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## At the Intersection of Corporate Governance and Environmental Sustainability

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*ESSAY:*

## AT THE INTERSECTION OF CORPORATE GOVERNANCE AND ENVIRONMENTAL SUSTAINABILITY

JAYNE W. BARNARD\*

ABSTRACT

*Most boards of public companies have learned to live comfortably with audit committees, nominating committees, and compensation committees. An increasing number of companies are now also creating risk-management committees. This Essay explores the early stages of development of yet another board-level committee: the sustainability committee. The Essay posits several advantages to having a board-level sustainability committee and identifies possible sources of pressure for the creation of more such committees. It also suggests some of the disadvantages of sustainability committees and cautions against cosmetic governance reform. By examining what we know today (and can imagine tomorrow) about sustainability committees, this Essay sets a baseline for future research.*

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## INTRODUCTION

The norms of corporate governance derive from many sources. A wide range of players, from state courts to institutional investors and from the U.S. Congress to the Department of Justice, have all weighed in with, what they claim to be, corporate governance “best practices.”<sup>1</sup>

The concept of environmental sustainability, too, derives from many sources. Advocates of some version of the concept now range from the United Nations to traditional environmental advocacy groups and from multinational investment banks to interest groups like CERES.<sup>2</sup> Companies as diverse as Wal-Mart, Nike, General Electric, and Dell Computers have all staked a claim to leadership in sustainability practices.<sup>3</sup> While there may be little consensus on what we mean by the term “sustainability,”<sup>4</sup> more and more companies are embracing the language, if not the substance, of the idea.

This Essay examines the small corner of the universe where corporate governance and environmental sustainability meet.<sup>5</sup> Though most public

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<sup>1</sup> See Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 COLUM. BUS. L. REV. 793, 794-95 (2008).

<sup>2</sup> See Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENV. L. & POL'Y REV. 291, 293-94, 296 (2007) (tracing the involvement of these and other groups in developing sustainability norms).

<sup>3</sup> See *id.* at 300; see also Sindya N. Bhanoo, *Products That Are Earth-and-Profit Friendly*, N.Y. TIMES, June 11, 2010, available at <http://www.nytimes.com/2010/06/12/business/energy-environment/12sustain.html>.

<sup>4</sup> As good a definition as any comes from Patricia Werhane: “Environmental sustainability involves protecting the environment, preventing further harms to nature, cleaning up pollution and other harmful emissions, conserving and recycling, maintaining the ecosystem, improving the environment, and/or restoring the ecosystem to a former, a pristine or pre-human condition.” Patricia H. Werhane, *Note on Environmental Sustainability*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=908136](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908136) (last visited Feb. 24, 2011). Another, more specific description of “sustainability” is:

In its most utopian form, [sustainability] envisions a world in which all products are made from natural materials and are 100 percent reusable, recyclable or biodegradable, never ending up in landfills. At its most pragmatic, it is mainly about cutting costs—by reducing waste, selling recyclable components and reusing byproducts like rubber or plastic to create a new product. For a large company, this can mean millions of dollars in annual savings.

Bhanoo, *supra* note 3.

<sup>5</sup> This is a largely unexplored space:

Despite the extensive body of literature available on corporate governance and sustainability as separate areas of research, minimal attention has been paid to the interaction between the two. In particular,

companies “are still at the early stage of developing an integrated, enterprise-wide sustainability program,”<sup>6</sup> an increasing number of those companies are involving their boards of directors in the process. The board, of course, serves as the fulcrum between expression of an ideal and execution by managers. The board usually achieves its goals by distributing its work among committees.<sup>7</sup>

Some of today’s boards assign directors not only to audit committees, nominating committees, compensation committees, and (a growing number of) risk management committees, but also to board-level committees tasked in whole or in part with focusing on environmental issues.<sup>8</sup> Nevertheless, according to The Conference Board, most public companies “still lack the structural framework to enable proper director oversight [of environmental activities].”<sup>9</sup>

There is a history to board involvement in environmental matters. Early board-level committees were known, generally, as “environmental affairs” or “environmental policy” committees.<sup>10</sup> These committees often were formed following a scandal, a lawsuit, or Congressional attention to a particular industry or practice.<sup>11</sup> Their focus was mostly on legal compliance and the creation and oversight of monitoring programs; their real purpose, however, was to make a convincing showing that directors and senior management were at least aware of their companies’ environmental impact.<sup>12</sup>

Today’s environmental committees increasingly are becoming known as “sustainability committees.”<sup>13</sup> These committees, unlike their predecessors, are not the offspring of scandals or lawsuits, nor are they a

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there is limited knowledge of the role performed by the board of directors in designing, endorsing, and overseeing the implementation of a corporate sustainability program.

See Matteo Tonello, *Sustainability in the Board Room*, THE CONFERENCE BOARD 1, 1-2 (2010).

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.*

<sup>8</sup> According to the *Wall Street Journal*, as of 2008, 25 percent of Fortune 500 boards had *some* board committee specifically addressing environmental issues. Joann S. Lublin, *Environmentalism Sprouts Up on Corporate Boards*, WALL ST. J., Aug. 11, 2008, available at <http://online.wsj.com/article/SB121840356252128043.html>. A 2010 survey by The Conference Board found that 21.6 percent of respondents assigned sustainability issues to a dedicated board committee. Tonello, *supra* note 5, at 7.

<sup>9</sup> Tonello, *supra* note 5, at 1.

<sup>10</sup> See Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 992 (1999) (discussing several such committees).

<sup>11</sup> *Id.* at 1005-06.

<sup>12</sup> *Id.* at 992.

<sup>13</sup> See *infra* notes 14-20.

response to any pressing threat of legislation.<sup>14</sup> Rather, these committees reflect a conscious decision to devote board-level resources to sustainability issues, in part because sustainability practices may translate into decreased costs and increased profits, and also in part because sustainability issues are a growing piece of the corporate branding equation.<sup>15</sup>

Today, sustainability committees can be found not only in extractive industries,<sup>16</sup> but also in service industries,<sup>17</sup> utility companies,<sup>18</sup> real estate companies,<sup>19</sup> paper manufacturers,<sup>20</sup> plastics manufacturers,<sup>21</sup> and various

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<sup>14</sup> There are some recent federal regulations that might foster growth of sustainability committees. First, the SEC recently announced a requirement for enhanced disclosure on risk management practices at the board level (for example, Regulation S-K Item 407(h)). See N. Kathleen Friday et al., *The Board's Role in Risk Oversight: A Survey of Recent Proxy Statement Disclosures*, 24 INSIGHTS: CORP. & SEC. L. ADVISOR 2, 2 (2010). Second, the SEC also recently provided guidance supporting enhanced disclosure on climate change issues. See Commission Guidance Regarding Climate Change, 17 C.F.R. pts. 211, 231, 241 (2010), available at <http://www.sec.gov/rules/interp/2010/33-9106.pdf>. See also Tonello, *supra* note 5, at 15-16 ("Experts expect the Commission's next move will be to officially mandate wide-ranging sustainability disclosure.").

<sup>15</sup> Barnard, *Reintegrative Shaming in Corporate Sentencing*, *supra* note 10, at 992.

<sup>16</sup> See GRYPHON-GOLD CORP., PROXY STATEMENT, available at <http://www.gryphongold.com/main/annualreports>; GOLD STAR RESOURCES, LTD., COMMITTEE CHARTER, available at [http://www.gsr.com/Investment/Corporate\\_Governance/CorpCommittee.asp](http://www.gsr.com/Investment/Corporate_Governance/CorpCommittee.asp); CENTURY ALUMINUM CO., PROXY STATEMENT, available at <http://investor.shareholder.com/cenx/annuals.cfm>; ALCOA, INC., COMMITTEE CHARTER, available at [http://www.alcoa.com/global/en/about\\_alcoa/corp\\_gov/Public\\_Issues\\_Committee.asp](http://www.alcoa.com/global/en/about_alcoa/corp_gov/Public_Issues_Committee.asp); SILVER STANDARD, INC., GOVERNANCE REPORT, available at [http://www.silverstandard.com/company/governance/bcc/index.php?content\\_id=18](http://www.silverstandard.com/company/governance/bcc/index.php?content_id=18); ALPHA NATURAL RESOURCES, INC., COMMITTEE CHARTER, available at <http://www.alphanr.com/corporategov/committeecharters/she/Page/FullTextofSafetyHealthEnvironmentalandSustainability.aspx>; WEYERHAEUSER, COMMITTEE REPORT, available at <http://www.weyerhaeuser.com/Sustainability/Directors/Responsibility>.

<sup>17</sup> See INT'L MED. STAFFING, PURE SPECTRUM LIGHTING, INC., PROXY STATEMENT, available at <http://www.psrui.com/sec-filings/>.

<sup>18</sup> See PNM RES., INC., PROXY STATEMENT, available at <http://www.pnmresources.com/investors/documentdisplay.cfm?DocumentID=5604>.

<sup>19</sup> See PROLOGIS, PROXY STATEMENT, available at [http://ir.prologis.com/reports/2008SustainabilityReport/report\\_guide.cfm](http://ir.prologis.com/reports/2008SustainabilityReport/report_guide.cfm); BOSTON PROPERTIES, INC., PROXY STATEMENT, available at <http://ir.bostonproperties.com/phoenix.zhtml?c=120176&p=irol-proxy>.

<sup>20</sup> See KIMBERLY-CLARK CORP., COMMITTEE CHARTER, available at <http://www.kimberly-clark.com/aboutus/sustainability.aspx>.

<sup>21</sup> See SPARTECH CORP., PROXY STATEMENT, available at [http://www.spartech.com/Spartech2009\\_AnnualReport.pdf](http://www.spartech.com/Spartech2009_AnnualReport.pdf).

consumer product companies.<sup>22</sup> Indeed, sustainability committees are popping up all over.

Some of the companies that have created board-level sustainability committees may, of course, be playing a public relations game. By invoking “sustainability” rather than merely “compliance,” they may be pouring old wine into a new bottle. On the other hand, the emergence of sustainability committees across a range of industries may reflect a genuine and growing commitment to at least *some* conception of environmental sustainability. Only time will tell.

This Essay will unfold as follows: First, it will explore what we know today about U.S. board-level sustainability committees.<sup>23</sup> Then, it will consider the values served by assigning responsibility for sustainability issues to a board-level committee: (1) it stimulates high-level attention to the goal(s) of sustainability; (2) it encourages competent oversight of in-house sustainability functions; (3) it provides a focal point for resource allocation decisions; (4) it emphasizes the notion that environmental compliance is not a sufficient corporate goal—something more aspirational may be appropriate; (5) it fosters education of committee members, often leading to “missionary work” both in and outside of the corporation; and (6) it helps in branding a corporation as a moral leader.<sup>24</sup>

The Essay will then examine the driving forces that might promote the creation of more sustainability committees and elevate the practice from a handful of companies to hundreds or thousands. These driving forces include: (1) state corporate law; (2) federal securities law; (3) NYSE listing requirements; (4) consensus-based “best practices” for American corporations; (5) shareholder demand from the social investment sector; (6) shareholder demand in the form of shareholder proposals; (7) the imposition of governance changes in the settlement of securities class actions or SEC enforcement litigation; and (8) norm entrepreneurship by corporate CEOs.<sup>25</sup>

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<sup>22</sup> See FORD MOTOR CO., PROXY STATEMENT, *available* at <http://www.ford.com/microsites/proxy-statements>; Coca Cola Enter., Inc., Committee Charter, *available* at <http://ir.cokecce.com/phoenix.zhtml?c=117435&p=irolgovCommittee&Committee=846>.

<sup>23</sup> See *infra*, Part I.

<sup>24</sup> See *infra*, Part II.

<sup>25</sup> See *infra*, Part III.

## I. BOARD-LEVEL SUSTAINABILITY COMMITTEES IN 2010

The decision to create a sustainability committee, like the decision to create any board-level committee, represents a deliberate choice about the optimal use of directors' time and energy. An increasing (though still minute) portion of the United States corporate universe is now deciding that sustainability committees are a necessary component of their corporate governance structure.

### *A. Committee Charters and Goals*

Sustainability committee charters vary and are currently evolving. Some companies, like Ford Motor Co., are both transparent and specific in their description of their committee's objectives and tasks:

To fulfill its responsibilities and duties, the Sustainability Committee shall:

(1) Assist management in the formulation and implementation of policies, principles and practices to foster the sustainable growth of the Company on a world-wide basis. "Sustainable Growth" means the ability to meet the needs of present motor vehicle customers while taking into account the needs of future generations. "Sustainable Growth" shall also encompass a business model that creates value consistent with the long-term preservation and enhancement of financial, environmental and social capital.

(2) Assist management in the formulation and implementation of policies, principles and practices to permit the Company to respond to evolving public sentiment and government regulation in the area of motor vehicle and stationary source emissions, especially in the area of greenhouse gas emissions and fuel economy and CO<sup>2</sup> regulation.

(3) Assist management in setting strategy, establishing goals and integrating sustainability into the daily business activities across the Company.

(4) Review on a continuing basis new and innovative technologies that will permit the Company to achieve sustainable growth and Company actions to protect those technologies.

(5) Review on a continuing basis partnerships and relationships, both current and proposed, with customers and others that support the Company's sustainable growth.

(6) Review on a continuing basis the Company's communication and marketing strategies relating to sustainable growth.<sup>26</sup>

Other companies are, at best, obfuscatory in describing the goals of their sustainability committees.<sup>27</sup> Some, though not all, post their committee charters on their websites.<sup>28</sup>

A recent survey by The Conference Board reveals an important feature of many sustainability initiatives, including the creation of board-level sustainability committees: many companies simply have no idea what they mean by "sustainability." That is, when asked "how does your company define sustainability?" 32.4 percent of the respondents answered "we avoid definitions and focus on actions."<sup>29</sup> Where that is the case, the work of sustainability committees may cover a lot of ground. Or these committees—with no goals to guide them—may achieve little of lasting importance. One important task for researchers will be to track the performance both of companies that define and articulate their sustainability objectives and those companies that do not.

### *B. Expertise, Information, and Accountability*

An inevitable issue with the creation of a new board-level committee is identifying who among the directors has either the interest or the expertise to be a useful committee member. Surely, some unwilling or unsuitable directors have been conscripted.

A related issue is information flow to the committee members. The 2010 Conference Board survey found that directors' primary source of information to expand their knowledge of sustainability issues and to stay

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<sup>26</sup> FORD MOTOR CO., CHARTER OF THE SUSTAINABILITY COMMITTEE OF THE BOARD OF DIRECTORS, *available at* [http://www.ford.com/doc/corpgov\\_sustainability\\_committee\\_charter.pdf](http://www.ford.com/doc/corpgov_sustainability_committee_charter.pdf).

<sup>27</sup> *See, e.g.*, CENTURY ALUMINUM CO, PROXY STATEMENT, *available at* <http://investor.shareholder.com/cenx/annuals.cfm> ("The Health, Safety and Sustainability committee (the HSS Committee) was formed in 2008 to assist the board with regard to oversight of Century's policies and management systems with respect to health, safety, and sustainability matters.").

<sup>28</sup> *See, e.g.*, SYSCO CORP., CORPORATE SUSTAINABILITY COMMITTEE CHARTER, *available at* [http://files.shareholder.com/downloads/SYY/854834918x0x234923/b50417fe-221c-451e-82ced9894b229a83/Corporate\\_sustainability\\_committee\\_charter\\_Sept\\_2008.pdf](http://files.shareholder.com/downloads/SYY/854834918x0x234923/b50417fe-221c-451e-82ced9894b229a83/Corporate_sustainability_committee_charter_Sept_2008.pdf); PNM RESOURCES, PUBLIC POLICY AND SUSTAINABILITY COMMITTEE CHARTER, *available at* <http://www.pnmresources.com/investors/documentdisplay.cfm?DocumentID=5604>; PROLOGIS, SUSTAINABILITY COMMITTEE CHARTER, *available at* [http://files.shareholder.com/downloads/PLD/854844087x0x281671/49faa944-889d-4376-a19a-d2694487f0b7/SUSTAINABILITY\\_COMMITTEE\\_CHARTER.pdf](http://files.shareholder.com/downloads/PLD/854844087x0x281671/49faa944-889d-4376-a19a-d2694487f0b7/SUSTAINABILITY_COMMITTEE_CHARTER.pdf).

<sup>29</sup> Tonello, *supra* note 5, at 9.

abreast of competitive developments is, as is the case with most other corporate matters, reports from senior executives.<sup>30</sup> This means directors must either come to the committee with pre-existing knowledge, do their own due diligence in developing expertise, or rely—perhaps excessively—on what the CEO and senior executives tell them. We understand that, in fact, directors rarely do independent due diligence: “[D]irectors almost never avail themselves of those additional sources (including peer-company benchmarks, securities analyst reports, director education programs, and outside consultants) that would enable them to critically verify and analyze any internally produced information on these matters.”<sup>31</sup>

Yet a third issue for new committees, apart from acquiring expertise, is figuring out how to recognize failure and measure success. In the Conference Board survey, 38.2 percent of respondents reported they “do not currently have a system in place for measuring progress made in their social and environmental activities and 32.4 percent do not assess the impact of such activities on the organization’s financial performance.”<sup>32</sup> Importantly, too, more than 60 percent of the survey’s respondents reported “they do not embed sustainability-related metrics into their top-executive compensation policy.”<sup>33</sup>

### *C. Effectiveness and Impact*

Even where board-level sustainability committees have the right people and give those people the right tools, these committees still may fail to protect the company’s interests. A vivid example is BP, which “appears to have done everything right” in assigning environmental issues to its board of directors.<sup>34</sup> The board-level Safety, Ethics, and Environment Assurance Committee (SEEAC) was charged with ensuring that BP met its goal of “no accidents, no harm to people, and no damage to the environment.”<sup>35</sup> Although it had reviewed critical reports on the safety

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<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 10-11.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> Geoff Colvin, *Who’s to Blame at BP The Board*, FORTUNE, July 28, 2010, [http://geoffcolvin.com/fortune\\_articles/article/whos-to-blame-at-bp-the-board/](http://geoffcolvin.com/fortune_articles/article/whos-to-blame-at-bp-the-board/).

<sup>35</sup> *Id.* The specific charge of the SEEAC Committee included (a) reviewing “the processes adopted by the executive management to identify and mitigate significant non-financial risks and receive assurance that they are appropriate in design and effective in implementation,” (b) “monitoring and obtaining assurance that the management or mitigation of significant BP risks of a non-financial nature is appropriately addressed,” (c) reviewing material to be placed before shareholder which address BP’s

of BP's projects, the SEEAC apparently ignored the message. That is, the SEEAC was aware of pervasive safety problems throughout BP's North American operations and also was aware that the mechanisms for informing the board of these problems were "dysfunctional."<sup>36</sup>

We know now that the Committee's efforts were wholly inadequate to anticipate or avoid the human and financial calamity arising out of the explosion on the Deepwater Horizon in April, 2010.<sup>37</sup> In a shareholder's derivative action filed shortly after the explosion on the drilling platform, plaintiffs described the directors' conduct as follows:

Defendants' gross mismanagement of BP has severely damaged what was once a valuable corporate franchise. They have deliberately refused to take steps necessary to ensure the Company's compliance with legally required safety rules and environmental safeguards, instead preferring to risk the safety of BP's workers and the well-being of their families in the pursuit of increased profits.<sup>38</sup> . . . . The conduct of BPs directors and officers complained of herein involves a knowing and culpable violation of their fiduciary obligations, the absence of good faith on their part, and a reckless disregard for their duties to the Company and its shareholders which the directors and officers were aware or should have been aware posed a risk of serious injury to the Company.<sup>39</sup>

There are reasons, of course, for failures like this. Outside directors work only part-time, are not provided staff, and often, even within the board, face competing priorities. The second-tier committees—those committees that deal with issues other than finance, governance, succession, and high-profile crises—probably fall far down the board's agenda and may not command the face-time with the full board necessary

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environmental, safety and ethical performance and making recommendations to the board about their adoption and publication," (d) "reviewing BP's internal control systems as they relate to non-financial risk," and "reviewing reports on the group's compliance with its code of conduct and on the employee concerns programme." BP ANNUAL REPORT AND ACCOUNTS 77 (2009).

<sup>36</sup> Colvin, *supra* note 34 (quoting the testimony of corporate governance activist Robert A. G. Monks).

<sup>37</sup> Campbell Robertson & Clifford Krauss, *Gulf Spill is the Largest of its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14 ("The BP spill is by far the world's largest accidental release of oil into marine waters. . .").

<sup>38</sup> Complaint at 5 ¶ 11, *Pickett v. Hayward*, No. 9809041 (Alaska Ct. App. May 20, 2010) (verified shareholder derivative complaint for intentional and negligent breach of fiduciary duty, abuse of control, and mismanagement).

<sup>39</sup> *Id.* at 16-17 ¶ 43.

to achieve the committees' goals. The members of these committees may also, like any group, fall prey to group-think.<sup>40</sup>

#### *D. Corporate Resistance to Sustainability Committees*

It is curious, perhaps, that while some American companies are voluntarily creating board-level sustainability committees, others are fiercely resisting doing so. At Apple, Inc., for example, the 2010 proxy statement included a shareholder proposal that the company amend its bylaws to establish a board-level Committee on Sustainability.<sup>41</sup> Apple's management argued against adoption, in part because, according to Apple, the company already was doing more than any other company in the electronics industry to pursue sustainability goals.<sup>42</sup> Intel successfully opposed a similar proposal at its annual meeting in April, 2008.<sup>43</sup>

The Intel story, however, gets more interesting. In 2010, "under pressure from activist investors," Intel announced that it had altered its corporate governance structure.<sup>44</sup>

Specifically, as of March 10, 2010, Intel's corporate governance and nominating committee charter requires that the committee "... review(s) and report(s) to the Board on a periodic basis with regard to matters of corporate responsibility and sustainability performance, including potential long and short term trends and impacts to our business of environmental, social and governance issues, including the company's public reporting on these topics."<sup>45</sup>

The emergence of sustainability committees, incidentally, has given rise to a predictable form of entrepreneurship. For instance, one distance-learning website now promises to "certify" members for sustainability committees for only \$397.<sup>46</sup>

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<sup>40</sup> See Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1233 (2003) (discussing the perils of groupthink and its role in the Enron debacle).

<sup>41</sup> Apple Inc., Proxy Statement (Schedule 14A) 54 (Feb. 25, 2010) (Shareholder Proposal No. 7), available at <http://www.sec.gov/Archives/edgar/data/320193/000119312510013030/ddefr14a.htm>.

<sup>42</sup> *Id.* at 54-55.

<sup>43</sup> Ambrose McNevin, *Intel Rejects Call for Sustainability Committee*, THE INQUIRER, Apr. 2, 2008, <http://www.theinquirer.net/inquirer/news/1004991/intel-rejects-call>.

<sup>44</sup> Tonello, *supra* note 5, at 17.

<sup>45</sup> *Id.*

<sup>46</sup> Distance Learning Online Certification Program, Certified Member of the Corporate Sustainability Committee of the Board of Directors, <http://www.members-of->

## II. WHY SUSTAINABILITY COMMITTEES MIGHT MATTER

Notwithstanding the recent decision of the United States Supreme Court in the *Citizens United* case,<sup>47</sup> corporations have limited means of self-expression. One way a corporation can speak, however, is through its allocation of resources; particularly the limited resources of its outside directors. When a company assigns responsibility, say, for approving charitable contributions or political donations to a board-level governance committee, it is saying something about its institutional values and the board's willingness to be held accountable for controversial corporate decisions.<sup>48</sup> When a company establishes a board-level risk management committee, it is saying much the same thing: we take risk seriously, we have escalated it to the board level in order to maximize the attention and oversight that is given to the topic, and we want to centralize and professionalize this oversight rather than diffusing it across the entire board.<sup>49</sup>

Choosing to create a sustainability committee (or a committee with comparable purposes but a different name) also sends a message. Indeed, the creation of such a committee is a signaling device that sustainability is a corporate priority. Creating a sustainability committee provides (some) evidence that a company is committed to performance that goes beyond mere compliance with existing and projected environmental laws. It can and does add flesh to those (ubiquitous) corporate mission statements that identify sustainability as one of a company's key objectives.

The creation of a sustainability committee—indeed the creation of any board-level committee—reflects the belief that that its members will develop and employ valuable competencies: knowledge of the larger environment in which the subject matter is situated and knowledge regarding issues the company may face (for example, sustainable manufacturing practices or preparedness for climate change) that the full board may lack; knowledge of the technologies required to achieve sustainability goals; knowledge of the language and metrics by which sustainability is assessed; a sense of the range of possible short-term and

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[the-boardassociation.com/Distance\\_Learning\\_for\\_the\\_Sustainability\\_Committee\\_of\\_the\\_Board.htm](http://the-boardassociation.com/Distance_Learning_for_the_Sustainability_Committee_of_the_Board.htm) (last visited Feb. 24, 2011).

<sup>47</sup> See *Citizens United v. FEC*, 130 S. Ct 876 (2010).

<sup>48</sup> See Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities, and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147, 1150 (1997) (advocating that corporate philanthropy be made a board-level agenda item).

<sup>49</sup> See generally E. William Bates, II & Robert J. Leclerc, *Boards of Directors and Risk Committees*, 17 CORPORATE GOVERNANCE ADVISOR. 15 (2009) (considering the ramifications of risk committees).

long-term sustainability goals and (at least in general) the pathways necessary to achieve those goals; an understanding of the resources and competencies currently within the company that can advance sustainability goals; an understanding of the company-specific levers required to activate people and resources; and a company-specific ability to move ideas and proposals through the chain of command.

As we have seen, many of these competencies are still missing on corporate environmental committees.<sup>50</sup> Still, a well-functioning committee, led by a competent chair, can with effort achieve many, if not all, of the objectives for which the committee was created.

Beyond developing board-level expertise, there may be other benefits that arise from the creation of a sustainability committee. First, a sustainability committee (like any other special subject committee) is likely to be more “nimble” than the whole board in identifying trends and events.<sup>51</sup> Second, a committee may foster cross-committee synergies—a director who serves simultaneously on the Governance Committee and the Sustainability Committee, for example, may see the dynamics of CEO succession in a different light than others who lack the dual committee experience.<sup>52</sup>

Third, sustainability committees offer a particularly good opportunity for the exercise of the “advising” function by outside directors.<sup>53</sup> When serving on a sustainability committee, outside directors may import good ideas that have not bubbled up internally, but nevertheless may be ripe for exploitation within the company. In other words, outside directors working from the platform of a sustainability committee may prove influential in urging the company to “gear up” for sustainability initiatives.<sup>54</sup>

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<sup>50</sup> See *supra* notes 34-36 and accompanying text.

<sup>51</sup> Bates & Leclerc, *supra* note 49, at 16.

<sup>52</sup> *Id.* (noting the synergistic potential of membership on a board-level risk management committee).

<sup>53</sup> See Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 801-03 (2001) (articulating the three well-recognized board functions: monitoring, legitimizing, and advising).

<sup>54</sup> This wonderful metaphor derives from the automotive industry:

The framework’s first gear denotes compliance. In this first stage, a firm views the business case for sustainability with skepticism and, aside from generic corporate philanthropy, does little beyond comply with applicable labor and environmental regulations. In second gear, firms voluntarily move beyond mere compliance, view sustainability as legitimate though mostly a public-relations matter, and focus their efforts on “eco-efficiency” and “measuring, managing, and reducing” the direct impact of their operations. Companies that shift into third

Fourth, sustainability committees might serve to create a ripple effect—when a director is appointed to such a committee at Company *A*, and embraces its mission, she soon may become a champion of sustainability at Companies *B*, *C*, and *D*. Betsy Atkins may be one such example. She currently sits on the boards of four public companies.<sup>55</sup> She recently wrote a first-person commentary arguing that “[i]t has become obvious to every board member today that environmental issues are now a factor in governance decisions.”<sup>56</sup> She learned this lesson in her board service at SunPower Corp., a manufacturer of solar generating equipment.<sup>57</sup> Perhaps now she will carry that message to Chico’s (apparel), Polycom (communications equipment), and Reynolds American (tobacco).<sup>58</sup>

Of course, there also may be some downsides to the creation of a sustainability committee. Every additional committee increases the burden on directors and spreads ever more thinly the time they are likely to devote to their board duties. Creation of a special-purpose committee also may unburden directors who are not on the committee from thinking deeply, or at all, about the issues that are not in their immediate portfolio. Balkanizing the board, in other words, may make the majority of directors less rather than more attentive to sustainability issues.

As a related matter, creating a sustainability committee may also form the basis for unwarranted confidence on the part of stakeholders that environmental matters are receiving adequate attention. Sustainability

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gear are more proactive in their efforts, often partnering with the government as well as “suppliers, customers, and others in their industry” to innovate sustainable solutions together. By fourth gear, a firm has integrated sustainability principles into its strategy and business processes (starting with product or service development), putting the firm at a competitive advantage in its sector and at the same time creating value for all of its stakeholder groups. In the fifth and highest gear, companies redesign or “reengineer” their business models, financial institutions, and markets to root out underlying causes of nonsustainability at “macro” (planetary ecological limits), “meso” (human-consumption demands), and “micro” (industry and company) levels. To be sure, “for many people, most of the time, four gears is enough, but there are times when it is necessary to shift into fifth gear, or overdrive.”

Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 993-94 (2009).

<sup>55</sup> *Committee Composition, Betsy S. Atkins, Director, SUNPOWER*, <http://investors.sunpowercorp.com/committees.cfm> (last visited Feb. 25, 2011).

<sup>56</sup> Betsy S. Atkins, *How SunPower Builds “Green” Issues into its Corporate Governance*, 18 CORP.. GOVERNANCE ADVISOR 1, 21 (2010).

<sup>57</sup> *Id.*

<sup>58</sup> *Committee Composition, supra* note 55.

committees, as in the case of BP, may lull stakeholders into a false sense of security.<sup>59</sup>

### III. WHAT MIGHT DRIVE THE CREATION OF MORE BOARD LEVEL SUSTAINABILITY COMMITTEES?

Currently, only a handful of American companies have created board-level sustainability committees.<sup>60</sup> If there is to be a drumbeat for the creation of more board-level committees, it will have to start somewhere. Who or what is likely to be the catalyst for change?

#### *A. State and Federal Law, NYSE Listing Standards*

Under applicable state law, U.S. corporations (with exceptions for closely-held enterprises), must have a board of directors;<sup>61</sup> committees are optional.<sup>62</sup> Under federal law, *public* companies must have only a board-level audit committee.<sup>63</sup> As of July, 2011, they also will have to have a fully independent compensation committee.<sup>64</sup> The New York Stock Exchange's listing standards require that boards have not only an audit committee and a compensation committee, but also a nominating/corporate governance committee (these are known collectively as the "big three").<sup>65</sup> Otherwise, the use of committees is optional.

As a practical matter, state law is an unlikely driver for any change in this setup. Typically, state corporate laws are enabling, not directive, and Delaware is certainly unlikely to deviate from this approach. Federal statutory law, too, is an unlikely driver. With a few notable exceptions, U.S. federal law is aimed at disclosure and not at corporate governance details. Recall, for example, that when Congress attempted to micro-manage some aspects of corporate governance in the Sarbanes-Oxley Act of 2002, Delaware legislators, judges, lawyers, and corporate leaders

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<sup>59</sup> See Robertson & Krauss, *supra* note 37.

<sup>60</sup> See *supra* note 8 and accompanying text.

<sup>61</sup> MODEL BUS. CORP. ACT § 8.01 (2002).

<sup>62</sup> MODEL BUS. CORP. ACT § 8.25 (2002).

<sup>63</sup> SEC Rule 10A-3, 17 C.F.R. § 240.10A-3(b) (2010).

<sup>64</sup> Mary E. Alcock, et al., *Not Just Financial Reform: Dodd-Frank's Executive Compensation and Governance Requirements*, 18 CORP. GOVERNANCE ADVISOR 1, 5 (2010).

<sup>65</sup> FINAL NYSE CORPORATE GOVERNANCE RULES § 4, available at <http://www.nyse.com/pdfs/finalcorpgovrules.pdf>.

famously rebelled.<sup>66</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in July, 2010, does little to change this situation.<sup>67</sup>

The New York Stock Exchange is an unlikely driver, as well. True, the Stock Exchange has mandated the “big three” committees for the boards of its listed companies, but beyond that, the NYSE insists that, when it comes to corporate governance practices, one size does not fit all.<sup>68</sup> Indeed, the NYSE has encouraged a great deal of experimentation through the use of company-specific corporate governance guidelines.<sup>69</sup> As a competitor with NASDAQ, the Stock Exchange would have little to gain by further prescribing the organizational structure of companies whose listings it seeks.

### B. “Soft Law” and Norms

Who or what else might drive the development of sustainability committees? What about the “best practices” community? Mainstream actors like the Council of Institutional Investors, CalPERS, and the Business Roundtable, and the for-profit advisors that make up the “corporate governance industry”<sup>70</sup> all support the use of the “big three” committees.<sup>71</sup> They are unlikely, however, to agree on the need to create additional special-interest board-level committees.

On the other hand, leading social investment funds like Domini or widely-followed indices like the Dow Jones Sustainability Index or the FTSE4Good Index might well add to their screening criteria the establishment of board-level sustainability committees. Recently, for

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<sup>66</sup> See, e.g., Myron T. Steele, *Sarbanes-Oxley: The Delaware Perspective*, 52 N.Y.L. SCH. L. REV. 503 (Delaware Supreme Court Chief Justice Myron T. Steel makes the case against Sarbanes-Oxley from Delaware’s perspective).

<sup>67</sup> See Paul Rose, *Regulating Risk by ‘Strengthening Corporate Governance’* 1, 25-26 (June 25, 2010), <http://ssrn.com/abstract=1630122> (arguing that the major corporate governance mandates in the bill do little to change the status quo of corporate governance).

<sup>68</sup> FINAL NYSE CORPORATE GOVERNANCE RULES, *supra* note 65, at § 9 (“No single set of guidelines would be appropriate for every company ....”).

<sup>69</sup> *Id.*

<sup>70</sup> See Paul Rose, *The Corporate Governance Industry*, 32 J. CORP. L. 887, 896 (2007).

<sup>71</sup> See COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES § 2.5 (“Companies should have audit, nominating and compensation committees, and all members of these committees should be independent.”); CALPERS, GLOBAL PRINCIPLES OF ACCOUNTABLE CORPORATE GOVERNANCE III.B.2 § 1.8 (2010) (“Independent Board Committees: Committees who perform the audit, director nomination and executive compensation functions should consist entirely of independent directors.”); BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE § III (2010).

example, CERES recommended that some financial institutions elevate consideration of climate change issues to the board level.<sup>72</sup> Others could follow CERES's lead.

### *C. Shareholder Demand*

Still other possible drivers for governance change might surface, on a corporation-specific basis. First, shareholders of individual companies may advance shareholder proposals under SEC Rule 14a-8, as they did in the cases of Apple and Intel.<sup>73</sup> Similar proposals advancing sustainability goals by means of systematic reporting, specific project objectives, and adherence to the standards of groups such as the Forest Stewardship Council are now commonplace during proxy season, though rarely successful.<sup>74</sup> Second, it is now possible for shareholders not only to advance advisory proposals under Rule 14a-8 but also to advance binding by-law amendments.<sup>75</sup>

Third, plaintiffs' class action lawyers may use their leverage in settling securities class actions to impose governance changes, including the creation of new board-level committees, as one of the terms of a class action settlement.<sup>76</sup> These kinds of settlements are attractive both to corporate leaders (who must do little to change their behavior) and also to plaintiffs' lawyers (who are ensured the recovery of a fee).

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<sup>72</sup> See DOUG COGAN, MEGAN GOOD & EMILY MCATEER, CERES, ADDRESSING CLIMATE RISK: FINANCIAL INSTITUTIONS IN EMERGING MARKETS: A BEST PRACTICES REPORT (2009), available at <http://www.ceres.org/Document.Doc?id=496>.

<sup>73</sup> See *supra* notes 41 and 44 and accompanying text.

<sup>74</sup> Rule 14a-8 has recently been used to promote sustainability goals at: SunTrust Banks, Inc., Proxy Statement (Schedule 14A) 59-60 (Mar. 5, 2010); PPG Industries, Inc., PPG Industries, Inc., Proxy Statement (Schedule 14A) 10-11 (Mar. 5, 2010); EOG Resources, Inc., Proxy Statement (Schedule 14A) 61-62 (Mar. 25, 2010); Tyson Foods, Inc., Proxy Statement (Schedule 14A) 21-23 (Dec. 22, 2009), ONEOK, Inc., Proxy Statement (Schedule 14A) 42-43 (Mar. 28, 2008); Kimberly-Clark Corp., Proxy Statement (Schedule 14A) 48-50 (Mar. 14, 2007); and Kroger Co., Proxy Statement (Schedule 14A) 43-44 (May 15, 2006), among others. There have been many shareholder proposals advocating enhanced environmental disclosure.

<sup>75</sup> See *Am. Fed'n of State, Cnty. & Mun. Emps v. Am. Int'l Grp., Inc.*, 462 F.3d 121, 123 (2d Cir. 2006).

<sup>76</sup> See Jessica Erickson, *Corporate Governance in the Courtroom*, 51 WM. & MARY L. REV. 1749, 1749 (2010) (identifying the specific terms of recent securities class action settlements); Barnard, *Corporate Therapeutics*, *supra* note 1, at n.2 (enumerating examples of governance changes extracted by plaintiffs' lawyers in class action settlements).

*D. Negotiated Regulation Resulting from Civil and Criminal Enforcement Proceedings*

Plaintiffs' class action lawyers are not the only advocates who can demand alterations in corporate governance practices. The Securities and Exchange Commission has also used its powers to create new board-level committees when settling civil enforcement actions.<sup>77</sup> Presumably, the Environmental Protection Agency or the Department of Justice could also extract such governance changes in settling lawsuits arising out of violation of the environmental laws.<sup>78</sup>

*E. Norm Entrepreneurs*

Finally, some corporations may be influenced by the personal preferences and initiatives of a powerful CEO. Charles O. "Chad" Holliday was such a leader. As chairman and CEO of the chemical giant DuPont from 1998-2009,<sup>79</sup> Holliday also chaired the Business Roundtable's Task Force on Environment, Technology, and Economy.<sup>80</sup> He co-authored the book *Walking the Talk*, which advocates social responsibility and environmental stewardship by major industrial companies.<sup>81</sup> He is credited with "transforming DuPont from a fossil fuels and chemical company to a science company, delivering sustainable solutions that help others reduce their environmental footprints."<sup>82</sup>

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<sup>77</sup> See Barnard, *Corporate Therapeutics*, *supra* note 1, at 795-96 (detailing the terms of SEC settlements requiring changes in corporate governance practices and establishing the creation of new board-level committees).

<sup>78</sup> See Joseph G. Block & David L. Feinberg, *Look Before You Leap: DPAs, NPAs and the Environmental Criminal Case*, ALI-ABA BUS. L. COURSE MATERIALS J. 7, 9 (2010), available at [http://www.venable.com/files/Publication/4307e686-a055-41ca-9150-b2ccfd550365/Presentation/PublicationAttachment/83ca143f-8819-4478-8422-b820340fa10d/CMJ1002-Block\\_Feinberg.pdf](http://www.venable.com/files/Publication/4307e686-a055-41ca-9150-b2ccfd550365/Presentation/PublicationAttachment/83ca143f-8819-4478-8422-b820340fa10d/CMJ1002-Block_Feinberg.pdf).

<sup>79</sup> *DuPont's Board of Directors Appoints Ellen Kullman Chair, News Releases*, DUPONT (Oct. 30, 2009), <http://onlinepressroom.net/DuPont/NewsReleases/> ("Charles O. Holliday, Jr., 61, Chair, will retire from the board after 11 years as its chairman....Holliday served as DuPont's CEO for 10 years.")

<sup>80</sup> *Business Roundtable Companies to Empower 10 Million Employees with Information on how to Save Energy, Recent News*, SEE CHANGE (Dec. 13, 2006), <http://seechange.businessroundtable.org/News/Read.aspx?ID=9>.

<sup>81</sup> See generally CHAD HOLLIDAY, STEPHAN SCHMIDHEINY, & SIR PHILIP WATTS, *WALKING THE TALK: THE BUSINESS CASE FOR SUSTAINABLE DEVELOPMENT* (2002) (discussing the business case for sustainable development).

<sup>82</sup> Chad Holliday Receives Courage to Lead Award, DUPONT NEWS, Nov. 13, 2009, [http://www2.dupont.com/Media\\_Center/en\\_US/daily\\_news/november/article20091113.html](http://www2.dupont.com/Media_Center/en_US/daily_news/november/article20091113.html).

Throughout his tenure as CEO, his board included an Environmental Policy Committee.<sup>83</sup>

There is a lesson here. At the end of the day, a commitment to sustainability, with or without the creation of sustainability committees, is unlikely to be achieved merely because shareholders or stakeholders want it. Rather, as in all governance matters, this commitment is likely to depend on the “moral conscience and self-interest of corporations’ leaders.”<sup>84</sup>

#### CONCLUSION

There is, of course, nothing magically transformative about the creation of a board-level sustainability committee. Cosmetic committees that sound good, but achieve little, litter the corporate landscape.

Still, the mini-trend that we can now observe, with the embrace by a few U.S. companies of new language, new board-level commitments, and new corporate structures, may be a leading indicator (a “green shoot”) of things to come. As the sample size grows, it will be useful to see if companies that have adopted board-level sustainability committees outperform their peers either in sustainability performance or financial performance. It will also be intriguing to see if, over the next decade, these committees proliferate or evaporate.

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<sup>83</sup> BUSINESS FOR SOCIAL RESPONSIBILITY, BEYOND NEUTRALITY: MOVING YOUR COMPANY TOWARD CLIMATE LEADERSHIP 11 (2007), available at [http://www.bsr.org/reports/BSR\\_Beyond-Neutrality.pdf](http://www.bsr.org/reports/BSR_Beyond-Neutrality.pdf).

<sup>84</sup> See Thomas Joo, *Global Warming and the Management-Centered Corporation*, 44 WAKE FOREST L. REV. 671, 671 (2009).