Beyond Corporate Social Responsibility: Reconciling the Ideals of a for-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe

Alissa Mickels

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol32/iss1/6
Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe

By ALISSA MICKELS*

I. Introduction:

Greed—the antithesis of grace—does nothing but create excessive waste. This world is ready to create space, to benefit others, to reject profit-driven disgrace. But when corporations give grace—when this novel transaction take place—will the world be ready for the global transformation it will create?¹

In the current market-based economy, directors all over the world are questioning whether corporations should exist solely to maximize shareholder profit.² Indeed, many for-profit corporations abide by the neoclassic assumption that in order for a manager to maximize profit, he must “take the wage demand as a given and produce its output at the lowest possible cost.”³ Capitalism, as

---

¹ I wrote this poem after I finished the first draft of this note. May it be an encouragement to those who desire to do good and do well.

² See discussion infra Parts II., IV.

commonly understood to be the institution holding maximization of monetary wealth for enterprise owners as the utmost goal, has widely been criticized as a practice fostering such things as global warming, human rights abuse and labor violations. Many of these claims are highly debatable, and aspects of profit maximization have certainly been applied positively to social betterment. However, the fact remains that much of the business world does not properly account for environmental and social impacts, as evidenced by rapid degradation of natural resources and the persistence of global poverty. The suggestion that business can, in fact, be a primary ground for reversing these types of damages is no longer mere idealism.

Indeed, many corporate directors no longer abide by Milton Friedman's famous declaration that a corporation's only social responsibility is to provide a profit for its owners. Now more than ever, businesses are refusing to define the highest social good as trading wealth and prosperity freely and fairly in open markets and are choosing to hold themselves to a higher standard of care, enlarging their fiduciary duty to include all stakeholders, including suppliers, creditors, and the community in which the corporation resides. Social entrepreneurs have realized that profit-driven businesses consume resources at a rate that cannot be sustained indefinitely and have adopted a sustainable corporate policy that attempts to benefit the society in which they reside.

Will the law allow these public corporations to benefit non-shareholder constituents? At what amount does corporate

4. Institute for Economic Analysis, Towards the Integration of Economic Science, available at http://www.iea-macro-economics.org/int-ec-sci-pol.html (last visited Mar. 17, 2007) (“[I]t has become obvious that continued depletion of economic resources at the present rate cannot be sustained indefinitely, particularly if the rest of the world attempts to achieve the present U.S. standard of waste”).

5. Id.; see also MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY 3-6, 18 (PublicAffairs 2007) [hereinafter “YUNUS, WORLD WITHOUT POVERTY”] (explaining that the “mainstream free-market-theory suffers from a conceptualization failure, a failure to capture the essence of what it is to be human.”). Yunus further explains that people and businesses are multi-faceted and that business should not be bound to serve one single, purely profit driven objective.

6. Id.


8. See discussion infra Part II.c.

Beyond Corporate Social Responsibility

philanthropic giving become corporate waste? This note discusses the emergence of a new corporation known as the For-Benefit corporation and how publicly owned For-Benefit corporations in the U.S. and Europe could avoid shareholder derivative suits when other constituents are served. Although there are few cases addressing the legal constraints on socially responsible companies, precedent in the U.S. offers a likely favorable outcome for directors in possible shareholder derivative suits.

II. Global Corporate Transformation: The Fall of the Wall Between For-Profit and Non-Profit Corporations

The concept of a compassionate corporation existed long before the United States of America was formed. In his earlier work, The Theory of Moral Sentiments, Adam Smith speaks of the need for morality and compassion in both commercial and governmental affairs. The debate regarding whether a corporation should be socially responsible began in the U.S. in the 1930s between Professors Adolf Berle and E. Merrick Dodd. This debate raised the question of whether corporations owed a duty of “trusteeship” to constituencies other than shareholders. In the end, Berle conceded that directors are not limited to running a business purely to maximize profit, but are “in fact and recognized in law as administrators of a community system.” Yet, state legislators largely ignored the outcome of this pivotal debate on the nature and purpose of a corporation until the late eighties when states enacted constituency statutes, which allow directors to take into consideration stakeholder interests. Around this same time, companies marketing themselves as socially responsible started to emerge, setting the stage for a movement towards a more compassionate corporation.

12. Id.
14. Orts, Beyond Shareholders, supra note 11.
15. The definition of a double bottom line companies is discussed in Part II.a.
16. For a more in-depth discussion on corporate social responsibility, see CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES: LEGAL, ECONOMIC AND SOCIOLOGICAL ANALYSES ON CORPORATE SOCIAL RESPONSIBILITY 1-177 (Klaus J.
A. Double Bottom Line: The Emergence of Green Business

The influential Business Roundtable\textsuperscript{17} describes corporations as being entities that are "chartered to serve both their shareholders and society as a whole."\textsuperscript{18} Socially responsible corporations became more visible to the public in the 1980s and 1990s with leading companies like The Body Shop and Ben & Jerry's. The Social Venture Network ("SVN"), which was formed in 1991 by socially responsible entrepreneurs, and Business for Social Responsibility ("BSR") formed in 1992, brought together many of these early pioneers.\textsuperscript{19}

Many people consider Ben & Jerry's as the first "socially responsible" company by introducing the concept of improving the environment as a second bottom line.\textsuperscript{20} Others praise Newman's Own as a pioneer for establishing itself as a private sector company to donate all profits and royalties after taxes for educational and charitable purposes.\textsuperscript{21} The notion of a double bottom line reflects the understanding that a company is not merely created to make a profit, but should also account for possible deleterious effects on the environment.\textsuperscript{22}

B. Adding a Third Bottom Line: Corporate Social Responsibility

Despite the novel addition of a second bottom line for measuring corporate success, the lack of guidelines for properly treating

\textsuperscript{17} The Business Roundtable is an association of chief executive officers of leading U.S. companies with $4.5 trillion in annual revenues and more than 10 million employees. See generally Business Roundtable Home Page, http://www.businessroundtable.org, for more information.

\textsuperscript{18} See Orts, Beyond Shareholders, supra note 11, (citing The Business Roundtable, Corporate Governance and The U.S. Competitiveness, 241, 244 (Nov. 1990)).

\textsuperscript{19} These include Joshua Mailman and Wayne Silby of Threshold Foundation; Ben Cohen and Jerry Greenfield, co-founders of Ben & Jerry's; and Jeffrey Hollender and Steven Fenichell of Seventh Generation.

\textsuperscript{20} JEFFREY HOLLENDER AND STEVEN FENICHELL, WHAT MATTERS MOST, 12, (X ed., "publisher" 2004) [hereinafter "WHAT MATTERS MOST"].


\textsuperscript{22} WHAT MATTERS MOST, supra note 20.
employees and subcontractors jeopardized the reputation of green companies as socially responsible businesses. As a result, in 1994, John Elkington added a new, third bottom line that focused on serving "people" in addition to the planet and profit. This triple bottom line business model maintains fair and equitable business practices toward their employees, the community, and the region in which a corporation conducts business.

As triple bottom line companies were emerging, the term Corporate Social Responsibility ("CSR") re-entered the corporate dialogue. CSR in the U.S. is "an ongoing commitment by business to behave ethically and to contribute to economic development while demonstrating respect for people, communities, society at large, and the environment.”

CSR attracts an integrated community of global citizens who feel an innate calling to be environmental stewards and are interested in sustainable development. The main problem socially responsible companies face is how to succeed in implementing a heightened standard of "socially responsible" values without being overburdened by the financial demands from pragmatic execution of such values.

The concept of CSR is now a common term used frequently by multi-national corporations. European interest in CSR promoted the European Council in Lisbon in March 2000 during which the European Council encouraged companies to become more socially responsible by taking into consideration "lifelong learning, work

---


25. See WHAT MATTERS MOST, supra note 20, at 29 (citing Business: The Ultimate Resource (2002)).

26. Id. at 192.

organization, equal opportunities, social inclusion and sustainable development. Further, the European Commission recognized that shareholder value is not achieved merely through maximizing short-term profits, but also through "market-oriented yet responsible behavior."

In addition, European support of CSR businesses is increasing exponentially. On March 13, 2006, the European Commission ("EC") enacted a Resolution entitled, "Corporate Social Responsibility: A New Partnership." In this resolution, Europe acknowledged that CSR has become "an increasingly important concept for competitiveness both globally and within the E.U., and is part of the debate about globalization, competitiveness and sustainability." The resolution led to the creation of the European Alliance for CSR, which recognized that all stakeholders must be taken into account when making business decisions. This Alliance operates around three core principles: 1) raising awareness and improving knowledge on CSR and reporting on its achievements; 2) helping to mainstream and develop open coalitions of cooperation; and 3) enabling the environment for CSR.

The definition of CSR in the U.S. mirrors that in Europe. According to the European Commission, CSR is "a concept whereby companies integrate social and environmental concerns in their

28. Id.
30. Id.; see also supra note 27. In the past decade, numerous reports have been published on CSR. "The Sustainable Development Strategy for Europe" adopted during the Goteborg European Council of June 2001 acknowledged that long-term economic growth, social cohesion, and environmental protection go hand in hand and encouraged businesses to adopt such policies in their own bylaws. Additionally, the EU Multi-Stakeholder Forum on CSR (CSR Forum) was formed in 2002, and the European Coalition for Corporate Justice (ECCJ) formed in 2006 which has more than ten countries. For more information see http://www.corporate-responsibility.org/C2B/document_tree/ViewACategory.asp?CategoryID=35.
32. Id. at 2.
33. Id.
34. Id. at 11.
business operations and in their interaction with their stakeholders on a voluntary basis." CSR has three main features in Europe. First, it is behavior by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest. Further, it promotes sustainable development of a business by integrating the economic, social and environmental impact of their activities. Lastly, CSR is not an optional "add-on" to business core activities; instead, it represents the way businesses are managed. Although the European and the U.S. definitions are vague, both embody a conviction that a corporation's existence should not relate solely to making money for the sake of making money but that a corporation has a social responsibility to contribute and improve the community in which it operates.

Muhammad Yunus, the 2006 Nobel Peace Prize recipient, suggests that socially responsible companies in the U.S. take two basic forms: weak and strong. A "weak" CSR company does no harm to people or the planet, unless doing so will sacrifice profit. On the other hand, "strong" CSR companies seek to benefit people and the planet in the course of doing business so long as the profit margin is not lost. Yunus rejects the idea that CSR will cause positive change in business leaders. He states that the concept is often misused by corporate leaders for selfish gain and, as a result, is ineffective. Instead of CSR, Yunus advocates for a completely new entity, which he calls a "social business," a corporation that has an underlying objective of "creat[ing a] social benefit for those whose lives it touches . . . [as] cause-driven rather than profit-driven, with the potential to act as a change agent for the world." Maria Eitel, Nike's Vice President for Corporate Responsibility, notes that there is no

36. *Id.* at 5.
37. *Id.*
38. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 16.
43. *Id.* (stating that the philosophy of these companies "seems to be: Make as much money as you can, even if you exploit the poor to do so—but then donate a tiny portion of the profits for social causes or create a foundation to do things that will promote your business interest...[a]nd then be sure to publicize how generous you are!")
44. *Id.* at 22.
perfect factory, just as there is no perfect community, but this should not hinder the business community from creating a system and a framework within which these issues can be addressed, and expressed.\textsuperscript{45} Eitel's reference to a "system and framework" is exactly what socially responsible companies need now in order to survive.\textsuperscript{46}

In order to assess and identify businesses that are trying to position themselves in the vector of Fourth Sector organizations, a number of different rating systems have been developed.\textsuperscript{47} One of the most comprehensive of these rating systems was developed in 2004 by S-BAR.\textsuperscript{48} More recently B Lab, a 501(c)(3) non-profit corporation, developed a certification scheme, derived from S-BAR and other rating systems, which it uses to identify socially responsible for-profit businesses that it brands as "B corporations."\textsuperscript{49} In order to be "B certified," a corporation must score eighty points out of two hundred on a test to determine whether it meets a set of social and environmental performance standards.\textsuperscript{50} Once the corporation has passed this initial test, it must institutionalize stakeholder responsibility by inserting certain language into its corporate bylaws that allows managers to consider the interests of employees, the community and the environment, which may, in some cases, require companies to reincorporate into a state with a constituency statute.
allowing for such an amendment.\textsuperscript{51} B Lab’s founders adopted their stakeholder accountability approach from Upstream 21, a holding company which pioneered the idea of incorporating stakeholder language in the articles of its portfolio companies.\textsuperscript{52} Once the corporation has become a B corporation, it must donate one-tenth of one percent of its revenue to B Labs.\textsuperscript{53}

\textbf{C. For-Benefit Corporations: The Emergence of a New Fourth Sector}

Socially responsible businesses and social enterprises in the U.S. are catalyzing a wave towards a new type of "hybrid" organization. This movement has been building for decades and is now at a breaking point when the floodgates are about to burst open. Businesses today are dedicating more resources than ever to providing social and environmental benefits.\textsuperscript{54} Similarly, government and social-sector organizations are beginning to emulate for-profit businesses by adopting earned-income governance models as a way to acquire the necessary capital to sustain their social mission.\textsuperscript{55} The convergence of the mission and methods of these non-profit and for-profit companies is producing a fourth sector of "hybrid" organizations, which pursue social purposes while engaging in business activities. This Fourth Sector is emerging in the U.S. and abroad, with over twenty different names to describe the activity within the Fourth Sector.\textsuperscript{56} It emulates a new generation of value-driven consumers and shareholders who are demanding that corporations benefit their communities. The legal community within the Fourth Sector must decide what alternative approaches or legal


\textsuperscript{52} Id. Upstream 21 was co-founded by Leslie Christian. For more information see http://www.upstream21.com/

\textsuperscript{53} Id.


\textsuperscript{55} Id.

\textsuperscript{56} “Fourth Sector” organizations are also referred to as Philanthropic capitalism, Hybrid organization, Corporate citizenship, Social enterprise, For-Benefit company, B Corporation, Fourth Sector Organizations, Cooperative corporation, Social entrepreneurship, Cooperative Societies, Community Interest Corporations (U.K), Social Business, Empresa, Social economy enterprises, Le cooperative de solidarite, Sociétés à finalité sociale, Social Cooperatives, Sociedad Laboral, Corporate social responsibility, Responsabilitè social de l’entreprise, and Social investment.
forms might meet the needs of these hybrid social ventures better than existing structures or whether a new legal form makes sense, and if so, what it would look like.

The Fourth Sector Network ("FSN"), which pioneered the concept of a For-Benefit corporation, has conducted a series of conventions focused on further developing a structure and legal framework for a new type of "hybrid" organization. The first of these meetings was held in 2006 at the Aspen Institute.\(^5\) This meeting convened a group of seasoned lawyers, legal scholars, financial experts, and social entrepreneurs to discuss the need for new hybrid legal structures.\(^5\) The idea for a B certification and a new type of hybrid organization referred to as the L3C materialized during this meeting.\(^5\) Following this successful meeting, a second meeting was convened in Boston in April 2007 at a Social Enterprise Alliance ("SEA") conference.\(^5\) The most recent convention on establishing new legal "hybrid" forms was held at NYU Law School on July 17, 2008, bringing together attorneys, investors, funders, scholars, and entrepreneurs to explore the limits to "hybrid" organizations under existing law and to examine possible characteristics of new hybrid forms.\(^5\) This convention resulted in the creation of the first ever "Legal Strategy Group" website that offers all the necessary legal aid for hybrid organizations. More specifically, the website contains a legal document library, a tool and resource library, a social enterprise attorney directory, a discussion forum and a Fourth Sector wiki for social entrepreneurs and attorneys.

As social entrepreneurs and businesses attempt to surf the wave towards a Fourth Sector by seamlessly blending a social purpose with their business agenda, a collaborative effort has begun to develop the essential characteristics of an archetypal Fourth Sector organization, also known as a "For-Benefit" corporation.\(^5\) For-Benefit corporations are a new class of organizations that are "driven by a

---

58. Id.
59. Id.; For more information on L3C, see infra note 169.
60. See http://www.se-alliance.org/about_policy.cfm.
61. The report for the meeting will be distributed in November 2008.
62. Sabeti, The Emerging Fourth Sector, see supra note 54.
social purpose; they are economically self-sustaining, and they seek to be socially, ethically, and environmentally responsible. A For-Benefit corporation represents a new paradigm in organizational design. At all levels, they aim to link two concepts which are held as a false dichotomy in other models: private interest and public benefit.

Currently, the Fourth Sector community is building consensus around ten essential characteristics for the For-Benefit corporation. Some of the characteristics that are being considered include: 1) a core commitment to a social purpose which is embedded in the organizational structure, 2) freedom to engage in any legitimate business activity in pursuit of the social purpose, 3) equitable distribution of ownership rights and distribution rights among stakeholders, 4) equitable compensation of employees, investors, and other stakeholders in proportion to their contributions and risk, subject to reasonable limitations that protect the ability of the organization to achieve its mission, 5) commitment to having a net positive social and environmental impact, 6) commitment to full and accurate assessment and reporting of social, environmental, and financial performance, 7) limited liability structure such that the directors of the organization will not be held personally responsible for the actions of the organization as long as the directors conduct any business activity that is consistent with its social purpose and stakeholder obligations, 8) ability to accept debt and equity investments as well as tax deductible donations, 9) exemption on certain business taxes, and 10) lock on assets that prevents them from being privatized upon terminal events.

As the Fourth Sector expands, organizations are encountering limitations imposed by existing legal and tax structures. Social entrepreneurs and their attorneys do not have a clear understanding about the existing legal consequences of structuring a For-Benefit corporation. For-Benefit entrepreneurs have little choice but to operate within the constraints of the three existing sectors. In the next section, I discuss the legal consequences of trying to create a For-Benefit corporation under existing law as it relates to the fiduciary duties of For-Benefit directors.

---

64. Id.
III. Shifting from Shareholder to Stakeholder: The Consequences of Being Generous in a Market-Based Economy in the U.S. and Abroad

A For-Benefit corporation seeks to benefit not only its shareholders, but also its stakeholders, creating a risk that directors could be held liable for breaching their fiduciary duty to maximize shareholder profit in favor of benefiting another corporate stakeholder. Such risk is reduced with For-Benefit corporation directors who look to the state constituency statute as support for decisions made in the interest of nonshareholder constituencies.66

Scholars claim that a corporate manager’s only objectives are to sustain monetary growth for the company and to increase company and shareholder value.67 This obligation stems from the commonly-held belief that the sole interest of a shareholder is to maximize profit and thus, a director must maximize the value of corporate shares to fulfill his fiduciary duty to the shareholder. Under this current legal framework, For-Benefit corporations are significantly limited in the scope of their activity. For example, For-Benefit corporations seek to maximize benefit to all stakeholders and donate one hundred percent of their economic profits towards advancing their social purpose. So, must we assume that all publicly held For-Benefit corporations will be subject to shareholder derivative suits for breaching their fiduciary duty?

More importantly, what obligations will For-Benefit directors have towards their shareholders? In this section, I clarify that a director’s fiduciary duty does not always involve maximizing shareholder profit. Additionally, the protection of the business judgment rule protects directors in most cases involving the shareholder primacy doctrine. For-Benefit corporations should not be liable for day-to-day business decisions made in the interest of stakeholders as long as the directors are disinterested and independent, and make decisions in a reasonable manner.

66. See discussion infra Part III.a.iv.
67. YUNUS, WORLD WITHOUT POVERTY, supra note 5, at 16., see also notes 82-84, infra.
A. Standard of Conduct and Fiduciary Duties in the U.S.

i. The Business Judgment Rule

When making day-to-day decisions, courts apply the business judgment rule absent bad faith, or self-dealing, to determine whether a director has violated his duty to uphold the best interests of the corporation. Generally, the business judgment rule protects most lawful disinterested and independent actions of a board of directors provided they were taken in the honest belief that the action was in the best interests of the company, after a reasonable deliberative process. Under this standard, there is the “presumption that in making business decisions the directors of a corporation acted on an informed basis, in good faith and in the honest belief that action taken was in best interest of the company.” Because the court presumes valid business purpose, the burden of proof is on the shareholder to show otherwise. When a court decides that a director’s decision was a valid exercise of business judgment, the decision is almost always upheld as long as the court can attribute a rational business purpose for such a decision.

A shareholder may overcome this presumption by showing a violation of his duty of care or duty of loyalty in connection with a deliberate decision averse to the economic interests of the shareholder. Such a breach is manifest when the board “acts intentionally, in bad faith, or for personal gain.” A director acts in bad faith when “the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation ... demonstrating a conscious disregard for his duties.” Only when the presumption is overcome does the burden of proof shift to the director to prove that his decision was entirely fair to the interests of

---

68. Ryan v. Gifford, 918 A.2d 341, 357 (Del. Ch. 2007) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).
69. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (explaining that a court “under such circumstances will not substitute its own notions of what is or is not sound business judgment”).
70. Id.; see also Model Bus. Corp. Act § 8.30(a) (2005).
71. Id.
72. Id.; see also ALI, Principles of Corporate Governance § 4.01(c).
73. See Ryan v. Gifford, 918 A.2d at 357.
74. Id. (citing Malpiede v. Townson, 780 A.2d 1075, 1093-97 (Del. 2001)).
Delaware law contains very few bright-line rules governing the relationship between directors and shareholders. However, in the non-takeover context, directors may favor non-shareholder constituencies as long as it does not have a significant impact on shareholders. Jurisprudence seems to suggest that the court will be especially deferential when directors claim to have altruistic purposes that benefit the company in the long run because of the possibility that shareholders will eventually receive a higher return on their investment. The court’s rationale for refusing to apply the business judgment rule is premised on the belief that shareholders must be protected from self-interested directors. Thus, when a director is focused on benefiting others, the court will be less likely to find a self-interested motive. Additionally, when a For-Benefit corporation establishes non-shareholder constituencies as an essential objective of the corporation, either through stating it in their articles of incorporation or its bylaws, the court may find that the director was acting in the best interests of the corporation, despite the disregard for shareholder interest. Further, if the identity of the corporation is based on distinguishing itself in the market as a value-driven corporation, it may be detrimental to the economic prosperity and sustainability efforts.
thus shareholder value, if the corporation sacrifices such value for monetary gain.

    ii. Unocal's heightened standard of review: exceptions to the business judgment rule

Even under a heightened Unocal standard of review, Delaware case law tends to uphold decisions in favor of non-shareholder constituencies. In the context of a hostile takeover or a change of control situation, courts apply a heightened Unocal standard of review under the rationale that managers have a higher tendency toward personal entrenchment at the expense of the shareholders' interests in a takeover or merger. Under this standard, the court will give directors the benefit of the business judgment rule only if they can first demonstrate that they had "reasonable grounds for believing a danger to corporate policy and effectiveness existed" and the defensive measure was "reasonable in relation to the threat posed." In Unocal, the court explained that a "reasonable" decision for a defensive measure is "an element of balance" between, inter alia, the impact of non-shareholder constituencies, the effect on shareholder value, and the effect on the corporation. The balancing test is supported by case law in Delaware and several other states.

81. Although the Unocal standard originated in Delaware, twenty-eight states have adopted essentially the same Unocal standard principle in their statutes; see Shani Fuller, COMMENT: Shareholders, Directors, and Other Constituencies: Who’s on First in Oregon Corporate Takeover Law?, 30 WILLAMETTE L. REV. 347, 359 (1994) [hereinafter Fuller, Takeover Law].

82. Ragazzo, Unifying the Law, supra note 78, at 996.


84. Craig W. Palm & Mark A. Kearney, A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part II), 42 VILL. L. REV. 1043, 1066 (1997); see also Lawrence A. Cunningham, Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance, 84 CORNELL L. REV. 1133, 1160 (1999) (stating that even when Revlon applies, Delaware still permits corporate boards wide leeway to act); see also Engledow, Scope of Duties, supra note 83, at 531.

85. Unocal Corp., 493 at 955.

86. Id.; see also Fuller, Takeover Law, supra note 81, at 360.

87. See Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1015 (E.D. Wis.), aff'd on other grounds, 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989) (upholding defensive tactics because, inter alia, the pending bid posed "a danger to a corporation's [nonshareholder] constituencies (customers,
For-Benefit corporations that make decisions to uphold the socially-conscious culture of the corporation will be more likely to succeed in shareholder derivative suits than those corporations who fail to establish a connection between their decision and the social purpose of the corporation. Indeed, Delaware case law demonstrates a strong deference when directors make decisions to maintain corporate value despite a change in management situation. In Paramount Communications v. Time, Inc., Time spent two years researching a possible merger opportunity with an entertainment company that would uphold its own values. When the merger deal was almost completed with Warner, Paramount offered Time an all-cash offer for all outstanding shares at $175 per share. Time persistently refused Paramount’s offer even when the bid rose to $200 per share asserting that the Warner transaction had greater long-term value and, unlike Paramount, would not threaten the “culture” of Time. The court found that the directors’ actions were justified because “directors are not obliged to abandon a deliberately conceived corporate plan for short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.” Similarly, socially responsible companies who have created a culture and deliberate strategy of balancing a duty to all stakeholders are more likely to win the court’s presumption that they are not in violation of their fiduciary duty to maximize shareholder profit.

iii. Maximizing shareholder profit: Revlon’s strict standard of review

Scholars claim that in order to uphold corporate philosophy, a


88. Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (1990) (holding that a target company’s board does not have to make any financial comparisons to justify defensive action); see also Cheff v. Mathes, 199 A.2d 548 (Del. 1964) (regarding directors’ defense against hostile takeover that would be harmful to employees).

89. Id.

90. Paramount Commc’ns., 571 A.2d at 1144.

91. Id. at 1147-49.

92. Id. at 1149.

93. Id. at 1154 (citing Revlon, 506 A.2d 173).
Beyond Corporate Social Responsibility

public company must maximize short-term shareholder profits. Commentators cite *Dodge v. Ford Motor Co.* as the fountainhead of the corporate law rule that the objective of directors must only be to make profits for shareholders. Although the court in *Dodge* precluded a business decision made in the interest of non-shareholder interests, *Dodge* is no longer applied as such. Instead, federal and state case law reference *Dodge* as evidence of the broad discretion a director has in business decisions.

Nevertheless, under the *Revlon* duties, a director has a duty to maximize shareholder value in certain circumstances. The Supreme Court of Delaware states that the *Revlon* duties are generally triggered “when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company,” or “where a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.” According to *Revlon*, once the board of directors is no longer defending the company from takeover, it must sell to the highest bidder or implement routine defensive strategy to enable the board to negotiate for a higher bid. The court in *Revlon* suggests that a board of directors may no longer take non-shareholder constituency interests into account when deciding which bid to accept; however, *Revlon* still “permits consideration of other

98. *Id.*
100. *Id.* (citing Revlon, Inc v. Macandrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986).
101. Revlon, 506 A.2d at 182.
102. See Ragazzo, *Unifying the Law*, supra note 78 at 989; see also Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate
constituencies so long as it is "rationally related [to] benefit[s] accruing to the stockholders." Moreover, modern case law has significantly narrowed the scope of an enhanced duty to maximize profits under the Revlon standard so that a company is certain to trigger Revlon only in the context of a sale of the entire company.

iv. Business decisions made in the interests of U.S. stakeholders: A hypothetical case study

The cases upholding a defensive action under the stricter Unocal standard based on threats to non-shareholder constituencies are difficult to evaluate because each of these cases also involved a threat to shareholders. Although the courts have allowed directors to refuse bids that threatened non-shareholder constituencies, it is impossible to determine whether the court upheld this decision based on the threats to shareholders, non-shareholders, or both.

Essentially, fiduciary duties were created with the primary purpose of redressing the imbalance of power between the fiduciary and the shareholder. This relationship, taken to the extreme is fairly predictable. According to Delaware case law, if a For-Benefit corporation director shut down an unprofitable manufacturing plant immediately, thereby maximizing short-term profit for shareholders, no cause of action would exist against a director for violation of fiduciary duty because the director upheld the shareholder's interest. On the other extreme, if a director left the same manufacturing plant open indefinitely in order to uphold the employees' interest to keep their job, shareholders would have a cause of action for breach of fiduciary duty and possible corporate waste because shareholders

Constituency Statutes, 70 TEx. L. REV. 579, 609 (1992) [hereinafter "Mitchell, Enforcing Constituency Statutes"].


104. See Ragazzo, Unifying the Law, supra note 78 at 1004-1009 (explaining that a company is certain to trigger the Revlon standard only when there has been a complete sale of the entire company. "The possibility that a sale of control triggers Revlon remains extant but is called into question by Paramount . . . [c]hanges of control may not, and substantial restructurings do not, trigger enhanced Revlon duties because the corporation continues as an entity.").

105. See Ragazzo, Unifying the Law, supra note 78, at 997.

106. Id.

have a financial stake in the corporation and a legally mandated fiduciary relationship with the directors. Therefore, decisions made in favor of stakeholders at the expense of shareholders will most likely be a violation of a director’s fiduciary duty.

Delaware case law becomes highly unpredictable in the middle of the two aforementioned extremes. How does a director balance preservation of capital, including a fiduciary duty to shareholders with pursuit of a social purpose to benefit stakeholders? The current U.S. legal system has answered this question by building a wall between the profit and public interest. Essentially, a company must choose between either pursuing a lawful business purpose to maximize profit, thereby attracting investors and shareholders, or pursuing a charitable purpose, which requires preclusion of all private inurement, thereby excluding the possibility for attracting the necessary capital to be successful.

Assuming, arguendo, a For-Benefit corporation director is faced with the decision to either shut down an unprofitable manufacturing plant immediately to maximize shareholder profit, or keep it open for six months, so that employees, and non-shareholders have enough time to find a job, would the court uphold the director’s decision? \(^{108}\) Delaware jurisprudence suggests courts will apply a balancing test, taking into consideration both the interests of shareholders and non-shareholders. Applying the probable balancing test to this hypothetical, a court is likely to uphold such a decision absent implicit self-interest motive and weigh the balance in favor of the directors’ decision. Although directors may take into account non-shareholder constituencies, stakeholders lack a legal fiduciary relationship with the corporation under existing law. Accordingly, the court will not allow directors to preference stakeholder interests at the complete disregard of those of a shareholder. Nevertheless, the court will be more willing to favor a decision involving both shareholder and stakeholder interests when the For-Benefit corporation inserts a provision allowing stakeholder bias into the articles of incorporation or the corporate bylaws.

---

108. For the purposes of this hypothetical, I will assume that Delaware law will govern considering the novel use of constituency statutes by For-Benefit corporations.
v. Constituency Statutes: Reinforcing Business Decisions in Favor of Stakeholders

The balancing scale will swing back in favor of the socially responsible director when he looks to constituency state statutes to preference stakeholder interests over shareholder interests. Constituency statutes vary from state to state: some inevitably overrode the Unocal or Revlon standards, while others simply offer the option for directors to look to stakeholder interests in certain contexts. Although states enacted constituency statutes primarily to give directors another defensive tactic following the explosion of takeovers in the late 1980's, these statutes may also allow directors to consider stakeholder interests when making day-to-day decisions. In effect, constituency statutes codify the right of a director to consider the best interests of the corporation as a whole. Indeed, more than half of the states have enacted constituency statutes.

allowing directors to take into consideration the interests of non-shareholder constituencies, which normally include employees, consumers, suppliers, and the local community.\textsuperscript{114} In many states, this standard arguably has become the accepted model of corporate governance for public corporations.\textsuperscript{115}

Courts have not yet provided an analysis of the legality or constitutionality of constituency statutes, or even an explanation of how they should be implemented.\textsuperscript{116} Nevertheless, some cases reference constituency statutes as a valid reason for looking to long-term non-shareholder interests instead of short-term shareholder interests in making certain business decisions.\textsuperscript{117}

\textsuperscript{114} Rima Fawal Hartman, \textit{Situation-Specific Fiduciary Duties for Corporate Directors: Enforceable Obligations or Toothless Ideals?}, 50 \textit{WASH & LEE L. REV.} 1761, 1765 (1993) (stating that constituency statutes as well as Delaware case law indicates that directors should be allowed to consider the concerns of all stakeholders and in certain situations requires the board to consider certain stakeholders' concerns under certain circumstances).


\textsuperscript{117} See Baron v. Strawbridge & Clothier, 646 F. Supp. 690, 697 (E.D. Pa. 1986) (stating that Pennsylvania law requires a director to oppose a tender offer that is harmful to the corporation's long-term interests, even at the expense of short-term shareholder interests); Thompson v. Central Ohio Cellular, 639 N.E.2d 462 (Ohio 1994) (stating that directors "must" consider interests of shareholders and "may" consider interests of creditors); Georgia-Pacific Corp. v. Great Northern Nekoosa Corp., 727 F. Supp. 31 (D. Me. 1989) (stating that Maine law "suggests" that the Directors of a corporation, in considering the best interests of the shareholders and corporation, should also consider the interests of the company's employees, its customers and suppliers, and communities in which offices of the corporation are located); Murray v. Conseco, Inc., 795 N.E.2d 434 (Ind. 2003) (citing constituency statute to state the rule that the director's decision was valid because it was made in the interest of the corporation as a whole to remove a director that the shareholders had voted in); Keyser v. Commonwealth National Financial Corp., 675 F.Supp. 238, 241 (M.D. Pa. 1987) ("[T]he Board could consider so-called social issues in evaluating merger proposals."). For a more in-depth discussion of the acknowledgment that non-shareholder interests should be considered an essential component to a director's decision, see also Wai Shun Wilson Leung, \textit{The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests}, 30 COLUM. J.L. & SOC. PROBS. 587, 613-14 (1997). See also Andrew Keay, \textit{Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'}, 29 SYDNEY L. REV. 577, 596 (2007)
Commentators assert that "the legal effect of such [constituency] laws may be to insulate officers and directors from liability for failing to maximize profits to shareholders." While constituency statutes may be useful in rejecting shareholder primacy, these statutes are limited in application. Most constituency statutes limit the definition of stakeholder constituents to include customers, suppliers, employees, creditors or the community around which a company's office is located. This narrow definition does not include the international community, environmental concerns or broader human rights concerns. Consequently, decisions made in the interest of the broader local community are considerably risky in nature but they are one step in the right direction.

B. European Fiduciary Duties and Corporate Governance

The shareholder primacy doctrine is considered by many scholars as a purely Anglo-American concept. In fact, most industrialized countries besides the U.S. and Great Britain have a stakeholder model integrated into their corporate governance model. The reason why the stakeholder movement is of little concern in non-U.S. countries is because of a lack of the shareholder primacy doctrine, the rarity of shareholder derivative suits, and the lack of hostile takeovers. "In a non-U.S. environment, the director may be more concerned with the effect of a decision on employees or the local..."
economy than would a U.S. director." Accordingly, there is no need to enact constituency statutes because the stakeholder doctrine is already embedded within the corporate governance.

One example of such stakeholder model is found in Germany. Germany’s stakeholder corporate governance doctrine emerged with the aid of the Reform Act of 1870 ("German Reform Act"). The German Reform Act created the Aufsichtsrat, an intermediary outside board between Vorstand, the management team. The Aufsichtsrat was created in order to take into account stakeholder interests including the "investors, workers, the state, and others." After World War II, the government reaffirmed the importance of stakeholder interests by enacting the Codetermination Act of 1976, which requires "all stock corporations, Aktiengesellschaft (AG), and all other business entities over a certain employee base, to have a two-tiered board structure that includes significant employee representation on the supervisory Aufsichtsrat board." Arguably, the Aufsichtsrat board oversees the Vorstand board to the same degree that a board of directors oversees corporate officers in a company based in the U.S. Having a board made up of non-shareholder constituencies creates the implicit assumption that non-shareholder interests must also be upheld when making business decisions.

Moreover, U.K. corporations are now moving towards a more stakeholder centered model of governance. The recent enactment of The Companies Act of 2006 ("British Companies Act") incorporates a provision that is consistent with the American version of a constituency statute. Section 172(1) of the British Companies Act allows directors to take into consideration the long-term interests

123. Id. at 1674.
124. Id. at 1675.
125. Id.
126. Id. at 1675.
127. Id. at 1676-77.
128. Id. at 1677. ("For entities that have between 500 and 2000 employees, one-third of the supervisory Aufsichtsrat board must consist of employee representatives. For entities with 2000 or more employees, one-half of the supervisory Aufsichtsrat board must be employee representatives, and some of these must be representatives of the unions. Typically, if the company has more than 20,000 workers, the Aufsichtsrat board consists of twenty members, of which ten represent the shareholders, seven the workers, and three the unions.").
130. Id. at 594-95.
of the corporation, including those affecting the company’s employees, suppliers, customers, the community and the environment. According to the Commission, European businesses should “provide products and services that add value for society and deploy entrepreneurial spirit and creativity towards value and employment creation.”

Indeed there is a global trend towards the adoption of a more stakeholder-centered corporate governance model. Even Asian countries are turning away from the shareholder maximization doctrine. The global market in which American companies operate is recognizing the importance of taking stakeholder interests into account in their corporate governance. As such, businesses in the U.S. that do not adopt a stakeholder governance model risk losing profit on cross-border ventures.

IV. Liability for Decisions Involving Large Charitable Donations

One way a For-Benefit corporation benefits stakeholders is apportionment of a considerably large percentage of profit to charitable causes. Consequently, For-Benefit corporations may face shareholder derivative suits for corporate waste if a court finds that such donations are unreasonable. To date, the court has never found a corporate charitable donation to be wasteful; however, this does not preclude future adjudication against corporations for

131. See supra note 31, at 3.
132. Id. (Europe urged directors to take all stakeholders into account, declaring that “Europe does not need just business but socially responsible business that takes its share of responsibility for the state of European affairs.”). Additionally, many European countries have already enacted the equivalent of a For-Benefit corporation including the Sociedad Laboral in Spain, Society for Social Purpose in Belgium, Social Cooperatives in Italy, and the Social Solidarity Cooperatives in Portugal.
133. The Social enterprise in South Korea, enacted by the 2007 Act on Social Enterprise Promotion, the Seed Money project launched by the Social Welfare Department in 2001 in Hong Kong, the New Labor Contract Law of 2008 in China, the Singapore Compact for Corporate Social Responsibility launched by National Tripartite Initiative in 2004, the Singapore Companies Act of 2004, and the Council for Better Corporate Citizenship launched in 2002 in Japan.
excessive charitable giving.\textsuperscript{135}

When a public For-Benefit corporation donates an exceptional percentage of their profit to a charitable cause, the court will apply the reasonableness standard of review.\textsuperscript{136} What is reasonable is a factual inquiry. Further, the court has never dealt with cases involving donations larger than 10 percent of corporate profit.\textsuperscript{137} In \textit{Theodora Holding Corp. v. Henderson}, the court found that a donation of 2.7 percent of the corporation’s annual gross income was reasonable, explaining that the donation was less than the 5 percent limit for federal tax deductions of charitable donations.\textsuperscript{138} In \textit{Kahn v. Sullivan}, the Court of Chancery found support in the Delaware statute and the Internal Revenue Code to uphold a corporate decision to donate $85 million to a museum.\textsuperscript{139} The Court found that state legislation has placed no limitation on the size of the gift, and the donation did not exceed the 10 percent deduction limitation of the Internal Revenue Code.\textsuperscript{140} Accordingly, 10 percent of a company’s taxable income for the year\textsuperscript{141} has been considered to be the appropriate threshold for reasonableness.\textsuperscript{142}

Despite the Internal Revenue Service ("IRS") limitation, it is unlikely that ten percent is the limitation for what a court will allow a For-Benefit corporation to donate. Although state courts have never had to adjudicate cases involving a donation larger than ten percent of corporate profits, both \textit{Kahn} and \textit{Theodora} looked to the IRS limitation as only one factor to consider among many in determining whether the donation was reasonable.\textsuperscript{143} The court intimates that a

\textsuperscript{135} Theodora Holding Corp. v. Henderson, 257 A.2d at 404; see also Kahn, 594 A.2d at 61 ("The Court of Chancery recognized that not every charitable gift constitutes a valid corporate action.").

\textsuperscript{136} Kahn, \textit{Pandora's Box}, supra note 134, at 606 ("The standard of reasonableness was also endorsed by the Delaware Supreme Court in Kahn v. Sullivan, and it appears, to date, to be the authoritative standard.").

\textsuperscript{137} Id.

\textsuperscript{138} Theodora Holding Corp. v. Henderson, 257 A.2d at 405.


\textsuperscript{140} Id.


\textsuperscript{142} See Kahn, \textit{Corporate Philanthropy}, supra note 139, at 1130-31.

\textsuperscript{143} Kahn, 594 A.2d at 61 (taking into consideration the percentage of income, as
“relatively small loss of immediate income... is far out-weighed by the overall benefits flowing from the placing of such gifts in channels where they serve to benefit those in need of philanthropic or educational support, thus providing justification for large private holdings, thereby benefiting [shareholders] in the long run.”144 Moreover, commentators interpret Theodora as requiring directors to show that donating funds must be reasonable in “amount and purpose,” serving both the long-term interest of the shareholders and the corporation.145 Therefore, if a corporation can show that the donation is congruent with the corporation’s purpose and interests, it is highly probable that a court will overlook the fact that the donation exceeds the ten percent IRS limitation.

Additionally, a closer analysis of the language used in Kahn and Theodora demonstrates that directors and managers are not agents of shareholders when directing proceeds toward charitable donations. Therefore, their decisions are presumed to be made in the interests of the shareholders.146 “Managers are agents of the corporation itself, and directors are sui generis... there is no explicit legally enforceable agency contract between shareholders and directors.”147 No consideration exists in the exchange between a director and a shareholder and thus is significantly distinguishable from a contractual relationship. Indeed, this relationship is more analogous to the relationship between a trustee and a trustor whereby the shareholder as a beneficiary financially invests broad discretion in the director. Appropriately, when a For-Benefit corporation inserts a

---

well as the benefit to the corporation, finding that “the net worth of Occidental, its annual net income before taxes, and the tax benefits to Occidental” in concluding that the gift to the Museum was within “the range of reasonableness” established in Theodora).

144. Theodora Holding Corp., 257 A.2d at 405.

145. See Oswald, Shareholders v. Stakeholders, supra note 116, at 6 (“Although corporate law doctrine does permit corporations to use some corporate assets for charitable and other non-profit-related purposes, these eleemosynary acts are usually tempered by a requirement that they be in the best long-range interest of the corporation and thus in the best long-range interest of the shareholders.”); see, e.g., Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968); see also David S. Ruder, Public Obligations of Private Corporations, 114 U. PA. L. REV. 209 (1965); see also Kahn, Corporate Philanthropy, supra note 142.


provision in its articles of incorporation that explicitly declares its intent to benefit stakeholders and the community, the investor has a choice of whether to accept the terms before financial investment.

V. Fumbling into Possibility: Amending the Corporate Code in Europe and the U.S. to Accommodate a More Conscious Economy

A. Corporate Code Amendment in the U.S.

A 2000 Business Week/Harris poll asked Americans which of the following statements did they support: 1) corporations should have only one purpose, to make the most profit for their shareholders, and the pursuit of that goal will be best for America in the long run, or 2) corporations should sometimes sacrifice some profit for the sake of making things better for their workers and communities in which they operate? Ninety-five percent of Americans chose the second proposition. Further, according to the Research Collaborative Initiative ("RCI"), a report that surveyed 108 countries covering over 96 percent of the global GDP, the U.S. is far behind in its efforts to promote responsible business practices. Indeed, if the majority of consumers prefer social businesses over purely profit-driven corporations, what options are available to eliminate the shareholder primacy doctrine?

Robert Hinkley, a corporate securities attorney, claims that one way to eliminate shareholder primacy is to amend the corporate code in every jurisdiction. According to Hinkley, under the current corporate code, "corporations are established for one purpose – to make money for shareholders." Consequently, under Hinkley's "Code for Corporate Citizenship Amendment" ("Hinkley

---

149. Id.
150. The RCI report listed the U.S. as #18 on a list, just above Japan and China following France and Singapore.
152. Id.
Amendment”), a director will still have a duty to make money for shareholders "but not at the expense of the environment, human rights, the public safety, the communities in which the corporation operates or the dignity of its employees."\textsuperscript{153} Hinkley’s Amendment adds additional constituencies to the constituency statutes and the requirement for constituency interests to trump those of the shareholders.\textsuperscript{154} After more than seven years of advocacy, California and Minnesota attempted to enact legislation to incorporate Hinkley’s Amendment but to no avail.\textsuperscript{155}

Although the Hinkley Amendment is a promising solution to the problem of shareholder primacy, its application renders the amendment useless, adding an additional barrier for For-Benefit corporations. For example, a 2004 California Assembly bill which would preclude directors from making decisions that will cause deleterious effects on, \textit{inter alia}, the environment, human rights, and public health and safety,\textsuperscript{156} was tabled. A new bill was proposed in 2008 that would allow directors to take stakeholder interests and the environment into consideration when making business decisions.\textsuperscript{157} After the bill was approved by both the Assembly and Senate, it was rejected by the governor on September 30, 2008, because it allowed directors to consider factors other than the strict financial interest of corporate shareholders.\textsuperscript{158} Although Governor Schwarzenegger condoned strict adherence to the shareholder primacy doctrine, he also urged the California legislature to consider and study

\begin{footnotes}
\item[154.] Id.
\item[155.] California Senate Bill (SB) 917, \textit{available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0901-0950/sb_917_bill_20030221_introduced.pdf (amends section 309 of California’s Corporate Code, requiring corporate directors to ensure that profits do not come at the expense of the environment, human rights, public health and safety, the welfare of communities, and employee dignity); Minnesota also tried to enact a similar bill: Bill S.F. 1529, \textit{available at http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S1529.0&session=ls83. (Both bills have been tabled and are no longer active as of 2004.).}
\item[156.] Id.
\item[157.] See California Assembly Bill 2944 \textit{available at http://info.sen.ca.gov/cgi-bin/postquery}.
\item[158.] Id.
\end{footnotes}
"alternative models of corporate governance." Hence, California may be the pioneer in creating the first For-Benefit corporation.

Despite this window of opportunity in California, drafting a new chapter to the California corporate code will take time and may be subject to opposition from powerful interest groups that will lobby to table the bill or kill it in the process. Additionally, it is uncertain whether courts will uphold legislation inherently contrary to case law that offers large deference to the director in making business decisions.

Assuming Hinkley’s Amendment is enacted, the final amendment may end up significantly different from the original proposition due to the common compromises and filibusters as seen in California’s enactment of the Hinkley Amendment. California’s amendment may even pose a threat to For-Benefit corporations because of its vague and over inclusive terms. Many states have proposed new “hybrid” forms including the Socially Responsible Corporations (“SRCs”) proposed in Hawaii and Minnesota in 2007, the Non-profit Limited Liability Company enacted in Tennessee and Kentucky, and the Low-profit Limited Liability Company (L3C)
proposed in North Carolina in 2007 and enacted in Vermont in 2008. Although these propositions are a step in the right direction, all fall short of a fully-realized For-Benefit corporation.

**B. Europe's Adoption of Similar Socially Responsible Provisions**

After much pressure from the Corporate Responsibility Coalition, the United Kingdom enacted the Companies Act, similar to the Hinkley Amendment. The Companies Act requires directors to take into account how their business activities will affect employees, communities and the environment. Although this act is a positive turn in the right direction, companies have received no pragmatic guidance or help as to how exactly they should respond. Moreover, corporations are left unsure as to whether they will be held liable for a breach of their fiduciary duty to stakeholders in addition to shareholders.

Similar encouragement for corporations to acknowledge stakeholder interests is expressed in European Union. In March 2005, the European Council acknowledged that “in order to encourage investment and provide an attractive setting for business and work, the European Union must complete its internal market and make its regulatory environment more business-friendly, while

---


167. Section 172(1) of the Companies Act 2006 states that: (1) A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly between the members of the company. Companies Act, 2006, c.46, § 172 (United Kingdom).

business must in turn develop its sense of social responsibility."169 In the Integrated Guidelines for Growth and Jobs (2005-2008), the Council urged Member States to "encourage enterprises in developing their corporate social responsibility."170

Moreover, the European Parliament has passed resolutions to encourage CSR businesses, notably in its resolutions of 2002171 and 2003.172 In a 2006 resolution, the European Commission recognized that although the market based economy opens up new jobs and business, it "also creates a corresponding need for self-limitation and mobilisation on the part of the business community, in the interest of social stability and the well-being of modern democratic societies."173 This resolution, inter alia, extends the responsibility of the board of directors to encompass the duty of minimizing any harmful social and environmental impact of companies' activities, seeks to improve working conditions, encourages a multi-stakeholder approach to governance, and aims to resolve issues of corporate transparency and communication.174 In addition, it requires corporations to create their own CSR reports, bringing forward a proposal for social and environmental reporting to be included with financial reporting requirements.175 A year later, the European Parliament reaffirmed these guidelines, calling on the commission to implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States.176

Despite the resolution's enumeration of new alternatives for stakeholder-based business decisions, European companies will not be liable for breach of the resolution's provisions because the resolution is not binding and cannot be enforced under the European Court of Justice.177 Nevertheless, this resolution may be referred to in the European Court of Justice as a way to explain a law or prove

170. Id.
174. Id. at 12.
175. Id. at 11.
additional support for a corporation's decision to look to stakeholder interest business decisions.

International Governmental Organization's ("IGO's") are also following in step with the European Union and the U.K. in promoting socially responsible companies.\textsuperscript{178} The overall support of CSR companies worldwide should be an encouragement to directors of For-Benefit corporations who intend to expand their business abroad because they will effectively be equipped with many tools to support decisions made in the interests of non-shareholders.

\section*{VI. Conclusion: Multinational Multi-Faceted Corporations}

In a 1999 Environics International Millennium Poll, where more than 25,000 citizens across six continents were interviewed, two out of three citizens wanted companies to go beyond the historical role of making a profit.\textsuperscript{179} The international community is ready for companies to contribute to broader societal goals, and a new Fourth Sector is emerging to fulfill these needs. The Fourth Sector recognizes that corporations are multi-faceted, harboring an innate desire to do good and do well. Environmentalist entrepreneur Paul Hawken claims that this "For-Benefit Sector" will be the guiding light as we shift into a "restorative economy;" an economy that will cure the flaws of our current one.\textsuperscript{180}

Although the Fourth Sector is emerging in virtually every country, the U.S. is far behind. The For-Benefit corporate model offers a novel possibility for U.S. companies to enter into the Fourth Sector. However, before the For-Benefit corporation can become a


\textsuperscript{179} WHAT MATTERS MOST, supra note 20, at 47.

\textsuperscript{180} Clark, A New Kind of Company, supra note 51.
recognized legal entity in every state, it is first necessary to understand how existing law affects For-Benefit corporations and to decide what characteristics a For-Benefit corporation should have.

Within the current legal framework, careful and deliberate decisions made with the utmost devotion towards benefiting the interests of the corporation's socially conscious values should not violate the shareholder primacy doctrine. As Woodrow Wilson so gracefully states: "You are not here merely to make a living. You are here to enrich the world — and you impoverish yourself if you forget the errand." Appropriately, For-Benefit corporations are breaking out of the one-dimensional, profit-driven mold, pioneering the path towards a new multi-dimensional and values-driven Fourth Sector. This pioneering venture is both exciting and terrifying as directors are left with more questions than answers. Will the judiciary discard outdated, market-based application of corporate law? How will social businesses use old constituency statutes for new purposes? Will a new stakeholder primacy doctrine emerge within the Fourth Sector? To remedy these daunting uncertainties, corporations should demand proper revisions in state corporate statutes that support For-Benefit corporations. Eventually, the tax code will need to recognize a For-Benefit corporation as a new legal entity that will have the ability to apply for tax-exempt status in exchange for certain other limitations. Indeed, the time is ripe for businesses to refuse legal penalty for the simultaneous pursuit of monetary success and positive social impact.