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A Whole New World: Supporting Socially Responsible Business Through Legislation

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INTRODUCTION

A fundamental question that commentators have asked since the inception of the corporation is whether a corporation is merely a tool to make profits for its shareholders, or, as a construct of society, does it owe that society certain obligations.[1] Currently, corporate law in the United States mandates that a corporation's sole obligation is to its corporate shareholders.[2] While this view of corporations is popular among investors and free market proponents, many activists and commentators have argued that corporations should actively consider the effects corporate decisions have on other constituencies, most notably employees, customers, and neighbors.[3] However, advocates differ on what Corporate Social Responsibility (CSR) is, and how a corporation can ensure that it is a responsible member of society.[4] At the same time, critics argue that the only social responsibility corporations have is to their shareholders and that CSR violates the principles of free market society.[5]

Many corporations, such as Nike, Inc. (Nike) and BP, plc (BP) have voluntarily implemented CSR programs for a variety of reasons.[6] These programs have had mixed success and are often met with skepticism from the public as mere ploys for publicity.[7] Additionally, the legality of CSR programs is unsettled and voluntary programs might subject the corporation and its directors to civil liability should shareholders revolt over a perceived failure of the duty of loyalty or if corporate reporting on the programs proves incorrect.[8] Perhaps most concerning for corporate directors, is the market's reaction to corporate CSR programs as there is evidence the market devalues corporations when there is a perception that the directors are neglecting shareholder value.[9] Because of the many disincentives, voluntary programs might not be effective to achieve the results many believe are possible. While voluntary programs face several hurdles, there is some evidence that CSR has long-term benefits to the corporation such as employee and customer loyalty, cost savings, and other potential benefits.[10]

As state, federal, and international governments deal with the aftermath of the current financial crisis, calls for increased use of CSR programs are inevitable. However, with the current legal framework, corporate consideration of other constituencies is difficult as the corporations have a duty to shareholders.[11] Further, voluntary CSR programs face potential hurdles including opening the corporation up to civil liability and market devaluation. As a result, any policy promoting CSR needs support from changes in state or corporate law. Corporate law in the United States does not currently provide corporate executives the tools necessary to implement effective CSR programs, as the legality is suspect and there are no methods of ensuring compliance with voluntary programs. In order to ensure that CSR programs are effective, the federal government should enact a comprehensive scheme to support the development of CSR programs, as well as provide enforcement mechanisms to ensure compliance.

This paper proceeds in three parts. Part I begins by discussing the difficulty in defining the concept of CSR. It then discusses how corporations use CSR programs and ends with a discussion of the efficacy of the programs. Part II deals with the legal issues surrounding corporations that attempt to enact CSR programs. Finally, Part III analyzes the current framework and proposes that any attempt to reform the corporate environment to include CSR programs must begin with a federal statute.

I. WHAT IS CORPORATE SOCIAL RESPONSIBILITY?

Before examining the intricacies of CSR, it is useful to examine what CSR is. In trying to define CSR, commentators have had to examine the purpose of corporations in order to assess what CSR is, and what it should do.[12] Many try to define CSR broadly to encompass how corporations actually use the concept,[13] while others define CSR, as they believe it should be.[14] Because it is such a broad concept, it is difficult to find a single definition, or to describe how corporations use the concept. Still, attempting to define the concept and examining corporate use of CSR will illuminate some of the issues both proponents and detractors face in determining whether such practices are legal, whether they benefit society, and how they affect corporate profits.

A. Defining Corporate Social Responsibility

In 1970, the Nobel winning American economist Milton Friedman argued in an article in the New York Times Magazine that the only responsibility of the corporation was to maximize its shareholders' investment.[15] In this perspective, corporate executives, the agents of the corporation's shareholders, have a duty to manage the corporation to increase profits, thereby employing people, contributing to the local, national, and international economies, and creating valuable products.[16] If executives implement policies that decrease the company's profits, they are placing a tax on the shareholders, customers, or employees.[17] At the same time, he recognized that CSR programs often provide benefits for the corporation or the shareholders by attracting new and better employees, creating good will in the communities, or by taking advantage of charitable deductibility laws that allow corporations to contribute more than shareholders could contribute individually.[18]

Friedman's view, sometimes referred to as the minimalist view, has been widely held in the United States and the international community, but it is by no means the only view of what corporate social responsibility entails.[19] In addition to the minimalist view, definitions have been divided into (1) philanthropic, (2) encompassing or stakeholder, and (3) social activist.[20] Like

Friedman's minimalist view, each of the definitions is more a description of what CSR should be or how corporations use it rather than an encompassing definition of the movement itself. As mentioned above, the minimalist view is the view espoused by people like the economist Milton Friedman who argued that the only social responsibility a corporation might have is to the shareholders and that any other attempt by the corporation's board and managers to consider external factors is wrong.[21]

Under the philanthropic view, the corporation's primary objective is still to maximize shareholder profit, but the corporation may make charitable contributions.[22] This view of CSR has been a major factor in the United States over the course of the last century, as corporations have found that it is an effective marketing tool and that charities such as the Ronald McDonald House generate tremendous good will.[23] While corporate philanthropy is legal in all fifty states, many criticize the practice because it forces shareholder contribution, whereas if the funds used for charitable giving were paid as dividends, shareholders could contribute directly to their own charities.[24]

Proponents of the encompassing view, also known as the stakeholder view, believe that corporations must consider other constituencies when making decisions.[25] Unlike the minimalist or charitable views, the encompassing method does not see the corporation as primarily a tool to enhance shareholder wealth. Rather, as a legal person, the corporation, through its directors and managers, must consider the overarching effect each decision has on "employees, customers, creditors, and the community."[26] To some extent, this view is the current predominant view of those seeking to implement CSR, as proponents believe that forcing corporations to look at the interests of these diverse groups will improve the environment, labor standards, and lead to a more stable economy.[27] Many states have incorporated the encompassing concept into their corporate law using stakeholder statutes that permit management of corporations to examine the risk to non-shareholder stakeholders in the event of a takeover.[28] Finally, the social activist view argues that corporations have an affirmative duty to benefit society as society gives the corporation and its investors the tools to create great wealth.[29] Under this view, the corporation is viewed as an agent of change, improving the environment, improving the standard of living of its employees, and ensuring the safety of its customers.[30]

While these definitions are important to understanding the importance and purpose of corporations in the United States and the world, they are problematic when trying to examine the current trends in CSR as these definitions all refer to models of CSR rather than creating an encompassing definition. In a recent symposium published by the Review of Environmental Economics and Policy, the authors each attempted to define CSR more broadly.[31] Professors Robert Reinhardt, Robert Stavins, and Richard Vietor proposed the first and narrower definition of CSR in their article.[32] They define CSR as "sacrificing profits in the social interest."[33] In contrast, Professor Portney argued that defining CSR so narrowly would make the list of corporations undertaking CSR very small, as most corporations are implementing social policy that does not affect corporate profits.[34] In Portney's article, he posits that the appropriate definition of CSR is any action by the executives of a corporation that goes beyond the governing regulations in regards to the environment, labor practices, product safety, and community investments.[35] Under Portney's definition, a corporation could remain faithful to Friedman's free market beliefs while being socially responsible, as long as those actions above the regulatory minimum were also in the best interest of the shareholders.[36] Using the narrower definition proposed by Reinhardt and his associates, such actions often would not be CSR as the programs do not negatively impact corporate profits[37]

B. Background on CSR

CSR is not a new concept. Successful individuals have long felt the need or social compulsion to repay society for their success.[38] In modern history, the twentieth century industrialists, such as the Rockefellers and Carnegies felt the need to contribute to society through vast charitable campaigns, building schools, libraries, and other community assets.[39] Even today, modern corporations still give enormous amounts to charities, the arts, and educational institutions.[40] Over the last century, however, corporations pressured by labor organizations, activists, and society as a whole have begun to take notice of the effects business has on various constituencies.[41] In recognition of their effect on society, many corporations are going beyond philanthropy and charitable giving and enacting policies that proactively respond to the pressures and effects on constituencies.[42] Outside of the business community, activists promote CSR as a means to achieve additional social welfare, particularly when it comes to labor practices in developing countries and the environment.[43]

1. *Nike's Board used CSR Programs to Respond to Allegations of Worker Abuse in Southeast Asia*

Over the last three decades, many manufacturers with production facilities in developing countries have dealt with charges of unfair labor practices. This has particularly affected clothing manufacturers such as Nike and Gap, Inc., which have come under scrutiny due to the working conditions in factories producing their clothing.[44] Recognizing that these incidents have led to poor publicity as well as concern about the corporation's reputation and bottom line, the boards of companies like Nike have taken measures to alleviate the negative publicity.

In the 1990s, several news stories tarnished Nike's image by uncovering the poor labor standards in the factories producing Nike's footwear and apparel.[45] The stories uncovered allegations of substandard pay, child labor, and poor working conditions.[46] Because of the articles, Nike faced strong criticism, especially among members of the anti-globalization movement.[47] Protests were particularly strong on college campuses, where Nike had lucrative deals to produce licensed apparel for the sports teams.[48]

At first, Nike executives argued that it had no control over the working conditions in the factories as they were hired under contract and not directly owned by Nike.[49] Eventually realizing that it had to respond, executives began to work proactively in order to improve the corporation's image.[50] The first step Nike managers took was to institute codes of conduct that suppliers had to sign.[51] The code required the suppliers to monitor environmental and other health standards as well as maintain a set of basic labor practices.[52] Nike has also required the suppliers to ensure employees met a minimum age requirement and that the factories satisfy US Occupational Safety and Health Administration Standards.[53] A compliance department visits and monitors suppliers for compliance with labor and environmental regulations.[54] Even with these enhanced procedures, Nike still faces criticism that it is not doing enough to protect the workers in its factories.[55] As a sign of its commitment to social responsibility, Nike has begun to report its success on its website Nikebiz.com as well in a biannual report detailing its strategic vision for its CSR policies.[56] In particular, the report highlights the steps Nike is taking to ensure that its products are produced under fair labor standards, as well as in a sustainable manner.[57] Due to these steps, Nike is quickly building a reputation as a leader in fair labor standards.[58]

Nike is not alone in the textile industry in trying to improve corporate image with internal codes of conduct and other CSR programs.[59] However, internal codes require self-monitoring and with the large number of factories that Nike and other companies such as Levi's and Reebok use to manufacture products, it be difficult or cost prohibitive to ensure that the codes are truly enforced.[60] Because internal codes of conduct require self-enforcement, the codes have been criticized as “the fox monitoring the henhouse.”[61] In reaction to this criticism, as well as to the failure of many of the individual internal codes of conduct, trade organizations and Non Governmental Organizations have developed “multi-stakeholder” codes of conduct.[62] While these multi-stakeholder codes have the effect of standardizing labor practices, because of the large number of codes corporations can select which code best fits their needs.[63] Additionally, academics wonder whether these codes of conduct are effective at curbing unfair practices.[64] While there seems to be some evidence that Nike has taken steps in the right direction and despite its improving reputation, there are still many who are unconvinced that the company has truly changed its practices.[65]

2. *British Petroleum*

Like the textile industry, the energy services and food industries have seen calls for increased corporate responsibility. The environmental movement, in particular, has argued that corporations have a responsibility to prevent environmental harm caused by manufacturing and energy consumption. Corporations have responded to that pressure, as well as a general change in consumer demand, by providing “green products” and promoting the corporation as a “green business.”[66] Many of these businesses may be truly concerned about their business’s effect on the environment, but it is also possible these businesses are reacting to the increased cost of fuel and the global movement towards conservation and environmentalism.[67]

Corporations, such as BP, have attempted to develop a culture of corporate social responsibility, particularly as it relates to the environment.[68] For example, BP has attempted to develop a sustainable energy company by investing in so-called *clean technologies*.[69] Likewise, BP has implemented several programs to improve safety, sustainability, and environmental concerns.[70] One interesting program is the institution of stakeholder meetings in a number of locales to ensure that it is listening to stakeholder opinions.[71] Most notably, BP has accepted the findings of the Intergovernmental Panel on Climate Change, which hold that global climate change is occurring and is very likely caused by humans.[72] Because of this acceptance, the corporation has put programs in place, both in the corporation as a whole as well as in local operations to limit and reduce overall carbon emissions of the corporation.[73] Further, in addition to achieving carbon reduction among its traditional hydro-carbon based industry, it has invested in and begun research in renewable energy sources such as solar and bio-fuels.[74] While some commentators have hailed these moves, critics remain who point to BP's reliance on production of natural gas as a sign the corporation has not done enough.[75]

C. Why Corporations Implement CSR Policies

Corporations use CSR programs for a variety of reasons. Like Nike and BP, many corporations are responding to external pressure and bad publicity. However, other corporations are responding to other factors. These factors include better customer relations, employee loyalty, attracting investors, promoting community good will, better relationships with regulators, and improving the bottom line.[76] Some corporate executives believe that ensuring happy employees, neighbors, or other constituencies are vital to the corporation's long-term strategy. An early example of an executive who held this belief was Henry Ford, who attempted to use excess corporate profits to pay workers higher wages and to invest in long term growth as opposed to paying profits out as dividends.[77]

Some corporations have enacted CSR policies to differentiate themselves from their competition.[78] By enacting CSR programs, the corporations appeal to a certain investor or customer.[79] Two corporations that have employed this philosophy are Ben and Jerry's Homemade Holdings, Inc. (Ben and Jerry's) and Whole Foods Market, Inc. (Whole Foods).[80]

Both of these companies from their inception have viewed socially responsible business as a means of building market share.[81] Ben and Jerry's has emphasized that its products, both the product itself and the packaging, come from sustainable and environmentally friendly processes.[82] Likewise, Whole Foods Market motto is "Whole Foods, Whole People, Whole Planet," emphasizing that company's commitment to the environment, its customers, and its employees.[83] In particular, Whole Foods works to ensure that its products are produced in a sustainable nature and even sources many of its fresh goods from local sources.[84] Other corporations, like McDonalds have undertaken CSR programs in response to a change in social values or a concern that current practices will lead to bad publicity or a loss in market share.[85]

Like the desire to set themselves apart from customers, many corporate executives may be concerned with attracting investors. Just as there are customers who will look for a product from a corporation with a "responsible" reputation or label, there are investors interested in supporting corporations that have CSR programs.[86] These executives believe that a CSR program will allow their business practices to align with the investor's beliefs, or that an investor will believe the program will create a good return on investment.[87]

Finally, other corporate executives are interested in a well-trained and efficient workforce that is loyal to the corporation. Theoretically, a happy workforce should improve efficiency, as the corporation would enjoy lower costs associated with employee turnover. An example of a corporation that is implementing an employee loyalty program is Costco.[88] Costco provides a generous benefits package to its employees in the belief that this will create a happy and loyal workforce, leading to long-term cost savings from reduced employee turnover.[89] Another example of a corporation emphasizing employee morale is Whole Foods Market. In addition to its emphasis of sustainable development, its management tries to ensure employee morale through safety and benefits programs.[90] Most individuals would want to work for a corporation where they felt their contribution was valued.[91]

D. Efficacy of CSR Programs: Do They Deliver the Promised Results

Due to a number of reasons, it is difficult to determine whether CSR Programs are successful as there is little reliable evidence that measures the effect of these programs on society or on the corporations themselves.[92] Companies like Nike have implemented broad CSR programs and, as mentioned before, Nike is now considered "the global leader when it comes to improving labor standards in developing-country factories."[93] Still, it faces many critics who feel it has not done enough to curb abuses in its suppliers' factories.[94] Likewise, BP faces continued criticism that it relies too heavily on Natural Gas and other hydrocarbon based fuels to demonstrate a decreased reliance on petroleum production.[95] However, by adopting its own cap and trade system for carbon emissions, BP claims to have saved $600 Million Dollars and preserved public good will.[96] More importantly for the environmental critics, BP claims to have made real reductions in carbon dioxide emissions in the last seven years because of its programs.[97] Whether these programs are effective at curbing the alleged labor or environmental issues is often a matter of perspective and difficult to determine.

One sign that investors value corporations with CSR programs is the proliferation of funds that look for corporations employing CSR programs.[98] It has been reported that up to $2 trillion in assets are in funds that screen for at least some manifestation of CSR.[99] However, as these are newer funds, it is too early to tell if they will remain attractive to investors as their reported track records are poor relative to other funds.[100] While the current popularity of the funds points towards investor interest in CSR programs, there is some anecdotal evidence that CSR programs may result in an undervalued stock price.[101] One example is that of the bulk retailer Costco.[102] The company is dedicated to its employees and pays them a higher wage and better benefits than its competitor Sam's Club pays. While Costco argues that this has resulted in cost savings as they have a productive and happy workforce resulting in fewer turnovers, the corporation's stock price trades at a lower premium than Wal-mart, Sam's Club's parent company, ostensibly because the market believes the benefits are too generous.[103] Further, when markets have fully anticipated CSR costs, initial public offerings of stock will often sell at a discount, with entrepreneurs bearing the cost of the *responsible* activities.[104]

In addition to the possibility of attracting investors, some corporations have seen positive results in regards to business efficiency from the use of CSR programs. One example in particular is the Chiquita Corporation.[105] Chiquita and its predecessor companies have operated for over a century producing bananas in Latin America.[106] During that time, it spurred economic development by creating jobs on its farms and building the infrastructure needed to transport the bananas to market; however, it was also known for oppressive labor practices and interfering with sovereign governments, including participating in the overthrow of the Guatemalan government in the 1950s.[107] In the 1990s, the corporation began to implement a number of policies with the aim of improving farming practices, labor standards, and the corporate image.[108] One of the most important steps was its voluntary participation with non-governmental organizations dedicated to more sustainable banana farming practices.[109] The company also reworked its relationship with the labor unions as well as implemented training for managers on the corporation's new policies.[110] Early signs of success have included reduced costs associated with worker health, safety, and the choice by a group of major European retailers to purchase bananas from Chiquita.[111]

There is evidence that the public views the treatment of customers and employees as the most important issue for a business to address, with a study conducted by the Mori Research institute in Britain finding that 29% of the population was at least interested in "ethical" goods.[112] At the same time, most of the "responsible" purchasers were upscale purchasers with a large portion of the rest of the "ethical" purchasers under the age of 25 and motivated by brand name.[113] In the current economic environment, it is possible that the group interested in purchasing ethical goods and services will succumb to market pressures, namely the tight economy, and look to purchase less expensive products

II. THE LEGAL STRUCTURE OF CORPORATE SOCIAL RESPONSIBILITY

For most of the twentieth century, states and courts asserted that corporate directors should run corporations for the profit of the shareholders.[114] Because shareholders owned the corporation, the directors were the shareholder's agents and thus had fiduciary duties to serve in the shareholder's best interests.[115] As the fiduciary duties require corporations to maximize shareholder profits, any attempts to consider external constituencies or stakeholders would violate the duty to those shareholders.[116] This would ostensibly ensure that any CSR programs that do not have a clear benefit for shareholders would face legal challenges from shareholders, as they would violate this principle.[117] On the other hand, when courts are asked to review director and officer decisions, they employ the Business Judgment Rule, which is deferential to the directors and the decisions they make, meaning courts are reluctant to second-guess their decisions.[118]

In reaction to the takeover movement of the 1980s and 1990s, many states enacted stakeholder statutes in an effort to protect local corporations, and local jobs from the threat of hostile takeovers.[119] These statutes theoretically allow corporations to invoke the name of external shareholders such as employees, the community, and other constituencies, the statutes are mostly permissive. Further, none of the statutes incorporates an enforcement mechanism that would allow shareholders to force corporations to consider the needs of other constituencies when making decisions.[120] While most states have enacted stakeholder laws there are still a handful of states that have not.[121] This allows most corporations to opt out of the statutes just by virtue of where the corporation is incorporated.

A. Shareholder Primacy: The Corporate Board's Duty to Maximize Shareholder Wealth

In United States corporate law, directors, as agents of the shareholders, owe the shareholders a duty to manage the corporation to the shareholder's benefit, usually seen as maximizing the value of the company's shares.[122] This view of the corporation, often referred to as shareholder primacy, is similar to the principle that Milton Friedman argued for in his 1970 article discussed in Part I.A.[123] The shareholders, as owners of the corporation, employ corporate directors, and, because of the employer-employee relationship, the director has a direct responsibility to the shareholder.[124] Advocates of this model argue that this agency relationship prevents directors and officers from considering other stakeholders.

This model of corporate governance received early credence in the Michigan case *Dodge v. Ford Motor Co.*.[125] The Dodge brothers, ten percent owners of the Ford Motor Co. sued the company seeking to compel dividends.[126] In testimony before the trial court, Henry Ford argued that the corporation's future policy was not to pay special dividends, but to put the money back into the company in order to improve the life of his employees.[127] On appeal, the Michigan Supreme Court held that the company's shareholders were entitled to dividends that Henry Ford had tried to withhold in order to pay employees higher wages and sell cars cheaper to the public.[128] In reaching its holding, the court held that corporations are organized "primarily for the profit of stockholders."[129]

One question that the courts have not answered clearly in the years since *Dodge v. Ford Motor Co.* is whether corporate executives are to manage the company for the short-term or long-term benefit of the shareholders.[130] The case itself implies that short-term gain was the main purpose, as it required Ford to issue special dividends rather than investing in long-term growth.[131] However, other courts have allowed executives to focus on long-term goals. In *Shlensky v. Wrigley*, the Illinois Supreme Court sided with Wrigley's directors, who believed that the decision to install lighting in order to play night games might hurt the shareholders in the short term but would ultimately be in their long-term interests as lights might ultimately cause the neighborhood to deteriorate, leading to crime and deters customers.[132]

While shareholder primacy is the consensus in the United States, courts often protect the decisions of the board through use of the business judgment rule.[133] The Business Judgment Rule (BJR) "acts as a presumption in favor of corporate managers' actions."[134] Effectively, the rule protects a director's decisions under the theory that the director, as an expert, is better suited to making business decisions than the courts.[135] The case, *In Re Walt Disney Co. Derivative Litigation* is an example of the difficulty a plaintiff may face when attempting to overcome the presumption created by the BJR.[136] Plaintiffs sued over the severance package, estimated at $140 million, provided to Michael Ovitz when terminated a little over a year after he took office as Disney's President.[137] Ovitz and his friend Michael Eisner, Disney's Chairman and CEO, negotiated the package prior to Ovitz's employment with the corporation.[138] While the Delaware Supreme Court acknowledged that the board and its compensation committee were not the "paragons" of good management, it still held that the board had not violated any fiduciary duties in approving the original employment contract and in paying the large severance package.[139]

The concept of shareholder primacy is particularly strong in Delaware, home to a majority of the publicly traded corporations in the United States. Since the 1980s, there have been several cases decided by the Delaware Supreme Court that are often cited as requiring corporate boards to maximize shareholder wealth.[140] While these cases seem to imply that directors must maximize shareholder wealth, they are all dealing with corporate takeovers and takeover defenses, which makes determining the overall rule difficult. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, held that when the corporation was up for sale, the directors' must maximize shareholder value.[141] Revlon, attempting to prevent a hostile takeover, employed several defensive techniques in addition to searching out a "white knight" suitor.[142] The court ruled that because a sale of the corporation was inevitable, based on the fact the corporation was dealing with a "white knight," the company's consideration of employees was wrong and the board breached its fiduciary duty by failing to obtain the best price for the shareholder's stock.[143]

In *Paramount Communications, Inc. v. Time, Inc.*, the Delaware Supreme Court seemed to take a step back from its ruling in *Revlon* by allowing Time's board to consider Paramount a threat to its corporate culture.[144] The Time board had long considered a strategic merger and had been in extensive discussion with Warner Brothers.[145] When Paramount approached Time with a tender offer, Time and Warner renegotiated their deal.[146] The court accepted the Time board's argument that a takeover by Paramount would damage its corporate culture.[147] In addition to the corporate culture, the Supreme Court seemed to open the door for boards to consider a range of stakeholders.[148] However, in *Paramount Communications, Inc. v. QVC Network, Inc.* the court distinguished *Time* on the facts by noting that *Revlon* had not applied to the case, as the break up of the corporation was never inevitable.[149] Furthermore, *QVC* confirmed that *Revlon* duties applied any time a change of control was inevitable, not just in a break up situation.[150] Whether these rules apply outside of a take over situation is unclear, and even if they did, the BJR might still protect directors from liability.

B. Stakeholder Statutes: Allowing Corporate Boards to Consider External Constituencies

Because of the number of takeovers in the 1980s and 1990s, many states enacted statutes to try to protect local companies from hostile takeovers.[151] Some of these statutes allowed, or even forced corporations to consider other constituencies when considering takeover offers.[152] Pennsylvania passed the first "stakeholder law," and as of 2003, forty additional states had passed some form of stakeholder statute.[153] These statutes vary in their operation, with at least nineteen of the statutes only taking effect when the corporation is in a takeover situation.[154] Most statutes give directors the ability to consider other constituencies; however, at least one state, Connecticut, mandates board consideration of non-shareholder constituencies when making decisions.[155] While permissive, Pennsylvania, Iowa, and Indiana also have strongly worded statutes making it clear that corporate boards have the ability to consider other constituencies and they do not have to consider one group's interests (i.e. the shareholders) over the interests of the other stakeholders.[156]

Although popular, stakeholder statutes have several problems. The first problem with most statutes is the permissive nature of the statutes.[157] Similarly, there is no enforcement mechanism to ensure that corporations are considering constituencies outside of the shareholders.[158] Furthermore, the statutes are focused on preventing hostile takeovers.[159] There are many instances outside of takeover law where stakeholders might need consideration.[160] Finally, a major concern with the stakeholder statutes is the possibility of corruption.[161] Because of the open nature of the statutes, directors and managers can entrench themselves by invoking the statute in order to justify defensive tactics.[162]

C. International CSR

CSR is not merely a U.S. concept, but has strong support globally, particularly in continental Europe.[163] Common law countries, such as Britain, Australia, and New Zealand have laws and policies similar to U.S. corporate law and policies.[164] These countries tend to favor the idea of maximizing shareholder wealth.[165] Although they have implemented policies that provide some level of consideration of outside constituencies.[166] On the other hand, laws in Continental Europe require actual consideration of other stakeholders, even to a greater extent than the stakeholder statutes in the United States.[167] Many countries require labor participation on corporate boards, or have multiple tier board systems that allow for consideration of other stakeholders.[168]

III. MAKING CSR PROGRAMS WORK: EXAMINING THE CURRENT REGIME AND PROPOSING A NEW REGIME

Whether you restrict your definition of CSR to the maximization of shareholder wealth, or look at CSR more expansively and define it as corporations intentionally going beyond the minimum regulatory requirements, CSR is a growing movement in the United States.[169] While proof of the efficacy of CSR programs is still light, the fact that companies such as Chiquita and Nike are continuing to expand programs may be a sign that their boards see long-term benefits to the programs.[170] Furthermore, companies have claimed some increased efficiency and savings.[171] As most CSR programs are based on long-term strategies, many of the programs may take time to pay dividends socially and to shareholders.[172]

Currently, as the predominant view of the corporation's purpose is maximization of shareholder wealth, boards that want to implement CSR programs may face legal challenges from shareholders alleging that the directors violated their fiduciary duties.[173] However, even if the programs place corporate directors in violation of their fiduciary duties, courts may be reluctant to impose liability and find that the Business Judgment Rule protects the programs.[174] Rather than allow corporate boards to implement CSR programs with the hope that the BJR will protect their actions, it would be better for the boards and overall the corporations to implement governmental policy to support and protect corporate boards from shareholder liability. The question then becomes, should government support CSR? And if so, how?

Because of the current economic crisis, it seems likely that reforms to corporate laws are likely as lawmakers attempt to prevent similar crises to happen again. After the Enron and WorldCom scandals of the early twenty first century, Congress passed The Public Accounting Reform and Investor Protection Act of 2002 (commonly known as the Sarbanes-Oxley act, or SOX).[175] One of the provisions of the act requires corporations to disclose codes of ethics, and if the corporation did not have a code, to justify why the corporation did not have a code.[176] However, it is unclear whether such an act would have saved Enron as it had a code of ethics, although its provisions were waived.[177] With the current financing crisis, the federal government has taken an expanded role in the financial industry as well as the manufacturing industry, with the loans to and forced bankruptcies of Chrysler and General Motors.[178] The crisis and the current increase in governmental control make it more likely that Congress will enact some type of federal corporate law.

Another possible reason to support a government policy of promoting CSR programs is the global influence on the market. Shell's experience with the Brent Spar platform in the North Sea is a good example of the effect the global marketplace can have on corporations.[179] After receiving approval from the British Government to dispose of the Brent Spar Oil Platform in the deep waters of the North Sea, Shell faced a barrage of criticism from Greenpeace and other Non Governmental Organizations as well as a boycott in Continental Europe.[180] Because of these pressures, Shell relented and found a disposal method more acceptable to Greenpeace and the European consumers.[181] This incident highlights the effect that globalization may have in the future on domestic corporations, particularly as Europe has already developed mandatory CSR programs.[182]

How best to promote CSR is a more difficult question. While stakeholder statutes seem to be one option, the current statutes are limited as they are permissive, do not have enforcement mechanisms, and are specific to takeover situations.[183] Furthermore, while a vast majority of states have these statutes, eight states, including Delaware, do not, leading to the problem of holdouts. If CSR programs are beneficial and are to be the policy of the United States, then there should be a consistent application across the board to protect the directors as well as ensuring significant buy in on the part of corporations.

A. Voluntary Programs are Inherently Flawed

One argument is to allow corporations to adopt voluntary CSR programs and codes of ethics. Although there is some evidence of CSR programs providing long-term benefits to corporations with CSR programs, many corporations will not voluntarily institute CSR programs because of the risks of litigation. While companies like Nike and Chiquita have slowly improved their image, they still face critics that claim the programs are disingenuous and pander to the protestors without any real action.[184] Without concrete results, and the quasi-legal nature of the programs, many corporations may forgo implementing CSR programs without some governmental mandate. Any success corporations achieve in the goals of the program in addition to efficiency and cost savings may come at a cost in the stock market due to the perception that the companies are wasting profits that could go towards shareholders, which could lead to claims of waste or other shareholder litigation.[185] Furthermore, many of the corporations are using CSR programs, like Ben and Jerry's and Whole Foods, to differentiate themselves from their competition through their *responsible* business plans.[186] As discussed above, the number of *ethical* consumers is limited and most individuals are looking more for "price, taste, or sell-by date than ethics."[187] Overall, CSR programs can be expensive and therefore a hurdle for corporations that have a lower income clientele.

Voluntary CSR programs present corporations with another problem, namely competitors that have not implemented CSR programs. While many corporations might join the movement, those corporations risk one competitor opting out. Although the competitor that opts out risks a backlash from the public for its *unethical* behavior, it might also, due to efficiency, provide a cheaper product and take market share from the corporations with CSR programs.[188] As many people, particularly in the current economic climate, prefer a good deal over *ethical* products, the corporation with the CSR program is at a disadvantage due to the higher cost of providing the goods and services.[189]

Because of the way many markets have developed, CSR programs are difficult to manage, particularly in industries such as the textile industry, where Nike and other manufacturers use a number of suppliers from around the globe.[190] While these companies may try to ensure that the suppliers are treating workers humanely, there is evidence that at least some of the suppliers are falsifying records to meet the heightened labor requirements imposed on them by the contracting companies.[191] Of course, it is possible that as more corporations face scandals, protest over labor practices, higher fuel costs, and other events, the number of conscientious consumers' will increase and put pressure on corporations to implement CSR programs. Unless there is some mass change in consumer habits, it is unlikely that the markets alone will force corporations to behave more ethically.

B. Although the Business Judgment Rule Protects Corporate Decision-making, Boards still Run the Risk of Liability by Implementing CSR Programs

Although the consensus is that corporate directors and officers owe corporate shareholders the duties of care, loyalty, and good faith, assumed to mean that they must maximize shareholder wealth, in reality, courts are reluctant to second guess a corporate executive's decisions on behalf of the corporation.[192] As discussed in Part II.A, the Business Judgment Rule (BJR) is a presumption that the directors and officers of a corporation have acted in the best interests of the corporation.[193] Because the courts presume that the directors, with specialized knowledge of the corporation's operations and the market, can make better decisions than the court, if a shareholder challenged a board's decision, a court would most likely uphold the decision. The plaintiff must show that the board's decision was made in bad faith, lacked due care, or was self interested, a difficult task to accomplish as the Disney case demonstrates.[194]

Because of the presumption the BJR creates, directors who implement CSR programs are probably shielded in the event of shareholder litigation.[195] If the director or directors can demonstrate that the decision to implement the program was done on an informed basis and done with intent to benefit the corporation, the court will likely find the presumption precludes the shareholder's cause of action. Using Nike as an example, the corporation began to implement CSR programs after receiving damaging publicity regarding the labor standards in its Southeast Asian factories.[196] The directors, seeing that the publicity generated by this scandal was tarnishing its image (or good will) and that it threatened or potentially threatened some of its lucrative college apparel contracts, acted in the best interests of the corporation and the shareholders by implementing a CSR regime to ensure fair labor standards in these factories.[197]

Similarly, Chiquita's board can likely shield itself from shareholder litigation on the same principle. By proactively working to change corporate practice, and hence Chiquita's image, it was improving its good will and hopefully generating future business. Because each of these corporate boards enacted CSR programs to protect the corporation, plaintiffs will have a difficult time challenging board actions. Even so, while the BJR might theoretically shield corporations and directors from liability, the threat of litigation itself might be enough to chill a director's desire to implement CSR programs due to the time and costs involved.

While the BJR might protect boards that implement CSR programs, the unsettled nature of the legality of the programs might deter boards and directors from implementing CSR programs. In Delaware, as in other states, shareholder primacy is still the overriding policy, meaning corporations must maximize shareholder wealth.[198] Unless the directors can justify the CSR program as a method of accomplishing that goal, they are in violation of this duty even if a court may not second guess their judgment. This is particularly difficult for directors who have implemented CSR programs that fall into the extreme definition of programs that benefit society at the expense of profits.[199] On the other hand, all states permit charitable contributions, one of the most obvious illustrations of a corporation benefiting society at the expense of the corporate bottom line.[200] Finally, it would be better to amend the law than to continue to rely on the fact that courts tend to shield directors from liability for decisions made while running the corporation.

C. Stakeholder Statutes Alone Are Not Enough to Enforce Beneficial CSR Programs

Some commentators point toward stakeholder statutes as a solution to the legality question.[201] Proponents argue that amending corporate law to allow corporations to consider other stakeholders – employees, neighbors, customers, etc. – corporations will be able to implement CSR programs without fear of litigation. However, the current stakeholder statutes have several main flaws that prevent them from being a legitimate solution to the problem of implementing CSR programs. As mentioned above, the stakeholder statutes are permissive, have no real enforcement mechanism, some are applicable solely to takeovers.[202] Without a mandatory statute with some form of enforcement mechanism, stakeholders have no way to ensure that corporations are meeting their interests.[203] Unlike shareholders who have the ability to bring a derivative cause of action, stakeholders are not in privity with the corporation and cannot sue without some type of statutory right.

The second and possibly larger issue is the fact that Delaware does not have a stakeholder statute. As half of all publicly held corporations (over 60% of Fortune 500 companies) are currently incorporated in Delaware, stakeholder statutes currently cannot have the impact desired by proponents.[204] Until Delaware enacts a stakeholder statute, stakeholder statutes will not have the authority needed to institute a true CSR regime. Further, because Delaware is such a popular state for corporations and because of the traditional shareholder centric policy, Delaware may be reluctant to pass a stakeholder statute, as it would upset the status quo. Still, a broader stakeholder statute, particularly a federal statute, might be a valuable tool to promote responsible business.

D. A Federal CSR Statute

If promotion of CSR programs is to be policy of the United States, then reform of the current corporate law to allow CSR programs must be amended. To best serve the needs of corporations, shareholders, and other stakeholders, the federal government should enact a series of statutes that create a federal policy of CSR, mandates at least some action on the part of corporations, and incentivizes the process. This statute should mandate that all public corporations publish an annual report detailing the corporations CSR programs, its successes and failures. In addition, Congress should enact a law that creates incentives for corporations implementing CSR programs, through either tax relief, or other means to ensure that corporations opt into the program. Finally, Congress should ensure that the laws passed emphasize the governmental policy is for a responsible business and permits corporate boards to consider all constituencies when making decisions.

1. *Mandatory Reporting of CSR Programs*

While many corporations already periodically report on their CSR programs, often times the public disregards the reports as mere public relations.[205] If all public corporations were responsible for producing an annual report detailing their efforts on social responsibility, the skepticism displayed may diminish as the markets and the public become used to the reports. Further, if the reports were somehow standardized, the belief that they were public relations works would also diminish, as there would be little room for embellishment, similar to the financial reports required by the Securities Laws.

By making the reporting requirement mandatory, the statute would help the corporate holdout problem inherent in the current stakeholder statutes.[206] While the statute will not require the corporations to consider stakeholders, by requiring the reports on CSR policies, it will in essence force corporations to begin considering other stakeholders, at the risk of seeming callous and cold when the corporation's annual CSR report is published. Similar to peer pressure among teenagers, corporations will implement CSR policies to ensure that their corporation does not lose good will due to the reports.

Furthermore, because the reports would be similar to the quarterly and annual financial reports, any false or misleading statements would subject the corporation and directors of the corporation to criminal and civil sanctions similar to a material misrepresentation under 10b-5. This further enhances the reliability of the annual report, and the pressure it will place on corporations to enact valid CSR programs. This reporting requirement could possibly be created as an amendment to SOX's ethics code requirement, mandating an annual or some other periodic report to the SEC or other agency of the corporation's activities regarding sustainability and employment practices.[207] Of course, this highlights one of the biggest problems of the reporting requirement that of what should be included in any CSR report. Should it be anything that goes beyond mere compliance with regulation, should it be anything that is done sacrificing profits, or does it include anything that is done in consideration of other constituencies outside of the shareholders.[208]

2. *Incentive Programs to Encourage Participation*

While the reporting program would act like a big stick to encourage corporations to implement CSR programs, some type of true incentive would assuage some of the anger over the CSR program requirement. An incentive program that was attractive enough to the business community would ensure full compliance with the program. As mentioned above, without full buy in, some corporations might choose to forego the CSR program because of the cost of some programs. Again, what types of activities would receive incentives would have to be carefully considered, as well as how those incentives are used.

3. *The Federal Stakeholder Statute*

In order to implement CSR programs, corporations must know that they will not face litigation from shareholders or the government for actions taken in furtherance of the program.[209] A federal stakeholder statute would alleviate some of these concerns by permitting corporations to consider the needs of stakeholders alongside shareholders. In combination with the reporting and incentive laws, this would again encourage corporations to consider the interest of stakeholders.

Currently, as a policy tool to promote CSR programs, stakeholder statutes suffer because they are permissive and a federal stakeholder statute may have similar issues.[210] However, by requiring periodic reporting, the public, and the market will know which corporations have CSR programs in place. Unlike the current scenario, where the market discounts corporations with CSR programs, corporations without CSR programs might face a situation like Nike, where the corporation has to use CSR in an effort to rehabilitate their brand image, which is necessary to sell products.[211] Because of the risk these corporations face, they will be forced by their shareholders and other stakeholders to take action in order to prevent such an event from occurring.

Of course, one of the other issues with stakeholder statutes is the lack of an enforcement mechanism.[212] However, even if a stakeholder statute had a private cause of action, how would the stakeholder have standing to sue the corporation? Such a provision might allow neighbors of smaller corporations to sue, as there would be a clear number of parties that are affected by the corporate activities. In larger corporations, like BP, Nike, or any other national or multinational corporation, the potential stakeholders are limitless. Still, the main purpose behind the stakeholder statute is to authorize the board to consider the stakeholders. The reporting and incentive laws would be the carrot and stick portions of the statute, putting the lack of compliance into the market, as well as incentivizing compliance with the statute.

CONCLUSION

The current legal regime, focused on shareholder primacy, fails to give corporations the legal ability or incentives necessary to achieve an adequate result. In an era where corporations are incorporating CSR programs into their business plans for a variety of reasons, directors run the risk that they will face costly litigation, even though the Business Judgment Rule would most likely immunize the directors' decisions.[213] If encouraging CSR is to be a policy in the United States, corporate law must be amended to allow directors the flexibility to implement CSR that will both achieve the desired social results as well as allow the corporation to operate profitably without the risk of costly litigation.

A tripartite solution of reporting, incentives, and permissive language will allow corporations to implement programs that will benefit the corporation itself, through efficiency and reduced costs, as well as benefiting society in general. Using the federal government to implement the scheme will solve the problem of hold-out-states and hold-out-corporations, as all publicly owned corporations will be subject to the regulations. Further, the mandatory reporting, combined with the incentives, will push most corporations towards compliance. Finally, by permitting corporations to consider stakeholders, the corporations can determine what stakeholders and what programs to implement in order to benefit that company in the long term.

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[1] *See* Forest L. Reinhardt, *et al.*, *Corporate Social Responsibility Through an Economic Lens*, 2 REV. ENVTL. ECON. & POL'Y 219, 220 (2008) (discussing commentators such as Milton Friedman who attempted to describe the legal purpose of the corporation).
[2] *See infra* note 114 and accompanying text (discussing corporate law and the duties that corporate executives owe to shareholders).
[3] *See infra* note 25 and accompanying text.
[4] *See id*.
[5] *See infra* note 12 and accompanying text.
[6] *See infra* Part I.B.
[7] *See* Lance Compa, *Corporate Social Responsibility and Workers' Rights*, 30 COMP. LAB. L. & POL'Y J. 1, 4 (2008).
[8] *See infra* Part I.B.
[9] *See infra* Part II.A.
[10] *See infra* Part.I.D and accompanying text.
[11] *See infra* Part I.A. (discussion of shareholder primacy).
[12] *See* Milton Friedman, *The Social Responsibility of Bsiness is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 § 6, at 32 (discussing the purpose of business and that a business's only true responsibility is to increase its

profits). *See also* Marcel van Marrewijk, *Concepts and Definitiosn of CSR and Corporate Sustainability: Between Agency and Communion*, 44 J. BUS. ETHICS 95, 96 (2003) (explaining that CSR is different to different people).
[13] *See* Paul R. Portney, *The (Not So) New Corporate Social Responsibility: An Empirical Perspective*, 2 REV. ENVTL. ECON. & POL'Y 261, 261 (2008). *See also* Forest L. Reinhardt, Robert N. Stavins, & Richard H.K. Vietor, *Corporate Social Responsibility Through and Economic Lens*, 2 REV. ENVTL. ECON. & POL'Y 219, 219 (2008).
[14] *See* Friedman, *supra* note 12 (explaining that the only CSR in a free market economy is to maximize profits); *but see*, Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct*, 26 YALE L. & POL'Y REV. 367, 368-69 (2008) (describing the different types of CSR as 1) minimalist, 2) philanthropic, 3) encompassing or stakeholder, 4) social activist).
[15] Friedman, *supra* note 12.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *See* Brown, *supra* note 14, at 368-69 (explaining that Milton Friedman's view is the dominant view within the American Business Community).
[20] *See Id.*
[21] *See Id. See also* Friedman, *supra* note 12.
[22] *See* Brown *supra* note 14, at 369.
[23] *See* J.J. Asongu, *The History of Corporate Social Responsibility*, 1 J. BUS. & PUB. POLICY 1 (2007) http://www.jbpponline.com/article/viewFile/1104/842 (discussing the history of CSR from its roots in early Mesopotamia through early industrialists like Carnegie, to current trends in the movement).
[24] *See* Portney, *supra* note 13, at 274.
[25] *See* Brown, *supra* note 4, at 369.
[26] *See Id.*
[27] *See Id.*
[28] *See* Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 831 (2003).
[29] *See Id.* at 370
[30] *See id.*
[31] *See supra* note 13.
[32] *See* Reinhardt et al., *supra* note 13, at 219 ("We adopt a simple definition . . . sacrificing profits in the social interest.").
[33] *Id.*
[34] *See* Portney, *supra* note 13, at 261
[35] *See Id.* ("For this reason, I have previously defined CSR to mean 'a consistent pattern, at the very least, of private firms doing more than they are required to do under applicable laws and regulations governing the environment, worker safety and health, and investments of the communities in which they operate.'").
[36] *Id.*
[37] *See* Reinhardt et al, *supra* note 13, at 219 ("We adopt a simple definition originally offered by Elhauge: sacrificing profits in the social interest.").
[38] *See* Asongu, *supra* note 23, at 8 (discussing the ancient roots of CSR in Africa, Mesopotamia and elsewhere).
[39] *See* Marcel van Marrewijk, *supra* note 12, at 96; Asongu, *supra* note 23, at 9.
[40] *See* Asongu, *supra* note 23, at 11.
[41] *See Id.* at 12 ("The current emphasis on the role business in society has been promoted by increased sensitivity to and awareness of environmental and ethical issues. Issues such as environmental damages, improper treatment of workers, and faulty production that inconveniences or endangers customers are highlighted in the media."). *See also* Richard M. Locke, *The Promise and Perils of Globalization: The Case of Nike*, at 2 http://web.mit.edu/polisci/research/locke/nikepaperFINAL.pdf ("Although multinationals are eager to pursue the opportunities of increased global integration, they are increasingly aware of the reactions which their strategies induce, both at home and abroad."), *and* Stelios C. Zyglidopoulos, *The Social and Environmental Responsibilities of Multinationals: Evidence from the Brent Spar Case*, 36 J. BUS. ETHICS 141 (2002) (using the controversy of Shell Oil Corporation's decision to use deep water disposal to decommission the Brent Spar oil platform as a case study to examine the pressures that multinational organizations face because of the decisions one subsidiary might make).
[42] *See* Locke, *supra* note 41.

[43] *See* Brown, *supra* note 14, at 370 (discussing the social activist view of CSR that promotes corporations as vehicles of social welfare).
[44] *See* Locke, *supra* note 41, at 9. *See also Gap Pulls Child Labor Clothing*, BBC News, October 28, 2007, http://news.bbc.co.uk/1/hi/world/south_asia/7066019.stm.
[45] *See* Locke, supra, note 41, at 9 (discussing the "public relations nightmares" that negatively impacted Nike's image as a good corporate citizen).
[46] *Id.*
[47] *Id.*
[48] *Some UNC Students Protest Nike Link*, WRAL.Com, Oct. 31, 1997, http://www.wral.com/news/local/story/166755/; *see also* Susan Momin, *Speaking Out: Why So Many Students Care about Coke, Coffee, and Sweatshops*, MICH. DAILY, March 23, 2006 *available at* http://www.michigandaily.com/content/speaking-out (discussing protests at the University of Michigan over business practices of companies such as Nike and the University's response to those protests).
[49] *See* Locke, *supra* note 39, at 15.
[50] *See id.*
[51] *See id.* (describing the steps Nike has taken to "become a Global Corporate Citizen.").
[52] *See Id.* ("As we saw earlier, at first, Nike managers refused to accept any responsibility for the various labor and environmental/health problems found at their suppliers' plants. Workers at these factories were not Nike employees, and thus Nike had no responsibility towards them.").
[53] *See Id.* at 16 ("Since 1998, Nike has increased the minimum age of footwear factory workers to 18 and all other workers (in apparel, equipment) to 16.").
[54] *Id.*
[55] *See Id.* at 15.
[56] *See* Nike Responsibility, www.Nikebiz.com, http://www.nikebiz.com/responsibility/ (last visited 5/1/2009). *See also* Innovate for a Better World: Nike 05-06 Corporate Responsibility Report, *available at http://www.nikebiz.com/responsibility/documents/Nike_FY05_06_CR_Report_C.pdf*.
[57] *See Id.* at 1 (Letter From Mark Parker , CEO).
[58] *See* Deborah Doane, *The Myth of CSR: The Problem with Assuming that Companies Can do Well While Also Doing Good is that Markets Don't Really Work that Way*, STAN. SOC. INNOVATION REV., Fall 2005, at 24
[59] *See* Lance Compa, *Corporate Social Responsibility and Workers' Rights*, COMP. LABOR LAW & POL'Y J. 1, 4 (2008) (recognizing that Levi Strauss & Co. & Reebok Corp. both had developed early codes of conduct with some success but arguing that most "internal" codes of conduct failed).
[60] *See Id.* at 4 ("However, internal codes of conduct had inherent weaknesses. Sourcing from hundreds, even thousands of factories around the globe, even the most diligent CSR-conscious company could not guard against labor abuses in every one of its supplier factories.").
[61] *See Id.*
[62] *See Id.* at 5.
[63] *See* Aaron K. Catterji & Siona Listokin, *A Comment on "Corporate Social Responsibilit and Workers' Rights"*, 20 COMP. LABOR L. & POL'Y J. 11, 11 (2008) ("First, the proliferation of codes of conduct within particular domains makes assessment very difficult. Further, it potentially dilutes the value of each code itself, since firms can choose the code they wish to abide by and the acronyms are nearly interchangeable.").
[64] *See* Compa, *supra* note 59, at 5.
[65] *See* Locke, *supra* note 41, at 19.
[66] *See* Thomas P. Lyon & John W. Maxwell, *Corporate Social Responsibility and the Environment: A Theoretical Perspective*, 2 REV. ENVTL. ECON. & POL'Y 240, 241 (2008).
[67] *See Id.* at 241.
[68] *See* Companies in the News: BP, MallenBaker.net, *Corporate Social Responsibility – Companies in the News*, October 27, 2007, http://www.mallenbaker.net/csr/CSRfiles/bp.html.
[69] Brown, *supra* note 14, at 400. *See also* Martin LaMonica, *BP CEO: Today's Clean Tech not Nearly Enough*, cnet news, March 4, 2008 (discussing BP CEO's speech as well as giving background on BP's portfolio of clean technologies).
[70] *See* BP, *Sustainability Review 2008: 100 Years of Operating at the Frontiers*, bp.com/sustainability (introduction).
[71] *See id.* at 9.
[72] *See id.* at 15.

[73] *See id.* at 16.
[74] *See id.*
[75] *See* MallenBaker.net, *supra* note 68 (discussing BP's move toward sustainable energy production as the "red rag to the bull" to critcs).
[76] *See* Portney, *supra* note 13, at 263-65 (examining the reasons that corporations will implement CSR policies).
[77] *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).
[78] *See* Brown, *supra* note 14, at 398-99.
[79] *See* Portney, *supra* note 13, at 263 (explaining that corporations will enact CSR programs under the belief that they will attract customers).
[80] *See* Brown, *supra* note 14, at 398.
[81] *See id.*
[82] *See* Ben and Jerry's, *Social & Environmental Assessment Report 2007*, http://www.benjerry.com/company/sear/2007/index.cfm.
[83] *See* Whole Foods Market, *Declaration of Interdependence*, http://www.wholefoodsmarket.com/company/declaration.php, *last visted* May 29, 2008.
[84] *Id.*
[85] *See* Portney, *supra* note 13, at 263 (discussing McDonald's Corp.'s public disclosure of support for sustainable agriculture as well as its support for Ronald McDonald House in an effort to preempt a boycott by a group like People for the Ethical Treatment of Animals).
[86] *See* Portney, *supra* note 13, at 264.
[87] *Id.*
[88] Brown, *supra* note 14, at 399.
[89] *Id.*
[90] *See* Whole Foods, *supra* note 83.
[91] *See* Portney, *supra* note 13, at 264.
[92] *See id.* at 266 ("If CSR is, in fact, good for business, it would be nice to be able to point to some strong evidence that supports this point. However, such evidence is scant.").
[93] *See* Deborah Doane, *The Myth of CSR: The Problem with Assuming that Companies Can do Well While Also Doing Good is that Markets Don't Really Work that Way*, STAN. SOC. INNOVATION REV., Fall 2005, at 24.
[94] *See* Locke, *supra* note 41, at 19 ("Of course, not all of Nike's critics are convinced. Many continue to complain about poor wages and working conditions at Nike's suppliers in Vietnam, China, and Indonesia.").
[95] *See* MallenBaker, *supra* note 68.
[96] *See* Geoffrey Heal, *Corporate Social Responsibility – An Economic and Financial Framework* (2004), http://ssrn.com/abstract=642762 at 6.
[97] *See* Sustainability Report, *supra* note 70, at 16.
[98] *See* Portney, *supra* note 13, at 266.
[99] *See id.*
[100] *Id.*
[101] *See id.* at 400. Brown compares Costco to WalMart's Sam's Club. Costco has a generous benefits package and subsequently has better customer and employee loyalty than Sam's club. *Id.* On the other hand, Costco's stock price is valued lower than Walmart's, in part due to the perception that shareholders are not getting the most value for their investment. *Id.*
[102] *See* Brown, *supra* note 14, at 399.
[103] *See id.*
[104] *See* Lyon, *supra* note 66, at 244.
[105] *See* Marco Werre, *Implementing Corporate Responsibility: The Chiquita Case*, 44 J. BUS. ETHICS 247, 249 (2003) (examining the steps Chiquita has taken to improve its environmental and labor record and create a better business model).
[106] *See id.* at 249.
[107] *Id.*
[108] *Id.*.
[109] *Id.*
[110] *Id.*
[111] *See id.* at 258.

[112] Jenny Dawkins & Stewart Lewis, *CSR in Stakeholder Expectations: And Their Implication for Company Strategy*, 44 J. BUS. ETHICS 185, 189 (2003).
[113] *Id.*
[114] *See* Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 255 (2008).
[115] *Id.*
[116] *Id.*
[117] *See* Brown, *supra* note 14, at 386 (describing the idea that corporations have to be managed to maximize shareholder wealth).
[118] *See* Reinhardt et al., *supra* note 13, at 222.
[119] Hale, *supra* note 28, at 829.
[120] *See id*.
[121] *See id.*
[122] *See* Colombo, *supra* note 114, at 247, 253.
[123] *See* Part I.A.
[124] Friedman, *supra* note 12.
[125] *See* Brown, *supra* note 14, at 387.
[126] Dodge v. Ford Motor Comp., 170 N.W. 668 (Mich. 1919).
[127] *See id.* at 671 (quoting Henry Ford's testimony).
[128] *Id.* at 685.
[129] *Id.* at 684.
[130] *See* Brown, *supra* note 14, at 387.
[131] *See Ford Motor Co.*, 170 N.W. at 685.
[132] 237 N.E. 2d 776, 778 (Ill. App. Ct. 1968). *See also* Brown, *supra* note 14, at 387.
[133] *See* Reinhardt, et al., *supra* note 13, at 222.
[134] *See* Douglas M. Branson, *The Rule that isn't a Rule – The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 635 (2002).
[135] *See id.* at 637.
[136] *See* James D. Cox & Eric Talley, *Hope and Despair in the Magic Kingdom:* In Re Walt Disney Company Derivative Litigation, 2003 Berkley Program in Law & Economics, Working Paper Program Paper 230.
[137] *See* 906 A.2d 27, 35 (Del. 2006).
[138] *Id.* at 36-38.
[139] *Id.* at 68, 70.
[140] *See e.g.*, Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587 (1997).
[141] 506 A.2d 173, 185 (Del. 1986) ("However, in granting an asset option lock-up to Forstmann, we must conclude that under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment, and followed a course that ended the auction for Revlon, absent court intervention, to the ultimate detriment of its shareholders.")
[142] *See Id.* at 177-78.
[143] *Id.*
[144] *See* 571 A.2d 1140, 1142 (Del. 1990).
[145] *See Id.*
[146] *See Id.* ("We find that Paramount's tender offer was reasonably perceived by Time's board to pose a threat to Time and that the Time board's "response" to that threat was, under the circumstances, reasonable and proportionate.").
[147] *Id.*
[148] *Id.*
[149] *See* Paramount Communications v. QVC Network, Inc., 637 A.2d 34, 46 (Del. 1993) ("The facts in *Time-Warner,* however, were quite different from the facts of this case, and refute Paramount's position here."); *see also* Leung, *supra* note 140, at 611-12.
[150] *QVC*, 637 A.2d at 46.
[151] *See* Hale, *supra* note 28, at 831 (explaining that the prevalence of takeovers led many states to create "stakeholder statutes" to attempt to protect employees in the event of a takeover).
[152] *See id.*

[153] *Id.*
[154] *See id.*
[155] *See* CONN. GEN. STAT. § 33-756(d) (2003). *See also* Hale, *supra* note 28, at 833.
[156] *See* 15 PA. CONS. STAT. § 1715(a) (2002); Iowa Code § 30-1702 (Michie 2002); Ind. Code § 23-1-35-1(d). *See also* Leung, *supra* note 140, at 614-16.
[157] *See id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162]
[163] Reinhardt, et al., *supra* note 13, at 224, (explaining that civil law countries generally have strong stakeholder laws, particularly countries in continental Europe).
[164] *See id.*, at 223-24 ("Corporations in these countries have similar board structures, face similar legal requirements, and even share some legal precedents.")
[165] *Id.*
[166] Aaron Einhorn, *The Evolution and Endpoint of Responsibility: The FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code*, 35 DENV. J. INT'L L. & POL'Y 509, 527 (2007).
[167] *See Id*. (explaining that these countries have more stakeholder involvement in corporate governance as well as other traditions and policies that encourage corporate responsibility).
[168] *See* Reinhardt et al., *supra* note 13, at 224.
[169] *See* Part I.A.
[170] *See* Parts I.C.
[171] *See* Part I.C.
[172] BP Sustainability Review, *supra* note 70.
[173] *See* Parts I.A., II.A.
[174] *See* Part II.A.
[175] *See* Pub. L. No. 107-204, 116 Stat. 745.
[176] *See* Brown, *supra* note 14, at 380.
[177] *See id.*
[178] Kevin Krolicki & David Bailey, *GM Makes New Bondholder Offer Ahead of Bankruptcy*, YahooFinance!, http://finance.yahoo.com/news/GM-makes-new-bondholder-offer-rb-15370745.html?.v=8 (discussing the Federal Government's role in trying to prevent the complete collapse of General Motors).
[179] *See* Zyglidopoulos, *supra* note 41, at 141.
[180] *See id.* at 144.
[181] *See id.*
[182] *See supra* Part III.C
[183] *See supra* Part II.B.
[184] *See supra* note Locke, *supra* note 38.
[185] *See* Lyon, *supra* note 66, at 244 (discussing research that suggests that investors, except for those who seek socially responsible firms, devalue corporations that have CSR programs).
[186] *See* Brown, *supra* note 14, at 398.
[187] *See* Doane, *supra* note 58, at 26.
[188] *See* Lyon, *supra* note 66, at 243; *see also* Brown, *supra* note 14, at 399 (describing the higher cost of CSR programs and the fact that corporations cannot always pass costs on to customers).
[189] *See supra* note 112 and accompanying text.
[190] *See supra* Part I.B.
[191] Naomi Abasta – Vilplana, *Paradoxical Consquences of CSR*, STANFORD SOCIAL INNOVATION REVIEW, Fall 2005, at 29.
[192] *See supra* note 134 and accompanying text.
[193] *See id.*
[194] *See supra* note 134, and accompanying text.
[195] Reinhardt, *et al.*, *supra* note 1, at 223 ("As a practical matter, as long as managers can plausibly claim that their actions are in the long run interests of the firm, it is almost impossible for shareholders to challenge the actions of managers who act in the public interest.").

[196] *See supra* Part II.B.1.
[197] *See id*.
[198] *See* Brown, *supra* note 14.
[199] *See supra* note 32 and accompanying text.
[200] *See supra* note 25 and accompanying text.
[201] *See supra* Part II.B.
[202] *See id*.
[203] *See* Compa, *supra* note 59, at 5.
[204] *See* State of Delaware, Division of Corporations, http://corp.delaware.gov/ (discussing why corporations should incorporate in the state and indicating that 50% of all publicly traded corporations and 63% of all Fortune 500 corporations are incorporated in Delaware).
[205] *See* Compa, *supra* note 7, at 4.
[206] *See supra* Part II.B.
[207] *See supra* part II.C
[208] As discussed in Part I.A above, the definition of CSR is difficult to clearly define and when creating this statute, a clear line must be drawn in order to ensure that corporate boards are able to comply with the statute.
[209] *See* supra Part II. (discussing the voluntary nature of all U.S. programs, and the risk that corporations might face civil and criminal litigation from the use of CSR programs).
[210] *See* Part II.
[211] *See* Locke, *supra* note 41.
[212] *See supra* part II.B.
[213] *See supra* Part II.A.