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Office of Regulations and Interpretations,
Employee Benefits Security Administration, Room N-5655,
U.S. Department of Labor,
200 Constitution Avenue NW,
Washington, DC 20210

Attention: Financial Factors in Selecting Plan Investments
Proposed Regulation

Re. RIN 1210-AB95

We respectfully submit the following comments to the Department of Labor ("**DOL**") on the above captioned Regulatory Identifier Number (the "**ESG RIN**").

1. Introduction

Zachor Legal Institute ("**Zachor**"), "), a non-profit legal foundation focusing on constitutional and rights advocacy with the aim of eliminating discrimination, has serious concerns with the misuse and abuse of corporate social responsibility programs ("**CSR**") by various hate groups who seek to harm investors and companies for political purposes. While CSR programs (also known as Environmental, Social and Governance programs ("**ESG**")) often have laudable goals, they are also subject to abuse by special interests who cloak their discriminatory agendas under the imprimatur of CSR ("**CSR Discrimination**").

Furthermore, many CSR activists promote the "stakeholder" theory of corporate governance, requiring a corporation's board of directors to make business decisions on the basis of how a proposed corporate action may affect third party stakeholders, rather than the corporation's shareholders. While this platform can comport with state corporation law requirements under certain circumstances, such as when the corporation is a "Benefit Corporation", as applied to a traditional for-profit Delaware corporation (the most frequent corporate form of publicly traded companies), it can conflict with both corporate law principles mandating shareholder wealth maximization as well as the expectation of investors.

Because CSR programs that require or encourage a corporation to discriminate and put the interests of stakeholders at parity with, or above the interests of, shareholders are at the heart of materiality when it comes to the purposes of investor disclosure, the undersigned asks the DOL to adopt the regulation proposed in the ESG RIN (the "**Proposed ESG Regulation**"). Our comments cover issues related to corporate governance and applicable laws, rather than the particulars of Title I of the Employee Retirement Income Security Act of 1974 ("**ERISA**"), though these comments are integral to any ERISA rule that is based on corporate governance issues and just as important to ERISA plan participants, who should be accorded no less than the same protections provided to other investors. The corporate governance rules discussed herein that apply to a corporation's board of directors should be applied to ERISA plan fiduciaries as well.

2. Overview of the Origins and Focus of CSR Programs[1]

The traditional view of for-profit corporations has been that they exist primarily to serve their shareholders and, more specifically, to maximize the value of the shareholders' investment in the corporation. This norm, often referred to as the shareholder primacy theory or norm, has been the dominant theory since the earliest days of corporation statutes. While state corporation statues have not expressly enumerated maximizing shareholder value as the primary objective of corporations, the actions of corporate directors and supporting caselaw in relevant states have repeatedly affirmed that corporations exist for the primary objective of benefitting their shareholders.

In recent years, however, other constituencies, including employees, local governments, environmental advocates and social welfare organizations have succeeded in making claims that they, as non-shareholder stakeholders in corporations, should also be considered when the governing bodies of corporations make decisions on how the corporation operates and whose concerns should be added to deliberations. In contrast to the shareholder primacy theory, this developing doctrine is known as the corporate stakeholder theory.

To bridge the gap between the traditional shareholder primacy norm and the burgeoning calls for corporations to elevate stakeholder interests, corporations have implemented CSR programs. In some cases, corporations that faced boycotts or other public campaigns in response to incidents such as environmental disasters or labor abuses adopted narrow CSR programs to address specific complaints, while in other cases CSR advocates, backed by activist investors operating under the mantle of "socially responsible investing" platforms, forced law-abiding corporations to adopt CSR programs under the guise of good corporate citizenship. Socially responsible investing programs can be seen as the means through which activist investors compel corporations to adopt and implement CSR. There is no single agency or organization responsible for the socially responsible investment agenda, but a United Nations affiliated organization known as the "PRI" (Principles for Responsible Investment) is a primary driver of the socially responsible investing movement and has over 1,700 signatories with over $70 trillion of assets under management as of 2017.

[1] The material in this comment is primarily derived from a recently published article from the co-founder of Zachor Legal Institute, Marc Greendorfer. The complete article is available at the website of the American University's Business Law Review with the citation Marc A. Greendorfer, *Discrimination as a Business Policy: The Misuse and Abuse of Corporate Social Responsibility Programs*, 8 AM. U. BUS. L. REV. 307 (2020) (hereinafter, "Discrimination as a Business Policy"), available at http://www.aublr.org/wp-content/uploads/2020/05/full-8.3.pdf. Citations in support of the statements made in the following sections can be found in the aforementioned article.

In many ways, the rise of CSR programs can be seen as a logical interim development to help boards of directors balance the need to respond to aggrieved constituencies, on the one hand, with the relative paucity of tools meant to deal with such issues available under corporation statutes, on the other hand. Those who promote CSR programs, however, have myriad agendas, some as benign as ensuring that companies are responsible for pollution emitted into local communities and others acting as a facade for political campaigns that punish targeted groups or entities. In the worst of cases, activists have used CSR programs as cover to promulgate discriminatory campaigns of racial and national origin discrimination.

Beginning approximately ten year ago, as an apparent response to the rise of CSR programs, a number of American states formally addressed the need for a new corporate form that tempered shareholder primacy and elevated non-shareholder interests by creating a new statutory corporate form that allows shareholders to adopt non-financial objectives for the corporation (these entities are known as "**Benefit Corporations**"). A majority of American states now have some form of Benefit Corporation statute.

Under the Delaware General Corporation Law ("**DGCL**"), the state corporation law most frequently governing publicly traded companies, a business can be formed as either a traditional for-profit corporation where shareholder primacy is the guiding principle ("**Traditional Corporation**") or as a Benefit Corporation (referred to in the DGCL as a "**Public Benefit Corporation**"). If the corporation is a Public Benefit Corporation, it must include two components to its certificate of incorporation that are not present in the certificate of incorporation of a Traditional Corporation: A statement that it is a Public Benefit Corporation and the specific social benefits that the corporation is to provide.

With a Traditional Corporation, unless the certificate of incorporation has specified a corporate purpose, the corporation can conduct any lawful business allowed by the state. A Public Benefit Corporation, on the other hand, is limited under the laws of the jurisdiction of its incorporation to engaging in acts that are in furtherance of the social benefits it was formed to provide. As a result, when compared to a Public Benefit Corporation, a Traditional Corporation might be viewed as having an existential question. In other words, if a Traditional Corporation can do anything lawful, what should guide its board of directors in operating the business?

The answer to this question can be found in what is known as primacy theory.

A century's worth of caselaw has demonstrated that maximizing the value of the shareholders' investment in the company is at the core of each Traditional Corporation's being. In *Dodge v. Ford Motor Co.*, decided in 1919, the court explained

> [a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Nine decades later, in *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Chancery Court reiterated that this principle continues to govern the conduct of the Traditional Corporation's board of directors:

> The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment…. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.

The enduring impact and relevancy of *Dodge* in corporate law was noted by Professor Johnathan Macey, who wrote:

> [t]he case is not a doctrinal oddity. *Dodge v. Ford* still has legal effect, and is an accurate statement of the form, if not the substance, of the current law that describes the fundamental purpose of the corporation. By way of illustration, the American Law Institute's ("ALI") Principles of Corporate Governance ("Principles"), considered a significant, if not controlling, source of doctrinal authority, are consistent with *Dodge v. Ford's* core lesson that corporate officers and directors have a duty to manage the corporation for the purpose of maximizing profits for the benefit of shareholders. Specifically, section 2.01 of the Principles makes clear that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." Significantly, the Principles specify that the goal of the corporation is shareholder wealth maximization. … Moreover, the ALI expressly emphasizes shareholder wealth rather than corporate wealth, and specifically excludes labor interests as something that should be maximized….

The principle that a Traditional Corporation exists primarily to maximize the value of its shareholders' investments is the essence of the shareholder primacy norm. As with so many other corporate law theories, there are a number of variations of the shareholder primacy norm. The two theories that have garnered the most traction are traditional and radical shareholder primacy theories. Professor David Millon, a corporate law scholar who is well known for advancing the premise that social welfare should become a corporate duty, has examined both radical and traditional shareholder primacy and, as part of his analysis, posits that under radical shareholder primacy the board of directors can be considered agents solely of the shareholders with a duty to their interests (the maximization of the value of their investments in the corporation) alone. Millon further explains that under radical shareholder primacy it is the duty of the board of directors to maximize short term shareholder returns at the risk of long term returns, if that is what the shareholders choose. With traditional shareholder primacy, on the other hand, the board of directors may act to achieve objectives other than short term shareholder value maximization, such as expanding market share or developing new products that are expected to hurt short term profits but result in longer term enterprise value increases, so long as the primary longer term objective remains providing benefits to shareholders, rather than third parties.

Professor Millon acknowledges that radical shareholder primacy "…enjoys broad currency among corporate executives and major shareholders..." and is "…widely—though not universally—embraced by legal academics" but concludes that there is no legal basis for radical shareholder primacy, while there is for traditional shareholder primacy (and its focus on ensuring that the board of directors focuses on providing benefits to shareholders, rather than to third parties, even if those benefits are not short-term profit maximization).

In claiming that there is no legal basis for radical shareholder primacy, Professor Millon discusses both *Dodge v. Ford* and *eBay v. Newmark*. Interestingly, when looking at the arc of caselaw traced by these two cases, Professor Millon demonstrates that courts have consistently ruled that in most situations (hostile takeovers being an exception), the board's duty is to maximize shareholder value, but he then argues that radical shareholder primacy theory is nowhere to be found in the text of statutory corporate law. While Millon's statement is literally accurate, since corporate statutory law doesn't explicitly state that short term profit maximization is the objective that the board must work towards, statutory duties of the board have been consistently interpreted and applied by courts in a manner that is not only in line with traditional shareholder primacy, but often also in line with radical shareholder primacy.

According to Professor Millon, the clear language of *eBay* regarding the board's duty to elevate shareholder interests over external matters should be seen as an anomaly because the opinion doesn't cite to precedent and it is a case where a board blatantly eschewed profit to pursue a social mission, rather than a more difficult case of a board choosing one form of shareholder benefit over another, such as long term versus short term wealth maximization.

This, again, is an accurate analysis of the case, and while Millon may not have intended to do so, and because he shows no case where traditional shareholder primacy and its requirement that the board only work to promote shareholder interests is denigrated in Delaware in favor of non-shareholder interest advocacy, he has bolstered the case for shareholder primacy over corporate stakeholder theory. Other scholars have explicitly noted that "…in no case has the all-important Delaware Supreme Court held that directors will be permitted to prefer the interests of other constituencies over shareholders or that they ought, as a normative matter, to take such interests into account."

To put an exclamation point on the certainty of the shareholder primacy norm, the legendary corporate law scholar and current Chief Justice of the Delaware Supreme Court, Leo E. Strine, explicitly stated that "…American corporate law makes corporate managers accountable to only one constituency—stockholders—and that accountability has been tightened because of market developments concentrating voting power in institutional investors and information technology innovations easing communication and joint action among stockholders." Chief Justice Strine predicted that progressive scholars and activists would try to divine exceptions to the shareholder primacy norm in favor of a form of stakeholder theory from Strine's own words, and in a 2017 law review article he rebutted these attempts by referring to the projection of stakeholder theory into Delaware law as "wish-fulfillment" and equating these positions to a "dream world" exercise in arguing what the law ought to be rather than what it actually is.

This is not to say that the board of directors of a Traditional Corporation are utterly handcuffed to the will of shareholders. As long as the board acts in a manner that fulfills its duties to shareholders, it can have wide latitude in making corporate decisions as they see fit. To wit, a board of directors of a Traditional Corporation is under an obligation to fulfill two general duties to the corporation and its shareholders: the duty of loyalty and the duty of care.

Under the duty of loyalty, the board of directors must put the interests of the corporation and its shareholders above any interests of the board, as a whole, or individual directors. Under the duty of care, the board is required to ensure that it makes decisions through a deliberative process where appropriate information is obtained and considered and, as needed, experts are consulted, though there is no expectation that the board of directors will be informed of every fact or make a perfect decision.

Indeed, an entire doctrine known as the "Business Judgment Rule" exists to protect the board of directors of a Traditional Corporation from judicial second guessing. The Delaware Court of Chancery artfully explained the balancing act between duties of the board and inevitable negative outcomes represented by the Business Judgement Rule in a 2005 opinion:

> The decision-makers entrusted by shareholders must act out of loyalty to those shareholders. They must in good faith act to make informed decisions on behalf of the shareholders, untainted by self-interest. Where they fail to do so, this Court stands ready to remedy breaches of fiduciary duty.
>
> Even where decision-makers act as faithful servants, however, their ability and the wisdom of their judgments will vary. The redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court. Should the Court apportion liability based on the ultimate outcome of decisions taken in good faith by faithful directors or officers, those decision-makers would necessarily take decisions that minimize risk, not maximize value. The entire advantage of the risk-taking, innovative, wealth-creating engine that is the Delaware corporation would cease to exist, with disastrous results for shareholders and society alike. That is why, under our corporate law, corporate decision-makers are held strictly to their fiduciary duties, but within the boundaries of those duties are free to act as their judgment and abilities dictate, free of post hoc penalties from a reviewing court using perfect hindsight. Corporate decisions are made, risks are taken, the results become apparent, capital flows accordingly, and shareholder value is increased.

In other words, courts will not substitute their judgement for that which was made by the board of directors so long as the board adhered to their fiduciary duties in making the ultimately unsatisfactory corporate decision. Here, again, we see the court explicitly endorsing the shareholder primacy norm, and charging shareholders, rather than the courts, with the obligation to reward or punish directors for the consequences of their actions. While maximizing shareholder value may not be a statutory duty of the board, it is clearly the governing principle of corporate behavior. Some scholars, acknowledging that the shareholder primacy norm is the guiding principle in American corporate law, note that shareholders can be left without sufficient power to protect their financial interests in a Traditional Corporation due to the breadth of the business judgment rule and the undemocratic nature of the board nomination process (where the board itself selects nominees), both of which conspire to entrench incumbent directors. While this concern may have validity, it is a critique of established law and a call for future reforms that give sharper teeth to shareholder rights, rather than an argument that the shareholder primacy norm and its directive that a corporation exists to maximize shareholder value are not currently the guiding principle in corporate law. Until such reforms are enacted, the shareholder primacy norm prevails.

Here, the interplay of certain state corporation statutes and the shareholder primacy norm may appear to be in conflict. Among the significant deviations from the DGCL in other states' corporation codes is the "constituency statute" concept, which allows a board of directors to consider how decisions will impact third parties, such as employees, local and national economies and other societal considerations. It is important to note that while constituency statutes give directors of a Traditional Corporation discretion to consider non-shareholder interests, they do not vest third parties with legally enforceable rights and do not obligate directors to consider third party interests. Connecticut, prior to amendments to its corporation code in 2010, was one state that required directors of publicly traded corporations to consider third party interests in making decisions relating to business combinations, but that requirement was considered antithetical to traditional theories of the corporation and was eliminated.

Furthermore, while constituency statutes exist, they have rarely been used to support board actions that favor stakeholder theory over shareholder primacy and it is likely the case that constituency statutes would not survive challenges if a board were to ever use one as a basis for denigrating the financial interests of shareholders in favor of third parties.

Finally, the fact that states have had to enact constituency statutes, and corporations have had to adopt provisions in governing documents (all of which require shareholder approval), in order to allow for deviations from the shareholder primacy norm reinforces the notion that absent explicit statutory and shareholder action to permit the consideration of third-party stakeholders, American corporate law, and Delaware's in particular, do not allow the board of directors to favor non-shareholder constituencies over shareholders.

Thus, while CSR programs can and do coexist with the legal principles mandating shareholder primacy in Traditional Corporations, when such programs are designed to elevate stakeholder theory over shareholder primacy, or when they have an aim that is discriminatory and contrary to the principle of shareholder wealth maximization, they are not only violative of corporate law norms they can also result in situations where publicly traded Traditional Corporations unintentionally mislead investors who, rightfully, believe that they are making a financial investment rather than a social justice statement.

3. Analysis of the Implementation of CSR Programs Under Shareholder Theories

On its face, CSR, as the embodiment of stakeholder theory, would seem to be incompatible with the shareholder primacy norm, especially under the radical expression of the norm. This result is mandated only if one rigidly views CSR as requiring the board of directors of a Traditional Corporation to subordinate shareholder interests to the social responsibility agenda. In fact, though, it is possible, at least theoretically, for CSR to exist as a secondary consideration of the board, one that is considered only to the extent it does not interfere with the board's obligation to maximize shareholder value.

In jurisdictions where the shareholder primacy norm is not the controlling theory, it is certainly possible for CSR to thrive as a corporate policy that takes precedence over maximizing shareholder wealth, even at corporations with publicly traded securities. Scholars at the Institut Européen d'Administration des Affaires recently published a paper examining the possibility of how CSR could be implemented in a way that doesn't violate shareholder primacy norms. One theory covered in that paper resulted in "…the integration of social, ethical, and ecological aspects into business operations and decision-making, **provided it contributes to the financial bottom line**". The authors of that paper looked at CSR in the context of a system where shareholder wealth maximization constrains the board of directors of a Traditional Corporation and noted that this expression of the shareholder primacy norm necessarily relegates CSR initiatives to a strategic role, where CSR must satisfy a "business case" that results in shareholder wealth appreciation, rather than the provision of benefits to non-shareholder constituencies.

Other scholars have proposed theories under which a Traditional Corporation's board of directors can fulfill their duties to the corporation and shareholders while still advancing a CSR agenda that conflicts with the shareholder primacy norm. One of the leading scholars promoting this view was Professor Lynn Stout, who argued that not only is the traditional understanding of the shareholder primacy norm requiring the board to maximize shareholder value a fiction, it is harmful to corporations and shareholders. Professor Stout deemed the wealth maximization language in *Dodge v. Ford* and its progeny "mere dicta" and tried to explain away decades of judicial opinions and scholarly works that built on this language with distinctions that, frankly, are nothing more than a scholarly dance upon the head of a pin. For example, Professor Stout claimed that the *Revlon* doctrine, is an exception, rather than the rule, when it comes to shareholder wealth maximization and goes on to counter the established understanding of board conduct by asserting that a board of directors can essentially waste corporate assets under the protection of the business judgment rule in all cases other than one where a public company is being taken private:

> As long as [the board of directors] do not take those assets for themselves, they can give them to charity; spend them on raises and health care for employees; refuse to pay dividends so as to build up a cash cushion that benefits creditors; and pursue low-profit projects that benefit the community, society, or the environment. They can do all these things even if the result is to decrease—not increase—shareholder value.

Professor Stout was engaging in what Chief Justice Strine described as dream world wish-fulfilment (with the dream being progressive stakeholder theory supplanting the shareholder primacy norm).

Professor Thomas Clarke similarly has argued that concerns such as climate change have broadened the scope of the duties of the board of directors of a Traditional Corporation to the point that a "reevaluation of fiduciary duty is presently taking place and will prove to be profound." To support this position, Professor Clarke argues that climate change is not just an environmental concern for certain group, it can have a direct impact on the financial condition of a company if that company has not prepared to mitigate the risks inherent in climate change theory. To that end, Professor Clarke argues, a board of directors that manages the corporation to minimize the corporation's contributions to climate change will help the corporation to minimize the costs it incurs to remediate those contributions and avoid regulatory penalties, all of which work to increase shareholder wealth.

Ultimately, however, the position that board actions that ignore shareholder wealth maximization in favor of the promotion of third-party stakeholder interests is a proper corporate goal is a fringe, aspirational position, rather than a reflection of what the law, and weight of scholarship, say.

The esteemed economist Milton Friedman provided the most succinct theory of the corporation, and strongly implied that CSR has no place in a Traditional Corporation other than as a means to the end of wealth maximization: "In [a free economy] there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game."

Nonetheless, there is a perverse accuracy to the position espoused by Professor Stout. While there is no question that the shareholder primacy norm precludes the implementation of CSR other than as a strategy to increase shareholder wealth, as a practical matter courts tend to take a passive approach to board abdication of their duties, often relying on shareholders to provide redress through director elections and applying the business judgment rule so broadly as to rubber-stamp virtually all board action. The fact that courts have been hesitant to hold directors accountable for their wrongful elevation of CSR principles above shareholder interests does not vest that practice with any legal foundation; furthermore, in many applications the business judgment rule serves as an uncodified judicial loophole allowing a board to divert corporate assets to third parties so long as the board action can be justified as being reasonable at some *de minimis* level.

What this means for CSR programs at Traditional Corporations is that where a CSR initiative can be shown to either have no material negative effect or is reasonably expected to have an overall benefit to the value of shareholder investments in the corporation, that company's directors are on firm legal footing in adopting the initiative. The decision, however, cannot be based on mere speculation or attenuated theories that depend on magical thinking or a horizon of such indeterminate duration as to make the results of the action impossible to determine.

By way of example, the board of directors of an automobile manufacturer might review a plan to introduce a new type of vehicle that is claimed to have significant environmental benefits. There will be significant start-up costs for the new vehicle line, but based on deliberative market research and financial analysis, the board is informed that within a set and realistic timeframe the new vehicle division is expected to have sales that provide sufficient revenue to pay the start-up expenses and achieve a level of profitability that is at least as substantial as could have been achieved through other investments of corporate assets. In such a case, even though a component of the board's decision was for the benefit of non-shareholder constituencies, the board will not have violated their duties to the corporation and its shareholders.

Contrast the foregoing example with a decision by the board of directors of that same automobile manufacturer to refuse to do business with a country that is one of the company's prime markets but is under attack by environmental activists for contributing to environmental harms. The board has been pressured by activists to divest from and refuse to conduct business in that country with the theory that if put under enough economic pressure, the country will change its way. If the company does as the activists demand, it will lose 10% of global automobile sales and it will also incur higher costs to relocate manufacturing and research facilities from that country to one that is not being targeted by activists. The only business justification given to the board of directors for adopting the CSR initiative to blacklist the country is that such action might bolster the company's reputation among consumers who are environmental activists and, at some point in the future, if the campaign is successful, the country will reduce the harm it causes to the environment, which might provide benefits to a wide range of non-shareholder constituencies. These considerations are entirely speculative, as opposed to the sum-certain costs to the company of lower sales and relocation expenses. In this case, if the board nonetheless adopts the CSR initiative, it will have violated its duties to the corporation and its shareholders.

4. How CSR Programs Can Violate Domestic Laws

As adoption of CSR programs expanded, states realized that there was a need for a corporate structure to fill the gap between non-profit corporations and Traditional Corporations. The "Benefit Corporation" first came into existence in the United States in late 2010 when the State of Maryland used a model Benefit Corporation code produced in connection with the non-profit B Lab to create a new, hybrid entity that at once could pursue social benefits, much like a non-profit corporation, while still working to provide profits to its shareholders.

While a Benefit Corporation is also a for-profit corporation, it differs from a Traditional Corporation in that the shareholder primacy norm has been statutorily written out of its governance. Instead of focusing on maximizing shareholder value, the board of directors of a Benefit Corporation is required to consider the effects of their decisions on a range of constituencies that can include employees, suppliers, customers, communities, society as a whole and the environment.

The drafters of the Model Benefit Corporation Code saw the duty to maximize profits as a relic of Traditional Corporation corporate governance and acted to unshackle Benefit

Corporations from solely pecuniary goals and explicitly rejected shareholder primacy caselaw such as *Dodge v. Ford* and *eBay v. Craigslist*. The comment to Section 301(a)(1) of the Model Benefit Corporation Code states

> [t]his section is at the heart of what it means to be a benefit corporation. By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in Dodge v. Ford, 170 N.W. 668 (Mich. 1919), and eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010), that directors must maximize the financial value of a corporation.

While a Traditional Corporation usually has few limitations on corporate purpose, a Benefit Corporation is, by its nature, required to fulfill prescribed corporate goals. A Benefit Corporation is limited to creating a general public benefit, typically defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation taking into account the impacts of the benefit corporation as reported against a third-party standard." In addition to the general public benefit purpose, a Benefit Corporation can list additional specific purposes.

To further distance the Benefit Corporation from the shareholder primacy norm, "[t]he Model [Benefit Corporation Code] explicitly states that '[t]he creation of a general public benefit and specific public benefit . . . is in the best interests of the benefit corporation.' **This serves to protect against the presumption that the financial interests of the corporation take precedence over the public benefit purposes**, which maximizes the benefit corporation's flexibility in corporate decision-making."

Not only does a Benefit Corporation have to specify in its certificate of incorporation the benefits that it is obligated to perform, it must provide an annual report on its progress in performing those benefits that includes an analysis of the Benefit Corporation's performance of its social benefit goals compared to a third-party standard for performance.

In the event that a Benefit Corporation fails to properly pursue its stated benefit, the Model Benefit Corporation Code provides for a "benefit enforcement proceeding" as a remedy. A benefit enforcement proceeding can be initiated by either the Benefit Corporation itself or by shareholders derivatively. As a further protection, a Benefit Corporation can't change its status as a Benefit Corporation without the affirmative vote of 2/3rd of the Benefit Corporation's shareholders.

The penalty for a failure to fulfill the purpose of a Benefit Corporation includes, but is not limited to, a benefit enforcement proceeding, which could conceivably include intervention by the state's attorney general to compel performance of the Benefit Corporation's stated beneficial purpose.

Added up, Benefit Corporation governance procedures provide a guarantee that the entity will be guided by a commitment to public benefit over profit that is at least as robust as the rules that govern non-profits.

Because Delaware is a state with a Benefit Corporation statute, a Traditional Corporation with a shareholder base that supports the stakeholder theory and has a desire to adopt a CSR program that is not limited by the strictures of shareholder wealth maximization has no choice but to convert to Benefit Corporation status. If the board of directors and shareholders of that Traditional Corporation choose to remain a Traditional Corporation, however, they cannot pursue a CSR program that conflicts with the shareholder primacy norm. This conclusion is supported by scholars who advocate for CSR, where they note that under the American corporate law system, as embodied by Delaware law with maximization of shareholder value as the model, CSR must have a strategic financial justification and must be supported by a business, rather than a moral, case.

Assuming that a company's CSR program is not otherwise unlawful, requiring Traditional Corporations that reject the shareholder primacy norm in favor of a stakeholder-based CSR program to convert to a Benefit Corporation is also good corporate governance. Converting to a Benefit Corporation requires a supermajority vote of shareholders, a higher statutory threshold than is required for a merger or other significant corporate transaction. Only through a referendum of this nature, where shareholders are directly asked to allow the board of directors to abandon the shareholder primacy norm and its focus on maximizing shareholder value in favor of third party interests such that the company will no longer have profit as the primary objective, can a stakeholder-based CSR program be countenanced under traditional theories of corporate law.

In many cases, the objectives and implementation of CSR programs result in social benefits without violations of law (either laws relating to corporate governance or other laws that may be applicable). A CSR program that furthers the environmental goals set out in the UNGC by committing a Traditional Corporation to using renewable energy if such use doesn't materially increase expenses or otherwise materially and adversely affect the financial condition of the company is an example of this. Reducing the use of fossil fuels is generally in line with local, federal and international guidelines and other than an obscure law that might be contorted to apply, there are no notable laws that prohibit the replacement of fossil fuels with renewable energy by Traditional Corporations.

There are, however, cases where CSR objectives can conflict with laws that govern the activities of a Traditional Corporation. The obvious example of this under Traditional Corporation corporate governance law is that of a CSR program that materially harms shareholder value in order to provide benefits non-shareholder stakeholders, where the board would likely be in breach of its state corporation law duties. Then there are harder cases, such as when a Traditional Corporation makes business decisions to mollify political activists and those business decisions have an unknown or immaterial impact on the value of the corporation. In that scenario there likely is no redress for shareholders under state corporation laws.

Lost in the rush to adopt CSR programs, though, are the many other ways that CSR programs, especially those rooted in international protocols, can violate United States federal and local laws, particularly those aimed at combatting discrimination.

Consider a CSR program that requires companies to refuse to do business in any country or state that allows same sex cohabitation. The originators of the CSR program in this hypothetical are countries with strong religious institutions and they seek to impose economic burdens that are intended to force a change in the policies of those countries that provide equal rights to homosexuals. Further assume that a CSR advisor with a religious affiliation adopts the aforementioned CSR program and advises its clients to avoid doing business in the identified countries and companies that do business in those countries. If an American real estate leasing company that has pledged to support CSR initiatives were to follow this CSR program and refused to lease dwelling units to same sex couples, it would be in violation of federal and state anti-discrimination laws even though it can honestly assert it was simply following CSR guidelines.

International guidelines, such as United Nations principles relied upon by European CSR firms, do not insulate American companies from liability for acts that violate domestic law unless those guidelines are contained in a treaty that has been ratified by the Senate in accord with Article II of the Constitution or approved by Congress and the President in a customary manner. Further, unless the agreement has been ratified by Congress, a state cannot enter into binding international agreements. While some have argued that individual states have some level of autonomy with regard to complying with international law, even under these theories state action that either frustrates federal foreign policy or conflicts with federal law would necessarily fail due to the Constitution's foreign affairs and supremacy clauses. Thus, in the event of a conflict between foreign or international standards and laws, on the one hand, and federal or state level laws, on the other hand, the federal and state level laws will prevail absent a specific international agreement on the subject that has been properly enacted and executed under the Constitution.

There are hundreds of anti-discrimination laws in the United States at the federal and state levels. At the federal level, the earliest significant anti-discrimination law was the Fourteenth Amendment's Equal Protection Clause, which was supplemented by the Civil Rights Act of 1964 and its progeny, including the Age Discrimination in Employment Act of 1967, the Equal Employment Act of 1972, the Pregnancy Discrimination Act of 1978, the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, among others. These federal anti-discrimination laws prohibit differential treatment in a wide range of circumstances, including voting, the application of law and opportunities for and conditions of employment on the basis of, *inter alia*, age, race, color, religion, national origin and sex.

At the state level, all 50 states have enacted some form of anti-discrimination laws, though some states generally defer to federal anti-discrimination laws while others aggressively regulate in this field.

Of particular interest for the purposes of this comment are the anti-boycott provisions of the federal Export Administration Act and certain anti-discrimination laws enacted by a majority of states in the past several years (collectively, the "**Anti-Boycott Laws**"). These laws were enacted to combat the discriminatory boycott campaign against Israel first launched by the Arab League and recently assumed by the so-called "Boycott, Divest and Sanction" ("**BDS**") movement (collectively, the "**Foreign Boycott Campaign**"). The Anti-Boycott Laws impose penalties ranging from imprisonment and significant fines for violations of the federal Anti-Boycott Law to the loss of eligibility to enter into contracts with states and divestment of state investments in boycott participants for state Anti-Boycott Laws.

In addition to being promoted by groups affiliated with the BDS movement, elements of the Foreign Boycott Campaign have recently been adopted by CSR advisors and companies that employ CSR programs. As a result, the Foreign Boycott Campaign represents the intersection of several strains of discrimination with CSR.

Since 2010, the United States Department of State has utilized a working definition of anti-Semitism that was recently incorporated into the United States Department of Education's definition of discrimination for purposes of Title VI of the Civil Rights Act of 1964, as amended (the "**Federal Definition of anti-Semitism**"). The Federal Definition of anti-Semitism provides a number of examples of such discrimination, including "denying the Jewish people their right to self-determination, e.g., by claiming that the existence of the State of Israel is a racist endeavor", "applying double standards by requiring of [Israel] a behavior not expected or demanded of by any other democratic nation" and "holding Jews collectively responsible for actions of the State of Israel." Consequently, anti-Zionism, the core of the Foreign Boycott Campaign, is considered by the United States government to be a form of anti-Semitism as it has been deemed to be national origin and race-based discrimination.

The Foreign Boycott Campaign is predicated on the outrageous and discredited claim that Israel is nothing more than a colonial and racist initiative undertaken by Jews and explicitly makes the blatantly racist claim that the State of Israel is an illegitimate entity that should not exist. In making calls to boycott Israel, the Foreign Boycott Campaign holds academics, entertainers and businesses in Israel or that support Israel responsible for the actions of Israel and in selecting objects for the boycott campaign, applies a unique standard not applied to any other country.

The Foreign Boycott Campaign satisfies a number of prongs of the test set out in the Federal Definition of anti-Semitism and thus is national origin and race-based discrimination in violation of the federal government's longstanding policy and existing anti-discrimination laws.

A recurring theme in CSR ideology is the notion that in addition to the benefits to society, the environment and other non-shareholder constituencies, CSR programs are accretive to the profitability and financial condition for Traditional Corporations. Because the shareholder primacy norm is the guiding principle for Traditional Corporations in the United States, the financial case for CSR is the only one that can be used to defend the implementation of any CSR program in this jurisdiction.

Some have argued that a well-designed and implemented CSR program can mitigate regulatory risks and costs for a Traditional Corporation. McKinsey & Company has studied this issue and concluded that CSR programs not only can positively impact regulatory settlements, price premiums, sales, the risk of boycotts, and employee retention, they also "…can create value in many other ways that support growth, improve returns on capital, reduce risk, or improve management quality."

But what if a particular CSR initiative, one that purports to promote laudable goals such as human rights advocacy and that is allowed, or even encouraged, by foreign governments and non-governmental organizations, demonstrably creates material financial costs to a Traditional Corporation with little to no financial benefits?

The BDS movement is a timely case study on this point. The BDS movement is a recent mutation of the longstanding Arab world effort to weaken, and ultimately eliminate, the State of Israel through economic, academic and cultural attacks on Israel and those who are affiliated with Israel. The BDS movement identifies businesses, entertainers, academics and others that are based in or work with Israel as part of a campaign to compel governments, companies, educational institutions and religious and social groups to either boycott or otherwise terminate relationships with the Israeli and Israel-affiliated parties. Though the stated goal of the BDS movement is to promote what the Federal Definition of anti-Semitism considers national origin and race-based discrimination, and it has numerous ties to terrorist organizations that share the goal of destroying Israel, the BDS movement and its supporters allege that they are a human rights organization devoted to protesting alleged Israeli human rights violations. Using this claim as cover, BDS activists have promoted their cause as one that properly belongs within the CSR world and have had success in encouraging governments, NGOs, CSR advisors and CSR advisory clients to boycott and/or divest from Israeli businesses and institutions.

5. Discriminatory Campaigns Adopted by International Organizations Do Not Sanitize Unlawful Domestic Discrimination.

At the heart of many CSR campaigns, particularly those adopted by foreign companies, is some form of international imprimatur. In his role as the founder of a non-profit legal institute that combats discrimination, the author of this comment has filed governmental complaints against companies that participate in discriminatory boycotts. The typical scenario in which such complaints have been filed involves a state with a law that requires state pension funds to divest from companies that boycott Israel. State laws of this nature have a form of due process in which companies that have been identified for divestment are first informed of the determination and then given an opportunity to dispute the determination. Only after the appeal process has been completed with a finding that the company has engaged in the prohibited activity will the divestment occur.

A recent interaction between a state regulator and a publicly traded European bank ("**Subject Bank**") is illustrative of how discriminatory campaigns can infect CSR with the support of CSR adherents. In late 2017, a state public employee retirement association (the "**PERA**") notified the Subject Bank that it was in violation of the state's anti-boycott law (the "BDS Law") and would be subject to divestment. Through its counsel, the Subject Bank acknowledged that under its exclusion policy it boycotted two Israeli companies, but claimed that the boycott was not a boycott as that term is defined in the BDS Law. To argue this, the Subject Bank parsed the text of the BDS Law to opine that a prohibited boycott has to have a politically motivated intent to inflict harm on Israel. The Subject Bank stated that its boycott was not politically motivated to inflict harm on Israel but was, instead, part of its CSR program and pointed to the fact that it was simply complying with its own "Responsible Investing" policies, which in turn were developed on the basis of the UNGC and United Nations Guiding Principles on Business and Human Rights with the advice and counsel of investment advisors, and thus had no political motivation to harm Israel.

Responding to that argument, the author of this comment reminded PERA that compliance with international CSR guidelines does not absolve a company of liability for violating valid laws of the United States and individual states.

> The [BDS Law] does not contain exemptions for boycotts that have been undertaken as part of a company's voluntary compliance with the guidance of an international political organization. As an initial matter, the international organization that has issued the standards [the Subject Bank] complies with [the United Nations] is notoriously anti-Israel. The Subject Bank chooses to comply with the standards promulgated by this biased entity. There is certainly no binding authority under which [the Subject Bank] is forced to comply with the UN standards in the manner it has and no law otherwise obligates [the Subject Bank] to boycott the two Israeli companies.

Particularly problematic is when CSR guidelines are based on United Nations actions or determinations. The United Nations' biases, especially against Israel, are well documented. All 100 United States Senators recently called for the United Nations to eliminate its bias against Israel. The fact that any topic was able to get bipartisan, unanimous support of the Senate is strong evidence of the pervasiveness of UN bias. Further, Secretary of State Mike Pompeo and former U.S. Permanent Representative to the United Nations Nikki Haley, in announcing the withdrawal of the United States from the United Nations Human Rights Council, highlighted the organization's lengthy and deep bias against Israel and stated

> …the council's continued and well-documented bias against Israel is unconscionable. Since its creation, the council has adopted more resolutions condemning Israel than against the rest of the world combined…. Last year, the United States made it clear that we would not accept the continued existence of agenda item seven, which singles out Israel in a way that no other country is singled out. Earlier this year, as it has in previous years, the Human Rights Council passed five resolutions against Israel – more than the number passed against North Korea, Iran, and Syria combined. This disproportionate focus and unending hostility towards Israel is clear proof that the council is motivated by political bias, not by human rights.

What this documented bias against Israel by the United Nations and its affiliated agencies demonstrates is the risk of international guidelines being weaponized and deployed as CSR programs. Foes of Israel have pushed the Foreign Boycott Campaign not only at the local level, but by infiltrating United Nations agencies that are publish standards used as a benchmark to set CSR policies, these groups have been able to create a de facto international boycott campaign directed at Israel. Put another way, CSR is being used, in part, to sanitize discrimination.

A Traditional Corporation that incorporates BDS principles in its CSR policies is not only engaging in unlawful discrimination, it is also acting in violation of the shareholder primacy norm. While CSR advocates argue that CSR programs ultimately lead to increased shareholder value, these claims are vague and speculative. In fact, Professor Stephen Bainbridge examined the question of how the adoption of BDS affects investment performance and concluded that it is "nearly certain to result in poorer performance" of investment plans. To this point, Israel has been named "Startup Nation" in response to its prolific entrepreneurial nature, was described as one of the top 10 most technologically advanced countries in the world and in 2020 was identified as the third most startup friendly ecosystem globally, ranking behind only the United States and the United Kingdom.[2] Only the United States and China have more companies listed on NASDAQ. Adopting an investing program that prohibits investments in one of the world's leading investment markets is clearly at odds with the fiduciary duties of any Traditional Corporation's board of directors, yet this is exactly what happens when a board signs on to a CSR program with BDS elements. In addition, in a jurisdiction that has enacted legislation that prohibits the state from entering into contracts with, or investing in, companies that boycott Israel, the financial cost of adopting any form of BDS program can be significant.

While Zachor's primary interest in investment regulations is assuring that investing, especially for retirees, is protected from the type of discriminatory politization that BDS directs at Jews and Israel, the concerns raised in this comment apply to all CSR programs. Under accepted shareholder primacy theories, whether radical or traditional, directors (and by extension, ERISA fiduciaries) ultimately have a duty to enhance the value of investments. Adhering to a CSR policy that includes BDS elements turns the plan from one that is primarily focused on enhancing plan participant returns to one that is acting for a political or social constituency, something that is not permissible for a non-benefit corporation. CSR can only provide "social justice" returns (that is, appeasement of a radical base), something at odds with traditional notions of Shareholder Primacy.

6. Conclusion

A fiduciary adopting a CSR program, or otherwise abandoning governance under the shareholder primary norm in favor of a stakeholder style of governance, can have the same effect on plan participants as the companies in the fiduciary's portfolio changing their status to a Benefit Corporation or a non-profit entity. As much as some would prefer stakeholder theory, there can be no doubt that shareholder primacy is modern rule for corporate governance. As such, for purposes of ERISA, it is imperative that the DOL adhere to the shareholder primacy norm and consider the financial implications of corporate policy to be the *sine qua non* of ERISA regulations.

We respectfully and enthusiastically support the Proposed ESG Regulation.

[2] https://www.startupblink.com/pdf/ecosystem_report.html.

If the DOL or its staff have any questions, or if we can be of assistance in any way, please contact the undersigned.

Sincerely,

Marc A. Greendorfer
President of Zachor Legal Institute.