

TO BE[NEFIT] OR NOT TO BE[NEFIT]: LESSONS FROM GLOBAL CORPORATE GOVERNANCE AND A PRINCIPLED PATH FOR THE DELAWARE BENEFIT CORPORATION

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With ESG and conscious capitalism dominating boardroom conversations across America, Delaware’s adoption of the Public Benefit Corporation (PBC) has been a recent attempt to support this movement by offering a new form of corporate governance that seeks to create a positive impact on society and the environment. Yet, the Delaware PBC falls short in

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several regards. First, it fails to provide any worker representation or voting rights. Second, it neither requires a clear stakeholder mission nor attempts to create any incentives for management to govern in the best interests of the company's stakeholders. Finally, it lacks a significant enforcement mechanism to hold both management and the Board accountable for breaching its fiduciary duties to these stakeholders.

By assessing the similarities between the stakeholder-friendly governance models of other OECD nations, this Comment offers three critical amendments to the existing Delaware PBC with the goal of bringing it into harmony with these other stakeholder-oriented regimes. Such amendments would not only help fix a corporate governance structure that is ripe for abuse by “green-” or “social-responsibility-” washing, but they would also add a layer of legitimacy to the broader ESG movement and protect companies' stakeholders. In other words, companies electing PBC status that seek to “talk the talk” of corporate social responsibility and environmental conscientiousness should be made to “walk the walk” in ensuring their corporate structures and decision-making benefit stakeholders.

INTRODUCTION

It's hip to be woke. A recent review of Super Bowl advertisements makes this notion abundantly clear. From GM's Dr. Evil is “Back for Good” campaign¹ to Walmart's “United Towns” theme² to Michelob Ultra's “Contract for Change”³, the rise of conscious (or woke) capitalism appears to reflect a tectonic shift in thought leadership and economic ideology. Or does it? While some companies have attempted to alter their corporate structure and increase their funding of employee, environmental, social and corporate governance (EESG) initiatives, others have used a façade of “greenwashing” and “social-responsibility-washing” to entice a younger

1. Robert Goldrich, *Mike Myers' Dr. Evil Is “Back for Good” in General Motors' Super Bowl Spot from McCann Detroit*, SHOOT (Feb. 16, 2022), <https://www.shootonline.com/video/mike-myers-dr-evil-back-good%C2%A0-general-motors%C2%A0super-bowl-spot-mccann-detroit> [https://perma.cc/UD24-LGU6].

2. Marcy Twete, *Sustainability and Social Impact Win at Super Bowl LIV*, LINKEDIN (Feb. 2, 2020), <https://www.linkedin.com/pulse/sustainability-social-impact-win-super-bowl-liv-marcy-twete/> [https://perma.cc/5S9W-YK34].

3. *Id.*; see also Alicia Adamczyk, *Millennials Spurred Growth in Sustainable Investing for Years. Now, All Generations Are Interested in ESG Options*, CNBC (May 21, 2021, 9:00 AM), <https://www.cnbc.com/2021/05/21/millennials-spurred-growth-in-esg-investing-now-all-ages-are-on-board.html> [https://perma.cc/WEW5-QFFX].

generation of consumers and investors.⁴

States seeking to provide an added layer of legitimacy to these sustainability and social responsibility commitments have in turn adopted public benefit corporation (PBC) legislation.⁵ In doing so, these states have created a separate form of governance that is more responsive to stakeholder concerns and supports efforts by entrepreneurs and investors to improve corporate purpose, accountability, and transparency.⁶ As America's corporate law hub and home to more than one million businesses entities (including some of the nation's largest corporations), Delaware's adoption of the PBC has "been expected to have a significant effect on the development of this area of corporate law."⁷ Moreover, several states have subsequently modeled their own PBC statutes after Delaware.⁸

Proponents of the Delaware PBC model praise the statute's requirements of an articulated corporate purpose and the publication of reports that track the company's compliance with its stated purpose as well as its progress towards its sustainability goals.⁹ Further, these scholars have opined that the adoption of the Delaware PBC model has engendered a change in the corporate power dynamic that puts legal and market force "behind the social responsibility commitments benefit corporations make."¹⁰

Yet, in its current form, the Delaware PBC model falls short in several respects. First, the statute fails to provide any requirement for stakeholder representation (specifically laborers) on PBC boards. For the Delaware PBC to truly embrace its stakeholder model of governance¹¹ and "rebuild public trust in business by ensuring that the benefits of [the PBCs'] work extend

4. Adameczyk, *supra* note 3.

5. *Delaware Unveils Public Benefit Corporation Legislation*, DELAWARE.GOV (Apr. 18, 2013), <https://news.delaware.gov/2013/04/18/delaware-unveils-public-benefit-corporation-legislation/> [<https://perma.cc/CS55-DQ8C>].

6. *Id.*

7. *Id.*

8. FREDERICK H. ALEXANDER, *BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE* 87 (2018). *See also* Colo. Rev. Stat. § 7-101-501, et seq. (2017); H.B. 2125, 2016-2017 Leg. Sess. (Kan. 2017) (providing a similar framework for PBCs).

9. Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 428 (2021).

10. ALEXANDER, *supra* note 8, at xii.

11. Strine, *supra* note 9, at 404 ("That is what the advocate of the Delaware PBC statute did when they passed a law giving corporations the option to embrace a mandatory stakeholder model of governance.").

beyond their stockholders and managers,”¹² it should require labor representation on PBC boards.¹³ Not only would such a reform allow workers to be involved in the corporate decision-making processes that affect them, but it would also better inform the board of ground-level issues as well as improve labor relations.¹⁴

Second, commentators have raised serious concerns that the corporate purposes offered by these PBCs are often too vague and aspirational to evaluate whether the company is adhering to its social mission.¹⁵ As such, these vague corporate purposes are effectively unenforceable and have therefore been pushed to the periphery while notions of shareholder primacy continue to steer corporate action and direction.¹⁶

Third, and finally, the current Delaware PBC model lacks a sufficient enforcement mechanism to truly hold PBCs accountable to their identified social purpose.¹⁷ The fact that PBCs are not insulated from market pressures and that the PBC model provides limited teeth behind enforcement raise questions as to whether its incremental approach can effectively respond to

12. *Delaware Unveils Public Benefit Corporation Legislation*, *supra* note 5 (quoting Sen. David Sokola, D-Newark, who sponsored the bill).

13. See Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance/> [<https://perma.cc/Z5XT-YNGB>] (noting that the inclusion of labor on corporate boards could provide greater accountability over corporate decision making and ensure improved investment in capital and labor).

14. See Simon Jäger et al., *Labor in the Boardroom*, 136 Q.J. ECON. 669, 721 (2021) (concluding that labor representatives on the board help align the interests of laborers and capital owners thus improving labor relations).

15. Jill E. Fisch & Steven Davidoff Solomon, *The “Value” of a Public Benefit Corporation*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 68, 84 (Elizabeth Pollman & Robert B. Thompson eds., 2021). While this Comment focuses on the Delaware PBC statute’s shortcomings in providing an effective framework for stakeholder commitments and action, stockholder-primacy advocates have also expressed concerns that a robust PBC model that aligns with aspects of stakeholder capitalism could reduce accountability of corporate leaders and thus impose substantial costs on stockholders. Strine, *supra* note 6, at 53. See generally Lucian A. Bebchuk & Robert Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 92 (2020) (arguing that the acceptance of stakeholderism could create less accountability for corporate managers as well as impede reforms that could actually protect stakeholders).

16. Fisch & Solomon, *supra* note 15, at 69. This is in part due to Section 365(c) of the Delaware General Corporation Law (DGCL), which effectively exculpates directors for failing to appropriately balance stockholder and stakeholder objectives and commitments. DEL. CODE ANN. tit. 8, § 365(c) (2022) (“In the absence of a conflict of interest, no failure to satisfy that balancing requirement shall, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty, unless the certificate of incorporation so provides.”).

17. Fisch & Solomon, *supra* note 15, at 69.

market and global developments that have seen the power of institutional investors increase while job quality and environmental health have declined considerably.¹⁸ Yet, the question remains—how can the Delaware PBC best adapt to this reality and embrace its stakeholder-oriented purpose?

Perhaps, the answer involves looking abroad. While institutional investors have intuitively invested in an American corporate governance system that has steadfastly endorsed a shareholder primacy model, they continue to invest considerable capital in other Organization for Economic Co-operation and Development (OECD) nations whose corporate governance systems provide significantly less accountability for stockholder return.¹⁹ This seems to suggest that, at least, short-term stockholder gain is not always the sole consideration of these investors. Further, it indicates that a new generation of investors exists, and that this generation tends to look beyond equity value as a company's real economic measure and instead considers stakeholder interests and the reduction of harmful externalities as key ingredients in long-term, sustainable profit.²⁰ In short, a more aggressive stakeholder focus does not necessarily diminish stockholder value but rather may supplement it by better aligning corporate purpose and objectives with the sustainability goals and interests of its stockholders. To echo Larry D. Fink, CEO of BlackRock, “[w]e focus on sustainability not because we’re environmentalists, but because we are capitalists and fiduciaries to our clients.”²¹

Nevertheless, I do not argue that the goal of the Delaware PBC should be to achieve perfectly symmetrical outcomes for both stockholders and stakeholders. Rather, my argument is to the contrary. Corporations have the freedom and flexibility to incorporate in any way they see fit under the law. The decision to incorporate as a PBC is a conscious one. It is one that is

18. Ken Silverstein, *Institutional Investors Have More Power Than Governments to Shape Climate Future*, FORBES (July 26, 2019, 9:04 AM), <https://www.forbes.com/sites/kensilverstein/2019/07/26/institutional-investors-have-more-power-than-governments-to-shape-climate-future/?sh=1f36ff9430d1> [<https://perma.cc/FUV7-KREU>]; see also David R. Howell & Arne L. Kalleberg, *Declining Job Quality in the United States: Explanations and Evidence*, RUSSELL SAGE FOUND. J. SOC. SCI., Sept. 2019, at 1, 1 (concluding that American job quality has declined across three dimensions including the stagnation or decline in real (inflation-adjusted) income, increasing wage inequality, and greater incidences of lower pay).

19. See ORG. FOR ECON. COOP. & DEV., OECD INSTITUTIONAL INVESTORS STATISTICS 2020 (2020), <https://doi.org/10.1787/9a827fb7-en> (showing that investment funds are continually and increasingly investing in foreign companies in countries like Germany, France, and Denmark that strongly emphasize some form of stakeholder governance).

20. Adamczyk, *supra* note 3.

21. Brett Hurt, *‘Woke Capitalism’ Is A New Ideology For A Digital Economy*, TECHCRUNCH (Feb. 9, 2022, 1:32 PM), <https://techcrunch.com/2022/02/09/woke-capitalism-is-a-new-ideology-for-a-digital-economy/> [<https://perma.cc/T68Q-43ZV>].

opted for by businesses and investors who seek to go the extra mile, who wish to differentiate themselves in their commitments to sustainability and social responsibility. Providing more stringent guidelines and enforcement to the current PBC framework would not undermine American corporate governance or its legal structure, but instead allow for PBCs to better embrace their core purpose within a parallel model of corporate governance.

As such, this Comment explores two critical ideas. First, it looks at the similarities between stakeholder governance models of OECD nations. Second, it considers the most promising aspects and trends of these OECD corporate governance models and how their implementation in the Delaware PBC could allow for it to move into greater harmony with other high-functioning market economies that compete effectively in global markets while producing better outcomes for stakeholders. Ultimately, while the Delaware PBC is still in its infancy, this Comment seeks to provide fodder for its future reform and alteration with the goal of creating a system of corporate governance that can better serve its purpose as a framework for sustainable and stakeholder-oriented governance.

I. SIMILARITIES ACROSS OECD CORPORATE GOVERNANCE MODELS

Many corporate governance systems within the OECD share critical similarities that distinguish them from their American counterparts, including the current Delaware PBC model. First, these corporate governance models place an emphasis on labor's participation, either direct or indirect, in the corporate decision-making process. Second, they embed a clear stakeholder mission in the fiduciary duties of the board, and structure executive and director compensation to meet long term objectives.²² Finally, these foreign models of corporate governance include more stringent mechanisms for the enforceability and accountability of fiduciary duties in protecting and promoting stakeholder interests and limiting harmful externalities. Together, these shared characteristics of corporate governance in other OECD countries help provide an effective and sustainable model that can help better protect and promote stakeholder interests.

22. Christiaan de Brauw, *The Dutch Stakeholder Experience*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 2, 2020), <https://corpgov.law.harvard.edu/2020/08/02/the-dutch-stakeholder-experience/> [<https://perma.cc/6KRM-TPDX>].

A. Labor's Voice: Worker Representation in Corporate Governance

Of the many OECD nations who prefer stakeholder governance, those who have gone the extra step to provide opportunities for stakeholders to participate in the corporate decision-making process have reaped the benefits of a diverse pool of knowledge that has allowed for more informed policies and development strategies.²³ While there is a range of stakeholder engagement within these different models, they all have nonetheless contributed to long-term profitability and industrial success. The most popular means of stakeholder participation takes the form of board codetermination.

Board codetermination, in its broadest iteration, is an element of economic organization where a percentage of a company's board of directors are elected by the workforce.²⁴ While several OECD member nations provide some form of codetermination rights, Germany has the most far-reaching model.²⁵

Since the passage of the Codetermination Act of 1976, German companies over a certain employee base are required to form a two-tiered corporate board structure that included significant labor representation on the supervisory board, or *Aufsichtsrat*.²⁶ For these companies, the supervisory *Aufsichtsrat* board is responsible for overseeing the management board (*Vorstand*) in a manner similar to a US board of directors overseeing

23. See UMBERTO PISANO ET AL., EUR. SUSTAINABLE DEV. NETWORK, Q. REP. NO. 39, THE ROLE OF STAKEHOLDER PARTICIPATION IN EUROPEAN SUSTAINABLE DEVELOPMENT POLICIES AND STRATEGIES 10–11 (2015), https://www.esdn.eu/fileadmin/ESDN_Reports/2015-December-The_role_of_stakeholder_participation_in_European_sustainable_development_policies_and_strategies.pdf [<https://perma.cc/E6GZ-GS6V>] (noting that stakeholder participation in countries like Germany, France, Finland, and Switzerland has facilitated necessary space for debate and information exchange and allowed for the strengthening of National Sustainable Development Strategies); see also Patricia Pinkhasik & Pia Herrmann, *Learning from External Stakeholders: Evidence from Two Railway Projects in Germany*, PROJECT LEADERSHIP & SOC., Dec. 2021, at 1, 1, <https://doi.org/10.1016/j.plas.2021.100028>.

24. Leo Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Withing American Corporate Governance*, 106 MINN. L. REV. 1325, 1327 (2022).

25. *Id.* at 1336.

26. Rebecca Page, *Co-Determination in Germany – A Beginner's Guide* 4,8 (Hans-Böckler-Stiftung, Working Paper No. 313, 2018), <https://www.econstor.eu/handle/10419/209552>; see also Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2478 (2020) (“Generally speaking, corporations with fewer than 500 employees have supervisory board members elected by shareholders; corporations with 500 to 2,000 employees must have one-third of their board members elected by employees; and those with more than 2,000 employees have one-half of their supervisory board members elected by employees.”).

corporate officers.²⁷ The *Aufsichtsrat* board is responsible for setting the goals and direction for the company and evaluating the performance (including hiring and firing) of members of the *Vorstand* board.²⁸ Additionally, the *Aufsichtsrat* must be partially comprised of employee representatives and work alongside trade unions in identifying and communicating problems related to the workforce.²⁹

A similar form of board codetermination can be found throughout Scandinavia. Here, labor representation on a company's board of directors is determined exclusively by the vote of that company's workers.³⁰ Like in Germany, unions play a critical role in the selection of Scandinavian worker directors.³¹

Other OECD nations, like the Netherlands and France, offer a more restrained form of board codetermination. Dutch corporate law gives companies the option between a single-tier and a two-tier corporate governance structure.³² While a single-tier structure may be composed of entirely executive directors, if a company has issued capital of over \$16 million euros and has more than 100 employees, then the board must be comprised of a majority of non-executive directors, a third of which are selected by a works council.³³ When there is a two-tier structure, a works council is responsible for nominating directors to the supervisory board that is subject to approval by both the supervisory board and the shareholders.³⁴

27. Page, *supra* note 26, at 23.

28. The *Aufsichtsrat* is also responsible for determining certain business operations that require supervisory board approval. These usually include important business decisions related to the sale of the company or any large-scale change to operations. Further, the *Aufsichtsrat* is responsible for scrutinizing the corporation's annual financial accounts and expenditures (including dividends) and must provide a report of these findings to the corporation's stockholders. *Id.*

29. Similar to the fiduciary duties present in Delaware corporate law, members of the *Aufsichtsrat* have a duty of care and confidentiality to make decisions that are in the best interest of the corporation, and which also protect the company's secrets. *Id.* at 24.

30. Per Lekvall, *A Consolidated Nordic Governance Model*, in *THE NORDIC CORPORATE GOVERNANCE MODEL* 52, 83 (Per Lekvall ed., 2014).

31. See Jesper Lau Hansen & Carsten Lønfeldt, *Appendix A: Corporate Governance in Denmark*, in *THE NORDIC CORPORATE GOVERNANCE MODEL*, *supra* note 30, at 115, 149 (noting that unions help facilitate employee representation on corporate boards in Denmark and Sweden).

32. *Netherlands*, EUR. TRADE UNION INST.: WORKER PARTICIPATION, <https://www.worker-participation.eu/national-industrial-relations/countries/netherlands> [<https://perma.cc/3USV-JE7L>] (last visited Jan. 25, 2023).

33. *Netherlands*, EUR. TRADE UNION INST.: BOARD-LEVEL REPRESENTATION, <https://www.worker-participation.eu/national-industrial-relations/countries/netherlands> [<https://perma.cc/3USV-JE7L>] (last visited Feb. 3, 2023).

34. *Id.*

While these worker directors can exercise powers similar to the German *Aufsichtsrat*, they cannot be an employee of the company or a member of an affiliated union.³⁵

Similarly, French corporate law allows for a selection between a one and two-tier board structure and excludes union representatives.³⁶ However, French employees are entitled to elect one director and these directors are limited to an advisory role on the board.³⁷

Underlying these different forms of top-down or “company level” board codetermination is the strong influence of works councils whose ground-up representation provides workers with voice and leverage even in the absence of unions.³⁸ Although not an official union body, works councils are groups that are elected by employees to represent the interests of employees and can, in some instances, possess codetermination and veto rights in connection with certain board actions.³⁹ Further, works councils are empowered, and often required, to work cooperatively with management, obtain information regarding worker performance, and nominate worker directors to the board.⁴⁰ These duties are important in large companies, both public and private, who are required by EU law to establish works councils with strong employee membership.⁴¹ While works councils lack the governance powers of directors, they nonetheless serve a critical role in representing workers and furthering their interests in matters related to safety, job security, hours, and pay.⁴² In short, works councils operate as an important and necessary agent that both protects and furthers the interests of a company’s workforce.

Both “top-down” and “ground-up” board codetermination models have

35. *Id.*

36. Strine et al., *supra* note 24, at 1350 (arguing that union influence in both the Netherlands and France is waning given that employee representation on corporate boards excludes union representatives); see also Hanjo Hamann, *Unpacking the Board: A Comparative and Empirical Perspective on Groups in Corporate Decision-Making*, 11 BERKELEY BUS. L.J. 1, 12–13 (2014) (noting that stock corporations in France have the option to have either a one- or two-tier board structure).

37. Jens Dammann & Horst Eidenmueller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 871, 880 tbl.1 (2021), <https://doi.org/10.52214/cblr.v2020i3.7809>.

38. Strine et al., *supra* note 24, at 1337.

39. *Germany*, EUR. TRADE UNION INST.: WORKER PARTICIPATION, <https://www.worker-participation.eu/national-industrial-relations/countries/germany> [<https://perma.cc/AQ2G-J2FM>] (last visited Jan. 25, 2023).

40. *Id.*

41. Council Directive 94/45, 1994 O.J. (L 254) 64 (EU).

42. Strine et al., *supra* note 24, at 1338 (noting that German works councils have a right to codetermination in matters involving increases in working hours, holiday schedules, performance monitoring, accident prevention, and performance-based compensation).

enhanced the role of workers within the corporate decision-making process. This, in turn, has yielded significant benefits for workers and other stakeholders within these OECD nations, especially in terms of management-labor relations and the relationship between the company and society.

Greater labor representation on either the board or supervisory board has led to the resolution of workforce and other stakeholder-based objectives through the amplification of labor's voice and its improved position in relation to management.⁴³ These objectives include the improvement of labor conditions and the corporation's impact on the broader community.⁴⁴ As such, board codetermination has also served as a vital bulwark in protecting employee interests from domineering management control.⁴⁵ In countries that have adopted board codetermination, company boards have created higher-wage jobs, reduced the number of unskilled jobs, and experienced stronger wage growth over the last two decades.⁴⁶ This can be partially attributed to board-level codetermination's creation of two-way knowledge flows that give "employers a more intimate understanding of company operations and the desires of workers" while also "giving workers financial and strategic information that may inform collective bargaining strategies."⁴⁷ Additionally, codetermination's ability to create harmonious relationships between labor representatives and a company's management and stockholders is fostered, in part, by the legal requirement that these labor representatives ultimately place the interests of the corporation over those of

43. Susan R. Holmberg, *Workers on Corporate Boards? Germany's Had Them for Decades?*, N.Y. TIMES (Jan. 6, 2019), <https://www.nytimes.com/2019/01/06/opinion/warren-workers-boards.html> [<https://perma.cc/4NUA-58F7>]; see also Klas Levinson, *Codetermination in Sweden: Myth and Reality*, 21 ECON. IND. DEM. 457, 463 (2000) (noting that board codetermination in Sweden is an important asset for many Swedish companies as it allows for the contribution of new ideas, strengthens the legitimacy of difficult decisions, and creates greater cooperation that enhances the value of the company).

44. See Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 357 (2021) ("In sum, this new economic research suggests that employee representation on corporate boards benefits employees, creditors, and the broader community through the pursuit of meaningful CSR measures.").

45. For example, worker directors on Volkswagen's board have veto powers over plant closures and employee layoffs. *Id.* at 333.

46. George Tyler, *The Superiority of Codetermination*, SOC. EUR. (July 16, 2019), <https://socialeurope.eu/the-superiority-of-codetermination> [<https://perma.cc/6SCE-73KZ>] (finding that countries such as Austria, the Netherlands, Germany, and Scandinavia have grown their median labor compensation at a rate that is twice to ten times faster than the U.S. while also offshoring fewer high-skilled jobs).

47. Simon Jäger et al., *Codetermination and Power in the Workplace*, ECON. POL'Y INST. (Mar. 23, 2022), <https://www.epi.org/unequalpower/publications/codetermination-and-power-in-the-workplace/> [<https://perma.cc/CV8Z-T4DC>].

their respective constituents.⁴⁸ In aligning the interests and, more importantly, the fiduciary duties of management and labor representatives, this shared form of corporate governance provides greater transparency and efficiency within the corporate decision-making process. Thus, board codetermination can create an almost symbiotic relationship between labor representatives and management as each recognize the importance of the other in helping the company thrive. This, in turn, has strengthened the bonds between labor and management and “lead employee representatives to be more understanding of management concerns, [and] managers to be more solicitous of the worker perspective.”⁴⁹

Finally, codetermination can also produce greater societal benefits.⁵⁰ A recent study by Robert Scholz and Sigurt Vitols found a positive relationship between the strength of codetermination and substantive corporate social responsibility (CSR) policies.⁵¹ Specifically, the study noted that corporate governance systems with codetermination facilitated greater CSR commitments to emissions reduction and employment security.⁵² Further, this relationship is likely to strengthen if labor representatives live in a community that would be adversely affected by corporate policies.⁵³

Employee participation in corporate governance is also present in countries that do not practice board codetermination and have a less formal process of stakeholder governance. In countries like Japan and South Korea, whose corporate governance systems lack both “company level” codetermination and works councils,⁵⁴ there is nonetheless a strong emphasis on relationships between the company and its employees.⁵⁵ In both systems,

48. Hayden & Bodie, *supra* note 44, at 349.

49. *Id.* at 354.

50. Grant Hayden & Matthew Bodie, *How Corporate Governance Codetermination Works in Practice*, COLUM. L. SCH.: CLS BLUE SKY BLOG (June 3, 2021), <https://clsbluesky.law.columbia.edu/2021/06/03/how-corporate-governance-codetermination-works-in-practice/> [<https://perma.cc/85YL-WV4Y>].

51. Robert Scholz & Sigurt Vitols, *Board-Level Codetermination: A Driving Force for Corporate Social Responsibility in German Companies*, 25 EUR. J. INDUS. RELS. 233, 233 (2019)

52. *Id.* at 239–40.

53. Mark J. Loewenstein, *Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673, 1680 (2002).

54. See generally JAPAN INST. FOR LAB. POL’Y & TRAINING, No. 11-2012, SYSTEM OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE (2012), <https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11.pdf> [<https://perma.cc/MKR3-MWV6>].

55. See Hirotaka Takeuchi, Emi Osono & Norihiko Shimizu, *The Contradictions That Drive Toyota’s Success*, HARV. BUS. REV. (June 2008), <https://hbr.org/2008/06/the-contradictions-that-drive-toyotas-success> [<https://perma.cc/62CV-V7V2>] (“What’s different is that

employees are viewed as long term stakeholders, and this emphasis on relationships can, and often does, determine both board composition and company policy.⁵⁶ Specifically, it is customary for Japanese companies to elect directors who are former long-term employees of the corporation.⁵⁷ This means that the board is likely to carry an employee's perspective, or at least be responsive to employee interests, in relation to corporate policy. Further, the presence of these former long-term employees provides informal protections for laborers like that of the German codetermination model. These informal protections, in turn, have given rise to a corporate culture that prioritizes long-term employment, non-shareholder stakeholder interests, and secure and positive relations between labor and management.⁵⁸

At bottom, worker participation and representation in the corporate decision-making process compliments the shift towards a more EESG-friendly style of governance. Moreover, investors see shared governance as critical in improving productivity and profits, as it helps negate problems arising from investment in firm-specific human capital and allows for the attraction and retention of high-caliber labor.⁵⁹ This reality should help to allay concerns about investors' potential hesitancy and unwillingness to invest in a more labor-friendly form of governance. This shared focus on greater labor representation and participation has both fostered an improved commitment to the very stakeholders responsible for the company's operation and provided a sustainable model of corporate governance that can improve firm performance within high functioning market economies.

B. Clear Stakeholder Missions and EESG-based Compensation

Many OECD models of corporate governance also share a preference for the prioritization of long-term value creation. According to some critics,

the company views employees not just as pairs of hands but as knowledge workers who accumulate *chie*—the wisdom of experience—on the company's front lines. Toyota therefore invests heavily in people and organizational capabilities, and it garners ideas from everyone and everywhere: the shop floor, the office, the field.”); Hasung Jang & Joongi Kim, *Korea Country Paper: The Role of Boards and Stakeholders in Corporate Governance* 4 (Third OECD Asian Roundtable on Corporate Governance, 2001) (“Traditionally, in most of Korean corporate history, boards consisted of former employees that had spent their lifetime at the company. Board positions were often seen as a way to honourably retire aging employees out of the company.”).

56. Loewenstein, *supra* note 53, at 1686.

57. *Id.*

58. *Id.*

59. *Id.* (“Firms invest in human capital and realize the advantages of a stable, well-trained, and loyal workforce.”).

this diverges significantly from that of the American corporate governance structure, which has shifted towards short-term stock price maximization.⁶⁰ In doing so, corporate boards prioritize a company's market value and short-term financial performance at the expense of other stakeholder investments that are crucial to long-term productivity.⁶¹ The reason for the divergence in these models is simple: the American system equates equity value with a company's corporate value.⁶² In contrast, most OECD governance models have a more well-rounded view of corporate value that considers the overall value a company provides to society inclusive of externalities and stakeholder interests. To be clear, these other OECD models of corporate governance do not dispense with the goal of generating returns for stockholders. Rather, they view stockholder profit as merely a piece, albeit an important one, in creating sustainable, long-term productivity and value.⁶³

In assessing corporate governance structures that allow for sustainable, long-term growth and value, it is critical to note the characteristics of these models that help insulate the company from short-term market pressures. These characteristics include embedding a clear, purpose-driven stakeholder mission in the fiduciary duties of the board and tying director and manager compensation to EESG objectives.⁶⁴ Businesses in nations whose corporate governance models provide some or both of these characteristics may be

60. See Ann Marie Knott, *The Real Reasons Companies Are So Focused on the Short Term*, HAR. BUS. REV. (Dec. 13, 2017), <https://hbr.org/2017/12/the-real-reasons-companies-are-so-focused-on-the-short-term> [<https://perma.cc/YD8U-8H9X>] (addressing the argument that American companies are largely subject to short-termism).

61. See, e.g., Strine, *supra* note 9, at 413 (“The predominant strain was just on squeezing corporate management to get more juice to the stockholders, with pushback from a few traditionalist scholars who argued that there was long-term value to stockholders in a more managerialist model that reduces some of the short-term pressures of the market.”).

62. *Id.* at 408.

63. See generally Patricia Crifo & Antoine Rebérioux, *Corporate Governance and Corporate Social Responsibility: A typology of OECD Countries*, 5 J. Gov. & Reg. 14, 16–17 (2016) (observing the different emphasis on CSR and governance structures across OECD countries); see also Steve Klemash, *Stakeholder Capitalism for Long-Term Value Creation*, HARV. L. SCH. F. ON CORP. GOV. (June 13, 2019), <https://corpgov.law.harvard.edu/2019/06/13/stakeholder-capitalism-for-long-term-value-creation/> [<https://perma.cc/368Y-5N74>] (offering guidance to boards in shifting corporate focus to long-term value creation).

64. See Merel Spierings, *Linking Executive Compensation to ESG Performance*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 27, 2022), <https://corpgov.law.harvard.edu/2022/11/27/linking-executive-compensation-to-esg-performance/> [<https://perma.cc/CPT4-CMGK>] (discussing ESG performance goals in several OECD countries that adopt a form of stakeholder governance); see also Christiaan de Brauw, *The Dutch Stakeholder Experience*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 2, 2020), <https://corpgov.law.harvard.edu/2020/08/02/the-dutch-stakeholder-experience/> [<https://perma.cc/Q5DF-P5XP>] (noting that the Dutch stakeholder model requires companies to embed a clear stakeholder mission in the fiduciary duties of the board).

better able to avoid market pressures and pursue long-term corporate objectives that enhance stakeholder welfare.

While a company's stakeholder-oriented model is often criticized for its ambiguity and lack of clarity, the Dutch model of corporate governance has demonstrated that a pluralistic model can be sufficiently clear and practical.⁶⁵ The 2016 edition of the Dutch Corporate Governance Code (DCGC 2016) and recent Dutch case law have borne this out. The DCGC 2016 emphasizes the notion that corporate purpose centers on the "long-term alliance between its shareholders and other parties involved."⁶⁶ Specifically, the board must "focus on long-term value creation for the corporation and its affiliated undertaking, and take[] into account the stakeholder interests that are relevant."⁶⁷

Although the DCGC 2016 provisions are subject, like many EU models of corporate governance, to a "comply or explain" regime and do not provide a direct link between long-term value creation and directors' fiduciary duties to promote the enduring success of the company, recent Dutch case law has made this link explicit.⁶⁸ In its 2014 landmark *Cancun* decision, the Dutch Supreme Court held that a board's primary duty is to pursue a corporate direction that will best lead to sustainable, long-term business success.⁶⁹ This positive duty of care towards the company, in turn, creates a negative duty of care towards stakeholders where, in fulfilling their duties in promoting the enduring success of the company, directors must prevent disproportionate and unnecessary harm to stakeholders.⁷⁰ Together, the DCGC 2016 and Dutch common law provide boards with an adequately clear set of responsibilities that help guide their commitments to both long-term productivity and interested stakeholders.

Similarly, in France, companies that elect to become a *société à mission* under the country's new Action Plan for the Business Companies' Growth and Transformation act (*Loi PACTE*) must specify a clear corporate purpose that guides the company's strategy with respect to certain social and environmental issues.⁷¹ By adopting this mission statement, or *raison d'être*,

65. De Brauw, *supra* note 64.

66. Manuel Lokin & Jeroen Veldman, *The Potential of the Dutch Corporate Governance Model for Sustainable Governance and Long Term Stakeholder Value*, 4 ERASMUS L. REV. 50, 52 (2019), <https://doi.org/10.5553/ELR.000160>.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Blanche Segrestin, Armand Hatchuel & Kevin Levillain, *When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose*, 171 J. BUS. ETHICS 1, 9 (2021).

in the company's charter or bylaws, *société à mission* companies make a contractual commitment to a specific social or environmental objective. With these specific commitments now binding on the company, the CSR initiatives of *société à mission* companies benefit from enhanced credibility and the lack of greenwashing claims.⁷² Moreover, by specifying the mandate of directors, these contractual commitments to CSR initiatives increase directors' abilities to "refuse excessive demands for profits from shareholders . . . thus secur[ing] long-term collective efforts for desirable futures."⁷³ This long-term view of corporate governance leaves the Dutch and French models well positioned to embrace EESG initiatives, as these stakeholder goals are required for continual and sustainable business success.

Other OECD nations have furthered their commitment to long-term corporate growth and value by ensuring that both directors and officers have a stake in the long-term success of the company, particularly in regard to EESG commitments. This often takes the form of equity in the business and serves as an important incentive in aligning director and executive interests with the long-term objectives of the company and its stockholders and stakeholders.⁷⁴ Further, the U.K. and many OECD countries within the EU have tied these long-term incentives to specific EESG goals.

A survey conducted by Pay Governance found that 90% of U.K. and EU companies include EESG metrics in their incentive compensation plans as compared to only 20% of U.S. companies.⁷⁵ Their research also revealed that 41% of these U.K. and EU companies had long-term incentive plans tied to EESG metrics, as opposed to a mere 5% of U.S. companies.⁷⁶ The remuneration policy of Dutch chemical company DSM offers an insight into how numerous EU companies have structured their incentive plans to center

72. *Id.* Many large French companies like Danone have begun to adopt the *société à mission* model to signal their social commitments. See generally *Raison D'Être*, DANONE, <https://www.danone.com/about-danone/sustainable-value-creation/danone-entreprise-a-mission.html> [https://perma.cc/9LX6-3PPH] (last visited Jan. 26, 2023) (describing Danone's social and environmental commitments).

73. Segrestin et al., *supra* note 71, at 9.

74. Boris Groysberg et al., *Compensation Packages That Actually Drive Performance*, HARV. BUS. REV. (Feb. 2021), <https://hbr.org/2021/01/compensation-packages-that-actually-drive-performance> [https://perma.cc/HE3B-TJXW].

75. John Ellerman Mike Kesner & Lane Ringlee, *Do UK and EU Companies Lead US Companies in ESG Measurements in Incentive Compensation Plans?*, HARV. L. SCH. F. ON CORP. GOV. (June 18, 2021), <https://corpgov.law.harvard.edu/2021/06/18/do-uk-and-eu-companies-lead-us-companies-in-esg-measurements-in-incentive-compensation-plans/> [https://perma.cc/Q9GK-NZAP].

76. *Id.*

on long-term financial performance and sustainability objectives.⁷⁷ At DSM, the Long-term Incentive (LTI) scheme, which accounts for half of an executive's variable remuneration and quarter of their entire pay, is based on Total Shareholder Return (TSR) performance versus a competitor and greenhouse gas emissions (GHGE) reductions over volume-related revenue.⁷⁸ Further, these performance shares only vest after both LTI objectives have been satisfied, which is measured over a three-year period.⁷⁹

By having their remuneration committees tie director and executive compensation to long term performance metrics and sustainability goals, many companies within OECD nations have successfully repelled short-term market pressures and temptations that could jeopardize both stakeholder well-being and long-term value creation.

Together, the long-term focus towards value creation shared by many OECD nations and protected through a clear stakeholder mission in the fiduciary duties of the board and ensuring managers have a stake in the accomplishment of the company's long-term, ESG initiative have been essential in improving outcomes for stakeholders and protecting corporate sustainability.

C. Limiting Negative Externalities Through Accountability and Enforceability

A final shared characteristic of other OECD corporate governance structures is the enforcement of stakeholder rights and greater accountability toward EESG commitments. This has been accomplished, in large part, through broadened fiduciary duties as well as the universal adoption of standardized EESG disclosure requirements.⁸⁰ These mechanisms have played a significant role in both enhancing stakeholder welfare by limiting corporate externalities that have disastrous environmental and social

77. PRINCIPLES FOR RESPONSIBLE INV., INTEGRATING ESG ISSUES INTO EXECUTIVE PAY: GUIDANCE FOR INVESTORS AND COMPANIES 22 (2012), <https://www.unpri.org/download?ac=1878> [<https://perma.cc/Q98U-9AAR>].

78. *Id.* at 21. For more information regarding DSM's remuneration policy see DSM, DSM REMUNERATION POLICY MANAGING BOARD 4-5 (2019), https://www.dsm.com/content/dam/dsm/corporate/en_US/documents/managing-board-remuneration-policy.pdf [<https://perma.cc/X78Q-CFDD>].

79. See DSM, *supra* note 78, at 5 (noting that even after vesting LTI shares are subject to a holding period of two years and therefore performance shares are blacked for a period of 5 years in total).

80. Eric J. Belfi, Lisa Streljau & Roger W. Yamada, *US Follows EU's Lead on ESG Reporting Standards*, LABATON SUCHAROW (Jan. 12, 2022), <https://www.labaton.com/blog/us-follows-eus-lead-on-esg-reporting-standards> [<https://perma.cc/J4PW-G3D2>].

consequences.⁸¹

The three corporate governance systems that have emerged as leaders in broadening stakeholder enforcement rights are Italy, France, and Canada. Adopted in December 2015, Italy's *società benefit* is the first "benefit corporation" model created in a civil law legal system and the second ever in the world (following the various state models adopted in the U.S.).⁸² Similar to the public benefit corporation models in the U.S. (and specifically the Delaware PBC), the *società benefit* contains a preamble that states that the purpose of a public benefit corporation is to "operate in a responsible, sustainable and transparent manner"⁸³ The *società benefit*, in conjunction with the Italian Stability Law of 2016, imposes a similar set of fiduciary duties on directors who are required to consider not only the interests of shareholders and to pursue "common benefit objectives," but also to take into account the welfare of "individuals, communities, territories and the environment, cultural and social heritage, entities and associations, as well as other stakeholders."⁸⁴ Still, the Italian public benefit corporation model goes further.

First, the Italian system of corporate governance delegates enforcement responsibilities to the Competition Authority (AGCM), who are tasked with controlling and monitoring *società benefit* companies' actual pursuit of "common benefits."⁸⁵ In short, the AGCM possesses the power to fine *società benefit* companies that fail to pursue their stated purpose and common benefits.⁸⁶

Second, directors of *società benefit* companies face greater and considerably more onerous fiduciary responsibilities to their respective shareholders and companies.⁸⁷ As the *società benefit* model does not limit remedies and director liability, preserve or create director discretion, or limit stakeholder suits, directors of Italian benefit corporations must actively

81. Carlos Oliviera, *The Delaware Public Benefit Corporation Model: Analysis and Comparison*, 4 PORTUGUESE L. REV. 191 (2020) (manuscript at 70).

82. *Id.* (manuscript at 47).

83. Frederick Alexander, *Putting Benefit Corporation Statutes into Context by Putting Context into the Statutes*, 76 BUS. LAW. 1, 11 (2021) (quoting L. 208/2015).

84. *Id.*

85. Oliviera, *supra* note 81 (manuscript at 51).

86. *Id.* To date, there are more than three hundred *società benefit* companies, none of which have been subject to fines by the AGCM for failing to adequately pursue its stated corporate purpose. See *English Information*, SOCIETA BENEFIT, <https://www.societabenefit.net/english-information/> [<https://perma.cc/WL5L-HPR4>] (providing a list of all registered *società benefit* companies).

87. Oliviera, *supra* note 81 (manuscript at 51).

protect the interests of non-shareholder constituents.⁸⁸ Further, *società benefit* companies are required to appoint an “impact director” who is responsible for the pursuit and the actualization of stakeholder benefits.⁸⁹ In the annual reports of *società benefit* companies, these impact directors are tasked with describing the company’s specific stakeholder objectives, the actions taken to accomplish these objectives, and any potential obstacles preventing the company from achieving them.⁹⁰ Any contravention of these requirements would constitute a breach of fiduciary duty under Italian law and leave an impact director personally liable.⁹¹

Although a *società benefit* company has yet to be subject to substantial litigation or financial penalties, this new corporate governance structure has pioneered a model that strikes an optimal balance between shareholder return and stakeholder welfare. In short, this model was not used as a vehicle to feign stakeholder interest while protecting directors. Rather, the broadening of directors’ fiduciary duties and the inclusion of an enforcement mechanism have allowed *società benefit* companies to promote a new model of business that equally pursues profit and a social purpose.⁹²

As discussed above, France introduced its own model for benefit corporations in May 2019 through the *Loi PACTE*.⁹³ This act fundamentally redefined the purpose of an enterprise as an innovative space for collective action that considers both economic organization and social stewardship. Similar to the *società benefit*, the French benefit corporation (or *société à mission*) statute contains provisions that provide for greater corporate accountability and the enforcement of company’s stated purpose and stakeholder commitments.

Specifically, *société à mission* companies must comply with the following three conditions: First, the corporation’s purpose, or *raison d’être*, should be specifically listed in its charter together with at least one or more social and environmental objectives “that the company shall pursue as a

88. Alexander, *supra* note 83, at 11.

89. Oliviera, *supra* note 81 (manuscript at 51).

90. *Id.*

91. *Id.*

92. *See id.* (manuscript at 49) (“[T]he creation of the *Società Benefit* was not underpinned primarily by a motivation to give directors more flexibility to look after the interests of non-shareholder constituencies. Quite the opposite . . . the advent of the *Società Benefit* is treated as an innovation which was necessary to bring Italian conceptions of corporate law into the twenty-first century.” (internal quotation marks omitted)).

93. Guido Ferrarini & Shanshan Zhu, *Is There a Role for Benefit Corporations in the New Sustainable Governance Framework?* 11 (Eur. Corp. Governance Inst., Law Working Paper No. 588/2021, 2021), <https://dx.doi.org/10.2139/ssrn.3869696>.

mission in the performance of its activities.”⁹⁴ Second, the corporation must form a committee (*comité de mission*), which is separate from other corporate bodies and consists of at least one employee, that is tasked both with the monitoring of social and environmental objectives and the presentation of an annual report that is verified by an independent third-party.⁹⁵ Finally, the corporate charter of the *société à mission* must be communicated to the “clerk of the commercial court” who, in turn, publishes it “subject to the compliance of the same with the above-mentioned conditions.”⁹⁶

Under the French public benefit statute, if a *société à mission* fails to comply with any of these requirements or its social and environmental objectives, a public prosecutor or *any interested person* has the power to refer the matter to the court, who then can subject the company to a financial penalty or require them to remove their designation as a *société à mission* from all company documents and correspondences.⁹⁷ Further, the *société à mission* model possesses significant theoretical legal effects that can remedy harmful externalities to third party stakeholders caused by the company. Specifically, stakeholders can hold companies directly liable for any harm incurred as a result of any breach of the company’s *raison d’être*.⁹⁸ Stakeholders may also be able to pursue equitable relief by enforcing relevant provisions of the company’s by-laws in order to annul a corporate policy or act that has had a detrimental impact on these interested third parties.⁹⁹

Though it does not yet have a formal public benefit statute, Canada is credited as being the pioneer in developing a regulatory, stakeholders-friendly corporate governance regime.¹⁰⁰ This has been accomplished, in large part, through the passage of the Canada Business Corporations Act (CBCA) which permits any “proper person” to initiate both direct and

94. *Id.* at 12.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Consequences of France’s New PACTE Law (Action Plan for Business Growth and Transformation) on Corporate Governance*, HUGHES HUBBARD & REED (Aug. 1, 2019), <https://www.hugheshubbard.com/news/consequences-of-the-french-pacte-act-action-plan-for-growth-and-transformation-of-companies-on-the-corporate-governance-management-of-companies-based-on-their-interests-and-potentially-their-raison-detre-1> [<https://perma.cc/96S6-SGP2>].

99. *See id.* (noting that the practical effects of this enforcement hinges on how and whether a company expresses its *raison d’être* through quantified or measurable objectives).

100. PM Vasudev, *Corporate Stakeholders in Canada—An Overview and a Proposal*, 45 OTTAWA L. REV. 137 (2015).

derivative actions.¹⁰¹ As such, the CBCA enables the potential influence of stakeholders on corporate decision making. While Canadian courts have historically limited the number of claimants that could be identified as “proper persons,” recent decisions by the Supreme Court of Canada and the subsequent passage of Bill C-97 have attempted to clarify the corporate constituencies a board may consider when acting in the best interests of the corporation.¹⁰² These constituents include shareholders, employees, pensioners, creditors, consumers, governments, and the environment.¹⁰³ Although Canadian courts continue to rely on a business judgment presumption when assessing stakeholder actions, these recent decisions and legislation has only served to bolster stakeholders’ ability to seek redress for conduct contrary to their reasonable expectations.¹⁰⁴

In two landmark cases, the Supreme Court of Canada signaled a departure from a strict shareholder primacy model in favor of a more stakeholder-oriented model.¹⁰⁵ In *Peoples Department Stores Inc (Trustee of) v. Wise* (2004), the Court clarified directors’ duty of care and held that the directors owed fiduciary duties to the company and that the interests of the company should not be conflated with those of stockholders.¹⁰⁶ This sentiment was furthered in *BCE Inc. v 1976 Debentureholders* (2008), where the Court rejected *Revlon*-like duties to maximize stockholder value in a change of control transaction and accepted an oppression remedy claim by stakeholders who were concerned that the transaction would cause them serious financial harm.¹⁰⁷ In broadening these fiduciary duties, the Court noted that:

101. Dalia Palombo, *The Future of the Corporation: The Avenues for Legal Change* 43, 64 (2019) (unpublished working paper), <https://www.thebritishacademy.ac.uk/documents/2553/future-of-the-corporation-avenues-for-legal-change.pdf> [<https://perma.cc/T929-VYZR>].

102. *Id.*; see also *A New Dimension to Directors’ Duties: Bill C-97*, TORYS (June 2019), <https://www.torys.com/Our%20Latest%20Thinking/Publications//2019/07/a-new-dimension-to-directors-duties/> [<https://perma.cc/W6HU-HP2Y>] (discussing Bill C-97 and the expansion of the class of stakeholders directors must consider when operating a corporation including the environment, creditors, government, retirees, and pensioners).

103. Canada Business Corporations Act § 122(1.1).

104. See, e.g., *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (Can.) (affirming that directors may consider the interests of various stakeholders when making decisions).

105. Gesta Abols & Brad Freelan, *Shareholder Governance, “Wall Street” and the View from Canada*, HARV. L. SCH. F. ON CORP. GOV (Feb. 16, 2020), <https://corpgov.law.harvard.edu/2020/02/16/shareholder-governance-wall-street-and-the-view-from-canada/> [<https://perma.cc/8RCZ-EJR7>]. While notably these cases involved traditional corporations and not special form companies like a PBC, the implementation of a broadened scope of fiduciary duties, like in Canada, would allow Delaware PBCs to better honor its specific stakeholder commitments.

106. *In Peoples Department Stores Inc (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 (Can.).

107. *BCE Inc.*, 3 S.C.R. 560.

Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation.¹⁰⁸

The decisions in *Wise* and *BCE* provide concrete support for Canada's commitment to a stakeholder-focused system.

In addition to the enforcement mechanisms within these three corporate governance structures, the corporate sustainability reporting requirements for OECD nations within the EU help provide additional accountability measures that limit a corporation's harmful externalities. The Non-Financial Reporting Directive (NFRD) requires large companies of public importance with more than five hundred employees to disclose information detailing its operation and management of social and environmental challenges.¹⁰⁹ These requirements include the publishing of information related to environmental matters, treatment of employees, human rights, anti-corruptions and bribery, and board diversity.¹¹⁰ Moreover, it is important to note that these requirements apply to both public and private companies, which "helps investors, civil society organizations, consumers, policy makers and other stakeholders evaluate the non-financial performance of large companies and encourages these companies to develop a responsible approach to business."¹¹¹

These current EESG reporting initiatives are expected to provide even greater transparency following the recent passage of the Corporate Sustainability Reporting Directive (CSRD). In upgrading the NFRD, the CSRD improves the coverage and reliability of the current sustainability reporting by extending the scope of mandatory reporting to all large companies (including all companies listing on regulated markets), requiring the audit of reported information, creating a universal and mandatory EU sustainability reporting standard, and applying a "double materiality" principle to all reported information.¹¹² Together, these directives along with

108. *Id.* at 593.

109. *Corporate Sustainability Reporting*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en [<https://perma.cc/9B2V-8B54>] (last visited Jan. 27, 2022).

110. *Id.*

111. *Id.*

112. Addishu Lashitew, *The Risks of US-EU Divergence on Corporate Sustainability*

the EU's existing sustainability initiatives will improve the transparency of capital markets and, in turn, entice institutional investors seeking to fund companies whose profits do not come at the direct expense of the larger social community and environment.

II. BRINGING THE DELAWARE PUBLIC BENEFIT CORPORATION INTO HARMONY

In determining how the Delaware PBC can come into greater harmony with the more stakeholder-focused corporate governance systems of the OECD, it is critical to first address the arguments put forth by critics of the stakeholder-oriented model. Only then can the reforms offered contextualize, respond, and assuage these common concerns and provide a principled path forward for the Delaware PBC.

Numerous commentators have been quick to cast aspersions on a stakeholder-oriented form of corporate governance positing that a shift towards stakeholder governance would drastically alter long-enshrined principles of Delaware law, fail to “maximize[e] the benefits of private enterprise to society,”¹¹³ “mak[e] corporate leaders less accountable,”¹¹⁴ and “impair economic efficiency.”¹¹⁵ Yet, these critiques seem to mischaracterize Delaware law all while ignoring the effectiveness of stakeholder-friendly models that are practiced abroad.

First, a stakeholder form of corporate governance is not contrary to Delaware law. At bottom, the fiduciary duty of the board is to promote the value of the *corporation*, which implies a duty to consider the interests of those who comprise it (e.g., shareholders, employees) and those whom it impacts (e.g., customers, suppliers, the environment, communities).¹¹⁶ This

Disclosure, BROOKINGS (Sept. 28, 2021), <https://www.brookings.edu/blog/future-developments/2021/09/28/the-risks-of-us-eu-divergence-on-corporate-sustainability-disclosure/> [<https://perma.cc/TJ98-P87Q>].

113. George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, SSRN (June 9, 2021), <https://ssrn.com/abstract=1368947> [<https://perma.cc/3TL3-55VB>].

114. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 100 (2020).

115. George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107, 1135 (2008).

116. See Martin Lipton, Karessa L. Cain, & Kathleen C. Iannone, *Wachtell Lipton Discusses Stakeholder Governance and the Fiduciary Duties of Directors*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Sept. 3, 2019), <https://clsbluesky.law.columbia.edu/2019/09/03/wachtell-lipton-discusses-stakeholder-governance-and-the-fiduciary-duties-of-directors/> [<https://perma.cc/TZ6K-GAEH>] (“Indeed, the Board’s ability to consider other stakeholder interests in not only uncontroversial – it is a matter of basic common sense and a fundamental component of both risk management and strategic planning.”).

is especially true if we are to assume that a significant part of a corporation's value is not only the value it provides to society, but also the reality that many Americans have staked their financial security on the long term success of these corporations.¹¹⁷

Second, by adopting a governance model that better considers the interests and is more responsive to the concerns of stakeholders, corporations (and in the context of this Comment, public benefit corporations) can fully embrace their roles and external impacts on society and, in turn, provide value and benefit to society that far exceeds equity value.¹¹⁸

Third, while critics note that a stakeholder governance model can serve to insulate directors and make them less accountable to stockholders, this argument ignores the fact that, despite the business judgement rule protecting corporate directors that "use their power to advance liberal political values using corporate funds," stockholders nonetheless retain the power to remove or vote out these directors.¹¹⁹ Further, these commentators also ignore the reality that stakeholders, such as laborers, often care more about profit than stockholders and are more vested in ensuring that directors pursue sustainable returns.¹²⁰

Finally, an improved emphasis on stakeholders within PBC corporate governance models can enhance economic efficiency by creating a pool of

117. See *State Public Pension Fund Returns Expected to Decline*, THE PEW CHARITABLE TRS. (May 3, 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/05/state-public-pension-fund-returns-expected-to-decline> [https://perma.cc/A4QY-U8WU] (noting that roughly twenty-nine million Americans have retirement benefits and pensions tied to state public pension systems and that more than two-thirds of the assets of these pension systems are allocated to equities and alternative investment vehicles like real estate and hedge funds). Given that a significant portion of these savings are tied to the long-term viability and profitability of these corporations, many asset and portfolio managers have called for an integration ESG insights. See also Mark Wiseman & Tariq Fancy, *Commentary: Integrating ESG into Investment Portfolios Improves Performance*, PENSIONS & INVS. (April 10, 2020, 9:00 AM), <https://www.pionline.com/industry-voices/commentary-integrating-esg-investment-portfolios-improves-performance> [https://perma.cc/9B6F-XDRT] (advocating for an investment value-based approach that only considers externalities that are likely impact a company's long-term financial performance).

118. See Strine, *supra* note 9, at 410 (noting that corporations provide additional societal value by giving workers the ability to live better lives through improved financial resources and they also play a significant role in limiting harmful externalities on consumers and the environment).

119. *Id.* at 399.

120. See Andy Puzder, *The Importance of Stakeholders to Profitability*, NAT'L REV. (Aug. 31, 2021, 6:30 AM), <https://www.nationalreview.com/2021/08/the-importance-of-stakeholders-to-profit/> [https://perma.cc/ZD8R-EXPT] (noting that stakeholders, especially customers and workers, have a significant stake in a company's profitability and that the alignment of shareholder and stakeholder desire for profitability can help promote the sustainability and longevity of the corporate entity).

diverse knowledge and experience that can help anticipate and respond to looming risks.¹²¹ This is especially pertinent given the more recent alignment of stockholders and stakeholders' long term-interests.¹²²

To be clear, I do not advocate for the erasure of shareholder primacy models, nor do I wish to paint over long-standing corporate precedent. As mentioned previously, the scope of this Comment is far narrower and only opines that corporations who have made the conscious decision to reorganize as a Delaware PBC be required to embrace a stakeholder model of governance and be held accountable for failures to align corporate decisions with stakeholder interests. Such a proposal is not radical. Rather, it is an obvious response to the lack of case law clarifying the Delaware PBC statute as well as the absence of any enforcement mechanism to hold corporations accountable to their stakeholder commitments. It addresses the concern that PBCs benefit from the favorable perception of being a PBC while continuing to prioritize stockholders' short-term price maximization. In short, to allay concerns that PBCs are "talking the talk" without "walking the walk," further change is needed.

So far, this Comment has presented characteristics of sustainable, stakeholder-focused corporate governance models that are shared by many high functioning market economies within the OECD. But which, if any, of these characteristics could the Delaware PBC statute reasonably adopt?

A. Workforce Committees and Codetermination Rights: Amplifying Labor's Voice

For Delaware PBCs to adequately consider the interests of external stakeholders as well as their compliance with corporate social responsibility standards and EESG objectives, they must first look internally. No company can be a good corporate citizen if they fail to treat their own constituents with the same commitment and respect. This follows the notion that wealth is created collectively and that the most important way that corporations create wealth for society is through paying workers good salaries and providing them with economic stability (often through pension accounts). Still, many practitioners and scholars have likened Delaware's corporate governance system to a Friedman-like perspective of business where a corporation's sole purpose for existence is to provide money for investors and to leave

121. Stavros Gadinis & Amelia Miazard, *A Test of Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOV. (Oct. 28, 2021), <https://corpgov.law.harvard.edu/2021/10/28/a-test-of-stakeholder-governance/> [<https://perma.cc/8XUT-BN64>].

122. *See id.* (describing how COVID and the ESG movement have helped bolster a desire for this alignment).

stakeholder interests in the purview of external protections.¹²³

However, the adoption of the Delaware public benefit statute and its three-prong balancing test appears to push back on this view, as PBCs must balance “stockholders’ pecuniary interests [with] the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.”¹²⁴ Delaware can better facilitate this balance by mandating the implementation of workforce committees on PBC boards and requiring that at least a portion of the committee serve on the workforce.¹²⁵ This will improve labor representation and voice within the corporate decision-making process, especially when such decisions concern key workplace issues.¹²⁶

In conjunction with these workforce committees, the creation of codetermination rights that will allow workers to elect members of the workforce committee will further help empower a company’s workers by allowing them to play an important role in such a crucial matter of corporate governance. Like the governance models in Germany and Scandinavia, the introduction of board-level codetermination (bottom-up and top-down) in companies would ease the tension between labor and management while also helping align their interests in pursuit of common objectives, including sustained profitability.¹²⁷ Such a proposal would be crucial for Delaware PBCs, as it would allow for them to embrace their role as good corporate citizens by carving out room for labor influence in the absence of unions. In doing so, workers who were previously powerless in the corporate decision-making process due the precipitous drop in private sector unions can be better protected against companies who have historically “squeeze[d]

123. See Dent, Jr., *supra* note 115, at 1144 (referring to the stakeholder theory as a “folly”); Bebachuk & Tallarita, *supra* note 114, at 102 (arguing that stakeholderism will not produce desired outcomes); see also Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (“[T]here is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable.”).

124. DEL. CODE ANN. tit. 8, § 362(a) (2022).

125. Often, the efficacy of worker representation hinges on the proportion of worker directors to the total number of directors as well as whether certain corporate decisions require a supermajority vote. Lenore Palladino, *Economic Democracy at Work: Why (and How) Workers Should Be Represented on U.S. Corporate Boards*, 1 J.L. & POL. ECON. 373, 384 (2021). If a supermajority vote is required, then a one-third proportion of worker directors to total directors would give workers significant influence on corporate decision-making process. However, workforce committees that contain a majority of non-worker directors could still function effectively without this ratio if their appointment to the committee is a reflection of their pro-labor position.

126. Palladino, *supra* note 125, at 379.

127. Strine, *supra* note 9, at 434–35.

workers in response to the demands of powerful institutional investors.”¹²⁸

A full workforce committee’s responsibility would be to oversee company policies that address workplace diversity and labor conditions as well as amplify worker voice across the board and management.¹²⁹ In doing so, a workforce committee would not only ensure an improved flow of information to the board concerning important workforce issues, but it would also elevate the voice of marginalized workers (especially minority workers).¹³⁰ With greater worker voice and participation in the implementation of key corporate policies and decisions, workforce committees could improve corporate productivity by broadening its knowledge base and effectively responding to concerns that can hamper worker well-being and, in turn, overall corporate performance.

While a federal mandate requiring PBCs to adopt a more stakeholder-friendly form of corporate governance would be the most efficient method for delivering these desired results,¹³¹ the experimentation of a full workforce committee in Delaware PBCs could “serve as a partial substitute for the ground-up mechanism of works councils by giving worker directors access to information and an opportunity to shape policies that are most important to workers.”¹³² In time, the implementation of workforce committees could lead to a convergence of best practices that use improved worker voice as a vital means of increasing corporate sustainability and profit, a proposition

128. Strine et al., *supra* note 24, at 1388.

129. *Id.* at 1385.

130. *Id.* at 1385–86.

131. See Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance/> [<https://perma.cc/QFL9-2W92>] (“In today’s multinational economy, where corporations employ workers across the nation and the world, federalizing incorporation, along with regulation of our financial and securities markets, is a sensible, modern reform. A federal corporate charter for large corporations would bring corporate law into the 21st century and make it subject to the political will of all of us, rather than the voters of Delaware alone—who, at 960,000, are fewer in people than the total number of hourly employees at Walmart. It is also the most straightforward political mechanism for stakeholder governance to be instituted and enforced.”). At present, Senator Elizabeth Warren has introduced the Accountable Capitalism Act that would require large American corporations with more than \$1 billion in annual revenue to obtain a federal charter that would require directors to consider the interests of all corporate stakeholders as well as require workers of these corporations to elect at least 40% of the Board members. *Warren Introduces Accountable Capitalism Act*, ELIZABETH WARREN (Aug. 15, 2018), <https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act> [<https://perma.cc/9ZVK-AVCJ>].

132. Strine et al., *supra* note 24, at 1386.

that is both feasible and attractive to large companies nationwide.¹³³

B. Concrete Corporate Purpose and Measurable Objectives

Although Delaware PBCs are required to provide “one or more specific public benefits to be promoted,”¹³⁴ these purpose statements are often crafted in a way that make it impossible to realistically measure whether corporations’ actions satisfy or promote its stated benefit.¹³⁵ This, in turn, makes it difficult to truly distinguish a PBC from a traditional corporation as it creates the potential for corporations to partake in “social-responsibility-washing.”¹³⁶ The resulting disparity between marketing a corporation as socially responsible (and benefiting from such marketing) and effectively adopting corporate decisions and allocating resources that support these proclaimed social commitments is concerning.¹³⁷ To shrink this disparity and make PBCs more accountable to their stated public benefit, the Delaware PBC statute should require a more concrete and measurable corporate purpose.

In attaining a more concrete and measurable corporate purpose, companies should specify a discrete corporate purpose.¹³⁸ Regardless of whether the purpose is unidirectional or multifaceted, corporations should take pains to specify the stakeholders it seeks to benefit and strategies it plans to follow in fulfilling its commitments to a given group of stakeholders.¹³⁹ In instances where a corporation identifies multiple stakeholders and goals within its corporate purpose, it must seek to prioritize these groups.¹⁴⁰ By doing so, corporations can make decisions that best align with its corporate purpose and help facilitate its long-term sustainability even when an inevitable conflict between stakeholder interests arises.

The mission statement of Italian *società benefit* corporation, illycaffè S.p.A., exemplifies the use of a corporate purpose statement to prioritize

133. *Id.* at 1384–86.

134. DEL. CODE ANN. tit. 8, § 362(a) (2022).

135. See Fisch & Solomon, *supra* note 15, at 77 (“[T]he charters of the most economically significant PBCs and those that are publicly-traded put forth purpose statements so vague and aspirational that it is hard to think of them as providing any content or ability to monitor them in the public markets.”).

136. Hanna Basra, *Delaware Public Benefit Corporations Through the Lens of Executive Compensation*, COLUM. BUS. L. REV. ONLINE (Nov. 9, 2021), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/447> [<https://perma.cc/5PQL-VB8M>].

137. *Id.*

138. See Fisch & Solomon, *supra* note 15, at 84.

139. *Id.*

140. *Id.*

commitments to stakeholders all while providing a list of specified principles it will follow in actualizing these commitments. Illycaffè's stated purpose is to "delight all those who appreciate beauty and flavour worldwide with the best coffee nature can offer" by "satisfying our customers through excellent products and services, creating the conditions for the greatest personal and professional fulfilment of its collaborators, and creating value for its shareholders, while always maintaining complete economic and social correctness."¹⁴¹ While this initial statement may appear to lack specificity, it goes on to list the hierarchy of stakeholders in detail. Represented as an inverted pyramid, illycaffè's stakeholder hierarchy is as follows:

Our consumers are at the very top, followed by our clients, who are our partners in serving the consumers. Then there are the company's collaborators with their professionalism and passion. Next come our suppliers, who ensure the excellence of our products, then there are the communities the company has a relationship with, and finally, there are the shareholders, who are at the service of the company. For each of these stakeholders, illycaffè pursues economic sustainability through the creation of shared value: social value, through personal growth, and environmental value, through respect for the planet.¹⁴²

This stated purpose is supported by a list of principles of conduct that provides a specific framework for all aspects of illycaffè's operations. These principles outline the company's general strategy in achieving its stated purpose and honoring its commitments to stakeholders. Such principles include environmental objectives, management of administrative and accounting procedures, monetary and financial transactions, relationships with stakeholders, and more.¹⁴³ Illycaffè's corporate purpose, which prioritizes stakeholder commitments with a specified list of objectives needed to fulfill these commitments, creates a heightened sense of transparency between stakeholders and management as well as greater corporate accountability.

Commentators further suggest that corporations articulate social purpose in ways that can be easily measured against a reliable third-party standard.¹⁴⁴ Delaware PBCs, which are currently not required to undergo

141. ILLY, CODE OF ETHICS 5 (2018), http://unicaffe.illy.com/wps/wcm/connect/764076e8-1aba-4d5c-8023-9435a1537152/Codice+Etico+2018_EN.pdf?MOD=AJPERES&useDefaultText=0&useDefaultDesc=0 [<https://perma.cc/4UW8-B3JG>].

142. *Id.*

143. *Id.* at 11–13.

144. Michael R. Littenberg, *Delaware Public Benefit Corporations—Recent*

such an assessment, could benefit from the assessment against an accepted third-party standard as it would force the company to be more accountable to its stated public purpose. Given that issuers choose to become a PBC, it is important that they have the freedom to select a comprehensive third-party standard that best aligns with their stated corporate purpose. While there is not an exhaustive list of third-party standards to assess corporations' social purpose and stakeholder commitments, Delaware PBCs should consider thorough standards like the B Impact Assessment, Global Reporting Initiative, and the Task Force on Climate-related Financial Disclosures, among others.¹⁴⁵ These third-party standards are preferable given their clear thematic structure, which targets the core elements of how and why specific PBCs operate.¹⁴⁶ Further, these standards provide comprehensive recommendations that are constantly updated and enhanced by the research of leading economic scholars, social activists, climate scientists, and business professionals. As a result of these thorough third-party standards, PBCs can reap the benefits of comprehensive disclosures which can, in turn, improve a company's ability to evaluate climate-related risks, better inform the board and management on where and when to allocate capital, and provide for greater strategic planning.¹⁴⁷

Another way to ensure that Delaware PBCs include and pursue sufficiently clear and measurable objectives would be to tie executive and director compensation to these social and/or environmental goals, thereby bringing the interests of stakeholders, directors, and management into

Developments, HARV. L. SCH. F. ON CORP. GOV. (Aug. 31, 2020), <https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/> [<https://perma.cc/S5KM-KG9A>].

145. While other states have adopted versions of the Model Benefit Corporation Legislation (MBCL) that assess a company's purpose and impact on stakeholders against a third-party standard, these standards are of varying quality and frequently ill-defined in the statutes. See Fisch & Solomon, *supra* note 15, at 85. Nonetheless, a required standard would still be preferable to no standard at all.

146. See, e.g., GLOB. REPORTING INITIATIVE, CONSOLIDATED SET OF THE GRI STANDARDS (2022), <https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/> [<https://perma.cc/WQX8-NE4V>] (providing EESG standards across major industries as well as guidance as to material topics and determining what to report); *Standards Development & Governance*, B LAB, <https://www.bcorporation.net/en-us/standards/development-and-governance> [<https://perma.cc/R2TK-G6E7>] (last accessed Jan. 27, 2023) (assessing companies' practices and outputs across in terms of governance, workers, community, the environment, and customers, and comparing performance to similarly situated companies).

147. See, e.g., TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, <https://www.fsb-tcfd.org/> [<https://perma.cc/98YD-7CYA>] (providing recommendations and standards that are widely applicable and adoptable across sectors and that can allow both companies and its stockholders to assess the company's position, risk, and strategy in response to climate change).

alignment. Further, this proposal would also require Delaware PBC boards to disclose their specific compensation structures for these social and environmental benefit incentives. Such a requirement would adequately respond to concerns that EESG-linked compensation “poses the danger of creating vague, opaque, and easy-to-manipulate compensation components, which can be exploited by self-interested CEOs to inflate their payoffs, with little or no accountability for actual performance.”¹⁴⁸

Currently, the three-prong Delaware PBC balancing test lacks bright line guidance on how courts should properly balance stockholder and stakeholder interests in relation to the corporation’s stated “benefit.” This lack of clarity can lead to an imbalance of interests that can likely disadvantage stakeholders. With courts opting to take a business judgment-like discretion that favors directors’ decisions to prioritize short-term stock price maximization at the expense of company’s stakeholders, the Delaware PBC statute without further clarification will not adequately ensure a proper balance of interests.¹⁴⁹ This concern is reflected in the executive and director compensation structures of current Delaware PBCs Vital Farms and Lemonade.

Vital Farms, a produce company that specializes in pasture raised eggs and butter, centers its operations on the following stakeholders: farmers and suppliers, customers and consumers, crew members, and community and environment.¹⁵⁰ Nonetheless, its executive and director compensation is not expressly tied to those stakeholders.¹⁵¹ While its corporate goals may include these stakeholders, those goals are not defined in either the company’s 10-K, proxy statement, or articles of incorporation, and thus any decision to align executive pay with stakeholder interests is left to the Board’s discretion.¹⁵² Specifically, Vital Farms’ proxy statement lacks any mention of EESG-tied compensation.¹⁵³ Even if such compensation was included as

148. Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. (forthcoming 2022) (manuscript at 4), <https://dx.doi.org/10.2139/ssrn.4048003>.

149. In fact, the Delaware PBC statute gives directors even greater protection from liability than the traditional corporate statute.

150. Basra, *supra* note 136.

151. *Id.*

152. *Id.* While Vital Farms’ stated corporate purpose is “a commitment to Conscious Capitalism, which prioritizes the long-term benefits of each of our stakeholders (farmers and suppliers, customers and consumers, communities and the environment, employees, who we refer to as crew members, and stockholders,” its equity incentive plans are not tied to stakeholder outcomes but rather are aligned with stockholder interests. Vital Farms, Inc., Annual Report (Form 10-K) (Mar. 10, 2022).

153. Vital Farms, Inc., Proxy Statement (Form 14A) (Apr. 25, 2022).

part of either equity or non-equity-based incentive plan compensation, nothing in the document discloses what these objectives are or how their attainment weighs into the compensation analysis.

Lemonade, an insurance company, structures its executive compensation primarily through a base salary and stock options.¹⁵⁴ Lemonade's equity compensation consists of stock options that vest over four years, but only if the stock price equals or exceeds four pre-determined amounts.¹⁵⁵ While this equity compensation structure creates long-term incentives for sustainable, corporate profit, it does not motivate based on corporate social responsibility or stakeholder commitments.¹⁵⁶ As such, CEOs are solely incentivized to achieve specified stock prices and, although the four-year vesting period may encourage more long-term sustainability, Lemonade's executive compensation structure nonetheless does not take stakeholder interests, including worker pay,¹⁵⁷ into account.¹⁵⁸

In view of their current executive and director compensation structures, Vital Farms and Lemonade would benefit significantly from a fully disclosed, social benefit-linked compensation structure that can effectively align executive and director compensation with stakeholder interests. In doing so, PBCs will be better able to realize their stakeholder commitments and stated "social purpose." By providing a concrete corporate purpose that can be easily measured against a reliable standard, Delaware PBCs can better facilitate long-term corporate sustainability and accountability.

154. Basra, *supra* note 136.

155. Lemonade, Inc., Proxy Statement (Form 14A) (May 10, 2022) (noting that "25% of each 2021 Award, to the extent vested, will become exercisable if the average closing price during any 30 consecutive calendar day period occurring between the 2021 Grant Date and the 2025 Full Vest Date for the Company's common stock equals or exceeds \$126, (ii) 25% of each 2021 Award, to the extent vested, will become exercisable if the average closing price during any 30 consecutive calendar day period occurring between the 2021 Grant Date and the 2025 Full Vest Date for the Company's common stock equals or exceeds \$162, (iii) 25% of each 2021 Award, to the extent vested, will become exercisable if the average closing price during any 30 consecutive calendar day period occurring between the 2021 Grant Date and the 2025 Full Vest Date for the Company's common stock equals or exceeds \$198, and (iv) 25% of the 2021 Award, to the extent vested, will become exercisable if the average closing price during any 30 consecutive calendar day period occurring between the 2021 Grant Date and the 2025 Full Vest Date for the Company's common stock equals or exceeds \$234; provided, further, that in the event any portion of a 2021 Award has not become exercisable as of the 2025 Full Vest Date, such portion of such 2021 Award shall be automatically forfeited.")

156. Basra, *supra* note 136.

157. KMPG, *The Future of Capitalism and the Role of the Corporation in Society*, YOUTUBE (Mar. 16, 2020), https://www.youtube.com/watch?v=t_xlxIdi0g [<https://perma.cc/7XP4-HBEP>].

158. Basra, *supra* note 136.

C. Stakeholder Enforcement

Although the need for a more concrete corporate purpose is a step in the right direction, it cannot be said that the mere “rearticulation of normative purpose alone will rebalance the American corporate governance system in a way that is fairer to stakeholders.”¹⁵⁹ Greater enforcement and corporate accountability are essential if the Delaware PBC is to become a truly stakeholder-minded form of governance. Without them, the PBC is nothing more than a corporate label whose purpose and commitments pay only lip service to stakeholder concerns. To improve the enforcement of PBC’s purpose and duties to stakeholders, the Delaware PBC statute should provide stakeholders with standing to pursue legal relief.

While the interests of stakeholders and investors often overlap, they do not always align. These conflicting interests, which are often due to collective action problems, can allow for short-term stock price maximization to take priority at the expense of stakeholder harm. Currently, the Delaware PBC Statute only permits shareholder litigation, which must be initiated by at least 2% of the outstanding shares or \$2 million worth of stock.¹⁶⁰ Not only does this provision prevent stakeholders from bringing suit but its minimum ownership requirement also makes stockholder litigation unlikely.¹⁶¹ Therefore, these shortcomings of the current statute raise serious doubts as to whether PBCs can be held accountable for their failures to protect stakeholders.

In view of the stakeholder enforcement mechanisms in Italy, France, and Canada, an alteration of the Delaware PBC statute, specifically Section 367 of the Delaware General Corporation Law (DGCL), could be easily implemented in a manner that would provide greater accountability while still preserving director autonomy. As an unbounded view of director liability, like that in Italy’s *società benefit* statute, could disincentivize board membership and lead to frivolous litigation, a reform calling for stakeholder enforcement would need to be limited in form. Specifically, if the statute provided for monetary damages that were relatively unlimited, any alleged stakeholder (as well as any class of alleged stakeholders) could bring a suit claiming a loose connection to the company as a way in which to pursue monetary relief. As such, while I fundamentally believe stakeholders should

159. Strine, *supra* note 9, at 426.

160. Fisch & Solomon, *supra* note 15, at 85.

161. *See id.* (noting that this is due to institutional investors, like mutual funds, who hold a substantial number of shares in publicly traded companies are rarely involved in stockholder litigation and individual investors that would be most likely to bring suits are unlikely to satisfy the ownership requirement).

be compensated for a corporation's harmful externalities, limiting stakeholder suits to equitable relief, or only permitting derivative actions, may serve as an appropriate compromise. Further, the Delaware legislature could follow the Canadian model in limiting the group of stakeholders that could be entitled to file such derivative suits.

Stakeholder derivative suits also could fit within Delaware courts' current *Caremark* framework, given that EESG and stakeholder interests are now becoming part of the corporate purpose debate and companies are increasingly confronted with how far *Caremark* should go. Given that Delaware PBCs are required to state a public benefit or social commitment as part of their corporate purpose, any actions that relate to these benefits or stated purpose could be logically considered "mission critical."¹⁶² This would require PBC boards to implement reporting or information systems related to these stated objectives and to consistently monitor these systems for risks or activities detrimental to the company's ability to achieve its stated objectives. In doing so, Section 365(c) of the Delaware PBC statute should be amended to provide for director and officer liability when PBC boards and management breach their duty of good faith by failing to honor or effectively pursue its stakeholder commitments.

Outside the *Caremark* context, stakeholder suits could serve as a reliable mechanism in enforcing PBC's benefit purpose and holding corporations accountable for failing to adequately promote these benefits and therefore protect stakeholders. The ability for stakeholders to bring an action that might not be brought by stockholders broadens the fiduciary duties of directors, but only in a manner that is consistent with the board's expanded commitments to stakeholders. This would also preserve incentives for directors to honor its stakeholder commitments, even in the absence of damage awards, as stakeholder suits would nonetheless create reputational damage that directors desperately seek to avoid.

CONCLUSION

This Comment has sought to explore the similarities between OECD models of corporate governance and how aspects of these systems can be used to improve the current Delaware PBC model and allow it to move into greater harmony with the rest of the world by providing greater stakeholder protection and influence. Given the new generation of investors that seek to

162. See *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019) ("Although *Caremark* may not require as much as some commentators wish, it does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks.").

invest in companies with strong EESG outcomes and commitments, as well as the precipitous rise of PBCs nationwide, the push to make Delaware's PBC statute more responsive to stakeholder concerns is timely. The similarities and reforms offered are not meant to be exhaustive. Rather, they should provide fodder and further discussions related to board codetermination, EESG-tied executive and director compensation, the social purpose of PBCs, and potential enforcement and accountability measures. While there are legitimate concerns that a more rigorous statute may disincentivize companies from converting to PBCs, recent trends suggest otherwise.¹⁶³ Today, investors and stockholders are not just concerned about a company's profit, but, perhaps more importantly, how that profit is made.¹⁶⁴

The push for a more stakeholder-friendly form of corporate governance has gained significant traction across the globe. While this stakeholder focus has long featured prominently in the corporate governance systems of many OECD nations, its recent introduction in the U.S. suggests that companies are beginning to rethink their impact on stakeholders. Such a shift in focus could be a sign of things to come. In light of Elon Musk's recent takeover of Twitter, corporations whose platforms and businesses can serve as a hotbed for misinformation, discrimination, and targeted virtual attacks may consider converting to a PBC. By doing so, these companies can better protect stakeholders, as they no longer are constrained by traditional shareholder primacy and stock value maximization principles.

Delaware, as the epicenter of American corporate law and home to more than one million companies,¹⁶⁵ should take the lead in ensuring that such corporate commitments to stakeholders are honored. By reforming the Delaware PBC statute to provide for greater worker voice, concrete corporate purpose, and improved enforcement and accountability, such an

163. See, e.g., Peter Reali, Jennifer Grzech & Anthony Garcia, *ESG: Investors Increasingly Seek Accountability and Outcomes*, HARV. L. SCH. F. ON CORP. GOV. (Apr. 25, 2021), <https://corpgov.law.harvard.edu/2021/04/25/esg-investors-increasingly-seek-accountability-and-outcomes/> [<https://perma.cc/U2RB-2DUY>] (noting that investors today are seeking to hold corporations accountable to ESG and DEI commitments through shareholder proposals); see also Julia Hood, *As ESG Investment and Goals Expand and The Sector Evolves, Expectations Grow for More Accountability and Data*, BUS. INSIDER (MAY 3, 2021, 1:45 PM), <https://www.businessinsider.com/esg-goals-investment-accountability-growing-2021-5> [<https://perma.cc/T39Q-C2XP>] (“Companies are increasingly setting environmental, social, and governance (ESG) goals, as systems to measure the impact of ESG initiatives are evolving to meet the moment. The momentum could be a driver of new areas of business transformation . . .”).

164. Reali, *supra* note 163; Hood, *supra* note 163.

165. *About the Divisions of Corporations*, DELAWARE.GOV, <https://corp.delaware.gov/aboutagency/> [<https://perma.cc/E9WB-M9YE>] (last visited Jan. 27, 2023).

objective is attainable. Without reform and a way to effectively distinguish PBCs from regular corporations, however, the Delaware PBC risks standing idly behind a veil of progress and social benefit.