https://www.cato.org/blog/richard-epstein-general-incorporation-laws.

207 For the deficiencies of "regulation by enforcement" as currently practiced by federal agencies like the Consumer Financial Protection Bureau, see Richard Foster, Steven I. Zeisel, and Anne C. Canfield, "FSR-CBA-CMC Joint CFPB Enforcement Comment Letter," Consumer Bankers Association, May 14, 2018, https://www.consumerbankers.com/cba-issues/comment-letters/fsr-cba-cmc-joint-cfpb-enforcement-comment-letter.

208 Stakeholder capitalism proponents Frederick Alexander, Holly Ensign-Barstow, and Lenore Palladino wrote in 2020 that "protecting shareholders and relying on unfettered market forces to create value is not sufficient to create a just, equitable, and inclusive society." They insist that "reflexive shareholder primacy is at the root of the failure of capital markets" and must be replaced with "modified principles." Frederick Alexander, Holly Ensign-Barstow, and Lenore Palladino, "From Shareholder Primacy to Stakeholder Capitalism," Harvard Law School Forum on Corporate Governance, October 26, 2020, https://corpgov.law.harvard.edu/2020/10/26/from-shareholder-primacy-to-stakeholder-capitalism/. N. Craig Smith and David Rönnegard advocate for shifting away from shareholder primacy in corporate governance, which they describe as "a widely acknowledged impediment to corporate social responsibility." N. Craig Smith and David Rönnegard, "Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools," *Journal of Business Ethics*, Vol. 134, No. 3 (March 2016), pp. 463-478, https://www.jstor.org/stable/24703783.

209 Frederick H. Alexander, *Benefit Corporation Law and Governance*: Pursuing Profit with Purpose, (Oakland, CA: Berrett-Koehler Publishers, Inc., 2018).

210 B Lab, "Why Pass Benefit Corporation Legislation," Benefit Corporation, accessed July 2, 2020, https://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation.

211 "Existing companies can elect to become a benefit corporation by amending their governing documents. Amendment requires a 2/3 super-majority vote of all shareholders in most states." B Lab, "How to Become a Benefit Corporation," Benefit Corporation, accessed July 2, 2020, https://benefitcorp.net/businesses/how-become-benefit-corporation.

212 Ibid., p, 69-70.

213 Alexander, p. 86.

214 Honeyman and Jana, pp. 61-160.

215 "Benefit Corporations & Certified B Corps," B Lab, https://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps, accessed August 17, 2020.

216 Ibid., p. 65. B Lab commissioned the drafting of the MBCL and has been active in promoting its adoption by state legislatures. "Benefit Corporations & Certified B Corps," B Lab, accessed August 17, 2020, https://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps.

217 Honeyman and Jana, p. 190.

218 Christian Investment Forum, "History," accessed March 24, 2021, https://www.faithdriveninvestor.org/history.

219 Lee Mannion, "Pope leads Catholics to profit from, not just give to, the poor," Reuters, September 6, 2018, https://www.reuters.com/article/us-investment-catholic-development/pope-leads-catholics-to-profit-from-not-just-give-to-the-poor-idUSKCN1LM2J8.

220 Rob Morgan, "What are Shariah-compliant investments?" Charles Stanley, July 15, 2020, https://www.charles-stanley.co.uk/group/cs-live/what-are-shariah-compliant-investments. M.K. Lewis, "Accentuating the positive: governance of Islamic investment funds," *Journal of Islamic Accounting and Business Research*, April 2010, pp. 42-59. https://www.researchgate.net/publication/235318510_Accentuating_the_positive_governance_of_Islamic_investment_funds.

221 "Directory of Kosher Certifying Agencies," Chicago Rabbinical Council, accessed August 21, 2020, https://www.crcweb.org/agency_list.php.

222 Department of Labor, Employee Benefits Security Administration, "Financial Factors in Selecting Plan Investments.

223 Books like Herbert Croly's *The Promise of American Life* (1909) argued that the federal government had a responsibility to ensure that standards of living for average Americans rose over time. "Croly advocated combining the Hamiltonian and Jeffersonian traditions and creating a strong federal government to ensure that all Americans had a fair shot at individual success." Franklin Foer, "Foreword," in Herbert Croly, *The Promise of American Life: Updated Edition* (Princeton, N.J.: Princeton Universiy Press, 2014), https://press.princeton.edu/books/paperback/9780691160689/the-promise-of-american-life. Croly-style progressivism was becoming popular at the same time that the "industrial welfare" movement in the United States and United Kingdom was growing. Many business leaders made significant voluntary commitments to raising wages and educational standards and improving workplace safety and access to health care within the context of the employer-employee relationship, consistent with the progressive ideal of continually rising living standards. Heald, pp. 34-43.

224 Hebrew and Christian scripture contain many references to treating workers with respect, such as Leviticus 19:13 ("You shall not defraud your neighbor; you shall not steal; and you shall not keep for yourself the wages of a laborer until morning.") and James 5:4 ("Listen! The wages of the laborers who mowed your fields, which you kept back by fraud, cry out, and the cries of the harvesters have reached the ears of the Lord of hosts."), https://www.biblegateway.com/.

225 For more on eating disorders, see Michelle Minton and Connor Kianpour, "How Federal Policy Puts Eating Disorder Sufferers at Risk," *Issue Analysis* 2020 No. 1, Competitive Enterprise Institute, https://cei.org/issue_analysis/how-federal-policy-puts-eating-disorder-sufferers-at-risk/.

226 The trade-in-minerals provisions of Dodd-Frank, applicable to conflict zones of the Democratic Republic of Congo and adjoining countries, have "created 'a de facto embargo on the minerals mined in the region' that impoverished poor villagers and made warlords more powerful." John Berlau, "Dodd-Frank Is Hurting Those Who Had Nothing to Do with the Financial Crisis," *New York Times*, April 14, 2016, https://www.nytimes.com/roomfordebate/2016/04/14/has-dodd-frank-eliminated-the-dangers-in-the-banking-system/dodd-frank-is-hurting-those-who-had-nothing-to-do-with-the-financial-crisis, quoting from David Aronson, "How Congress Devastated Congo," *New York Times*, August 7, 2011, https://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html. Aronson summarizes the impact of Dodd-Frank on Congolese workers as "a catastrophe."

227 Benjamin Powell, "A Case against Child Labor Prohibitions," *Economic Development Bulletin* No. 21 (2014), Cato Institute, https://www.cato.org/publications/economic-development-bulletin/case-against-child-labor-prohibitions.

About the Author

Richard Morrison is a research fellow with the Competitive Enterprise Institute's Center for Advancing Capitalism, where his work focuses on the relationship between economic and political freedom. He previously served as the Center's program manager, in which capacity he coordinated outreach to the business community, universities, and other key stakeholders.

Before rejoining CEI in 2014, he was manager of communications at the Tax Foundation, where he was also the host and producer of the weekly Tax Policy Podcast. Prior to that he served as CEI's director of media relations and director of new media between 1999 and 2010, during which he hosted the podcast Liberty Week.

He received his Bachelor of Arts in Government from Claremont McKenna College.

COMPETITIVE ENTERPRISE INSTITUTE

The Competitive Enterprise Institute promotes the institutions of liberty and works to remove government-created barriers to economic freedom, innovation, and prosperity through timely analysis, effective advocacy, inclusive coalition-building, and strategic litigation.

COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, DC 20005
202-331-1010
cei.org