UBC Law Review

Volume 55 | Issue 3 Article 5

12-2022

Corporations on the Couch: Is Therapeutic Disclosure a Kind of Madness

Bryce C. Tingle
University of Calgary Faculty of Law, btingle@ucalgary.ca

Follow this and additional works at: https://commons.allard.ubc.ca/ubclawreview

Recommended Citation
Tingle, Bryce C. (2022) "Corporations on the Couch: Is Therapeutic Disclosure a Kind of Madness," *UBC Law Review*: Vol. 55: Iss. 3, Article 5.
Available at: https://commons.allard.ubc.ca/ubclawreview/vol55/iss3/5

This Article is brought to you for free and open access by the Journal and Peer-Reviewed Series at Allard Research Commons. It has been accepted for inclusion in UBC Law Review by an authorized editor of Allard Research Commons. For more information, please contact petrovic@allard.ubc.ca, elim.wong@ubc.ca.

CORPORATIONS ON THE COUCH: IS THERAPEUTIC DISCLOSURE A KIND OF MADNESS?

BRYCE C TINGLE, KC

Over the past decade, regulators and various third parties have advanced a relatively new type of corporate disclosure. Only peripherally related to the financial performance of the affected corporations, and usually involving risks that fall well outside the relatively short period of time in which they can be accurately assessed and reflected in security prices, the new disclosure is designed to induce better corporate behaviour.[1] "Therapeutic" disclosure is not completely new—the biggest experiment in therapeutic disclosure began in relation to executive pay in the early 1990s—but its scale is new. We now have disclosure practices either mandated or urged that have as their entirely laudable intentions: reducing inequality,[2] improving diversity,[3]

1 See generally AA Sommer Jr, "Therapeutic Disclosure" (1976) 4:3 Sec Reg LJ 263; Louis Lowenstein, "Financial Transparency and Corporate Governance: You Manage What You Measure" (1996) 96:5 Colum L Rev 1335; Merritt B Fox, "Required Disclosure and Corporate Governance" (1999) 62:3 Law & Contemporary Problems 113; Stephen M Bainbridge, "Dodd-Frank: Quack Federal Corporate Governance Round II" (2011) 95:5 Minn L Rev 1779 at 1797–1801 [Bainbridge, "Quack Corporate Governance"]; Troy A Paredes, "Blinded by the Light: Information Overload and Its Consequences for Securities Regulation" (2003) 81:2 Wash ULQ 417 at 464 (discussing the use of disclosure to influence corporate conduct); Eric D Roiter, "Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws" (1982) 50:5 Fordham L Rev 781 at 785–86 (discussing the self-conscious use of disclosure by securities regulators to deter certain kinds of corporate conduct).

2 See Delilah Rothenrberg, Paul Rissman & Joanne Bauer, "It is Time for a Taskforce on Inequality-related Financial Disclosures", *Responsible Investor* (5 May 2020), online: <responsible-investor.com/articles/it-is-time-for-a-taskforce-on-inequality-related-financial-disclosures>; Dean Baker, Josh Bivens & Jessica Schieder, "Reining in CEO Compensation and Curbing the

preventing conflicts in the developing world,[4] reducing corruption,[5] producing more ethical behaviour (at least as defined in corporate codes of ethics),[6] combatting the use of slave labour,[7] and, most notably, encouraging better social and environmental practices.[8]

Rise of Inequality" (4 June 2019), online: *Economic Policy Institute* <epi.org/publication/reining-in-ceo-compensation-and-curbing-the-rise-of-inequality/>.

3 See *Canada Business Corporations Regulations*, 2001, SOR/2001-512 at s 72.2; *Disclosure of Corporate Governance Practices*, OSC NI 58-101 (31 December 2016) [OSC, *NI 58-101*]; ISS, "Canada: Proxy Voting Guidelines for TSX-Listed Companies Benchmark Policy Recommendations" (19 November 2020) at 14, online (pdf): <issgovernance.com/file/policy/active/americas/Canada-TSX-Voting-Guidelines.pdf> [ISS, "Canada Voting Guidelines"].

4 See "OECD Guidelines for Multinational Enterprises" (2011) at 27–30, online (pdf): *OECD* <oecd.org/daf/inv/mne/48004323.pdf>; "Guidance on Responsible Business in Conflict-Affected & High Risk Areas: A Resource for Companies and Investors" (2010), online (pdf): *United Nations Global Compact* <d306pr3pise04h.cloudfront.net/docs/issues_doc%2FPeace_and_Business%2FGuidance_RB.pdf>.

5 See OECD, "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (1997), online (pdf): *OECD* <oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>; United Nations Office on Drug and Crime, "United Nations Convention against Corruption" (2004), online (pdf): *United Nations* <unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>; *The Foreign Corrupt Practices Act of 1977* ("FCPA"), Pub L No 95-213, 91 Stat 1494 (1977), as amended by 15 USC §§78dd-1, et seq; *Bribery Act* (UK), 2010, c 23; *Corruption of Foreign Public Officials Act*, SC 1998, c 34.

6 See *Form NI 58-101F1 – Disclosure of Corporate Governance Practices* (2017) s 5, online (pdf): *British Columbia Securities Commission* <bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy5/58101F1-F-December-31-2016pdf.pdf>.

7 See Bill S-216, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*, 2nd Sess, 43rd Parl, 2020; AMF, "Notice relating to modern slavery disclosure requirements" (4 September 2018), online (pdf): *Autorité des marchés financiers* <lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/0-avis-amf/2018/2018sept04-avis_esclavage_moderne-en.pdf>.

8 See TSX "A Primer for Environmental & Social Disclosure" (August 2020), online: *TSX* <tsx.com/resource/en/2388>; Barbara Zvan & Stephen Erlichman, "The Directors' E&S Guidebook" (2018), online: *Harvard Law*

The rhetoric around these various disclosure initiatives is suffused with assertions that they are, in fact, advancing shareholder value. Professors Lund and Pollman use these representations to support their argument that the shareholder interest is so dominant in what they term "the corporate governance machine" that even socially important initiatives that have very little to do with advancing the financial interests of shareholders must pretend to do so in order to be acceptable in our current governance culture.[9] It is outside the scope of this paper whether shareholders, in fact, make use of this disclosure in arriving at investment decisions, and whether those investment decisions improve outcomes for investors, or direct capital in ways that support socially superior business models. These outcomes, however, seem unlikely.[10] Instead, this paper is concerned with the claims—mixed in with the appeals to shareholder value—that these disclosure initiatives will themselves cause improvements in corporate behaviour. In a memorable formulation of this sort of claim, professor Louis Loss argued that "[p]eople who are forced to undress in public will presumably pay some attention to their figures."[11] But is this true of that notably shameless and distracted creature, the public corporation?

School Forum on Coprorate Governance <corpgov.law.harvard.edu/2018/07/01/the-directors-es-guidebook/>; ISS, "Canada Voting Guidelines", *supra* note 3 at 47; Glass Lewis, "2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice Canada" (2021) at 42, online (pdf): <glasslewis.com/wp-content/uploads/2020/11/Canada-Voting-Guidelines-GL.pdf?hsCtaTracking=f153f022-9925-4b47-b836-e177d6f66259%7C71febae0-a616-47f9-b311-d619935ab48f>.

9 Dorothy S Lund & Elizabeth Pollman, "The Corporate Governance Machine" (28 January 2021), U Pa, Inst Law & Econ Research Paper No. 21-05.

10 See Bryce C Tingle, "Are Shareholders a Solution to Environmental and Social Problems?" [forthcoming] [Tingle, "Are Shareholders a Solution"].

11 Louis Loss, *Fundamentals of Securities Regulation*, 1st ed, (Boston: Little, Brown & Company, 1983) at 33. Similar points are made by Sommer, *supra* note 1 (stating that "[v]ery simply put, if every instance of adultery had to be disclosed, there would probably be less adultery" at 266–67); Louis D Brandeis, *Other People's Money and How the Bankers Use It* (New York: Cosimo Classics, 2009) (asserting "[p]ublicity is justly commended as a

This paper begins with a discussion of the logic behind therapeutic disclosure and its growing influence on corporate disclosure practices. Part II of the paper discusses the reasons why, in theory, therapeutic disclosure is unlikely to alter corporate behaviour. Part III will turn to the empirical evidence on the efficacy of the various therapeutic disclosure regimes we have actually tried in order to: reduce executive pay, increase board diversity, improve ethical behavior, and reduce foreign corruption. These initiatives have not had the effects on firm behaviour that reformers hoped, and because of the public nature of corporate disclosure, the new rules have often produced perverse results.

I. THE LOGIC OF THERAPEUTIC DISCLOSURE

Disclosure can be said to have a therapeutic function "when its ultimate goal is to induce desired corporate behavior."[12] The channel through which this kind of disclosure is supposed to operate varies according to the author. Some emphasize that therapeutic disclosure forces managers and directors to focus on aspects of their own conduct or the "disagreeable realities" of their business operations.[13] By raising the consciousness of insiders about various types of bad behaviour, the disclosure exercise will motivate them to improve.[14] Professor Cass Sunstein, on the other

---

remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman" at 62).

12 Luca Enriques & Sergio Gilotta, "Disclosure and Financial Market Regulation" (April 2014) ECGI Working Paper No 252/2014 at 24, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2423768>; Bainbridge, "Quack Corporate Governance", *supra* note 1 (noting "[t]herapeutic disclosures are not intended to inform investors. Instead, they are intended to affect substantive corporate behavior" at 1797).

13 Lowenstein, *supra* note 1 at 1342.

14 Peter Dey & Sarah Kaplan, "360° Governance: Where are the Directors in a World in Crisis?" (February 2021), online (pdf): *Rotman School of Management* <rotman.utoronto.ca/-/media/Files/Programs-and-Areas/lee-Chin_Institute/360Governance-Dey_Kaplan_FEB22.pdf?la=en&hash=9F6A2CDC84EB9FE493704D791B123B6FA158BFEE> (describing the purpose of their report: "[t]he guidelines are meant to elevate the status of

hand, emphasizes the "expressive" function of law: its capacity to communicate social norms and, in doing so, change behaviour.[15] Other scholars argue that disclosure can produce behavioural change through publicly shaming companies that are forced to disclose socially disfavoured activity.[16]

It is useful to note the types of disclosure that do not qualify as "therapeutic" as we are using the term in this paper. Disclosure obligations which are not primarily intended to change corporate behaviour are not "therapeutic". This includes, for example, most of the disclosure obligations historically imposed on public companies. The financial disclosure that forms the core of modern securities reporting is intended to provide a window on what has occurred in the corporation's business, not to change it.[17] "The main purpose of corporate disclosure is to increase transparency

other stakeholders in the board's mind rather than reflect a bias against shareholders" at 9).

15 Cass R Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2025. See also Matthew Adler, "Expressive Theories of Law: A Skeptical Overview" (2000) 148:5 U Pa L Rev 1363; Alex Geisinger, "A Belief Change Theory of Expressive Law" (2002) 88:1 Iowa L Rev 35; Elizabeth S Anderson & Richard H Pilades, "Expressive Theories of Law: A General Restatement" (2000) 148:5 U Pa L Rev 1503; Aaron Dhir, *Challenging Boardroom Homogeneity: Corporate Law, Governance & Diversity* (New York: Cambridge University Press, 2015) at 219–29 [Dhir, *Challenging Boardroom Homogeneity*].

16 David A Skeel, "Shaming in Corporate Law" (2001) 149:6 U Pa L Rev 1811; Paredes, *supra* note 1 (stating "[t]he strategy of shaming is premised on actively using disclosure to influence corporate conduct" at 454).

17 See Kevin S Haeberle, "Marginal Benefits of the Core Securities Laws" (5 August 2020) [unpublished], online: *SSRN* <ssrn.com/abstract=3667963>; Hillary A Sale, "Disclosure's Purpose" (2019) 107:4 Geo LJ 1045; Ann M Lipton, Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure" (2020) 37:2 Yale J on Reg 499; Beiting Cheng, Ioannis Ioannou & George Serafeim, "Corporate Social Responsibility and Access to Finance" (2014) 35:1 Strategic Management J 1 (discussing the way social disclosure supposedly mitigates information asymmetry between investors and the firm).

(or decrease informational asymmetries) to foster more efficient public markets."[18]

Disclosure also does not operate as "therapeutic" when corporate behaviour changes because of the intervention of an outside party.[19] If, for example, corporate reporting provides evidence that anti-corruption laws have been violated, prompting action by regulators to discipline the corporation, this is not "therapeutic" disclosure. While the disclosure has led to a change in corporate behaviour, it hasn't arisen from the disclosure itself affecting corporate managers, it has arisen from the actions of an outside party.

Climate change disclosure provides an illustration of the different objectives that may theoretically be advanced by corporate reporting. One rationale for requiring this sort of disclosure is that climate change imposes idiosyncratic risks on individual companies that are difficult for outsiders, such as shareholders, to anticipate without more information from insiders.[20] This is the traditional reason for disclosure requirements. Another rationale for climate change disclosure is that it will provide various outside groups with the information they need to begin public pressure campaigns (such as consumer boycotts or regulatory interventions) to change corporate

---

[18] Brandon D Stewart, "Shining Some Sunlight on Mandatory Corporate Climate-Related Disclosure" (2021) 17 McGill J Sustainable Development L 34 at 40.

[19] See e.g. Deborah L Spar & Lane T LaMure, "The Power of Activism: Assessing the Impact of NGOs on Global Business (2003) 45:3 Cal Management Rev 78 (discussing the impact of boycotts and negative publicity campaigns on corporate behaviour).

[20] See e.g. Alessio M Paccesm "Sustainable Corporate Governance: The Role of the Law" (October 2020) ECGI Law Working Paper No 550/2020 at 3–5; Leo E Strine Jr, "Restoration: The Role of Stakeholder Governance Must Play in Recreating a Fair and Sustianable American Economy: A Reply to Professor Rock" (15 December 2020) at 26, online: *Faculty Scholarship at Penn Law* <scholarship.law.upenn.edu/faculty_scholarship/2238>; Elisabeth Albertini, "Does Environmental Management Imrpove Financial Performance? A Meta-Analytical Review" (2013) 26:4 Organization & Environment 431 at 433–34.

behaviour.[21] The third possible rationale is that the disclosure process, itself, will—as a result of consciousness raising, norm communication, or shame—result in managers changing their behaviour.[22] Only this third rationale for climate change disclosure counts as "therapeutic".

A significant part of therapeutic disclosure's appeal is that it is a form of substantive regulation without obviously appearing to be such. Regulators are supposed to be neutral as to the law-abiding business operations of public firms; Canada's various *Securities Acts*, for example, generally do not give securities commissions in this country the power to do more than protect investors or ensure fair and efficient capital markets.[23] Securities commissions cannot pick and choose among companies seeking to go public and permit only those whose industry or social practices they favour.[24]

---

[21] See Erin M Reid & Michael W Toffel, "Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies" (2009) 30:11 Strategic Management J 1157.

[22] See Skeel, *supra* note 16; Akash Chattopadhyay, Matthew D Shaffer & Charles CY Wang, "Governance Through Shame and Asipiration: Index Creation and Corporate Behavior" (2020) 135:3 J Financial Economics 704; Stephen M Bainbridge, "Mandatory Disclosure: A Behavioral Analysis" (2000) 68:4 U Cin L Rev 1023 [Bainbridge, "Mandatory Disclosure"]; Mark Stephan, "Environmental Information Disclosure Programs: They Work, but Why?" (2003) 83:1 Soc Sci Q 190.

[23] The Ontario Securities Act was recently amended to also permit the commission to focus on capital formation and fostering the stability of the financial system: see *Securities Act*, RSO 1990, c S5, s 1.1.

[24] See Yoon-Ho Alex Lee, "The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus" (2015) 57:1 Ariz L Rev 85 (securities regulators historically justify their rulemaking on expected effects on investor welfare rather than on social welfare); Bainbridge, "Quack Corporate Governance", *supra* note 1 (finding that "[s]eeking to effect substantive goals through disclosure requirements is inconsistent with the original intent behind the [US] federal securities laws" at 1801); Paul G Mahoney & Julia D Mahoney, "The New Separation of Ownership and Control: Institutional Investors ESG" (2021) 2021:2 Colum Bus L Rev 840, (arguing mandating ESG disclosures is not compatible with the SEC's stated mission of protecting investors and maintaining fair and efficient capital markets); J Harold Mulherin, "Measuring the Costs and Benefits of Regulation: Conceptual Issues in Securities Markets" (2007) 13:2/3 J Corporate Finance 421.

Passing therapeutic disclosure requirements allows regulators to remain ostensibly neutral while disproportionately affecting some types of companies, hopefully in ways that will produce a favoured social outcome.[25]

Indeed, because disclosure lies at the heart of securities regulation (in large part because it leaves substantive decisions to the market), therapeutic disclosure looks like something securities commissions should be permitted to do.[26] As well, it is easy to claim most social or environmental issues result in risk to a company over a suitably long time horizon, so therapeutic disclosure initiatives can often be cloaked in terms that suggest the disclosure is largely intended to assist investors in pricing future corporate cash flows. This rhetoric is deployed even in cases where there is little evidence firm-specific (as opposed to economy-wide) risks exist, little chance corporate insiders will be better able to predict the future than any informed market participant, where the risks will be incurred well outside any reasonable time frame for either accurate predictions or appropriate valuation, in a time frame where other risks—regulatory, competitive, or technological—are likely to swamp the impact of the specific risks being disclosed, or where the risks are highly speculative.[27] One likely reason for the

---

[25] See Susanna Kim Ripken, "Paternalism and Securities Regulation" (2015) 21:1 Stan JL Bus & Fin 1 [Ripken, "Paternalism"] (stating "disclosure regulation avoids the appearance of paternalistic intervention in the securities markets" at 45).

[26] See Susanna Kim Ripken, "The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation" (2006) 58:1 Baylor L Rev 139 [Ripken, "Disclosure Antidote"] (discussing the centrality of mandated disclosure to securities regulation); Bainbridge, "Mandatory Disclosure", *supra* note 22 (asserting that "[m]andatory disclosure is a—if not *the*—defining characteristic of U.S. securities regulation" at 1023 [emphasis in original]); *Securities Act of 1933*, 15 USC §§ 77a–77mm (1934) (where the preamble mentions "[a]n Act [t]o provide full and fair disclosure of the character of securities sold").

[27] For these sorts of arguments, see e.g. John Cochrane, "Don't Let Financial Regulators Dream Up Climate Solutions", *City Journal* (24 March 2021), online: <city-journal.org/dont-let-financial-regulators-dream-up-climate-solutions?wallit_nosession=1>.

increasing appetite for therapeutic disclosure is a political climate in which democratic change is hard to achieve, making action undertaken by regulatory fiat an appealing substitute.[28]

The move to therapeutic disclosure has another cause, and that is the way it fits within the foundational assumptions of the modern corporate governance project. Whereas corporate law historically and doctrinally concerns itself with supporting *ex ante* corporate governance bargains, modern public market reforms are preoccupied with securing *ex post* welfare outcomes.[29] If we look at the central debate today in corporate governance—shareholder versus stakeholder conceptions of corporate purpose—we can see that they actually share this distinctively modern assumption. Therapeutic disclosure's substantive nature would have seemed completely out of place forty years ago, but it now fits within this relatively modern perspective.

For these reasons, calls for ever more therapeutic disclosure are at a peak.[30] In Canada, Ontario's Capital Markets

---

28 See Matthew A Edwards, "The FTC and the New Paternalism" (2008) 60:2 Admin L Rev 323 (stating disclosure laws "are more politically feasible than other forms of regulation" at 335); Roland Benabou & Jean Tirole, "Individual and Corporate Social Responsibility", (2010) 77:305 Economica 1; Stephen M Bainbridge, "Revitalizing SEC Rule 14a-8's Ordinary Business Exemption: Preventing Shareholder Micromanagement by Proposal" (2016) 85:2 Fordham L Rev 705 (discussing, for example, the use of shareholder proposal to restrict the supply of guns by Walmart in a context in which meaningful law reform in this area is impossible).

29 See Bryce C Tingle, "Returning Markets to the Centre of Corporate Law" [forthcoming in J Corp L (2022)] [Tingle, "Returning Markets"].

30 For descriptions of the evolution and growth of environmental and social disclosure, see Daniel Cash, "Can Regulatory Intervention Save the Sustainability Rating Industry?" (2021) 42:1 Bus L Rev 13 (stating "[t]he World Business Council for Sustainable Development stated in 2018 that there were 211 reporting provisions in the United States regarding [non-financial information]" at 22); Stewart, *supra* note 18 at 3–5, 16–21 (summarizing current initiatives to require additional disclosure around climate); Joseph Taylor, Joseph Vithayathil & Dobin Yim, "Are Corporate Social Responsibility (CSR) Initiatives such as Sustainable Development and Environmental Policies Value Enhancing or Window Dressing?" (2018) 25:5 Corp Soc Responsibility & Envtl Mgmt 971; Amir Amel-Zadeh & George Serafeim, "Why and How Investors Use ESG Information: Evidence from a

Modernization Task Force recently proposed that companies start providing generalized social and environmental disclosure.[31] In response, a letter prepared by a Canadian corporate law firm and signed by a dozen prominent Canadian companies pointed out that Canadian securities laws already require issuers to disclose environmental and social information if it is "material".[32] Indeed, multiple CSA Staff Notices have been published on this topic in recent years.[33] "Materiality" in Canada's Securities Acts is tied to

Global Survey" (2018) 74:3 Financial Analysts J 87 at 87; Ioannis Ioannou & George Serafeim, "The Consequences of Mandatory Corporate Sustainability Reporting" (1 May 2017) [unpublished], online: *SSRN* <ssrn.com/abstract=1799589> at 6–8; Aaron A Dhir, "Shadows and Light: Addressing Information Asymmetries Through Enhanced Social Disclosure in Canadian Securities Law" (2009) 47:3 Can Bus LJ 435 at 448–59 [Dhir, "Shadows and Light"].

31 See Ontario's Capital Markets Modernization Taskforce, "Capital Markets Modernization Taskforce: Final Report" (January 2021) at 69–71, online (pdf): *Ontario* <files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22.pdf> [Modernization Taskforce].

32 See Shawn McCarthy, "Canadian Corporations Push Back Against Internationally Aligned-Climate Reporting", *Corporate Knights* (19 January 2021), online: <corporateknights.com/channels/climate-and-carbon/canadian-corporations-push-back-against-internationally-aligned-climate-reporting-16110600>; Letter from Power Corporation of Canada to Capital Markets Modernization Taskforce, "RE: Consultation—Modernizing Ontario's Capital Markets" (4 September 2020), online: *Power Corporation of Canada* <powercorporation.com/en/governance/public-submissions/#september-4-2020-modernizing-ontarios-capital-markets>. See also Dhir, "Shadows and Light", *supra* note 30 (noting the ways existing, largely traditional securities regulation in Canada already requires disclosure of material social and environmental information). For similar arguments in the US context, see Center for Capital Markets, "Essential Information: Modernizing Our Corporate Disclosure System" (Winter 2017), online (pdf): *Center for Capital Markets* <centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information_Materiality-Report-W_FINAL.pdf?x48633> (noting "[a]n investor that bases its voting and investment decisions on promoting social or political goals is not a "reasonable" investor when it comes to what materiality means under the federal securities laws" at 3–4).

33 See *CSA Staff Notice 51-358: Reporting of Climate Change-related Risks* (1 August 2019), online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf> [*CSA Staff Notice 51-358*]; *CSA Staff Notice 51-354: Report on Climate change-related Disclosure Project* (5 April 2018), online (pdf):

the value and the price of an issuer's securities.[34] Non-material information is, by definition, information that does not impact investors' calculations of risk and future cash flows. The most likely purpose, therefore, for requiring additional disclosure that is, by definition, not material, is that it will have some therapeutic effect on the management that prepares and releases the disclosure.

This objective is made explicit in the high-profile report issued in February 2021 by Peter Dey and Sarah Kaplan, *360° Governance: Where are the Directors in a World in Crisis?*[35] Their report recommends the adoption of a comply or explain regime on environmental and social matters and endorses a range of non-financial reporting standards.[36] The report is clear in stating one of the main audiences for this reporting are the corporate managers themselves:

> the ultimate purpose of reporting is not just compliance . . . . Instead, a good reporting process should be part of informed strategic decision making, where the processes for understanding stakeholder interests and assessing metrics of performance can highlight previously unanticipated risks or bring attention to innovative new possibilities for growth.[37]

The federal government is an enthusiastic supporter of therapeutic disclosure. In relation to climate change, the Large Employer Emergency Financing Facility (LEEF), introduced as an emergency measure to assist large employers adversely impacted

---

Ontario Securities Commission <osc.ca/sites/default/files/pdfs/irps/csa_20180405_climate-change-related-disclosure-project.pdf> [*CSA Staff Notice 51-354*]. See also *OSC Staff Notice 51-716—Environmental Reporting* (2008) 31 OSCB 2223; ASC, "Continuous Disclosure Review Program 2007 Report" (February 2008), online (pdf): *Alberta Securities Commission* <albertasecurities.com/-/media/ASC-Documents-part-1/Publications/2007-Continuous-Disclosure-Review-Program-Report.ashx?la=en&hash=CAC233A25646410FE7CCC0BBED7F691B>.

[34] See *Securities Act*, *supra* note 23, s 1(1).

[35] *Supra* note 14

[36] See *ibid* at 28.

[37] *Ibid* at 27.

by the COVID-19 pandemic, carries with it an entirely unconnected obligation to provide a climate change financial disclosure report in conformity with the Financial Stability Board's Taskforce on Climate-related Financial Disclosure.[38] This organization prominently identifies the "benefits of better disclosure" as helping managers "more effectively evaluate climate-related risks to your company, its suppliers, and competitors", as well as guiding internal corporate capital allocation and strategic planning.[39] Federal Finance Minister Morneau suggested the LEEF climate reports are a way to "accelerate the process" of decarbonization in the firms applying to the programme.[40]

In the United States, the acting chair of the SEC recently supported initiatives to create an environmental and social reporting framework with the observation that various capital markets participants, including the issuers themselves, have "embraced sustainability factors and metrics as significant drivers in decision making, capital allocation, and pricing."[41] The SEC's request for comment that followed her remarks included such indicia of therapeutic disclosure as reporting on how the directors

---

[38] See "Large Employer Emergency Financing Facility: Frequently Asked Questions" (10 July 2020), online: *Canada Development Investment Corporation* <cdev.gc.ca/leeff-faq/>. See also the Department of Finance's plans to create a Sustainable Finance Action Council to make recommendations about enhanced environmental disclosure: "Sustainable Finance" (last modified 12 October 2021), online: *Government of Canada* <canada.ca/en/department-finance/programs/financial-sector-policy/sustainable-finance.html>.

[39] "Climate Change Presents Financial Risk to the Global Economy" (2021), online: *Task Force on Climate-related Financial Disclosures* <fsb-tcfd.org>.

[40] Alex Ballingall, "Justin Trudeau says Companies Will Need to Show They're 'Thinking About' Climate Change to get Government Loans. Here's What that Means", *Toronto Star* (12 May 2020), online: <thestar.com/politics/federal/2020/05/12/justin-trudeau-says-companies-will-need-to-show-theyre-thinking-about-climate-change-to-get-government-loans-heres-what-that-means.html>.

[41] Allison Herren Lee, "A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC" (15 March 2021), online: *US Securities and Exchange Commission* <sec.gov/news/speech/lee-climate-change>.

provide governance and oversight of climate-related issues, providing evidence of the connection between executive compensation and climate change risks, as well as suggesting the entire regime might consist of a "comply or explain" disclosure framework.[42] "Comply or explain" regulatory regimes almost always have a therapeutic element, as they are designed to apply gentle pressure on companies that choose not to comply.

The European Securities and Markets Authority (ESMA) recently discussed proposals for a European sustainability-inflected disclosure regime and repeatedly touched upon the therapeutic aspect of this disclosure. For example, discussing corporate disclosure obligations, ESMA notes that it wanted to "ensure" disclosure of social and environmental matters, "not only relates to the information an issuer *discloses* but also to the way it actually *makes its decisions*".[43] Like the SEC, ESMA also explains that while it is, of course, opposed to "mandatory" links between executive remuneration and non-financial performance, it favours requiring companies to disclose information about this link in the hopes this will "improve market practice."[44]

This regulatory activity is supported by a great deal of current academic writing assuming at least one important way desired outcomes will be achieved is through disclosure's therapeutic impact.[45] A representative claim states: "the pressure to disclose

---

42 See Allison Herren Lee, "Public Input Welcomed on Climate Change Disclosures" (15 March 2021), online: *US Securities and Exchange Commission* <sec.gov/news/public-statement/lee-climate-change-disclosures>.

43 "Response to Public Consultation: EC Consultation on a Renewed Sustainable Finance Strategy" (15 July 2020) at 36, online (pdf): *European Securities and Markets Authority* <esma.europa.eu/sites/default/files/library/esma30-22-821_response_to_ec_consultation_on_a_renewed_sustainable_finance_strategy.pdf> [emphasis in original].

44 *Ibid* at 32. See also Financial Conduct Authority, "Climate Change and Green Finance: Summary of Responses and Next Steps" (October 2019) online (pdf): *FCA* <fca.org.uk/publication/feedback/fs19-6.pdf> (asserting it will "further consider the role of firm's culture . . . in ensuring that firms appropriately take action to manage the risks of climate change and support the transition more widely" at 26).

45 See e.g. Janis P Sarra & Cynthia Williams, "Time to Act: Response to Questions Posed by the Expert Panel on Sustainable Finance on Fiduciary Obligation

emissions can lead to improved carbon management and, consequently, to reduced energy consumption and energy costs".[46] Indeed, notwithstanding a long tradition of corporate law skepticism about the utility of mandatory disclosure, "climate change and sustainability disclosure has especially gripped the imagination of legal scholars."[47] A recent law review paper even

and Effective Climate-related Financial Disclosures" (26 January 2019), online (pdf): *Allard Faculty of Law* <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1480&context=fac_pubs> (stating ESG disclosure "will encourage directors' and officers' best thinking in respect of material ESG risks and opportunities" at 68); Andrew Johnston, "Climate-Related Financial Disclosures: What Next for Environmental Sustainability" (2018) University of Oslo Faculty of Law Legal Studies Research Paper Series No 2018-02, online: *SSRN* <ssrn.com/abstract=3122259> at 2 (influencing corporate behaviour an indirect effect of proposed disclosure). For academic advocacy of ESG disclosure regimes generally, see e.g. Rick A Fleming & Alexandra M Ledbetter, "Making Mandatory Sustainability Disclosure a Reality" (2020) 50:8 Environmental L Reporter 10647; Jill E Fisch, "Making Sustainability Disclosure Sustainable" (2019) 107:4 Geo LJ 923 (proposing a sustainability discussion and analysis section in firm annual reports); Lipton, *supra* note 17; Brett McDonnell et al, "Green Boardrooms" (2021) 53:2 Conn L Rev at 72–75; Daniel C Esty & Quentin Karpilow, "Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation" (2019) 36:2 Yale J Reg 625; Dhir, "Shadows and Light", *supra* note 30 (discussing the possibility of mandatory social disclosure); Virginia Harper Ho, "Nonfinancial Risk Disclosure and the Cost of Private Ordering" (2018) 55:3 Am Bus LJ 407 (calling for the US SEC to consider non-financial disclosure on a comply-or-explain basis); Jay Cullen, Jukka Mähönen & Heidi Rapp Nilsen, "Financing the Transition to Sustainability: SMART Reform Proposals" (2020) University of Oslo Faculty of Law Legal Studies Research Paper Series No 2020-10 at 76, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3594433> (calling for the expansion of Europe's sustainability disclosures to all market participants).

46 Rüdiger Hahn, Daniel Reimsbach & Frank Schiemann, "Organizations, Climate Change, and Transparency: Reviewing the Literature on Carbon Disclosure" (2015) 28:1 Organization & Environment 80 at 81.

47 Stewart, *supra* note 18 at 34–35. Skeptics argue investors discount their valuation of cash flows to account for undisclosed risks, which both provides incentives for voluntary corporate disclosure and ensures investor returns are preserved. See Frank H Easterbrook & Daniel R Fischel, "Mandatory Disclosure and the Protection of Investors" (1984) 70:4 Va L Rev 669; Stephen J Choi & Andrew T Guzman, "Portable Reciprocity: Rethinking the International Reach of Securities Regulation" (1998) 71:5 S Cal L Rev 903 at

puts disclosure and its therapeutic effects at the very centre of corporate boards' work.[48] "The board's treatment of the full range of mandatory and discretionary corporate communications . . . [including] ESG reports and reports on the firm's philanthropic and political activities—shapes the firm's organizational identity and culture, hence its prospects."[49]

II. THE PROBLEMS WITH THERAPEUTIC DISCLOSURE

In practice, calls for enhanced disclosure seldom rely solely on its therapeutic effects. Instead, the claim that there will be a therapeutic impact is mingled with very different claims about the usefulness of the disclosure to third parties like shareholders, consumers and regulators.[50] This imprecision results in

---

925 (discussing the ways even differences in legal regimes are priced into share values); Merritt Fox et al, "Law, Share Price Accuracy, and Economic Performance: The New Evidence" (2003) 102:3 Mich L Rev 331 (finding that there is "broad consensus that the effect of [future] disclosure practices on the expected future cash flow to [shareholders] is reflected in the price" at 336, n 13); Merritt B Fox, Lawrence R Glosten & Gabriel V Rauterberg, "Informed Trading and its Regulation" (2018) 43:2 J Corp L 817 at 841 (discussing the way share prices are discounted to account for widened spreads resulting from information asymmetry so that less informed shareholders are neither helped nor hurt); Kevin S Haeberle, "Information Asymmetry and the Protection of Ordinary Investors" (2019) 53:1 UC Davis L Rev 145 (showing that information asymmetries actually disproportionately benefit the ordinary buy-and-hold investors).

[48] See Faith Stevelman & Sarah C Haan, "Boards in Information Governance" (2020) 23:1 U Pa J Bus L 179 (stating "*[t]he board is not merely monitoring the value-creating work of others* to diminish agency costs. *Rather, it is itself creating value* by participating in identifying the firm's key sources of competitive advantage, including its ESG capabilities" at 184 [emphasis in original]).

[49] *Ibid* at 186.

[50] See Dey & Kaplan, *supra* note 14; Virginia Harper Ho, "Non-Financial Reporting & Corporate Governance: Explaining American Divergence & It's Implications for Disclosure Reform" (2020) 10:2 Accounting Economics & L Convivium 20180032 (noting "disclosure is widely recognized as a soft form of regulation, incentivizing changes in corporate behavior" at 12); David Katz & Laura A McIntosh, "SEC Regulation of ESG Disclosures" (28 May 2021), online: *Harvard Law School Forum on Corporate Governance*

surprisingly little attention being paid to the supposed channels of therapeutic influence. When these are isolated and investigated, however, there seems to be many reasons they will not operate in the ways disclosure advocates hope.

A. WILL MANAGERS LEARN SOMETHING FROM THERAPEUTIC DISCLOSURE?

The core of therapeutic disclosure is the assumption that if, for example, "disclosure requirements force firms—particularly at the board level—to *think* about climate change, they will be more likely to *act* in ways that support and accelerate the global transition to a low-carbon economy."[51] Both the "consciousness-raising" and the "norm communication" mechanisms for accomplishing this change in behaviour depend on the assumption that corporate managers either do not (in the former case) understand or appreciate what their business is doing in a particular area, or do not (in the latter case) really understand the relevant societal norms.[52]

To anyone who has spent time with corporate executives and board members, the idea that they do not understand either a major part of their business or how it interacts with widely held societal beliefs seems extremely unlikely. The kinds of disclosure topics we are considering are not obscure: international military conflicts, public corruption, wealth inequality, and climate change. The topics frequently proposed for enhanced disclosure are, in fact, precisely the topics that dominate the news and which represent the points of maximum reputational or legal threat to the corporation. Is there a director of Exxon not clear that her firm is deeply embedded in the carbon economy and that there is a groundswell of concern about global warming? Is there a director of the Bank of America unaware at the time he is approving the

---

<corpgov.law.harvard.edu/2021/05/28/sec-regulation-of-esg-disclosures/> (noting the alternative rationales for ESG disclosure regulation: "driving changes in corporate behavior" and "help[ing] investors"). See also Esty & Karpilow, *supra* note 45.

[51] Stewart, *supra* note 18 at 24 [emphasis in original].

[52] See *Securities Act*, *supra* note 23.

CEO's new compensation arrangements, that a large percentage of the public, including the bank's shareholders, are scandalized by the modern income inequality reflected in executive pay?

A perfect example of this dynamic is found in the reception of the federal government's LEEF disclosure programme. While the intent of the required disclosure is to explain "how corporate governance, strategies, policies and practices will help manage climate-related risks and opportunities",[53] oil producers pronounced themselves "satisfied" with the programme because they "mostly do this [disclose the information] anyway."[54] LEEF disclosure is not going to tell oil company directors anything they didn't already know about either their companies or the normative environment in which they are operating.

In fact, it is hard to escape the feeling that corporate managers are generally better informed about possible regulatory interventions or the impact of new technologies on their business models than much of the outside world. To take just one example, a group of scholars looked at what types of companies produce green innovations.[55] It turns out oil and gas firms of the type "explicitly excluded from ESG funds investment" and "the targets of many divestiture campaigns" produce more, and better quality, green patents.[56] They are also more likely to produce what the researchers call "blockbuster" green patents than firms supported by environmental investors and activists.[57] It is easy to see why this would be the case. Energy companies are considerably more

---

53 Innovation, Science and Economic Development Canada, "Large Employer Emergency Financing Facility Factsheet" (6 October 2020), online: *Canada Development Investment Corporation* <cdev.gc.ca/leeff-factsheet/>.

54 Janet French, "Alberta Government, Oil Producers Satisfied with Federal Bridge Loan Program for Big Business" *CBC News* (11 May 2020), online: <cbc.ca/news/canada/edmonton/alberta-satisfied-loan-assistance-1.5565386>.

55 See Lauren Cohen, Umit G Gurun & Quoc H Nguyen, "The ESG-Innovation Disconnect: Evidence from Green Patenting" (2020) NBER Working Paper No 27990, online: *SSRN* <ssrn.com/abstract=3718902>.

56 *Ibid* at 5.

57 *Ibid* at 2.

familiar than outsiders with the technical problems, as well as the regulatory and market rewards for solving them. It seems unsurprising that the targets of therapeutic disclosure, corporate managers, are in a better position to make productive R&D investment decisions than the rest of society. However, this is the opposite of the picture assumed by therapeutic disclosure, where managers are assumed to be in need of education about the "disagreeable realities" of their businesses.[58]

B. CAN THERAPEUTIC DISCLOSURE PRODUCE SHAME IN MANAGERS?

The third channel through which therapeutic disclosure is expected to operate is "shame". This is neither a claim that directors are learning something through the disclosure process, nor is it a claim that there will be third party consequences (such as a consumer boycott) as a result of the disclosure. Rather, it is reminiscent of Adam Smith's famous observation that "man naturally desires, not only to be loved, but to be lovely; or to be that thing which is the natural and proper object of love."[59] This is the point Louis Loss is making by comparing therapeutic disclosure to undressing in public.[60] Such a person already knows how their body looks, and they already know the standards of physical beauty prevalent in society. The reason for behavioural change is the shame that attends disclosure of a figure far removed from the ideal.

The initially plausible claim that shame is capable of changing the investment decisions of corporate managers breaks down if we look at the ways corporations differ from individuals. The most obvious difference is that corporations depend on assembling a productive coalition of many constituencies in order to accomplish

[58] Lowenstein, *supra* note 1 at 1342.

[59] Adam Smith, *The Theory of Moral Sentiments* (1759), online: *Marxists* <marxists.org/reference/archive/smith-adam/works/moral/part03/part3a.htm>.

[60] *Supra* note 11.

their business activities.[61] At a minimum, corporations require employees, suppliers, business partners, customers, executives, creditors, and shareholders. At different stages of their business, the firm may also require the support of broader local communities, regulators, and government. Actions orthogonal to the goals of a therapeutic disclosure regime will nearly always benefit at least some members of the corporate constituency.

Take, for example, an oil and gas company operating in Northern Alberta's heavy oil country. How likely is it that its managers will feel shame arising from the disclosure of their business activities? Undoubtedly, they would feel shame if all they cared about was how they were viewed by strangers in Eastern Canada, but this is not their situation. The investments the firm is making are allowing the managers to continue to employ their workers at wages significantly higher than these workers could make in any other industry.[62] The firm's heavy oil investments are supporting various communities in Northern Alberta, including First Nations communities.[63] The firm's activities are also aimed at

[61] See Margret M Blair & Lynn A Stout, "Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law" (2001) 149:6 U Pa L Rev 1735; Ronald H Coase, "The Nature of the Firm: Origin" (1988) 4:1 JL Econ & Org 3.

[62] Daphne G Taras, "Managerial Intentions and Wage Determination in the Canadian Petroleum Industry" (1997) 36:2 Industrial Relations 178 ("[t]he high wages might be explained by the nature of the petroleum industry." at 181); Bozorgmehr Sharafedin, "Third of Oil and Gas Workers Faced Pay Cut in 2020 Due to Pandemic, Survey Shows", *Reuters* (12 January 2021), online: <reuters.com/business/energy/third-oil-gas-workers-faced-pay-cut-2020-due-pandemic-survey-shows-2021-01-12/> ("[o]il and gas workers are still among the highest paid in the world").

[63] See e.g. Mark Milke & Lennie Kaplan, "Canada's Oil Sands and Local First Nations: A Snapshot" (March 2020), online (pdf): *Canadian Energy Centre* <canadianenergycentre.ca/wp-content/uploads/2020/03/CEC-Research-Canadas-oil-sands-and-local-First-Nations-V12-Mar-6-2020.pdf>; Rod Nickel & Nia Williams, "Canada's First Nations Seek Bigger Stakes, Profits from Oil Sector", *Reuters* (1 March 2018), online: <reuters.com/article/us-canada-oil-aboriginal-idUSKCN1GE0IT>; Rachel Ward & Tony Seskus, "Cenovus Pledges $50M for New Homes in Indigenous Communities Near Alberta Oilsands Operations" *CBC News* (30 January 2020), online: <cbc.ca/news/canada/calgary/cenovus-indigenous-funding-investment-northern-alberta-calgary-oilsands-1.5445820>.

generating the cash flows depended upon by the shareholders, creditors, and various levels of taxing authorities.[64] Finally, the products the company sells are sought after as essential (for now anyways) to the lifestyles enjoyed by their fellow citizens.[65] All of these constituencies are much closer to the corporate managers' day-to-day lives, and they are much more vulnerable to the managers' decisions, than disapproving observers on the other side of the country.[66] Oil company executives are more likely to feel pride about their successful oil business than shame, and disclosure isn't going to change this.

Another problem with the theory that disclosure regimes will lead to shame is that the impact of corporate activities is much harder to evaluate than whether you can see someone's abs. Part of the problem is the volume of disclosure now being generated by firms. Corporations are required to produce so much information that virtually no one familiar with the materials generated by public companies actually believes that disclosure rules are accomplishing their goals.[67] "The average number of pages in

[64] Lennie Kaplan & Mark Milke, "$672 Billion: The Energy Sector's Revenues to Canadian Governments 2000–2018" (8 November 2020), online: *Canadian Energy Centre* <canadianenergycentre.ca/672-billion-the-energy-sectors-revenues-to-canadian-governments-2000-2018/>; Natural Resources Canada, "Energy and the Economy" (6 October 2020), online: *Government of Canada* <energy-information.canada.ca/en/subjects/energy-and-economy>; Don Braid, "Braid: Alberta Oil Revenue Stages Another Fiscal Rescue. What Would Replace It?", *Calgary Herald* (31 August 2021), online: <calgaryherald.com/opinion/columnists/braid-alberta-oil-revenue-stages-another-fiscal-rescue-what-would-replace-it>.

[65] See Samantha Gross, "Why Are Fossil Fuels So Hard to Quit?" (June 2020), online: *Brookings* <brookings.edu/essay/why-are-fossil-fuels-so-hard-to-quit/>; IEA, "World Energy Outlook 2020" (October 2020), online: *IEA* <iea.org/reports/world-energy-outlook-2020> (showing continuing major role for fossil fuels even in an aggressive push for net-zero by 2050).

[66] See Eugene Stoltes, *Why They Do It: Inside the Minds of White Collar Criminals* (New York: PublicAffairs, 2016) (showing a similar dynamic in the context of white collar crime: prioritizing the welfare of constituencies visible to corporate managers at the expense of unknown third parties).

[67] See e.g. Jeffrey N Gordon, "The Rise of Independent Directors in the United States 1950–2005: Of Shareholder Value and Stock Market Prices" (2007) 59:6 Stan L Rev 1465; Henry T C Hu, "Illiteracy and Intervention: Wholesale

standard disclosure documents has increased exponentially in the last several decades because of disclosure regulation. Documents are often too long and convoluted to be of much use to the ordinary investor."[68] Almost ten years ago, professor Black trenchantly observed that in light of the length and complexity of current corporate disclosure, reading it "would be a waste of investors' time."[69] While most research in the area focuses on disclosure's utility to investors, there is no reason to think managers are not similarly overwhelmed by its volume. This is particularly true of information that is not "material" to the corporation (as that term is defined in securities regulations). Indeed, empirical studies have found the informational quality of

---

Derivatives, Retail Mutual Funds, and the Matter of Asset Class" (1996) 84:7 Geo LJ 2319 at 2376–77 (reviewing data showing most people don't read prospectuses or understand them sufficiently to make good decisions); Steven L Schwarcz, "Rethinking the Disclosure Paradigm in a World of Complexity" (2004) 2004:1 U Ill L Rev 1 (securities law creates a dilemma for complex transactions—either provide an oversimplified summary or provide information that is too detailed and complicated for investors); Tamar Frankel, "The Failure of Investor Protection by Disclosure" (2013) 81:2 U Cin L Rev 421. Securities regulators in Canada have indicated they believe the current disclosure obligations may be too extensive. See e.g. Canadian Securities Administrators, Staff Notice 51-353, "Update on CSA Consultation Paper 51-404: Considerations for Reducing Regulatory Burden for Non-Investment Fund Reporting Issuers" (27 March 2018), online (pdf): <osc.ca/sites/default/files/pdfs/irps/csa_20180327_51-353_fund-reporting-issuers.pdf>; Ontario Securities Commission, Staff Notice 11-784, "Burden Reduction" (24 January 2019), online (pdf): <osc.ca/sites/default/files/pdfs/irps/sn_20190114_11-784_burden-reduction.pdf>. Securities regulators in the United States have expressed similar concerns. See US, Securities and Exchange Commission, "Disclosure to Investors: A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts: The Wheat Report" (New York: Commerce Clearhousing, 1969) (concluding prospectuses are too long or complex and cannot be easily understood); US, Securities and Exchange Commission, "Report of the Task Force on Disclosure Simplification" (5 March 1996), online: <sec.gov/news/studies/smpl.htm> (making a number of recommendations to simplify disclosure).

[68] Ripken, "Paternalism", *supra* note 25 at 46 [citations omitted].

[69] Barbara Black, "Behavioral Economics and Investor Protection: Reasonable Investors, Efficient Markets" (2013) 44:5 Loy U Chicago LJ 1493 at 1506.

sustainability reporting to be low.[70] Notably, they tend to be prepared by specialized staff who do not occupy senior positions or have significant authority over the actual business operations of the company.[71]

Even more concerning is that empirical research has convincingly demonstrated that the quality of people's decisions is *inversely* related to the quantity of information available to them.[72] In other words, the massive expansion of corporate disclosure is actually making markets less efficient.[73] There is no reason to believe the vast increase in social and environmental disclosure contemplated by reformers will somehow prove to be immune

70 Jean-Noel Chauvey et al, "The Normativity and Legitimacy of CSR Disclosure: Evidence from France" (2015) 130:4 J Bus Ethics 789; Carlos Larringa et al, "Accountability and Accounting Regulation: The Case of the Spanish Environmental Disclosure Standard" (2002) 11:4 European Accounting Rev 723.

71 See McDonnell et al, *supra* note 45 (under the current voluntary system in the United States, "the collection and processing of [environmental] information may be done within a sustainability office that is isolated from other operating divisions" at 35); Robert G Eccles et al, "The Board's Role in Sustainability" (2020), online: *Harvard Business Review* <hbr.org/2020/09/the-boards-role-in-sustainability> (reporting that more than half of surveyed directors in 2019 thought boards were "spending *too much* time on sustainability" [emphasis in original]).

72 See Omri Ben-Shahar & Carl E Schneider, "More than You Wanted to Know: The Failure of Mandated Disclosure" (Princeton: Princeton University Press, 2014) [Ben-Shahar & Schneider, "More than You Wanted"]; Paredes, *supra* note 1; Ripken, "Disclosure Antidote", *supra* note 26.

73 See Ravindranath Madhavan & John E Prescott, "Market Value Impact of Joint Ventures: The Effect of Industry Information-Processing Load" (1995) 38:3 Academy Management J 900 (measuring the market value impact of announcements as a function of the quantity of information provided); Morris H Stocks & Adrian Harrell, "The Impact of an Increase in Accounting Information Level on the Judgment Quality of Individuals and Groups" (1995) 20:7/8 Accounting, Organizations & Society 685 (summarizing studies on the adverse impact of too much information); Steven M Davidoff & Claire A Hill, "Limits of Disclosure" (2013) 36:2 Seattle U L Rev 599 at 609–623 (noting the problem in the 2008 financial crisis was not insufficient disclosure of risks, but an inability of investors to understand and price those risks); Paredes, *supra* note 1 at 440–443 (summarizing an extensive literature on information overload in the context of financial markets).

from a phenomenon visible wherever disclosure is required by our society.[74] The addition of non-material environmental disclosure is at least as likely to obscure, as to reveal, corporate performance in this area.

Another difficulty is that the heterogeneous social outcomes produced by a typical corporation are incommensurable. That is, there is no way to measure, compare, reconcile, or characterize the corporation's outputs in areas as disparate as its financial performance, health and safety record, environmental achievements and failures, charitable contributions, treatment of employees, or social impacts.[75] How should a manager feel about a corporate record that includes low levels of carbon intensity, but very high levels of diversity and social investment? What about a corporation that pays above market wages to its employees or supports an entire community, but has a below-average record of environmental incidents? There are 17 different sustainable development goals for corporations promoted by the United Nations and 33 topics that form part of the Global Reporting Initiative; these are just two of many possible disclosure schemes.[76] Some companies report that they are asked to fill out

---

74 See Jacob Jacoby, "Is it Rational to Assume Consumer Rationality?: Some Consumer Psychological Perspectives on Rational Choice Theory" (2000) 6:1 Roger Williams U L Rev 81 (at some point "acquiring more information leads consumers to make poorer decisions" at 133); Ben-Shahar and Carl Schneider, "The Failure of Mandated Disclosure" (2011) 159:3 U Pa L Rev 647 ("[m]andated disclosure is not doomed to fail, but it rarely succeeds" at 679) [Ben-Shahar & Schneider, "Failure of Mandated Disclosure"]; Ben-Shahar & Schneider, "More than You Wanted", *supra* note 72("[m]uch that is disclosed people sensibly ignore . . . . The improvement [from disclosure] is too improbable and imperceptible to justify time and effort" at 12 [emphasis removed]).

75 For a popular exploration of the problem of incommensurability, see Malcom Gladwell, "The Order of Things: What College Rankings Really Tell Us", *The New Yorker* (6 February 2011) online: <newyorker.com/magazine/2011/02/14/the-order-of-things>.

76 "Sustainable Development Goals", online: *United Nations* <un.org/sustainabledevelopment/>; GRI Standards, "Consolidated Set of GRI Sustainability Reporting Standards 2020" (19 May 2020), online: *Global Reporting Initiative* <globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/>. There are at least six ESG disclosure standard-

UBC Law Review, Vol. 55 [2023], Iss. 3, Art. 5

up to 250 different surveys to describe how they include ESG factors into disclosure and decision making.[77] A company's relative ranking measured against these goals will never produce the kind of clear-cut conclusion needed to generate the shame that might produce significant change.

Unlike the financial metrics that do, in fact, drive changes in corporate behaviour, most reporting against social goals are impossible to quantify, or are too complex to quantify.[78] Attempts by rating agencies to give companies a clear, comparable "score" against these metrics have so far repeatedly proven to have little validity.[79] A representative recent study looking at the Corporate

---

setters besides the UN and Global Reporting Initiative: the FSB Task Force on Climate-Related Financial Disclosures, Sustainability Accounting Standards Board, CDP (formerly Carbon Disclosure Project), Climate Disclosure Standards Board, International Accounting Standards Board, International Integrated Reporting Council, and International Organization for Standardization. In addition to these firms, some large institutional investors, proxy advisory firms, and advocacy organizations have their own preferred disclosure schema (e.g. Edison Electric Institute Sustainable Reporting Initiative, MSCI ESG Rating, Sustainalytics, Canadian Coalition for Good Governance, etc.). For a detailed review of these various standard setters, see US Chamber Foundation, "Corporate Sustainability Reporting: Past, Present, Future" (November 2018), online (pdf): *US Chambers of Commerce Foundation* <uschamberfoundation.org/sites/default/files/Corporate%20 Sustainability%20Reporting%20Past%20Present%20Future.pdf>.

[77] See US Chamber Foundation, *supra* note 76 at 29.

[78] See Pierre Barat & Vincent Helrich, "The 'Trilemma' of Non-Financial Reporting and Its Pitfalls" (2019) 23:2 J Management & Governance 485.

[79] See e.g. Gregor Dorfleitner, Gerhard Halbritter & Mai Nguyen, "Measuring the Level and Risk of Corporate Responsibility—An Empirical Comparison of Different ESG Rating Approaches" (2015) 16:7 J Asset Management 450 (finding "hardly any correlation" between ratings of firms or appraisals of their ESG risk); Lies Bouten et al, "CSR Performance Proxies in Large-Sample Studies: 'Umbrella Advocates', Construct Clarity and the 'Validity Police'" (2017) [unpublished], online: *SSRN* <papers.ssrn.com/sol3/papers.cfm ?abstract_id=3107182> (finding the results of various papers are a function of the choice of ESG ratings provider and observing that the environmental scores of two reating agencies are *negatively* related to one another). See generally Bryce C Tingle, "Riding to the Rescue" [forthcoming] (discussing many studies finding low correlation between ESG ratings, as well as many

Social Responsibility (CSR) scores provided by six major social rating agencies found that they had very low correlations with one another.[80] The researchers concluded the problems arise because the raters "not only do not agree on one definition of responsibility (their 'theorizations' of CSR differ), but also that raters may measure the same construct in different ways (the 'commensurability' of CSR is low)."[81]

Once again, simply adding additional levels of disclosure only further complicates the picture. Another study found that environmental scores were not related to greenhouse gas emission intensity, but instead to a function of the resources put into disclosure.[82] "When provocatively formulated, we could propose that it may be better for companies to invest in sustainability reporting, rather than in sustainability activities or impact."[83] It seems unlikely that, for most corporate managers, disclosure will ever present a sufficiently clear enough indictment of their firms to be therapeutic in the ways hoped for by reformers.

In fact, few outsiders read the complex disclosure provided by public companies, or are equipped to call it into question. On this latter problem, researchers who have looked into the market effect of the "explanations" provided by companies in "comply or explain" disclosure regimes generally find little evidence of market

studies finding ESG ratings do not accurately predict future corporate environmental and social performance).

80 See Aaron K Chatterji et al, "Do Ratings of Firms Converge? Implications for Managers, Investors and Strategy Researchers" (2016) 37:8 Strategic Management J 1597.

81 *Ibid* at 1598.

82 See Samuel Drempetic, Christian Klein & Bernhard Zwergel, "The Influence of Firm Size on the ESG Score: Corporate Sustainability Ratings Under Review" (2020) 167:2 J Bus Ethics 333.

83 *Ibid* at 335. Many researchers find the identical phenomenon, that it is the quantity not the substance of reporting that drives ESG ratings. SeeAneesh Raghunandan & Shivaram Rajgopal, "Do ESG Funds Make Stakeholder Investments" (19 Nov 2021) [forthcoming Col Bus School Research Paper], online: *SSRN* <ssrn.com/abstract=3826357> at 3; Florencio Lopez-de-Silanes, Joseph A McChery & Paul C Pudschedl, "ESG Performance and Disclosure: A Cross-Country Analysis" (2020) 2020:1 Singapore J Legal Studies 217.

reaction to those explanations, suggesting "investors may ignore or not understand the content."[84]

To summarize, any disclosure that is claimed to be therapeutic is unlikely to produce a clear moral verdict on the corporation's operations, even in a particular area of its business. The good and bad is incommensurable, the sheer volume and complexity of current disclosure (voluntary and mandatory) is so great that much of what is really important is hidden, and corporations will work very hard to spin their social and environmental impacts.

C. IS THERAPEUTIC DISCLOSURE SUFFICIENTLY POWERFUL TO CHANGE CORPORATE BEHAVIOUR?

Assume that the argument so far is wrong, and that therapeutic disclosure is capable of impacting managerial behaviour through one or more of the channels we have discussed. It is still unlikely that anything meaningful will change. Voluntary social and environmental investments are difficult for the average firm because of the constraints imposed on them by competitive markets, and, to a much smaller degree, the influence of managerial self-interest.[85]

One of the most striking features of the advocacy around corporate social responsibility generally, and therapeutic disclosure specifically, is how little attention is paid to the fact corporations are embedded in competitive markets for their products and services.[86] The average non-financial American company in 2019 (the last full year without COVID-19) had profit margins of just 6.35% *before* deducting taxes and the cost of

---

[84] Stewart, *supra* note 18 at 13. For studies finding this lack of market reaction, see Sridhar Arcot, Valentina Bruno & Antoine Faure-Grimaud, "Corporate Governance in the UK: Is the comply or approach working?" (2010) 30:2 Intl Rev L & Econ 193; Yan Luo & Steven E Salterio, "Governance Quality in a 'Comply or Explain' Governance Disclosure Regime" (2014) 22:6 Corporate Governance Intl Rev 460.

[85] Bryce C Tingle, "Is Corporate Governance a Likely Solution to Social Problems" [forthcoming] [Tingle, "CSR"].

[86] *Ibid*.

capital.[87] Estimates of the total surplus generated by American businesses over several decades suggest they do not exceed 1.5% of all firm costs.[88] Recent research suggests that since 1926, about 96 percent of American publicly listed companies have failed to cover their cost of capital over that period.[89] This is largely in conformity with economic theory's prediction for competitive markets. Economic theory's prediction for competitive markets is that companies will not make anything above their costs, but in reality, not all industries are perfectly competitive and that produces surplus average returns for some firms.[90] Most firms have very little room to invest in ways that do not enhance their profitability.

The fundamental question for the vast majority of business leaders is not whether they will prioritize various corporate stakeholders over the interests of shareholders, but how to survive the relentless competition they face in the several markets that impact their firms. The US Bureau of Labor Statistics finds 75% of

---

87 See "Data Archives" (Jan 5, 2020), online: *Damodaran* <pages.stern.nyu.edu/~adamodar/New_Home_Page/dataarchived.html> ("Operating and Net Margins by Industry 1/20"). See also Eugene F Fama & Kenneth R French, "The Corporate Cost of Capital and the Return on Corporate Investment" (1999) 54:6 J Finance 1939 at 1940 (in the period between 1950 and 1996, the real cost of capital was found to be 5.95%).

88 See Michael J Alderson & Brian L Betker, "Additional Evidence on the Corporate Cost of Capital and the Return to Corporate Investment" (2009) 19:1/2 J Applied Finance 91 at 97 (between 1996 and 2005, non-technology companies were found to generate returns over their costs of 1.39%); Michael S Pagano, "The Relation Between the Cost of Capital and Economic Profit" (August 2007) [unpublished] online (pdf): <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.533.2436&rep=rep1&type=pdf> at 4 (it was estimated that from 1990–1997 the average corporate returns fell below their marginal costs and for the next 7 years barely broke even).

89 See Hendrik Bessembinder, "Do Stocks Outperform Treasury Bills?" (2018) 129:3 J Financial Economics 440.

90 See George J Stigler, "Perfect Competition, Historically Contemplated" (1957) 65:1 J Political Economics 1; Joseph M Ostroy, "The No-Surplus Condition as a Characteristic of Perfectly Competitive Equilibrium" in Andreu Mas-Colell, ed, *Noncooperative Approaches to the Theory of Perfect Competition*, (New York: Academic Press, 1982) 65; John C Wood, *Leon Walras: Critical Assessments*, Vol 2 (Milton Park, UK: Routledge, 1993) at 238.

all businesses fail in less than 15 years.[91] Even companies successful enough to go public have only a 63% chance of surviving the next five years.[92] Canada's problems with successful competition are such that in most high-tech industries, the country has failed to produce even a single large-scale company.[93] Given the commercial, technological, macroeconomic, and regulatory risks impacting the average business, most corporate leaders will be exceedingly careful about committing to investment programmes that do not contribute to the competitive advantage of the firm. This year might have been a good one for the company's business, but what about next year?

There is a huge literature on whether investments made by companies to achieve socially valuable outcomes confer competitive advantages.[94] There are some grounds to be skeptical in the case of therapeutic disclosure, as its utility depends on managers knowing less than outsiders about what will enhance the firm's competitive position. However, as we are assuming for the purpose of this section that managers in fact learn valuable strategic information from therapeutic disclosure, what might interfere with environmental and social investments that are in fact accretive to the firm's business?

---

91 "Table 7, Survival of Private Sector Establishments by Opening Year", online: *US Bureau of Labor Statistics* <bls.gov/bdm/us_age_naics_00_table7.txt>.

92 Vijay Govindarajan & Anup Srivastava, "Strategy When Creative Destruction Accelerates" (7 September 2016) Tuck School of Business Working Paper No 2836135. See also, Tingle, "CSR", *supra* note 85.

93 Benjamin Bergen, "Canada Has a Scale-up Problem, Not a Start-up Problem" (2017) [unpublished], online: *Centre for International Governance Innovation* <cigionline.org/articles/772anada-has-scale-problem-not-start-problem/>; Sean Silcoff & Iain Marlow, "Canada's Vanishing Tech Sector", *The Globe and Mail* (7 July 2012), online: <theglobeandmail.com/report-on-business/economy/canada-competes/canadas-vanishing-tech-sector/article4396596/>.

94 See Gunther Capelle-Blancard & Stéphanie Monjon, "Trends in the Literature on Socially Responsible Investment: Looking for the Keys Under the Lamppost" (2012) 21:3 Bus Ethics 239 ("[a] simple content analysis suggests that most of the papers on SRI focus on financial performance . . . . Maybe too much attention has been paid to this issue" at 239).

The first problem is that many of the social goals advocated by proponents of therapeutic disclosure do not provide competitive benefits in the near term.[95] The notion that short-term profits are regularly being missed by the individuals who know the business best would really strain credulity. For example, the economic benefits from lower carbon intensity will almost always be lower than the up-front costs and thus take many years to be realized.[96] Depending on the firm's cost of capital, this can make the discounted cash flow attributable to such investments negative. It is notable that the uncertainty (and thus "risk") surrounding the world's transition to a low-carbon economy are enormous, embracing yet-unclear technological change, regulatory activity, legislative reforms, and unpredictable changes in consumer behaviour. These risks must be reflected in the discount rate used to evaluate the proposed investment.

The second problem is that even if the net present value of the proposed investment is positive, it may still be lower than the firm's alternative investments. Take, for example, an oil company that finds its returns on an investment in wind power are positive, but less than the returns on developing a new oil field. If this

---

95 See e.g. Paul Cox, Stephen Brammer & Andrew Millington, "An Empirical Examination of Institutional Investor Preferences for Corporate Social Performance" (2004) 52:1 J Bus Ethics 27 ("[t]here is a broad consensus in the conceptual literature that many of the financial gains from improved social performance accrue in the long run" at 29); Bertrand Malsch, "Politicizing the Expertise of the Accounting Industry in the Realm of Corporate Social Responsibility" (2013) 38:2 Accounting, Organizations and Society 149 at 155 (showing how the accounting industry converts and subordinates social issues into financially relevant shorter-term issues).

96 See Merrian C Fuller, Stephen C Portis & Daniel M Kammen, "Toward a Low-Carbon Economy: Municipal Financing for Energy Efficiency and Solar Power" (2009) 51:1 Environment: Science & Policy for Sustainable Development 22 (discussing high up front costs as one of the barriers to reducing energy consumption); Andy Gouldson et al, "Innovative Financing Models for Low Carbon Transitions: Exploring the Case for Revolving Funds for Domestic Energy Efficiency Programmes" (2015) 86 Energy Policy 739; Paul von Paumgartten, "The Business Case for High Performance Green Buildings: Sustainability and its Financial Impact" (2003) 2:1 J Facilities Management 26 (finding environmentally conscious buildings can save more than 250 times their up-front costs, however over a period of 40 years).

company invests in the wind project and its competitors invest in new oil field development: (i) the company will find the oil it produces has a higher marginal per barrel price than its competitors, reducing its relative profits; (ii) declines in market price for oil will disproportionately adversely impact it; (iii) the company will have less capital available for new investments than competitors who have pursued higher return strategies; (iv) it will come under pressure from shareholders who have seen the performance of their shares decline on a relative basis, and from employees who could make more money on their equity incentives (and enjoy greater job security) elsewhere; and (v) its cost of capital will increase, further impacting profits and impairing the company's ability to grow. The company's competitive position will have significantly eroded.

The third problem is that even if the investment has a positive net present value, making the investment today may be a competitive mistake. First mover advantages only accrue to firms when there are significant technological barriers, like patents, to competitors following them. In the absence of these barriers, being the first to make a novel investment is often a mistake. The firm's competitors, by waiting, are able to take advantage of future technological, market, or policy developments. Indeed, the therapeutic disclosure rules actually make the risks of being a first mover worse, as the firm's disclosure will give its competitors guidance on costs, returns, mistakes to avoid, and how to improve results.[97] We have known for a long time that innovation is adversely impacted by disclosure regimes.[98]

---

97 See Stewart, *supra* note 18 at 27; Easterbrook & Fischel, *supra* note 47 at 708 (disclosure enhances competitor free riding and makes their reaction more effective, thus making the project less profitable); Edmund W Kitch, "The Theory and Practice of Securities Disclosure" 61:3 Brook L Rev 763 at 856 (disclosure increases the value of passive strategies of waiting and seeing).

98 See e.g. Sergio Gilotta, "Disclosure in Securities Markets and the Firm's Need for Confidentiality: Theoretical Frameworks and Regulatory Analysis" (2012) 13:1 Eur Bus Organization L Rev 45; Luigi Zingales, "The Future of Securities Regulation" (2009) 47:2 J Accounting Research 391 at 394; Wolfgang Schön, "Corporate Disclosure in a Competitive Environment—The Quest for a

These sorts of competitive pressures are why close examinations of social and environmental disclosures note a "decoupling" between rhetoric and practice.[99] It is also why socially important (but not necessarily economically advantageous) investments are tiny relative to corporate capacity. Chevron invested approximately $60 million in renewable energy projects over five years when its annual oil and gas exploratory budget was $10 billion.[100] The executives of these companies are not monsters of hypocrisy or neglect; they are just managing around the fundamental economic realities imposed on their firms by competitive markets.

It might be argued that not all objects of therapeutic disclosure are as long-term or uncertain as reducing the firm's carbon footprint. For example, adhering to ethics codes, introducing diversity into the boardroom, eliminating public corruption, or reducing pay inequality might enhance the firm's competitive position by improving their reputation with consumers. This is occasionally true for prominent consumer-facing brands with a strong commercial interest in their corporate reputation.[101] It is unlikely to be true for the vast majority of companies that do not have this character.

European Framework on Mandatory Disclosure" (2006) 6:2 J Corporate L Studies 259 at 294–96.

99 See Charles H Cho et al, "Organized Hypocrisy, Organizational Facades, and Sustainability Reporting" (2015) 40 Accounting Organizations & Society 79 at 88 (discussing the ways environmental disclosure do not deal with the core economic activities of the firm).

100 *Ibid*.

101 See Taylor, Vithayathil & Yim, *supra* note 30 (finding effects of social responsibility scores on firm value were positively moderated by the extent to which a firm is consumer facing); Zhasmina Tacheva, Natalie Simpson & Anton Ivanov, "Examining the Role of Top Management in Corporate Sustainability: Does Supply Chain Position Matter?" (2020) 12:18 Sustainability 7518 ("upstream B2B suppliers have been found to experience less stakeholder pressure for sustainability due to their lack of proximity to consumers and other key stakeholders, and to gain less from sustainability initiatives in terms of both reputation and performance than their consumer-facing counterparts" at 2).

It might be argued that managers may nevertheless pursue the social objects promoted by therapeutic disclosure out of self-interest. For decades, it has been an article of faith in discussions about corporate governance that managers have significant latitude to pursue their own interests at the expense of those of the firm.[102] I have argued that this is extremely unlikely[103] and that the empirical literature repeatedly fails to vindicate predictions arising from this assumption.[104] This is not to say that managers don't act in self-interested ways—of course they do—but that the scope for acting in these ways tends to be limited over the long term.

Nevertheless, even if it weakens the competitive position of the firm, might managers follow the dictates of therapeutic disclosure out of motives of, say, self-aggrandizement? This was famously one of the concerns expressed by Milton Friedman in his essay on corporate social responsibility: that managers' embrace of these causes "gain them kudos in the short run", but reveal "a suicidal impulse."[105] There is a strain of empirical literature that finds managers do engage in social investments to do things like obscure unethical behaviour such as earnings management,[106] burnish their reputation,[107] or secure perks.[108] The question is one

---

[102] See Bryce C Tingle, "We Need a New Theory of the Firm: The Failure of Agency Cost Theory to Predict Real World Outcomes" [forthcoming] [Tingle, "Agency Cost"].

[103] See Tingle, "CSR" *supra* note 85.

[104] See Tingle, "Agency Cost", *supra* note 102.

[105] Milton Friedman, "The Social Responsibility of Business is to Increase its Profits", *New York Times* (13 September 1970), online: <nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

[106] See Jennifer Martinez-Ferrero, Shantanu Banerjee & Isabel María García-Sánchez, "Corporate Social Responsibility as a Strategic Shield Against Costs of Earnings Management Practices" (2016) 133:2 J Bus Ethics 305; Diego Prior, Jordi Surroca & Josep A Tribó, "Are Socially Responsible Managers Really Ethical? Exploring the Relationship between Earnings Management and Corporate Social Responsibility" (2008) 16:3 Corporate Governance 160.

[107] See Martinez-Ferrero, Banerjee & Garcia-Sanchez, *supra* note 106 ("[w]e also document that a company's chances of being listed among the world's most

of scale. It is hard to imagine managers valuing any personal return from socially motivated expenditures over the personal returns from successful financial performance. In the medium- to long-term, a CEO's career opportunities, income, and reputation mainly depend on the corporation's financial returns from its market activities.[109] The most obvious evidence of this is that the therapeutic disclosure is needed in the first place. Nothing stops managers from trumpeting their good works even without therapeutic disclosure regimes. If such a regime is required, it is because the good works are going undone, notwithstanding their reputational advantages to corporate managers.

III. HAS THERAPEUTIC DISCLOSURE WORKED IN THE PAST?

There were few, if any, attempts at therapeutic disclosure regimes before the 1990s. As suggested above, this is likely because prior to the modern corporate governance era, securities and corporate law were not understood to be about securing substantive outcomes, but rather about facilitating the classic market activities of bargaining and innovation among the constituencies that form around businesses.[110]

There are necessarily some limitations to looking at the outcomes of past therapeutic disclosure regimes. None of them constitute anything like controlled experiments. The new disclosure rules typically impact all companies at the same time

---

admired companies increase when they display positive CSR strategies" at 307).

[108] See Lisa Atkinson & Joseph Galaskiewicz, "Stock Ownership and Company Contributions to Charity" (1988) 33:1 Administrative Science Q 82 (finding evidence that charitable giving can be a self-interested strategy used by executives to secure social benefits).

[109] See Martin J Conyon, "Executive Compensation and Board Governance in US Firms" (2014) 124:574 Economic J F60 at F74 (in 2012 grants of stock options and restricted stock accounted for almost 50% of CEO pay for S&P companies); Tamara C Belinfanti, ""Beyond Economics in Pay for Performance" (2012) 41:1 Hofstra L Rev 91 at 103 (finding CEO compensation attributable to incentive pay went up from 35% to 85% from 1993 to 2013).

[110] Tingle, "Returning Markets", *supra* note 29.

(though some allow for a regression discontinuity approach)[111] and it is hard to disentangle the effects of disclosure from other influences on corporate behavior. Few, if any, reforms are ever justified solely on their predicted therapeutic effects. A good example of this is provided by Canada's comply-or-explain corporate governance regime, introduced by the TSX in 1994 following the recommendations of the Dey Report.[112] This was one of the earliest attempts at therapeutic disclosure in Canada, and it was followed by the adoption of most of its recommended best practices by Canadian issuers.[113] The problem is that, in this case, there were so many other factors impacting firm behaviour in the area that it seems impossible to tease out the influence of the therapeutic channels. Shareholders, stock exchanges, securities commissions, proxy advisors, media outlets, pressure groups, think tanks, law firms, and business schools all created rules or applied pressure to companies to adopt corporate governance best practices.[114] This is the "governance industry"[115] or "governance

---

111 See e.g. Lucas Knust & David Oesch, "On the Consequences of Mandatory CEO Pay Ratio Disclosure" (2020) [unpublished], online: *SSRN* <ssrn.com/abstract =3540009>.

112 Peter Dey, "Where Were the Directors? Guidelines for Improved Corporate Governance in Canada" (December 1994), online (pdf): *Chart The Future* <chartthefuture.ca/assets/uploads/img/Where-Were-the-Directors-the-Dey-Report-optimized.pdf>.

113 See Bryce C Tingle, "What Do We Really Know About Corporate Governance? A Review of the Empirical Research Since 2000" (2017) 59 Can Bus L J 292 at 302 [Tingle, "What Do We Really Know"].

114 See Adam O Emmerich et al, "United States" in Willem J L Calkoen, ed, *The Corporate Governance Review*, 10th ed (London, UK: Law Business Research Ltd, 2020) at 355–56 (discussing power of proxy advisors); David F Larcker, Allan L McCall & Gaizka Ormazabal, "Proxy Advisory Firms and Stock Option Repricing" (2013) 56:2–3 J Accounting & Econ 149 (firms enact policies recommended by proxy advisors even when executives expect them to reduce firm values); Janet McFarland, "Board Games 2015 Methodology", *The Globe and Mail* (4 December 2015), online: <theglobeandmail.com/report-on-business/careers/management/board-games-2015/board-games-2015-methodology/article27566092/>; John Gray, "Top 25 Boards in Canada", *Canadian Business* (15 August 2015), online: <canadianbusiness.com/ business-strategy/top-25-boards-in-canada/>; Steve Salterio, "Audit Committees on Canada's 'Big Board' Fall Into Line; Little Guys Continue to

machine"[116] that exercises so much power over public companies.[117] Fortunately, the introduction of therapeutic disclosure rules in other areas have not been accompanied by the same volume of third-party interventions, though board diversity initiatives come close.

A. REDUCING EXECUTIVE PAY

One of the oldest and, in many ways, most exhaustive effort to use disclosure to change corporate behaviour occurred in the area of

---

Lag" (2008) Queen's Centre for Corporate Governance Draft Technical Report, online (pdf): *Queen's Centre for Governance* <smith.queensu.ca/_templates/documents/governance/reports/audit_committees.pdf>; Steve Salterio & Joan Conrod, "Corporate Governance: Platitudes, Principles or Best Practices" (2009) online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=1490131> ; Davies Ward Philips & Vineberg LLP, "Governance Insights 2014", (2014) at 10, 56–57, online: *Davies* <dwpv.com/en/Insights/Publications/2014-UNPUBLISHED/Davies-Governance-Insights-2014>; Suzanne Stevens, "Inside the Corporate Governance Complex" (20 May 2010) *Harvard Law School Forum on Corporate Governance and Financial Regulation*, online: <corpgov.law.harvard.edu/2010/05/20/inside-the-corporate-governance-complex/> (describing the corporate governance industry as a "well-funded, sprawling and interlocking set of institutions that have grown up around corporate governance over the past 30 years or so .... with major outposts across the country at research universities, law firms, the federal government, institutions, activist hedge funds and even blogs like this one, [which] generates considerable intellectual and financial firepower" at para 1); Paul Rose, "The Corporate Governance Industry" (2007) 32 J Corp L 887 [Rose, "The Corporate Governance Industry"]; National Policy 58-201 Corporate Governance Guidelines, OSC NP 58-201 (June 17, 2005), online (pdf): *Ontario Securities Commission* <https://www.osc.ca/sites/default/files/pdfs/irps/rule_20050617_58-201_corp-gov-guidelines.pdf>.

115 Rose, "The Corporate Governance Industry", *supra* note 114.

116 Lund & Pollman, *supra* note 9.

117 See Bryce C Tingle, "How Good are Our 'Best Practices' When It Comes to Executive Compensation? A Review of Forty Years of Skyrocketing Pay, Regulation, and the Forces of Good Governance" (2017) 80:2 Sask L Rev 387 [Tingle, "Best Practices"]; Bryce C Tingle, "What Is Corporate Governance? Can We Measure It? Can Investment Fiduciaries Rely on It?" (2018) 43:2 Queen's LJ 223; Tingle, "Returning Markets", *supra* note 29; Bryce C Tingle, "Framed! The Failure of Traditional Agency Cost Explanations for Executive Pay Practices" (2017) 54:4 Alta L Rev 899 [Tingle, "Framed"].

executive compensation. Pay is the most obvious way that money is diverted from shareholders to managers, so it was central to the preoccupation with reducing agency costs and maximizing shareholder value in the late 1980s and 1990s.[118] As the new century progressed, the use of corporate reporting to reduce executive pay was also taken up by those concerned it is a driving force of income inequality.[119] Because it is disliked by nearly everyone, we have seen almost thirty years of therapeutic disclosure designed to reduce executive compensation levels.

Beginning in 1993, disclosure rules in Canada around executive compensation began to change.[120] Regulators further expanded

---

[118] See Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3:4 J Financial Economics 305 (a CEO, as a utility maximizer, will not always act in the best interests of shareholders/principals generally, including in the context of remuneration); Michael C Jensen & Kevin J Murphy, "Remuneration: Where We've Been, How We Got to Here, What are the Problems, and How to Fix Them" (2004) European Corporate Governance Institute Working Paper No 44/2004 at 50. See also Patrice Gelinas & Lisa Baillargeon, "CEO Compensation in Canada, 1971–2008" (2013) 8:12 Intl J Business Management 1 ("[t]he modern history of executive compensation began in parallel with the emergence and acceptance of agency theory" at 1); Conyon, *supra* note 109 at F63; Dan R Dalton et al, "The Fundamental Agency Problem and Its Mitigation: Independence, Equity, and the Market for Corporate Control" (2007) 1:1 Academy Management Annals 1.

[119] See Thomas Piketty, *Capital in the Twenty First Century*, translated by Arthur Goldhammer (Cambridge, Mass: Harvard University Press, 2014) at 302; George A Akerlof & Janet L Yellen, "The Fair Wage-Effort Hypothesis and Unemployment" (1990) 105:2 QJ Economics 255; Joseph E Stiglitz, *The Price of Inequality* (New York: WW Norton & Company, 2012) at 39–43, 66–67. But see Steven N Kaplan, "Are U.S. CEOs Overpaid?" (2008) 22:2 Academy Management Perspectives 5 at 7 (CEOs appear to have delivered on productivity growth, owing to the good performance by the U.S. economy, compared to other developed countries); Calvin Blackwell et al, "Wealth Inequality and CEO Compensation" (2015) [unpublished] at 17, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2599740> (finding no support for the hypothesis that the increase in CEO income inequality helped to increase wealth inequality, or that the growth of the two types of inequality are linked to some third factor).

[120] See *Notice of Commission Approval of National Instrument 51-102 Continuous Disclosure Obligations, Companion Policy 51-102CP, Rule 51-801 Implementing National Instrument 51-102 Continuous Disclosure Obligations and Companion*

the pay disclosure rules in 2003, 2007, 2008, 2011, and 2015.[121] In expanding and refining its compensation reporting regime, Canada was merely keeping up with developments in the United States and United Kingdom.[122] All the reforms were clearly driven by therapeutic hopes.

One of the earliest changes consisted of a requirement to report executive pay alongside a graph comparing total shareholder return for the company matched against the return from a broad market index.[123] This graph didn't tell shareholders (or anyone else) anything they didn't already know. The shareholders were well aware of the corporation's relative stock price performance. As well, there is no obvious reason to require a graph comparing the company's relative performance in the executive compensation section of its information circular, except to introduce shame and moderation into the firm's pay practices.

What has been the results of this thirty-year effort to control the levels of executive compensation? For most of the decades following the Second World War, executive compensation had

Policy 51-801CP and Related Instruments, OSC Notice 1.1.8, (2003) 26 OSCB 8150, online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/pdfs/irps/rule_20031219_51-102-51-801_approv.pdf>.

[121] *Ibid*; *National Instrument 51-102 Continuous Disclosure Obligations*, OSC Notice, (2003) 29 OSCB (Supp-2), online (pdf): *Ontario Securities Commission* <osc.ca/en/securities-law/instruments-rules-policies/5/51-102/amendments-ni-51-102>; *Notice Form 51-102F6 Statement of Executive Compensation*, OSC CSA Notice (2008); *Amendments to Form 51-102F6 Statement of Executive Compensation and Consequential Amendments*, OSC CSA Notice (2011) 34 OSCB 8047, online: *Ontario Securities Commission* < osc.ca/en/securities-law/instruments-rules-policies/5/51-102/amendments-form-51-102f6-statement-executive-compensation-and-consequential-amendments>; *Amendments to NI 51-102 Continuous Disclosure Obligations* (2015) 38 OSCB 5121, online: *Ontario Securities Commission* <osc.ca/en/securities-law/instruments-rules-policies/5/51-102/amendments-ni-51-102-continuous-disclosure-obligations-1>.

[122] Tingle, "Framed", *supra* note 117 at at 905–06

[123] See *Statement of Executive Compensation*, OSC Form 51-102F6 (2008) 31 OSCB 12047 (19 December 2008), s 2.2(b), online (pdf): *Ontario Securities Commission* <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20081219_S1-102_f6.pdf>.

been essentially flat. It rose about 50 percent over the 1980s, then, in the era of therapeutic disclosure, it exploded. Over the course of the 1990s, executive pay increased 125 percent.[124] In 1993, the year Canada introduced its modern executive compensation reporting regime, payments to the five highest–paid senior executives in a US company absorbed, on average, 5 percent of its profits; by 2003 this had increased to 10 percent.[125] The ratio of CEO pay to worker pay rose "by over 900%, from 29:1 (in 1978) to 273:1 (in 2012)".[126] CEO pay has doubled the growth of the S&P Index over the past thirty years.[127] The rise of say-on-pay regimes

---

124 See Carola Frydman & Dirk Jenter, "CEO Compensation" (2010) 2 Annual Rev Financial Economics 75 at 79–80 (tbl 1 & graphs a, b).

125 See Lucian Bebchuk & Yaniv Grinstein, "The Growth of Executive Pay" (2005) 21:2 Oxford Rev Economic Policy 283 at 302.

126 Marc T Moore, "Corporate Governance, Pay Equity, and the Limitations of Agency Theory" (2015) University of Cambridge Faculty of Law Working Paper No 8/2015, online: <papers.ssrn.com/sol3/papers.cfm?abstractid= 2566314> at 7. See also Alex Edmans & Xavier Gabaix, "Executive Compensation: A Modern Primer" (2015) National Bureau Economic Research Working Paper No 21131, online (pdf): <nber.org/papers/ w21131.pdf> (finding that "CEO pay was 350 times that of the average worker in 2013" at 4); Kevin J Murphy, "Chapter 38: Executive Compensation" in Orley C Ashenfelter & David Card, eds, Handbook of Labor Economics, (Amsterdam: Elsevier, 1999) vol 3B 2485. In Canada statistics are hard to come by prior to 1995, but in 1998 the average CEO of the 100 largest companies in Canada earned 105 times more than the average Canadian; in 2013 he or she earned 195 times more. The top 50 CEOs earned 269.7 times more than the average Canadian: see Hugh Mackenzie, "Glory Days: CEO Pay in Canada Soaring to Pre-Recession Highs" (2015) Canadian Centre for Policy Alternatives at 7–8, online: <policyalternatives.ca/publications/reports/ glory-days>.

127 See Lawrence Mishel & Natalie Sabadish, "CEO Pay in 2012 Was Extraordinarily High Relative to Typical Workers and Other High Earners" (2013) 367 Economic Policy Inst 1 at 4, online: <epi.org/files/2013/ceo-pay-2012-extraordinarily-high.pdf>; Kaplan, *supra* note 119 (between 1993 and 2006 US CEO compensation increased from approximately 100 times the median household income in 1993 to more than 200 times median household income in 2006 at 8–10, figures 1–4). See also Carola Frydman & Raven E Saks, "Executive Compensation: A New View from a Long-Term Perspective, 1936–2005" (2010) 23:S Rev Financial Studies 2099 at 2111, figure 3.

in Canada and the United States over the past decade is a reaction to the clear failure of therapeutic disclosure in this area.[128]

The latest effort to control executive pay through disclosure has been Dodd-Frank's therapeutic requirement that companies report their CEO-to-median employee pay ratio.[129] While the process of generating the necessary data is reported to be "hugely burdensome,"[130] the strong pressure for the new disclosure obligation arose from the post–financial crisis discomfort with growing levels of income inequality in the United States.[131] It should not come as a surprise that the latest research (using a robust regression discontinuity approach) finds, "the pay ratio disclosure rule does not affect total CEO compensation. Moreover, firms do not respond to the pay ratio disclosure rule by altering the composition of their CEO's pay".[132]

Therapeutic disclosure has been a complete failure in the area of executive compensation. It actually is worse than it might initially appear. There is considerable evidence that at least part of the growth in executive compensation has been driven by the new disclosure rules themselves.[133] Executives who are underpaid can now easily identify this fact. As well, there is a natural reluctance to pay executives in ways that put them below the average of their peers, so pay disclosure has the effect of operating as a kind of

[128] See Sandeep Gopalan, "Say on Pay and the SEC Disclosure Rules: Expressive Law and CEO Compensation" (2008) 35:2 Pepp L Rev 207. Say-on-pay has also been a failure: Tingle, "Best Practices", *supra* note 117.

[129] See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 USC § 953(b) (2010).

[130] Bainbridge, "Quack Corporate Governance", *supra* note 1 at 1797.

[131] See *ibid* at 1798.

[132] Knust & Oesch *supra* note 111 at 3.

[133] See Davidoff & Hill, *supra* note 73 at 604, 623–26 (finding "the history of executive compensation disclosure suggests that heeding disclosure does not work as intended and, indeed, sometimes can have unintended negative effects" at 623); Geoffrey A Manne, "The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure" (2007) 58:3 Ala L Rev 473 at 476–77.

'ratchet' constantly pushing the average compensation package higher.[134]

B. BOARD DIVERSITY

Board gender diversity disclosure rules were introduced by a number of Canadian securities regulators, led by Ontario, by way of amendments to National Instrument 58-101 Disclosure of Corporate Governance Practices in 2014.[135] Like most therapeutic disclosure initiatives it was a comply-or-explain regime with the ostensible aim of improving corporate financial performance.[136] This was never a particularly convincing claim; it was contradicted by peer-reviewed empirical research[137]—and by common sense[138]—but the pretense was necessary as securities regulators

[134] See Alexandre Mas, "Does Disclosure affect CEO Pay Setting? Evidence from the Passage of the 1934 Securities and Exchange Act" (March 2016) Working Paper, online (pdf): *Princeton University* <princeton.edu/~amas/papers/CEODisclosureMandate.pdf>; Enriques & Gilotta, *supra* note 12 (referencing "the so-called Lake Wobegon effect of compensation disclosure" at 10. Lake Wobegon is a fictional place where all the children are above average).

[135] *Multilateral CSA Notice of Amendments to NI 58-101: Disclosure of Corporate Governance Practices* (15 October 2014), online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/pdfs/irps/csa_20141014_58-101_noa-national-instrument.pdf> [OSC, *Amendment to Disclosure Practices*].

[136] See *ibid*.

[137] For a review of the literature, see Tingle, "What Do We Really Know", *supra* note 113 at 203; Jesse M Fried, "Will Nasdaq's Diversity Rules Harm Investors?" (2021) European Corporate Governance Institute Working Paper No 579/2021, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642>.

[138] See e.g. J W Verret, "Diversity for Corporate Boards" (23 December 2009) online (blog): *Truth on the Market* <truthonthemarket.com/2009/12/23/diversity-for-corporate-boards/> (stating "I fail to see how cultural, religious, or gender based perspectives differ on, for instance, how to structure a debt offering or divest an operating subsidiary"); Kimberly D. Krawiec, John M. Conley & Lissa L. Broome, "The Danger of Difference: Tensions in Directors' Views of Corporate Board Diversity" (2013) 2013:3 U Ill L Rev 919 (noting directors have difficulty articulating why diversity would improve corporate performance).

lack the authority to implement a policy with purely social objectives.[139]

In the six years since the disclosure rules were adopted, the percentage of women occupying board seats increased from 11 percent to 20 percent.[140] Most of this growth occurred in the largest Canadian companies. In companies with market capitalizations below $1 billion (the vast majority of TSX companies), women directors comprise 15 percent of board seats, up 7 percent over the period.[141] The progress on executive positions is disappointing. At the time the disclosure rules were introduced, 60 percent of companies had at least one executive officer who was a woman, six years later the number is 65 percent.[142] Last year there was “slight attrition in the number of women executive officers.”[143]

Progress over the past seven years is not due to therapeutic disclosure alone. Canadian institutional investors are applying pressure on portfolio companies to increase diversity,[144] search

---

139 See *Securities Act*, *supra* note 23; Diana Nicholls, *Girls, Who Run The World? Not Yet: An Analysis of the Underrepresentation of Women on Boards in Canada and the Underlying Theory of the Regulation Thereof* (LLM Thesis, Osgoode Hall Law School Of York University, 2020), online: <digitalcommons.osgoode.yorku.ca/llm/38> (asserting “while securities regulators claim that the policy . . . was rooted in business case rationales, it in fact arose from normative concerns” at ii).

140 See *CSA multilateral staff notice 58-312, Report on Sixth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions* (10 March 2021), online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files/2021-03/sn_20210310_58-312_staff-review-women-on-boards.pdf> at 1–2.

141 See *ibid*.

142 See *ibid*.

143 Andrew MacDougall, John Valley & Jennifer Jeffrey, “Diversity Disclosure Practices: Diversity and Leadership and Canadian Public Companies” (2020), online (pdf): *Osler, Hoskin & Harcourt LLP* <osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf> at 34.

144 See *ibid* at 7–8.

firms are mandating diversity in their engagements,[145] and consumers are imposing reputational consequences on dilatory firms.[146] Rating agencies have begun assessing diversity plans when evaluating credit risk.[147] Yet even with these tail winds behind the therapeutic disclosure regime, observers describe their effects as "glacial movement."[148] The 2021 Ontario Task Force on Securities Modernization's *Final Report* indicates "progress has been slow" since the new rules came into effect.[149] In fact, one scholar estimates that at current rates of progress it will take more than fifty years for issuers to reach gender parity.[150] A 2017 op-ed in the Globe & Mail puts it this way: "the near lack of overall movement after three years under the comply-or-explain regime leads us to believe it is time to consider more prescriptive forms of regulation, potentially including quotas."[151]

The experience of other countries has been similar.[152] At the time the OSC was considering introducing the diversity disclosure

---

145 See e.g. Korn Ferry, "Diversity & Inclusion" (2021), online: <kornferry.com/uk/challenges/diversity-and-inclusion>; Boyden, "Diversity, Equity & Inclusion" (2022), online: <boyden.com/canada/diversity/index.html>.

146 See Marta Riera & Maria Iborra, "Corporate Social Irresponsibility: Review and Conceptual Boundaries" (2017) 26:2 Eur J Management & Bus Economics 146 at 158; Stephen Brammer, Andrew Millington & Stephen Pavelin, "Corporate Reputation and Women on the Board" (2009) 20:1 Brit J Management 17.

147 See MacDougall, Valley & Jeffrey, *supra* note 143; Lisa Pham, "Lloyds Ethnic Diversity Plan is 'Credit Positive' Moody's Says", *Bloomberg* (25 July 2020), online: <bloomberg.com/news/articles/2020-07-25/lloyds-ethnic-diversity-plan-is-credit-positive-moody-s-says#xj4y7vzkg>.

148 Nicholls, *supra* note 139 at 39.

149 See Modernization Taskforce, *supra* note 31 at 63.

150 See *ibid*.

151 Aaron Dhir & Sarah Kaplan, "Women in the Boardroom: Has the Time for Quotas Arrived?", *The Globe and Mail* (6 October 2017), online: <theglobeandmail.com/report-on-business/rob-commentary/women-in-the-boardroomhas-the-time-for-quotas-arrived/article36517480/?ref=http://www.theglobeandmail.com&>.

152 See Dhir, *Challenging Boardroom Homogeneity*, *supra* note 15 (discussing the United States and Scandanavia); Nicholls, *supra* note 139 at 60–61 (discussing the UK and Australia).

rules, a representative of the consulting firm, McKinsey Company, observed that when therapeutic disclosure rules have been tried (often accompanied by shareholder and third party pressure campaigns), female representation only goes up by approximately a percentage point per year.[153] In the United States, for example, a diversity disclosure rule was introduced in 2009,[154] and in the following ten years female board representation went from 15.2% to 22.5% in the Fortune 500.[155] The "federal diversity disclosure policy therefore has appeared to have very little impact on the number of women on public corporate boards."[156] In reaction, California recently introduced gender quotas for firms with their principal offices in that state.[157]

C. ETHICS CODES

The Sarbanes-Oxley Act of 2002 ("SOX") required U.S. issuers to make extensive disclosures about the adoption of internal codes of ethics.[158] Importantly for subsequent empirical studies it required disclosure of the waivers the company granted to top executives from operation of one part or another of the code. The American stock exchanges broadened these disclosure obligations in

---

153 See Roundtable 2013 Ontario Securities Commission, *Transcript: Roundtable Discussion Re Women on Boards and Senior Management*, (23 October 2013) at 46, online (pdf): *Ontario Securities Commission* <osc.ca/sites/default/files /pdfs/irps/oth_20131016_58-401_transcript.pdf>.

154 See *Regulation S-K*, 17 CFR § 229.407(c).

155 See Rachel Soares & Jan Combopiano, "Report: 2009 Catalyst Census: Fortune 500 Women Board Directors", (9 December 2009), online: *Catalyst* <catalyst.org/research/2009-catalyst-census-fortune-500-women-board-directors/>; Deloitte, "Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on *Fortune* 500 Boards, 6th Edition", online: *Deloitte* <deloitte.com/us/en/pages/center-for-board-effectiveness/articles/ missing-pieces-fortune-500-board-diversity-study-2018.html>.

156 Nicholls, *supra* note 139 at 58.

157 See *An Act to Add Sections 301.3 and 2115.5 to the Corporations Code, Relating to Corporations,* 2018, Reg Sess, Cal, 2018 ["Bill 826"].

158 *Sarbanes-Oxley Act*, 15 USC § 406 (2002).

2003.[159] Canada followed suit in 2004, incorporating ethics codes into its corporate governance comply-or-explain regime.[160] The therapeutic intent of the Canadian regulators amusingly comes close to the surface in the way the comply or explain obligation is described: "describe how the board monitors compliance with its code [of business conduct and ethics], or if the board does not monitor compliance, explain whether and how the board satisfies itself regarding compliance with the code".[161]

The obvious motivation to require ethics disclosure were the ethical lapses revealed by the Enron-era scandals.[162] It was not a new idea: "[f]or more than forty years, corporate codes have . . . found great favor with legislators and regulators seeking to promote ethical standards within the corporate culture."[163] Unfortunately this history means that "the companies involved in the major corporate scandals of 2001 and 2002 all had corporate

---

159 See New York Stock Exchange, *NY Listed Company Manual*, New York, 1953, s 303A.10, online: <nyse.wolterskluwer.cloud/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-78>; New York Stock Exchange, *NYSC Amex LLC Company Guide*, New York, s 807, online: <nyseamerican.wolterskluwer.cloud/company-guide/ document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7BBF725D93-3685-43D1-B51C-FCDC5A4CF5C0%7D--WKUS_TAL_18737%23teid-122>; NASDAQ, *Marketplace Rules*, New York, 2003, s 4350 (n), online (pdf): <sec.gov/rules/other/nasdaqllcf1a4_5/nasdaqllcamendrules4000.pdf>. The Federal Sentencing Guidelines for Organizations gave codes of ethics a boost by incorporating their presence as one of the factors to be considered in sentencing decisions. See United States Sentencing Commission, *The Federal Sentencing Guidelines*, Washington DC, 2018, Chapter 8 'Sentencing of Organizations'.

160 See OSC, *NI 58-101*, *supra* note 3.

161 *Ibid*, s 5(a).

162 See Michael K Braswell, Charles M Foster & Stephen L Poe, "A New Generation of Corporate Codes of Ethics" (2009) 34:2 Southern Bus Rev 1 at 1.

163 *Ibid* at 2. See also Maira Babri, Bruce Davidson & Sven Helin, "An Updated Inquiry into the Study of Corporate Codes of Ethics: 2005-2016" (2021) 168:1 J Bus Ethics 71 (noting corporate codes of ethics "have been a subject of interest in business studies for at least a hundred years" at 72).

codes of ethics."[164] These codes were not just disclosed to shareholders and third parties, they were celebrated by companies like Enron.[165]

The earliest literature reviews examining the effectiveness of codes of ethics found the aggregate results of the existing studies were inconclusive.[166] Partly this is due to serious defects in data and methodological differences.[167] A survey of the most recent empirical literature, covering the period 2005–2016 (after the passage of the US disclosure rules) finds that following the reforms, codes of ethics displayed "an increased emphasis on legal and regulatory" concerns and "exhibit a greater concern about actions against the firms than actions by the corporation".[168] A study looking at Canadian ethics codes found the same tendency to focus primarily on safeguarding the firm from outside criticism or legal actions.[169]

The second relevant feature discovered by various empirical studies is that the disclosure around ethical codes show a

---

164 Braswell, Foster & Poe, *supra* note 162 at 5. See also Simon Webley & Andrea Werner, "Corporate Codes of Ethics: Necessary but not Sufficient" (2008) 17:4 Bus Ethics: A Eur Rev 405 at 406.

165 See Jonathan R Macey, "Efficient Capital Markets, Corporate Disclosure, and Enron" (2004) 89 Cornell L Rev 394; Ronald R Sims & Johannes Brinkmann, "Enron Ethics (Or: Culture Matters More than Codes)" (2003) 45:3 J Bus Ethics 242; James L Smith III, W Brinkley Dickerson Jr & Eric A Koontz, "Early Lessons From The Powers Report (Or, What We Can Learn from Enron)" (2002) [unpublished], online (pdf): *Martindale* <martindale.com/legal-news/article_troutman-sanders-llp_18160.htm>.

166 See Muel Kaptein & Mark S Schwartz, "The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model" (2008) 77:2 J Bus Ethics 111; Betsy Stevens, "Corporate Ethical Codes: Effective Instruments for Influencing Behavior" (2008) 78:4 J Bus Ethics 601.

167 See *ibid*.

168 Babri, Davidson & Helin, *supra* 163 at 75.

169 See Virginia Bodolica & Martin Spraggon, "An Examination into the Disclosure, Structure, and Contents of Ethical Codes in Publicly Listed Acquiring Firms" (2013) 126:3 J Bus Ethics 459.

convergence following passage of SOX.[170] A representative study found the new language developed in corporate codes is designed to "minimize the effects of the Code on constraining organizational behavior."[171] Multiple studies have found the same disclosure-driven diminishment of the potential influence of ethical codes over firm behavior.[172]

The final finding from a review of the post-SOX literature is that while it is not clear whether the presence of a code of ethics produces better outcomes (the empirical studies are conflicting), the codes, themselves, are not a sufficient condition for these outcomes.[173] The authors of the literature review conclude, "[t]he main finding in this category of studies is that the effects of [corporate codes of ethics] are conditioned. Positive effects may

---

170 Babri, Davidson & Helin, *supra* 163 ("[s]everal studies notice a convergence of corporate codes in the U.S." at 80).

171 Lori Holder-Webb & Jeffrey Cohen, "The Cut and Paste Society: Isomorphism in Codes of Ethics" (2012) 107:4 J Bus Ethics 485 at 485.

172 See e.g. Enriques & Gilotta, *supra* note 12 (stating "[i]ndeed, rather than decreasing the number and scope of [ethical code] waivers granted to top managers, MD [mandatory disclosure] induced firms to relax their internal codes" at 25); Tommy Jensen & Johan Sandstrom, "Re-Articulating the Ethical Corporation: The Case of the Woolf Committee Report" (2010) 1:2 J Global Responsibility 279 (showing how a high-proflile report from BAE on ethics "provides reasons for preferring and enacting a business-as-usual kind of reality" at 290); Lutz Preuss, "Ethical Sourcing Codes of Large UK-Based Corporations: Prevalence, Content, Limitations" (2009) 88:4 J Bus Ethics 735 (finding ethical sourcing codes of large public companies mostly are designed to push responsibility to firms lower on the supply chain). See generally Babri, Davidson & Helin, *supra* 163.

173 See Kimberely D Krawiec, "Cosmetic Compliance the Failure of Negotiated Governance" (2003) 81:2 Wash U LQ 487 (providing a common view among legal observers: "[d]espite the pervasiveness of ethics codes in corporate America . . . little evidence exists to support the theory that ethics codes modify employee behavior" at 511). See also Harvey L Pitt & Karl A Groskaufmanis, "Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct" (1990) 78:5 Geo LJ 1559; Donald C Langevoort, "Placebo Statutes: Sarbanes-Oxley and Ethics Code Disclosures" (2010–2011) 96 Va L Rev Brief 9 (stating "I fully agree . . . that Section 406 [the SOX provision requiring disclosure of ethics code matters] has failed to produce much of value. I am less convinced that many thoughtful observers ever expected it to" at 9).

occur but requires for example top management commitment, or are dependent on pressure from the consumer side".[174] This finding is obviously incompatible with therapeutic disclosure claims.

The only empirical study looking explicitly at the *disclosure* aspects of ethical codes finds the regime "is unhelpful and inefficient, long on costly and burdensome disclosures, and short on demonstrable benefit."[175] The study looks at firms' disclosure of ethical waivers granted to executives. Generally, the "findings indicate . . . that current disclosure regulations are neither preventing the targeted behavior nor even revealing the types of activities that interest the marketplace."[176] Out of 200 randomly selected firms, nearly all chose to have a code of ethics rather than explain why they do not. Nevertheless, over a five-year period the researchers found a total of 103 instances where corporations failed to disclose the conflict of interest violations of the codes.[177] (These failures are visible—unlike other sorts of violations of the code—because conflicts must be disclosed in the firm's financial statements.) Announcements of ethical waivers, when made, failed to elicit any discernable change in stock prices.[178] News outlets did not mention them when disclosed.[179] It is hard to disagree with the authors' conclusion that this disclosure regime is probably not having much influence on corporate behaviour.

D. CORRUPTION

---

174 Babri, Davidson & Helin, *supra* 163 at 92 [citations omitted]. See also, Webley & Werner, *supra* note 164 (noting that "having an ethics policy based solely on a code of ethics is not sufficient to affect employee attitudes and behavior" at 405).

175 Usha Rodrigues & Mike Stegemoller, "Placebo Ethics: A Study in Securities Disclosure Arbitrage" (2010) 96:1 Va L Rev 1 at 2.

176 *Ibid* at 5.

177 See *ibid* at 8.

178 See *ibid* at 9.

179 See *ibid* at 18.

In 2014, the Canadian government enacted the Extractive Sector Transparency Measures Act (ESTMA) requiring Canadian natural resource issuers to report on all payments made to public authorities wherever located.[180] Similar rules were passed by countries in the EU and as part of Dodd-Frank in the United States, though in the United States they have yet to come into force.[181] The passage of ESTMA was one of the rare moments when a securities law development in Canada was more important than similar actions elsewhere in the world, as the vast majority of the world's public companies in extractive industries are listed in Canada.[182]

At the time ESTMA was introduced, most of the emphasis was on the way the disclosure would assist civil society organizations make foreign government officials accountable for their interactions with extractive companies, but there was also a

---

180 See *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376.

181 See Fayez A Elayan et al, "The Market Response to Mandatory Disclosure of Payments to Foreign Governments under the Extractive Sector Transparency Measures Act" (10 January 2021) at 8–9, online: *SSRN* <ssrn.com/abstract =3764053>. Norway and the EU have adopted legislation similar to that in Canada: *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending 2006/46/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC*, (2013) OJ, L 182/19, art 43; Lucas Porsch et al, "Review of country-by-country reporting and requirements for extractive and logging industries" (November 2018) at 12, online (pdf): *European Commission* <ec.europa.eu/info/sites/ default/files/ business_economy_euro/company_reporting_and_auditing/documents/18 1126-country-by-country-reporting-extractive-logging-industries-study_en.pdf>; Norway Department of Oil and Energy, "Mainstreaming EITI in Norway and request for adapted implementation" (September 2017), online (pdf): <eiti.org/sites/default/files/attachments/norway_mainstreaming-application.pdf>.

182 See Global Affairs Canada, "Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" (March 2009), online: <international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>; Government of Canada, "Extractive Industries: The Canadian Advantage at Home and Abroad" (2014), online: <canada.ca/en /news/archive/2014/11/extractive-industries-canadian-advantage-home-abroad.html>.

therapeutic rationale. It was argued that ESTMA might deter companies from making corrupt payments to public officials. In testimony to the Senate Committee[183] reviewing the proposed legislation, the representative of Justice Canada defended this aspect of ESTMA: "We're not regulating the industry. This is a corruption deterrence measure. Therefore, we're trying to put the focus on how the industry behaves in that context."[184] The academic literature on anticorruption is filled with similar assertions about the therapeutic benefits of disclosure in this area.[185] As one scholar claimed, "[t]he disclosure process can be a motivating mechanism for corporations to implement the needed changes and ensure their effectiveness over time."[186]

There is reason to question whether mandatory disclosure of the sort required by ESTMA actually works on any level to reduce corruption. ESTMA is relatively new, but it was based on an earlier initiative, the Extractive Industries Transparency Initiative, and research suggests this disclosure-based regime does not improve countries' levels of corruption.[187] (An interesting parallel issue is

---

[183] See Kristin Ciupa & Anna Zalik, "Enhancing Corporate Standing, Shifting Blame: An Examination of Canada's Extractive Sector Transparency Measures Act" (2020) 7:3 Extractive Industries & Society 826 (noting "[t]he proposed ESTMA . . . received the most attention from the Standing Senate Committee on Energy, the Environment and Natural Resources" at 829).

[184] "Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources", 2nd Sess, 41st Parl (4 November 2014), online: *Senate of Canada* <sencanada.ca/en/Content/Sen/Committee/412/ENEV/18ev-51704-e>.

[185] See e.g. David Hess, "Catalyzing Corporate Commitment to Combating Corruption" (2009) 88:4 J Bus Ethics 781; United Nations, "Business Against Corruption: Case Stories and Examples" (April 2006), online (pdf): *United Nations Global Compact Office* <edc.ca/content/dam/edc/en/non-premium/BACbookFINAL.pdf> (asserting companies disclose because "they wish to monitor and improve their anti-corruption processes and performance" at 98).

[186] Hess, *supra* note 185 at 786.

[187] See e.g. Ciupa & Zalik, *supra* note 183 (finding "[r]ecent studies . . . have assessed the effect of EITI adoption on GDP and the role of the EITI in reducing corruption. The results of this research are mixed" at 828); Ibeth Lopez-Cazar, Elissaios Papyrakis & Lorenzo Pellegrini, "The Extractive Industries Transparency Initiative (EITI) and Corruption in Latin America:

that the conflict minerals certifications imposed by Dodd-Frank appear to have actually increased violence in the Democratic Republic of the Congo.)[188]

In relation to corporate behaviour, earlier voluntary disclosure regimes did not work, as disclosures of payments to foreign governments were made only rarely.[189] As a result, countries in the EU and Canada imposed mandatory disclosure rules at "different

---

Evidence from Colombia, Guatemala, Honduras, Peru and Trinadad and Tobago" (2021) 70 Resources Pol'y 101907 (finding either no statistically significant effect, and even in some cases, a marginal increase in corruption following adoption of EITI); Elizabeth Kasekende, Charles Abuka & Mare Sarr, "Extractive Industries and Corruption: Investigating the Effectiveness of EITI as a Scrutiny Mechanism" (2016) 48 Resources Pol'y 117; Kerem Öge, "Which Transparency Matters? Compliance with Anti-Corruption Efforts in Extractive Industries" (2016) 49 Resources Pol'y 41. See also Liz López & Guillaume Fontaine, "How Transparency Improves Public Accountability: The Extractive Industries Transparency Initiative in Mexico" (2019) 6:4 Extractive Industries & Society 1156 (arguing transparency is necessary, but other institutional features are also required for it to have the desired effect); Ivar Kolstad & Tina Søreide, "Corruption in Natural Resource Management: Implications for Policy Makers" (2009) 34:4 Resources Policy 214 (stating "transparency is not sufficient in itself for reducing corruption; credible sanctions of corrupt officials are also required" at 223).

188 See Nik Stoop, Marijke Verpoorten & Peter van der Windt, "More Legislation, More Violence? The Impact of Dodd-Frank in the DRC" (2018) 13:8 PloS one e0201783 (finding the introduction of the certification requirements of Dodd-Frank was accompanied by a significant upsurge in battles, looting, and violence against civilians); Lauren Wolfe, "How Dodd-Frank is Failing Congo", *Foreign Policy* (9 August 2018), online: <foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/> (discussing an open letter by 70 academics and researchers asserting Dodd-Frank is "contributing to, rather than alleviating, the very conflicts they set out to address." The article also discusses Washington Post reporting of the way Dodd-Frank "set off a chain of events that has propelled millions of miners and their families deeper into poverty"); Dominic P Parker & Bryan Vadheim, "Resource Cursed or Policy Cursed? US Regulation of Conflict Minerals and Violence in the Congo" (2017) 4:1 J Association Environmental & Resource Economists 1 (finding increased looting and shifting battles in the wake of Dodd-Frank).

189 See Paul M Healy & George Serafeim, "An Analysis of Firms' Self-Reported Anticorruption Efforts" (2016) 91:2 Accounting Rev 489.

points in time between 2014 and 2017."[190] Using the staggered adoption of these rules, including ESTMA, allowed a recent paper to examine the impact of the new disclosure rules.[191] On the positive side, the author found that firms subject to the new rules increased their payments to the host government by 12 percent under the new regime. However, those firms also reduced investment in those countries by 28 percent relative to nondisclosing firms.[192] Companies subject to the mandatory disclosure rules also submitted fewer bids for new licenses.[193] These effects were concentrated among companies that faced potentially high media and NGO interest, operating in countries with public reputations for corruption: "I find significantly stronger payment and investment effects for firms with a high risk of public shaming".[194] Looking at the output of oil and gas wells that were transferred from companies in disclosing jurisdictions (like Canada) to those in nondisclosing jurisdictions (like America), the researcher found that average well productivity declined by 3.46 percent and total resource production declined by 3.53 percent.[195]

In short, the effect of the new disclosure rules is that companies, particularly well-known companies, leave developing countries and are replaced by firms that do worse at managing the resources. As production efficiency is ultimately good for the host country (which collects royalties) and the rest of the world (which receives the benefits of lower prices and greater wealth), the introduction of significant distortions in resource allocations is bad news. Interestingly, the market understands the impact of these disclosure rules; multiple event studies show the new

---

190 Thomas Rauter, "The Effect of Mandatory Extraction Payment Disclosures on Corporate Payment and Investment Policies Abroad" (2020) 58:5 J Accounting Research 1075 at 1077.

191 See *ibid*.

192 See *ibid* at 1077.

193 See *ibid*.

194 *Ibid* at 1079.

195 See *ibid* at 1080.

disclosure rules adversely impact the stock price of affected firms.[196] There are, as yet, no studies that attempt to quantify whether the gains outweigh the losses for host countries.

It is impossible to state conclusively from this initial study that there is no therapeutic effect on corporate managers from the anticorruption disclosure regime. However, the study concludes: "[the] cross-sectional evidence suggests [firms] change their behaviour because EPD [extraction payment disclosure] reports increase the reputational cost of corporate actions that the public could perceive as exploitative."[197] This doesn't look, therefore, like the internal therapeutic mechanism of action anticipated by proponents of disclosure; it looks like the legislation is primarily deriving its effects from the possibility disclosure creates for outside reputational headaches.[198] Companies are withdrawing investments in high-risk countries in anticipation that an outside pressure campaign *might* occur, and the companies' departures show they have precisely calibrated the chance they are prominent enough to attract the attention of outside critics. It is not that small firms are too stupid or shameless to learn from their disclosure; it is that they are less likely to be noticed, and

[196] Elayan et al, *supra* note 181 (finding significant negative market reactions to 10 events that had a major effect on the likelihood ESTMA would be implemented); Healey & Serafeim, *supra* note 189 (finding negative price reactions for oil and gas firms in response to the proposal and passage of US anticorruption disclosure rules pursuant to Dodd-Frank); Katharina Hombach & Thorsten Sellhorn, "Financial Disclosure Regulation to Achieve Public Policy Objectives: Evidence from Extractive Issuers" (April 2017), online (pdf): *INDEM* <indem.uc3m.es/seminarios/filesem_1494245902.pdf> (stating that negative stock reactions around 12 regulatory events related to SEC rulemaking in relation to mandatory anticorruption disclosure); Jody Grewal, Edward J Riedl & George Serafeim, "Market Reaction to Mandatory Nonfinancial Disclosure" (2019) 65:7 Management Sci 3061 (showing negative stock price reaction when the EU introduced their disclosure rules). But see Eric Linder & George Marbuah, "The Cost of Transparency: Stock Market Reactions to Introduction of the Extractive Sector Transparency Measures Act in Canada" (2019) 63 Resources Policy 101463 (which does not find any systemic price reactions in Canada).

[197] Rauter, *supra* note 190 at 1112.

[198] See *ibid* at 1103–07.

continuing investment in the country is relatively safe. Again, this shows companies are quite sophisticated in their understanding both of their own operations and the relevant societal norms, and once again, this contradicts several of the animating assumptions behind therapeutic disclosure.

IV. CONCLUSION: THE COSTS OF THERAPEUTIC DISCLOSURE

The largest number of therapeutic claims right now comes from advocates for greater disclosure (including mandatory disclosure) of environmental matters, particularly those related to global warming.[199] Of course, the claims are not confined to disclosure's therapeutic impact; shareholders and, to a much lesser extent, NGOs and consumers are expected to turn the disclosure to good effect as well. However, for the vast majority of companies that are not big enough to attract the finite attention of NGOs and consumers, or which are not consumer-facing, or which have shareholders more interested in returns than long-term climate impact, the expected therapeutic influence of the disclosure proposals is presumably very important.[200]

A team of researchers from the United States and Australia recently conducted interviews with a range of corporate stakeholders in those countries around the impact of corporate law initiatives on behaviour relevant to climate change.[201] In

---

[199] See text accompanying notes 30–48, *above*; Modernization Taskforce, *supra* note 31; Caroline Flammer, Michael W Toffel & Kala Viswanathan, "Shareholders are Pressing For Climate Risk Disclosures. That's Good for Everyone", *Harvard Business Review* (22 April 2021), online: <hbr.org/2021/04/shareholders-are-pressing-for-climate-risk-disclosures-thats-good-for-everyone>; Conference Board, "In 2020, Companies Will Continue to Face Pressure to Diversify Their Boards, Address Pay Gaps, and Expand Political Contribution Disclosure", *News Wire* (17 December 2019), online: <prnewswire.com/news-releases/in- 2020-companies-will-continue-to-face-pressure-to-diversify-their-boards- address-pay-gaps-and-expand-political-contribution-disclosure- 300976064.html>; ISS, "Policy Supports Investors Choosing to Integrate Climate Performance & Disclosure into their Proxy Voting" (9 March 2020), online: <issgovernance.com/iss-launches-climate-voting-policy/>.

[200] See Tingle, "CSR", *supra* note 85.

[201] See McDonnell et al, *supra* note 45.

America, "[n]o interviewee on the company side pointed to any clear way in which disclosure was causing their company to behave differently in a substantive way."[202] A sustainability officer "forcefully denied" that shareholder proposals for more disclosure "would change corporate behavior, characterizing this as 'a mistaken theory of change.'"[203] Australian interview subjects were similarly skeptical about that country's much more advanced disclosure requirements, claiming "it is not clear" that disclosure is "driving companies to respond to climate change risks and opportunities more quickly or to transition to cleaner energy practices."[204] A study of the largest Australian public companies found their climate risk disclosure remains "largely superficial."[205]

There is a way of reading these reports and coming to the conclusion that all we need to do is tweak the disclosure rules.[206] But surely this is wrong. What we have seen is that disclosure may impact the behavior of third parties, but without the active intervention of those third parties in corporate affairs, disclosure does not impact the behavior of the corporation.

---

202 *Ibid* at 36.

203 *Ibid*.

204 *Ibid* at 40.

205 *Ibid*.

206 The most common suggestion these days is to include ESG disclosure in financial reports: see Janis P Sarra & Cynthia Willaims, "Time to Act: Response to Questions Posed by the Expert Panel on Sustainable Finance on Fiduciary Obligation and Effective Climate-Related Financial Disclosures" (26 January 2019), online (pdf): *Allard Research Commons* <ccli.ubc.ca/wp-content/uploads/2021/04/Time-to-Act.pdf>. But see Joseph A Johnson, "The Influence of Performance Reporting Attributes on Managers' Capital Allocation Decisions: An Examination of Reporting Audience and Location" (2019) 4:1 J Financial Reporting 117 (CSR disclosure in financial reports resulted in greater emphasis on maximizing the financial returns of CSR investments than if the disclosure was in a standalone report); Abdifatah Ahmed Haji, Paul Coram & Indrit Troshani, "Effects of Integrating CSR Information in Financial Reports on Investors' Firm Value Estimates" (2021) 61:2 Accounting & Finance 3605 (finding investor reactions to negative CSR information is stronger if it is in a standalone report and that investors are more likely to mistakenly assume the CSR information is assured if it is integrated with financial reporting).

It is not just that therapeutic disclosure doesn't appear to work; it imposes serious costs.[207] Most importantly, the disclosure frequently produces perverse outcomes. Therapeutic disclosure around executive compensation likely had the effect of increasing it. Therapeutic disclosure around ethics codes has proved not just ineffective; it has resulted in weakening those codes and reorientating them towards protecting the company, rather than protecting those the company might harm. Anticorruption disclosure does not generally appear to reduce corruption, but it does reduce the interest of large, technically sophisticated companies in running the reputational risks of investing in developing countries, and it produces declines in those countries' natural resource production. In the case of climate change disclosure, we don't have enough empirical data, but it seems very possible that by broadcasting green innovations and their results, the disclosure regimes reduce the economic incentives for companies to lead their peers in investing in meaningful change.[208]

In all these cases, the problem with therapeutic disclosure isn't just that it is too weak to produce change on its own; it is that the disclosure becomes available to everyone, not just the managers it is supposed to reform, and that produces unintended effects.

---

207 See e.g. Financial Conduct Authority, "Proposals to Enhance Climate-related Disclosures by Listed Issuers and Clarification of Existing Disclosure Obligations" (March 2020) Consultation Paper CP20/3 at 43, online (pdf): *Financial Conduct Authority* <fca.org.uk/publication/consultation/cp20-3.pdf> (estimating costs of just climate-change reporting will result in one-off compliance costs of EUR 119.5 million, and ongoing costs of EUR 49.5 million for affected UK issuers). See also Ben-Shahar & Schneider, "Failure of Mandated Disclosure", *supra* note 74 (enumerating the direct costs of disclosure as well as the indirect and unintended costs); Enriques & Gilotta, *supra* note 12 at 19–20, 23–24 (discussing the direct and indirect costs of disclosure, including the loss of competitive advantage as a result of exposing trade secrets); notes 96–97, *above* (discussing the need for secrecy as an incentive for many innovations); Alan R Palmiter, "Toward Disclosure Choice in Securities Offerings" (1999) 1999:1 Colum Bus L Rev 1 (discussing costs of disclosure rules in primary market transactions including opportunity costs, liability costs and competitive costs).

208 See notes 96–97, *above* (discussing disclosure's impact on the advantage of being a first mover, the competitive rewards of waiting and seeing, and innovation's need for secrecy).

Executives use compensation disclosure to negotiate their pay packages, competitors use environmental disclosure to copy or avoid climate-related investments, litigators use ethics codes to launch lawsuits, and corporate fear that consumers or NGOs will use anticorruption disclosure leads them to withdraw from countries that need foreign investment. The only exception so far from this rule of unintended consequences are the diversity rules, and that may change the first time a lawsuit is brought against a firm that misses a disclosed target—or the first time an activist investor uses diversity disclosure as a weapon against an incumbent board of directors.

Our current disclosure rules have another negative effect. Managers start avoiding the public markets where these disclosure rules live.[209] If they do join the public markets, they take steps to immunize themselves from the corporate governance regime we have created, including taking steps to render themselves independent of shareholder pressure.[210] They "greenwash", "wokewash" or just "spin". They hide potentially embarrassing information. The area of activity being disclosed moves from something aspirational to a possible source of liability or reputational threat, and so any existing progressive attitudes are replaced by a lawyer-led defensive crouch.[211] If we are extremely lucky, the new disclosure may cause companies to adopt

---

[209] See Guido Ferrarini & Andrea Ottolia, "Corporate Disclosure as a Transaction Cost: The Case of SMEs" (2013) 9:4 Eur Rev Contract L 363 at 365 (arguing recent changes to disclosure rules may have discouraged new firms from joining the public markets); Bryce C Tingle & J Ari Pandes, "Reversing the Decline of Canadian Public Markets" (2021) 14:13 Sch of Pub Pol'y Publications (arguing the decline in Canada's public markets is due, in part, to some of the disclosure reforms discussed in this paper); Brian J Bushee & Christian Leuz, "Economic Consequences of SEC Disclosure Regulation: Evidence from the OTC Bulletin Board" (2005) 39:2 J Accounting & Econ 233 (finding indirect empirical evidence of the burdens of disclosure on smaller firms by examining the way SEC disclosure requirements forced over 2,600 firms into the less regulated "pink sheet" market).

[210] See Tingle, "Returning Markets, *supra* note 29 at 48–49 (new entrants to the public markets use dual-class shares poison pills and classified boards to preserve board independence from outside pressure).

[211] See text accompanying notes 166–173, *above*.

economically inefficient investment strategies, but they may not be the ones we want.[212]

[212] See Easterbrook & Fischel, *supra* note 47 at 708 (disclosure can distort firm investment decisions and cause them to forgo profitable projects); Joseph A Franco, "Why Antifraud Prohibitions Are Not Enough: The Significance of Opportunism, Candor and Signalling in the Economic Case for Mandatory Securities Disclosure" (2000) 2000:2 Colum Bus L Rev 223. See also text accompanying notes 206–208, *above*.