

Social Disclosure

Barnali Choudhury*

Globally, there is a growing interest in using disclosure rules in corporate and securities law to achieve social policy goals. The blending of corporate law with social issues is a transformation of disclosure obligations, which have traditionally focused on reducing information asymmetries and instilling confidence in the market. At the same time, the amalgamation of disclosure requirements with social goals signals a convergence of private and public goals. Private corporations are now being asked to take on a role in promoting social policies—a role traditionally allocated to governments.

Against this background, this article examines the utility of disclosure rules to promote social policies. The article finds that the role for public issues in the private area of corporate and securities law is limited, but concludes—from a comparative perspective—that disclosure rules which are narrow in scope and boast a high degree of specificity can be effective supplementary devices for curing corporate ills.

Keywords: Comparative Corporate Law; Corporate Social Responsibility; Corporate Accountability; Disclosure; Human Rights

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INTRODUCTION

When the UK government determined that there was an insufficient number of women on corporate boards, it did not mandate that corporations increase the number of women in management. Instead, it required that they disclose the number of women holding managerial positions within firms.¹ Similarly, when the Indian government became concerned about the country's energy usage, it too focused on disclosure, requiring corporations to report on corporate efforts to conserve energy.² More recently, in an effort to curtail the violence in the Democratic Republic of Congo (DRC),³ Congress directed the Securities and Exchange Commission to mandate corporate disclosure when using conflict minerals.

These practices are indicative of a growing trend by governments to use corporate and securities disclosure rules to achieve social aims. The blending of corporate law with social policy is a transformation of disclosure obligations, which have traditionally focused on reducing information asymmetries between investors and corporations and instilling confidence in the market.⁴ Instead, disclosure obligations are now gradually being refocused on a third function: improving corporate accountability.⁵ As Brandeis has noted about the utility of disclosure to address these issues: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants."⁶ The increasing reliance on disclosure requirements in corporate and securities laws suggests that there remain few ills that cannot be cured through disclosure.

At the same time, the amalgamation of disclosure requirements with social goals tends to signal a convergence of private and public goals in the corporate sphere. Corporations—traditionally viewed as private entities—are increasingly being asked to take on a role in promoting social policies, a role traditionally allocated to governments.

Against this background, this article takes a step back to question whether disclosure requirements in corporate and securities laws should be used as tools

1. For an overview of UK government initiatives to increase the number of women on boards, see Barnali Choudhury, *New Rationales for Women on Boards*, 34 OXFORD J. LEGAL STUD. 511, 515 (2014).

2. Companies (Disclosure of Particulars in the Report of Board of Directors) Rules, 1988 (India), <http://www.mca.gov.in/Ministry/actsbills/rules/CDoPitRoBoDR1988.pdf>.

3. Daniel M. Gallagher, Comm'r, SEC, *Statement at SEC Open Meeting: Proposed Rule to Implement Section 1502 of the Dodd-Frank Act – the "Conflict Minerals" Provision* (Aug. 22, 2012), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370542577745>.

4. GAËTANE SCHAEKEN WILLEMAERS, *THE EU ISSUER-DISCLOSURE REGIME: OBJECTIVES AND PROPOSALS FOR REFORM 21* (2011); see also LONDON STOCK EXCH., *ADMISSION AND DISCLOSURE STANDARDS 15* (2013), <http://www.lseg.com/sites/default/files/content/documents/admission-and-disclosure-standards.pdf> (discussing disclosure standards in the UK).

5. DEP'T FOR BUS. INNOVATION & SKILLS, *THE FUTURE OF NARRATIVE REPORTING – A CONSULTATION*5(2010), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31440/10-1057-future-narrative-reporting-consultation.pdf [hereinafter BIS].

6. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 65 (2009).

by governments to promote social policies. In doing so, it asks whether corporate law, traditionally thought of as a predominantly private law tool, should be used to achieve public aims. Moreover, even if corporate law is the correct vehicle for promoting these policies, it questions the utility of these types of disclosure obligations since such disclosures may make only marginal improvements to the social aims they seek to promote, often at significant cost.

This article proceeds in three parts. Part I begins by examining the concept of financial disclosure and reviews its origins and purpose. It then takes a comparative look at the prevalence of financial and other disclosure requirements aimed at social goals around the globe. Part II explores whether inserting social aims into financial disclosure requirements is justifiable given the private nature of corporations and the public nature of the goals. Finding support in both international and corporate law, it then examines the impact of these disclosure obligations on shareholders, who are thought to be the primary beneficiaries of these obligations. Finally, Part III discusses how best to regulate social disclosure obligations in light of the findings in the earlier Parts. Examining social disclosure obligations through a meta-regulatory lens and drawing from comparative perspectives, the article discusses the limitations of the most common regulatory approaches and suggests alternative regulatory proposals.

I. DISCLOSURE

Disclosure is the legal requirement for corporations to provide certain prescribed information. Today, disclosure requirements for corporations can be found in a broad range of statutes and rules, although the focus of this article is on mandatory disclosure requirements in corporate and securities laws. In the United States, mandatory financial and related disclosure requirements are found primarily in Regulation S-K promulgated by the Securities and Exchange Commission (SEC),⁷ while in other countries they are found predominantly in corporate law.⁸

A. *Why Disclose?*

The primary purpose for mandatory disclosure is the reduction of information asymmetries that can lead to market failures.⁹ By requiring corporations to disclose relevant information about their businesses, investors

7. 17 C.F.R. § 229 (2015).

8. See, e.g., Companies Act 2006, c. 46, Parts 15 and 16 (UK), http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf; Companies (Disclosure of Particulars in the Report of Board of Directors) Rules, 1988 (India) <http://www.mca.gov.in/Ministry/actsbills/rules/CDoPitRoBoDR1988.pdf>.

9. For an extensive discussion on the reasons justifying mandatory disclosure, see CHARLOTTE VILLIERS, CORPORATE REPORTING AND COMPANY LAW 16–22 (2012); DAVID KERSHAW, COMPANY LAW IN CONTEXT: TEXT AND MATERIALS, WEB CHAPTER A: DISCLOSURE, ACCOUNTING, AND AUDIT 13–21 (2d ed. 2013).

receive sufficient information to enable them to correctly price a security.¹⁰ To achieve this aim, the information must be of a quality that would otherwise be inaccessible by investors, either because of the costs in locating this information or because they lack the means to do so.¹¹

Without mandatory disclosure, information is thought to be under-produced;¹² that is, result in a market failure of certain disclosures.¹³ Corporate managers have the best access to information, but they may be disinclined from producing it in certain scenarios, such as when they can benefit from information asymmetries with shareholders.¹⁴ Mandatory disclosure therefore drives efforts by corporate managers to ferret out material information that “improve[s] the allocative efficiency of the capital market.”¹⁵ Thus, since disclosure improves the efficiency of the market and an efficient market is in society’s intereststhe benefits of disclosure extend beyond corporations and issuers to encapsulate society.¹⁶

While reducing information asymmetries—the primary justification for mandatory disclosure—is almost universally recognized, a less common, but increasingly important role for mandatory disclosure is in relation to corporate accountability and governance. Indeed, Fox has argued that improving corporate governance—the means by which corporate managers make decisions—is “the most persuasive justification” for imposing disclosure obligations on corporations.¹⁷ Others have agreed with Fox’s sentiments, recognizing disclosure

10. IRIS H.-Y. CHIU, REGULATORY CONVERGENCE IN EU SECURITIES REGULATION 14-15 (2008); LONDON STOCK EXCH., *supra* note 4, at 15; Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 737-40 (2006).

11. CHIU, *supra* note 10, at 14-15; Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 375-76 (2013).

12. John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 722 (1984); Langevoort & Thompson, *supra* note 11, at 375.

13. CHIU, *supra* note 10, at 15.

14. Langevoort & Thompson, *supra* note 11, at 375-76.

15. Coffee, *supra* note 12, at 722; *see also* Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1415 (1999) (“[T]he primary function of disclosure is promotion of efficiency.”); Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1335 (1996) (praising U.S. disclosure requirements as contributing to the efficiency of U.S. financial markets).

16. Coffee, *supra* note 12, at 722 (arguing that an efficient capital market improves “the productiveness of the economy”); GUIDO FERRARINI, EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND 69 (1998) (arguing there is a public interest in the functioning of the capital market as it is crucial to the economic development of the country).

17. Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 L. & CONTEMP. PROBS. 113, 114 (2000); *see also* Lowenstein, *supra* note 15, at 1335 (noting that U.S. disclosure obligations have contributed to effective corporate governance); Elliot J. Weiss, *Disclosure and Corporate Accountability*, 34 BUS. LAW. 575, 576-77 (1979) (“Disclosure . . . is the oil that lubricates the machinery of the governance system.”).

as a key safeguard of corporate governance¹⁸ and necessary to focus corporations “on the issues which matter to their long term success.”¹⁹

Eminent securities law historian Louis Loss has well summed up the behavioral effects of disclosure obligations on corporate managers: “People who are forced to undress in public will presumably pay some attention to their figures.”²⁰ In other words, disclosure obligations can force corporate managers to better manage the areas of corporate life which they will later be forced to reveal. Indeed, encouraging desired corporate behavior is a “by-product of the framework for better disclosures.”²¹ Disclosure is thus used as a tactic to force corporate managers “to confront disagreeable realities in detail and *early on*”²² and as a review of the corporation’s stewardship.

B. Social Disclosure

While adhering to disclosure obligations requires firms to report both financial and non-financial data,²³ this article focuses on the disclosure obligations of non-financial data, particularly disclosure of information oriented towards social issues. These non-financial disclosure requirements, including human rights and environmental disclosures, are herein termed “social disclosure.”

1. *The Rising Interest in Social Disclosure*

There has been a relatively recent uptake in the number of countries choosing to impose social disclosure obligations on corporations. From 2006 to 2013, the number of countries prescribing social disclosure rules have more than doubled, and the number of worldwide mandatory social disclosure requirements have

18. As early as the Cadbury Report, the UK government has envisaged disclosure as a key safeguard of corporate governance. See THE COMM. ON THE FIN. ASPECTS OF CORP. GOVERNANCE, REPORT OF THE COMMITTEE ON FINANCIAL ASPECTS OF CORPORATE GOVERNANCE ¶ 7.2 (1992), <http://www.ecgi.org/codes/documents/cadbury.pdf>.

19. BIS, *supra* note 5, at 5.

20. LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 33 (2d ed. 1988).

21. FIN. REPORTING COUNCIL, THE SHARMAN INQUIRY – GOING CONCERN AND LIQUIDITY RISKS: LESSONS FOR COMPANIES AND AUDITORS – FINAL REPORT AND RECOMMENDATIONS OF THE PANEL OF INQUIRY ¶ 47 (2012), <https://www.frc.org.uk/getattachment/591a5e2a-35d7-4470-a46c-30c0d8ca2a14/Sharman-Inquiry-Final-Report.aspx>; see also VILLIERS, *supra* note 9, at 22 (“The existence of such disclosure requirements might of itself encourage higher standards of behaviour by the company directors.”).

22. Lowenstein, *supra* note 15, at 1342-44.

23. For some of the financial and non-financial data that companies listing on the London Stock Exchange are required to disclose, see LONDON STOCK EXCH., MAIN MARKET – KEY CONTINUING OBLIGATIONS (2010), <http://www.londonstockexchange.com/companies-and-advisors/main-market/documents/brochures/main-market-continuing-obligations.pdf>. For companies that do not trade on the LSE, disclosure obligations are found in Parts 15 and 16 of the Companies Act 2006 (UK).

more than tripled.²⁴ In a survey of 45 countries, a report found that there were now 180 standards and laws prescribing social disclosure, 72 percent of which were mandatory.²⁵

The recent interest in social disclosure obligations arises, in part, from a prolonged interest in improving overall corporate transparency.²⁶ Social disclosure obligations can be used to provide information on a corporation's relationship to social policy issues to stakeholders and to society at large. Stakeholders can then use the disclosed information to determine to determine on what basis, or whether at all, they will transact with a corporation. For instance, employees can use a corporation's disclosed social information as part of a collective bargaining strategy.²⁷ Similarly, social disclosure can facilitate "the efficient allocation of resources by enabling individuals to more fully satisfy their preferences" when interacting with the corporation, such as when a customer buys a corporation's product or when an individual accepts employment.²⁸

More broadly, increased corporate transparency on social issues may enable society to hold corporations accountable.²⁹ Society often has certain expectations of corporations beyond economic goals, yet they may not be able to assess whether corporations are meeting these expectations without further information which is likely only available from the corporations themselves.³⁰ Social disclosure can therefore be used as an instrument for public scrutiny of corporate actions and as a guarantor for public trust in corporations.³¹

2. *Social Disclosure Obligations Across the Globe*

Mandatory social disclosure obligations across the world are experiencing phenomenal growth. Countries from almost every region of the world now engage in some form of reporting. This section discusses social disclosure

24. UNITED NATIONS ENV'T PROGRAMME ET AL., *CARROTS AND STICKS: SUSTAINABILITY REPORTING POLICIES WORLDWIDE – TODAY'S BEST PRACTICE, TOMORROW'S TRENDS* 9 (2013), <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

25. *Id.* at 8-9.

26. VILLIERS, *supra* note 9, at 31; KERSHAW, *supra* note 9, at 4-5.

27. VILLIERS, *supra* note 9, at 31.

28. KERSHAW, *supra* note 9, at 4.

29. UNITED NATIONS ENV'T PROGRAMME ET AL., *supra* note 24, at 19.

30. *See Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Non-financial and Diversity Information by Certain Large Companies and Groups*, at 2, COM (2013) 207 final (Apr. 16, 2013) (proposal requiring certain large companies to disclose relevant non-financial information) ("[N]on-financial information is used by civil society organisations and local communities to assess the impact and risks related to the operations of a company.")

31. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Renewed EU Strategy 2011–14 for Corporate Social Responsibility*, at 11, COM (2011) 681 final (Oct. 25, 2011); UNITED NATIONS ENV'T PROGRAMME ET AL., *supra* note 24, at 15.

requirements across Europe (France, Denmark, and the UK), Asia (India, China), and the United States.

a. Europe

European countries lead the way in social disclosure requirements,³² in part because of European Union legislation which requires corporations to disclose environmental and employee matters.³³ Further, the European Parliament recently adopted a directive requiring large corporations to disclose information relating to social and employee-related matters, respect for human rights, anti-corruption and bribery matters, and board diversity.³⁴

Several EU member states have, however, adopted a higher standard for social disclosure than that required by EU legislation. France, for instance, requires corporations to disclose information on their environmental and social performance, which is then subject to third party verification.³⁵ Larger corporations also have to disclose their greenhouse gas emissions, at a minimum, on a tri-annual basis.³⁶ Similarly, in Denmark, corporations must disclose their corporate social responsibilities (CSR) policies, discuss how they translate their policies into action, and evaluate what they have achieved through their CSR initiatives.³⁷ In addition, since 2013, Danish corporations must expressly discuss their human rights and climate impact reduction actions, regardless of whether they are already included in their CSR policies.³⁸ Still further, Danish law requires corporations to disclose their progress in increasing the number of women managing Danish corporations and any policies they have enacted to achieve this goal.³⁹

32. See generally GLOB. REPORTING INITIATIVE, SUSTAINABILITY REPORTING POLICY INITIATIVES IN EUROPE, <http://www.globalreporting.org/resource/library/Sustainability-Reporting-Policy-Initiatives-in-Europe.pdf> (last visited Apr. 5, 2016) (summarizing European nation specific obligations for non-financial disclosure); Tineke Lambooy & Nicole van Vliet, *Transparency on Corporate Social Responsibility in Annual Reports*, 5 EUR. COMPANY L. 127 (2008) (discussing implementation of the Modernization Directive in EU Member States and trends in CSR transparency in annual reports).

33. E.g., Fourth Council Directive 78/660/EEC, art. 46(b), 2003 O.J. (L 178) 16 (EC).

34. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182) 19.

35. Loi 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement [Law 2010-788 of July 12, 2010 Bearing on National Engagement for the Environment] as amended by Décret 2012-557 du 24 avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale [Decree 2012-557 of April 24, 2012 Concerning Corporate Transparency Requirements Relating to Social and Environmental Matters], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Apr. 26, 2012, p. 7439.

36. *Id.* at art. 75.

37. Danish Financial Statements Act 2008, § 99a (2008) (Den.), <https://www.retsinformation.dk/Forms/r0710.aspx?id=158560>.

38. Act Amending the Danish Financial Statements Act (2012) (Den.), <http://csrgov.dk/legislation>.

39. Danish Financial Statements Act 2013, § 99b (Den.), <https://www.retsinformation.dk/Forms/r0710.aspx?id=158560>.

In the UK, large corporations are required to disclose environmental and employee matters as part of their annual business review.⁴⁰ In addition to these requirements, listed corporations are required to disclose information about the impact of the corporation's business on the environment, employees, and social and community issues, as well as policies on these matters and an evaluation of the effectiveness of those policies.⁴¹ More recently, the UK government revised its disclosure obligations and introduced a new requirement obliging corporations to produce a strategic report containing certain disclosures.⁴² Large corporations must still disclose information on environmental and employee matters,⁴³ but listed corporations must disclose information on environmental, employee, and social and community matters as well as, for the first time, information on human rights issues.⁴⁴ Moreover, as part of the government's efforts to increase the number of women on boards, listed corporations are additionally required to disclose the number of female directors, senior managers, and employees of the corporation,⁴⁵ as well as disclose their greenhouse gas emissions if it is practical to obtain that information.⁴⁶

b. Asia

Asia is another region experiencing tremendous growth in social disclosure obligations, and India is at its forefront. In 2012, the Indian Parliament introduced new requirements that mandate that corporations form CSR committees comprised of directors who are required to formulate CSR policies that outline the activities the corporate will undertake in this respect.⁴⁷ Corporations are required to spend at least two percent of their average net profits from the preceding three years on CSR activities.⁴⁸ In connection with these requirements, corporations must disclose the composition of the CSR Committees and CSR activities. Where a corporation fails to spend the minimum prescribed amount on CSR activities, the corporation must provide an explanation for their failure to do so.⁴⁹ Listed corporations are also required to

40. Companies Act 2006, c. 46, § 417 (UK), http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf.

41. *Id.* § 417(5).

42. The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, SI 2013/1970, § 414A (UK), http://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi_20131970_en.pdf. The strategic report replaces the earlier required business review.

43. *Id.* § 414C(4)(b).

44. *Id.* § 414C(7)(b).

45. *See id.* § 414C(8).

46. *Id.* §§ 15-20.

47. The Companies Bill, 2012, No. 121-C, 2012, § 135 (India).

48. *Id.* § 135(5).

49. *Id.* § 135(2), (4)(a), (5).

disclose environmental and social measures taken by the business as part of their business responsibility reports.⁵⁰

Chinese listed corporations are similarly required to disclose prescribed environmental information under the country's Green Securities Policy.⁵¹ Corporations in energy-intensive industries must even undergo an environmental assessment before they are permitted to initiate an initial public offering.⁵² Conversely, state-owned Chinese corporations are only strongly encouraged to disclose CSR activities, but as this recommendation has been issued by China's State-owned Assets Supervision and Administration Commission—a highly influential presence over the business community in China—it holds important influence over corporate reporting in China.⁵³ Chinese stock exchange rules provide further social disclosure obligations. The Shanghai Stock Exchange, for instance, encourages listed corporations to disclose CSR practices while the Shenzhen Stock Exchange requires corporations to establish a social responsibility mechanism and to disclose social responsibility matters.⁵⁴

c. United States

In the United States, the SEC holds primary responsibility for the corporate disclosure of social obligations, although there remain significant social disclosure obligations under non-corporate or securities law-related legislation.⁵⁵ Under SEC rules, corporations must, among other requirements, disclose climate

50. For an overview of Business Responsibility reports in India, see SEC. & EXCH. BD. OF INDIA, CIRCULAR – BUSINESS RESPONSIBILITY REPORTS (2012), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1344915990072.pdf.

51. Disanxiang huanjing jingji zhengce lvse zhengquan zhidao vijian chutai 2008nian jiang jianli shangshi qiye huanjing xinxi tongbao zhidu (第三项环境经济政策绿色证券指导意见出台 2008年将建立上市企业环境信息通报制度) [The Third Environmental Economic Policy Guide Issued and Environmental Information Reporting System to be Built in 2008] (promulgated by the St. Env'tl Prot. Agency, Feb. 25, 2008, effective Feb. 25, 2008), http://www.mep.gov.cn/gkml/hbb/qt/200910/t20091023_180135.htm (China). For an overview of the Green Securities Policy, see Hua Wang & David Bernell, *Environmental Disclosure in China: An Examination of the Green Securities Policy*, 22 J. ENV'T & DEV. 339, 343-46 (2013), and ADINA MATISOFF & MICHELLE CHAN, THE GREEN EVOLUTION – ENVIRONMENTAL POLICIES AND PRACTICE IN CHINA'S BANKING SECTOR 12-13 (2008), http://www.banktrack.org/manage/ems_files/download/the_green_evolution_environmental_policies_and_practice_in_the_chinese_banking_sector/green_evolution_2008_foe_final.pdf.

52. Wang & Bernell, *supra* note 51, at 343; MATISOFF & CHAN, *supra* note 51, at 12.

53. STATE-OWNED ASSETS SUPERVISION & ADMIN. COMM'N OF THE STATE COUNCIL (SASAC), THE PEOPLE'S REPUBLIC OF CHINA, GUIDELINES TO THE STATE-OWNED ENTERPRISES DIRECTLY UNDER THE CENTRAL GOVERNMENT ON FULFILLING CORPORATE SOCIAL RESPONSIBILITIES (2011), <http://en.sasac.gov.cn/n1408035/c1477196/content.html>; Brian Ho, *CSR as "No. 1" Issue for State-owned Enterprises in China*, 4 CSA ASIA WKLY. 1, 1-2 (2008).

54. See Michael A. Levine, *China's CSR Expectations Mature*, 35 CHINA BUS. REV. 50, 51-52 (2008); Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies (promulgated by the Shenzhen Stock Exch., Sept. 25, 2006, effective Sept. 01, 2010), CLL6.88455(EN) (Lawinfochina), art. 35-36.

55. See, e.g., 29 C.F.R. § 1602.7 (2015) (requiring the filing of certain information about employees); 40 C.F.R. § 90 (2015) (requiring information on greenhouse gas emissions).

change-related matters.⁵⁶ Accordingly, corporations must disclose the material effects of compliance with federal, state, and local environmental laws, pending environmental litigation, business risks and opportunities that arise from legislation or regulation related to climate change or other technical and scientific developments, and the physical impacts of climate change on operations and results.⁵⁷

SEC rules further require corporations to disclose how corporations consider diversity in identifying nominees for directorships.⁵⁸ For example, corporations must disclose whether they have a diversity policy in appointing directors, and if so, describe how the policy is implemented and how its effectiveness is assessed.⁵⁹

More recently, in the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,⁶⁰ the SEC introduced two new rules relating to social disclosure. The first was directed at corporations that use conflict minerals in the function or production of a manufactured product.⁶¹ The purpose of this rule was three-fold: to help end the human rights abuses in the DRC, to promote peace and security, and “to bring greater public awareness of the source of issuers’ conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains.”⁶²

Additionally, corporations using conflict minerals are required to conduct an inquiry to determine whether any of the minerals originated in the DRC or bordering countries and to disclose the details of this process. If the corporation determines that the minerals originated in a conflict country, they must file a report detailing the measures taken to exercise due diligence on the source and chain of custody of those conflict minerals; measures which must conform to a nationally or internationally recognized due diligence framework and be approved by an independent third-party audit.⁶³

The second rule introduced under the Dodd-Frank Act was directed at resource extraction corporations and required the disclosure of any payments made by the corporation, or its subsidiaries to governments for the commercial development of oil, natural gas, or minerals.⁶⁴ The rule’s purpose was to increase

56. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).

57. *Id.* at 6293-97

58. 17 C.F.R. § 229.407(c)(2)(vi) (2015).

59. *Id.*

60. Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 5, 12, 15 and 42 U.S.C.).

61. *Id.* § 1502 (codified as amended at 17 C.F.R. § 240.13p-1).

62. Conflict Minerals, 77 Fed. Reg. 56274, 56275 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240, 249b).

63. *Id.*

64. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56365 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240, 249).

the transparency of payments made in this area and “to help empower citizens of . . . resource-rich countries to hold their governments accountable for the wealth generated by those resources.”⁶⁵

Both the conflict minerals rule and the resource extraction payment rule were highly contested by corporations and the relevant industries. In October 2012, both rules were challenged in separate lawsuits by several corporations and industry groups.⁶⁶ In July 2013, the U.S. District Court of the District of Columbia vacated the resource extraction payment rule.⁶⁷ The court found the wording of the regulation did not mandate public disclosure of the requested information.⁶⁸ Instead, the court suggested that the SEC had discretion to allow corporations to disclose the payment information to them confidentially. In turn, the SEC could then make public a compilation of some of that information.⁶⁹ The court further found that the SEC’s failure to make exemptions to the rule for countries that prohibit payment disclosure was arbitrary and capricious.⁷⁰ Having decided not to appeal the court’s decision, the SEC recently proposed a revised resource extraction payments rule.⁷¹

Similarly, in April 2014, the U.S. District Court of Appeals ruled that part of the conflict minerals rule is unconstitutional.⁷² The court found that the rule’s requirement that an issuer describe its products as “conflict free” violated corporations’ right to free speech, as the label conveyed corporations’ moral responsibility for the war in the DRC even if it disagreed with that assessment of its responsibility. While the ruling means that corporations do not have to disclose whether their products are conflict free, the remainder of the rule’s disclosure requirements remain in place.⁷³

65. *Id.* at 56366.

66. The resource extraction payment rule was challenged in two lawsuits: *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5 (D.D.C. 2013), and *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013). The conflicts mineral rule was challenged in *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) *overruled on other grounds by* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.D.C. 2014).

67. *Am. Petroleum Inst.*, 953 F. Supp. 2d at 25. The second case was dismissed for lack of jurisdiction. *Am. Petroleum Inst.*, 714 F.3d at 1331.

68. *Am. Petroleum Inst.*, 953 F. Supp. 2d at 13-16.

69. *Id.* at 9.

70. *Id.* at 20-23.

71. Sarah N. Lynch, *SEC Won’t Appeal Ruling vs Disclosing Payments Abroad*, REUTERS (Sept. 3, 2013, 6:40 PM), <http://www.reuters.com/article/us-sec-resource-extraction-idUSBRE9820Z820130903>; *SEC Proposes Rules for Resource Extraction Issuers Under Dodd-Frank Act*, SEC (Dec. 11, 2015), <http://www.sec.gov/news/pressrelease/2015-277.html>.

72. *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 373 (D.C. Cir. 2014).

73. Keith F. Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*, SEC (Apr. 29, 2014), <https://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994>.

II. JUSTIFYING SOCIAL DISCLOSURE

In some ways, governments' increasing reliance on corporate and securities laws to promote social policy goals is surprising. Corporate law is traditionally seen as a tool of private law,⁷⁴ while issues of human rights and other "social issues" are traditionally viewed as public issues. The public/private divide between corporate law and social rights is underscored by their respective governance: while corporate managers, such as boards of directors, are mainly responsible for the governance of corporate matters, governments assume primary responsibility for overseeing the protection of human rights and other social issues. Thus, using corporate and securities laws to promote social issues results in a predominantly private tool being used to foster essentially public goals.

Nevertheless, the divide between corporate and social issues becomes less pronounced if social disclosure requirements further the interests of the shareholders, since shareholders are presumed to be the primary beneficiaries of corporate law.⁷⁵ Yet it is unclear whether social disclosure rules benefit or harm shareholder interests.

A. *Shareholders and Social Disclosure Requirements: Help or Hindrance?*

On one hand, many social disclosure requirements are primarily justified on the basis that they protect shareholder interests. For instance, corporate reporting obligations are designed to inform shareholders about how corporate managers have furthered the interests of the corporation for their benefit.⁷⁶ Similarly, securities laws require corporations to disclose information to help investors make investment decisions.⁷⁷

Indeed, social disclosure obligations can act to protect shareholders' interests through risk identification and management, as well as through shareholder engagement. As the European Parliament observed, social disclosure obligations provide information on matters that are likely "to bring about the materialisation

74. See MARC T. MOORE, *CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE* 177-226 (2013).

75. Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("Corporate law should principally strive to increase long-term shareholder value."); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998) ("Corporate directors have a fiduciary duty to make decisions that are in the best interests of shareholders.")

76. Companies Act 2006, c. 46, § 417(2) (UK), http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf.

77. See, e.g., FIN. CONDUCT AUTH., *DISCLOSURE RULES AND TRANSPARENCY RULES DTR 1.3.3* (2015), <https://www.handbook.fca.org.uk/handbook/DTR.pdf>; FINANCIAL SERVICES AUTHORITY, *MARKET ABUSE DIRECTIVE (DISCLOSURE RULES) INSTRUMENT 2005 R 2.2.4* (2005), http://ec.europa.eu/internal_market/finances/docs/actionplan/transposition/uk/d13.2-uk.pdf; *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444-49 (1976).

of principal risks.”⁷⁸ Moreover, by requiring corporate managers to disclose information about potentially harmful events, shareholders can more accurately price stocks by taking into account the risks their investment faces.⁷⁹ At the same time, by having to gather information about particular risks, corporate managers can ex ante identify potential problems the business faces and work to avoid the commission of these events.⁸⁰ This can benefit shareholders when the costs of correcting a problem are greater than the costs of risk minimization or prevention.⁸¹

In recent years, the issue of risk identification in relation to social policy issues has gained urgency. This is because a failure to manage social policy issues relating to the business may result in a host of risks to the corporation, including community disruptions or protests of projects leading to project delays, lawsuits by stakeholders aimed at the corporation, and reputational damage.⁸² One study even found that a firm’s environmental performance can play a role in its risk of bankruptcy.⁸³ Thus, risk minimization or management prompted by social disclosure obligations may protect shareholders’ interests—directly or indirectly.

In addition to helping identify risks, social disclosure obligations better enable shareholders to engage with corporations to improve corporations’ performance on social issues.⁸⁴ The United Nations’ Principles for Responsible Investment report found that lack of environmental and social data is the “key barrier” to investors engagement with corporations’ social policy issues.⁸⁵ Providing information on social policy issues therefore gives investors information which can be used to orient the corporation in a desired direction.

78. Directive 2014/95/EU of The European Parliament and of the Council Of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) ¶ 8.

79. Conflict Minerals, 77 Fed. Reg. 56274, 56350 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240, 249b) (noting that social disclosure obligations “protect[] investors by requiring disclosure of information that may be material to their understanding of the risks of investing in an issuer or its supply chain,” which will help them price the company’s securities).

80. Paul R. Kleindorfer & Eric W. Orts, *Informational Regulation of Environmental Risks*, 18 RISK ANALYSIS 155, 165 (1998).

81. See Martin Petrin, *Assessing Delaware’s Oversight Jurisprudence: A Policy and Theory Perspective*, 5 VA. L. & BUS. REV. 433, 463 (2011); HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE SARBANES-OXLEY DEBACLES: WHAT WE’VE LEARNED; HOW TO FIX IT* 92 (2006). The costs which emanate out of the commission of a problem include reputational costs, project delays and disruptions costs, and costs arising from successful lawsuits emanating out of the misconduct.

82. AMY K. LEHR & GARE A. SMITH, *IMPLEMENTING A CORPORATE FREE, PRIOR, AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES* 21 (2010) (ebook); Paul Kapelus, *Mining, Corporate Social Responsibility and the “Community”*: *The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi*, 39 J. BUS. ETHICS 275, 285 (2002).

83. Thomas E. Schneider, *Is Environmental Performance a Determinant of Bond Pricing? Evidence from the U.S. Pulp and Paper and Chemical Industries*, 28 CONTEMP. ACCT. RES. 1537, 1538 (2011) (finding a firm’s high environmental risk to be a “significant component of bankruptcy risk”).

84. See UNEP FIN, INITIATIVE, *PRINCIPLES FOR RESPONSIBLE INVESTMENT – REPORT ON PROGRESS 2009* (2009), <http://www.unpri.org/wp-content/uploads/PRIReportonProgress09.pdf>.

85. *Id.* at 34.

On the other hand, there is also a growing concern that social disclosure obligations may actually be impeding shareholders' interests through imposing heavy compliance costs on corporations and inundating shareholders with information. As the SEC has found, a corporation's shareholders will bear the cost of social disclosure compliance, potentially leading to the diversion of capital away from other productive opportunities and resulting in a loss of allocative efficiency.⁸⁶ This potential burden on shareholders is noteworthy as disclosing information can be expensive, sometimes even "costing more than it is worth."⁸⁷

For instance, the new conflict mineral rule has been estimated by the SEC to result in initial compliance costs of between \$3 and \$4 billion and ongoing compliance costs of between \$207 and \$609 million.⁸⁸ Similarly, the SEC's resource extraction payment rule is expected to result in initial compliance costs of \$1 billion and ongoing compliance costs of between \$200 and \$400 million.⁸⁹

Even if costs to shareholders for compliance with social disclosure obligations are proportionate, it is questionable whether providing more information to investors is effective. As commentators have observed, individuals, including shareholders, have a limited ability to process information.⁹⁰ Because of this limitation, providing information is always subject to the risk of overburdening individuals, resulting in "information overload."⁹¹ In these instances, providing large amounts of information is akin to not providing any information at all.⁹²

Without a doubt, shareholders are provided with considerable amounts of information. A recent study found that the average corporation's annual report in the UK has more than doubled since 1996 and today stands at over 100 pages.⁹³

86. Conflict Minerals, 77 Fed. Reg. 56274, at 56350 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240, 249b).

87. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 626 (1999); see also David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 339 (2011).

88. Conflict Minerals, 77 Fed. Reg. at 56351.

89. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56365, 56410 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240, 249).

90. See Sunstein, *supra* note 87, at 627; Christine Jolls et al., *A Behavioural Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1533-37 (1988).

91. Troy A. Paredes, Comm'r, SEC, Remarks at The SEC Speaks in 2013 (Feb. 22, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1365171492408#U1ZpcPldWSp>; Lynn, *supra* note 87, at 339; KPMG & FIN. EXECS. RES. FOUND., DISCLOSURE OVERLOAD AND COMPLEXITY: HIDDEN IN PLAIN SIGHT 2-3 (2011), <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/disclosure-overload-complexity.pdf>; Omri Ben-Shahar & Carl E. Schneider, *The Futility of Cost Benefit Analysis in Financial Disclosure Regulation*, 43 J. LEGAL STUD. S253, S268 (2014).

92. Sunstein, *supra* note 87, at 627-28.

93. DELOITTE, A NEW BEGINNING – ANNUAL REPORTS INSIGHTS 2013 21 (2013), <http://www2.deloitte.com/content/dam/Deloitte/uk/Documents/about-deloitte/deloitte-uk-audit-a-new-beginning-interactive.pdf>.

The Chair of the SEC has even publicly questioned whether investors are being served “by the detailed and lengthy disclosures about all of the topics that companies currently provide in the reports they are required to prepare.”⁹⁴ Therefore, increasing the amount of disclosure obligations may be compounding already existing problems of information overload on investors.

Thus, while social disclosure obligations can promote shareholders’ interests through informational efficiency and by providing them with the necessary tools for shareholder engagement, these benefits are only bestowed on shareholders when they are not outweighed by compliance costs and problems of informational overload. It is therefore debatable whether social disclosure obligations are benefitting shareholders.

B. Society as Beneficiaries of Social Disclosure Requirements

Because the utility of social disclosure obligations to shareholders is equivocal, governments may be designing these obligations for a wider class of beneficiaries than simply shareholders. India’s Securities and Exchange Board, for example, notes that social disclosure obligations are necessary to enable corporations—as “critical components of the social system”—to be accountable to the public at large.⁹⁵ It goes on to observe that the need for accountability is underscored where corporations have accessed public funds, thereby adding a ‘public interest’ element.⁹⁶ Similarly, the Chinese government has introduced the concept of “building a harmonious society” as part of the governmental agenda and this concept now underscores corporate reporting obligations in the country.⁹⁷ The Shenzhen Stock Exchange thus prefaces its social disclosure obligations by noting that these rules have been implemented for the purpose of “building social harmony” and “accelerating sustainable economic and social development.”⁹⁸ According to these views, social disclosure obligations are clearly intended to benefit the public or society at large.

The Indian and Chinese stock exchanges are not alone in using social disclosure obligations as a tool to benefit society generally. Some countries have introduced social disclosure obligations as a result of a growing awareness of “external responsibilities unfulfilled by governmental institutions” and a

94. Mary Jo White, Chair, SEC, *The Path Forward on Disclosure* (Oct. 15, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#_ftnref7.

95. SEC. & EXCH. BD. OF INDIA, *supra* note 50, at 1.

96. *Id.*

97. Jingchen Zhao, *The Harmonious Society, Corporate Social Responsibility and Legal Responses to Ethical Norms in Chinese Company Law*, 12 J. CORP. L. STUD. 163, 164 (2012); Geoffrey (Kok Heng) See, *Harmonious Society and Chinese CSR: Is There Really a Link?*, 89 J. BUS. ETHICS 1 (2009).

98. Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies (promulgated by the Shenzhen Stock Exch., Sept. 25, 2006, effective Sept. 01, 2010), CLI.6.88455(EN) (Lawinfochina), art. 1.

recognition of the role of corporations in this arena.⁹⁹ Other countries see these obligations as a tool to combat the global financial crisis.¹⁰⁰ The US government has even been driven to impose social disclosure obligations on corporations for humanitarian reasons.¹⁰¹

Several governments have confirmed that both shareholders *and* society are the beneficiaries of social disclosure obligations. The Indian national stock exchange observes that social disclosure obligations are required because corporations are accountable to *both* shareholders and to the larger society.¹⁰² The Shenzhen Stock Exchange similarly notes that social disclosure obligations promote commitments to shareholders, employees, and communities among other stakeholders.¹⁰³

By contrast, the UK government has been more opaque in suggesting that social disclosure obligations benefit more than just shareholders. The government's documents on social disclosure reporting state that these requirements are targeted at helping corporations provide information to investors, which they can use to be "active company owners."¹⁰⁴ In other words, the emphasis appears to be on using social disclosure requirements to further shareholder interests. However, in the government's impact assessment report of the social disclosure requirements, it lists the beneficiaries of these rules as shareholders, corporations, NGOs, and "interested members of the public."¹⁰⁵ Thus, the UK government seemingly intends social disclosure requirements to benefit public or societal interests alongside shareholder interests.

C. Using Private Law to Further Public Aims

Inserting social disclosure obligations into the private rubric of corporate and securities law is largely justifiable to the extent that it furthers the underlying goal of protecting shareholders' private interests. Moreover, social disclosure

99. KPMG'S GLOB. SUSTAINABILITY SERVS. & UNITED NATIONS ENV'T PROGRAMME, CARROTS AND STICKS FOR STARTERS – CURRENT TRENDS AND APPROACHES IN VOLUNTARY AND MANDATORY STANDARDS FOR SUSTAINABILITY REPORTING 6 (2006), <https://www.kpmg.com/GR/en/IssuesAndInsights/ArticlesPublications/Sustainability/Documents/CarrotandSticksStarters.pdf>.

100. UNITED NATIONS ENV'T PROGRAMME ET AL., *supra* note 24, at 10.

101. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 2213 (codified as amended at 15 U.S.C. § 78m) ("It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is . . . contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act . . .").

102. SEC. & EXCH. BD. OF INDIA, *supra* note 50, at 1.

103. Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies (promulgated by the Shenzhen Stock Exch., Sept. 25, 2006, effective Sept. 01, 2010), CLI.6.88455(EN) (Lawinfochina).

104. BIS, *supra* note 5.

105. DEP'T FOR BUS. INNOVATION & SKILLS, NARRATIVE REPORTING 1 (Dec. 5, 2010), http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31404/11-1293-narrative-reporting-impact-assessment.pdf.

obligations which further shareholders' *and* societal interests are also largely justifiable in the private law realm as long as it does not contradict or diminish the protection of shareholders' private interests. However, problems of justification arise in the use of corporate and securities law to further entirely public law issues, which do not have any bearing on the interests of shareholders.¹⁰⁶

Still, there is support for the enmeshment of public policy issues within the private rubric of corporate and securities law from two sources. The first involves the international legal duty of countries to protect their nationals' rights, while the second stems from the need for governmental regulation to supplement the private ordering of corporate law.

1. Duty to protect

International human rights law imposes a duty on all countries to protect against human rights abuses, including abuses by business entities, within their jurisdiction.¹⁰⁷ As part of this duty to protect, countries have positive obligations to prevent third party interference with the state's nationals' enjoyment of their rights, including private actors.¹⁰⁸ From these obligations, John Ruggie, former UN Special Representative on Business and Human Rights, has developed an international framework that guides countries in fulfilling these obligations.¹⁰⁹

In his framework, Ruggie advocates that countries should support and strengthen market pressures on corporations to respect rights by using mechanisms such as sustainability reporting.¹¹⁰ He notes that corporations bear an independent duty to respect the rights of others which requires them to engage in due diligence. Due diligence entails corporations becoming aware of, preventing, and addressing adverse human rights impacts. Ruggie compares these obligations to systems that require corporations to manage financial and related risks.¹¹¹

106. See, for example, the discussion on the problems with the Conflict Minerals Rule *infra* Section III.C.

107. John Ruggie (Special Representative of the Secretary-General), *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 10, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter *BHR*]; see also U.N. Secretary-General, *Addendum – State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, ¶¶ 7-10, U.N. Doc. A/HRC/4/35/Add.1 (Feb.13, 2007) [hereinafter *Addendum*].

108. John Ruggie (Special Representative of the Secretary-General), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 18, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect and Remedy*]; see also *BHR*, *supra* note 107, ¶¶ 12–18; *Addendum*, *supra* note 107, ¶ 7.

109. See *Protect, Respect and Remedy*, *supra* note 108.

110. *Id.* ¶ 30.

111. *Id.* ¶¶ 55–56.

While Ruggie's framework is not binding on countries, the international human rights legal instruments from which he derives his framework are.¹¹² Thus, countries party to the main international human rights treaties bear a duty under international law to protect their nationals' rights and to prevent corporations from interfering with these rights. For example, the *International Covenant on Civil and Political Rights* (ICCPR) requires states to protect individuals from having their Covenant rights violated by private entities while the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) requires states to take measures to eliminate discrimination against women by any enterprise.¹¹³

Ruggie's suggestions for international human rights obligations—such as requiring sustainability reporting or imposing due diligence standards on corporations—are comparable to social disclosure obligations. For example, both the ICCPR and the CEDAW mandate states to ensure equality between genders,¹¹⁴ which several countries meet directly by obliging corporations to disclose gender representation at senior levels of management.¹¹⁵ In this way, social disclosure obligations are justifiable as tools by which states can meet their international human rights obligations.¹¹⁶

2. Supporting Private Law

A second source of support for enmeshing social issues within corporate law is the increasing recognition of the need for governmental regulation to support the private ordering of corporate law. In essence, the notion of private ordering is based on the view that a corporation is a “nexus of contracts,” a metaphor that represents the implicit and explicit voluntary contracts that affected parties will work out among themselves.¹¹⁷ Viewed in this manner, corporate law is seen as a set of default rules that represent the bargains corporate constituents would

112. These include, among others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

113. Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); G.A. Res. 34/180, *Convention on the Elimination of All Forms of Discrimination Against Women*, art. 2(e) (1980) [hereinafter CEDAW].

114. *International Covenant on Civil and Political Rights*, Dec. 19, 1966, art. 3, 172 U.N.T.S. 1976; CEDAW, *supra* note 113, at art. 2(3).

115. See, e.g., *The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013*, SI 2013/1970, § 414C (UK), http://www.legislation.gov.uk/ukxi/2013/1970/pdfs/ukxi_20131970_en.pdf; CANADIAN SEC. ADM'RS, MULTILATERAL CSA NOTICE OF AMENDMENTS TO NATIONAL INSTRUMENT 58-101 – DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES 1 (Oct. 15, 2014), http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20141014_58-101_noa-national-instrument.pdf.

116. John Ruggie's report was generated under the auspices of the United Nations' Human Rights Council.

117. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

have demanded had they determined the rules governing their relationship before the corporation was formed.¹¹⁸ Given the importance of private contracts to this view of the corporation, the focus for contractarians is on private ordering, making freedom of contract essential, and warranting a limited role for government intervention except in the enforcement of private contracts.¹¹⁹

While the shortcomings of the contractarian view have been well-documented,¹²⁰ it continues to dominate corporate law theory, particularly in the United States.¹²¹ Still, even for advocates of contractarianism, who have traditionally eschewed governmental regulation in this arena, there is a growing recognition of the importance of governmental regulation in at least some areas of both corporate and securities law.¹²²

For example, governmental regulation in corporate law may be necessary to enable its private-order foundation to operate. In other words, from a contractarian perspective, regulations can lead to improved private contracts between parties.¹²³ Thus, in instances of market failure, such as shareholders' inability to accurately price governance rules¹²⁴ or where there are opportunities for corporate managers to alter governance rules in their favor,¹²⁵ governmental regulations can act as a guarantee to investors' bargains with the corporation. These regulations also ensure the protection of standard form terms in corporate

118. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36 (1991); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577-78 (2003).

119. See Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 526 (1999).

120. For an overview of these shortcomings, see Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 637-640 (2009), and notes therein, and Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779 (2006).

121. See, e.g., Easterbrook & Fischel, *supra* note 117; STEPHEN BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* (2008).

122. See, e.g., Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989); Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023 (2002); Easterbrook & Fischel, *supra* note 117. For further discussion on the need for governmental regulation in corporate law, see Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461 (1989), Lucian A. Bebchuk, Foreword, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989), MOORE, *supra* note 74, at 177, John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989), and Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703 (1989).

123. Gordon, *supra* note 122, at 1554; see also Anita Indira Anand, *An Analysis of Enabling vs. Mandatory Corporate Governance: Structures Post-Sarbanes-Oxley*, 31 DEL. J. CORP. L. 229, 239 (2006) (noting that mandatory laws can facilitate private contracting); Bainbridge, *supra* note 122, at 1033.

124. Where rules are complex or highly specialized, investors may not have sufficient knowledge to properly price (i.e. discount the projected returns from an equity investment) these rules. See MOORE, *supra* note 74, at 38-39.

125. Gordon refers to this as "opportunistic charter amendment." Gordon, *supra* note 122, at 1573-85; see also Eisenberg, *supra* note 122.

charters, meaning that investors will be less likely to face divergent, and consequently uncertain, terms.¹²⁶

Without governmental regulation, private parties may not obtain optimal contracts. Where corporate managers fail to disclose certain information about a firm, including information which could be beneficial to competitor firms or could place their own jobs at peril, investors will not have sufficient information to conclude the best possible contract as they will not be knowledgeable about all available contracts.¹²⁷ In this scenario, governmental regulation can act as a bond to corporate managers' promise to disclose all material information, good and bad, thereby facilitating private ordering.¹²⁸

Governmental regulation may also be necessary to constrain corporate managers' actions where their interests diverge from shareholder interests. Although contractarians argue that market forces will align the interests of corporate managers and shareholders, thereby making governmental regulation unnecessary,¹²⁹ there are many instances in which market forces do not align divergent interests.¹³⁰ In part, this is because the impact of market forces guiding corporate governance rules may be overstated. Studies have shown that a corporation's corporate governance rules do not have a statistically significant effect on the price of its stock,¹³¹ and in any case, a corporation's market value is dependent on a variety of factors beyond corporate governance rules.¹³² Commentators have further argued that governmental regulation is necessary as the different market forces which could constrain corporate managers are imperfect or entirely ineffective for some issues.¹³³

Governmental intervention, in securities law particularly, may also be used to further society's interest in having a more efficient market. As Coffee argues, regulations which require the disclosing of specific securities-related information may not improve the balance between purchasers and sellers of stocks, but it does

126. Gordon, *supra* note 122, at 1567-69.

127. Easterbrook & Fischel, *supra* note 117, at 1436-38; Bainbridge, *supra* note 122, at 1033; see also Mitu Gulati, *When Corporate Managers Fear a Good Thing is Coming to an End: The Case of Interim Nondisclosure*, 46 UCLA L. REV. 675, 732-39 (1999) (discussing the risks of nondisclosure of information prior to offerings).

128. BAINBRIDGE, *supra* note 121, at 1033.

129. See Easterbrook & Fischel, *supra* note 117, at 1419; Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U.L. REV. 99, 108 (1989); John H. Matheson & Brent A. Olson, *Corporate Cooperation, Relationship Management, and the Trialogical Imperative for Corporate Law*, 78 MINN. L. REV. 1443, 1449 (1994); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1460-61 (1992).

130. Eisenberg, *supra* note 122, at 1492; Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 579-81 (1990); Bebchuk, *supra* note 129, at 1460-67.

131. Eisenberg, *supra* note 122, at 1502.

132. MOORE, *supra* note 74, at 41.

133. Black, *supra* note 130, at 579; Bebchuk, *supra* note 129, at 1461-67.

“improve the allocative efficiency of the capital market,” and consequently, the productiveness of the economy.¹³⁴

Even under a private-ordering view of corporate law, governmental regulation is justifiable if it improves managerial accountability vis-à-vis shareholders or promotes the efficiency or productivity of the market. To some extent, social disclosure obligations satisfy both of these drivers of governmental interference. In terms of managerial accountability, mandatory social disclosure obligations can force corporate managers to disclose all social-related information and facilitate private ordering as well as help align the interests of managers and shareholders during instances of market failures. In addition, by requiring managers to produce otherwise under-produced information about corporate-related social issues, social disclosure obligations can drive the productivity of the market by propelling the allocative efficiency of the market. Moreover, to the extent that social disclosure obligations ex ante address negative externalities of corporate acts, for example by minimizing risk,¹³⁵ the productivity and the efficiency of the market are also aided. As a result, there appears to be a role for governmental regulation in corporate and securities law relating to non-financial information. The scope of that role is less clear.

III. REGULATING SOCIAL DISCLOSURE OBLIGATIONS

Having located a role for governmental intervention in corporate and securities law in relation to social issues, the next issue to examine is the nature and scope of that role. We have seen that mandatory disclosure rules can promote managerial accountability as well as promote the efficiency of the market. Thus, the role for governmental regulation relating to social disclosure obligations should focus on areas in which they will best promote these goals.

In fact, commentators have argued that governmental regulation in corporate law is mainly acceptable as a supplemental or limited device.¹³⁶ The supplemental or limited role for governmental intervention in this arena is further supported by the objectives of corporate law, which prioritizes shareholders' (private) interests over other stakeholder interests¹³⁷ and may privilege shareholder interests in instances of conflict.¹³⁸ It follows, then, that the role for

134. Coffee, *supra* note 12, at 722.

135. For examples as to how social disclosure obligations minimize risk, see the discussion *supra* Section II.A.

136. Eisenberg, *supra* note 122; Bebchuk, *supra* note 129; Gordon, *supra* note 122; Coffee, *supra* note 122; Clark, *supra* note 122. Even Easterbrook & Fischel support governmental regulation in limited areas. See Easterbrook & Fischel, *supra* note 117, at 1436-42.

137. See, e.g., Companies Act 2006, c. 46, §§ 172, 419A (UK), http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf. For a discussion on the prioritization of shareholder interests in UK corporate law, see generally ANDREW KEAY, THE CORPORATE OBJECTIVE (2011).

138. See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (holding that where breakup of a company is inevitable, the board's duty changes from corporate entity

governmental regulation in corporate and securities law should be supplemental in nature; accordingly, its scope should be narrow and well-delineated.

It is perhaps for this reason that countries have decided to rely on disclosure obligations as their preferred regulatory mechanism for promoting social aims in the context of business. Rather than prohibiting or controlling corporate conduct, social disclosure obligations allow a relatively light-handed approach to curbing corporate conduct in the context of social issues.

Yet if the goal of government is to control corporate conduct on social issues, why do they rely on disclosure obligations rather than regulating the offending conduct? In other words, if governments want corporations to increase the number of women on boards or release less greenhouse gases, why do the regulations not focus on mandating female board representation or reducing greenhouse gas emissions instead of focusing on information about these issues? The answer appears to be a recognition of the limited role for government in corporate law and a preference for a meta-regulatory approach.

A. *Meta-Regulatory Approach*

Meta-regulation is a regulatory approach that induces corporations to identify and develop their own approaches to addressing problems.¹³⁹ It enables reflexive thinking about regulation and focuses on regulating the process of regulation, rather than regulating the issues directly.¹⁴⁰ The idea behind meta-regulation is that corporations, which possess superior information as to which internal rules and procedures are needed to address issues, should be encouraged to reorient their internal workings to address problems identified by the regulators. In this way, corporations possess ample flexibility to solve the problems they create.¹⁴¹

One particular form of meta-regulation that appears to underscore the idea of social disclosure is reflexive law, which emerges in an attempt to draw together different aspects of society into different subsystems based on function.¹⁴² Reflexive law is a tool used to structure functionally differentiated semi-autonomous social systems and whose aim is to shape these systems' procedures

preservation to maximizing company's value for benefit of shareholders); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 11 (Del. Ch. 2010) (holding that directors cannot use a corporate vehicle to solely pursue community service; they must promote the corporation's value for the benefit of its stockholders).

139. Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, in *THE OXFORD HANDBOOK OF REGULATION* 146, 150 (Robert Baldwin, Martin Cave, & Martin Lodge eds., 2010); CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* 255 (2002).

140. BRONWEN MORGAN, *SOCIAL CITIZENSHIP IN THE SHADOW OF COMPETITION: THE BUREAUCRATIC POLITICS OF REGULATORY JUSTIFICATION* 2 (2003).

141. Coglianese & Mendelson, *supra* note 139, at 149.

142. See Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *L. & SOC'Y REV.* 239, 242-46 (1983) (developing the theory of "reflexive law" aimed to reconcile the internal dynamics of legal developments with the external constraints and necessities of post-modern society).

of internal discourse and their methods of coordination with other systems.¹⁴³ Because of this, reflexive law is primarily a procedural tool, one that is not responsible for substantive outcomes,¹⁴⁴ and a method by which bargaining power between parties can be equalized.¹⁴⁵

The appeal of meta-regulatory approaches like reflexive law comes from using legal norms, procedures and sanctions to ‘frame’ or ‘steer’ the process of the corporation’s actions.¹⁴⁶ They are designed to influence the processes of corporations, “to encourage thinking and behavior in the right direction,” and to cause corporations to reflect on and re-examine their own behavior.¹⁴⁷ Meta-regulatory approaches can prompt corporations to internalize social values which can then instigate changes to their behavior. Indeed, self-control as a necessary ingredient for social ordering is at the root of meta-regulatory approaches since it is not possible to create rules for every possible harm.¹⁴⁸

The underpinnings of a meta-regulatory approach are apparent in social disclosure obligations. Social disclosure obligations do not prescribe substantive outcomes; they focus on regulating the procedure by which information on these issues are disclosed. Furthermore, they work to help equalize bargaining power between corporations and those that transact with them by enabling shareholders, consumers, and employees to make informed decisions about whether—or to what extent—they want to transact with the corporation. More importantly, social disclosure obligations put the onus on corporations to self-reflect and to reexamine their behavior and encourage the internalization of social values. In doing so, social disclosure obligations are thought to norm correct bad corporate behavior.

B. Limitations

Despite a meta-regulatory approach providing a sound theoretical explanation for social disclosure obligations, it is unclear whether this approach to social disclosure obligations is, in and of itself, effective. To be sure, it does offer certain benefits. First, it circumvents problems of increased juridification as it prevents the need for governments to create new forms of regulation for

143. *Id.* at 255.

144. *Id.* at 254-55.

145. As Teubner writes, reflexive law “attempts to subject contracting parties to mechanisms of ‘public responsibility’ that are designed to ensure that bargaining processes will take account of various externalities.” *Id.* at 256.

146. Catherine Barnard et al., *Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time 4* (ESRC Ctr. for Bus. Research, Univ. of Cambridge, Working Paper No. 294, 2004).

147. Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1264 (1995); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 IOWA J. CORP. L. 41, 48-51 (1999); David J. Doorey, *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L. J. 353, 370 (2005).

148. Coglianese & Mendelson, *supra* note 139, at 164.

every aspect of corporate behavior that affects society.¹⁴⁹ It also enables a proactive form of regulation rather than a reactive one. With regulation, there is generally a time difference between when the problem in need of regulation is identified and when the regulation is identified—a time difference that does not arise with disclosure obligations.¹⁵⁰ Third, it allows governments to better understand new social problems, which may be crucial to the eventual introduction of more substantive regulation.¹⁵¹ Fourth, it enables corporations to innovate solutions to problems, rather than merely to adhere to minimum levels of behavior, by offering them the flexibility to determine how they will meet their social disclosure obligations, enabling them to adopt firm-specific strategies. Finally, it can replace more complex regulation and act as a public monitoring device that, in some instances, can spur desirable outcomes.¹⁵² Nevertheless, due to the overriding interest in using social disclosure obligations to change corporate behavior, there are concerns about the effectiveness of meta-regulation.¹⁵³ Mainly, it is unclear as to whether social disclosure can actually change corporate behavior.

In fact, research on the utility of social disclosure obligations has been inconclusive. The only large-scale study of mandatory sustainability reporting found that disclosure obligations increase corporate priorities for employee training and implementation of ethical practices.¹⁵⁴ Another study, surveying 540 firms, found that the process of drafting a sustainability report is the most important catalyst for businesses for organizational change and establishing suitable structures and practices.¹⁵⁵ In the case of disclosure obligations related to toxic chemicals, limited empirical research has demonstrated that these obligations can improve firms' environmental performance.¹⁵⁶

149. See Orts, *supra* note 147, at 1260 (discussing reflexive law in particular).

150. Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 127-28 (2001); David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 428 (2005).

151. Sunstein, *supra* note 87, at 625.

152. *Id.*

153. See, e.g., Commission Staff Working Document, *Executive Summary of the Impact Assessment Accompanying Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Companies and Groups*, at 28, COM (2013) 207 final (Apr. 16, 2013).

154. Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries 4* (Harv. Bus. Sch., Working Paper No. 11-100, 2011)

155. Hendrik Garz & Claudia Volk, *What Really Counts: The Materiality of Extra-Financial Factors* (WESTLB RES., 2007), cited in Commission Staff Working Document, *supra* note 153, at 38.

156. See, e.g., Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions*, 32 J. ENVTL. ECON. & MGMT. 109 (1997); Shameek Konar & Mark A. Cohen, *Why Do Firms Pollute (and Reduce) Toxic Emissions?*, ORG. FOR ECON. CO-OPERATION & DEV. (Mar. 2000), <http://www.oecd.org/env/outreach/33947723.pdf>; Dara O'Rourke & Eungkyoon Lee, *Mandatory Planning for Environmental Innovation: Evaluating Regulatory Mechanisms for Toxics Use Reduction*, 47 J. ENVTL. PLANNING & MGMT. 181 (2004); Peter W. Kennedy et al., *Pollution Policy: The Role for Publicly Provided Information*, 26 J. ENVTL. ECON. & MGMT. 31 (1994); Bradley C. Karkkainen, *Information as Environmental Regulation: Tri and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001).

However, studies have not consistently found the effects of mandatory social disclosure obligations on corporate behavior to be positive. For instance, the same large-scale study that found positive effects of mandatory sustainability reporting on some aspects of corporate behavior failed to find “a statistically reliable effect of mandatory disclosure on the prioritization of sustainable development by firms.”¹⁵⁷ Similarly, another study found that while reporting on environmental and social issues may increase corporate management’s awareness of these issues, it does not lead to corporate management questioning their practices in this area.¹⁵⁸ A Spanish study found similar results, concluding that reporting on environmental issues did not lead to significant organizational changes in firms.¹⁵⁹ One study even emphasized the need to introduce governmental regulations—and not voluntary corporate social responsibility policies—in order to effect significant changes in corporate behavior in the oil industry.¹⁶⁰ Disclosing social issues may not, therefore, necessarily result in changes to corporate behavior.

The reasons for the failure of mandatory social disclosure requirements to affect corporate behavior are myriad. One possibility may be because corporations are either failing to comply with these obligations, or they are doing so in a “tick-the-box” method without embracing their “spirit.”¹⁶¹ For instance, in relation to disclosure obligations relating to diversity in corporations, compliance has been found to be haphazard.¹⁶² Climate change disclosure in the United States has been similarly found to be problematic, with a recent study reporting that most climate change disclosures “are very brief, provide little discussion of material issues, and do not quantify impacts or risks.”¹⁶³ Comparatively, in the UK, corporations have been more diligent about providing extensive commentary relating to disclosure obligations on environmental and

157. Ioannou & Serafeim, *supra* note 154, at 22.

158. Michael Mitchell et al., *Can Triple Bottom Line Reporting Become a Cycle for “Double Loop” Learning and Radical Change?*, 25 ACCT. AUDITING & ACCOUNTABILITY J. 1048 (2012).

159. Carlos Larrinaga-González et al., *The Role of Environmental Accounting in Organizational Change: An Exploration of Spanish Companies*, 14 ACCT. AUDITING & ACCOUNTABILITY J. 213 (2013).

160. Jędrzej G. Frynas, *Corporate Social Responsibility or Government Regulation? Evidence on Oil Spill Prevention*, 17 ECOLOGY & SOC’Y 4 (2012).

161. See, e.g., Mario Christodoulou, *PwC Partner Speaks Out Over ‘Dreadful’ Annual Reports*, ACCT. AGE (Oct. 9, 2009), <http://www.accountancyage.com/aa/news/1745982/pwc-partner-speaks-dreadful-annual-reports> (discussing how a “box ticking culture” can lead to companies merely paying “lip service” to sustainability reporting).

162. See, e.g., Pru Bennett, *Australia’s Female-Less Boardrooms*, BLACKROCK AUSTRALIA (Feb. 2012), <http://www.blackrockinvestments.com.au/individual/literature/market-commentary/blackrock-australia-femaleless-boardrooms-en-au.pdf>; Elisse B. Walter, Comm’r, SEC, *Remarks at the DirectWomen Board Institute* (Feb. 10, 2011), <http://www.sec.gov/news/speech/2011/spch021011ebw-2.htm>.

163. CERES, COOL RESPONSE: THE SEC & CORPORATE CLIMATE CHANGE REPORTING – SEC CLIMATE GUIDANCE & S&P 500 REPORTING—2010 TO 2013 5 (Feb. 2014), <http://www.ceres.org/resources/reports/cool-response-the-sec-corporate-climate-change-reporting>.

employee matters, but around 20 percent of corporations continue to provide only brief or generic information on these issues.¹⁶⁴

Additionally, commentators have raised concerns that corporate managers are disclosing information showing the corporation only in a favorable light.¹⁶⁵ In an effort to manage impressions, corporate managers may manipulate stakeholders' impressions of a corporation's social and environmental performance or disclose information selectively in order to preserve organizational legitimacy.¹⁶⁶ Even where negative information is disclosed, the information can be marginalized or abstracted in such a way that its focus is on altering stakeholders' perceptions rather than changing corporate behavior.¹⁶⁷ Corporate managers may thus be using disclosure obligations only to emphasize the positive and as a "public relations tool rather than as an opportunity for candid performance analysis."¹⁶⁸ Moreover, since the aim of these obligations is to equalize bargaining powers between corporations and stakeholders, information that is generic, incomplete, or overly optimistic undercuts the ability for stakeholders to transact with the corporate on a level playing field.

C. Reconfiguring Social Disclosure Obligations

A meta-regulatory approach to social disclosure obligations in corporate and securities law may not, consequently, be achieving its aims. Both its ability to correct corporate managers' behavior and its ability to equalize bargaining between corporations and stakeholders are likely not consistently being met. However, as it does offer a number of benefits, it should not be overlooked as a regulatory strategy. Still, the role of social disclosure obligations should nonetheless be primarily supplemental.

Confining social disclosure obligations to a supplemental role ensures it cannot be viewed by governments as a panacea to correct corporate-related social ills. Since evidence of their effectiveness is equivocal, it seems likely that if they

164. The study reports that in 2013, 39 percent of companies provided extensive commentary on environmental impact and 32 percent of companies provide extensive commentary on employee issues. See DELOITTE, *supra* note 93, at 33, 44.

165. Niamh M. Brennan & Doris M. Merkl-Davies, *Accounting Narratives and Impression Management*, in THE ROUTLEDGE COMPANION TO COMMUNICATION IN ACCOUNTING 109, 112 (Lisa Jack et al. ed., 2013); Reggy Hooghiemstra, *Corporate Communication and Impression Management – New Perspectives Why Companies Engage in Corporate Social Reporting*, 27 J. BUS. ETHICS 55 (2000); Rüdiger Hahn & Regina Lülfs, *Legitimizing Negative Aspects in GRI-Oriented Sustainability Reporting: A Qualitative Analysis of Corporate Disclosure Strategies*, 123 J. BUS. ETHICS 401 (2013); Pratima Bansal & Iain Clelland, *Talking Trash: Legitimacy, Impression Management, and Unsystematic Risk in the Context of the Natural Environment*, 47 ACAD. MGMT. J. 93 (2004).

166. Brennan & Merkl-Davies, *supra* note 165, at 1, 6; Hahn & Lülfs, *supra* note 165; Bansal & Clelland, *supra* note 163.

167. Hahn & Lülfs, *supra* note 163; WILLIAM L. BENOIT, ACCOUNTS, EXCUSES, AND APOLOGIES – A THEORY OF IMAGE RESTORATION STRATEGIES 74-79 (1995); Hooghiemstra, *supra* note 165, at 60-61.

168. Oloajo Aiyegbayo & Charlotte Villiers, *The Enhanced Business Review: Has It Made Corporate Governance More Effective?*, 2011 J. BUS. L. 699, 703 (2011).

are correcting corporate behavior, they are doing so only in an incremental manner. As a result, regulation of corporate interactions with social issues, such as human rights and the environment, requires the implementation of additional regulatory strategies—besides just disclosure obligations—to ensure the respect and protection of these issues.¹⁶⁹

Moreover, as a supplemental regulatory strategy, social disclosure obligations in corporate and securities law should occupy a well-defined and delineated space. They should not be overly broad, should bear a relationship to corporate objectives, and should be specific. This reflects both their origins as primarily a private law device with a supplemental public law role¹⁷⁰ and as a regulatory strategy which cannot, in and of itself, correct corporate-related social ills.

1. Limited and Related Scope

Since social disclosure obligations in corporate and securities law should only be given a supplemental role, they must be drafted carefully to prevent them from being overly broad. As a way of limiting the scope of the obligation, there should be a reasonable and proximate relationship between the social issue requiring disclosure and corporate objectives.

Under U.S. securities law, “materiality” defines the scope of the required disclosure of information, which requires issuers to disclose information “if there is a substantial likelihood that a reasonable person would consider it important” or it “alter[s] the ‘total mix’ of information made available.”¹⁷¹ Moreover, corporate objectives for U.S. corporations are mainly directed at maximizing shareholder profit.¹⁷² Thus, social disclosure obligations should require the disclosure of social policy information that is both material and bears a reasonable and proximate relationship to furthering shareholder profit.

Applying these standards to the Conflict Mineral Rule, it becomes apparent that the Rule’s materiality is questionable and it fails to conform to the need for a reasonable and proximate relationship to shareholder profit. In terms of materiality, investors’ interests in having corporations disclose information about conflict mineral usage appears to be mixed. In support of the Conflict Minerals Rule, investors representing just under \$200 billion in assets, signed a letter supporting the disclosure of conflict mineral information.¹⁷³ However, the U.S. Chamber of Commerce, the National Association of Manufacturers and the

169. See, for example, the important role for governmental regulation in changing corporate behavior in the oil industry. Frynas, *supra* note 160.

170. See discussion *supra* Section II.B.

171. SEC, REL. NO. SAB 99, SEC STAFF ACCOUNTING BULLETIN: NO. 99 – MATERIALITY (1999).

172. Hansmann & Kraakman, *supra* note 75; Smith, *supra* note 75.

173. SEC, INVESTOR STATEMENT REGARDING CONFLICT MINERALS FROM THE DEMOCRATIC REPUBLIC OF THE CONGO (Apr. 23, 2010), <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-54b.pdf>.

Business Roundtable, apparently representing industry and investor interests, brought an action to have the Rule nullified.¹⁷⁴ Therefore, while some investors believe the Rule elicits important information, others do not. It is thus unclear whether the ‘reasonable’ investor considers information pertaining to the use of conflict minerals as material.

The importance of whether a corporation’s use of conflict minerals is material to investors is particularly cogent since the Conflict Minerals Rule does not have a *de minimis* threshold.¹⁷⁵ As a result, even minimal use of a conflict mineral must be disclosed if it is “necessary to the functionality or production of that product.”¹⁷⁶ Thus, currently any instance in which a conflict mineral, which is necessary to the functionality or production of a manufactured product, is used – no matter how small or whether investors are interested in this information – must be disclosed, further complicating the materiality threshold.

At the same time, the Conflict Minerals Rule fails to bear a reasonable and proximate relationship to furthering shareholder profit. Instead, as the SEC has noted, legislators introduced the Conflict Minerals Rule primarily for humanitarian reasons.¹⁷⁷ While commentators recognize that securities laws can serve the public interest,¹⁷⁸ the public interest goals should be clearly related to the underlying goals of the legislation itself.¹⁷⁹ Thus, regulation prohibiting fraudulent disclosures serves the public interest by preserving the integrity of the public market, but it also fosters investor protection, one of the goals of securities legislation. Conversely, the Conflict Minerals Rule mandating disclosure on a corporation’s supplier chains in the DRC serves the public interest by preventing conflict in another country, but without any identifiable relationship to the goals of securities legislation.¹⁸⁰

The effects of the Conflict Mineral Rule highlight the problems with using corporate and securities law to regulate issues that clearly lie beyond their purview. While the Rule has brought a renewed awareness of the conflict in the DRC, it has also caused market distortions to the detriment of the local

174. *See* Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013).

175. Conflict Minerals, 77 Fed. Reg. 56274, 56295 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240, 249b).

176. *Id.* at 56364.

177. *Id.* at 56275 (noting the Rule was introduced for humanitarian reasons).

178. *See, e.g.,* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1204 (1999).

179. As the SEC has noted, its discretion to promulgate disclosure requirements is dependent on whether it believes that the information would be necessary or appropriate for the protection of investors or the furtherance of fair, orderly and informed securities markets or for fair opportunity for corporate suffrage. *See* Notice of Commission Conclusions and Rulemaking Proposals, Exchange Act Release No. 5627, 8 SEC Docket 73 (Oct. 14, 1975).

180. This is because it is unclear whether the Conflict Minerals Rule fosters investor protection. *See* Daniel M. Gallagher & Michael S. Piwowar, Comm’rs, SEC, *Joint Statement on the Conflict Minerals Decision* (Apr. 28, 2014), <http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541665582#.VRLBro6sUfE>; Nat’l Ass’n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014).

population. Corporations pulled out of the region altogether, resulting in armed groups seeking alternative sources of funding and causing the conflict mineral smuggling chain to be re-routed rather than stopped.¹⁸¹ Indeed, as a political problem, using corporate and securities law to address the issues in the DRC may have exacerbated problems for the Congolese rather than alleviate them. It could have also provided the impression that the problem is being “handled,” thereby discouraging further attempts at resolving it.¹⁸²

Limiting the scope of social disclosure obligations may alleviate some of the problems caused by the Conflict Minerals Rule. For example, in the UK, the requirement for corporations to disclose information on human rights violations is limited “to the extent necessary for an understanding of the development, performance or position of the company’s business.”¹⁸³ The use of the words “to the extent necessary” creates a natural *de minimis* threshold, noticeably absent in the Conflict Mineral Rule. This allows corporations to disclose only the amount of information that is relevant to the corporation’s development, performance or position, rather than every piece of human rights information. Not only does this reduce the amount of information the corporation must produce—saving the corporation money and time which could be better used on other activities—but it also allows the corporation to focus on the human rights issues that are the most pertinent to the functioning of the business.

A more limited scope for social disclosure obligations exists where those obligations have a closer relationship to the underlying goals of securities or corporate law. For example, disclosure obligations relating to greenhouse gas emissions,¹⁸⁴ a corporation’s CSR practices,¹⁸⁵ employment practices,¹⁸⁶ and climate change impact actions¹⁸⁷ are much closer related to the underlying goals of corporate or securities law than the Conflict Mineral Rule because they focus

181. *The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 130th Cong. 3-6 (2013); Laura E. Seay, *What’s Wrong with Dodd-Frank 1502? – Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* (Ctr. for Glob. Dev., Working Paper No. 284, 2012).

182. Representative Huizenga questioned whether passage of this law could lead to a sense of “Okay, we are done. We passed Section 1502. It is now being implemented. Whew. Good. That is off the table. Now we can walk away?” *The Unintended Consequences of Dodd-Frank’s Conflict Minerals Provision, Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 130th Cong. 31 (2013) (statement of Rep. Huizenga, Member, H. Comm. on Fin. Servs.).

183. Companies Act 2006, c. 46, § 414C(4), (7) (UK), http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf. See also Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, art. I, 2003 O.J. (L 178), for the EU Modernisation Directive, from which the UK legislation derives.

184. See, for example, *supra* notes 36, 46, 57, for the requirements in France, the UK, and the United States

185. See, for example, *supra* notes 37, 49, for the requirements in Denmark and India.

186. See, for example, *supra* notes 43-44, for the requirements in UK.

187. See, for example, *supra* note 38, for the requirements in Denmark.

on issues of clear and well-evidenced¹⁸⁸ interest to corporate stakeholders, including shareholders.

2. *Specificity*

In addition to ensuring that social disclosure obligations are limited in their ambit and relate to corporate objectives, these obligations should be drafted in a manner that elicits specific rather than generic answers. For instance, disclosure obligations that require corporations to disclose information on their employees or their community can be easily responded to by generic answers, given that they do not provide any guidance on the nature of the information they seek.¹⁸⁹ Moreover, even if the corporation provides information on these issues, it may not be information that is meaningful or that meets the spirit of the obligations. For example, one corporation, in relation to its disclosure obligations relating to community issues, listed its tax payments as a contribution to the community.¹⁹⁰

Legislators should thus draft disclosure obligations with a degree of specificity. This can be accomplished in a number of ways. One approach would be to break down the disclosure obligation into subcategories. For example, disclosure obligations under French law require corporations—under the heading of employment information—to disclose information about: the total number and distribution of employees by gender, age and geographical area; hiring and firing; remuneration and its evolution; collective bargaining agreements; health and safety conditions; and descriptions of training policies.¹⁹¹ Further subcategories of employment information could also include information on wages, parental leave programs, employee lawsuits and policies on work-life balance. As with employment information, other social disclosure obligations could similarly be broken down into subcategories in an effort to solicit more detailed information relating to each category.

A second approach would be to rely more on quantifiable data relating to social issues, rather than only narrative data. Standardization of disclosed information may prove successful in changing corporate behavior under disclosure rules relating to toxic chemicals. Standardization allows for

188. *See, e.g.*, Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6291 (Feb. 8, 2010) (discussing the impact of greenhouse gas emissions and climate change evidence on reporting companies).

189. *See, e.g.*, Companies Act 2006, c. 46, § 417(5) (UK), <http://www.legislation.gov.uk/ukpga/2006/46/section/417> (requiring certain disclosure to include “to the extent necessary for an understanding of the development, performance or position of the company’s business . . . information about . . . the company’s employees”).

190. VEDANTA RES., ANNUAL REPORT AND ACCOUNTS 2013 17 (2013), <http://www.vedantaresources.com/media/126374/vedantafy2013ar.pdf>.

191. Décret 2012-557 du 24 Avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale [Decree 2012-557 of April 24, 2012 Concerning Corporate Transparency Requirements Relating to Social and Environmental Matters], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Apr. 26, 2012, art. 1.

comparison of data and benchmarking across corporations, and corporate managers can therefore easily measure their performance leading to an understanding of the issue early on. Commentators argue that this ability to confront reality as well as the ability to compare information with competitors has prompted changes in corporate behavior.¹⁹²

Currently, social disclosure obligations mainly focus on narrative information, meaning that the information is more difficult to standardize and does not easily enable comparisons or benchmarking. There is, however, quantifiable information relating to social issues. For example, in terms of environmental issues, greenhouse gas emissions, carbon emissions, and energy consumption, are all quantifiable. Similarly, for employee issues, the average number of training hours per employee provided, the retention rate, the percentage of employee injuries or fatalities and the remuneration ratio of women to men for each employee are also quantifiable. Even for human rights, certain information is quantifiable including the number of employee training hours on human rights policies, the number and percentage of operations that have been subject to human rights reviews or impact assessments, the number of significant contracts that have undergone human rights screening, and the number of human rights grievances that have been filed and resolved through formal grievance mechanisms. While these quantifiable areas of the social issues need not replace narrative data, which may be necessary to flesh out the details of the quantifiable data or for areas which cannot be measured through numbers, they are more likely to elicit data which can be more easily measured, standardized and used to benchmark progress.

Using subcategories of social issues or relying more heavily on quantifiable social information helps corporations focus the information they are disclosing. By responding to specific inquiries, corporations are guided along the elements of the broadly-worded category and no longer have to self-determine what information on these issues they have to disclose. This deters the provision of generic answers.

Finally, a third approach—which could be used independently or in conjunction with one or both of the two earlier approaches—would be to provide informational guidance to corporations on completing social disclosure obligations. The SEC has previously employed this approach by providing interpretive guidance to corporations in completing their disclosure obligations relating to climate change and cybersecurity issues.¹⁹³ Several organizations in the UK have also provided similar forms of guidance.¹⁹⁴ Professional services

192. See, e.g., Karkkainen, *supra* note 156, at 295; Lowenstein, *supra* note 15, at 1342-45.

193. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010); Division of Corporation Finance, SEC, CF Disclosure Guidance: Topic No. 2 – Cybersecurity (Oct. 13, 2011), <https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm>.

194. See, e.g., ACCOUNTING STANDARDS BD., REPORTING STATEMENT: OPERATING AND FINANCIAL REVIEW (2006), <https://www.frc.org.uk/Our-Work/Publications/ASB/Reporting-Statement->

firm Deloitte has even provided samples of how corporations can properly adhere to their disclosure obligations, including in the context of social issues.¹⁹⁵ Informational guidance on where corporations may encounter human rights, environmental or other social policy issues; in what business context this information could become apparent, how this information could be material to investors, and how to incorporate these issues into pre-existing reporting requirements could be provided as a persuasive, but non-binding tool to assist corporations in completing disclosure requirements. By doing so, corporations could draw from professional guidelines to help make their disclosure more specific and thus more meaningful.

CONCLUSION

While likely not a panacea for curing corporate ills, there is value in using social disclosure requirements to promote social aims in the corporate context. These types of requirements may force corporations to acknowledge – perhaps for the first time – certain social policy issues within the business environment. This acknowledgement can lead corporate managers to incorporate social considerations into corporate decision-making with the potential effect of curbing corporate misconduct. The transparency provided by social disclosure requirements may also provide a platform for shareholders or other stakeholders to engage with corporations on these issues.

Nevertheless, by focusing on regulating informational disclosure of particular social policy issues rather than directly regulating the issues themselves, governments risk the possibility of not having *any* effect on social policy issues in the corporate context. In fact, social disclosure obligations do not offer any guarantees. Reliance on social disclosure obligations, exclusively or even primarily, as a regulatory strategy therefore carries potentially severe risks.

Social disclosure obligations are imperfect substitutes for direct regulation of corporate conduct on social policy issues. They do, however, offer promise as a complementary regulatory strategy. But as complements, their supplemental role should be underlined by ensuring that social disclosure obligations are limited in their ambit, are specific and relate to the legislative goals and objectives of corporate and securities laws.

Operating-and-Financial-Review-File.pdf; INT'L ACCOUNTING STANDARDS BD., IFRS PRACTICE STATEMENT MANAGEMENT COMMENTARY – A FRAMEWORK FOR PRESENTATION (2010), <http://www.ifrs.org/Current-Projects/IASB-Projects/Management-Commentary/IFRS-Practice-Statement/Documents/Managementcommentarypracticestatement8December.pdf>; INT'L INTEGRATED REPORTING COUNCIL, CONSULTATION DRAFT OF THE INTERNATIONAL <IR> FRAMEWORK (2013), <http://integratedreporting.org/wp-content/uploads/2013/03/Consultation-Draft-of-the-InternationalIRFramework.pdf>.

195. See generally DELOITTE, *supra* note 93.

While the search for the optimal basket of regulatory tools to ensure corporate alignment with social policy issues continues, social disclosure obligations offer a good—but far from perfect—alternative to traditional regulatory options. Their success, however, will only be realized by recognizing their limitations.