RISKY BUSINESS

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ABSTRACT

Corporate law scholarship and doctrine have largely operated on the assumption that corporate shareholders are interested in financial goals, while corporate stakeholders—such as employees, consumers, and local communities—are interested in social and environmental goals, like diversity and inclusion and climate change. Because of this assumption, the law largely requires a corporation to disclose information it considers to be "financially material" to shareholders—that is significant enough to impact the company's financial position—including factors it considers to be financially risky. Financial materiality is so embedded in corporate law doctrine that even if an issue is about social and environmental concerns, financial materiality is still the exclusive lens through which the law examines shareholders' interests in the issue.

However, recent developments between corporations, shareholders, and stakeholders make plain that shareholders and stakeholders both desire information on social and environmental issues that extend beyond their financial implications. Between 2020 and early 2024, corporations voluntarily disclosed such information to shareholders in relation to and apart from their financial implications.

This Article uses empirical data to show that starting in 2024, as political tides shifted, corporations also shifted to expressing social and environmental issues as financial risk factors to corporate interests, with little consideration of the relevance of those disclosures to nonfinancial goals. This shift has two

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significant consequences. The first is that disclosing social and environmental issues primarily as financial risk factors prevents shareholders and stakeholders from obtaining information that extends to other shared interests, including the impact of social and environmental concerns on employees, society, and the environment. The second is that describing issues like inclusion, human rights, and climate change as risk factors can chill progress towards improving them. This Article proposes solutions to expand access to information about social and environmental concerns that go beyond their financial goals, for both shareholders and stakeholders.

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INTRODUCTION

As soon as President Donald Trump began his second term in office, he signed an executive order targeting diversity, equity, and inclusion ("DEI") practices of private companies.[1] While the executive order did not define the parameters of DEI,[2] companies responded by changing the language in which they previously described diversity and equity programs, closing their DEI offices, discontinuing diversity-focused hiring and promotion efforts, and scrapping other programs they believed were related to DEI.[3]

For example, Target Corporation—which had previously stated its "significant commitments" to "racial equity" and its "focused diversity, equity and inclusion . . . strategy" in public reports as early as 2022[4]—moved its discussion of these issues to the risk factor section of its annual report to shareholders and changed its discussion to the language of risk.[5] Target also publicly stated that it was "eliminating hiring goals for minority employees, ending an executive committee focused on racial justice and making other changes to its diversity initiatives."[6] Almost immediately, many customers stopped shopping at Target, and the company's foot traffic reduced drastically.[7]

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[1] Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

[2] *Id.*

[3] *See* Conor Murray & Molly Bohannon, *IBM Reportedly Walks Back Diversity Policies, Citing 'Inherent Tensions': Here Are All the Companies Rolling Back DEI Programs*, FORBES (Apr. 11, 2025, at 11:27 ET), https://www.forbes.com/sites/conormurray/2025/04/11/ibm-reportedly-walks-back-diversity-policies-citing-inherent-tensions-here-are-all-the-companies-rolling-back-dei-programs [https://perma.cc/EX6X-CPT4].

[4] *See, e.g.*, TARGET CORP., 2021 TARGET CORPORATE RESPONSIBILITY REPORT 5 (2022) https://corporate.target.com/getmedia/f522b0eb-065b-410c-9c1c-07a2244bfdb2/2021_Target_Corporate-Responsibility-Report.pdf [https://perma.cc/H7EC-QBWV]; *see also* TARGET CORP., 2022 ANNUAL REPORT 5 (2023), https://corporate.target.com/getmedia/47558ecc-2461-437f-894b-0f8533dd704c/ 2022-Target-Annual-Report.pdf [https://perma.cc/ 49PB- P4KS] ("We champion workplace diversity and an inclusive work environment with a focus on attracting, engaging, developing, and advancing team members equitably in order to reflect the guests and communities we serve.").

[5] TARGET CORP., 2024 ANNUAL REPORT 10 (2025), https://corporate.target.com/getmedia/c23bca62- 1790-47 bd-ad0e-6971aee4f78d/ 2024-Annual -Report -Target- Corporation.pdf [https://perma.cc/6D3U-RLB7].

[6] Nathaniel Meyersohn, *Target Is Getting Hit from All Sides on DEI*, CNN: BUS. (Feb. 21, 2025, at 12:57 ET), https://www.cnn.com/2025/02/21/business/target-dei-lawsuit/index.html [https://perma.cc/RR5V-LHVG].

[7] *See* Retail Brew & Andrew Adam Newman, *Target Backtracking Its DEI Efforts Backfired. Store Traffic Dropped Nearly 10% After the Company's Move to Conclude Its Diversity-Related Goals and Initiatives*, FORTUNE (Feb. 22, 2025, at 01:39 ET), https://fortune.com/2025/02/22/target-backtracking-dei-efforts-backfired-foot-traffic-dropped [https://perma.cc/3H98-N6NQ]; NUMERATOR, THE IMPACT OF DEI CUTS ON RETAIL (Mar. 2025), https://web.archive.org/web/20250310200054/https://www.numerator.com/wp-content/uploads/ 2025/ 03/ Numerator_DEI-Cuts-Impact_Report.pdf (noting Target's market share

Target's stock also plummeted by approximately $27.27 per share within a single month, erasing $12.4 billion in market value.[8] These financial impacts resulted in Target decreasing its sales and earnings projections.[9] Despite the company's stance, over 90% of Target's shareholders voted against "a proposal requesting a report on how affirmative action initiatives affect the retailer's risks related to actual and perceived discrimination."[10]

Unlike Target, Costco's officers and managers took a different approach in responding to the executive order, by choosing not to waver in the language of its commitments. From 2021 through 2024, Costco made public commitments to care for its employees, which is foundational to its "approach to diversity, equity and inclusion."[11] In 2024, the National Center for Public Policy Research ("NCPPR"), a conservative think tank and shareholder activist, submitted a shareholder proposal asking other shareholders to vote against Costco's "People

fell after publicly declaring cuts to efforts to improve diversity and inclusion); Dominick Reuter, *Costco Is Looking like the Big Winner After Target's DEI Rollback*, BUS. INSIDER (Mar. 12, 2025, at 14:25 ET), https://www.businessinsider.com/shoppers-ditching-target-choosing-costco-after-dei-shift-2025-3 [https://perma.cc/QS8E-KUBD].

8 Karen R. King & Catherine Foti, *Fiduciary Responsibility on the DEI Battlefield*, FORBES (Apr. 30, 2025, at 16:09 ET), https://www.forbes.com/sites/insider/2025/04/30/fiduciary-responsibility-on-the-dei-battlefield [https://perma.cc/U3LT-UM4W].

9 *See* Ty Roush, *Target Warns of Lower Sales in 2025—Blaming Tariffs and DEI Rollback Backlash*, FORBES (May 21, 2025, at 10:05 ET), https://www.forbes.com/sites/tylerroush/2025/05/21/target-warns-of-lower-sales-in-2025-blaming-tariffs-and-dei-rollback-backlash [https://perma.cc/EQQ9-QRW4]; Nathaniel Meyersohn, *Target May Have Hit Rock Bottom*, CNN: BUS. (Nov. 19, 2025, at 08:46 ET), https://www.cnn.com/2025/11/19/business/target-stock-economy#openweb-convo. Meanwhile, in the Complaint in, *Craig v. Target Corp.*, American First Legal, a conservative think tank, sued Target, claiming that it failed to inform its shareholders about social and political risks arising from the company's Environmental, Social, and Governance ("ESG") and DEI strategies. Complaint at 2, Craig v. Target Corp., No. 2:23-CV-00599 (M.D. Fla. Aug. 8, 2023).

10 *See* Bill Wilson, *Target Shareholders Stand Pat on DEI Pullback*, SUPERMARKET NEWS (Dec. 31, 2025), https://www.supermarketnews.com/company-news/target-shareholders-stand-pat-on-dei-pullback. The proposal was rejected with about 92% of votes cast. *See infra* Appendix B.

11 *See* COSTCO WHOLESALE CORP., 2021 ANNUAL REPORT 6 (2022), https://s201.q4cdn.com/287523651/ files/ doc_financials/ 2021/ar/FY-2021-Annual-Report..pdf [https://perma.cc/2UGX-NS8T]; *see also* COSTCO WHOLESALE CORP., 2022 ANNUAL REPORT 6 (2023), https://s201.q4cdn.com/287523651/files/doc_financials/2022/ar/Costco-2022-Annual-Report.pdf [https://perma.cc/Y973-96AB] ("The commitment to 'Take Care of Our Employees' is also the foundation of our approach to diversity, equity and inclusion and creating an inclusive and respectful workplace."); COSTCO WHOLESALE CORP., 2023 ANNUAL REPORT 7 (2024), https://s201.q4cdn.com/287523651/files/doc_financials/2023/ar/cost-annual-report-final-pdf-from-dfin.pdf [https://perma.cc/F7AM-GYM4] (using same language); COSTCO WHOLESALE CORP., 2024 ANNUAL REPORT 7 (2025), https://s201.q4cdn.com/287523651/files/doc_financials/2024/ar/COST-2024-Annual-Report.pdf [https://perma.cc/ EE4X-XQVH] (using same language).

and Communities" initiative on the basis that it poses "litigation, reputational and financial risks to the Company, and therefore financial risks to shareholders."[12] In response, Costco publicly reaffirmed the importance of its diversity programs to the company's success as determined not only by the financial interests of its shareholders,[13] but also by service to stakeholders—like employees and suppliers—through the fostering of inclusion, employee satisfaction, and respect.[14] Costco's board of directors recommended that other shareholders vote against the shareholder proposal.[15] Like Target, the response from Costco's shareholders was overwhelming, with 98% disagreeing with NCPPR and voting against what many likely considered to be an anti-DEI proposal.[16]

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[12] COSTCO WHOLESALE CORP., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 31 (2024), https://s201.q4cdn.com/287523651/files/doc_financials/2024/ar/FY24-Proxy-Statement.pdf [https://perma.cc/8HW5-F2H9]. Under SEC Rule 14a-8, shareholders of public companies are permitted to present corporations with proposals on a wide range of social issues to draw attention to them and pressure management to respond. *See* 17 C.F.R. § 240.14a-8 (2025). Rule 14a-8 further requires corporations to include eligible shareholder proposals in their proxy materials. *Id.* Shareholders then vote on proposals at annual meetings or in proxy statements. *Id.* Shareholder proposals tend to also receive substantial publicity beyond the shareholder meeting. *See* Myron P. Curzan & Mark L. Pelesh, *Revitalizing Corporate Democracy: Control of Investment Managers' Voting on Social Responsibility Proxy Issues*, 93 HARV. L. REV. 670, 690-91 (1980) (examining institutional power dynamics related to rise of social responsibility shareholder proposals at public companies).

[13] *See* James Darley, *Costco Stands Resolute Against the Anti-DEI Movement*, SUSTAINABILITY MAG. (Jan. 7, 2025), https://sustainabilitymag.com/articles/costco-stands-resolute-against-the-anti-dei-movement.

[14] *See* COSTCO WHOLESALE CORP., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 32 (2024), https://s201.q4cdn.com/287523651/files/doc_financials/2024/ar/FY24-Proxy-Statement.pdf [https://perma.cc/8HW5-F2H9] ("Our success at Costco Wholesale has been built on service to our critical stakeholders: employees, members, and suppliers. Our efforts around diversity, equity and inclusion follow our code of ethics.").

[15] *Id.* at 33.

[16] *See* Costco Wholesale Corp., Current Report (Form 8-K) (Jan. 23, 2025); *see also* Anne D'Innocenzio, *Costco Successfully Defends Its Diversity Policies as Other US Companies Scale Theirs Back*, ASSOCIATED PRESS (Jan. 23, 2025, at 18:35 ET), https://apnews.com/article/costco-shareholder-proposal-diversity-dei-0330f448741b35f2f788a36948ff3f95 [https://perma.cc/2WLW-JNS6] ("[M]ore than 98% of shares voted against the proposal.").
Apple took a similar approach, and 97% of Apple's shareholders voted to maintain the company's diversity and inclusion programs. *See* Sara Braun & Azure Gilman, *Companies May Be Rolling Back Their Diversity Policies, But Investors Keep Voting Down Anti-DEI Shareholder Proposals*, FORTUNE (Feb. 28, 2025, at 08:00 ET), https://fortune.com/2025/02/28/costco-apple-john-deere-anti-dei-shareholder-proposals-voted-down-trend [https://perma.cc/638R-29ZH]; *see also* Andrew Ramonas, *Deere Investors Reject Anti-DEI Proposal Seeking Hiring Data*, BLOOMBERG L. (Feb. 26, 2025, at 13:09 ET), https://news.bloomberglaw.com/ esg/ deere-investors-reject-anti-dei-proposal-seeking-hiring-data (discussing John Deere's shareholders' decision to vote down anti-DEI proposal with 98% rejecting). Apple's

The shareholders' and stakeholders' back-and-forth at Costco, Target, and many other companies is part of a shifting tide where shareholders and stakeholders pressure companies to engage with social and environmental issues.[17] However, corporate law doctrine, with its primary focus on financial goals, is ill-equipped to provide companies with principled ways to deal with the pressure to address social and environmental issues coming from shareholders and stakeholders.

Since the debate between Columbia Law School's Adolph Berle and Harvard Law School's Merrick Dodd in the early 1930s about the purpose of the modern corporation,[18] scholars have discussed whether corporations should primarily be concerned with maximizing shareholder profit for the benefit of shareholders, or also consider the interests of stakeholders—like customers, employees, suppliers, and local communities—in their decision-making.[19] This

board defended the company's diversity and inclusion programs by arguing that the proposal "inappropriately attempts to restrict Apple's ability to manage its own ordinary business operations, people and teams, and business strategies." Apple Inc., Notice of Annual Meeting of Shareholders and Proxy Statement (Schedule 14A) 87 (Jan. 10, 2025).

[17] *See, e.g.*, Alexis Keenan, *Shareholders Are Showing Signs of DEI Fatigue as Activists Push for More Votes*, YAHOO FIN. (Mar. 8, 2025), https://finance.yahoo.com/news/shareholders-are-showing-signs-of-dei-fatigue-as-activists-push-for-more-votes-140136546.html?.tsrc=rss&guccounter=1 ("As of the end of February, a total of 21 'anti-DEI' proposals and 16 'pro-DEI' proposals were set for a vote this year among publicly traded companies included in the Russell 3000 . . . .").

[18] *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049-50 (1931) (analyzing equitable limitations on exercise of corporate power as determined by financial interests of shareholders); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1158-61 (1932) (positing corporation's role includes social responsibility to broader interests of stakeholders like employees and communities, in addition to financial interests of shareholders).

[19] *See, e.g.*, Robert P. Bartlett III & Ryan Bubb, *Corporate Social Responsibility Through Shareholder Governance*, 97 S. CAL. L. REV. 417, 429-33 (2024) (arguing for "enlightened shareholder value" as a form of Environmental, Social, and Governance theory in corporations); Colin Mayer, Essay, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction: A Comment on the Illusory Promise of Stakeholder Governance," by Lucian Bebchuk and Roberto Tallarita*, 106 CORN. L. REV. 1859, 1859 (2021); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309 (2021); Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223, 223-25 (2021); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1537-38 (2018); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249-51 (1999); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 35 (2004); David Millon, Essay, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1001-03 (2000); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1409-14 (1993); Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1197-200 (1984).

longstanding debate has often rested on the assumption that the motivations of shareholders are monolithic and those of stakeholders are pluralistic. For shareholders, profit is assumed to be the paramount interest,[20] while stakeholders are presumed to be interested in social issues like sustainability, equity, inclusion, human rights, dignity, respect, etc.[21]

Like the scholarly focus on financial interests, except in very narrow circumstances, corporate law doctrine has largely operated with the assumption that shareholders are primarily interested in financial goals and obtaining information tailored to that goal is paramount. Specifically, the Securities and Exchange Commission ("SEC") does not require publicly traded companies to consider or disclose the impact of social issues on business strategies and operations unless they are *financially material* to business interests, nor are corporations required to disclose the impact of business activities on social and environmental conditions to shareholders.[22] The Supreme Court defines information as "material" if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[23] Facts and circumstances that could render a statement or misstatement material are those considered to have direct financial implications for maximizing profits.[24]

Importantly, in 2020, the SEC modified its risk factor disclosure rules to require corporations to disclose factors that make investing in a company risky, but only if they have financial implications.[25] The modified rules are "rooted in

[20] *See, e.g.*, Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1864 (2003); Blair & Stout, *supra* note 19, at 752 (noting commonly-held notion that primary goal of public corporations ought to be maximizing shareholders' wealth); STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 102-03 (2023) (discussing monetary value of prioritizing corporate social responsibility); *see also* Dodge v. Ford Motor Co., 170 N.W. 668, 685 (Mich. 1919) (holding Ford had to operate Ford Motor Company in interests of shareholders); Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); Simeone v. Walt Disney Co., 302 A.3d 956, 958 (Del. Ch. 2023) (holding boards of directors have "significant discretion" to make decisions concerning social and political issues in manner rationally related to building value for shareholders).

[21] *See infra* Part II.

[22] *See generally infra* Part II.

[23] *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 249 (1988) (adopting *TSC Industries* materiality standard to SEC Rule 10b-5 context); 17 C.F.R. § 230.405 (2025) (defining "material" as "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered").

[24] *See supra* note 23.

[25] Modernization of Regulation S-K Items 101, 103, & 105, 85 Fed. Reg. 63726, 63761 (Oct. 8, 2020) (codified at 17 C.F.R. §§ 229.101, .103, .105).

materiality and facilitate an understanding of a [company]'s business, financial condition and prospects . . . through which management and the board of directors manage and assess the [financial] performance of the [company]."[26] The risk disclosure rule is open-ended so that each company determines which risk factors have financial implications.[27]

Using hand-coded data from 702 publicly traded companies' annual reports to shareholders in 2024 and 2025, this Article reveals that, since 2024, corporations have begun to describe social and environmental issues like environmental stewardship, sustainability, employee welfare, human rights, diversity, inclusion, and equity, as "risk factors."[28] On the other hand, prior to 2024, corporations described social and environmental issues in their annual and other reports as opportunities for growth and development towards sustainability and equity.[29]

There are two consequences of this development in companies' framing of social and environmental issues. The first is a legal consequence: Limiting the disclosure of social and environmental issues solely to what is financially material to shareholders prevents shareholders and stakeholders from obtaining the most relevant information about a company.

There is scholarly recognition that shareholders have financial and nonfinancial goals when they invest in a corporation.[30] While some shareholders are interested in social issues because of their financial implications, such as customer foot traffic and employee retention,[31] others are interested in social

[26] *Id.* at 63727.

[27] *See id.* (amending disclosure rules to allow them to be "tailored to reflect [companies]' particular circumstances").

[28] As described in Part III, the risk factors are business, reputation, litigation, talent, and fines and fees. All these risks boil down to the bottom line.

[29] *See* Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV 307, 336-37 (2023) [hereinafter Adediran, *Disclosing Diversity*] (showing murder of George Floyd in 2020 began dramatic increase in positive diversity disclosures); Atinuke O. Adediran, *Racial Targets*, 118 NW. L. REV. 1455, 1456 (2024) [hereinafter Adediran, *Racial Targets*] (demonstrating empirically that large corporations began making commitments to hire or promote people of color starting in 2020).

[30] *See, e.g.*, Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1283 (2008) ("[T]he belief that minority shareholders share a common economic goal has also become inaccurate."); Fisch & Solomon, *supra* note 19, at 1321 (noting "shareholders themselves have heterogeneous interests").

[31] *See, e.g.*, Jake Andrassy, Joseph Burke & Matthew T. Stern, *Not Walking the Talk: The Effect of Prioritizing Profit or ESG Impact on Employee Behavior Across ESG Impact-and Shareholder Value-Focused Mission Statements*, 37 J. MGMT. ACCT. RSCH. 171, 172 (2025) (finding employees respond positively to actions prioritizing social impact over profit); Juan Isaza, *Do Consumers Still Value Brands Taking a Political or Social Stand?*, FORBES (Sep. 15, 2023, at 10:15 ET), https://www.forbes.com/councils/forbesbusinesscouncil/2023/09/15/do-consumers-still-value-brands-taking-a-political-or-social-stand [https://perma.cc/89RP-DG3V].

issues because they want to see some impact in the world, or for moral reasons and values that may not be related to financial ones.[32] In other words, shareholders generally care about profit, but they also care about employee wellbeing, a company's impact on local communities, human rights, climate and environmental degradation, and sustainability for reasons *beyond* their financial ends.[33]

The second consequence, which is about adverse societal impacts, is that couching social and environmental issues as risk factors chills progress on those issues. To be sure, the new conservative movement is attempting to steer corporations away from social and environmental concerns.[34] However, shareholders and stakeholders are also pressuring corporations to either do something about or retreat from social and environmental issues.[35] Corporations simply cannot avoid social issues; limiting them to the singular issue of "financial risk" is not beneficial to shareholders, stakeholders, or long-term societal interests.

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[32] Investors with consequentialist preferences care about the outcomes of their investments, such as a reduction in a company's carbon footprint. Investors with non-consequentialist preferences aim to align their investment choices with their own moral values or ethical principles, regardless of the real-world impact of those choices. For example, investors may have tastes for "green" or LGBTQ+ friendly firms. However, research has shown that sustainability investments tend not to make major real-world impact, implying that consequentialist investors are really just like non-consequentialists—they are interested largely in the relationship between their investments and their personal values. *See, e.g.*, Florian Heeb, Julian F. Kölbel, Falko Paetzold & Stefan Zeisberger, *Do Investors Care about Impact?*, 36 REV. FIN. STUD. 1737, 1740 (2023); Alex Edmans, *What Makes 'Sustainable Funds' Different? Not Much*, WALL ST. J. (Sep. 26, 2024, at 09:00 ET), https://www.wsj.com/finance/investing/sustainable-esg-fund-manager-other-managers-4702eb1a; Adediran, *Disclosing Diversity*, *supra* note 29, at 307 (arguing diversity disclosures are important for stakeholders to know what companies value).

[33] *See* Heeb et al., *supra* note 32, at 1738 ("[A] substantial pool of investors hold prosocial preferences. Indeed, recent research has demonstrated that prosocial preferences affect investment decisions . . . ."); Pablo Ottonello, Wenting Song & Sebastian Sotelo, *An Anatomy of Firms' Political Speech* 3-4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32923, 2024) (recounting large language model research results showing corporations imbibe shareholders' nonfinancial preferences). It is important to acknowledge that shareholders who care about social and environmental issues may also have different interests, priorities, and even conflicting goals concerning social and environmental issues.

[34] *See* David R. Burton, *Securities and Exchange Commission and Related Agencies*, *in* MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE, PROJECT 2025, at 832 (Paul Dans & Steven Groves eds., 2023) ("Congress should . . . [o]ppose efforts to redefine the purpose of business in the name of social justice; corporate social responsibility (CSR); stakeholder theory; environmental, social, and governance (ESG) criteria; socially responsible investing (SRI); sustainability; diversity; business ethics; or common-good capitalism." (footnotes omitted)); Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (ending DEI programs in federal agencies and demanding all federal contractors do same).

[35] *See, e.g.*, Keenan, *supra* note 17.

This Article therefore makes empirical, theoretical, and normative contributions to the literature. Empirically, it reveals the shift in how corporations discuss social and environmental issues—from opportunities for growth to risk factors. Normatively and theoretically, it makes the claim that limiting the relevance of social and environmental issues to financial materiality leaves out what is relevant to shareholders beyond their financial goals, and what is relevant to stakeholders with social interests in a firm. It proposes using a new model of materiality, often dubbed "double or dynamic materiality," which would consider the implications of adopting sustainability measures on a company's financial standing,[36] as well as the social impacts of a company's financial activities on society and the environment.[37]

This Article proceeds in four parts. Part I addresses the alignment of shareholder and stakeholder interests and the SEC's focus on financial materiality as the primary interest of shareholders. It also discusses the SEC's risk factor disclosure rules. Part II focuses on state corporate laws. While many states recognize the interests of stakeholders in social and environmental issues, they tend not to recognize the interests of shareholders in the same issues. Corporations that are interested in social and environmental issues are largely siloed to nontraditional corporate forms, like public benefit corporations ("PBCs"),[38] to consider stakeholder interests, which publicly traded companies tend to ignore. Part III provides empirical evidence for the shift from discussing social and environmental issues as areas of growth to disclosing them as risk factors. It also includes legal analysis to show that risk factor disclosures are unlikely to absolve companies of litigation. Part IV considers the implications of describing social and environmental issues as risk factors and makes suggestions for incorporating double or dynamic materiality into financial disclosures.

I. SHAREHOLDER AND STAKEHOLDER ALIGNMENT, FINANCIAL MATERIALITY, AND RISK FACTORS

While the notion has been challenged for decades, there is a historical and fundamental understanding that the primary role of the corporation is to make the most profits for its shareholders.[39] This understanding is so ingrained into

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[36] Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information, 2019 O.J. (C 209) 4 (noting European Parliament's Non-Financial Reporting Directive has a double materiality perspective because "[t]he reference to the company's 'development, performance [and] position' indicates financial materiality" and "[t]he reference to 'impact of [the company's] activities' indicates environmental and social materiality").

[37] *Id.*

[38] A PBC is a for-profit corporation legally permitted to simultaneously pursue both profit and social benefits.

[39] *See, e.g.*, Bainbridge, *supra* note 20, at 102-03; Blair & Stout, *supra* note 19, at 755; Smith, *supra* note 19, at 278; Tsuk, *supra* note 20, at 1862.

the literature that even when scholars discuss the importance of social issues in the corporate context, they tend to view social issues as ultimately being about financial gains for shareholders,[40] or limit social issues to the interests of stakeholders.[41] Save for a few exceptions, most corporate law scholars largely leave open the reasonable position that shareholders and stakeholders may want corporations to address concerns that impact people and the planet within and outside the goal of profit maximizing.[42]

Section I.A first discusses the alignment of shareholders and stakeholders on social issues and the ways in which shareholders communicate their non-financial interests to corporations. Section I.B examines the doctrine and application of the financial materiality standard in corporate law and its focus on shareholders' profit maximization interests. Section I.C examines how financial materiality plays out even when the SEC mandates the consideration and disclosure of social and environmental issues. To illustrate the infiltration of financial materiality in social and environmental disclosures, it uses examples of current or previously mandated disclosures on human capital and employees, climate risks and sustainability, and board diversity. In all three examples, the focus was largely about the financial interests of shareholders, highlighting that even social issues are often limited to their financial goals and that companies fail to take the pluralistic interests of shareholders in social issues into

[40] *See, e.g.*, Aneil Kovvali, *ESG and Securities Litigation: A Basic Contradiction*, 73 DUKE L.J. 1229, 1264 (2024) (discussing ESG in terms of market returns); Michael Simkovic, *Natural-Person Shareholder Voting*, 109 CORN. L. REV. 1525, 1527 (2024) (discussing social issues as externalities and asserting shareholders care about "both the return on their investment and the direct effect that negative externalities have on themselves"); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 631 (2022) (arguing for finance-based framework for assessing concerns classified under ESG umbrella).

[41] *See, e.g.*, Simkovic, *supra* note 40, at 1527 ("The traditional view in corporate governance, shareholder primacy, holds that boards and executives should manage corporations with a single-minded focus on increasing financial returns to shareholders. By contrast, the Environmental, Social and Governance (ESG) and stakeholder movements want corporations to consider the interests of stakeholders such as employees, customers, governments, and communities in which corporations operate."); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORN. L. REV. 91, 105 (2020) (discussing stakeholders' interests as separate from shareholders goals).

[42] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1038-40 (2022); Lynn A. Stout, *The Shareholder Value Myth*, EUR. FIN. REV., Apr. 19, 2013, *reprinted in* CORN. L. FAC. PUB'NS, Apr. 19, 2013; Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 739, 804 (2005). For exceptions, see Amelia Miazad, Faith Investors 16 (Nov. 1, 2024) (unpublished manuscript), https:// papers.ssrn.com/ sol3/ papers.cfm? abstract_id =5152567 (portraying Christian shareholders as motivated by factors which extend beyond profit); ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT 46 (Cambridge Univ. Press ed., 2020) (although not exactly arguing shareholders and stakeholders may have similar end goals in social issues, but noting corporation's purpose should be to serve society with profits resulting as a byproduct of doing so).

consideration. Finally, Section I.D discusses the modified risk factor disclosure rules promulgated by the SEC in 2020, which corporations now use to communicate their concerns about social and environmental issues, limiting those issues to their financial stakes.

A. *Shareholder Influence and Stakeholder Alignment*

Shareholders generally exercise their influence on corporations through the powers to vote for board directors, to sell their shares, or to sue corporate officers and managers.[43] If shareholders want to assert their interests, they often first try to negotiate with a company behind the scenes.[44] If that process fails, shareholders can sell or divest their investments from a company in protest.[45] Alternatively, shareholders can file derivative lawsuits on behalf of a company to claim that directors failed to fulfill their fiduciary duties to the company.[46]

More often, shareholders, particularly the activist types, rely on the shareholder proposal process, outlined in Rule 14a-8 of the Securities and Exchange Act of 1934, to present a broad range of demands on companies—demands that are both financial and nonfinancial.[47] Through the proposal process, shareholders submit requests for items to be brought for a vote at shareholders' meetings.[48] These requests are included in the materials sent to

[43] Robert B. Thompson, *The Power of Shareholders in the United States*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 441, 441 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

[44] Peter Cziraki, Luc Renneboog & Peter G. Szilagyi, *Shareholder Activism Through Proxy Proposals: The European Perspective*, 16 EUR. FIN. MGMT. 738, 741 (2010) ("The role of shareholder activism arises when shareholders . . . seek changes within the firm without a change in control. These investors may then press for corporate reforms by negotiating with management behind the scenes, or—especially when management is unresponsive—by submitting proposals for shareholder vote."). This behind-the-scenes process, while significant, has been limited under the Trump administration's SEC staff guidelines of Regulations 13D and 13G. The guidelines limit the ability for institutional shareholders with 5% or more in shares to inform a corporation's board of its voting direction, because such shareholder engagement may constitute "attempts to influence control" over management. *SEC Staff Adopts Significant New Guidance Affecting Shareholder Proposals and Engagement*, COOLEY LLP: NEWS (Feb. 14, 2025), https://www.cooley.com/news/insight/2025/2025-02-14-sec-staff-adopts-significant-new-guidance-affecting-shareholder-proposals-and-engagement [https://perma.cc/3ZC3-RZHS].

[45] CAROLINE HELDMAN, PROTEST POLITICS IN THE MARKETPLACE: CONSUMER ACTIVISM IN THE CORPORATE AGE 8-9 (2017).

[46] Cziraki et al., *supra* note 44, at 743.

[47] Kenneth Khoo & Roberto Tallarita, *Expanding Shareholder Voice: The Impact on SEC Guidance on Environmental and Social Proposals* 2 (Eur. Corp. Governance Inst., Working Paper No. 822/2025, 2025).

[48] 17 C.F.R. § 240.14a-8 (2025) ("A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders."); *see also* Harwell Wells, *Shareholder*

shareholders in advance of the meetings at the company's expense.[49] Shareholder activists have used proposals to encourage companies to increase their board diversity, change their environmental practices, reduce gender and racial pay gaps, and disclose more information about their gender and racial compositions, or other forms of identity, with financial and nonfinancial goals in mind.[50] And, as discussed in the introduction, NCPPR, a shareholder activist, asked Costco to conduct an evaluation and publish a report on the risks the company might have incurred by maintaining its commitment to values of diversity, equity, and inclusion.[51]

A proposal alerts other shareholders to an issue, allowing them to communicate their support for or against the proposal. By mid-2025 alone, shareholders in major public companies had voted down thirty-two so-called anti-DEI proposals.[52] Similar to Costco, at least 97% of shareholders voted against each of these proposals.[53]

Activity around proposals can also extend to stakeholders.[54] Employees may identify with a proposal and use it as a starting point for internal employee activism.[55] Government actors, such as regulatory agencies, may become alerted to issues through activist investors' proposals and consider them in rulemaking or legislation.[56] Proposals may inform customers about issues, impacting how they perceive a company and their willingness to buy goods from it, or they too

Power in America, 1800-2000: A Short History, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 22 (Jennifer G. Hill & Randall S. Thomas eds. 2015) (pointing out shareholder proposals are almost always defeated).

49 Wells, *supra* note 48, at 22.

50 *See* ATINUKE O. ADEDIRAN, DISCLOSURELAND: HOW CORPORATE WORDS CONSTRAIN RACIAL PROGRESS 60 (2026) [hereinafter ADEDIRAN, DISCLOSURELAND] ("A small but significant group of institutional investors have used shareholder proposals as a vessel to present a broad range of demands to companies, often asking companies to conduct racial equity audits to further illuminate claims and suspicions of racial discrimination and racial bias in their businesses.").

51 COSTCO WHOLESALE CORP., *supra* note 12, at 31.

52 *See infra* Appendix B for a complete list and description.

53 *Id.* These vote counts are extraordinary because social and environmental proposals rarely receive majority support. *See* Elizabeth A. Ising, Ronald O. Mueller, Geoffrey Walter & Gibson Dunn, *Shareholder Proposal Developments During the 2025 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 30, 2025), https://corpgov.law.harvard.edu/2025/08/30/shareholder-proposal-developments-during-the-2025-proxy-season [https://perma.cc/6GZR-GTCE].

54 Parthiban David, Matt Bloom & Amy J. Hillman, *Investor Activism, Managerial Responses, and Corporate Social Performance*, 28 STRATEGIC MGMT. J. 91, 92 (2007) (studying effects of shareholder proposals on stakeholder decision making).

55 *Id.* ("Current and potential employees may respond negatively if they become aware of inadequacies in a firm's [corporate social performance] through [shareholder] proposals.").

56 *Id.*

can take the subject of a proposal to use for their own activism.[57] Consumers may have relied on shareholder proposals at Costco and Target to make decisions about whether to buy products from both retailers. Shareholders want corporations to seriously consider social issues and make their interests known through the shareholder proposal mechanisms that seek votes from other shareholders.

But shareholder proposals also serve an underexplored goal: communicating shareholder interests to corporate directors and managers.[58] The past five years represent a "surge in environmental and social proposals" as shareholder focus has shifted towards these issues in unprecedented ways.[59] 62% of the total number of proposals submitted by shareholders in 2024 were about social and environmental issues, an increase from 44% a decade earlier.[60]

From shareholder proposals, corporations receive information about what their shareholders are concerned about, both financially and socially. Corporations then internalize those issues and respond to them in annual or semi-annual reports that provide information to shareholders. Shareholder annual reports signal, among other things, what companies consider important for shareholders to consider in making investment decisions.[61] This feedback loop is built into the securities market, allowing shareholders and corporations to communicate their values and interests.[62]

Research also suggests that shareholder influence has an impact on corporate managers' consideration of stakeholder interests. In one study, as shareholder influence decreased, so did managements' effort and allocation of resources

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[57] *Id.*

[58] *See* Davidson Heath, Daniele Macciocchi & Matthew C. Ringgenberg, *The Economics of Investor Engagement* 1 (Eur. Corp. Governance Inst., Finance Working Paper No. 1075/2025, 2025), https:// papers.ssrn.com/ sol3/papers.cfm?abstract_id=5030999 (exploring various methods of shareholder engagement with corporate executives, including proposals).

[59] Subodh Mishra, *U.S. Shareholder Proposals: A Decade in Motion*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 18, 2024), https://corpgov.law.harvard.edu/2024/11/18/u-s-shareholder-proposals-a-decade-in-motion [https://perma.cc/MU76-3NJN].

[60] *Id.*

[61] *See Annual Report*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/annual-report [https://perma.cc/8SV3-3VG9] (last visited Feb. 13, 2026).

[62] Other modes of communication between shareholders and corporations include sustainability and other nonfinancial reports that corporations voluntarily disclose to shareholders and the public, as well as earnings calls. Earnings calls are conference calls made between the management of a public company, analysts, investors, and the media to discuss the company's finances during a given reporting period. Earnings calls are "an increasingly important medium through which firms convey value relevant information to the market." *See* S. McKay Price, James S. Doran, David R. Peterson & Barbara A. Bliss, *Earnings Conference Calls and Stock Returns: The Incremental Informativeness of Textual Tone*, 36 J. BANKING & FIN. 992, 992 (2012).

towards improving stakeholder engagement.[63] This suggests that shareholders influence how corporations respond to the interests of stakeholders. Shareholder alignment with stakeholder interests, and communication with management, creates a crucial feedback loop so that managers can consider both shareholder and stakeholder interests in social and environmental issues when allocating firm resources and managerial effort.

B. *Financial Materiality: History and Concept*

Following the 1929 financial crisis, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934 to safeguard investors from "fraud, misrepresentation, and securities manipulation."[64] As part of the 1934 Exchange Act, Congress established the SEC to regulate the issuance of securities, positioning the SEC as the primary authority overseeing capital markets.[65] The concept of "materiality" was first introduced in the Act of 1933, but what constitutes "material" information was not delineated by the act.[66] Then the SEC promulgated rules requiring corporations to disclose any information that could be considered material to investors.[67] The original goal of securities

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63 Benjamin Bennett, René M. Stulz & Zexi Wang, *What Are the Costs of Weakening Shareholder Primacy? Evidence from a U.S. Quasi-Natural Experiment* 1, 3 (Eur. Corp. Governance Inst., Finance Working Paper No. 1064/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5252884 (finding although Nevada's new law "made it crystal clear that the doctrine of shareholder primacy does not apply in Nevada," company insiders "do not use the law to pursue [stakeholder friendly] policies").

64 Noah V. Andel, Comment, *An Avalanche of Trivial Climate-Related Information: Why the SEC's Enhancement and Standardization of Climate-Related Disclosures for Investors Will Fail*, 56 TEX. TECH L. REV. 437, 440 (2024) (footnotes omitted) ("The goal of these acts was to protect ordinary citizens from 'inaccurate, incomplete and misleading information.'" (quoting Kahan v. Rosenstiel, 424 F.2d 161, 173 (3d Cir. 1970)).

65 BRENT A. OLSON, CAL. BUS. L. DESKBOOK § 40:1 (Expert Series, Dec. 2024) (providing history of securities laws).

66 Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a)(2) (2010) ("It shall be unlawful for any person in the offer or sale of any securities . . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . ."); *see also* Henry Engler, *"Double Materiality": New Legal Concept Likely to Play in Debate over SEC's Climate Plan*, THOMSON REUTERS (Apr. 12, 2022), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/sec-double-materiality-climate [https://perma.cc/ 6XXA-B4B2] (emphasizing lack of clarity in "existing materiality principle"); Maggie Pahl, Michael Hamersky & Jason J. Czarnezki, *Multinational Asset Management Firms & ESG Disclosure Management*, 20 N.Y.U. J.L. & BUS. 577, 603-04 (2024) (noting debate about meaning of "materiality" in SEC context).

67 BUSINESS ROUNDTABLE, THE MATERIALITY STANDARD FOR PUBLIC COMPANY DISCLOSURE: MAINTAIN WHAT WORKS 1 (2015), https://s3.amazonaws.com/brt.org/archive/reports/Materiality%20White%20Paper%20FINAL%2009-29-15.pdf [https://perma.cc/XLV2-WZAM] (defining material information as "those matters to which an average prudent investor ought reasonably to be informed before purchasing the security registered"); David

laws was to protect investors by ensuring the accuracy of financial reporting.[68] Consequently, the regulatory definition of "materiality" was initially centered on financial information, reflecting the understanding that investors' primary concerns were assessing profitability and risk.[69]

The United States Supreme Court has stepped in to flesh out the definition. It has defined information as "material" in the context of securities fraud litigation if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[70] "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[71] In *Matrixx Initiatives, Inc. v. Siracusano*,[72] the Supreme Court made clear that materiality is about maximizing profits for shareholders by, for example, maintaining the trading price of securities.[73] In general, for securities markets in the United States, materiality is understood to mean *financial* materiality.[74]

In 1999, the SEC reaffirmed the existing common law definition of materiality through Staff Accounting Bulletin No. 99 ("SAB 99").[75] SAB 99 did not introduce new standards but reiterated the materiality principles expressed

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A. Katz & Laura A. McIntosh, *Corporate Governance Update: "Materiality" in America and Abroad*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 1, 2021), https://corpgov.law.harvard.edu/ 2021/05/01/corporate-governance-update-materiality-in-america-and-abroad [https://perma.cc/7DH8-N3UX].

[68] *See* Andel, *supra* note 64, at 440.

[69] *See* Katz & McIntosh, *supra* note 67.

[70] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Basic v. Levinson, 485 U.S. 224, 249 (1988) (adopting same definition of materiality for securities fraud contexts); 17 C.F.R. § 230.405 (2011) (defining "material" as "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered").

[71] *TSC Indus.*, 426 U.S. at 449.

[72] 563 U.S. 27 (2011).

[73] *Id.* at 50 (finding publicly traded pharmaceutical manufacturer's failure to disclose adverse reports showing possible link between cold remedy and loss of smell gave rise to "cogent and compelling inference" that company decided not to disclose reports to avoid negative impact on stock price).

[74] Mark Bagnoli, Thomas Godwin & Susan G. Watts, *On the Real Effects of Changes in Definitions of Materiality*, FINREG BLOG (Jan. 6, 2022), https://sites.duke.edu/thefinregblog/2022/01/06/on-the-real-effects-of-changes-in-definitions-of-materiality [https://perma.cc/S2FC-L9HE] ("In 2018, the Financial Accounting Standards Board (FASB) revised its definition of materiality . . . . The associated press release stated that the new definition . . . is aligned with the Supreme Court's definition[] and . . . the definition[] of materiality currently being used by the Securities and Exchange Commission . . . .").

[75] SEC Staff Accounting Bulletin, No. 99, 64 Fed. Reg. 45150, 45151 (Aug. 19, 1999).

in accounting, auditing, and case law.[76] It included a non-exhaustive list of circumstances that could render a misstatement material, all of which had direct or indirect financial implications.[77]

The concept of the "reasonable investor," as defined in *TSC Industries, Inc. v. Northway, Inc.*,[78] focuses on the financial outcomes most likely to influence investors' decisions.[79] Courts have maintained this standard in part to prevent investors from being inundated with irrelevant information that would overwhelm their ability to make informed investment decisions.[80] Justice Marshall, in *TSC Industries*, warned of the potential for overinclusive disclosures, arguing that the broad purpose of having a materiality standard is "to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice."[81] This concern has shaped the SEC's reasoning, including when it stated in its 1975 Environmental and Social Disclosure that requiring only information deemed important to a reasonable investor ensures the disclosure process remains manageable, benefitting investors without unduly burdening issuers and shareholders.[82]

The materiality standard has remained relatively stable over time.[83] The standard, fixed in securities regulation,[84] connects directly to the principle of shareholder primacy, which states that the corporation's foremost responsibility is to maximize profits for its shareholders.[85] One key question is whether

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[76] *See id.* (quoting Financial Accounting Standards Board's definition of materiality and noting it "is in substance identical to the formulation used by the courts in interpreting the federal securities laws").

[77] *See id.* at 41152.

[78] 426 U.S. 438 (1976).

[79] *Id.* at 426 U.S. 449.

[80] *See, e.g.*, *In re* Kidder Peabody Sec. Litig., 10 F. Supp. 2d 398, 411 (S.D.N.Y. 1998) (emphasizing materiality standard is meant to encourage "accurate disclosure of relevant information" and discourage burying shareholders "in an avalanche of information" (quoting *TSC Indus.*, 426 U.S. at 448)); *see also* Goss v. Clutch Exch., Inc., 701 P.2d 33, 35-36 (Colo. 1985) ("An unnecessarily low [materiality] standard could . . . cause management to overwhelm shareholders with an abundance of trivial information in an effort to avoid liability under the statute.").

[81] *TSC Indus.*, 426 U.S. at 448.

[82] Environmental and Social Disclosure, 40 Fed. Reg. 51656, 51660 (Nov. 6, 1975) ("This limitation is believed necessary in order to insure meaningful and useful disclosure documents of benefit to most investors without unreasonable costs to registrants and their shareholders.").

[83] *See* Paul Munter, *Assessing Materiality: Focusing on the Reasonable Investor When Evaluating Errors*, U.S. SEC. & EXCH. COMM'N (Mar. 9, 2022), https://www.sec.gov/newsroom/ speeches-statements/munter-statement-assessing-materiality-030922#_ednref4 [https://perma.cc/2YCK-FCXP] (citing *TSC Industries*' materiality standard).

[84] *See* SEC Staff Accounting Bulletin, *supra* note 75, at 45151 (discussing origin and nature of materiality standard).

[85] *See* Anthony O. Nwafor, *Shareholders Profit Maximization and Stakeholders Interests in Corporate Governance*, 11 CORP. OWNERSHIP & CONTROL 670, 670 (2014) ("[T]he primary

nonfinancial information, including information about social and environmental concerns, can actually contribute to profit maximization.[86] Increasingly, scholars suggest they can.[87] For example, disclosures about a company's labor practices or carbon footprint may not have immediate financial implications, but they can affect the company's long-term reputation, regulatory risk, and consumer loyalty.[88] Scholars argue that these long-term effects can influence investor behavior and, ultimately, profitability.[89] Thus, nonfinancial materiality may serve as a proxy for long-term financial outcomes, aligning social responsibility with shareholder interests.[90]

Professor Renée Jones has argued that the concept of materiality should be understood differently in the context of shareholders' voting decisions as compared to their investment decisions (buying, selling, holding).[91] She reasons that requiring a direct correlation between environmental, social, and governance ("ESG") metrics and stock price as a precondition for materiality in disclosure debates, which is often the case, creates an unreasonable framework.[92] According to Jones, opponents of mandatory ESG disclosures

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purpose of the corporation is to maximize profits."); *see also* Claire A. Hill, *The Rhetoric and Reality of Shareholder Profit Maximization*, 99 CHI.-KENT L. REV. 39, 40 (2025) (defining shareholder profit maximization as "the idea that companies should be run exclusively in the financial interests of their shareholders").

86 *See* Ilze Zumente & Jūlija Bistrova, *ESG Importance for Long-Term Shareholder Value Creation: Literature vs. Practice*, J. OPEN INNOVATION: TECH., MKT., & COMPLEXITY, no. 7, June 2021, at 1, 1 ("This article aims to detect how ESG adds value to the long-term shareholder value creation and to discover whether businesses are aware of positive ESG effects . . . . [It also] aims to determine if shareholders' value is positively affected by corporate ESG awareness.").

87 *See id.* at 2 (noting research suggesting investors use ESG data because of "relevance to the investment performance"); *see also* Ann M. Lipton, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1584, 1606 (2024) (reviewing STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION (2023)) ("[D]espite his denunciation of financial ESG, Bainbridge eventually concedes in a footnote that financial ESG is, ultimately, the same thing as shareholder primacy.").

88 *See* Zumente & Bistrova, *supra* note 86, at 3, 6 ("[N]onfinancial factors work as sources of competitive advantage vis à vis other companies leading to higher sales growth and lower costs in terms of employee turnover, which increase the firm's value in the long term.").

89 Aaron Yoon, *Two Factors that Determine When ESG Creates Shareholder Value*, HARV. BUS. REV. (Feb. 7, 2024), https://hbr.org/2024/02/two-factors-that-determine-when-esg-creates-shareholder-value (arguing the more companies and their management prioritize ESG investment and "quantify how these activities contribute to shareholder value, the more they will likely attract savvy investors who want to reap that potential return").

90 *See id.* (documenting "link between the ESG risk in a company's supply chain and its future stock returns").

91 Renée M. Jones, *Voting Matters: Materiality Considerations and the Shareholder Vote*, 48 SEATTLE U. L. REV. 419, 431 (2025) ("[I]n the context of shareholder voting, the concept of materiality should be more capacious than in the context of investment decisions.").

92 *Id.* at 423, 430.

often narrowly define materiality based on a direct link to financial performance, dismissing socially-minded investors as having "special interest agenda[s]" that do not align with maximizing short-term profits.[93] Jones finds it illogical to claim that "the ESG data shareholders seek is not material to shareholders when shareholders frequently approve proposals seeking enhanced ESG disclosures."[94] Because shareholders "already incorporat[e]" ESG information into their "investment and voting decisions," she argues, mandatory disclosures should be expanded to include ESG-related information.[95]

The SEC has attempted to mandate these kinds of disclosures.[96] Some rulemaking initiatives, such as the adoption of Regulation S-K in the late 1970s and its subsequent amendments, have required disclosing specific nonfinancial risks under limited circumstances; still, these requirements have always tied back to their potential financial impact on a company.[97]

C. *Financial Materiality in Social Contexts: Human Capital, Climate, and Board Diversity*

The expectation that shareholders are concerned largely about narrowly-defined financial materiality also flows into the context of social issues. But, of course, assumptions that investors care only about financial materiality are largely "unrealistic."[98] An increasing number of investors make investment

[93] *Id.* at 428.

[94] *Id.* at 436-37.

[95] *Id.* at 437.

[96] *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 281 (2022) (noting, among other examples, SEC's solicitation of public comment on need for sustainability disclosure in 2016); *see also* Mark Ortega, *Environmental, Social, and Governance (ESG) Reporting from an Environmentalist's (Not Investor's) Lens*, 47 ENVIRONS: ENV'T L. & POL'Y J. 52, 97-98, 98 n.261 (2023) (positing SEC's climate disclosure rule was "positive spillover effect" of privately driven ESG reporting).

[97] *See* Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23971 (Apr. 22, 2016) (acknowledging when SEC originally adopted Regulation S-K, it "concluded that it would require disclosure relating to social and environmental performance 'only if such information . . . is important to the reasonable investor'" (quoting Environmental and Social Disclosure, 40 Fed. Reg. 51656, 51660)); *see also* Kara M. Stein, Commissioner, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting on a Concept Release on the Business and Financial Disclosure Required by Regulation S-K (Apr. 13, 2016), https://www.sec.gov/ newsroom/ speeches-statements/ stein-statement-1-041316 [https://perma.cc/2KLM-4Q8L] (noting potential importance of disclosure requirements for ESG topics due to fact that "companies that adopt certain . . . ESG measures may perform better than those that do not").

[98] *See* Hans B. Christensen, Luzi Hail & Christian Leuz, *Mandatory CSR and Sustainability Reporting: Economic Analysis and Literature Review*, 26 REV. ACCT. STUD. 1176, 1222 (2021) ("[T]he assumption that investors care only about monetary returns seems unrealistic. An increasing number of investors appear to make investment decisions not only

decisions not only based on expected future returns but also on considerations of social and environmental concerns.[99] Other shareholders invest for moral reasons.[100] And when shareholders are asked "whether they are willing to sacrifice some [financial] value for important values, most are inclined to do so, even when their choices have [financial] consequences."[101]

The SEC has attempted to expand its disclosure requirements for corporations to include social and environmental issues that it defines as being material to business operations, including issues involving employees, diversity and inclusion, and climate and environmental risks. Even in those contexts, the SEC defines materiality in financial terms. As discussed below, in the case of climate risks, the SEC attempted to expand the definition of materiality beyond financial terms but was met with intense pushback, resulting in further roll back, which included focusing on risks that were likely to have a financially material impact on companies and investors.

1. Human Capital and Employees

In August 2020, the SEC amended Item 101(c) of Regulation S-K to require companies to make human capital disclosures in the *business* section of their annual 10-K reports, to the extent the information is material to the understanding of businesses.[102] Specifically, public companies are required to disclose: (1) the number of employees and a description of human capital resources if *material to the business as a whole*, and if material to a particular

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based on expected future returns, but also considers non-monetary aspects and social norms.").

[99] *See* GREGORY UNRUH ET AL., MASS. INST. OF TECH. SLOAN MGMT. REV., INVESTING FOR A SUSTAINABLE FUTURE 3-4, 7 (2016); Caroline Flammer, *Corporate Social Responsibility and Shareholder Reaction: The Environmental Awareness of Investors*, 56 ACAD. MGMT. J. 758, 761 (2013).

[100] *See generally* Jean-François Bonnefon, Augustin Landier, Parinitha Sastry & David Thesmar, *The Moral Preferences of Investors: Experimental Evidence*, J. FIN. ECON 2025, at 1 (discussing investors seeking positive social impact through choices); Zwetelina Iliewa, Elisabeth Kempf & Oliver Spalt, *Corporate Actions as Moral Issues* (Nat'l Bureau of Econ. Rsch., Working Paper No. 33749, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5063396 (studying nonpecuniary preferences of representative sample of United States population, for set of corporate actions that managers routinely take in their companies, and finding moral drivers for those preferences).

[101] *See* Oliver Hart, Helene E. Landemore & Luigi Zingales, *How to Implement Shareholder Democracy* 3 (George J. Stigler Ctr. for the Study of the Econ. & the State, Working Paper No. 350, 2025), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/workingpapers/350shdemocracy.pdf.

[102] *See* 17 C.F.R. § 229.101(c)(2)(ii) (2020). Regulation S-K is an SEC regulation "that outlines how [companies] should disclose material qualitative descriptors of their business on registration statements, periodic reports, and any other filings." *Regulation S-K*, LEGAL INFO. INST. (Jan. 2022), https://www.law.cornell.edu/wex/regulation_s-k [https://perma.cc/5SN9-A7WL].

segment, that segment should be identified; and (2) any human capital measures or objectives, if material, that companies focus on in *managing their business*, such as those related to the "development, attraction, and retention of personnel."[103]

Per the language of human capital disclosures, the primary focus is on financial materiality—the impact of a company's human capital on its financial performance and how corporate practices affect shareholders' financial outcomes.

To incorporate disclosures about social issues, the SEC could have also asked companies to disclose the positive and negative effects of their business activities and operations on the development, attraction, safety, engagement, and retention of employees. These disclosures would have provided shareholders and stakeholders, including employees, with information about how a company responds to the people who help them earn profits. Information about the positive and negative effects of a company's activities on employees has financial, reputational, and social implications for corporations and their employees.[104] Both shareholders and stakeholders are interested in such information that goes beyond financial ends.[105]

2. Climate Disclosures

The most significant departure from the traditional financial materiality standard occurred in March 2024 with the SEC's final climate disclosure rule, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*.[106] The rule required public companies to "disclose information in three key areas: (1) climate-related financial risks, (2) GHG emissions, and (3) any climate-related targets or transition plans."[107] Requiring these types of

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[103] *See* 17 C.F.R. § 229.101(c)(2)(ii).

[104] *See* Omer Unsal & Jennifer Brodmann, *The Impact of Employee Relations on the Reputation of the Board of Directors and CEO*, 78 Q. REV. ECON. & FIN. 372, 373-75 (2020) (explaining how positive employee relations can improve firm's reputation and shareholder returns while negative employee relations, especially when demonstrated through litigation, correlated to reputational harms and increased costs).

[105] *See id.* (noting how firm's reputational harm can cause increased business costs while improved employee relations can decrease costs and increase shareholder dividends).

[106] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21668 (Mar. 28, 2024) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) [hereinafter Enhancement and Standardization of Climate-Related Disclosures for Investors] (adopting amendments to Securities Act of 1933 and Securities Exchange Act of 1934 to "require information about a registrant's climate-related risks that have materially impacted, or are reasonably likely to have a material impact on, its business strategy, results of operations, or financial condition").

[107] Chloe Field & Cynthia Hanawalt, *The SEC's Final Climate Disclosure Rule: Key Requirements, and the Materiality Threshold*, COLUM. L. SCH. SABIN CTR. BLOG (Mar. 11, 2024), https://blogs.law.columbia.edu/climatechange/2024/03/11/the-secs-final-climate-disclosure-rule-key-requirements-and-the-materiality-threshold [https://perma.cc/63J4-MDVM].

disclosures expanded the definition of materiality beyond financial information to include broader environmental concerns.[108]

The SEC successfully promulgated this Rule, in part, because Section 7 of the 1933 Act gives the SEC full authority to determine what information companies must disclose and does not explicitly limit the SEC to requiring only material disclosures.[109] Section 7 merely allows the SEC to require information deemed "necessary or appropriate in the public interest or for the protection of investors."[110] This broader interpretation provided the SEC with a legal basis to argue that climate-related information—even if not traditionally considered financially material—could still be deemed essential for investors making informed decisions.

However, about a month after releasing its new climate rule, the SEC voluntarily paused implementing the climate-related disclosure rules pending judicial review in response to lawsuits from twenty-five states.[111]

Critics claimed the SEC overstepped its authority because environmental regulation falls outside its purview and should instead be managed by the Environmental Protection Agency ("EPA").[112] Opponents also argued that "neither the public interest nor the protection of investors adequately supports the Proposal," because "[a]bsent materiality, there is no plausible connection between the Proposal and the protection of investors."[113] Others said that the use of the term "public interest" in regulatory statutes does not confer unchecked power to regulate outside of the authority delegated to the SEC, especially when

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[108] *See id.* (exploring how SEC's climate disclosure rule requires fact-specific inquiry based on likelihood reasonable investors would consider it important when determining whether to buy or sell securities or how to vote, even if disclosed information does not necessarily affect company's bottom line).

[109] *See id.* ("Nowhere in Section 7 of the Securities Act of 1933 does it say that the SEC can only require 'material' disclosures.").

[110] Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 106, at 21683.

[111] *In re* Enhancement and Standardization of Climate-Related Disclosures for Investors, Order Issuing Stay, Release No. 99908, File No. S7-10-22 (SEC Apr. 4, 2024); Christian D. H. Schultz, Adrien K. Anderson, Jane Norberg & Teresa L. Johnson, *SEC Halts Defense of the Climate-Related Disclosures Rule*, ARNOLD & PORTER (Feb. 13, 2025), https://www.arnoldporter.com/en/perspectives/advisories/2025/02/sec-halts-defense-of-the-climate-related-disclosures-rule [https://perma.cc/5S5X-VX3C].

[112] *See* Richard C. Breeden, Philip R. Lochner, Jr., Paul S. Atkins, Harvey L. Pitt & Richard Y. Roberts, Comment Letter on Proposed Rule of The Enhancement and Standardization of Climate-Related Disclosures for Investors, at 5 (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132519-303005.pdf (noting SEC's expertise is limited to financial markets and "Congress expressly delegated climate disclosure regulation to the Environmental Protection Agency").

[113] *Id.* at 4 (emphasis omitted).

such information does not contribute to investors' decisions.[114] To critics, requiring the disclosure of this information would simply overwhelm investors and undermine the goal of informed decision-making.[115]

In response, the SEC made several adjustments, including refining the scope of climate-related disclosures, focusing on the risks that were likely to have a financially material impact on companies and investors.[116] The final rule also includes specifications to ensure that disclosures are not unnecessarily duplicative or overly detailed to help mitigate the concerns about excessive disclosures.[117]

The immediate pushback to the SEC's climate disclosure rule highlights the tension between the financial materiality standard and evolving demand to expand disclosure requirements to include broader economic, social, and environmental concerns.

The SEC under the Trump Administration has dropped its defense of its climate rules.[118] If the same rules are ever revived, companies will be required to disclose, among other things, (1) climate-related risks that have had or are reasonably likely to have a *material impact on their business strategies*, the results of operations (or *financial condition*), and (2) the actual and potential material impacts of any identified climate-related risks on business strategy, model, and outlook.[119] The rule will not require corporations to make disclosures

[114] *See id.* at 4 ("[T]he use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare.").

[115] *See id.* at 2-3 ("[D]isclosure of the effects of 'physical' and 'transition' risks . . . could 'bury investors' and thus impede their informed decision-making." (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976))).

[116] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 106, at 21698 ("Some commenters misinterpreted the rule proposal as requiring the disclosure of actual or potential impacts of climate-related risks, regardless of their materiality. We have, therefore, added an explicit materiality qualifier to Item 1502(b) . . . ." (footnote omitted)).

[117] *See id.* at 21707 ("We also have streamlined the proposed scenario analysis disclosure requirements to reduce redundancy in the final rules. For example, we have eliminated the introductory provision in the rule proposal requiring a [company] to describe the resilience of its business strategy in light of potential future changes in climate-related risks.").

[118] Press Release, U.S. Sec. & Exch. Comm'n, SEC Votes to End Defense of Climate Disclosure Rules (Mar. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-58 [https://perma.cc/VV73-KET3].

[119] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 106, at 21669 (emphasis added). "Republican-led states, energy industry companies and business groups say the rules amount to environmental regulation and therefore overstep the SEC's legal mandate" to ensure that shareholders have information they need to make investment decisions; environmental groups like the Sierra Club and Natural Resources Defense Council ("NRDC") "said the rules do not go far enough," especially because a stronger initial version was watered down to the current version. *See* Isla Binnie, *US SEC Stays Climate Disclosure Rule Amid Legal Challenges*, REUTERS (Apr. 4, 2024, at 20:56 ET), https://www.reuters.com/legal/us-sec-stays-climate-disclosure-rule-amid

on broader environmental topics, such as climate change, GHG emissions, climate related targets, or transition plans.[120]

3. Board Diversity

The requirement to disclose the racial and gender composition of corporate boards was one of the SEC's most controversial moves. In August 2021, the SEC approved the Nasdaq Stock Exchange's rules requiring companies listed on its exchange to disclose the diversity of their boards pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 and Rule 19b-4.[121] It was the SEC's first-ever disclosure mandate related to social issues.[122] Still, the diversity disclosure rules were largely about financial materiality.[123]

Between August 2021 and when they were struck down,[124] any company listed on Nasdaq had to comply with these rules.[125] In announcing the diversity disclosure rules, Nasdaq cited several studies to show that boardroom diversity is "positively associated with improved corporate governance and company performance," and that "there is substantial evidence that board diversity promotes investor protection."[126] The rule did not ask companies to consider the

-legal-challenges-2024-04-04 [https:// perma.cc/ Q83F-JNTS]. The Sierra Club and the NRDC, who had originally sued the SEC to challenge the limits, dropped their lawsuits in June 2024. *See* Lamar Johnson, *Sierra Club, NRDC Drop Legal Challenges to SEC Climate Rule*, ESG DIVE (June 5, 2024), https://www.esgdive.com/news/sierra-club-nrdc-drop-legal-challenges-to-sec-climate-risk-disclosure-rule/718098 [https://perma.cc/QG73-FRNK].

[120] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 106, at 21669 (limiting company disclosures to material impact of climate risks on companies' operations, finances, and management).

[121] Order Approving NASDAQ Proposed Rule Change Related to Board Diversity, 86 Fed. Reg. 44424, 44445 (Aug. 12, 2021); *see also* 15 U.S.C. § 78s(b)(2) (outlining procedure for self-regulatory organization's rule changes); 17 C.F.R. § 240.19b-4 (2006) (same). For further analysis on the SEC's rulemaking authority, see generally James Fallows Tierney, *Overseeing Private Rulemaking: Evidence from SEC Review of SRO Rules*, 27 U. PA. J. BUS. L. 589 (2025).

[122] *See* Adediran, *Disclosing Diversity*, *supra* note 29, at 313.

[123] *See id.* at 368 ("The rule is unlikely to lead to increased corporate diversity because it merely requires disclosures for investor transparency and decision-making, applies only to Nasdaq-listed companies, and only to board diversity—not executives or other employees.").

[124] All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n, 125 F.4th 159, 185 (5th Cir. 2024).

[125] *See* Adediran, *Disclosing Diversity*, *supra* note 29, at 331-32 (explaining three-pronged approach to Nasdaq's proposed board diversity disclosure rules).

[126] *See* Order Approving NASDAQ Proposed Rule Change, 86 Fed. Reg. at 44431; *see also* John A. Zecca, Response to Comments and Notice of Filing of Amendment No. 1 of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (File No. SR-NASDAQ-2020-081) (Feb. 26, 2021), https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf (detailing how diversity disclosures can enhance corporate performance and investor confidence); Jonathan D. Uslaner & Thomas Sperber, *Nasdaq's Board Diversity Rules: Inclusivity Is Good Business*, REUTERS (Feb. 15, 2022, at

impact of a lack of board diversity on stakeholders or shareholders' potential concerns about the lack of board diversity's impact on society.

While the Nasdaq board diversity rules were struck down by the Fifth Circuit Court of Appeals in December 2024,[127] they are illustrative of the singular focus on what is financially material to shareholders, even when rules are about social issues.

D. *Risk Factor Disclosures*

Public companies, whose shares are traded freely on stock exchanges, are required to periodically disclose information about their financial and operational conditions to the SEC to aid shareholders in making informed investment decisions.[128] Disclosures made to the SEC must not be inaccurate, false, or misleading lest a company expose itself to possible sanctions.[129]

Corporations that wish to provide information on social and environmental issues that are not financially material, as defined by law, must carve out opportunities to do so in voluntary sustainability reports and other avenues designed for stakeholders to understand corporate activities.[130] Information about social and environmental issues are typically made in corporate sustainability reports that are accessible from company websites, as opposed to a standardized annual report publicly disclosed to shareholders and accessible from a centralized database.[131]

The SEC requires risk factor disclosures if they are financially material. Risk factor disclosures in Form 10-K and other SEC filings offer investors an

10:58 ET), https://www.reuters.com/legal/legalindustry/nasdaqs-board-diversity-rules-inclusivity-is-good-business-2022-02-15 [https://perma.cc/E9PB-942M] ("Several studies cited by Nasdaq in announcing Rule 5606(f) show that boardroom diversity directly benefits firm performance, including improved shareholder engagement, public securities disclosure accuracy, and a boost in companies' ability to attract and retain talent.").

[127] *All. for Fair Bd. Recruitment*, 125 F.4th at 182 (holding SEC exceeded "regulatory domain of market manipulation" in approving Nasdaq's rules).

[128] *See* Securities Act of 1933, Pub. L. No. 73-22, § 7, 48 Stat. 74, 78-79 (1933) (codified at 15 U.S.C. § 77) (detailing disclosure requirements for initial offerings of securities); Securities Exchange Act of 1934, Pub. L. No. 73-291 § 13, 48 Stat. 881, 894-95 (1934) (codified at 15 U.S.C. § 78) (detailing periodic reports security issuers must file with SEC). For an extensive overview on the SEC's disclosure regime, see Henry T. C. Hu, *Too Complex to Depict? Innovation, Pure Information, and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601, 1614-28 (2012).

[129] *See* 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2010).

[130] *See* Adediran, *Disclosing Diversity*, *supra* note 29, at 339 (illustrating rising number of companies with voluntary ESG reports from 2017 to 2021).

[131] Pahl et al., *supra* note 66, at 591. Investors have noted that the inconsistent "format or location" of such disclosures "can make [the] information hard to compile and review." U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 13 (2020).

understanding of financial risks faced by an individual company.[132] Risk is about future occurrences.[133] "[I]t implies a degree of uncertainty and inability to control fully the outcomes or consequences of such an action."[134] Shareholders are in the best position to make informed decisions when they are apprised of the precise nature and magnitude of all potential risks.[135]

In 2020, the SEC modified its risk factor disclosure rules to streamline the disclosure process. The modification limits risk disclosures to only "material factors that make an investment in [a company] speculative or risky."[136] As the SEC's press release notes, "the amendments reflect the [SEC's] long-standing commitment to a principles-based, registrant-specific approach to disclosure . . . rooted in materiality and . . . designed to facilitate an understanding of each [company's] business, financial condition, and prospects."[137] The rules are designed so that risks are consistent with the views of management and the board of directors in their assessment of a company's financial performance.[138]

Therefore, each company must determine and disclose its financial risks. The rules advise companies against presenting risks that are applicable to any company.[139] Rather, Eric Gerding, former Director of the Division of Corporate Finance in the SEC, urges companies to "discuss the more particularized risks and impacts on their specific company."[140] Companies should not "revert to boilerplate disclosures," and "[a]ny material [information] should be disclosed."[141] Traditionally, SEC corporate risk disclosures have centered on economic downturns, cybersecurity threats, natural disasters, or litigation related to business operations.[142] However, it is not only federal securities laws that

[132] INV. RESP. RSCH. CTR. INST., THE CORPORATE RISK FACTOR DISCLOSURE LANDSCAPE 3 (2016).

[133] PETER MOORE, THE BUSINESS OF RISK 1 (1993).

[134] *Id.*

[135] *Id.*

[136] 17 C.F.R. § 229.105 (2020).

[137] Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020), https:// www.sec.gov/ newsroom/ press-releases/2020-192 [https://perma.cc/N3DU-PANK].

[138] *Id.*

[139] 17 C.F.R. § 229.503(c) ("Do not present risks that could apply to any issuer or any offering.").

[140] Former Director Erik Gerding emphasized that boilerplate risk factors do not serve investors well, who gain more from understanding how risks specifically impact a particular issuer. Erik Gerding, U.S. Sec. & Exch. Comm'n, Dir. of Div. of Corp. Fin., Statement on the State of Disclosure Review (June 24, 2024), https://www.sec.gov/newsroom/speeches-statements/gerding-statement-state-disclosure-review-062424 [https://perma.cc/53BD-FU3K].

[141] *Id.*

[142] Stephen Riddick, *The SEC Is Serious About Cybersecurity. Is Your Company?*, HARV. BUS. REV. (Sep. 8, 2021), https://hbr.org/2021/09/the-sec-is-serious-about-cybersecurity-is-

focus on financial materiality. As discussed in the next Part, state corporate laws also share this focus.

II. STATE CORPORATE LAW AND THE SILOING OF SOCIAL AND ENVIRONMENTAL ISSUES

State laws regulate most aspects of corporations in the United States, including how corporations are formed, governed, and operate within a state. States also govern how corporations interact with shareholders and stakeholders.

Social and environmental issues in state corporate law are almost universally siloed into special types of statutes outside of the standard business corporation or C Corporation statutes. Two examples that have been adopted by most states are public benefit corporation statutes and constituency statutes—legal provisions that publicly traded corporations have largely ignored. This Section considers these legal provisions, paying particular attention to Delaware and California law. Delaware passed legislation that siloes social issues considered to be of interest largely to stakeholders, while California uses a financial materiality lens for climate disclosures that ignores other important aspects of the climate concern, much like the SEC.

A. *State Public Benefit Corporation Statutes*

A Public Benefit Corporation ("PBC") is a for-profit corporation that is "simultaneously permitted to pursue both economic profits and social benefits."[143] PBCs are "designed by state statutes" to enable a corporation "to choose explicitly to pursue societal or stakeholder interests," and consider the interests of workers, the environment, and the public, "rather than focusing primarily or exclusively on shareholder economic value."[144] Most PBCs are small and privately held.[145] There are currently only twelve publicly traded PBCs in the United States.[146] Therefore, the PBC structure is a niche in corporate

your-company ("Businesses are required to properly disclose 'risk factors' in SEC filings to inform the investing public about the risks that may come with the stocks they purchase. These risks can include competitive threats, natural disasters, supply-chain issues, economic downturns, political events, public-health issues, trade wars and cybersecurity incidents.").

[143] Jill E. Fisch & Steven Davidoff Solomon, *The "Value" of a Public Benefit Corporation*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 68, 71 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[144] *Id.*

[145] *Id.* at 72 (noting as of July 1, 2021, there were only four publicly traded PBCs).

[146] *See Publicly Traded B Corps*, IMPACT ASSESSMENT (Feb. 21, 2025, at 10:26 ET), https://kb.bimpactassessment.net/support/solutions/articles/43000632643-publicly-traded-b-corps [https://perma.cc/MF36-9LHL] (listing twelve current publicly traded B Corps in United States). Publicly traded companies are those listed on stock exchanges, which tend to be larger than privately held ones. Publicly traded companies also tend to be multinational. *Determining Company Status: Public v. Private*, GEORGETOWN L. LIBR.: CO. RSCH. GUIDE, https:// guides.ll.georgetown.edu/ companyresearch/company-status [https://perma.cc/8V5E-

law, often discussed only in the context of small, privately held firms, and a select group of publicly traded companies who chose to also consider the interests of stakeholders. To further understand the niche nature of PBCs, it is useful to consider that their creation was spearheaded by a nonprofit organization, called B Lab, which issues certificates to companies that choose to become B Corporations, also known as B Corps, separate from state statutes.

B Lab started the benefit corporation revolution in 2006.[147] The movement began with three friends—two apparel entrepreneurs and a private equity investor who met at Stanford University.[148] B Lab's goal was to "use the power of business to solve social and environmental issues."[149] B Lab sought to "develop[] an approach center[ed] on companies' social and environmental transparency and accountability."[150] B Lab issues certificates to companies that choose to become B Corps and meet "certain social and environmental performance, accountability, and transparency standards," in addition to financial goals.[151] Becoming a B Corporation allows a company to claim interest in both shareholders and stakeholders.[152] In theory, B Corps have a "business structure that challenges . . . traditional" shareholder primacy "by requiring the

P393] (last visited Jan. 28, 2026). Most companies that have adopted formal standards are small and new, and the largest ones tend to be private professional service firms. Publicly traded companies are so few that I list them here: Vital Farms, Lemonade Insurance, Veeva Systems, SDAC, Amalgamated, Coursera, Broadway Financial Corporation, Warby Parker, Allbirds, United Therapeutics, Planet Labs, Greenlight Biosciences Holdings. All twelve corporations are also Public Benefit Corporations under Delaware state law. This list does not include publicly traded companies with PBC or B Corp subsidiaries, like Gap.

[147] *See* CHRISTOPHER MARQUIS, BETTER BUSINESS: HOW THE B CORP MOVEMENT IS REMAKING CAPITALISM 107-08 (2020); Lydia Segal, *Benefit Corporations*, *in* LEGAL BUT CORRUPT: A NEW PERSPECTIVE ON PUBLIC ETHICS 105, 108 (Frank Anechiarico ed., 2017).

[148] MARQUIS, *supra* note 147, at 18-19; *see also* DANA BRAKMAN REISER & STEVEN A. DEAN, *Evaluating the Current Menu of Legal Forms for Social Enterprise*, *in* SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT AND CAPITAL MARKETS 52, 60 (2017) ("B Lab was founded by two successful apparel entrepreneurs and a private equity investor, who developed a three-part strategy for pursuing this ambitious mission.").

[149] Ronald Weber Kirst, Miriam Borchardt, Maurício Nunes Macedo de Carvalho & Giancarlo Medeiros Pereira, *Best of the World or Better for the World? A Systematic Literature Review on Benefit Corporations and Certified B Corporations Contribution to Sustainable Development*, 28 CORP. SOC. RESP. & ENV'T MGMT. 1822, 1822 (2021).

[150] MARQUIS, *supra* note 147, at 19.

[151] Andrea Richardson & Eleanor O'Higgins, *B Corporation Certification Advantages? Impacts on Performance and Development*, 38 BUS. & PRO. ETHICS J. 195, 196 (2019); *see also* Atinuke O. Adediran, *The Relational Costs of Free Legal Services*, 55 HARV. C.R.-C.L. L. REV. 357, 395 n.183 (2020) ("B Lab is the only organization that provides a comprehensive certification encompassing all aspects of social and environmental performance in addition to financial performance.").

[152] Suntae Kim, Matthew J. Karlesky, Christopher G. Myers & Todd Schifeling, *Why Companies Are Becoming B Corporations*, HARV. BUS. REV. (June 17, 2016), https://hbr.org/2016/06/why-companies-are-becoming-b-corporations.

pursuit of a social benefit," and "remov[ing] the notion that the firm must maximize shareholder wealth.[153] B Lab has described B Corp as being equivalent to other certification programs: "B Corp is to business what Fair Trade certification is to coffee or USDA Organic certification is to milk."[154] There are now thousands of certified B Corps, including private companies like Patagonia, publicly traded corporations like Allbirds, and start-ups like Kickstarter.[155]

To become a Certified B Corp, a company must meet three criteria. First, it must conduct an assessment using the free B Impact Assessment tool, which, according to Patagonia—one of the first adopters of the B certification—"helps companies measure, compare, and improve their social and environmental performance."[156] It assesses a company's commitment based on five "impact areas": governance, workers, community,[157] the environment, and customers.[158] A firm must obtain a score of 80/200 for certification, which is assessed and updated every two years.[159] Second, a company must make a legal commitment to be accountable to all stakeholders by, for example, changing its corporate governance structure or achieving benefit corporation status, if available in its jurisdiction.[160] However, a B Corp certificate requires only a consideration of, rather than prioritization of, social good.[161] Third, a company must exhibit

[153] Segal, *supra* note 147, at 108.

[154] Richardson & O'Higgins, *supra* note 151, at 196.

[155] MARQUIS, *supra* note 147, at 4; *Publicly Traded B Corps*, *supra* note 146.

[156] Rose Marcario, *Foreword* to RYAN HONEYMAN & TIFFANY JANA, THE B CORP HANDBOOK: HOW TO USE BUSINESS AS A FORCE FOR GOOD 13 (2d ed. 2019).

[157] Communities are multilayered and diverse, but the focus is primarily on the groups and systems located near a business's operations or directly affected by them. *See* Don Tapscott & David Ticoll, THE NAKED CORPORATION: HOW THE AGE OF TRANSPARENCY WILL REVOLUTIONIZE BUSINESS 172 (2003).

[158] *Impact Areas: Governance, Workers, Community, Environment and Customers*, B IMPACT ASSESSMENT (May 20, 2020, at 11:24 ET), https://kb.bimpactassessment.net/en/support/solutions/articles/43000574683-impact-areas-governance-workers-community-environment-and-customers [https://perma.cc/MQ8L-TEKS] ("Each of these sections evaluates the impact of a company's operations and business model impact on the stakeholder."); *see also* Kristy O'Leary, *A Brief Overview of the 5 Impact Areas of B Corporation Certification*, DECADE, https://www.decadeimpact.com/blog/5-impact-areas-of-b-corporation-certification [https://perma.cc/2J65-ZJLJ] (last visited Oct. 2, 2025) (describing elements of each impact area).

[159] Richardson & O'Higgins, *supra* note 151, at 196.

[160] *See id.*; *see also The Legal Requirement for Certified B Corporations*, B CORP., https://www.bcorporation.net/en-us/about-b-corps/legal-requirements [https://perma.cc/9FN3-BHY6] (last visited Feb. 13, 2026) ("Certified B Corporations are legally required to consider the impact of their decisions on all of their stakeholders—a model known as stakeholder governance."). This marks the shift from shareholder primacy to stakeholder governance, making the company legally accountable to the people. *Id.*

[161] REISER & DEAN, *supra* note 148, at 57.

transparency by having its performance measured against B Lab's standards and made available through B Lab's verification process, including publication on its website.[162] While the relative strength of the enforcement process behind B Corp certification may reassure stakeholders that a company is concerned about social and environmental issues, some observers view B Corp certification as ambiguous.[163]

In addition to issuing certificates, B Lab was instrumental in getting states to recognize and establish PBC Statutes.[164] B Lab founders were motivated to push for these statutes because B Corps were not recognized under the law, leaving them vulnerable in the event of a hostile corporate takeover.[165] So B Lab developed the Model Benefit Corporation Legislation ("MBCL"), which allows companies to incorporate as benefit corporations with "their social missions embedded in their articles of incorporation."[166]

The MBCL requires directors to consider a broad group of stakeholders when making decisions.[167] It also imposes a corporate "purpose of creating general public benefit," which it defines as a "material positive impact on society and the environment, taken as a whole, *assessed against a third-party standard*."[168] The statute makes benefit corporations accountable in two ways. First, it requires them to annually report against that third-party standard; second, it allows shareholders to bring lawsuits challenging whether that corporate purpose is being met.[169] B Corp's goal was realized with the first PBC statute enactment in Maryland in 2010, only four years after the movement began.[170] Virginia and similar states adopted the MBCL as their own Benefit Corporation statutes.[171]

The distinction between PBC statutes and B Corp certifications has largely collapsed in states that have enacted PBCs, because B Lab often requires

[162] *Certification Notice*, B CORP (May 1, 2024), https://www.bcorporation.net/en-us/certification-notice [https://perma.cc/3NR8-KQ8H].

[163] Fisch & Solomon, *supra* note 143, at 80.

[164] *See* MARQUIS, *supra* note 147, at 20 ("Fundamental to their mission's success was the creation of the benefit corporation . . . .").

[165] Segal, *supra* note 147, at 108.

[166] *Id.*; *see also* Anna Patton, *The Unexpected Evangelist: Bill Clark, Father of Benefit Corporation Law*, PIONEERS POST (Mar. 20, 2019), https://www.pioneerspost.com/news-views/20190320/the-unexpected-evangelist-bill-clark-father-of-benefit-corporation-law [https://perma.cc/YAL6-3GQG] (connecting Clark's experience as reporter for Model Nonprofit Corporation Act to his work with B Lab founders on benefit corporation legislation).

[167] REISER & DEAN, *supra* note 148, at 54.

[168] *Id.* at 53 (quoting *Model Benefit Corporation Legislation* §§ 201(a), (c)).

[169] *Id.* at 57, 59.

[170] MD. CODE ANN. CORPS. & ASSN'S § 5-6C-01 (West 2025) (defining "benefit corporation" under Maryland law).

[171] Summer Brown, *Benefit Corporations: A Case Study in the Issues of Implementation and Adoption of the Fastest Growing Business Form in the United States*, 35 BUS. & PRO. ETHICS J. 199, 201 n.4, 7 (2016).

companies in these states to also incorporate as PBCs.[172] Since thirty-eight states, including Delaware, have enacted PBC statutes, many companies seeking B Corp certifications must also become PBCs. Delaware—where a majority of corporations are incorporated—defines a public benefit corporation as "a for-profit corporation . . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[173] A public benefit is "a positive effect (or reduction of negative effects) on [one] or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[174] Colorado, Georgia, Iowa, Kansas, Kentucky, Ohio, Tennessee, and Texas have adopted virtually identical definitions of a public benefit.[175] Delaware's PBC statute is clearcut. It does not allow directors to prioritize the interests of stakeholders; they must instead balance stakeholder interests with those of shareholders, assuming misalignment between stakeholders' social interests and shareholders' financial interests.[176]

Virginia's PBC statute provides another widely adopted definition. It defines general public benefit as having "a material positive impact on society and the environment taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation."[177] Most publicly traded

[172] *The Legal Requirement for Certified B Corporations*, *supra* note 160.

[173] DEL. CODE ANN. tit. 8, § 362(b) (West 2025).

[174] *Id.*

[175] Brown, *supra* note 171, 211-12, tbl. 1.

[176] Michael R. Littenberg, Emily J. Oldshue & Brittany N. Pifer, *Delaware Public Benefit Corporations—Recent Developments*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (Aug. 31, 2020), https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments [https://perma.cc/T4LQ-NR29] ("Under Section 365(a) [of the DGCL], the board of a PBC is required to . . . balance[] the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct and the public benefit identified in its certificate of incorporation.").

[177] VA. CODE ANN. § 13.1-782 (West 2025). The most common example of this type of reputable third-party is B Lab. According to B Corp, it uses a comprehensive tool to "measure, manage, and improve [a company's] impact." *Introducing B Impact: A Better Way to Measure and Manage Impact*, B CORP., https://www.bcorporation.net/en-us/programs-and-tools/b-impact [https://perma.cc/4RDY-77BQ] (last visited Jan. 28, 2026). It also assesses eligibility for B Corp Certification based on a review of "potentially negative impacts" associated with a company's industry and other practices, and additional baseline requirements for multinational parent companies generating more than $5 billion in annual revenue. B Glob. Network, *Common Concerns About B Corp Certification: A Q&A*, B CORP. (June 6, 2022), https://www.bcorporation.net/en-us/news/blog/common-concerns-about-b-corp-certification-a-q-and-a [https://perma.cc/AS48-VEKE]. However, states do not evaluate any third-party assessor to determine whether the third party meets its stated or unstated assessment standards. *See* Brown, *supra* note 171, at 209 (noting lack of requirement for B Lab to report to state that corporation does not meet its standards).

companies have ignored these statutes. In fact, there are no publicly traded PBCs in any of the states that have adopted Virginia's definition, including Arizona, California, Connecticut, Florida, Indiana, Idaho, Illinois, Louisiana, Maine Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, and West Virginia.[178]

B. *State Constituency Statutes*

Thirty-one states have laws known as "constituency statutes" that allow corporate directors to consider stakeholders in determining the best course of action for the corporation.[179] Constituency statutes were originally enacted to protect board directors that push back against shareholders who believe their interests must prevail over all stakeholders during a hostile takeover.[180] Therefore, constituency statutes were enacted to benefit directors and not necessarily stakeholders.[181]

Constituency statutes provide another example of the separation of shareholder interests from those of stakeholders for three reasons. First, constituency statutes do not mandate corporate directors to consider stakeholders in their decision making.[182] Constituency statutes provide only voluntary suggestions—corporate directors can decide to consider only the financial interests of shareholders, if they wish.[183] Second, constituency statutes have yet to be tested in courts as a source of authority for directors' consideration of the interests of stakeholders. Thus, the statutes' abilities to protect customers, employees, or the environment, or to show the interconnectedness of

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[178] Fisch & Solomon, *supra* note 143, at 68 ("The specific requirements and attributes of the PBC vary from state to state, but a substantial number of PBCs . . . are formed under the *Delaware* PBC statute." (emphasis added)).

[179] *See* STAN. UNIV., *Constituency Statutes*, at 00:04 (Stanford.edu) https://stanford.edu/dept/gsb-ds/Inkling/CSI_Legal_Structures/ops/s9ml/chapter04constituency_statutes.xhtml [https://perma.cc/K5BD-HL8Z] (on file with the Boston University Law Review) ("Thirty-one states have adopted [c]onstituency [s]tatutes, but they have not been tested in court and don't exist in Delaware or California." (emphasis omitted)); JEFF LINGWALL, BUSINESS ETHICS: 100 QUESTIONS 58 (n.d.), https:// boisestate.pressbooks.pub/ businessethics ("So-called 'corporate constituency' statutes specifically allow corporations to consider factors other than simply shareholder profit when making decisions.").

[180] Anne Lockner, *Constituency Statutes: The Overlooked Predecessor to the ESG Movement*, ROBINS KAPLAN (Sep. 2022), https://www.robinskaplan.com/newsroom/insights/constituency-statutes [https://perma.cc/8SWU-WYU3].

[181] *Id.* ("That constituency statutes were meant to benefit directors is perhaps best reflected by the fact that none provide an enforcement mechanism for any of the non-shareholder constituencies.").

[182] STAN. UNIV., *supra* note 179, at 00:56 (noting consideration of interests of certain categories of individuals during decision-making is optional under constituency statues).

[183] *Id.* at 01:02 (stating company's board of directors may, under valid application of constituency statutes, elect *not* to consider stakeholder interests in decision making).

shareholder interests with those of stakeholders, is unclear.[184] Third, Delaware does not have a constituency statute, which invariably means that constituency statutes have a limited reach for publicly traded companies who are largely incorporated in the state of Delaware (at least for now).[185] Because of these limitations, constituency statutes have mostly been dormant in United States corporate law.[186]

State corporate laws tend to isolate social and environmental considerations in PBC statutes or constituency statutes. Publicly traded companies with shareholders, some of whose interests align with the interests of stakeholders on social and environmental issues beyond financial materiality, have largely ignored these statutes. These statutes have additional limitations that scholars have addressed extensively.[187]

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[184] *Id.* at 01:18 (explaining lack of court history on this issue creates uncertainty regarding constituency statutes' effect on interest consideration).

[185] *Id.* at 01:36 (stressing since many United States companies are incorporated in Delaware, constituency statutes fail to apply to large percent of stakeholder-director relationships).

[186] *Id.* at 02:04 (summarizing how constituency statutes never became widely used because of previously noted flaws).

[187] For example, corporate law scholars like Jill Fisch, Steven Solomon, and Thomas Hazen have argued that there are at least four significant problems with PBCs, which are particularly salient with regard to publicly traded companies. The first is that state statutes tend to lack guidance on what constitutes permissible social and environmental goals for companies. Fisch & Solomon, *supra* note 143, at 77-78 ("Most PBC statutes do not provide affirmative guidance as to what constitutes a permissible corporate purpose."). Statutes do not say, for example, whether philanthropy or a focus on environmental and social issues would be enough. *Id.* The second is that while statutes expressly authorize firms to consider stakeholders—customers, employees, communities—or societal interests, they do not revise the power structure or decision-making mechanisms of the traditional corporation, leaving shareholders as key decision makers, and ensuring that shareholder financial interests remain paramount. *Id.* at 74 (noting PBC statutes do not change role of shareholders or dynamics that shape a company's mission). Third, public companies themselves tend to have vague and unmeasurable articulations of what makes them a PBC. *Id.* at 77. Fourth, statutes' stated goals often lack mechanisms for enforcement, including the ability for courts to determine whether a firm's management is balancing social responsibility with profitability to satisfy the formal standard. *Id.* As such, a PBC does not commit to further the interests of all those affected by its business. It need not "promote a cleaner environment, workplace diversity, or responsible supply chain practices." *Id.* at 78. Indeed, some firms' stated goals are as vague as to "do the right thing," or harness technology and social impact to be the world's "most loved company." *Id.* at 79. *See also* John E. Tyler III, *Giving Priority to Social Good and Public Benefit with Meaningful Accountability Thereto: 'Differentiated Social Good' and the Social Primacy Company*, 88 UMKC L. REV. 955, 959 (2020). *See generally* Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851 (2021) (discussing growth of corporate responsibility narrative and drawbacks to benefit corporation statutes).

C. *Delaware*

In the 2024 Delaware Chancery Court decision *McRitchie v. Zuckerberg*,[188] the court reaffirmed the ideal that a corporation's primary purpose is to maximize profits for shareholders.[189] Since most publicly traded corporations are incorporated in Delaware, this reiteration further confirms the importance of shareholders' economic gains in corporate decision-making.[190] In *McRitchie*, the plaintiff contended that Meta allows its platforms to be used as vectors that cause societal harm, which Meta should address for the benefit of stakeholders.[191] The court concluded that corporate managers have "expansive discretion to take risks and pursue profit, while at the same time protecting the legitimate rights and expectations of investors."[192] The underlying assumption in *McRitchie* is likely that shareholders are primarily concerned about earning profit, and stakeholders are primarily concerned about social harm to people. Similarly, in 2023, the Delaware Chancery Court declared in *Simeone v. Walt Disney Co.*[193] that boards of directors have "significant discretion" to make decisions concerning "social and political issues."[194] However, the court reiterated that corporate managers' consideration of stakeholders, "such as the workforce that drives a company's profits," may be rationally related to building value for shareholders.[195] In other words, the Delaware Chancery Court does not appear to consider the possibility that shareholders may *also* be interested in social and political issues beyond profit.

In addition to its PBC statute, Delaware further siloed stakeholder interests in 2018 when it established the Certification of Adoption of Transparency and Sustainability Standards Act ("the Delaware Act")—a voluntary disclosure regime designed to foster dialogue around sustainability and responsibility among participating Delaware corporations and their stakeholders.[196] A company that adopts the disclosure regime need not change its corporate form. A corporation can become certified if: (1) "its governing body adopts principles,

[188] 315 A.3d 518 (Del. Ch. 2024).

[189] *Id.* at 571 (citing article written by then-Chief Justice Strine mandating directors to make stockholder welfare their "sole end"). This concept dates back to cases that command a shareholder-wealth-maximization norm. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (holding Ford must operate business in interests of shareholders).

[190] Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263, 264 (2019) ("Delaware corporate law has become virtually synonymous with American corporate law.").

[191] 315 A.3d at 531-32 ("The plaintiff contends that Meta's business generates negative externalities. . . . The plaintiff [also] contends that Meta consciously and openly prioritizes company-specific value over harm to the economy and society.").

[192] *Id.* at 573.

[193] 302 A.3d 956 (Del. Ch. 2023).

[194] *Id.* at 958.

[195] *Id.* at 971.

[196] DEL. CODE ANN. tit. 6, §§ 5000E-5008E (West 2023).

guidelines and standards" to report the *impact of its activities on society and the environment*; (2) it "adopts metrics for assessing whether it has met its *sustainability objectives*"; and (3) it "agrees to ongoing public reporting requirements."[197]

The language suggests that the Delaware legislature believes that stakeholders (and not shareholders) are interested in the impact of a company's activities on society and the environment, and ongoing reporting of those activities. The Delaware Division of Corporation's website states that the Act "establishes a voluntary disclosure regime to foster dialogue around sustainability and responsibility among participating Delaware business entities and their various stakeholders. . . . 'in their global sustainability efforts.'"[198] Nowhere does the Division of Corporations or the statute itself mention the importance of sustainability to shareholders. This bifurcation misses the crucial importance of social and environmental issues to shareholders, whether or not they are also financially material.

The Delaware Act seems relatively easy to implement because the board of directors of a company "selects the standards . . . and can tailor them to the specific needs of the [corporation]'s industry or business."[199] "In designing these standards," the board can rely on "third-party experts and advisors, as well as input from investors, clients and customers."[200] However, despite its apparent ease of implementation, no corporation to date has chosen to adopt the Delaware Act.[201]

Thus, the Delaware Act is another example of how states silo social and environmental issues in separate legal provisions, rather than incorporating them into general corporate laws and centering the financial, social, and environmental interests of shareholders and stakeholders alike.

D. *California*

On October 7, 2023, California passed Senate Bill 261 ("SB 261")—its own climate disclosure rule, applicable to certain entities doing business or operating in California.[202] The rule, like the SEC's climate disclosure rule, is also focused

[197] Littenberg et al., *supra* note 176 (emphasis added); *see also* tit. 6, § 5003E.

[198] *Adoption of Transparency and Sustainability Standards*, DEL. DIV. OF CORPS., https://corp.delaware.gov/ adoption- transparency- sustainability- standards [https://perma.cc/SQ73-WPTM] (last visited Feb. 13, 2026).

[199] Littenberg et al., *supra* note 176.

[200] *Id.*

[201] *Reporting Entities Under the Certificate of Adoption of Transparency and Sustainability Standards Act*, DEL. DIV. OF CORPS., https://icis.corp.delaware.gov/ecorp2/information/soa [https://perma.cc/ 8SFR-LEAU] (last visited Feb. 13, 2026) (establishing there are no reporting entities to the Act).

[202] S.B. 261, 2023-2024 Leg., Reg. Sess., ch. 382 (Cal. 2024) (requiring covered entities prepare reports disclosing climate-related financial risk and measures created to address this risk). California defines "doing business" very broadly to include companies that engage in

on the disclosure of climate-related financial risks.[203] The law mandates that companies with annual revenues exceeding $500 million that do business in California prepare biennial climate-related financial risk reports, "disclosing the entity's climate-related financial risk and measures adopted to reduce and adapt to climate-related financial risk."[204]

In some ways, SB 261 seeks wider implementation than the SEC's rule, prioritizing broad economic risk disclosures.[205] California defines "climate-related financial risk" as "material risk of harm to immediate and long-term financial outcomes due to physical and transition risks, [such as] . . . risks to corporate operations, . . . employee health and safety, capital and financial investments, institutional investments, . . . shareholder value, consumer demand, and financial markets and economic health."[206] If unable to meet all disclosure requirements, entities must explain any gaps and outline future compliance steps.[207]

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any transaction for the purpose of financial gain within the state, are organized or commercially domiciled in California, or have California sales, property, or payroll that exceed specified threshold amounts, which are also low. *Doing Business in California*, STATE OF CAL.: FRANCHISE TAX BD. (Nov. 7, 2025), https://www.ftb.ca.gov/file/business/doing-business-in-california.html [https://perma.cc/2YPQ-79J5]. California also passed other climate disclosure rules focused on financial materiality. S.B. 253, 2023-2024 Leg., Reg. Sess., ch. 382 (Cal. 2024); Assemb. B. 1305, 2023-2024 Leg., Reg. Sess., ch. 365 (Cal. 2023). New York also attempted to pass its own climate disclosure rules—the Climate Corporate Data Accountability Act and the Climate-Related Financial Risk Act—S.B. 3456, 248th Leg., Reg. Sess. (N.Y. 2025) (mandating disclosures of certain emissions from certain businesses and establishing related funds); S.B. 3697, 248th Leg., Reg. Sess. (N.Y. 2025) (defining climate-related financial risk and requiring reporting of this risk by certain entities). Neither bill progressed towards being passed into law. New York legislatures reintroduced both bills in January 2025. For additional information on New York's climate disclosure bills, see Amanda Urquiza, *2025 Environmental and Social Developments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 27, 2025), https://corpgov.law.harvard.edu/2025/03/27/2025-environmental-and-social-developments [https://perma.cc/E2TZ-NCUD].

[203] S.B. 261 (Cal. 2024).

[204] *Id.*

[205] *Contrast* Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 106, at 21713 ("The focus of the final rules remains on investor protection and improving investors' access to comparable and consistent climate-related disclosures."), *with* CAL. HEALTH & SAFETY CODE § 38533(a)(2) (West 2025) (defining "climate-related financial risk" broadly, covering material risks to financial outcomes due to physical and transition risks, including those affecting operations, supply chains, employees, capital investments, and consumer demand).

[206] CAL. HEALTH & SAFETY CODE § 38533(a)(2).

[207] *Id.* § (b)(1)(B); *see also* S.B. 253, 2023-2024 Leg., Reg. Sess. (Cal. 2023) (codified at CAL. HEALTH & SAFETY CODE § 38532) (mandating companies doing business in California with annual revenues exceeding $1 billion publicly disclose their greenhouse gas ("GHG") emissions).

Like the SEC climate disclosure rules, California's SB 261 has been challenged in the Central District of California as violative of the First Amendment, preempted by the federal Clean Air Act, and a burden to interstate commerce.[208] The district court granted California's motion to dismiss plaintiffs' supremacy clause claim with prejudice, finding that they failed to point to any specific text in the Constitution or Clean Air Act "that preempts the disclosure at issue here."[209] The court, however, dismissed plaintiffs' extraterritoriality claim *without* prejudice, on procedural grounds.[210]

Therefore, most states, including Delaware and California, are primarily concerned about what is financially material for shareholder interests, even in the contexts of social and environmental issues, and silo social and environmental goals by creating specific statutes to address those goals. Publicly traded companies have largely ignored those siloed statutes, leaving shareholder profit as the primary focus of corporate interests. This move leaves shareholders' and stakeholders' social and environmental interests unaddressed to the extent they are not related to their financial goals.

Part III provides empirical evidence of how corporations have limited social and environmental issues to financial materiality by disclosing them as risk factors. Both federal and state corporate laws appear to support the narrowing of these issues in this way. As discussed in Part IV, existing laws must be modified to provide shareholders and stakeholders with adequate disclosures regarding social and environmental issues..

III. Disclosing Social and Environmental Goals as Risky

Between 2020 and early 2024, most publicly traded corporations discussed social and environmental issues in their annual reports to shareholders largely as areas of growth toward positive change.[211] However, the end of 2024 saw a shift in corporate disclosures about social and environmental issues.[212] For example, in its 2022 annual report to shareholders, which it publicly disclosed in 2023,

[208] Chamber of Com. v. Cal. Air Res. Bd., 763 F. Supp. 3d 1005, 1005 (C.D. Cal. 2025); *see also* 42 U.S.C. §§ 7401-7438 (1963) (protecting air quality by regulating emissions and allowing EPA to set emission standards).

[209] *Cal. Air Res. Bd.*, 763 F. Supp. 3d at 1022. Specifically, the court finds that SB 261 does not impose liability for a failure to reduce emissions, but rather for a failure to "*disclose* climate-related financial risk and the measures adopted to reduce such risk." *Id.*

[210] *Id.* at 1027 (granting defendant's motion to dismiss plaintiff's second and third causes of action over improper jurisdiction and failure to state claim). This case is ongoing.

[211] *See* Adediran, Disclosureland, *supra* note 50, at 50.

[212] *See* Hayden Goudy & Meghan Conway, *How Major Corporations Are Changing Their Sustainability Reporting Practices*, Orrick (Sep. 2, 2025), https://www.orrick.com/en/Insights/2025/09/How-Major-Corporations-Are-Changing-Their-Sustainability-Reporting-Practices [https://perma.cc/ 84ZJ-GYXG]. While this shift has been rapid at certain corporations, others have taken a gradual approach towards shifting the language of social and environmental conditions to risk factors. *See also* Adediran, Disclosureland, *supra* note 50, at 119-23.

Airbnb described its commitment to eliminating bias for the benefit of its employees as well as tackling the climate crisis:

> [W]e commit to encouraging diversity and eliminating bias, and we publish the changing demographic makeup of our workforce to hold ourselves accountable. We are also focused on supporting our employees across the full employee lifecycle from recruitment to onboarding to ongoing development.[213]
>
> [W]e announced our commitment to operating as a Net Zero company for our global corporate operations by 2030. To meet our goal, we have committed to a number of steps, including reducing greenhouse gas emissions associated with our corporate operations, and investing in quality nature-based solutions to offset residual emissions. This commitment is the latest step we are taking to help address the climate crisis.[214]

By 2025, these statements have either been modified or removed. Airbnb removed its previous language about diversity and replaced it with language about diversity, human rights, and environmental sustainability as financial risk factors.[215] The company also modified the statement about the climate crisis by narrowing the scope of its commitments.[216]

This Part provides empirical data to show that hundreds of corporations now discuss social and environmental issues as risk factors in their annual reports to shareholders, effectively narrowing the significance of social and environmental concerns to only financial ends.

As discussed in Part IV, there are two implications for this move. The first implication is that describing social and environmental issues as risk factors centers financial materiality. Financial materiality in the form of risk disclosures prevents shareholders and stakeholders from obtaining sufficient information about these issues—they are limited to the narrow relationship between the issues and financial goals. The second implication is that describing social and

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213 Airbnb, Annual Report (Form 10-K) 5 (Feb. 17, 2023).

214 *Id.*

215 Airbnb, Annual Report (Form 10-K) 20 (Feb. 13, 2025) ("Companies like Airbnb face heightened expectations regarding matters such as environmental sustainability, diversity, human rights, and data privacy.").

216 *Id.* at 5. The new statement is as follows:

> [W]e committed to a goal to operate as a net zero company for our global corporate operations by 2030, reducing greenhouse gas emissions associated with our corporate operations across Scope 1 (direct emissions from stationary combustion and refrigerants), Scope 2 (indirect emissions from purchased electricity, diesel generators and district heat), and the following Scope 3 categories defined by the Greenhouse Gas Protocol: purchased goods and services, capital goods, fuel- and energy-related activities (not included in Scope 1 or Scope 2), waste generated in operations, business travel, employee commuting, and upstream leased assets. To help meet our goals, we are implementing a broad range of initiatives designed to help decarbonize our business and make our corporate operations more sustainable.

Id.

environmental issues as risks chills progress in addressing issues like diversity and inclusion and the impact of corporate activities on the environment.

In addition to providing empirical data to show how corporations describe social and environmental issues as financial risk factors, this Part engages in legal analysis of potential corporate liability for disclosure-related risks. Specifically, it considers to what extent disclosing a type of risk (litigation) that corporations claim might arise from engaging in social and environmental issues alleviates firms from liability if they are sued by shareholders or employees. Based on this legal analysis, it is unlikely that a company that describes social and environmental issues as risk factors could absolve itself from litigation, raising the question of whether describing social and environmental issues as risky may have more negative than positive consequences.

A. *Empirical Findings on Risk Disclosures*

Research assistants and I hand collected and coded 702 publicly traded companies' annual reports to shareholders disclosed in 2024 and 2025.[217] This Article focuses on the most recent annual reports because they are most likely to convey the shift in how corporations have responded to conservative pushback on social and environmental issues, particularly in characterizing these issues as risk factors.

In 2020, the SEC amended its rules to require corporations to make material human capital disclosures without providing a definition of materiality. At the time, corporations chose to embrace the importance of diversity and inclusion as part of the definition of human capital management.[218] The murder of George Floyd had roiled the country, and corporations responded to societal pressure to address racial and other forms of inequalities largely through disclosures.[219] Despite not having any mandate to change, corporations chose to make disclosures that went beyond the strict definition of financial materiality between 2020 and the summer of 2024.[220]

As I have shown extensively in other work, 2020 saw a dramatic shift in the disclosure of issues of race and diversity and inclusion.[221] Between 2020 and 2023, most large companies in the United States disclosed issues of diversity

[217] We manually reviewed the risk factors section for 1,200 companies. The 702 companies coded were those that described social and environmental issues as risks in 2024 and 2025.

[218] Adediran, *Disclosing Diversity*, *supra* note 29, at 329-30.

[219] *Id.* at 330-31. *See generally* ADEDIRAN, DISCLOSURELAND, *supra* note 50.

[220] *See generally* ADEDIRAN, DISCLOSURELAND, *supra* note 50 (detailing rise of race-conscious disclosures in years immediately folliwng George Floyd's murder). 2024 is an overlapping year, with early to mid-2024 corresponding to 2020-2023, and late 2024 comparable to 2025.

[221] *See* Adediran, *Disclosing Diversity*, *supra* note 29, at 330-31 (showing data from 2017-2023 and dramatic shift in disclosures about diversity and inclusion in 2020).

and inclusion as areas of growth, often acknowledging opportunities for improvement.[222]

But starting in the later part of 2024, around the presidential election, many companies began to narrow the scope of social and environmental issues by treating them as risk factors. For example, in the earlier part of 2024, AXIS Capital Holdings Limited, an insurance company, declared that "[f]ostering a culture that embraces diversity, equity and inclusion [was] foundational to [its] workplace environment . . . [and that DEI] is a key pillar of [its] Corporate Citizenship program."[223] The company also expressed the importance of building within the firm and having a commitment to employees' success.[224] However, in 2025, AXIS removed most of the language about fostering an inclusive culture from its human capital management section, and replaced it with broad language about talent and training.[225] The company then expressed its concerns about risks related to social issues:

> [R]egulators have adopted and likely will continue to adopt pro-or anti-ESG-related rules and guidance, which may conflict with one another and impose additional costs on us. Pressure from key stakeholders . . . could also require us to make substantial investments in ESG matters, which could impact the results of our operations. ESG encompasses a wide range of issues, including climate change and other environmental risks, inclusion and governance standards.[226]

Airbnb and AXIS are just two examples among hundreds of corporations across many industries that have begun to express social and environmental issues as risks arising from increased scrutiny and expectation from shareholders and stakeholders.

In general, these risk disclosures have three components. The first component is a specific mention that a corporation is concerned about *both* shareholders and stakeholders. The second is an explanation about the corporate activities that can generate risks. The third is a discussion of the types of financial risks that accrue from those activities, which this Article groups into the following components: business, reputation, litigation, talent, and fines and fees.

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[222] *Id.* at 312; *see also* ADEDIRAN, DISCLOSURELAND, *supra* note 50, at 54-57 (using data from 2018-2023 to show increase in race-conscious disclosures over time); Andrew C. Baker, David F. Larcker, Charles G. McClure, Durgesh Saraph & Edward M. Watts, *Diversity Washing*, 62 J. ACCT. RSCH. 1661, 1668-71 (2024) (examining 2008 to 2021 DEI disclosures and arguing companies made diversity disclosures for their own benefit while making limited progress on firm diversity).

[223] Axis Cap. Holdings Ltd., Annual Report (Form 10-K) 18-19 (Feb. 27, 2024).

[224] *Id.* at 18 ("AXIS is committed to the development and retention of its people. . . . We provide a menu of development programs for managers to identify opportunities to build an internal pipeline of talent.").

[225] Axis Cap. Holdings Ltd., Annual Report (Form 10-K) 17-18 (Feb. 26, 2025).

[226] *Id.* at 40.

As indicated in excerpts provided in Appendix A, companies also tend to make clear that they are concerned about risks from both shareholders and stakeholders who support or oppose their engagement in social or environmental issues. For example, in speaking about both its shareholders and stakeholders, Zuora Inc., a technology company, explains that:

> [D]ifferent stakeholder groups have divergent views on sustainability and ESG matters, which increases the risk that any action or lack thereof with respect to sustainability or ESG matters will be perceived negatively by at least some stakeholders and adversely impact [the company's] reputation and business. "Anti-ESG" sentiment has also gained some momentum across the United States, with several states having enacted or proposed "anti-ESG" policies or legislation. If [Zuora does] not successfully manage ESG-related expectations across stakeholders, it could erode stakeholder trust, impact [its] reputation, and adversely affect [its] business, financial condition, results of operations and cash flows.[227]

Table 1 describes activities that generate risks, and the types of financial risks that accrue from those activities related to business, reputation, litigation, talent, and fines and fees. These examples represent a range of industries, including travel, aviation, financial services, food, and technology. In addition to shareholders, corporations list a range of pertinent stakeholders, including employees, regulators, politicians, the media, and the public, as sources of potential risks. Appendix A contains more detailed language of these corporations' risk disclosures.

[227] Zuora, Inc., Annual Report (Form 10-K) 48 (Mar. 26, 2024).

Table 1. Examples of Risk Disclosures.

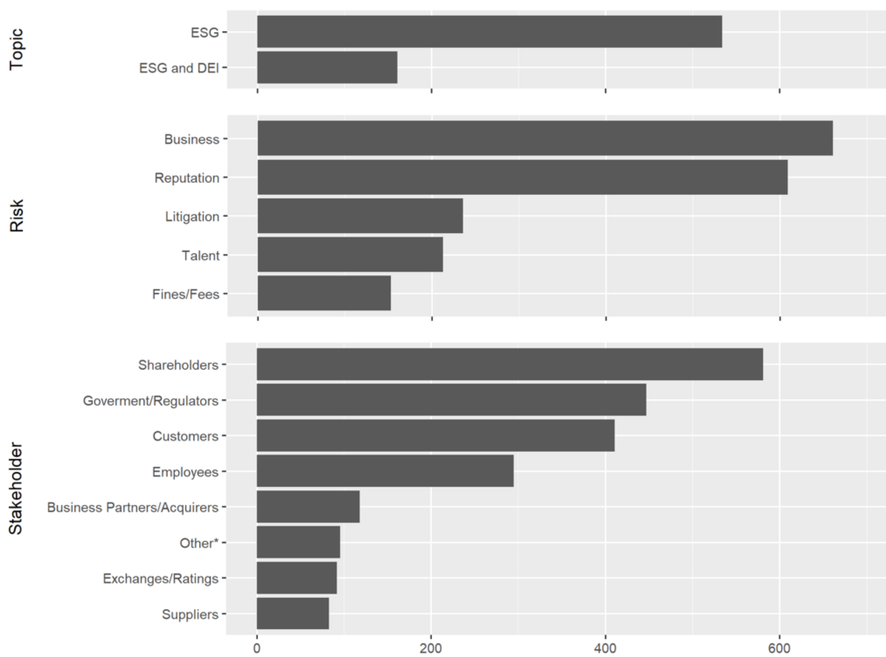
Company	Industry	Shareholders and Stakeholders	Risky Activities	Types of Financial Risks
Airbnb	Travel	Shareholders and other stakeholders, including customers, employees, regulators, politicians, and the general public	Practices, disclosures, and performance in relation to environmental sustainability, climate change, biodiversity, diversity, equity and inclusion, human rights, energy, water consumption, and human capital management	Brand and reputational harm
American Airlines	Aviation	Governments, regulators, investors, employees, customers, media outlets, and other stakeholders	Environmental, social, and governance considerations, including climate change and GHG emissions, human capital, and diversity, equity, and inclusion	Business, results of operations, and reputation, adverse operational, reputational, and legal impacts
Atlantic Union Bank	Financial Services	Governments, investors, customers, and the general public	Practices and disclosures of the customers, counterparties, and service providers with whom we choose to do business	Adverse effects on the trading price of common stock and/or business, operations and earnings
Dutch Bros	Food	Governments, investors, and other stakeholders	Expanded disclosure, make or expand commitments, set targets, or establish additional goals and take actions to meet such goals	Market, operational, reputational, and execution costs or risks, business, financial condition,

				results of operations, and prospects
Xylem	Technology	Investment community, regulators, media, and other stakeholders	Sustainability activities, commitments, goals, targets and objectives, and our methodologies and timelines for pursuing them	Substantial additional costs, fines, penalties, civil liabilities, reputation, ability to attract or retain employees, and attractiveness as an investment, business partner or acquiror, adverse operational, reputational, financial, and legal impacts
Zuora Inc.	Technology	Investors, legislators, regulators, employees, and other stakeholders	Compliance with ESG-related rules and efforts to meet stakeholder expectations on ESG matters, goals, targets, and objectives	Costly initiatives, reputation and business, operating results, and financial condition

To provide a broader picture of the scale of how corporations perceive shareholder and stakeholder concern on social and environmental issues, Figure 1 shows that corporations specifically name either ESG or ESG and DEI as risk topics. The Y axis indicates the types of financial risks corporations believe they may encounter in their engagement with social and environmental issues from their shareholders and stakeholders: business (operations, stock prices), reputation (brand perception—directly impacts financial standing), litigation, talent (hiring and retention), and fines and fees (government sanctions). The X axis shows the number of companies who state that a particular topic is a risk factor out of 702. All risk types are related to financial materiality, but the data is specific to how corporations believe those risks might show up. Specifically, business and reputational risks appear to be most significant, with 662 or 94.3% of companies stating business as a risk factor, and 609 or 86.8% of companies noting reputation as a risk factor. Other financial risks, including litigation (n=233) and obtaining talent (n=213), are also significant.

Finally, in terms of constituents' perceptions, 82.7% of corporations name shareholders as sources of risk, whether or not they choose to address social or environmental issues. 63.7% name the government or regulators as a source of risk for either addressing or not addressing social or environmental issues. 58.5% name customers as sources of risk if they do not address these issues, and 42% state that employees are a source of risk for either addressing or not addressing these issues. Other stakeholders (the media, stock exchanges and rating companies, and suppliers) are also named but with less frequency.

Figure 1. Topics, Risks and Stakeholders N=702.



Total Companies

Note: Other denotes general mentions of stakeholders or other groups like media and advocacy groups.

In addition to delineating how corporations disclose risk factors on social and environmental issues, these examples also show that even though federal and state corporate law tends to separate shareholder interests from those of stakeholders, corporations recognize that both shareholders and stakeholders have interests in social and environmental goals.

B. *Legal Analysis on Combating Litigation with Risk Factor Disclosures*

As shown in Part III.A above, disclosures limit social and environmental issues to financial materiality in terms of risks related to business, reputation, litigation, talent, and fines and fees imposed by regulators. Risk disclosures leave little to no room to consider social and environmental goals unrelated to financial ends. So, why do corporations disclose social issues as risk factors? Do companies believe that referring to social issues as risk factors would be beneficial to them? If so, in what ways?

This Article uses litigation risks as an example to highlight the feasibility of these claims because one can conduct a legal analysis to "test" potential benefits of these disclosures. In other words, if shareholders sue a corporation because it provides misleading information about its engagement in social or environmental issues, can the company rely on its risk disclosures to absolve it of liability?

The lawsuit would likely be brought in the context of a claim that the social risk disclosures misrepresent how a corporation actually addresses social or environmental issues.[228] Courts have held that risk disclosures that speak about risks as unrealized or contingent issues, when those risks have in fact occurred, can be misleading.[229]

However, there is the fundamental question of whether a court could find disclosures about social and environmental issues that describe a range of financial risks to be "material," notwithstanding their appearance in the risk factors section of a company's annual report.

In *People by James v. Exxon Mobil Corp.*,[230] New York's Attorney General ("AG") argued that Exxon Mobil deceived investors into believing that it had properly accounted for climate change risks in its business decisions through its risk disclosures. The court found that the disclosures were not material to

[228] *See, e.g.*, People v. Exxon Mobil Corp., 119 N.Y.S.3d 829 at *2 (N.Y. 2019) ("[T]he Court finds that the Office of the Attorney General failed to prove by a preponderance of the evidence that ExxonMobil made any material misrepresentations that 'would have been viewed by a reasonable investor as having significantly altered the "total mix" of information made available.'" (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976))); *In re* Alphabet, Inc. Secs. Litig., R.I., 1 F.4th 687, 703 (9th Cir. 2021) (holding risk disclosures warning of potential cybersecurity harms were misleading because company knew risks already materialized); *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 480 F. Supp. 3d 1050, 1061 (N.D. Cal. 2020) (discussing allegations risk disclosures were misleading for suggesting potential future harms when underlying misconduct already occurred).

[229] *In re* Alphabet, Inc. Secs. Litig., 1 F.4th at 703 ("Risk disclosures that 'speak[] entirely of as-yet-unrealized risks and contingencies' and do not 'alert[] the reader that some of these risks may already have come to fruition' can mislead reasonable investors." (quoting Berson v. Applied Signal Tech., Inc., 527 F.3d 982, 985-87 (9th Cir. 2008))); *In re Volkswagen*, 480 F. Supp. 3d at 1061 ("[T]o warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.").

[230] *Exxon Mobil Corp.*, 119 N.Y.S.3d at *1 (summarizing allegations ExxonMobil misrepresented integration of climate change regulatory risks into business operations).

investors.[231] As in a typical feedback loop between shareholders and a corporation, the company had received inquiries from shareholders about how it managed climate change risks and addressed regulatory challenges.[232] Shareholders also submitted shareholder proposals asking Exxon to release a report detailing its plans for managing climate change impacts over the coming decades.[233] The court concluded that Exxon's risk disclosures, which the AG claimed were misrepresentations, were not material to investors because there was no evidence that the information influenced their investment decisions or impacted Exxon's stock prices.[234]

Two issues are relevant in relation to the *Exxon* decision. The first is whether firms are disclosing social and environmental issues as contingent risks to their companies when those risks have already occurred. For example, does a company like Target disclose that pulling back on its diversity and inclusion initiatives is a potential risk, or does it inform its shareholders that doing so has already had financial consequences for the firm? To prevail, Target would need to state that those risks are no longer contingent but are in fact real. Customers can boycott Target in the future because of its stance on these issues, and Target should inform its shareholders about that possibility.

The second is whether a court would find that disclosing social and environmental issues as risk factors is financially material to shareholders—that the disclosures influenced their decision to buy a company's stocks or invest in it. This is the difficult question that would be determined on a case-by-case basis. In *Exxon*, the court noted that the AG had failed to present any witnesses who claimed to have been misled by the disclosures.[235] A firm can be absolved of liability for securities fraud because no shareholder claims reliance on the disclosures to make investment decisions.[236]

Based on this analysis, it seems unlikely that corporations would be able to use risk disclosures about social and environmental issues to absolve themselves of shareholder lawsuits, even if shareholders can show reliance on them, because most risk disclosures are contingent. [237] At the same time, it would likely be challenging for shareholders to show that they relied on those disclosures when making investment decisions.

Other types of lawsuits, including class actions, could be brought against corporations by employees or former employees. Since 2020, there has been an

[231] *Id.* at *30.

[232] *Id.* at *1.

[233] *Id.*

[234] *Id.* at *30

[235] *Id.*

[236] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[237] *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1471-72 (2020) (stating sustainability disclosures are not useful for plaintiffs who sue corporations "because no promises about the effectiveness of sustainability can be made").

uptick in lawsuits brought by white individuals—mostly men—claiming reverse discrimination by corporations based on their public commitments to address racial inequality.[238] Many of these cases are still ongoing.[239] The goal of many of these lawsuits is to pressure companies to stop engaging with social issues, particularly in terms of addressing inequality that impacts minorities. For example, in *Bradley v. Gannett Company*,[240] five current and former employees of Gannett Company, a media company that owns USA Today, brought a class action suit on behalf of themselves and prospective employees.[241] Plaintiffs allege that Gannett's policy led to adverse employment actions against white male employees, including terminations, delayed hiring, biased performance evaluations, lower salaries, and denial of promotions based solely on race.[242] The plaintiffs sought an injunction to end the policy, along with compensatory, punitive damages, and other equitable relief for the alleged violations of their civil rights under 42 U.S.C. § 1981.[243] In its 2023 annual report, Gannett discussed building on its ESG focus to foster culture and community both internally and externally, and expressed a commitment to continue its ESG journey with specific emphasis on diversity and equity in 2024.[244]

[238] *See, e.g.*, Harker v. Meta Platform, Inc., No. 23-CV-7865, 2024 WL 3990261, at *1 (S.D.N.Y. Aug. 29, 2024) (white male plaintiff bringing action related to "race-based hiring program"); Roberts v. Progressive Preferred Ins. Co., No. 23-CV-1597, 2024 WL 2295482, at *1-2 (N.D. Ohio Aug. 16, 2023) (white male suing over grants for "Black-owned businesses"); Complaint at 2, Beneker v. CBS Studios, No. 2:24-CV-01659 (C.D. Cal. Feb. 29, 2024) (white male writer alleging employment discrimination); Bolduc v. Amazon.com Inc., No. 22-CV-00615, 2024 U.S. Dist. LEXIS 75524, at *6 (E.D. Tex. Apr. 25, 2024) (white female alleging discrimination because defendant awards $10,000 grants to its "Black, Latino, and Native American contractors, while withholding benefit from its white and Asian contractors"); Complaint at *2, Vaughn v. CBS Broad., Inc., No. 2:24-CV-05570 (C.D. Cal. July 1, 2024) (white male employee alleging discrimination by CBS on the basis of race, sex, and age); *see also* Adediran, *Racial Targets*, *supra* note 29, at 1465-67 (analyzing data to show "racial targets" as a post-2020 phenomenon).

[239] *See, e.g.*, Wood v. Red Hat, Inc., No. 24-CV-00237, slip op. at 13 (D. Idaho Sep. 29, 2025) (granting motion to compel arbitration and stay proceedings in case brought by white male plaintiff); Reply in Support of Motion to Strike Class Allegations and Compel Arbitration at 5, Winter v. Jones, No. 4:25-CV-00299 (E.D. Mo. Aug. 6, 2025) (arguing to strike class allegations and compel arbitration in class action lawsuit alleging nationwide race-based policies that discriminated against white employees).

[240] No. 1:23-CV-1100, 2024 WL 3905817 (E.D. Va. Aug. 20, 2024).

[241] First Class Action Complaint & Demand for Jury Trial at 1, Bradley v. Gannett Co., No. 1:23-CV-01100 (E.D. Va. Aug. 18, 2023).

[242] Second Amended Class Action Complaint & Demand for Jury Trial at ¶¶ 25, 35, No 1:23-CV-01100 (E.D. Va. Sep. 19, 2024).

[243] *Id.* ¶¶ 5-6, 9-17.

[244] Gannett Co., Inc., Annual Report (Form 10-K) 17 (Feb. 22, 2024). Gannett also discussed the importance of its employee resource groups, its inclusion goals, and other matters related to diversity and inclusion, all of which are absent from its annual report in 2025. *Id.* at 18-19.

In 2025, Gannett pivoted from framing ESG and DEI as ways to empower communities to describing them as risk factors in its 2024 annual report, stating in pertinent part that:

> The rules and regulations related to [ESG and DEI] matters imposed or proposed by governmental and self-regulatory organizations such as the SEC and the New York Stock Exchange have been changing at a rapid pace. A variety of third-party organizations, institutional investors and customers evaluate the performance of companies on ESG topics, and the results of these assessments are widely publicized. These changing rules, regulations and stakeholder expectations may result in increased general and administrative expenses and increased management time and attention spent complying with or meeting such regulations and expectations. . . . If our ESG-related data, processes and reporting are incomplete or inaccurate, or if we fail to achieve progress with respect to our goals, on a timely basis, or at all, our reputation, business, financial performance and growth could be adversely affected. Also, given the rapidly changing regulatory landscape, we may in the future also face a heightened risk of litigation and compliance obligations in connection with these rules and regulations.[245]

It is unlikely that Gannett could rely on its risk disclosures to absolve itself of a class action lawsuit.[246] If anything, plaintiffs could argue that the company's shift from an ESG-focused mission to framing ESG and DEI as sources of potential litigation demonstrates that Gannett acted in bad faith and in violation of plaintiffs' civil rights.

Overall, it seems unlikely that couching social and environmental issues as risk factors would help a corporation in lawsuits brought by shareholders and stakeholders. But expressing social and environmental issues as risk factors can surely chill progress on those issues.

IV. RISKS OF RISK FACTOR DISCLOSURES AND POTENTIAL SOLUTIONS

The previous Section empirically showed the shift of social and environmental disclosures into financial risk factors. Part IV discusses the negative consequences of this shift.[247] The first consequence of categorizing

[245] Gannett Co., Inc., Annual Report (Form 10-K) 26 (Feb. 20, 2025).

[246] *See* 17 C.F.R. § 229.105 (2025) (declaring companies' duty to disclose material risks that make investment speculative or risky). Courts have held that failure to disclose material risks that have already occurred constitutes a violation of these provisions and thus leaves them open to liability. *See, e.g.*, United Ass'n Nat'l Pension Fund v. Carvana Co., 759 F. Supp. 3d 926, 988-89 (D. Ariz. 2024) (emphasizing companies must disclose material factors that make an investment risky and that terse, generic statements are insufficient to satisfy this requirement); Lilien v. Olaplex Holdings, Inc., 765 F. Supp. 3d 993, 1019 (C.D. Cal. 2025) (noting companies violate SEC requirements when their risk disclosures create impression of materially different state of affairs than what actually exists).

[247] Risk disclosures can be a double-edged sword if corporations engage in risk management. Referring to an issue as a risk could open opportunities to talk about and address

social and environmental issues as risky is that it limits the information made available to shareholders and stakeholders. Risk factor disclosures are meant to be narrowly tailored to financially material factors that make investment in a company speculative, and to facilitate an understanding of a company's business, financial conditions, and prospects.[248]

Issues like diversity, inclusion, climate change, human rights, and employee welfare have far-reaching implications for shareholders and stakeholders due to their financial, social, and climate-related consequences. Human rights, for example, includes issues like child labor, human trafficking, and workers' rights abroad, which shareholders and stakeholders are concerned about beyond financial goals.[249]

The second consequence is that expressing social and environmental issues as risk factors could chill any potential progress made to address those issues.

A. *Potential Solutions to Address Limited Information to Shareholders and Stakeholders*

Potential solutions to the limitation of disclosing social and environmental issues as risk factors are to broaden the scope of risk disclosures on those issues from a financial materiality standpoint to either a "double materiality" or a "dynamic materiality" perspective. Double or dynamic materiality standards would allow corporations to provide information about social and environmental conditions in terms of financial materiality, but also in terms of the impact of corporate activities on stakeholders, the public, and the environment, irrespective of their financial materiality.

1. Double Materiality

The concept of double materiality was proposed by the European Commission in its guidelines on nonfinancial reporting, which emerged from the European

them within a corporation. *See* Timothy J. McClimon, *Risk Management Overtakes ESG and DEI in 2024*, FORBES (Jan. 21, 2024, at 13:05 ET), https://www.forbes.com/sites/timothyjmcclimon/2024/01/21/risk-management-overtakes-esg-and-dei-in-2024 [https://perma.cc/RS3Q-J5XF] (discussing trend toward creation or "resurrection" of new or less controversial substitutes for DEI and ESG). The problem is that SEC risk factor disclosure rules only require financially material consequences, which limits the extent to which a corporation considers risk on social and environmental issues. *See* 17 C.F.R. § 229.105 (2025).

[248] 17 C.F.R. § 229.105 (requiring risk factor disclosures focus on "material factors that make an investment in the registrant or offering speculative or risky").

[249] *See* Kishanthi Parella, *Investors as International Law Intermediaries: Using Shareholder Proposals to Enforce Human Rights*, 45 SEATTLE U. L. REV. 41, 69 (2021) ("In the past few years, a number of faith-based organizations, as well as organizations dedicated to sustainable investment, have filed shareholder proposals with companies of various industries. . . . Significantly, some proposals requested that the board nominate a candidate with expertise in human rights and civil rights in order to ensure that the company is not contributing to human rights abuses.").

Union ("EU") in relation to how corporations address and disclose social and environmental issues.[250] There is currently no federal or state law in the United States incorporating double or dynamic materiality. As noted in Parts I and II, corporations are not required to make disclosures about social or environmental issues, and when they do, it is tied to financial materiality. However, some American companies that engage in business in the EU are subject to new EU laws that require them to make climate and human rights disclosures subject to a double materiality standard.[251] The fact that American corporations are now subject to a double materiality standard should, in theory, make it easier to integrate double materiality into corporate law in the future. Double materiality has also been adopted and championed by the United Nations ("UN") and the Global Reporting Initiative ("GRI"), one of the leading independent frameworks for voluntary sustainability reporting.[252] The GRI helps businesses and other organizations communicate their impacts on social and environmental issues using common language.[253]

Double materiality requires companies to assess social and environmental issues from two perspectives: (1) inward impacts—how social and environmental issues affect a corporation; and (2) outward impacts—how the corporation impacts society, the environment, and the economy.[254] Financial materiality is the focus of inward impacts, as it seeks to determine how engagement with social and environmental issues might affect a company's bottom line. Outward impacts, on the other hand, ask corporations to evaluate how their activities might have an impact on social and environmental issues.[255]

Under a double materiality standard, the relevance of a social or environmental issue should be reported to shareholders and stakeholders so that

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[250] Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-related Information, *supra* note 36, at 4-5.

[251] *See* Michael Kapoor, *US Companies to Feel EU Sustainability Rules Most Outside Bloc*, BLOOMBERG L. (Nov. 26, 2024, at 14:27 ET), https://news.bloomberglaw.com/esg/us-companies-to-feel-eu-sustainability-rules-most-outside-bloc [https://perma.cc/8AFJ-EBZU]; KPMG INT'L, THE MOVE TO MANDATORY REPORTING: SURVEY OF SUSTAINABILITY REPORTING 2024, at 22 (2024), https://aboutblaw.com/bgn5 [https://perma.cc/F293-PTRP] (last visited Jan. 28, 2026); Elena Philipova, *How Many Companies Outside the EU Are Required to Report Under its Sustainability Rules?*, LSEG (June 2, 2023), https://www.lseg.com/en/insights/risk-intelligence/how-many-non-eu-companies-are-required-to-report-under-eu-sustainability-rules [https://perma.cc/CBG2-9BCY].

[252] Tiziana De Cristofaro & Carmela Gulluscio, *In Search of Double Materiality in Non-Financial Reports: First Empirical Evidence*, 15 SUSTAINABILITY, no. 2, Jan. 2023, at 2.

[253] *About GRI*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/about-gri [https://perma.cc/8R9F-CNEK] (last visited Jan. 28, 2026).

[254] RADLEY YELDAR, DOUBLE AND DYNAMIC MATERIALITY. WHAT DO YOU NEED TO KNOW? 3 (2022), https://ry.com/media/icthvt0f/double-and-dynamic-materiality.pdf [https://perma.cc/HWT3-3MPG].

[255] Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-related Information, *supra* note 36, at 2.

they can understand the external impacts of the companies they invest in, work in, purchase products and services in, contract with to supply goods or services, or otherwise come in contact with in their neighborhoods.[256] A social or environmental issue is material from an outward impacts perspective if it relates to a company's material or actual potential impacts over the short, medium, or long term—whether positive or negative.[257] This includes impacts arising from the company's operations, its products and services, and its business relationships.[258] An "exclusive focus on financial materiality obscures socioenvironmental impacts."[259] For example, under a financial materiality assessment, greenhouse gas ("GHG") emissions can be immaterial if a company is unlikely to be the subject of emissions regulation that establishes the risk of fines and fees, while impact materiality would require corporations to inform shareholders and stakeholders about GHG emissions because these constituents are interested in how corporate activities influence climate change.[260]

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[256] *See* Jason Halper, Sara Bussiere & Timbre Shriver, *Investors and Regulators Turning up the Heat on Climate-Change Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 4, 2021), https://corpgov.law.harvard.edu/2021/10/04/investors-and-regulators-turning-up-the-heat-on-climate-change-disclosures [https://perma.cc/F5N9-DJFQ] (analyzing implications of climate change for corporate functions and relationships).

[257] Michael R. Littenberg, *The "Summer of CSRD" Series—Understanding Materiality*, ROPES & GRAY (Aug. 25, 2023), https://www.ropesgray.com/en/insights/viewpoints/102imny/ the- summer -of -csrd -series-understanding-materiality [https://perma.cc/SNM6-XWSF]. The assessment of materiality for negative impacts is guided by the due diligence framework outlined in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information, *supra* note 36, at 4 ("As markets and public policies evolve in response to climate change, the positive [or] negative impacts of a company on the climate will increasingly translate into business opportunities and/or risks that are financially material.").

[258] Littenberg, *supra* note 257 ("A material sustainability matter from an impact perspective includes impacts connected with the undertaking's own operations and upstream and downstream value chain, including through its products and services, as well as through its business relationships.").

[259] Andreas Rasche, *The Ethics of ESG Integration: Ethical Dilemmas of Quantification*, *in* THE ETHICS OF ESG: CRITICALLY ASSESSING THE ENVIRONMENTAL, SOCIAL AND GOVERNANCE MOVEMENT 226 (Valentina Gentile, Eric W. Orts, Andreas Rasche & Alan Strudler eds.) (2025).

[260] *See* Lynn M. LoPucki, *Corporate Greenhouse Gas Disclosures*, 56 UC DAVIS L. REV. 405, 429 (2022) (illustrating difference between single-materiality and double-materiality approach with greenhouse gas emissions). *See generally* Patrick M. Corrigan, *Can the SEC Mandate Disclosures that Contain Both Financial and Social Information? The Case of Human Capital Management Disclosures*, 54 SW. L. REV. 24 (2025) (using context of human capital disclosures to argue information which produces mixed financial and nonfinancial information should be required by SEC to fulfill its mission of providing useful information for investors).

2. Dynamic Materiality

Like double materiality, dynamic materiality recognizes social and environmental issues as important to shareholders and stakeholders outside of their financial materiality. But unlike double materiality, dynamic materiality takes the approach that the materiality of social and environmental issues is not static and can change over time.[261] Popularized by the World Economic Forum, dynamic materiality emphasizes continuous monitoring and adaptability as issues shift along the materiality continuum.[262] An example of this is carbon emissions, which are currently considered to be low-cost, but are highly impactful on the environment.[263] Over time, carbon taxes and regulatory changes may make emissions financially material.[264]

Some American corporations appear to be receptive to a dynamic materiality standard. For example, Alcoa Corporation, an aluminum production company, has stated that "if [its] strategies relating to environmental, social, and governance considerations do not meet stakeholder expectations and standards, which continue to evolve and may differ across jurisdictions, . . . [its] business, financial condition, results of operations, and reputation could be adversely impacted."[265] The only addition would be for Alcoa Corporation to also consider how its strategies might impact stakeholders and the environment in terms of financial as well as nonfinancial values.

Proponents of a dynamic materiality approach argue that it ensures alignment with rapidly changing shareholder and stakeholder expectations and regulatory environments.[266] Double and dynamic materiality have been implemented by standards setters and reporting frameworks, including the leading organizations that set reporting standards on sustainability issues.[267]

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[261] Issues may shift from being externally impactful to financially material, or vice versa, RADLEY YELDAR, *supra* note 254, at 3.

[262] Donoto Calace, *Double and Dynamic: Understanding the Changing Perspectives on Materiality*, SUSTAINABILITY ACCT. STANDARDS BD. (Sep. 2, 2020), https://sasb.ifrs.org/blog/double-and-dynamic-understanding-the-changing-perspectives-on-materiality [https://perma.cc/3Q8A-YWWP].

[263] RADLEY YELDAR, *supra* note 254, at 3.

[264] *Id.* ("Carbon emissions will have a more tangible and quantifiable financial impact, and the issue will shift to becoming financially material.").

[265] Alcoa Corp., Annual Report (Form 10-K) 25 (Feb. 21, 2024).

[266] Calace, *supra* note 262.

[267] The five leading sustainability and reporting standards organizations, CDP, CDSB, GRI, IIRC, and SASB, also known as the Group of Five, published two papers where they frame the nature of sustainability topics as changing over time and refer to this concept as "dynamic materiality." *See* CDP ET AL., STATEMENT OF INTENT TO WORK TOGETHER TOWARDS COMPREHENSIVE CORPORATE REPORTING 2 (Sep. 2020), https://www.wlrk.com/docs/Statement_of_Intent_to_Work_Together_Towards_Comprehensive_Corporate_Reporting.pdf [https://perma.cc/KEA3-4664] ("The nature of sustainability topics, including their interest to different types of users of information and their influence on companies' performance, can also change, sometimes slowly but sometimes rapidly. We refer to this

3. Opportunities to Adopt Double or Dynamic Materiality

While it might seem like the SEC will no longer promulgate rules related to social and environmental concerns, the regulatory tide will likely shift in the near future if a less conservative administration comes into power. Therefore, it is possible that the SEC will adopt either double or dynamic materiality in the future, especially because the EU has adopted double materiality.[268]

Some scholars have criticized the double materiality standard on the basis that most companies tend to focus on the financial materiality portion of the standard.[269] Some scholars have also argued that it would be challenging to determine relevant impacts.[270] Other scholars, who tend to lean towards a financial materiality standard, have argued that double materiality creates unnecessary complexity, reasoning that "[i]f any information is truly important, the results will ultimately be reflected in the company's value."[271] In other

concept as 'dynamic materiality.'"); CDP ET AL., REPORTING ON ENTERPRISE VALUE 6-7 (Dec. 2020), https://www.entegreraporlamatr.org/tr/mailing/25122020/images/Reporting-on-enterprise-value_climate-prototype_Dec20.pdf [https://perma.cc/ SBA7-JD62] (illustrating how sustainability matters can change over time and labeling phenomenon "dynamic materiality"). For further discussion, see Denielle Harrison & Charlotte Bancilhon, *Double and Dynamic: How to Enhance the Value of Your Materiality Assessment*, BSR: BLOG (Feb. 9, 2021), https://www.bsr.org/en/blog/double-and-dynamic-how-to-enhance-the-value-of-your-materiality-assessment [https://perma.cc/K5Z6-WUAQ] (providing summary of changes Group of Five made regarding sustainability reporting standards and definition of materiality).

[268] RADLEY YELDAR, *supra* note 254, at 5 (noting double and dynamic materiality are central premises in newly formed ISSB and principal foundations of GRI Universal Standards). For a blueprint on a regulatory regime that prioritized people and the planet within our capitalist system of government, see generally Felicia Wong, Suzanne Kahn, Mike Konczal & Matt Hughes, *Sea Change: How a New Economics Went Mainstream*, ROOSEVELT INST. (Nov. 2023), https://rooseveltinstitute.org/wp-content/uploads/2023/11/3927_RI_Sea_Change_Report_202311.pdf [https://perma.cc/HWZ7-T99U].

[269] *See* Jena Martin & Rachel Chambers, *The Securities and Exchange Commission as Human Rights Enforcer?*, 18 VA. L. & BUS. REV. 93, 129-32 (2023); Rasche, *supra* note 259, at 10 (using tobacco companies to illustrate how company's health impact may be obscured by solely financial reporting).

[270] Félix E. Mezzanotte, *Corporate Sustainability Reporting: Double Materiality, Impacts, and Legal Risk*, 23 J. CORP. L. STUD. 633, 645-46 (2023). In the EU, that determination must be made with stakeholder input, which is ideal but can be costly. *Id.* at 646-47 (summarizing and analyzing new EU corporate sustainability reporting regime).

[271] Jeffrey Johanns, *ESG and the Myth of Double Materiality*, LINKEDIN (Jan. 17, 2022), https://www.linkedin.com/pulse/esg-myth-double-materiality-jeffrey-johanns [https://perma.cc/QD9B-ENAX] ("If citizens or organizations don't approve of the entity's progress toward reducing carbon emissions, won't they stop buying their products and the reduced sales will show in the financial records? If companies must spend extensive amounts of money to replace manufacturing equipment to achieve their carbon neutral goals, won't the current and future cash flow impacts be reflected in the financial statements?").

words, social and environmental impacts on society and the planet would translate into financial risks through things like litigation or reputational risks.[272]

For these critics, expanding the scope of materiality would create an overly broad disclosure regime.[273] They assert that a "central weakness" to the EU's use of double and dynamic materiality is that there are "no clear limiting principle[s]" if the scope of disclosure is expanded beyond financially material information.[274] They express concerns that the disclosure of information for nonfinancial reasons should be separated from what is considered material.[275] For these critics, expanding materiality beyond financial information by requiring companies to report on all potentially relevant societal or environmental impacts could overwhelm shareholders with information that is not useful.[276]

The main problem with these criticisms lies in the underlying assumption that social and environmental issues are not important to shareholders, and that corporations need not concern themselves with social and environmental issues that do not have a direct impact on their bottom line. For starters, institutional investors, who hold about 80% of the market capitalization of United States equities—entities like credit unions, banks, mutual funds, hedge funds, venture capital funds, insurance companies, and pension funds that invest other people's money, as opposed to individual shareholders who invest their own money—use disclosures about social issues to assess the long-term value of a company *and* further social goals.[277] The Government Accountability Office ("GAO")

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[272] *See, e.g.*, Martin & Chambers, *supra* note 269, at 131-32; *see also* Madison Condon, *What's Scope 3 Good For?*, 56 UC DAVIS L. REV. 1921, 1925 (2023) (advocating for financial relevance of supply chain, also known as "Scope 3," emissions in reporting despite typically being limited to double materiality assessments).

[273] Chris Wright, *Adopting Components of European Union ESG Securities Regulations into United States Securities Regulation*, 11 PENN ST. J. L. & INT'L AFFS. 326, 347 (2022) ("Once materiality is expanded beyond the financial realm into non-financial matters, like environmental concerns, there is no limit as to what it can cover."); Katz & McIntosh, *supra* note 67.

[274] Katz & McIntosh, *supra* note 67 (describing how investors may expand category of materiality on personal whims when making meaningful investment decisions).

[275] *Id.* ("If disclosure of immaterial information is required for non-financial reasons, it should be acknowledged as such . . . . There are examples of such requirements under U.S. law, but though these disclosures are mandated, the information provided is not considered 'material.'").

[276] Wright, *supra* note 273, at 347 (suggesting double materiality may make materiality unendingly broad); Katz & McIntosh, *supra* note 67.

[277] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 9 (2020) (reporting majority of private asset managers and public pension fund managers use ESG information to inform risk assessment and investment decision making); *see also* Eric Juergens, William D. Regner & Amy Pereira, *Proxy Advisors and Institutional Shareholders Revise Voting Guidelines on Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar.

identified a survey conducted by the Forum for Sustainable and Responsible Investment in the United States in 2018.[278] The survey revealed that "private asset managers and other investors, representing over $3.1 trillion . . . said they consider ESG issues as part of their mission or in order to produce benefits for society."[279] And as discussed previously, shareholders are interested in social issues because they want to see some impact in the world, or for moral reasons and values. Shareholders are concerned about employee wellbeing, a company's impact on local communities, human rights, climate and environmental degradation, and sustainability outside of their financial ends.[280]

As the social and political landscape of which corporations are a part continues to change, double materiality or dynamic materiality is more likely to provide information on corporate impact in addition to what is financially material to shareholders and stakeholders. To be clear, corporate impact does not have to be a progressive agenda. Corporations can provide information on how their activities impact communities, including in rural areas.

The big question is whether a future SEC can mandate a double or dynamic materiality regime for social and environmental issues so that corporations can disclose the relevance of these issues outside of financial risk factors.

B. *Concerns with Social and Environmental Issues as Risk Factors*

There are negative consequences for society and the environment when corporations express social and environmental issues as risk factors. One negative consequence is that doing so could chill any potential progress and corporate accountability to address these issues, including the lack of diversity and inclusion and the impact of corporate activities on the environment. According to Merriam Webster Dictionary, risk entails "expos[ure] to hazard or danger" or the "possibility of loss or injury."[281] It is useful to consider broader implications of describing social and environmental concerns as risky. Fleeing danger, hazards, or things that may cause injury would be a fair reaction for corporations. To avoid scrutiny from conservative shareholders and stakeholders, corporations are pulling back on language that directly addresses

11, 2025), https:// corpgov.law.harvard.edu/ 2025/ 03/ 11/ proxy-advisors-and-institutional-shareholders -revise -voting -guidelines -on -board -diversity [https://perma.cc/ RB95-FMJ6] (compiling recent proxy advisor and shareholder voting guideline changes showing shift away from prior DEI-based voting practices).

[278] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, at 9; *see also* U.S. SIF FOUND., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 26, 26 fig. 2.10 (2018) (identifying disclosure on ESG topics by document).

[279] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, at 9 (summarizing 2018 US SIF survey of private asset managers' use of ESG information).

[280] *See supra* Introduction and accompanying notes.

[281] *Risk*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/risk [https:// perma.cc/8FA3-33SM] (last visited Feb. 13, 2026).

racial inequality, economic inequality, and the climate crisis.[282] The language of risk is likely to provide support for such retreat.

Describing social and environmental issues as risky can also negatively impact shareholder and employee activism. Companies communicate to shareholders and stakeholders that social and environmental issues are risk factors in which they should engage with caution. Shareholder and employee activism are important for driving social change in corporations, particularly on social issues.[283]

One might speculate about why this risk-based framing has become widespread. While it is beyond its scope, this Article notes that risk disclosures of this nature are a double-edged sword. On the one hand, describing social and environmental issues as risky allows corporate managers to continue to acknowledge these issues. On the other hand, the risk language limits the relevance of the issues to financial materiality.

Relatedly, couching social and environmental issues in terms of their financial consequences is likely only to lead to similar results as the scholarly and corporate argument for "the business case" for board diversity. The business case seeks to find clear causal relationships between having women and minorities on corporate boards and improved stock performance and other financial indicators.[284] Empirically showing a causal relationship between board members and financial performance is difficult, resulting in inconclusive findings and, at times, findings showing the opposite effect.[285] Nevertheless, some proponents of the business case have argued that in order to convince corporations that it is a good idea to diversify their boards, for example, it is insufficient to rely on the perspective that firms should pursue board diversity to

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[282] *See, e.g.*, Callum Borchers, *Companies Quietly Recast DEI to Duck Backlash*, WALL ST. J. (June 11, 2025, at 21:00 ET), https://www.wsj.com/lifestyle/careers/company-dei-strategies-d859e7d7?gaa_at=eafs&gaa_n=ASWzDAgZc0kLa-s2PbR_4Ov59b8-P44ULBl6WEWhUdJmrz6acLs9GHtRQDrfdaZ8M5A%3D&gaa_ts=68af661d&gaa_sig=NVDtpzZ97VlDPZLZvE4y_RVVbkjLJLIMblLOQU5BFWJFXkIXWJKQllpkfr5V6CF-MIb3usJ-XIVDhOTlomT5RQ%3D%3D.

[283] *See* Adediran, *Disclosing Diversity*, *supra* note 29, at 360-67 (explaining how shareholder proposals can create direct corporate policy changes or serve as leverage, while employee activism can generate public pressure and stir outcry).

[284] *See, e.g.*, Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 161 (2019) ("[T]he business case in its narrowest sense—a positive effect on accounting measures or stock price—has yet to definitively establish that gender diversity is the cause of an increase in the bottom line.").

[285] *See, e.g.*, Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 835 (2011) (concluding investor bias contributes to decline in stock price following increases in female board membership); Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 877 (2011) (outlining empirical fallacies of business case rationale).

empower minority groups and address gender and racial inequalities.[286] The idea that companies need a connection to financial consequences expanded support for and reliance on the business case, at times to the detriment of minorities and corporations themselves.[287] Indeed, corporations relied on the business case in their amicus briefs in support of racial diversity in colleges and universities in *Students for Fair Admissions v. Presidents & Fellows of Harvard College*,[288] arguing that racially diverse teams make better decisions, resulting in increased profits, innovation, and business success.[289]

Therefore, if some corporations claim that making risk disclosures on social and environmental issues can help to preserve those issues as important areas in which their firms hope to invest resources, the criticism is that the business case has been unsuccessful in connecting social issues to pure financial goals.

CONCLUSION

This Article provides empirical evidence that corporations are increasingly framing social and environmental conditions, such as diversity and inclusion, human rights, employee welfare, and climate change, as "risk factors" to their shareholders rather than opportunities for societal progress. This shift in disclosure practice narrows the meaning of these issues to their financial consequences, reflecting the dominance of financial materiality in corporate law.

Describing social and environmental issues as financial risks has two consequences. First, it limits the availability of information that shareholders and stakeholders seek about the broader, nonfinancial dimensions of corporate activity—how companies affect workers, communities, and the environment. Second, the framing of these issues as sources of risk may chill corporate

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[286] *See, e.g.*, Hans van Dijk, Marloes van Engen & Jaap Paauwe, *Reframing the Business Case for Diversity: A Values and Virtues Perspective*, 111 J. BUS. ETHICS 73, 77 (2012) ("[I]n a business context where employees are commonly referred to as 'resources' or 'asset' and hence solely as means to an end, [the prioritization of business results] constitutes a reality that is not likely to be sensitive to deontological principles and arguments.").

[287] *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013) (illustrating how business case could effectively encourage predominantly white firms to commodify racial identity in an executive or employee, encourage tokenism, and lead to exhaustion and resentment from people of color who feel exploited by white individuals at their company). *See generally* Oriane Georgeac & Aneeta Rattan, *The Business Case for Diversity Backfires: Detrimental Effects of Organizations' Instrumental Diversity Rhetoric for Underrepresented Group Members' Sense of Belonging*, 124 J. PERS. & SOC. PSYCH. 69 (2022) (finding business case for diversity has led minority applicants to anticipate lower sense of belonging at corporation, and in turn, less attraction to company).

[288] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

[289] Brief for Major American Business Enterprises as Amici Curiae Supporting Respondents at 16-18, *Students for Fair Admissions*, 143 S. Ct. 2141; Brief for Applied Materials, Inc. et al. as Amici Curiae Supporting Respondents at 5-18, *Students for Fair Admissions*, 143 S. Ct. 2141.

engagement and innovation on matters such as equity, sustainability, and human rights, effectively discouraging the very progress that disclosure once sought to promote.

The Article's empirical analysis shows that this reframing is widespread and deliberate: Hundreds of companies across industries now characterize social and environmental commitments as potential threats to profitability, reputation, or litigation exposure. This change reflects the convergence of regulatory uncertainty, political polarization, and shareholder activism. Legally, it reveals the inadequacy of federal and state corporate law, which continue to silo social and environmental concerns into marginal or voluntary regimes rather than integrating them into core disclosure obligations.

To address these limitations, the Article advances the doctrines of double materiality and dynamic materiality as pathways to a more comprehensive disclosure framework. Double materiality would require corporations to report not only how social and environmental issues affect their financial performance but also how corporate activities affect society and the environment. Dynamic materiality would recognize that what is immaterial today may become material tomorrow as social expectations, regulations, and markets evolve. Both frameworks reflect the reality that shareholders and stakeholders share intertwined interests in sustainable and equitable corporate practices. Ultimately, the language of risk constrains corporate responsibility. A disclosure regime grounded solely in financial materiality may protect firms in the short term but undermines transparency, accountability, and long-term value. Reorienting disclosure toward broader social and environmental impact would better reflect investor and stakeholder expectations.

APPENDIX A

The following are social risk excerpts from companies' risk disclosures. The disclosures generally have three components. One portion mentions the stakeholders the company is concerned about, including the investment community or shareholders, regulators, media, government representatives, and others. Another portion is about the specific activities that generate risks including sustainability activities, commitments, goals, targets and objectives, methodologies and timelines for pursuing those activities. The third portion is about the negative impact on the corporation, including fines, penalties and civil liabilities, reputational harm, and challenges hiring and retaining employees. Overall, these examples show that corporations are couching social issues as risky, which ultimately narrows social issues to their financial stakes, including brand and reputation, operations, fines, and fees etc.

Airbnb, a travel/consumer company:

> [O]ur brand and reputation could be harmed if we fail to act responsibly or are perceived as not acting responsibly, or fail to comply with regulatory requirements. . . . ESG matters have become an area of growing and evolving focus among our shareholders and other stakeholders, including among customers, employees, regulators, politicians, and the general public in the United States and abroad. In particular, companies, including Airbnb, face heightened expectations with respect to their practices, disclosures, and performance in relation to climate change, diversity, equity and inclusion, human rights, energy and water consumption, human capital management, data privacy and security, and supply chains (including human rights issues), among other topics.[290]

Alcoa, an aluminum company:

> [M]any governments, regulators, investors, employees, customers, media outlets, and other stakeholders are increasingly focused on environmental, social, and governance considerations relating to businesses, . . . including . . . climate change and GHG emissions, . . . human capital. Our business may face increased scrutiny from such stakeholders and if our strategies relating to environmental, social, and governance considerations do not meet stakeholder expectations and standards, which continue to evolve and may differ across jurisdictions in which we operate, our business, financial condition, results of operations, and reputation could be adversely impacted. Similarly, our failure or perceived failure to pursue or fulfill our strategies and . . . expectations; comply with federal, state, regional, or international ethical, environmental, or other standards, regulations, or expectations; adhere to public statements; satisfy reporting standards; or meet evolving and varied stakeholder expectations within the timelines we

[290] Airbnb, Inc., Annual Report (Form 10-K) 18, 20 (Feb. 16, 2024).

> announce, or at all, could have adverse operational, reputational, financial, and legal impacts.[291]

American Airlines, an aviation company:

> There is increased scrutiny from investors, customers, policymakers, governmental officials and other stakeholders regarding company management of climate change, human capital, and various other environmental and social matters. We engage in various initiatives to manage such matters and address stakeholder expectations; however, such initiatives can be costly and may not have the desired effect. For example, many of our initiatives leverage methodologies, standards, and data that are complex and continue to evolve. As with other companies, our approach to such matters also evolves, and we cannot guarantee that our approach will align with the expectations or preferences of any particular stakeholder. Moreover, various stakeholders have different, and at times conflicting, expectations. For example, while some policymakers (such as the State of California and the European Union) have adopted requirements for various disclosures or actions on environmental and social matters, policymakers in other jurisdictions have sought to constrain companies' consideration of such matters in certain circumstances. Proponents and opponents of such matters are increasingly resorting to activism, including litigation, to advance their perspectives. Addressing stakeholder expectations or requirements may be costly and any failure to successfully navigate such expectations, as well as evolving interpretations of any existing governmental laws or requirements, may result in reputational harm, loss of customers or contracts, regulatory or investor engagement, or other adverse impacts to our business.[292]

Atlantic Union Bank, a financial entity:

> We have multiple stakeholders, among them shareholders, customers, employees, federal and state regulatory authorities, and political entities. Often those stakeholders have differing, and sometimes conflicting, priorities and expectations regarding ESG issues. In addition, certain federal and state laws and regulations related to ESG issues may include provisions that conflict with other laws and regulations, which may increase our costs or limit our ability to conduct business in certain jurisdictions. . . . The executive orders, and recent actions taken by federal executive branch agencies and federal and state attorneys general may also indicate an increased focus on investigating certain private entities with respect to DEI programs and policies, including certain publicly traded companies. . . . Such divergent, sometimes conflicting views on ESG-

[291] Alcoa Corp., Annual Report (Form 10-K) 24 (Feb. 20, 2025).

[292] American Airlines, Annual Report (Form 10-K) 39 (Dec. 31, 2024).

> related matters increase the risk that any action or lack thereof by us on such matters will be perceived negatively by some stakeholders. Failing to comply with expectations and standards from investors, customers, regulators, policymakers and other stakeholders regarding ESG-related issues, or taking action in conflict with one or another of those stakeholder's expectations, could also lead to loss of business, adverse publicity, an adverse impact on our reputation, customer complaints, or public protests.[293]

Dutch Bros Inc., a restaurant/consumer firm:

> Ongoing public and government scrutiny of environmental, social, and corporate governance (ESG) matters or our reporting of such matters could negatively impact our business. There has been an ongoing public focus, including from the United States federal and state governments, on ESG matters, including with respect to climate change, greenhouse gases, water resources, packaging and waste, animal health and welfare, deforestation, and land use. We are working to manage the risks and costs to us, our franchise partners and our supply chain associated with these types of ESG matters, however, there is no assurance that such efforts will result in the intended effective management of such risks and costs. In addition, as the result of such focus on ESG matters, we may face increased pressure to provide expanded disclosure, make or expand commitments, set targets, or establish additional goals and take actions to meet such goals, in connection with such ESG matters. These matters and our efforts to address them could expose us to market, operational, reputational, and execution costs or risks. As ESG best practices and reporting standards continue to develop, we may incur increasing costs relating to ESG monitoring and reporting and complying with ESG initiatives. In the event that we communicate certain initiatives or goals regarding ESG matters in the future, we could fail, or be perceived to fail, in our achievement of such initiatives or goals, or we could be criticized for the scope of such initiatives or goals. If we fail to satisfy the expectations of certain investors and other stakeholders or our initiatives are not executed as planned, our business, financial condition, results of operations, and prospects may be adversely affected.[294]

Xylem, a water technology company:

> We may face increased scrutiny from the investment community, regulators, media . . . and other stakeholders related to our sustainability activities, commitments, goals, targets and objectives, and our methodologies and timelines for pursuing them. At the same time, certain governmental representatives and other stakeholders have increasingly

[293] Atl. Union Bankshares Corp., Annual Report (Form 10-K) 50 (Feb. 27, 2025).

[294] Dutch Bros, Inc., Annual Report (Form 10-K) 36 (Feb. 13, 2025).

expressed or pursued opposing views, legal and investment expectations around sustainability initiatives, including the enactment or proposal of "anti-ESG" legislation . . . or policies. . . . Complying with regulators' disclosure requirements has and will continue to impose substantial additional costs . . . . Any actual or alleged failure to comply with regulatory requirements around disclosures could result in fines, penalties and civil liabilities, and damage to our reputation. . . . [I]f we are unable to satisfy all stakeholders . . . , [our] ability to attract or retain employees, and attractiveness as an investment, business partner or acquiror could be negatively impacted. Similarly, our failure or perceived failure to pursue or fulfill our sustainability commitments . . . or to comply with reporting and disclosure requirements and standards related to these matters, within the timelines we announce, or at all, could have adverse operational, reputational, financial and legal impacts.[295]

[295] Xylem Inc., Annual Report (Form 10-K) 24-25 (Mar. 3, 2025).

APPENDIX B

Table 2. 2025 Shareholder Anti-DEI Proposals and Voting Results.[296]

Name	Annual Meeting Date	Percent of Total Shareholder Votes Rejecting Anti-DEI Proposals
Alphabet/Google (GOOG)	6/6/25	99-0 (1% abstained; two separate proposals)
Amazon (AMZN)	5/21/25	98-1 (1% abstained)
American Airlines (AAL)	6/11/25	98-2
American Express Company (AXP)	4/29/25	99-1
Apple Inc. (AAPL)	2/25/25	98-2
Berkshire Hathaway (BRK)	5/3/25	99-1 (two separate proposals)
Best Buy (BBY)	6/13/25	99-1
Bristol-Myers Squibb Company (BMY)	5/6/25	98-1 and 97-2 (two separate proposals; 1% abstained on both)
Caterpillar (CAT)	6/11/25	97-3
Coca-Cola Company (KO)	4/30/25	99-1 (two separate proposals)
Costco Wholesale Corporation (COST)	1/23/25	98-2
John Deere & Company (DE)	2/26/25	99-1
Gilead Sciences, Inc. (GILD)	5/7/25	99-1
Goldman Sachs Group, Inc. (GS)	4/23/25	98-2 (on two separate proposals)
International Business Machines Corporation (IBM)	4/29/25	Proposal withdrawn
Levi Strauss (LEVI)	4/23/25	99-1
Lockheed Martin Corporation (LMT)	5/9/25	Proposal withdrawn
Lululemon (LULU)	6/11/25	100-0 (rounded from 99.7-.3%)
Mastercard (MA)	6/24/25	100-0 (rounded from 99.6-.4%)
McDonald's Corporation (MCD)	5/20/25	99-1
Merck & Co., Inc. (MRK)	5/27/25	99-1
Netflix (NFLX)	6/5/25	100-0 (rounded from 99.55-.45%)

[296] Table adapted from Impactivize, *2025 Anti-DEI Proposals and Shareholder Voting Results*, IMPACTIVIZE, https://www.impactivize.org/2025-shareholder-proposals [https://perma.cc/3EWD-5KHY] (last visited Feb. 13, 2026) (compiling 2025 anti-DEI board proposals and resulting votes for major United States corporations).

PayPal (PYPL)	6/5/25	98-1 (1% abstained)
Pfizer Inc. (PFE)	4/24/25	98-2
Southern Company (SO)	5/21/25	98-2
Target (TGT)	6/11/25	92-7 (1% abstained)
The Boeing Company (BA)	4/24/25	97-3
Visa Inc. (V)	1/28/25	99-1
Walmart (WMT)	6/5/25	100-0 (rounded from 99.6-.4%)
Walt Disney Company (DIS)	3/20/25	99-1
Yum! Brands (YUM)	5/15/25	99-1