A Path to More Sustainable Corporations in the United States

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Introduction: Globalization & the Role of Corporations

"Globalization is a word used to describe the growing interdependence of the world's economies, cultures and populations brought about by cross-border trade in goods and services, technology, the flows of people and information."[1] Global trade has "skyrocketed" in the past century, and U.S. trade levels now exceed a third of its GDP, and world trade volume exceeds half of world GDP.[2] Globalization has seen some big winners—developing manufacturing countries such as China and India, highly skilled professionals, and multinational corporations.[3] But it has also devastated working class families with the impact of low-cost imports and loss of manufacturing jobs in the United States.[4]

Income and wealth inequality has grown across the developed world; while companies and rich individuals have gotten richer, the average income has basically stayed the same.[5] In the United States, from 1990 to 2014, "the GDP increased by seventy-eight percent," but "the real median household income was barely higher in 2014 than it had been in 1990."[6] Western countries face "stagnation of living standards", "rising inequality," and "dangerous environmental risk."[7]

Corporations play an important role in globalization and the rising inequality. Even though Americans are working more productively than ever, the fruits of their labors have primarily accrued to corporate profits; "From 1979 to 2018, net productivity [how much workers produce per hour] rose almost 69.9 percent,

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1. Melina Kolb, *What is Globalization?*, Peterson Inst. for Int'l Econ. (Oct. 29, 2018) (updated Feb. 4, 2019), https://www.piie.com/microsites/globalization/what-is-globalization, [https://perma.cc/SQS5-AJYN].

2. *Id.*

3. *See id.*

4. *See id.*

5. *See* Michael Jacobs & Mariana Mazzucato, Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth Ch. 1 (John Wiley & Sons, Inc. 2016) ("At the same time 'wealth inequality has grown even more than income.' The rise in inequality has been seen across the developed world: 'In the UK, the share of national wealth owned by the top 1% rose from 23% in 1970 to 28% in 2010. In the US, it has risen from 28% to 34% over the same period. In the US in 2010, the top 0.1% alone owned almost 15% of all wealth.'").

6. *Id.*

7. *See id.*

while the hourly pay of typical workers essentially stagnated – increasing only 11.6 percent over thirty-nine years."[8] The rising tide does not lift all boats. In other words, workers are getting poorer and corporations and their owners are getting richer.

Beyond exacerbating inequality, corporations are also exploiting the labor force and polluting to profit.[9] Corporations are key players in globalization; they set wage standards, labor standards, and make key decisions on trade and outsourcing.[10]

Multinational corporations use global supply chains to create their products.[11] "Global supply chains are production networks that assemble products using parts from around the world."[12] Today, eighty percent of world trade is driven by supply chains run by multinational corporations.[13] Corporations increasingly source goods and services from complex chains of suppliers that often span multiple countries.[14] These countries have different legal, regulatory, and human rights practices. And "more than 450 million people around the world work in supply chain related jobs."[15] "Through their global supply chains, many businesses risk contributing to the more than 12 million deaths attributable to unhealthy environments each year."[16] Corporations also outsource to countries with lax environmental standards to avoid compliance with regulations in the United States.[17] While corporations become wealthy from globalization and trade, workers are suffering and society is paying in environmental costs.[18]

So, what can be done to promote a more sustainable role for the corporation? To address this question, this Note explores private norm reordering to encourage more sustainable corporations. Part I describes corporate governance and how the shift in the purpose of a corporation sets the stage for change. Part II discusses the

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8. *The Productivity Pay Gap*, ECON. POL'Y INST. (July 2019), https://www.epi.org/productivity-pay-gap/ [https://perma.cc/H9GH-FNNF].

9. *See generally* Paul Griffin, *Carbon Majors Report 2017*, THE CARBON MAJORS DATABASE (July 2017) (finding "over half of global industrial emissions since human induced climate change was officially recognized can be traced to just 25 corporate and state producing entities"); HUMAN RIGHTS WATCH, HUMAN RIGHTS IN SUPPLY CHAINS: A CALL FOR A BINDING STANDARD ON DUE DILIGENCE (2016) [hereinafter HUMAN RIGHTS WATCH].

10. *See* Benjamin W. Heineman, Jr., *The Ideal of the 'Lawyer Statesman'*, 22 No. 5 ACC DOCKET 59, 62 (May 2004).

11. Kolb, *supra* note 1.

12. *Id.*

13. UN CONF. ON TRADE AND DEV., *Investment and trade are increasingly entwined via GVCs* (Feb. 27, 2013), https://unctad.org/news/investment-and-trade-are-increasingly-entwined-gvcs-report-says [https://perma.cc/UJT5-2JKN].

14. See id.

15. HUMAN RIGHTS WATCH, *supra* note 9, at 2.

16. *Id.* at 7.

17. *See generally* Itzhak Ben-David, Stefanie Kleimeier & Michael Viehs, *Research: When Environmental Regulations Are Tighter at Home, Companies Emit More Abroad,* HARV. BUSINESS REV. (Feb. 4 2019), https://hbr.org/2019/02/research-when-environmental-regulations-are-tighter-at-home-companies-emit-more-abroad [https://perma.cc/HPJ5-XUX4].

18. *See generally id.*

role of the in-house lawyer as a key player in corporate decision-making; as explained above, the world is changing and the role of in-house counsel needs to expand to meet that change. Part II suggests how changes to Model Rule 2.1 could impact the future role of the corporate lawyer. Finally, Part III proposes Environmental Social Governance disclosure required by stock exchanges and discusses the implications of consumer and investor pressure.

I. CORPORATE LAW & THE PURPOSE OF A CORPORATION

> *"[C]orporations that claim the legal rights of personhood should be legally required to accept the moral obligations of personhood."*[19]

Corporate law in the United States arguably enables these supply chain abuses. The corporation is a person in the eyes of U.S. law, which means owners and managers of the corporation, the actual human beings, face limited liability when the corporation violates environmental regulations or commits a tort.[20] The premise that corporations exist only to make money is at the root of this problem—cutting any costs or corners despite the impact on communities, workers, and the environment is in the "best interests" of the shareholders.[21]

"[I]n the 1980s corporations adopted the belief that their only legitimate and legal purpose was maximizing shareholder value," a theory known as shareholder primacy.[22] "By 1997, the Business Roundtable, [a group of CEOs of America's leading companies], declared that 'the principal objective of a business enterprise is to generate economic returns to its shareholders.'"[23] In the early 1980s, companies paid out "less than half of their profits to shareholders," investing the rest back into the company and its workers; today the figure is closer to over ninety percent of earnings paid out to shareholders.[24] The top ten percent of America's richest households own about eighty-four percent of stock in American companies, while forty-eight percent of U.S. households own no stock at all.[25] So,

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19. Matthew Yglesias, *Elizabeth Warren has a plan to save capitalism*, VOX (Aug. 15 2018), https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations [https://perma.cc/CE6A-466H] (describing the premise that Senator Warren's Accountable Capitalism Act is based on).

20. *See* Alan Palmiter, Frank Partnoy & Elizabeth Pollman, Business Organizations 186–87 (3d ed. 2019) [hereinafter Business Organizations].

21. *Warren Introduces Accountable Capitalism Act (ACA One Pager)*, ELIZABETH WARREN (Aug. 15, 2018), https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf [https://perma.cc/EMP4-D4R9] [hereinafter *ACA One Pager*].

22. *Id.*

23. *Id.*; *see also Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUSINESS ROUNDTABLE (Aug. 19 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/A388-F4U7] [hereinafter *BRT Purpose Statement*].

24. *ACA One Pager*, *supra* note 21; William Lazonick, *Congress can turn the Republican tax cuts into new middle-class jobs*, THE HILL (Feb. 7 2018), https://thehill.com/opinion/finance/372760-congress-can-turn-the-republican-tax-cuts-into-new-middle-class-jobs [https://perma.cc/P9KH-V3GF].

25. *See ACA One Pager*, *supra* note 21(stating the Top 10 percent own 84 percent of stock); *Majority of Families Are Invested in the Stock Market; shares vary by income, race, ethnicity*, PEW RES. CTR. (Mar. 24,

shareholder primacy has the effect of making the rich richer, at the cost of workers and communities.

But hope is not lost. Recently, there has been re-thinking about whom a corporation exists to serve. In 2019, the Business Roundtable dramatically redefined the "Purpose of a Corporation" to "Promote an Economy that Serves all Americans."[26] The updated statement moved away from a longstanding principle of shareholder primacy to a broader commitment to all stakeholders: shareholders, employees, and local communities.[27]

The debate over the purpose of the corporation has dominated corporate law since the Great Depression.[28] The opposing view of "shareholder primacy" is "corporate social responsibility" ("CSR") more modernly referred to as "environmental, social, and governance" ("ESG").[29] Proponents of ESG argue that corporations are not shareholder profit machines, but "economic institution[s] which have a social service as well as a profit-making function."[30] This debate is alive and well today, both in the courts[31] and among scholars.[32]

The Business Roundtable's statement could signal a real shift of the norms for U.S. corporations, from shareholder primacy to ESG. Alex Gorsky, Chairman of the Board and CEO of Johnson & Johnson, and Chair of the Business Roundtable Corporate Governance Committee, said the new purpose statement "affirms the essential role corporations can play in improving our society when CEOs are truly committed to meeting the needs of all stakeholders."[33] This new purpose is broadly focused on the implications of corporate behavior for generating long-term value and sustainability for both business and society.[34]

2020) https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/ft_20-03-23_stocksimportance/ [perma.cc/5AYN-NR77] (stating 52 percent of All Families have direct or indirect investment in stock market).

26. *BRT Purpose Statement, supra* note 23.

27. *BRT Purpose Statement, supra* note 23.

28. BUSINESS ORGANIZATIONS, *supra* note 20, at 134.

29. *Id.*

30. *Id.*

31. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1152 (Del. 1989) (holding Time board can make choices that protect the company's "culture" at the expense of immediate shareholder gains); Cox Enterprises Inc. v. Davidson, 510 F.3d 1350, 1353–54 (11th Cir. 2007) (affirming holding that corporate boards must make choices that maximize short-term shareholder value, not to support local news reporting, employee benefits, and the local arts community, sometimes at the expense of short-term shareholder returns).

32. *See generally* John F. Coogan, *Some Thoughts on the Business Roundtable's Statement of Corporate Purpose*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 7, 2020), https://corpgov.law.harvard.edu/2020/10/07/some-thoughts-on-the-business-roundtables-statement-of-corporate-purpose/#more-133358 [https://perma.cc/F26V-E78M]; Randi Val Morrison, *BRT Statement of Corporate Purpose: Debate Continues*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Aug. 28, 2020), https://corpgov.law.harvard.edu/2020/08/28/brt-statement-of-corporate-purpose-debate-continues/ [https://perma.cc/ZF7G-TF6B].

33. *BRT Purpose Statement, supra* note 23.

34. *BRT Purpose Statement, supra* note 23.

With a promising endorsement from some of the most powerful CEOs in the world, it is easier to imagine the role corporations could play in making society more sustainable and better for all stakeholders involved. The corporation is a powerful actor in society with regard to labor conditions and environmental conditions. However, to date "the [corporate] social responsibility/sustainability movement in the United States has been mostly voluntary."[35]

While sweeping regulation on corporations seems like the most straightforward way to regulate corporate behavior, it is also unlikely to happen in the near future. In 2018, Senator Elizabeth Warren proposed the Accountable Capitalism Act, which would require corporations with annual revenue over $1 billion to federally incorporate and to have a charter with a "general public benefit" which means "a material positive impact on society resulting from the business or operations" of the corporation.[36] Senator Bernie Sanders ran a presidential campaign on the idea of fundamentally changing Corporate America to shift value from corporate executives and large shareholders to workers and communities.[37] His plan also included federal incorporation and a "stakeholder" charter, "requir[ing] corporate boards to consider the interests of all of the stakeholders in a company – including workers, customers, shareholders, and the communities in which the corporation operates."[38]

But Warren's bill did not pass, and Sanders is not our president.[39] This Note borrows some ideas from Sanders and Warren and discusses alternate mechanisms to reach similar outcomes and explores proposals of private norm reordering for more sustainable corporations.

II. CHANGING THE ROLE OF THE CORPORATE LAWYER THROUGH THE RULES OF PROFESSIONAL RESPONSIBILITY

Corporations face ethical decisions all the time.[40] Even though the law recognizes corporate personhood, there are real people making these decisions. Corporations are striving to make more ethical and sustainable business decisions, and the key actors in corporations, such as in-house counsel, help make these decisions.[41] To explore how in-house counsel can contribute to ethical decisions, Part A will discuss the role of in-house counsel, Part B will pose a hypothetical ethical problem that in-house counsel could face, and Part C will present different proposals to address the issue.

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35. BUSINESS ORGANIZATIONS, *supra* note 20, at 136.

36. Accountable Capitalism Act S. 3348, 115th Cong. §§3, 5, 6, and 8 (2018).

37. Bernie Sanders, *Corporate Accountability and Democracy*, https://berniesanders.com/issues/corporate-accountability-and-democracy/ [https://perma.cc/2VEX-4DDG].

38. *Id.*

39. Accountable Capitalism Act S. 3348, 115th Cong. (2018).

40. *See* Sarah Helene Duggin, *The Pivotal Role of General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1018 (2007).

41. *See id.*

A. THE ROLE OF IN-HOUSE COUNSEL

The role of the corporate general counsel is growing more complex and sophisticated every day.[42] Companies are becoming more global and more international companies are hiring American general counsels.[43] The role and influence of the general counsel within the company has expanded in reaction to the evolving nature of global corporations.[44] The health of a modern day global corporation requires that it navigate changing law, regulation, and complex social and political issues.[45] In turn, the general counsel role has grown more important as the role's scope has broadened to include "ethics, risk, governance, and citizenship."[46] The general counsel is a key manager and "primary counselor for the CEO and board of directors" on business opportunities, risks, and legal decisions.[47]

Starting in the 1980s, general counsels began to more commonly claim the role of trusted advisor, in place of outside counsel, because the in-house lawyers were in the best position to understand the company's business.[48] This insider view allows the general counsel to "engage in the kind of risk assessment and preventive counseling that managers need to survive in an increasingly complex and turbulent legal environment."[49] Today, general counsels are "entrusted with both the roles of 'partner' to the business and the 'guardian' of the company's long-term reputation and values."[50]

B. EXAMPLE OF ETHICAL DECISIONS CORPORATE LAWYERS FACE: PROBLEM OF LEGAL ARBITRAGE IN MULTINATIONAL CORPORATIONS

Today's corporations face the ethical dilemma of sourcing labor in the most cost-effective way versus the most sustainable way.[51] Multinational corporations

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42. *See* David B. Wilkins, *The In-House Counsel Movement*, THE CHANGING ROLE OF GENERAL COUNSEL (June 2016), https://thepractice.law.harvard.edu/article/in-house-counsel-movement/ [https://perma.cc/BRY5-SCRW] (noting the continuous growth of "the power and prestige of in-house lawyers," observing that "in-house legal departments in the United States now also rival large law firms as a destination of choice for talented lawyers").

43. *See* Sabine Chalmers, *The Evolving Role of the In-house lawyer outside the United States*, 26 NO. 1 ACC DOCKET, 22 (Jan./Feb. 2008) ("Companies themselves are becoming increasingly global. . .many non-US companies now have substantial exposure to the US market and with it an increasing awareness of the importance of legal issues. As a result, many non-US companies are appointing Americans or lawyers with substantial US experience as their general counsel.").

44. Ben W. Heineman Jr., *The Inside Counsel Revolution*, THE CHANGING ROLE OF GENERAL COUNSEL (June 2016), https://thepractice.law.harvard.edu/article/inside-counsel-revolution/ [https://perma.cc/7GYW-LUSE].

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* Wilkins, *supra* note 42.

49. *Id.*

50. *Id.*

51. *See generally* BUSINESS ORGANIZATIONS, *supra* note 20, at 151–53.

in particular, operating across the globe, must decide whether to treat workers better than local workplace rules may require, or whether to implement more stringent environmental policies than otherwise would apply.[52] Corporate global supply chains often involve subcontractors; some even laborers in the informal sector.[53] Because of this lack of formal structure, the people impacted by human rights abuses in supply chains—often women workers, migrant workers, and child laborers—do not have the opportunity to call attention to the problems.[54] International norms, such as the UN Guiding Principles on Business and Human Rights, are not binding.[55]

To illustrate this ethical dilemma that corporate lawyers may face while advising clients on such issues, consider this hypothetical borrowed from *Business Organizations*:

> You are the corporate counsel of Exogen, a company that manufactures components for electric cars. One of the solvents used in the manufacturing process, Durasol, has been implicated as a potential carcinogen in recent medical studies. The Occupational Health and Safety Administration (OSHA) has begun to consider banning the use of Durasol because of its effect on workers who breathe its fumes. OSHA has asked the company voluntarily to discontinue use of the solvent.
>
> At a meeting of the Exogen board of directors, corporate officials have sought guidance on discontinuing the use of Durasol. The officials are concerned, however, that doing so will increase the costs of manufacturing, since the chemical that would replace it is much more expensive. The company is in the process of moving its major manufacturing operations to Ruranesia (a fictitious developing country that has become a manufacturing center for many multinational corporations). Occupational health regulation in Ruranesia is lax, and government regulators are poorly paid and often corrupt. The Exogen officials believe that the company could use Durasol in its operations there.
>
> Company officials suggest to the Exogen board that the company should not voluntarily cease using Durasol, but instead insist that OSHA institute formal proceedings to prohibit its use. This would require hearings, the opportunity for Exogen to question whether Durasol is actually harmful, and other elaborate procedural measures. At the same time Exogen would continue with plans to move the company's manufacturing operations to Ruranesia – as quickly as possible.
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> The directors turn to you for advice.[56]

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52. *See generally id.*
53. HUMAN RIGHTS WATCH, *supra* note 9, at 2.
54. *Id.*
55. *Id.* at 4.
56. BUSINESS ORGANIZATIONS, *supra* note 20, at 151–52 (paraphrased here).

The dilemma here is whether counsel should advise the board only about legalities or also about ethical implications of the decision. Corporate lawyers are frequently asked to advise boards of directors on matters beyond the legal consequences of corporate actions—on issues like trade, sourcing, and worker protection.[57] What is the role of the corporate lawyer in such situations? The *ABA Model Rules of Professional Conduct* ("*Model Rules*")[58] provide some guidance: First, the corporate lawyer is representing the corporation, not the CEO or any of the other agents of the corporation.[59] Rule 1.13 Organization as a Client states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[60] Second, the corporate lawyer must give independent and candid advice.[61] As stated in Rule 2.1, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[62]

"So, what does 'independent professional judgment' entail?"[63] This Note argues that the recent shift in corporate governance helps provide an answer to this question – corporate lawyers should not try to wash their hands of hard questions when the corporate decision makers face difficult moral or ethical issues. Instead, corporate lawyers should help directors and officers understand the full implications of their decisions.

The complexity of the role begs the question, how can an in-house counsel or a corporate legal department effectively manage this position with such an immense and important scope? And, how can the role of the in-house lawyer shift in accordance with the governance shift from shareholder primacy to corporate social responsibility? To start to answer these questions, this Note turns to the model of a "lawyer-statesman."[64]

C. PROPOSALS

> *In the trial setting, aggressive advocacy (at least in theory) supposedly operates to bring out the truth, by testing one-sided proof and argument against counter-proof and counter-argument. Ideally, it facilitates decisions of the legal validity of the parties' claims on the merits. Outside of such settings, one-sided advocacy is more likely to help parties overstep the line to violate*

57. *See* Benjamin W. Heineman, Jr., *The Ideal of the 'Lawyer Statesman'*, 22 No. 5 ACC DOCKET 59, 62 (May 2004).

58. ABA MODEL RULES OF PROF'L CONDUCT R. 2.1 (2016) [hereinafter Model Rules].

59. MODEL RULES R. 1.13.

60. MODEL RULES R. 1.13.

61. MODEL RULES R. 2.1.

62. *Id.*

63. BUSINESS ORGANIZATIONS, *supra* note 20, at 150 (stating there is an ongoing debate about what "independent professional judgment" should entail).

64. *See* Heineman, *supra* note 10, at 62.

> *the law, and to do so in such ways as are likely to evade detection and sanction, and thus frustrate the purposes of law and regulation.*[65]

1. PROPOSAL 1: ENCOURAGE CORPORATE LAWYERS TO TAKE ON THE 'LAWYER-STATESMAN' ROLE

Former General Electric General Counsel, Ben Heineman argues that the "lawyer-statesman" is the ideal for in-house counsel to aspire to.[66] A lawyer-statesman is a lawyer who represents his client's interest "with an eye to securing not only the client's immediate benefit, but [also] his long range social benefit."[67] This role requires "practical wisdom, not just technical mastery," and "the ability to focus on long term implications" with a deep concern for the public interest.[68]

Heineman argues that the nature of the role of in-house counsel demands the aspiration to act as a lawyer-statesman.[69] Such aspiration is particularly important for general counsels who face the challenges of global supply chain issues. These issues present an opportunity for in-house lawyers to take on an active role in promoting ESG by advising business partners on ethical implications of their decisions.[70] They present in-house counsel the opportunity to exercise the "practical wisdom, the broad judgment, and the long-term view," and exercise "the ability to create durable positions and institutions" characteristic of the idealized lawyer-statesman.[71]

The lawyer-statesman general counsel, when faced with an issue on sourcing and worker protection like the hypothetical scenario regarding legal arbitrage posed above, would take a practical and long-term approach. Instead of worrying about short-term profit and pleasing the CFO, the lawyer-statesman would give advice based on a long-term outlook and ensure the decision makers are aware of the implications the decisions would have for all stakeholders.

Consider Exogen: on one hand, the decision not to outsource to Ruranesia would hurt the company's bottom line in the short term, and therefore could be viewed as detrimental to the shareholders: owners of the company (to whom the general counsel owes a fiduciary duty).[72] On the other hand, deciding to go ahead with outsourcing instead of changing to a more sustainable material could damage the company's reputation a few years down the road if the media exposed the

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65. Robert Gordon, A New Role for Lawyers? The Corporate Counselor After Enron, 35 CONN. L. REV. 1185, 1205 (2003).

66. *See* Heineman, *supra* note 10, at 62.

67. Gordon, *supra* note 65, at 1208 (quoting ERYL HAROLD LEVY, CORPORATION LAWYER: SAINT OF SINNER? 151, 153 (1961)).

68. Heineman, *supra* note 10, at 60 (referencing TONY KRONMAN, THE LOST LAWYER 11–53 (Harvard University Press 1993)).

69. Heineman, *supra* note 10, at 62.

70. *See generally* Duggin, *supra* note 40, at 1018–19.

71. *See* Heineman, *supra* note 10, at 62.

72. *See* BUSINESS ORGANIZATIONS, *supra* note 20, at 80–81.

company for knowingly endangering laborers.[73] This exposure in turn could lessen the value of the company's stock, which would be detrimental to its shareholders.[74] So, taking the long-term view could justify making the decision to not outsource. Framing decisions in terms of long-term returns can reconcile the shareholder primacy and corporate sustainability view.[75]

Perhaps more importantly, the lawyer-statesman would consider and advise how this decision would affect all of the company's stakeholders—shareholders, employees, local laborers—and ask how this would impact the environment. Using a potentially lethal solvent in a developing country could have a devastating impact on the local community and workers there. Allowing a business to go forward with this decision would be a temporary fix. Eventually the company would have to stop using the chemical, and moving the operation only avoids the real problem.

Currently this type of wise advisor-counselor role is not well supported by institutional structures, incentives, or ethical rules.[76] Professor Robert Gordon describes the current corporate lawyer norm, as a zealous defender, compared to what he argues is a desirable norm, an independent counselor: "Ethically, the default master norm of the bar is zealous partisan representation of client interests rather than the counselor's norm of guidance of the client's desires to bring them into alignment with an objective and fair-minded construction of the public purposes of the law."[77] In order for lawyers to be able to give advice that considers the public as well as the client, a change in the professional standard and the ethical rules is needed.

2. PROPOSAL 2: ACHIEVING THE LAWYER-STATESMAN STANDARD THROUGH MODIFICATION OF MODEL RULE 2.1

With the evolving legal landscape, all lawyers are expected to advise clients on increasingly complicated and interdisciplinary issues. Model Rule 2.1 attempts to address issues like this where the role of the lawyer is as an advisor: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[78]

The Comment to Rule 2.1 elaborates that purely technical legal advice "couched in narrow legal terms may be of little value to the client" and therefore

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73. *See* Donald Langevoort, Corporations Lecture at Georgetown Law (Aug. 9, 2020) (discussing Exogen hypothetical in Corporations class; idea of reconciling shareholder primacy and corporate sustainability from lecture and class discussion)

74. See id.

75. *See id;* Morrison, *supra* note 32.

76. Gordon, *supra* note 65, at 1214.

77. *Id.*

78. MODEL RULES R. 2.1.

"can sometimes be inadequate."[79] It also explains that it is proper for a lawyer "to refer to relevant moral and ethical considerations in giving advice" because "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[80]

Model Rule 2.1 has been generally accepted as merely permitting attorneys to counsel clients on non-legal, moral considerations but not requiring such counseling.[81] Some scholars have interpreted Rule 2.1 as encouraging non-legal and moral counseling,[82] while others have come to the opposite conclusion.[83] Although numerous commentators have addressed Rule 2.1, it remains unclear whether this professional standard requires moral advice, and if so when and how to provide it.[84] To explore this question, this Note discusses the shortcomings of Rule 2.1 and potential modifications.

Professor Robert F. Cochran raised the issue of a lawyer discussing moral issues with his client to the ABA Ethics 2000 Commission.[85] He stressed the importance of the lawyer at least raising moral issues for discussion with the client, even if the lawyer did not provide advice.[86] Cochran suggested that the Commission add the following language to either the text or comment to Rule 2.1:

> Law, at its best, is an instrument of justice, but it can also be an instrument of injustice. The lawyer and client should consider the interests of other people when making decisions in the law office. A lawyer should discuss with the client, not only whether the client can use the law for the client's purposes, but whether the client should use the law for the client's purposes.[87]

Because the Commission did not adopt Cochran's proposal, at least one scholar concludes that this lack of action "could suggest that the ABA continues to affirm the distinction between the 'desirable' language and merely permissive 'may' language in the current Rule 2.1."[88]

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79. MODEL RULES R. 2.1 cmt 2.

80. MODEL RULES R. 2.1 cmt 2.

81. *See* Larry O. Natt Gantt, II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 370 (2005).

82. See Rutherford B. Campbell, Jr. & Eugene R. Gaetke, The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers, 56 RUTGERS L. REV. 9, 20 (2003) ("The lawyer must be candid in rendering advice to the client regarding the decisions and is even encouraged by the Model Rules to refer to a wide range of non-legal considerations in doing so.").

83. Geoffrey C. Hazard, Jr., *Under Shelter of Confidentiality*, 50 CASE W. RES. L. REV. 1, 13 (1999) (stating that Rule 2.1 "simply means that a lawyer is not being officious in going beyond 'strictly legal' advice, not that a lawyer is obliged to reach in that direction").

84. *See* Gantt, *supra* note 81, at 373.

85. *Id.* at 370.

86. *Id.*

87. *Id.*

88. *Id.* (concluding that Rule 2.1 implies that lawyers should offer non-legal and moral advice, because the "should" can be implied from other provisions of the Model Rules)

a. Shortcomings of Rule 2.1

Two of the main shortcomings of Rule 2.1 are its lack of enforceability and its vagueness. Using 'may' language in Rule 2.1 creates a serious consequence: it makes the rule much less enforceable and thus less meaningful. The Scope section of the *Model Rules* divides rules into "imperatives" cast in the terms "shall" or "shall not" and other rules generally cast in the term "may" as permissive.[89] When a rule is permissive, like Rule 2.1, "no disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."[90]

The 2.1 Comment uses more imperative language such as: "it is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice," and "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[91] But 'should' in a Comment does not carry the same weight as 'should' in a Rule.[92]

Enron and other corporate scandals in the early 2000s caused both the professions of accounting and law to reevaluate their professional standards.[93] One goal of these efforts to strengthen regulatory and professional rules was "to hold corporate lawyers more accountable and to prompt them to take a broader view of their responsibilities."[94] The ABA created a Task Force on Corporate Responsibility in 2002 which addressed Rule 2.1 and some of its shortcomings in its report.[95] The Task Force report noted that "in recent corporate failures, some legal advisors have been criticized for accepting management's instructions and limiting their advice and/or services to a narrowly defined scope, ignoring the context or implications of the advice they are giving."[96]

So even though the Task Force concluded that Rule 2.1 and its Comments "*encourage* lawyers to embrace and observe moral and ethical considerations beyond legally required minimum standards,"[97] corporate lawyers clearly were not all taking heed. The report also noted that "broad principles" like those in Rule 2.1 "do not afford a sufficient guide to the corporate lawyer confronted with aberrant conduct by corporate officers and insiders."[98]

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89. MODEL RULES scope [14].

90. MODEL RULES scope [14].

91. MODEL RULES R. 2.1, cmt 1 & 2.

92. MODEL RULES scope [14] ("Many of the Comments use the term 'should.' Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.")

93. *See* Duggin, *supra* note 40, at 1020–22.

94. *Id.*

95. *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 54 MERCER L. REV. 789, 807–08 (2003) [hereinafter Task Force Report].

96. *Id.* at 812–13.

97. *Id.* at 807 (emphasis added).

98. *Id.*

b. How to Modify Rule 2.1

Rule 2.1 language should be changed from 'may' to 'shall' to make the rule mandatory. This change would help resolve any ambiguity over whether giving advice that takes into account ethical considerations is necessary. Rule 2.1 could also be expanded to include the Comment to Rule 2.1: "Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."[99] Making the rule imperative and adding the Comment into the Rule would signal to the profession that the Bar's ethical rules support advising on ethical implications of decisions. Ignoring the shortcomings of Rule 2.1 could perpetuate a cycle of unethical behavior by corporations and the lawyers protecting them.

Another potential modification would be to add a Comment to Rule 2.1 about the types of situations in which it is appropriate to provide such advice. For example: "corporate lawyers should refer to relevant moral and ethical considerations in giving advice when advising on a decision that could significantly impact stakeholders of the corporation including employees, the local community and shareholders, or if the decision seems at odds with the corporation's ESG policy" or something like, "corporate lawyers should refer to relevant moral and ethical considerations in giving advice when advising the corporation on decisions that involve international outsourcing or on decisions that could have serious impact on the environment."

The Comment would not have to be all inclusive, but such additions could address the problem that the post-Enron ABA Task Force identified: that the principles in Rule 2.1 are too vague to provide sufficient guidance.[100]

c. Applying the Proposed Rule 2.1 to the Exogen Hypothetical

Returning to the Exogen hypothetical, if in-house counsel was bound by the modified Rule 2.1—with imperative 'shall' language requiring he refer not only to law but also to moral, economic, social, and political factors potentially relevant to the client's situation—the in-house lawyer might give the following advice.

Legal. Yes, our company could legally move the component manufacturing operation to Ruranesia. Doing so will not violate any current health regulations there, and also the chemical, Durasol, is unlikely to be regulated in Ruranesia any time soon. We can also choose not to voluntarily cease using Durasol in the United States because OSHA has not gone through formal proceedings to show that Durasol is actually harmful. It is likely only a matter of time before OSHA takes action, but we can legally wait as long as possible.

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99. MODEL RULES R. 2.1 cmt 2.

100. *See Task Force Report, supra* note 95, at 807.

Moral. Morally, if there is compelling evidence that Durasol causes workers' cancer, then our company should consider discontinuing the use in our U.S. plants now. Our company should do a similar assessment of exposing workers in developing countries to this chemical, regardless of whether it is legal there.

Economic. While switching to a different chemical in the short term will be costly, long-term it could benefit us financially. Dealing with lawsuits caused by exposing our workers to this chemical after we were initially warned about it in the U.S. could be a significant financial and reputational cost. Exposing foreign laborers to a cancerous chemical could likewise have a reputational cost.

Social & Political. Politicians will rebuke us for outsourcing jobs and shutting down domestic operations. On the other hand, our workers, consumers, and community will appreciate if we keep jobs here and maintain the reputation of a local and sustainable manufacturer. Cooperating with OSHA in the voluntary stage will help us gain political favor and could result in a more relaxed wind down of the chemical usage.

ESG policy. Finally, we also need to assess how this decision would align with our corporate ESG policy. That policy counsels that our company consider how a decision will impact all stakeholders of the corporation—employees, the local community, and shareholders. Arguably it is in the best interest of the employees and local community to immediately discontinue this chemical's use, and to keep the manufacturing local. The shareholders will see the long-term value of this decision in helping Exogen maintain its reputation as a sustainable brand and in avoiding legal and political backlash.

This example of advice is oversimplified, but it shows how the modification of Rule 2.1 encourages the lawyer and client, the corporation, to at very least consider the interests of all stakeholders when making a decision.

3. PROPOSAL 3: ENCOURAGE GOOD CORPORATE GOVERNANCE

The alternative response to the Exogen hypothetical is that a lawyer should only advise corporate decision makers about the law and consequences of complying or not complying with legal standards. This Note argues that this type of advising, regarding legal compliance only, is not in the best interest of the lawyer's client, the corporation. Corporate law invites moral counseling by lawyers; moral counseling is good corporate governance.[101]

If the Bar is resistant to modifying Rule 2.1, there is still an appeal to be made to in-house counsel to take on the "lawyer-statesman" mindset in order to be a

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101. *American Law Institute's Principles of Corporate Governance* § 2.01(b)(2) (1994) ("Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business . . . Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account [in making decisions], and it would be unwise social policy to preclude them from doing so.").

wise advisor to his corporation. The profession calls to the conscience of the in-house lawyer, and good corporate governance supports this type of advising.[102] If today's general counsel wants to be a full business partner, she will consider moral implications of her client's decisions. Even if it means possibly losing money in the short-term, this decision is not a violation of her or her business leaders' fiduciary responsibility, because it is in the long-term best interest of shareholders.

The lawyer-statesman counsel will weigh the long-term view to tie shareholder value to making socially and environmentally sustainable business decisions. Long term investment thinking, for example, diversifying energy investments to include wind and solar instead of just doubling down on fossil fuels and lobbying efforts, will be key in creating long term value. Even for day-to-day business operations, ESG is not just the right thing to do, it is good for the company. The positives of a sustainable governance model have been highlighted by the recent pandemic. Companies with strong ESG programs have been able to respond more efficiently during a crisis—the focus on human capital and supply chain concerns pre-pandemic helped companies deal with disruptions such as remote workforce, employee health concerns, and supply chain interruptions.[103]

The Note now shifts from analyzing this problem from the inside out to the outside in. Part III continues the discussion of how corporations can become more sustainable actors and adhere to ESG plans, but considers actors outside of the corporation. This Part discusses how society can regulate corporate behavior without depending on the SEC, Congress, or international governance regimes. To do so, Part III proposes mandated disclosure through stock exchange membership and discusses the influence of shareholder and consumer activism.

III. MANDATED DISCLOSURE OF LABOR AND ENVIRONMENTAL STANDARDS THROUGH STOCK EXCHANGE MEMBERSHIPS

> *But the goal cannot be transparency for transparency's sake. Disclosure should be a means to achieving a more sustainable and inclusive capitalism. Companies must be deliberate and committed to embracing purpose and serving all stakeholders – your shareholders, customers, employees, and the communities where you operate. In doing so, your company will enjoy greater long-term prosperity, as will investors, workers, and society as a whole. – Larry Fink, BlackRock CEO*[104]

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102. *See id.*

103. *See* Peter Rasmussen, *ANALYSIS: Lawyers Say Firms Don't Walk the ESG Talk on Covid-19*, BLOOMBERG LAW (Dec. 7, 2020, 3:01 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-lawyers-say-firms-dont-walk-the-esg-talk-on-covid-19?context=search&index=9 [https://perma.cc/N2Q4-RH86].

104. Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK (Jan. 2020), https://www.blackrock.com/hk/en/larry-fink-ceo-letter [perma.cc/KE33-3JCZ].

This Part begins with a brief description of existing disclosure requirements and the lack of ESG disclosure requirements, then proposes alternative disclosure or corporate governance structure mandates in order to enhance ESG disclosure in large publicly traded corporations.

A. EXISTING DISCLOSURE REQUIREMENTS & ESG DISCLOSURE

Disclosure is crucial in bringing about change in company supply chain behavior. Currently, there is no required public reporting of human rights abuses in supply chains.[105] More progressive brands in the garment and footwear sectors, like Nike and Patagonia, however, publish lists of factories they use.[106] This public disclosure of suppliers enables better risk assessments, and enables the companies to mitigate and quickly remediate labor violations in their supply chains.[107] This type of supply chain disclosure arguably should be mandatory. The Securities and Exchange Commission ("SEC") has taken some steps to add disclosure requirements for materials that raise ethical concerns; for example, the rule for disclosing conflict materials, which mandates companies "publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo ("DRC") or an adjoining country."[108] But there are no general ESG disclosure requirements.

In general, the purpose of securities laws is to make public companies' financial condition transparent to investors; financial condition does not currently include ESG measures the company is taking, but that could and should change in the near future.[109] "To date, the SEC has not adopted ESG-specific guidelines."[110] But recently, the SEC Investor Advisory Committee recommended that the SEC promulgate new disclosure policies regarding ESG topics.[111] This recommendation comes in wake of investors seeking increased information and disclosure on ESG topics.[112] The SEC has not acted in the United States, but non-U.

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105. *See generally* HUMAN RIGHTS WATCH, *supra* note 9.

106. *See id.* at 15.

107. *Id.*

108. U.S. Securities and Exchange Commission, *SEC Adopts Rule for Disclosing Use of Conflict Minerals* (Aug. 22, 2012), https://www.sec.gov/news/press-release/2012-2012-163htm [https://perma.cc/V97R-EQV3].

109. *Cf.* John Coates, *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and Capital Markets*, U.S. SECURITIES AND EXCHANGE COMMISSION 'PUBLIC STATEMENT', (March 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121 [perma.cc/QS2K-CTYW] ("We can and should continue to adapt existing rules and standards to the realities of climate risk, for example, and the fact that investors increasingly are asking for ESG information to help them make informed investment and voting decisions . . . Many ESG-related issues are similar to ones we have faced before. Asbestos-related disclosure is a great example. For years, asbestos-related risks were invisible, and information about asbestos would likely have been called 'non-financial.'").

110. Margaret R. Blake, Linda A. Hesse, Randi C. Lesnick, Corey L. Zarse & Michael R. Butowsky, *SEC Again Urged to Regulate ESG Disclosures,* JONES DAY INSIGHTS (June 2020), https://www.jonesday.com/en/insights/2020/06/sec-again-urged-to-regulate-esg-disclosures#:~:text=Under%20current%20SEC%20regulations%20and,investors%E2%80%95which%20offers%20flexibility%20to [https://perma.cc/3Y9A-3FRP].

111. *Id.*

112. *Id.*

S. regulators like the EU and its member states have integrated ESG into their legal reporting regimes.[113] Issuers in the United States have used a hodgepodge of non-governmental entities to establish ESG disclosure frameworks, but that approach has led to competing ESG standards that "are inconsistent, offer no legally mandated guidance or safe harbors to issuers, and may encourage greenwashing."[114] In order to establish a more consistent and nationwide standard on ESG disclosure reporting, this Note proposes mandating ESG disclosure through a stock exchange requirement.

B. PROPOSALS

In December 2020, Nasdaq filed a proposal with the SEC to require all companies listed on its exchange to disclose the breakdowns of their boards by race, gender, and sexual orientation.[115] The proposal would require Nasdaq-listed companies to have at least two diverse directors—including one woman and one underrepresented racial minority or someone who identifies as LGBTQ—or if they cannot meet the two-director mandate, explain why not.[116] If this mandate is approved by the SEC, Nasdaq will have effectively changed the standard for 3,000 public corporations.[117] State governments such as California have also had success in requiring disclosures and mandating more diverse representation, requiring all California-headquartered, publicly held, corporations to have at least one female director by the end of 2019 and, more recently, at least one director on their boards who is from an underrepresented community by the end of 2021.[118] But Nasdaq can do what states individually cannot with respect to disclosure requirements: quickly improve nationwide disclosure standards. Moreover, Nasdaq's proposal is a sign of change coming from the private sector for improving nationwide disclosure standards. Using Nasdaq's board diversity mandate as a starting point, this Note proposes additional mandates that stock exchanges should impose on their companies.

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113. *Id.*

114. *Id.*

115. Alexander Osipovich &Akane Otani, *Nasdaq Seeks Board-Diversity Rule That Most Listed Firms Don't Meet*, WALL ST. JOURNAL (Dec. 1 2020, 5:26 PM), https://www.wsj.com/articles/nasdaq-proposes-board-diversity-rule-for-listed-companies-11606829244 [https://perma.cc/X383-3PGW].

116. *Id.*

117. *Id.*

118. David A. Bell, Dawn Belt, Jennifer J. Hitchcock, & Fenwick & West LLP, *New Law Requires Diversity on Boards of California-Based Companies*, HARVARD LAW SCHOOL FORUM FOR CORPORATE GOVERNANCE (Oct. 10, 2020), https://corpgov.law.harvard.edu/2020/10/10/new-law-requires-diversity-on-boards-of-california-based-companies/ [perma.cc/MN8G-BHZZ] (defining underrepresented community as "an individual who selfidentifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who selfidentifies as gay, lesbian, bisexual, or transgender").

1. PROPOSAL 4: MANDATED DISCLOSURE OF LABOR AND ENVIRONMENTAL STANDARDS

Nasdaq or the New York Stock Exchange ("NYSE") could propose similar disclosure mandates regarding labor standards and environmental standards. The labor disclosure would be on some scale of supplier responsibility. Companies would assess the effects of the business and operations on the workforce of the corporation, its subsidiaries and suppliers, the local community and society, and the local and global environment. Companies would have to disclose if the company sources materials from areas of the world known to use child labor, slave labor, or to have poor working conditions. The environmental disclosure would include what countries the company operates in, the legal standards in these countries, and allow the company to explain if it holds itself to a higher standard than mandated by local law.

There are many third-party standards for ESG reporting in the U.S. right now.[119] The purpose of this Note is not to determine or discuss the most effective standard, but to highlight generally what the disclosures would cover. If there was a nationwide mandate, the most effective disclosure standard would be applied across all companies for consistency and effectiveness.

2. PROPOSAL 5: MANDATED B-CORPS OR MANDATED CONSTITUENCY CHARTERS

Nasdaq's current proposal is more of a rule requirement than a disclosure requirement, but it provides an out—if the company cannot meet the two-diverse-director mandate, it can instead explain why it did not.[120] Nasdaq or NYSE could propose such a rule mandate to require companies to be incorporated as Benefit Corporations or to have constituency charters (or again explain why the company could not meet the standard). A Benefit Corporation ("B-Corp") is a form of incorporation that allows the company to move from traditional purpose of a corporation, maximizing shareholder value, to a more expanded purpose that explicitly includes a general or specific public benefit.[121]

According to their purpose statements, B-Corps are required to consider the impact of their decisions not only on shareholders but also on their stakeholders.[122] Additionally, B-Corps are required to disclose an annual benefit report that assesses their overall social and environmental performance against a third-party standard.[123]

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119. *Cf.* B Lab, *How Do I Pick a Third-Party Standard?* (2021), https://benefitcorp.net/how-do-i-pick-third-party-standard, [https://perma.cc/VM7M-9R6S] (listing third-party standards and a link to more than 100 raters of corporate sustainability practices listed in the "Rate the Raters report published by the research and consulting firm SustainAbility") (last visited April 12, 2021).

120. *See* Osipovich & Otani, *supra* note 115.

121. *See* B Lab, *Why Pass Benefit Corporation Legislation* (2020), https://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation [https://perma.cc/FY4B-NKVE] (last visited April 12, 2021).

122. *See id.*

123. B Lab, *Benefit Corporation Reporting Requirements* (2021) (except in Delaware, where most large companies are incorporated), https://benefitcorp.net/businesses/benefit-corporation-reporting-requirements [https://perma.cc/A8FK-NWXQ] (last visited April 12, 2021).

Benefit reporting best practice includes reporting to the public and using a third-party standard assessment tool.[124] This reporting allows benefit corporations to inform the public of the overall social and environmental performance of the corporation, informs directors so they can improve performance in these areas if necessary to meet the expectations of the shareholders, and allows transparency for judges if necessary to determine if the B-Corp has met its statutory requirement for its named public benefit purpose.[125] In B-Corps, shareholders have the same protections found in traditional corporate law, and have the additional ability to hold the company accountable to its stated mission.[126]

A mandated constituency charter could also heighten the corporation's obligations to the public and heighten transparency requirements.[127] The constituency charter allows company directors to consider the interests of all corporate stakeholders—including employees, customers, shareholders, and the communities in which the company operates.[128] The charter changes the purpose of the corporation from serving shareholders to serving all corporate stakeholders.[129] A constituency charter would mandate an ESG outlook on all companies regardless of whether the company chooses to have a specific public benefit.[130]

When these two proposals are applied to the Exogen hypothetical, in-house counsel faces new obligations. In scenario one, assume only ESG disclosure was mandated; the corporation could still legally move the operations of the plant to the third-world country and avoid OSHA. But now, it would have to disclose that it was doing so in an annual report available to its shareholders and to the public. The report would include the environmental and labor standards in Ruranesia and the job losses caused by the move. When advising about the social and political reaction to the decision, counsel would discuss not only the morality, but also would consider whether that the public and political backlash to this type of decision due to the mandatory disclosure might not be worth any cost savings.

In scenario two, assuming a B-Corp or a constituency statute was mandated, the stakes are now higher. Counsel is already obligated to discuss the legal implications of moving the plant with the dangerous chemical to the developing country;[131] now, there are new legal implications of taking this action. It is no longer just a question of advising on ethical and moral implications. If the purpose of the corporation is a certain public benefit, or if the board is required to consider the interests of workers and communities in which the corporation operates, now making the decision to go forward with the outsourcing could be in violation of

124. *See id.*
125. *Id.*
126. *See id.*
127. *See* Sanders, *supra* note 37.
128. See id.
129. *See id.*
130. See id.
131. *Cf.* MODEL RULES R. 2.1 (requiring candid legal advice).

corporate law. The constituency statute legally obligates counsel to take into consideration all of the stakeholders and to advise accordingly.

Increased ESG disclosure is what sophisticated shareholders want and what customers need.[132] In a recent *Washington Post* article about globalization under the incoming Biden administration, the author comments on consumer and investor pressure: "As consumer-facing companies feel pressure from customers and investors to disclose and minimize the environmental impacts of their supply chains, manufacturing in countries with lax standards may lose appeal."[133] Increased ESG disclosure will allow customers and investors increased access to such information, and ultimately affect corporate decision-making.

Consumers should be able to buy products with transparency about the environmental and labor impacts of their purchases. Take the health food industry as an example. Grocery shoppers enjoy options for meat and dairy products based on different categories, such as non-GMO, organic, or sustainably raised and grass-fed only beef.[134] The same should be true for buying a t-shirt or a smart phone; there are human lives at stake. While some may perceive buying organic or grass-fed meat as a luxury they cannot justify, the more widely available and popular this type of discerning shopping becomes, the more change it will cause. And just as sustainably produced food has become more widely available, so will sustainably-made products. Once customers start asking for sustainability when it comes to everyday products such as clothing, the market will respond.

Shareholder or investor activism may be able to make a difference more quickly and effectively than customer activism. With the ability to vote on corporate governance and environment policies, shareholders have the power to change corporate behavior.[135] Shareholder power is now concentrated in institutions like mutual fund and asset management firms.[136] Combined, the three largest institutional shareholders – BlackRock, State Street, and Vanguard – "constitute the single largest shareholder of at least forty percent of all public companies in the United States" and the largest shareholder in 438 of the S&P 500.[137]

These institutional shareholders have immense power to change corporate behavior, and ESG is now top of mind for many. In his annual letter to CEOs in 2020, Larry Fink, the leader of BlackRock, described investor awareness of climate change as rapidly evolving, and claimed that "we are on the edge of a

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132. *See generally* Fink, *supra* note 104; Coates, *supra* note 109.

133. Marc Levinson, *We've Entered into a New Era of Globalization – No Matter What Joe Biden Does*, WASH. POST (Dec. 4, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2021/01/07/weve-entered-into-new-era-globalization-no-matter-what-joe-biden-does/ [https://perma.cc/Z5RU-GZSV].

134. *See generally* Lizz Schumer, *The Terms on a Food Label to Ignore, and the Ones to Watch For*, N.Y. TIMES (July 3, 2018), https://www.nytimes.com/2018/07/03/smarter-living/the-terms-on-a-food-label-to-ignore-and-the-ones-to-watch-for.html [perma.cc/L4M8-9SAT].

135. *See generally* BUSINESS ORGANIZATIONS, *supra* note 20, at 400–01.

136. *See* Eric A. Posner, Fiona M. Scott Morton & Eric Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors* (Mar. 22, 2017) ANTITRUST L. J. (forthcoming) (manuscript at 5).

137. *Id.* at 5.

fundamental reshaping of finance."[138] In the letter, BlackRock announced initiatives to place sustainability at the center of its investment approach, and Fink asked for improved sustainability disclosure for shareholders:

> We believe that all investors, along with regulators, insurers, and the public, need a clearer picture of how companies are managing sustainability-related questions. This data should extend beyond climate to questions around how each company serves its full set of stakeholders, such as the diversity of its workforce, the sustainability of its supply chain, or how well it protects its customers' data. Each company's prospects for growth are inextricable from its ability to operate sustainably and serve its full set of stakeholders.[139]

BlackRock intends to invest based on sustainability and climate change plans of companies. "Sustainability in the investment context means understanding and incorporating environmental, social and governance (ESG) factors into investment analysis and decision-making."[140] This strategy is not unique to BlackRock—other investors are increasingly aware that sustainability improves performances.[141] Public market investors are focused on ESG factors—stronger governance with effective management of environment and human capital is a sign to investors that companies will perform long-term and manage risk effectively.[142] A survey of 200 academic studies found that "88% of reviewed sources find that companies with robust sustainability practices demonstrate better operational performance, which ultimately translates into cash flows."[143] With investor pressure, corporations are more likely to accelerate implementation of broad ESG matters disclosure.

CONCLUSION

The world is changing, and the role of in-house counsel needs to expand to meet that change. The shift in corporate governance from shareholder primacy to environmental, social, and governance opens up the door for a shift in the norms of the corporate lawyer's role and for mandated ESG disclosure. Rule 2.1 should be changed to mandate moral and ethical counseling. Sticking to strictly legal questions and finding a way for corporate managers' actions to be legal, even if arguably unethical, goes against a lawyer's obligation to be professionally responsible and ethical. Another way to encourage corporate sustainability is through mandated ESG disclosure or mandated public benefit corporations. Through more disclosure, customers and shareholders will be able to invest in businesses that align with their values and sustainable corporations will become the norm.

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138. Fink, *supra* note 104.

139. *Id.*

140. BlackRock, *FAQs Making Sustainability Our Standard* (2020), https://www.blackrock.com/corporate/literature/investor-education/sustainability-faqs-global.pdf [https://perma.cc/2T5F-CT7V] (last visited April 12, 2021).

141. *See generally* Coates, *supra* note 109.

142. *See generally* Gordon L. Clark, Andreas Finer & Michael Viehs, *From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance*, UNIVERSITY OF OXFORD (Mar. 2015).

143. *Id.*