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Blair M. Warner

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* J.D. Candidate, Notre Dame Law School, 2015; B.S., International Business, Pepperdine University, 2009. Thanks to Professor Julian Velasco for his guidance, helpful comments, and engaging seminar class, and to the Spring 2014 Advanced Topics in Corporate Governance class for helping to spawn this Note topic (and title).

PLACING AL GORE ON THE BOARD: ACCOUNTING FOR ENVIRONMENTAL RISK IN THE CORPORATE GOVERNANCE MODEL

Blair M. Warner*

Introduction

Head to Coca-Cola's website today and you will find something unexpected—a position statement on climate change:

> Across the Coca-Cola system, we recognize that climate change may have long-term direct and indirect implications for our business and supply chain. As a responsible multinational company, we have a role to play in ensuring we use the best possible mix of energy sources, improve the energy efficiency of our manufacturing processes and reduce the potential climate impact of the products we sell.[1]

The company was not always this focused on climate change and sustainability initiatives. Coca-Cola's CEO, Muhtar Kent, explained to Forbes that sustainability was not always a part of the company's planning process—rather, it was "just a warm and fuzzy word in our corporate social responsibility report."[2] In order to genuinely fold sustainability into the company's corporate strategy and sharpen this "fuzziness," senior management realized they needed to create metrics that could quantitatively measure the success of sustainability initiatives and actually incorporate the company's sustainability strategy into its core business plan.[3] First, Coca-Cola picked three areas of focus to incorporate into its 2020 vision: water neutrality,[4] recycling, and managing its carbon footprint.[5] Particularly with water neutrality and recycling, the company's focus on the creation of specific metrics in order to quantitatively assess progress toward these goals is actually lowering Coca-Cola's cost of production and break-even points.[6]

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1. *Position Statement on Climate Protection*, Coca-Cola Co., http://www.coca-colacompany.com/position-statement-on-climate-protection (last visited Apr. 6, 2014).
2. Andrew L. Shapiro, *Coca-Cola Goes Green*, Forbes (Jan. 29, 2010, 4:35 PM), http://www.forbes.com/2010/01/29/muhtar-kent-coca-cola-leadership-citizenship-sustainability.html.
3. *Id.*
4. The term "water neutrality" refers to the concept of "returning as much water to the world as [Coca-Cola] uses." *Id.*
5. *Id.*
6. *Id.*

What is unique about Coca-Cola's strategy is that Kent considers all of this a critical part of corporate planning in order to maintain future business viability, rather than cabining these initiatives to a "sustainability report" or equivalent that lies outside the core business plan.[7] Why does Coca-Cola deem this a vital part of its business plan, while other multinational corporations ("MNCs") may not? Taking a step back, one must first address the concepts of "sustainability" and environmental risk assessment. As one scholar notes, sustainability involves an understanding of the premise that "earth's vital biophysical processes are characterized by uncertainty."[8] Because there is inherent uncertainty in assessing environmental risk, particularly climate change risk for MNCs,[9] corporations must make a choice regarding how much weight they will give this risk in their corporate strategies and business planning. The classic definition of sustainability is "providing for the needs of the present generation while not compromising the ability of future generations to meet their needs."[10] This Note seeks to analyze where sustainability falls within the shareholder ownership model of corporate governance, asking whether it is possible to reconcile the pursuit of "green" initiatives while staying true to the corporate principle of maximization of shareholder wealth.

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7. Coca-Cola's CEO has raised three points that assisted Coca-Cola in shifting to a successful sustainability strategy: "[Sustainability must] be embedded in the business plan. [Next], you've got to have the right metrics around it; it's got to be measurable. And then it's got to be beneficial from a financial perspective." *Id.* For a discussion of the dangers of disingenuous sustainability measures that are not successfully welded to corporate structure, often referred to as "greenwashing," see *infra* Section III.B.

8. Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2119 (2005).

9. This Note is limited primarily to the consideration of MNCs, usually large public corporations spanning multiple nations and markets, due to their global influence and much greater NGO pressure to account for stakeholders other than shareholders, *see infra* Section I.B. This Note recognizes that there is much less pressure on domestic corporations to account for environmental risks such as climate change.

> North America has the lowest percentage of companies changing their business models as a result of sustainability, as well as the lowest percentage of companies reporting profits after changing their business models . . . because many demands of sustainability have not taken hold in the region or spurred companies to translate pressures related to sustainability into profitable incentives.

Avery Fellow, *One-Third of Companies Report Profits from Sustainability: Survey*, BLOOMBERG (Feb. 6, 2013, 6:02 PM), http://www.bloomberg.com/news/2013-02-06/one-third-of-companies-report-profits-from-sustainability-survey.html.

10. Andrew W. Savitz, *What U.S. Environmental Lawyers Need to Know About Sustainability*, 17 NAT. RESOURCES & ENV'T 98, 98 (2002) (internal quotation marks omitted). Gina Iacona also provides an inclusive definition of sustainability:

> What is sustainability? It's more than environmentalism. It's about living and working in ways that don't jeopardize the future of our social, economic and natural resources. In business, sustainability means managing human and natural capital with the same vigor we apply to the management of financial capital. It means widening the scope of our awareness so we can understand fully the "true cost" of every choice we make.

Gina Iacona, Comment, *Going Green to Make Green: Necessary Changes to Promote and Implement Corporate Social Responsibility While Increasing the Bottom Line*, 26 J. LAND USE & ENVTL. L. 113, 113–14 (2010) (quoting *Sustainable Links*, SUSTAINABLE PITTSBURGH, http://www.sustainablepittsburgh.org/susDev_links.html (last visited Mar. 21, 2015)).

First, Part I lays the foundation of the need for environmental risk management by addressing the lack of internalization of environmental risk, growing pressure on MNCs by nongovernmental organizations ("NGOs") to make environmental disclosures, and finally outlining the challenges of uncertainty of environmental risk. Part II, by first laying out the traditional corporate governance model, makes the case for a "sustainability expert" on the board of directors as an effective method of working sustainability into the shareholder ownership model while still accounting for the shareholder wealth maximization principle. The sustainability expert on the board has the advantage of being a logical extension of the Sarbanes-Oxley Act's ("SOX") financial expert and can act as an important weapon against groupthink and systemic underestimation of risk by the board and management. Part III posits that the sustainability expert model is superior to the corporate social responsibility ("CSR") conception because it appropriately accounts for the fact that individuals, not corporations, have "moral" duties, and also addresses the problems of "greenwashing" and the model's lack of faithfulness to the traditional shareholder ownership model of corporate governance. Part III also addresses the "separationist approach," in which corporations do nothing until mandatory regulation so requires. This approach takes a shortsighted view of profitability, ignores the capacity of sustainability initiatives to lead to cost reductions, and does not account for the potentially significant corporate benefit of helping to shape regulation or stave it off altogether through proactive voluntary action.

I. Background and Laying the Foundation

A. *Lack of Externality Internalization and the Growing Need for Environmental Risk Management*

Traditional economic theory supports the idea that environmental risk is underestimated in the corporate model. The ideal "efficient market" contains efficient production and consumption that results in a competitive economy.[11] However, there are recognized "market failures" that act as exceptions to these assumptions—in the environmental context, these failures include externalities and information asymmetry.[12] An environmental externality is created when a corporation fails to internalize the full cost of an activity—a commonly cited example of this is pollution.[13] Information asymmetry also compounds market failure to fully account for environmental risk: "One central assumption in market economics is that in order to function efficiently, participants must have full information. When information is not complete and accurate, stakeholders and shareholders alike are unable to

11. Allison M. Snyder, Note, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer?*, 2007 Colum. Bus. L. Rev. 565, 577 (2007).

12. *Id.*

13. *See id.* at 577–79. When a corporation pollutes, the benefit is usually realized to the company through the production it results in, while the cost of the pollution is borne by the surrounding community.

make decisions that are in their best interests."[14] Thus, due to the market's failure to provide as much information as it should and corporations' failure to fully internalize the costs of production, environmental risk is underestimated by corporations and consumers alike.

B. *Growing Pressure by International Entities on MNCs to Make Environmental Disclosures*

As the world becomes increasingly interconnected and NGOs continue to grow in number and influence,[15] pressure on MNCs in foreign countries to disclose nonfinancial information continues to rise. Influence on corporations in the international context is attributed to the view, not nearly as prevalent domestically, that there is an obligation to preserve the natural environment for future generations.[16] Additionally, NGOs are increasingly able to influence MNCs via direct consumer and market pressure.[17] Coca-Cola provides an example of this: a Canadian anti-Coca-Cola NGO named the Polaris Institute was able to enact a comprehensive guide detailing the environmental and social history of the company along with large consumer-focused PR campaigns that helped lead to contract cancellations and university boycotts of Coca-Cola.[18] Particularly in the climate change context, MNCs are viewed as the "global superpower" with the ability, and to some the duty, to make environmental disclosures and reduce environmental impact globally.[19]

Internationally, a shift from "government to governance" is occurring to address complex social issues such as the environmental responsibilities of MNCs.[20] Rather than being content with a top-down, command-and-control approach as the international environmental model of regulation, individuals—through NGOs—are pushing from the bottom up for a new, less rigid model of governance. Increasingly,

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14. *Id.* at 577 (footnotes omitted).

15. *See, e.g.*, UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999, at 26 (1999), *available at* http://hdr.undp.org/sites/default/files/reports/260/hdr_1999_en_nostats.pdf (noting graphically that the number of NGOs has risen exponentially within the last century but particularly from 1964 on—from 176 in 1909 to 28,900 in 1993). One source indicates that this UN Development Report estimate is now up to 40,000. Sally Leverty, *NGOs, the UN and APA*, AM. PSYCHOL. ASS'N, http://www.apa.org/international/united-nations/publications.aspx (last visited Mar. 28, 2014).

16. *See* Kysar, *supra* note 8, at 2118 ("Perhaps the most widely accepted meaning of sustainable development is that there is some obligation to consider and protect the interests of future generations in relation to the natural environment. This responsibility usually is translated as a 'need to preserve natural resources for the benefit of future generations.'" (quoting PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 253 (Cambridge Univ. Press, 2d ed. 2003)).

17. *Id.* at 2152.

18. *Id.* Also of note in recognizing the influence of NGOs is a hedge fund that was formed specifically to profit off of declines in Coca-Cola's stock. *See* Thomas M. Kostigen, *Hedge Funds Banking on Social and Moral Issues*, WASH. POST, Dec. 25, 2004, at D7, *available at* http://www.washingtonpost.com/wp-dyn/articles/A25215-2004Dec24.html.

19. Perry E. Wallace, *Global Climate Change and the Challenge to Modern American Corporate Governance*, 55 SMU L. REV. 493, 494 (2002).

20. Kysar, *supra* note 8, at 2154 (quoting Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1018 (1997)).

self-regulation and market elements are influencing international public policy—often called "market-based regulation."[21] Examples of this include "triple bottom line reporting" within capital markets through the Equator Principles,[22] eco-labeling in consumer markets,[23] and fair trade sourcing.[24] With regard to climate change, a prominent example of this market-based regulation is the Business Environmental Leadership Council ("BELC") of the Pew Center on Global Climate Change. According to the group's website, "[s]tarting with 13 companies, the BELC is now the largest U.S.-based group of [Fortune 500] corporations focused on addressing the challenges of climate change and supporting mandatory climate policy."[25]

This discussion and these examples stress the importance of United States corporations choosing to engage in business abroad complying with these international environmental regulatory pressures and regimes.[26] While compliance may be voluntary in a technical sense, the sheer influence of NGOs and (as will be discussed *infra*) the evidence of competitive advantage due to sustainability strategy leaves MNCs with every incentive to evaluate the state of sustainability strategy in their corporate governance frameworks.

C. *The Challenge of Environmental Uncertainty vs. Increased Profit from Successful Sustainability Strategy*

1. The Challenge of Uncertainty of Risk

It is a common maxim of corporate governance that the more a firm is able to identify its risk exposure, the better it will be able to hedge this risk.[27] Corporations face prominent strategic and risk management challenges in working sustainability and environmental risk into a viable part of corporate strategy due to the inherent uncertainty

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21. *See id.* at 2155–56.

22. Andrew Hardenbrook, Note, *The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility*, 40 VAND. J. TRANSNAT'L L. 197, 197 (2007) ("The Equator Principles are a set of voluntary environmental guidelines created to manage environmental degradation that results from large-scale developmental projects in the Third World.").

23. Kysar, *supra* note 8, at 2156–57.

24. *See Definition of Fair Trade*, WORLD FAIR TRADE ORG., http://www.wfto.com/fair-trade/definition-fair-trade (last visited Mar. 20, 2015); *What Is Fair Trade?*, FAIR TRADE FED'N, https://www.fairtradefederation.org/what-is-fair-trade/ (last visited Mar. 20, 2015).

25. *Business Environmental Leadership Council (BELC)*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, http://www.c2es.org/business/belc (last visited Mar. 28, 2014).

26. *See, e.g.*, Fellow, *supra* note 9 (noting that nearly half of surveyed companies have modified their business models due to sustainability considerations and that "companies in developing countries are more likely to change their business models due to sustainability, possibly due to challenges arising from resource scarcity and population growth in those regions").

27. Ronald J. Gilson & Charles K. Whitehead, *Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets*, 108 COLUM. L. REV. 231, 243–44 (2008).

of environmental issues.[28] This is compounded by the fact that the typical economic concerns of a corporation are usually on a much different time scale than environmental considerations,[29] and thus are not properly accounted for.

Uncertainty does not mean that corporations should sit back and wait for regulation—institutional investors and consumers, particularly in the international sphere, want to know where an MNC sits in regard to its environmental and climate change risk as a part of their investment risk calculations.[30] And for some at least, uncertainty is not an excuse for inaction,[31] as well as the fact that certain specific types of environmental risk to corporations are quite certain and pose shorter-term risks.[32] One of the most prevalent of these short-term risks, which many corporations view as a "critical sustainability trend" in a time span of just the next three years, is energy scarcity and price volatility.[33] A survey from 2012 of large corporations indicated that almost seventy-five percent of surveyed corporations projected energy costs increasing over a five-year span.[34]

With climate change risk as an example, corporations can assess whether it is prudent to voluntarily reduce their carbon emissions both as a business strategy and in order to get ahead of future regulation.[35]

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28. *See* Porcher L. Taylor III & Harris L. Kay, *A Green Board as a Climate-Change Imperative: Appointing a Climate-Change Expert to the Audit Committee*, 18 U. BALT. J. ENVTL. L. 215, 215–17 (2011).

29. *See* Geoffrey Heal, *Markets and Sustainability*, *in* ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT: THE UNITED STATES, THE EUROPEAN UNION, AND THE INTERNATIONAL COMMUNITY 410, 422–24 (Richard L. Revesz et al. eds., 2000) (discussing that discounting in the environmental area has been controversial in economics due to its much longer time horizon than business planning, noting that "[c]orporations and governments normally look at most decades ahead, rather than centuries").

30. *See, e.g.*, Stephen Bernhut, *Corporate Climate Change*, CPA CANADA (Jan.–Feb. 2009), http://www.camagazine.com/archives/print-edition/2009/january-february/features/camagazine5372.aspx ("[I]nstitutional investors . . . want to know, for example, if a company is managing its carbon [offsetting strategies and risk] the way it should be. And they're only interested in it from an investment point of view: does the way a company manages its carbon [risk] make it a safer investment or a riskier one?" (quoting another source) (internal quotation marks omitted)). The European Union has already begun moving toward regulation requiring increased environmental disclosures and reporting as a tool toward increasing sustainable development, and the United Kingdom has implemented increased reporting as part of an "enlightened shareholder" approach. Kysar, *supra* note 8, at 2158 & n.229; *see also infra* notes 81–83 and accompanying text. The EU's movement may provide a reliable indication of the direction that U.S. regulation will ultimately be headed.

31. An example of this discussed in Bernhut's article is Deloitte's Global Climate Change Practice, which works with corporations to develop a range of cost scenarios ahead of various possible future regulatory regimes. Bernhut, *supra* note 30.

32. *See* Fellow, *supra* note 9 (noting that a corporate survey indicated that almost 80 percent of corporate respondents indicated that energy price volatility and scarcity was a critical concern over the next three years).

33. *Id.*

34. Derek Top, *Companies Amp Up Energy Concerns in Era of Roiling Markets*, GREENBIZ (June 13, 2012, 8:00 AM), http://www.greenbiz.com/blog/2012/06/13/corporate-energy-users-eye-efficiency-renewables-energy-mix (reporting that almost four in ten corporations surveyed "expect [energy cost] increases of at least 15 percent").

35. Fellow, *supra* note 9.

One method of more correctly accounting for the valuation of sustainability measures used by economists is discount utility maximization, in which the present value of current and future utility from consumption is discounted.[36] This results in an "optimal consumption path": a constant rate of consumption (in an idealized society) where utility is uniformly discounted at the same rate and markets are competitive and contain no externalities. Additionally, society can set the optimal consumption path at a level that does not allow for discounted utility to decrease over time[37]—adding this condition to the discount utility maximization and optimal consumption path principles thus leads to an economic model of sustainability.[38] Incorporating measures like these into corporate planning and analysis can assist MNCs in combatting uncertainty in assessing environmental and sustainability risk.

2. Empirical Evidence of Profit Increases and Competitive Advantage by Implementing Sustainability into Corporate Strategy

While this is not without debate, evidence exists that corporations may benefit by implementing sustainability into corporate strategy.[39] Sustainable development shifts the misconception that shareholder profit maximization and environmental awareness on the part of a company are mutually exclusive, opposing goals.[40] Bob Willard, a sustainability expert who spent much of his career in IBM management and now holds a Ph.D. in sustainability, has looked at over two hundred case studies in making the following analysis of sustainability strategies being implemented by large corporations:

> My research shows that by integrating sustainability strategies into the fabric of their business, large companies can increase profit by

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36. Kysar, *supra* note 8, at 2120–21.

37. *Id.* at 2121.

38. *See id.* at 2120–21.

39. *See, e.g.*, Robert G. Eccles et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance* (Harv. Bus. Sch., Working Paper No. 12-035, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964011 (finding that organizations that have institutionalized sustainability via formalization on the board and internal metrics that can more accurately report on the effectiveness of measures implemented show better performance than low sustainability firms, using both stock market and accounting rates of return); Brian W. Jacobs et al., *An Empirical Investigation of Environmental Performance and the Market Value of the Firm*, 28 J. OPERATIONS MGMT. 430, 430, 440 (2010) (finding statistically significant positive market reactions for particular types of environmental announcements, including ISO 14001 certification—in which corporations implement a framework for internal environmental management systems—and neutral market reactions overall for voluntary corporate environmental initiatives and environmental awards and certifications).

40. Iacona, *supra* note 10, at 113–14; *see also* Ram Nidumolu et al., *Why Sustainability Is Now the Key Driver of Innovation*, HARV. BUS. REV., Sept. 2009, at 57–58, *available at* http://hbr.org/2009/09/why-sustainability-is-now-the-key-driver-of-innovation/es ("Executives behave as though they have to choose between the largely social benefits of developing sustainable products or processes and the financial costs of doing so. But that's simply not true.").

> a minimum of 38% over five years, and small and medium-sized companies can increase their profit by a minimum of 66% in the same time frame. Being socially and environmentally responsible does not impede business success; it accelerates it by avoiding risks and adding to the bottom line.[41]

Willard further adds that sustainability measures have commonly suffered from being calculated too narrowly—for example, corporations have often only looked at savings to their water and energy bills. He advocates that benefits to a company's profits come in the form of reduced human resources costs such as recruiting and attrition, increased employee productivity, increased profits directly as a result of positive customer response to sustainability innovation, increased risk assessment and planning, and even savings such as better insurance and borrowing rates.[42] A working paper by a group of scholars at Harvard Business School, for example, has found similar results. First, the group classified a group of "[h]igh [s]ustainability" firms—firms that voluntarily adopted sustainability policies prior to 1993, and "[l]ow [s]ustainability" firms—companies that had adopted almost no sustainability policies.[43] They found that these high sustainability companies were more apt to be long-term oriented,[44] tended to formalize accountability for these sustainability policies through an official board committee and make the board the responsible party for sustainability, tied executive compensation to broader metrics such as environmental perception, and provided for more comprehensive, broader metrics to quantify these sustainability policies.[45] These high sustainability firms also outperformed low sustainability firms over the eighteen-year measurement period using both stock market and accounting profit metrics.[46]

While these studies paint a positive picture of the profitability of sustainability measures, it bears recognition that there are also many corporations that experience cost increases from implementation. In one study, one-third of companies reported profits from sustainability efforts, while two-thirds of companies are either not profiting or are losing money.[47] Nonetheless, it is difficult to assess the profitability of sustainability measures without being receptive to a broader view of the benefits associated with their execution, in part because the implemen-

41. Bernhut, *supra* note 30 (quoting Bob Willard).

42. *See id.*; *see also* Taylor & Kay, *supra* note 28, at 239–40 (noting that genuine commitment to sustainability within a corporation can lead to increased employee retention and morale that can help a company by "accelerating recession recovery and . . . profitability").

43. Eccles et al., *supra* note 39, at 1, 3.

44. For a discussion of the idea that corporations must take a longer-term, broader view of sustainability in order to remain viable, see generally Robert Sprague, *Beyond Shareholder Value: Normative Standards for Sustainable Corporate Governance*, 1 WM. & MARY BUS. L. REV. 47 (2010).

45. Eccles et al., *supra* note 39, at 1–4.

46. *Id.* at 4.

47. *See* Fellow, *supra* note 9.

tation of policies can create up-front costs with a delayed return.[48] This is a reason why corporations must be cognizant of the importance of specific metrics in order to accurately assess costs and cost savings associated with sustainability policy.[49] Failure to implement metrics with the ability to assess failure and success is a key issue for sustainability committees that are already in existence.[50] A broader understanding of the savings associated with sustainability initiatives comes in the form of decreased waste management and energy costs, reduction in risk, improved brand image and consumer approval,[51] and increased employee retention and talent recruiting ability,[52] just to name a few.

Additionally, evidence is surmounting that sustainability initiatives act as a gateway into innovations that give corporations a distinct competitive advantage.[53] Interface, Inc. provides a case study of this occur-

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48. Iacona, *supra* note 10, at 123 (recognizing the dilemma of short-term costs versus long-term benefits, stating that "companies may have to choose more expensive production techniques and resources to protect the environment, both of which lower the bottom line by increasing operating costs").

49. By way of example, at one facility IBM was able to calculate an increase in its output by 33 percent while reducing water and energy costs by $3 million per year. Peyton Fleming, *A Race Toward Sustainability—and Profits: New Report Delivers Powerful Message and Roadmap for Companies*, CERES (Mar. 11, 2010), http://www.ceres.org/press/press-releases/a-race-toward-sustainability-and-profits-new-report-delivers-powerful-message-and-roadmap-for-companies.

50. *See* Jayne W. Barnard, *At the Intersection of Corporate Governance and Environmental Sustainability*, 2 WM. & MARY BUS. L. REV. 207, 215 (2011) (discussing a corporate board survey in which "38.2 percent of respondents reported they 'do not currently have a system in place for measuring progress made in their social and environmental activities[,] 32.4 percent do not assess the impact of such activities on the organization's financial performance,'" and over 60 percent do not incorporate sustainability metrics into their executive compensation policies) (quoting Matteo Tonello, *Sustainability in the Board Room*, THE CONFERENCE BD. 1, 10–11 (2010), *available at* http://ssrn.com/abstract=1626050)).

51. *See, e.g.*, Iacona, *supra* note 10, at 123 (positing that many corporations have recognized that environmental responsibility is requisite to a "positive public reputation" and citing a survey indicating that "'the more . . . environmentally responsible a company is, the more likely [consumers] are to purchase the company's products or services'" (quoting MICHAEL KERR ET AL., CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 49 (2009))).

52. *See, e.g.*, Taylor & Kay, *supra* note 28, at 238, 240 ("[C]ompanies that pursue sustainability may find it easier to hire and retain talent, as recent research suggests that 75% of workforce entrants in the U.S. consider social responsibility and green commitment as significant factors in selecting employers."); Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 652 & n.112 (2009) (citing sources empirically supporting the proposition that social responsibility initiatives can "improve [a corporation's] attractiveness as an employer").

53. Nidumolu et al., *supra* note 40, at 57–58.

> We've been studying the sustainability initiatives of 30 large corporations for some time. Our research shows that sustainability is a mother lode of organizational and technological innovations that yield both bottom-line and top-line returns. Becoming environment-friendly lowers costs because companies end up reducing the inputs they use. In addition, the process generates additional revenues from better products or enables companies to create new businesses. In fact, because those are the goals of corporate innovation, we find that smart companies now treat sustainability as innovation's new frontier.

Id.

rence: the company's founder, Ray Anderson, implemented a "radical industrialism" vision that challenged the company to eliminate its environmental impact by 2020 despite its placement within the carbon and oil-laden carpeting industry.[54] Existing technology did not provide an efficient method for cutting carpeting tiles without producing a large amount of waste, so Anderson tasked engineers to come up with their own solution directly rather than looking to the industry and its suppliers for a solution. Borrowing technology from NASA, Interface created a new cutting machine that reduced trimming waste by eighty percent.[55] And this is just one of the intriguing innovations that Interface has created, all of which have led to its long-term profit growth and industry leadership in tandem with significant environmental impact reductions.[56] In sum, while corporations may shy away from the large costs of implementing sustainability initiatives and investing in environmental innovation today, evidence exists that profits as well as long-term benefits from innovation such as competitive advantages[57] may inure to corporations who choose to get ahead of future environmental and climate change regulation by authentically working it into their corporate strategies. The barriers to implementing sustainability initiatives may also be reduced even for unprofitable corporations if a broader view of the costs and benefits associated with proposed changes is adopted.[58]

II. Placing Sustainability Within the Corporate Governance Model

A. *The Traditional Corporate Governance Model*

In the Berle and Means traditional ownership model of corporate governance, ownership and control of a corporation are separated: "[T]he shareholders own the corporation, but the board of directors and management control the corporation."[59] Logically, this theory meant that directors functioned as agents or trustees of the shareholders, and this led to the foundational "shareholder wealth maximization"

54. Peter Vogel, *Interface: How Our Engineers Slash Massive Waste, Emissions*, GreenBiz (Mar. 17, 2014, 5:45 AM), http://www.greenbiz.com/blog/2014/03/17/interface-europe-sustainability-engineering-innovation.

55. *Id.*

56. *Id.*; Lorna Thorpe, *Interface: Achieving the Impossible*, The Guardian (May 30, 2012, 7:02 AM), http://www.theguardian.com/sustainable-business/best-practice-exchange/interface-achieving-the-impossible.

57. It should be noted that even if a corporation simply implements a sustainability measure as part of the status quo within an industry rather than achieving a competitive advantage as a first-mover, if this change leads to decreased waste or energy costs or savings in one of the forms previously discussed, then this can still present a corporation with a net gain over not implementing the measure at all. *See supra* notes 42 & 51 and accompanying text.

58. *See supra* notes 42 & 51 and accompanying text.

59. Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law Via an Aristotelian Understanding of Ownership*, 34 J. Corp. L. 247, 253 (2008).

norm of corporate law.[60] More progressive theories followed—most prominently the stakeholder conception of corporate law[61] and the "nexus of contracts"[62] approaches. While acknowledging these other conceptions of the corporate model, this Note will use the traditional corporate framework in addressing where the proper place for sustainability lies.

The Michigan Supreme Court powerfully articulated the traditional conception of the role of directors and the limits of their discretion in the famous case of *Dodge v. Ford Motor Co.*[63] The court held that because the purpose of the corporation is to create profit for shareholders, although directors have discretion in pursuing this purpose, this discretion "does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."[64] The challenge then is to work sustainability into the ownership model without running afoul of this structural limitation as articulated by *Dodge*.

As already recognized in Part I, a narrow conception of "profits" both structurally—in terms of a corporation's balance sheet[65]—as well as temporally[66] leads to the misguided perception that sustainability does not fit within the corporate model. But operating under the premise that sustainability and environmental risk considerations may lead to both increased profits and innovation advantages for a corporation, thus increasing its bottom line, sustainability is properly folded into the board of directors under the traditional ownership model.

B. *The "Sustainability Expert"*

The last ten years in corporate law have seen an increase in the call for director expertise on the board,[67] and the increasing demand—particularly internationally—for corporations to address climate change, as well as environmental and natural resources risks necessitates the need for a "sustainability expert" on the board of directors. DuPont has been credited with the first implementation of a green

60. *See id.* at 248–49 (defining the "shareholder wealth maximization" norm as one "under which boards of directors are charged primarily with maximizing shareholder interests (traditionally understood as the equivalent of maximizing shareholder wealth)").

61. *Id.* at 255 (defining the stakeholder model as one that was first articulated by Merrick Dodd, who argued that "corporate officers and directors 'serve as trustees for the corporate enterprise rather than for individual shareholders,' and thus may 'legitimately use corporate resources to address the interests of other constituents and behave in a socially responsible manner'" (quoting Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Shareholder Rhetoric On Corporate Norms*, 31 J. CORP. L. 675, 676 n.2 (2006))).

62. *Id.* at 249, 258–59 (noting the creation of this approach by Michael Jenson and William Meckling in 1976, in which "*all* of a corporation's relationships—both internal and external—[are] contractual in nature," with directors and officers still being treated as agents of the shareholders).

63. 170 N.W. 668 (Mich. 1919).

64. *Id.* at 684.

65. *See supra* text accompanying notes 40–58.

66. *See supra* text accompanying notes 36–37.

67. Taylor & Kay, *supra* note 28, at 220.

board in 1989, with its CEO creating a "Board-level Environmental Policy Committee" that eventually incited a green-board movement.[68] Early environmental committees were often created in response to a scandal or congressional pressure on a particular industry and focused on monitoring improvements and demonstrating that corporate leadership was genuinely considering environmental impacts.[69] These committees have evolved into "sustainability committees" today, created purposively in order to consider environmental risk, demonstrate corporate commitment to sustainability, or analyze potential cost reductions or profit increases that may be attained in the environment arena.[70] There is some evidence that sustainability committees may be on the rise due to recent federal regulations as well, including guidance from the SEC encouraging increased disclosure on climate change risk.[71]

The "sustainability expert" conception envisions a sustainability expert on the board of directors, similar to the accounting expert required by SOX for public corporations of a certain size.[72] This "sustainability expert" approach is a broader adaptation of Porcher L. Taylor III and Harris L. Kay's approach for the implementation of a green board through a climate change expert.[73] Taylor and Kay envision this expert as being an independent director serving within the now quite-important audit committee.[74] Broadly, this independent expert would help enhance the board's understanding of climate change risk, help shield directors from derivative suit liability under the business judgment rule (which Taylor and Kay posit could be a higher standard than normal down the road for climate change-related decisionmaking), and act as a "devil's advocate" in helping to diminish any board groupthink related to climate change.[75]

Taylor and Kay's conception of a green expert on the board should not be limited to climate change, however. A "sustainability (or green) expert" would take on the role of critically examining all of the environ-

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68. *Id.* at 232. Taylor and Kay go on to provide examples of successful carbon and sustainability-savvy boards that have achieved recognition and success, particularly for their high level of engagement and leadership, in these areas. *Id.* at 232–34.

69. Barnard, *supra* note 50, at 210.

70. *Id.* at 210–11.

71. *See* Commission Guidance Regarding Disclosure Related to Climate Change, 17 C.F.R. §§ 211, 231, 241 (2010); *see also* Barnard, *supra* note 50, at 211 n.14 ("[T]he SEC recently announced a requirement for enhanced disclosure on risk management practices at the board level (for example, Regulation S-K Item 407(h))"). Down the road, the next logical step for the SEC could be to move from voluntary encouragement to mandatory compliance.

72. *See infra* Section II.D.

73. *See* Taylor & Kay, *supra* note 28, at 219–20.

74. *See id.* ("[P]ractically every corporation needs to adopt board expertise as a new best corporate governance practice, to include the recruitment and appointment of a climate change or [greenhouse gas] management expert as an independent director to serve at the board's center of gravity: the audit committee." (footnotes omitted)). Taylor and Kay aptly characterize the audit committee as the "boardroom nerve center." *Id.* at 221.

75. *Id.* at 221–22, 224–25.

mental risk a corporation faces—this could encompass climate change, reliance on fossil fuels, natural resources, efficiency considerations, future regulatory regimes—anything within a given corporation's purview. Additionally, a "green committee" within the board, of which the sustainability expert would be the chair, could make recommendations to executive management, ensuring that environmental risk is accounted for appropriately and that corporate strategy takes environmental innovation into account. As will be articulated in the next Section, this fits squarely within the mandate of the business judgment rule and a director's duty to be informed, in addition to being beneficial to a corporation's profits and fostering innovation as has been previously discussed.[76]

Furthermore, a senior manager such as a "chief sustainability officer" is not enough to successfully reconcile sustainability with shareholder wealth maximization. Not all top-level executives view environmental risk as a concern worthy of much consideration, and it is highly likely to be underestimated by senior management.[77] Taylor and Kay analogize the lack of environmental risk management to the risk management failures in large financial institutions leading up to the 2008 financial crisis.[78] Managers are limited by the shareholder wealth maximization principle and the significant pressure this places on them to more narrowly pursue short-term profits, rather than viewing this goal with a broader lens that accounts for the profit and innovation that may be achieved through genuinely implementing sustainability into corporate strategy. By implementing a sustainability expert at the director level, an additional level of insulation is added from the pressure of narrower, short-term wealth maximization at the expense of broader sustainability strategy.[79]

Of note in this conception is the role and views of shareholders as well. What if shareholders do not react positively to the board and management's consideration of sustainability strategy? Relying on the premise that access to information, accountability, and disclosure is central to upholding the shareholder wealth maximization principle and reducing agency costs, "[i]ssues that are of significant interest to customers, to employees, to suppliers and to society more widely are, or

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76. *See supra* subsection I.C.2. While this is not the focus of this Note, other scholars—particularly those advocating for the stakeholder conception of corporate governance—advocate for broader stakeholder considerations than just environmental and sustainability initiatives (e.g., human rights accountability). This Note acknowledges that recognition of a green board could create a "slippery slope" argument for the addition of other types of "experts" (i.e., a human rights expert) to the board, but asserts that this formulation of a sustainability expert on the board is unique in that it is a part of corporate profitability rather than being purely a part of corporate philanthropy. Wholly altruistic environmentally beneficial actions by a corporation could, of course, fall under the philanthropy umbrella rather than the competitive sustainability strategies discussed and advocated in this Note.

77. *See, e.g.*, Taylor & Kay, *supra* note 28, at 225–26 (noting the "risk underestimations" of climate change in particular).

78. *Id.*

79. *See generally id.*

will very likely become, matters of concern for shareholders too."[80] The UK's relatively new environmental regulations, for example, require broad environmental disclosure based on the "enlightened shareholder theory"[81]—a recognition that environmental risks may affect a corporation's profitability and that these risks should be disclosed to shareholders.[82] Additionally, a growing number of shareholder proposals in the United States focusing on environmental, social, and corporate governance disclosures (second in volume only to corporate governance proposals in 2012) may serve as an indication of shareholder interest in this area.[83] Thus, increasing shareholders' access to information and education regarding the sustainability initiatives a corporation is implementing and *why* it is adopting them is important for increasing shareholder approval and support for this formalized role on the board.[84] As will be discussed *infra* in Section E, placing this role within the board also serves as a weapon against groupthink both on the board and by management.[85]

Admittedly, this idea is not one that may be successful or realistic for every corporation and downsides to this conception are present. Professor Barnard recognizes that each additional committee the board contains spreads more thinly the time that directors may devote to board activities (and directors serve on a part-time basis to begin with).[86] Furthermore, directors not affiliated with the sustainability expert or committee may not consider environmental risk at all after believing that this is no longer their concern: "Balkanizing the board, in other words, may make the majority of directors less rather than more attentive to sustainability issues."[87] In what may almost be characterized as the inverse of groupthink,[88] placing faith in a sustainability expert and committee may give a false sense of security to shareholders that environmental risk is being adequately assessed and accounted for as well.[89] Nonetheless, as previously discussed, placing sustainability and environmental risk consideration in the purview of directors, rather than a corporation's officers, serves to provide an additional level of insulation from short-term profit maximization pressures that

80. U.K. DEP'T OF TRADE & INDUS., THE OPERATING AND FINANCIAL REVIEW WORKING GROUP ON MATERIALITY: A CONSULTATION DOCUMENT 15 (2003), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/cld/ofrwgcon.pdf.

81. *See* Kysar, *supra* note 8, at 2158 n.229.

82. *Id.*

83. Mikhail Reider-Gordon et al., *Corporate Social Responsibility*, 47 INT'L L. 183, 187–88 (2013).

84. U.K. DEP'T OF TRADE & INDUS., *supra* note 80, at 15 ("If there is the potential, for example, for the way the company manages a particular environmental challenge to affect, directly or indirectly, significant numbers of people and thus affect its reputation, this is clearly relevant to shareholders because of the likely consequential effect on profitability and hence on shareholder returns.").

85. *See infra* Section II.E.

86. Barnard, *supra* note 50, at 220.

87. *Id.*

88. *See infra* Section II.D.

89. Barnard, *supra* note 50, at 220–21.

are particularly felt by management,[90] as well as additional reasons for this conception that will be considered in turn. Next, a look at the current state of directors' fiduciary duties to shareholders under current Delaware jurisprudence may provide hints as to what the future may hold for directors in regard to environmental risk.

C. *Accounting for Directors' Fiduciary Duties*

Delaware's standard of review in determining whether director decisionmaking has violated the duties of due care and loyalty owed to the shareholders is the deferential business judgment rule, in which "a presumption [exists] that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[91] Absent evidence demonstrating to the court an abuse of this decisionmaking discretion, the court will not interfere with the business decisions of a corporation.[92]

Of note in the *Aronson v. Lewis* conception of the business judgment rule was the court's emphasis of directors acting on an "*informed* basis." This can be characterized as a third requirement to the business judgment rule—the court indicated it would protect director decisionmaking with an informed basis for acting, but the court stated that the business judgment rule "has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act."[93] While the Delaware Supreme Court later retreated from *Aronson* in *Brehm v. Eisner*,[94] the duty to be informed as articulated by *Aronson* remains important. Significantly, in *In re Intel Corp. Derivative Litigation*,[95] a Delaware federal district court held that per Delaware law, a board may be held liable for its decision to do nothing given its oversight role of the corporation under the *Rales* standard.[96] The *Rales* standard indicated that the *Aronson* standard should not apply when a board has not made a business decision—"[t]he essential predicate for the *Aronson* test is the fact that a *decision* of the board of directors is being challenged in the derivative suit."[97]

While it can be acknowledged that a board's failure to account for environmental or climate change risk today would not be folded within Delaware's (and state corporate laws generally) characteristically ena-

90. *See supra* text accompanying notes 78–79.

91. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

92. *Id.*; *see also* Taylor & Kay, *supra* note 28, at 241 ("[C]ourts have shown great deference to directors' decisions—the rule refers to the presumption that directorial decisions are a product of business judgments and beyond the reach of judicial intervention.").

93. *Aronson*, 473 A.2d at 812–13.

94. 746 A.2d 244 (Del. 2000).

95. 621 F. Supp. 2d 165, 170 (D. Del. 2009).

96. *Id.* at 170.

97. Rales v. Blasband, 634 A.2d 927, 933 (Del. 1993).

bling—versus mandatory—jurisprudence,[98] as we look to the future this is nonetheless the direction that corporate law is headed. Eventually, a corporation's lack of decisionmaking in regard to environmental risk or climate change could land a corporation in the *Rales* camp rather than *Aronson* due to the fact that a decision must have been made in order for *Aronson* to apply. Furthermore, a corporation can head off a derivative challenge altogether under the duty to inform by implementing the use of a sustainability expert and green committee on the board—this would render a corporation safe from an *Aronson* or *Rales* inquiry by a court in the future.

D. *A Logical Extension of SOX's Financial Expert?*

While Delaware's deferential business judgment rule necessarily rewards risk-taking by a corporation by shielding directors from liability if acting based on reasonably informed decisionmaking, the Sarbanes-Oxley Act of 2002[99] has arguably diluted and federalized some of the strength of the Delaware business judgment rule. Under SOX, in the wake of the Enron scandal, Congress required public companies to begin disclosing if there was a "financial expert" on their boards and provide reasons as to why if one was not present.[100] SOX has also added the requirement of personal liability on the CEO and CFO for misrepresentations on certified financial statements.[101] Research suggests that this "financial expert" requirement has improved corporate governance and has led to better financial reporting.[102] This trend toward preference of a financial expert board member[103] may logically be extended from financial risk to environmental risk in the future. This aspect of SOX, well-received by Congress and the general public,[104] has direct application to a future regulatory environment should

98. Taylor and Kay admit as much, recognizing that the "default" for boards in regard to climate change: "[A]bsent law or regulation otherwise compelling private action, doing nothing about climate change is probably the default for private entities like boards. In such cases, the *Rales* doctrine may be [a] legal hook upon which boards indifferent to issues such as climate change are caught." Taylor & Kay, *supra* note 28, at 244; *see also* Barnard, *supra* note 50, at 221 ("Typically, state corporate laws are enabling, not directive, and Delaware is certainly unlikely to deviate from this approach.").

99. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 401–03, 407–09, 116 Stat. 745 (2002) (codified in scattered sections of U.S.C.).

100. Taylor & Kay, *supra* note 28, at 228.

101. *Id.* at 245.

102. *See* Lawrence A. Cunningham, *Rediscovering Board Expertise: Legal Implications of the Empirical Literature*, 77 U. CIN. L. REV. 465, 499 (2008) ("Gestures in SOX signal a sharp . . . conception of expertise on audit committees to promote superior financial reporting. Empirical evidence suggests that this works—directors with accounting expertise on audit committees are associated with more faithful financial reporting.").

103. Cunningham advocates that substantive expertise should be more important than director independence on the board, but notes the irony that under current Delaware structure, expert directors "are penalized for commanding expertise but rewarded for independence." *See id.* at 497–98.

104. *See* Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 DEL. J. CORP. L. 345, 378 (2007) ("[T]he one initiative in the SOX that is supported by empirical evidence, the appointment of a financial expert to the audit committee, is not a mandate but a disclosure requirement.").

Congress wish to begin mandating the use of other experts on the board—here, the use of a sustainability expert.

A future act by Congress could mandate disclosure of a company's environmental and climate change initiatives, risk management, and even fold this within the corporation's accounting practices[105]—all to be signed off on by a sustainability expert on the board. In the absence of this regime currently, it nonetheless behooves an MNC to begin thinking about this regulatory future now—both to get ahead of regulation in order to possibly help shape it in a more desirable direction,[106] and because working sustainability considerations into a broader conception of corporate strategy will help a corporation innovate and become more profitable.

E. *The Green Committee as a Weapon Against Groupthink*

One part of the broader call for more independent board members during the past decade has been attributed to the increased recognition of psychological processes and influences at work in group settings. One conception of the issue of structural bias in the corporate governance model, in which directors favor management interests over that of shareholders, has been that it extends to subconscious cognitive biases[107] such as in-group bias—favoring the in-group over the out-group,[108] and groupthink—preferring unanimity of thought and decision over dissenting opinions.[109] While the two forms of cognitive bias are related, groupthink is of particular concern in the context of environmental and sustainability risk assessment as it is likely that a majority of the board will currently underestimate or disfavor considering environmental risk. Interestingly, the creator of the groupthink theory suggested a formal designation of a "devil's advocate" as a method of reducing groupthink; this could be applied to the board in the corpo-

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105. *See* Bernhut, *supra* note 30.

> One thing is for sure: carbon—and accounting for its uses, emissions and costs—has become a key word in everyday accounting practices. . . . One key responsibility for accountants will surely be the risk management of carbon. For example, they will have to estimate the commercial risks of future carbon constraints and their likely effect on corporate performance and shareholder value.

Id. Bernhut goes on to list growing opportunities for accountants in regard to quantifying climate change, including developing practices for folding these considerations within financial statements, debt ratings, metrics, and more. *Id.*

106. *See infra* Section III.C.

107. *See* Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 860–61 (2004).

108. "Ingroup bias is 'the tendency to favor the in-group over the out-group in evaluations and behavior.' Although the theories explaining ingroup bias may be the subject of debate, evidence of the existence of ingroup bias is extensively documented in the psychological literature." *Id.* at 861 (quoting Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS 7, 13 (Stephen Worchel & William G. Austin eds., 1986) (footnotes omitted)).

109. Groupthink is defined by Taylor and Kay as occurring "when a person's thought process and decision-making capabilities become marred by peer pressure," in which the goal becomes unanimity of thought rather than dissent or difference of opinion based on rational judgment. Taylor & Kay, *supra* note 28, at 226–27.

rate model in the form of an independent and expert board member.[110] It is not that this environmental expert would necessarily successfully fight for the most environmentally friendly outcome in every situation. Rather, it would be to provide a critical voice that more assertively raises sustainable alternatives and reduces the inherent under-accounting of environmental risk by the board and senior management[111] (particularly risk underestimation due to groupthink). The formalization of a sustainability expert on the board can thus help the board improve its ability to evaluate and review management decisions while reducing the negatives effects of group biases.

III. Why This Approach

This Part will serve to address a few of the other conceptions of where environmental risk management belongs in the corporate model, beginning with corporate social responsibility and the stakeholder approach.

A. *The Corporate Social Responsibility Conception*

"Corporate social responsibility" is an oft-heard buzzword today, particularly in regard to the responsibility of corporations to address issues outside of a corporation's shareholder wealth maximization mandate. The term, also referred to as "sustainability," "triple bottom line," or "corporate citizenship," is used to describe expectations that go beyond simply maximizing profits and complying with laws and regulations at a minimum level.[112] Proponents of CSR point to the social contract between corporations and society as the basis for this conception—society gives a corporation a license to operate in return for certain behaviors.[113] These behaviors include making profits, but also broader societal expectations.[114] Particularly in regard to MNCs and the international sphere, these expectations have become much louder. The International Organization for Standardization ("ISO") in 2005 attempted to clarify corporate social responsibility expectations for MNCs, and has defined social responsibility as follows:

> [CSR is the] responsibility of an organization for the impacts of its decisions and activities on society and the environment through transparent and ethical behavior that contributes to sustainable development, including health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of

110. *See id.* at 227 (asserting that the formalization of the "devil's advocate" role on the board allows for the friendly challenge of inside management).

111. *See supra* text accompanying notes 77–79.

112. Mark A. Buchanan, *Social Contract, Corporate Social Responsibility, Counsel and the ISO 26000 Guidance on Social Responsibility*, Advocate, Oct. 2009, at 17.

113. *Id.* at 17–18.

114. *Id.*

behavior; and is integrated throughout the organization and practiced in its relationships.[115]

While this appears to be a laudable conception of the duties of an MNC, the question that logically follows is how this fits within the corporate governance framework. In the 1930s, Merrick Dodd of Harvard Law School first articulated an alternate model to the Berle and Means corporate governance conception, arguing that because officers and directors act as trustees of shareholders, they have broader authority to account for the interests of other actors—including engaging in socially responsible behavior.[116] Proponents of social responsibility considerations often also advocate for the nexus-of-contracts approach[117] rather than the traditional shareholders-as-owners model as well.

While these alternate conceptions laudably account for broader interests and groups—and in the context of this Note these models certainly help a corporation internalize negative environmental externalities that a narrower understanding of the corporate model may not appropriately account for, they suffer a key flaw. It is individuals, not corporations, who are bestowed as having any sort of "moral" duties, and thus these alternate approaches incorrectly place this duty on the corporate form when it must be mandated on individuals—the shareholders themselves.[118] But, as we have already seen, the corporate form calls for the separation of ownership and control, and thus the appropriate location for ethical or moral—in this case environmental and sustainability—decisionmaking is within the ambit of directors and management.[119] Additional support for this proposition is found in the fact that shareholders of MNCs today are increasingly institutional investors rather than individuals.[120]

An additional downside to the CSR model for the environmental and sustainability considerations of a corporation is its "fuzziness." This is articulated more properly by looking at the negatives of the CSR approach in the form of "greenwashing" and profit decreases.

B. *Downsides to the CSR Approach: Greenwashing*

The CSR model, as discussed in the previous section, is susceptible to criticism given its "fuzziness" and ambiguity in being the framework for a corporation's environmental risk assessment and sustainability

115. *Id.* at 19 (quoting Draft International Standard, *available at* https://www.iso.org/obp/ui/#iso:std:iso :26000:ed-1:v1:en).

116. Colombo, *supra* note 59, at 255.

117. *See supra* note 62.

118. *See, e.g.*, Norman P. Barry, *Controversy: Do Corporations Have Any Responsibility Beyond Making a Profit? A Response to Dennis P. McCann*, 3 J. MARKETS & MORALITY 115, 117 (2000) (articulating the differences and complexity surrounding "economic decision-making" in contrast with "moral decision-making").

119. *See* Colombo, *supra* note 59, at 266–67.

120. *Id.* at 266 n.145 (citing Paul S. Atkins, Comm'r, SEC. & EXCH. COMM'N, Remarks Before the Council of Institutional Investors (Mar. 27, 2003), *available at* http://www.sec.gov/news/speech/spch032703psa.htm).

considerations.[121] More specifically, a harmful effect of a corporation not working sustainability in a genuine, permanent manner into the actual corporate governance structure is an effect called "greenwashing." Taylor and Kay define greenwashing as the act of "[d]eliberately exaggerating a company's commitment to green issues through disingenuous marketing, [and it] can potentially tarnish a company's brand or image and could lead to lost sales."[122] A high-profile example of this occurred in the aftermath of the BP oil spill: consumers who had specifically gone out of their way to purchase BP's products, induced into believing that the company was more environmentally conscious due to its advertising and representations, felt betrayed by the huge disconnect between this advertising and the realities following the accident.[123] And within the traditional shareholders ownership model, this is an understandable misstep; corporations are incentivized to achieve short-term profit maximization at the expense of longer-term environmental risk assessment and investment in more efficient technology and innovation. An increasingly successful method of attaining this has been through advertising eco-friendly products and "green" labeling.[124]

Inherent weaknesses in determining that the sustainability expert belongs on the board, as addressed by Professor Barnard:

> Outside directors work only part-time, are not provided staff, and often, even within the board, face competing priorities. The second-tier committees—those committees [such as sustainability] that deal with issues other than finance, governance, succession, and high-profile crises—probably fall far down the board's agenda

121. As articulated by Professor Barry, "[M]oral decision-making is [often] indeterminate, regardless of how superficially persuasive one's moral principles might appear to be. . . . [T]he transition from individual ethics to a company (or quasi-collective) morality is not easily made." Barry, *supra* note 118, at 117; *see also* Clive Crook, *The Good Company*, ECONOMIST (Jan. 20, 2005), *available at* http://www.economist.com/node/3555212 (arguing that while CSR has won the "battle of ideas" in corporate law over the past decade, NGOs and other CSR advocates have begun to discover that they have been "conned" in the form of lip service to the CSR agenda that is "at best a gloss on capitalism," rather than any of sort of meaningful change in corporate behavior).

122. Taylor & Kay, *supra* note 28, at 239.

123. Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1025–26 (2011). Some scholars even go as far in their criticism of greenwashing as to advocate for a cause of action for misleading advertising or, eventually, finding a cause of action under Securities Act Rule 10b-5 for misleading investors with "faux CSR." *See id.* at 1027; Wendy E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather than a Corporate Bad*, 46 WAKE FOREST L. REV. 561, 564 (2011) (stressing the importance of information disclosure of sustainability in "inform[ing] the market" externally, as well as "inform[ing] internal practices," which has the vital benefit of "[e]nhanc[ing] corporate self-assessment").

124. *See* Cherry & Sneirson, *supra* note 123, at 1026–27 (discussing this incentive to advertise green initiatives disingenuously for the sake of profit maximization). The FTC provides an example of the danger of disingenuous (versus authentic) green labeling—in 2013, four large retailers were ordered to turn over $1.26 million in penalties after falsely labeling textiles as being made of bamboo. *See* Press Release, Fed. Trade Comm'n, Four National Retailers Agree to Pay Penalties Totaling $1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Were Actually Rayon (Jan. 3, 2013), http://www.ftc.gov/news-events/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million.

and may not command the face-time with the full board necessary to achieve the committees' goals. The members of these committees may also, like any group, fall prey to group-think.[125]

Nonetheless, greenwashing can put the company on the PR defensive and lead to profit loss once the public finds out—Shell provides a great example of this. Shareholder and institutional investor requests for environmental disclosure from corporations are on the rise, further increasing the likelihood that a disingenuous corporation could be "found out."[126] NGOs are increasingly serving a powerful role in voicing greenwashing criticism as well, and Greenpeace is just one that has launched significant criticism at Shell for profiting off of claims of climate change innovation and support while actually treading backwards when it comes to renewable energy.[127] A sustainability expert on the board must help in combatting this green marketing trap. By working this expert director into the core framework of a corporation and not simply embedding the role within senior management and marketing, sustainability can viably be worked into long-term, genuine corporate strategy. As previously addressed, this genuine readjustment—involving the incorporation of specific, measurable metrics—within the corporate framework may lead to profit increases and innovation, thus genuinely maximizing shareholder profit without risking a PR time-bomb scenario.[128]

C. *A Final (Incorrect) Conception: Do Nothing and Wait for Mandatory Regulation*

A final argument made by proponents of a too-narrow conception of the shareholder ownership model is that sustainability and environmental risk does not belong in this framework at all. The appropriate course of action, they advocate, is to do nothing except as required by law. Often called the "separationist approach," the theory maintains that "[p]rivate corporations should be permitted—indeed required—to pursue the single maximand of shareholder value, while concerns regarding distributive equity, environmental harm, and other consequences of corporate activity should be left to the 'political process.'"[129] The problem with this approach, however, is that it does not account for the harm of regulation and the importance of management

125. Barnard, *supra* note 50, at 216–17. For a discussion of group-think, see *supra* Section II.E.

126. Ernst & Young & GreenBiz Group, Six Growing Trends in Corporate Sustainability 33 (2013), *available at* http://www.ey.com/Publication/vwLUAssets/Six_growing_trends_in_corporate_sustainability_2013/$FILE/Six_growing_trends_in_corporate_sustainability_2013.pdf.

127. Guy Chazan, *Shell's Green Ads Take New Tack*, Wall St. J. (Feb. 3, 2009, 11:59 PM), http://online.wsj.com/news/articles/SB123361309328941079?mod=googlenews_wsj.

128. *See supra* subsection I.C.2.

129. Kysar, *supra* note 8, at 2161. Proponents of this view go as far as to argue that a broader stakeholder model such as CSR that accounts for more than just shareholders themselves gives so much discretion to management that it actually encourages self-dealing and pursuit of a personal agenda. *See* Ronald Chen & Jon Hanson, *The Illusion of Law:*

and directors to pursue the minimization of regulatory burdens as much as possible. The same objective of shareholder wealth maximization also leads to the objective of shaping regulation *before* its mandatory imposition by the legislature.[130] One may even consider the example of the adoption of Friedman's shareholder maximization model: scholars applied this to corporate philanthropy, and corporations gradually came to view corporate philanthropy as a form of investment.[131]

Genuinely working sustainability into the shareholder ownership model could have the same effect. By integrating an expert sustainability director into the board and integrating sustainability into corporate strategy, not only can MNCs achieve profit increases and increased innovation,[132] but these corporations can shape the regulatory environment going forward. If society views proposed environmental regulation by the legislature on corporations as undesirable given their already-implemented incorporation of sustainability into the corporate model, then mandatory regulation may be less likely. Alternatively, simply implementing sustainability into the corporate governance model now may just help mold future regulation into a shape more similar to what MNCs have implemented already, thus decreasing this potential regulatory burden. Certainly, the observation remains that there may of course be corporations where this approach is not feasible nor profitable—it must be acknowledged that corporate law is not conducive to a singular approach for the infinite unique ways that a corporation may be structured to best achieve the maximization of shareholder wealth. A corporation cannot know with complete certainty what the future regulatory landscape will look like, but evidence is accumulating that in general, implementing environmental strategy within the board that accounts for environmental risk can lead to cost reductions and will certainly improve a corporation's preparation for the future.

CONCLUSION

A sustainability expert on the board can help reconcile multiple competing and seemingly conflicting goals of an MNC to account to an increasingly vocal and influential body of diverse stakeholders other than shareholders—specifically in recognizing environmental risk to an organization and internalizing the often-costless negative consequences of environmental harms to an organization. This Note has sought to argue that sustainability need not necessarily be accounted for at the expense of the corporate mandate to maximize shareholder wealth. Rather, empirical evidence and an assessment of a future regulatory

The Legitimating Schemas of Modern Policy and Corporate Law, 103 MICH. L. REV. 1, 51–52 (2004).

130. *See* Chen & Hanson, *supra* note 129, at 112 ("[S]cholars cannot ignore the environment on the grounds that it is well-protected by so-called 'environmental' regulations"); Kysar, *supra* note 8, at 2161–62 (elaborating on this response to the "separationist approach").

131. Kysar, *supra* note 8, at 2162.

132. *See supra* subsection I.C.2.

environment in combination with limited natural resources show that genuinely internalizing sustainability into the corporate model (without falling prey to the trap of superficial changes that can create greenwashing and negative public perceptions) can make a corporation more profitable. Ultimately, this unique intersection of corporate governance with sustainability and environmental risk assessment may have the ability to increase shareholder wealth. Additionally, MNCs must more broadly analyze the sustainability changes they implement—narrow metrics to assess sustainability will not properly account for sustainability benefits that must also be more creatively assessed than traditional financial reporting may allow for. Rather than CSR or the separationist approach, placing a sustainability expert on the board is a more judicious approach for an MNC to take in staying true to the traditional corporate model of the separation of ownership and control. This approach is prudent in accounting for shareholder wealth maximization in the short and long term, as well as to increase competitive advantage through innovation and help peremptorily shape future mandatory regulation.