

*Journal of***APPLIED CORPORATE FINANCE****In This Issue: Sustainability and Shareholder Value**

<b>ESG Integration in Investment Management: Myths and Realities</b>	<b>10</b>	<i>Sakis Kotsantonis, KKS Advisors, Chris Pinney, High Meadows Institute, and George Serafeim, Harvard Business School</i>
<b>Bridging Sustainability and Finance: The Value Driver Adjustment Approach</b>	<b>17</b>	<i>Willem Schramade, Robeco Asset Management</i>
<b>Governance and Climate Change: A Success Story in Mobilizing Investor Support for Corporate Responses to Climate Change</b>	<b>29</b>	<i>Mats Andersson, AP4, Patrick Bolton, Columbia University, and Frédéric Samama, Amundi and SWF RI</i>
<b>Measuring What Matters: Industry Specificity Helps Companies and Investors Gain Traction on Sustainability</b>	<b>34</b>	<i>Bob Herz and Jean Rogers, Sustainability Accounting Standards Board</i>
<b>Materiality in Corporate Governance: The Statement of Significant Audiences and Materiality</b>	<b>39</b>	<i>Robert G. Eccles and Tim Youmans, Harvard Business School</i>
<b>ESG for All? The Impact of ESG Screening on Return, Risk, and Diversification</b>	<b>47</b>	<i>Tim Verheyden, Robert G. Eccles, and Andreas Feiner, Arabesque Partners</i>
<b>Integrating Systemic Risk into Modern Portfolio Theory and Practice</b>	<b>56</b>	<i>Steve Lydenberg</i>
<b>Morgan Stanley Perspectives on Sustainable Investing: Acceleration and Integration</b>	<b>62</b>	<i>Audrey Choi, Morgan Stanley</i>
<b>Delaware Public Benefit Corporations: Widening the Fiduciary Aperture to Broaden the Corporate Mission</b>	<b>66</b>	<i>Frederick Alexander, B Lab</i>
<b>The Evolution of Integrating ESG Analysis into Wealth Management Decisions</b>	<b>75</b>	<i>Peter Roselle, Morgan Stanley</i>
<b>Corporate Philanthropy and Innovation: The Case of the Pharmaceutical Industry</b>	<b>80</b>	<i>Frederick L. Bereskin, University of Delaware and Po-Hsuan Hsu, University of Hong Kong</i>
<b>Managing the “S” in ESG: The Case of Indigenous Peoples and Extractive Industries</b>	<b>87</b>	<i>Nick Pelosi and Rebecca Adamson, First Peoples Worldwide</i>
<b>ESG Investing in Emerging and Frontier Markets</b>	<b>96</b>	<i>Jamieson Odell and Usman Ali, Caravel Management</i>

# Materiality in Corporate Governance: The Statement of Significant Audiences and Materiality

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**M**any if not most directors view their primary fiduciary duty as serving the interest of shareholders, a view that is widely believed to be required by law. Given the prevalence of this “shareholder primacy” doctrine, directors often find it difficult to propose or support significant investment of corporate capital or other resources in their non-investor stakeholders, such as their employees, their local communities, or “the planet.” As we will argue in this paper, law does not prevent the directors of value-maximizing companies from recognizing the significance of stakeholders beyond shareholders and their contributions to long-run corporate competitiveness and value.

Corporate stakeholder initiatives and investments are an important focus of a growing set of corporate disclosure practices known as “integrated reporting.” In the recent book, *The Integrated Reporting Movement: Meaning Momentum Motives and Materiality*, we define an integrated report as one that combines information from traditional, financially-oriented annual reports with the “material” parts of the corporate sustainability reports that the largest companies in most developed nations have been producing for at least the past decade. By “material,” we mean information about those stakeholder issues that, when managed effectively, represent a significant contribution to company value or that, if *mismanaged*, could lead to a significant loss of value and opportunities to create or preserve future value. Given the potential effects of such stakeholder considerations on value, we believe strongly that the arguments about materiality and significant audiences presented in this paper are as relevant for “Form 10-K” and “Form 20-F”<sup>1</sup> reporting as for integrated reporting.

This paper’s main points about director fiduciary duty and materiality in corporate governance apply to all forms of corporate reporting, traditional as well as integrated, in all countries.<sup>2</sup> However, for many boards, this is likely a new way of thinking. With the aim of helping boards in this new realm of account-

ing for the value created (or lost) through the consideration of stakeholder issues, we have structured this paper in four parts. We begin by reviewing the concept of director fiduciary duty, as it is understood not only in the U.S. but in a global context. In the second part, we review the relevance of materiality in corporate governance. In the third section, we present our “audience-focused” approach for determining the materiality of issues relevant to the company’s many different stakeholders. In part four, we propose the new idea of an annual “Statement of Significant Audiences and Materiality” to be issued by corporate boards. As we envision it, such a statement would provide a clear identification of the investor and non-investor audiences whose issues will affect the ability of the company to create value and the time frames the board uses to evaluate the impact of its decisions on these audiences. We believe that this can be done in a single page.

## Director Fiduciary Duty

The objective of the “going concern” corporation, as a separate and potentially immortal legal entity, is simply to survive and, if possible, to thrive.

A prevailing ideology across the globe is that the fiduciary duty of directors requires that they place primacy on shareholders’ interests. But what about the law? What obligations and constraints does it put on corporate managers and boards to put shareholders first?

The answer, it turns out, is almost none. According to the law of virtually all nations with publicly listed corporations that have been examined to date, shareholders are construed as the owners not of companies nor of corporate assets, but rather of a set of freely tradable rights—rights that entitle them to vote, to receive dividends or other distributions, and to claim the “residual value” of corporate assets. And this means, contrary to the popular view, that shareholders are not in fact “the owners” of public companies.<sup>3</sup> The responsibility of ownership—that is,

\* Much of the material presented in this paper has been adapted and updated from Chapter 5 of Robert Eccles’ recent book, *The Integrated Reporting Movement: Meaning Momentum Motives and Materiality*. Tim Youmans, the co-author of this paper, was a significant contributor to Chapters 5 and 6, as well as other chapters.

1. By U.S. Securities and Exchange Commission Rules, U.S. listed domestic companies must submit annual reports on Form 10-K, and foreign companies listed on U.S. exchanges must submit annual reports on Form 20-F.

2. It is this general sense that describes the difference between Chapter 5 of *The Integrated Reporting Movement: Meaning Momentum Motives and Materiality* and this paper. While Chapter 5 looked at materiality and governance in the context of integrated reporting, this paper is focused on materiality in the context of corporate governance,

with common import for traditional, integrated, and sustainability reporting.

3. “The Misleading Metaphor of Shareholder ‘Ownership’ ... describes shareholders as “owners” of corporations. As a legal matter, the claim that shareholders “own” the corporation is obviously incorrect. Corporations are independent legal entities that own themselves; shareholders only own a security, called “stock,” with very limited legal rights. See Footnote on p. 804: “This metaphor may have roots in the nineteenth century, when most corporations were closely held firms with only a single shareholder or a very small number of shareholders. In such firms, shareholders exercise far more control, and it may make more sense to think of them as “owners.” From Lynn A. Stout, “The Mythical Benefits of Shareholder Control,” *Virginia Law Review*, Vol. 93, No. 3, May, 2007, p. 804, <http://www.jstor.org/stable/25050361>.

overseeing and ensuring the efficient management of the corporation's assets—is entrusted to the board of directors, a trust that is commonly referred to as “fiduciary duty.” Shareholder value is in large part the outcome of directors’ decision-making and the execution of their commitment to making investments in developing and maintaining all of their corporation’s critical capabilities (which are often referred to as “capitals”)<sup>4</sup> and investments in the corporate stakeholders who are essential to enabling companies to make commercial use of those capitals.<sup>5</sup>

In sum, shareholders and other providers of financial capital are but one important audience among several that companies need to invest in and engage with. As the corporation mobilizes financial, manufactured, intellectual, human, social and relationship, and natural capital, each form of capital has one or more audience.

Moreover, the potential immortality of the corporation implies, both in a legal and an economic sense, that future generations are also stakeholders. Considering all possible combinations of issues and stakeholders, in terms of both nonfinancial (e.g., environmental, social, and governance, or “ESG”) and financial performance over the future as well as near-term time frames, would appear to make directors’ fiduciary task nearly impossible, given limited corporate resources and competencies. Recognizing these limitations, directors must make choices about which audiences are significant, and which are not. This choice of “significant audiences,” which will in turn determine which issues are “material,” is critical to the ability of the corporation to sustain itself over a self-defined period of time.

With the aim of building resistance to the natural tendency toward excessive focus on short-term financial performance, we suggest that directors, when determining which of their audiences are significant (and whose concerns are therefore “material”), devote more of their time to prioritizing the companies’ relationships with their most important stakeholders—with the implication that a broader range of issues will be considered over a longer time horizon. To the extent that a commitment to shareholder primacy has been widely perceived as a legal requirement, directors have by and large failed to give adequate consideration to the full array of potentially significant audiences in their oversight of strategy, investments, and reporting.

Research is now being conducted with the goal of establishing a composite global legal framework that allows directors to consider the universe of stakeholders in their materiality determination process. Over the past 21 months, we have gathered legal memos provided by leading law firms in 32 countries, including all of the G20 countries, about the fiduciary duty of board directors in their respective jurisdictions. The template for these memos was developed in collaboration with Linklaters, a renowned global law firm. (See Appendix I for more detail on this research.)

The main finding of this research to date is that, in every jurisdiction across the world without exception, the board of director’s primary duty is to the corporation itself as a separate legal entity. The concept of “corporate personhood,”<sup>6</sup> separate and apart from shareholders as well as other providers of capital and other stakeholders, appears to be universal and underlies both the limited liability of shareholders of public corporations and the liquidity of freely tradable shareholder rights (i.e., “shares”). In some jurisdictions, most notably the United States, there is “dual primacy” in the sense that directors’ duty to the separate corporate entity has equal co-primary legal standing with directors’ duty to shareholders. In no jurisdiction, however, is a director’s duty to shareholders construed as a higher duty than the duty to the corporate entity. What’s more, in some jurisdictions such as Brazil, the current legal duty of directors to the corporate entity requires consideration of a full range of potential stakeholders, including employees, customers, and NGOs representing various interests of civil society.<sup>7</sup>

### The Relevance of Materiality in Corporate Governance

Materiality, in its essence, is entity-specific. Whether the interests and issues of a certain stakeholder audience are material will vary from company to company, depending on sector, strategy, business model, and the time frame under consideration. As a consequence, materiality determination must ultimately reflect the judgment of the board of directors. The board’s guiding principle in determining whether a given stakeholder group is “significant” should be economy of director focus and information. Boards that have the courage to, for example, limit reporting to only material information are sending their investors and other key stakeholders the

4. “The International IR Framework,” The International Integrated Reporting Council, cites the six capitals of: financial, manufactured, intellectual, human, social and relationship, and natural capital in its business value creation process map. <http://integratedreporting.org/resource/international-ir-framework/>.

5. “In other words, once again beyond legal requirements, the interests of others, including human rights, derive from those of the corporations’ shareholders. So the argument for shareholder value has been profoundly influential in shaping the laws and conventions that govern the conduct of our corporations. So elegant is the argument that I will employ it in coming to the exact opposite conclusion (pp. 31-32)... Shareholder value is an outcome not an objective. It should not drive corporate policy but be treated as a product of it. (p.261)” See Colin Mayer, “Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in It,” 2013. See also Lynn Stout, “The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public,” 2012.

6. See note 13.

7. “The Brazilian Corporate Law also provides for a requirement to satisfy the “public at large” and the “social role” of the company. Our view is that such concepts could be construed as to encompass not only a duty to the company itself (and its shareholders) but also to non-shareholders that could be impacted by the company’s activities, such as, for example, the company’s employees, third parties with business relationship with the company, the community in which the company’s activities are carried out, the environment and the society in general. See Mattos Filho Advogados, “Legal Perspective on an Annual Board ‘Statement of Significant Audiences and Materiality,’” October 2014, p.2, on the *American Bar Association Sustainable Development Task Force: Duty of Board Directors* web site, [http://www.americanbar.org/content/dam/aba/administrative/environment\\_energy\\_resources/resources/brazil\\_legal\\_memo.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/resources/brazil_legal_memo.authcheckdam.pdf).

message that the board has the ability to exercise this judgment—in other words, to govern.

Indeed, determining materiality could well be described as the essence of directors' fiduciary duty as overseers of the management of the corporation. A recent statement by the International Integrated Reporting Council (IIRC) makes this point when it says that the act of defining materiality "emphasizes the involvement of senior management and those charged with governance in the materiality determination process in order for the organization to determine how best to disclose its unique value creation story in a meaningful and transparent way."<sup>8</sup> We go farther than the IIRC and argue that the responsibility for making this determination ultimately lies with the board and that, in order to fulfil its primary fiduciary responsibility to the sustainability of the corporation, it must make this determination. But before prescribing a more specific role for the board and proposing new board tasks in the annual reporting cycle, we think it's useful to recall the basic role of boards as actors in the social construction of materiality.

In one of the most important business books of all time,<sup>9</sup> *The Modern Corporation and Private Property*,<sup>10</sup> Adolf Berle and Gardiner Means identified three broad privileges granted to corporations by the State:

1. The ability to limit liability, or socialize losses,<sup>11</sup> while privatizing profits, thus attracting risk capital.<sup>12</sup>

2. The ability of corporations to own other corporations, allowing for concentration of control that is disproportionate to share of risk capital.<sup>13</sup>

3. The separation of ownership rights from control rights, enabling freely tradable shares.<sup>14</sup>

Berle and Means went on to say that "The property owner who invests in a modern corporation so far surrenders his wealth to those in control of the corporation that he has exchanged the position of independent owner for one in which he may become merely [a] recipient of the wages of capital... [Such owners] have surrendered the right that the corporation should be operated in their sole interest."<sup>15</sup> Because society has granted corporations these special privileges, corporations can and should be thought of as having a civic, if not a moral, duty to think not only of profits, but also of the good of society.<sup>16</sup> This underpins the duty of corporations not only to "perform," but also to "report" to society, including reporting on all short-, medium-, and long-term value creation initiatives related to their significant non-investor stakeholders.

The duty of a corporation to take society's interest into account in exchange for these special privileges is held in trust by the board of directors. Through a privilege granted by

8. International Integrated Reporting Council. "Materiality background paper for IR," p.1. <http://www.theiirc.org/wp-content/uploads/2013/03/IRBackground-Paper-Materiality.pdf>.

9. In an extraordinarily positive 1933 review in the *New York Herald Tribune*, Charles Beard had this to say: "In the time to come this volume may be proclaimed as the most important work bearing on American statecraft ... and will mark a sharp turning point in fundamental, deep-thrusting thinking about the American State and American civilization." See Charles Beard, "Who Owns—and Runs—the Corporations," February 19, 1933, book review section, *New York Herald Tribune*. And it enjoyed similar praise in a 1932 issue of the *Yale Law Review*: "This book will perhaps rank with Adam Smith's *Wealth of Nations* as the first detailed description in admirably clear terms of a new economics epoch." See Frank and Meyers, *Yale Law Review*, 42, 989-1000, 1933. See Colin Mayer, *Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in It*, Oxford University Press, 2013.

10. Adolf Augustus Berle and Gardiner Coit Means, *The Modern Corporation and Private Property*, Transaction Publishers, 1991 (10th version, originally published in 1933).

11. The ability to limit liability, through bankruptcy protection, is common to sole proprietors, closely held companies and individuals, as well as corporations. A key difference is that the corporation's control group (officers and directors) are able to socialize the losses on others' capital investment, not their own capital investment.

12. From American and English law, "the very existence of the corporation was conditioned on a grant from the state. This grant created the corporation and set it up as a separate legal person independent of any associates [investors and managers]," [also contemporarily termed "corporate personhood."] From this state granted personhood "privilege ... flowed a limited liability of associates ... a stockholder was not liable for any of the debts of the enterprise and he could thus embark a particular amount of capital in the corporate affairs without becoming responsible, beyond this amount, for the corporate debts." Berle and Means, *The Modern Corporation*, p. 120-121. Regarding the role of limited liability in attracting risk capital in Easterbrook, Frank H., and Daniel R. Fischel. "Limited liability and the corporation." *U. Chi. L. Rev.* 52 (1985): 89.p. 636, "Third, limited liability enables the transfer of securities on a trading market, ensuring liquidity. Absent limited liability, shares would be difficult to value because they would carry the potential of excess liabilities." The role of limited liability in attracting risk capital has also been shown mathematically in Robert C. Merton, "An Intertemporal Capital Asset Pricing Model," *Econometrica*, Vol. 41, No. 5, September, 1973. That paper concludes on page 885 that "An intertemporal model of the capital market has been developed which is consistent with both the expected utility maxim and the limited liability of assets [equities]."

13. Also derivative of corporate personhood, corporations can exert "Control Through a Legal Device. In the effort to maintain control of a corporation without ownership of a

majority of its stock, various legal devices have been developed. Of these, the most important among the very large companies is the device of "pyramiding." This involves the owning of a majority of the stock of one corporation which in turn holds a majority of the stock of another—a process which can be repeated a number of times. An interest equal to slightly more than a quarter or an eighth or a sixteenth or an even smaller proportion of the ultimate property to be controlled is by this method legally entrenched." Berle and Means, *The Modern Corporation*, p. 69.

14. "The separation of ownership from management and control in the corporate system has performed this essential step in securing liquidity. It is the management and "control" which is now wedded to the physical property. The owner has no direct personal relation to it and no responsibility toward it. The management is more or less permanent, directing the physical property which remains intact while the participation privileges of ownership are split into innumerable parts—'shares of stock'—which glide from hand to hand [as a "token"], irresponsible and impersonal... Most striking of all, a liquid token acquires a value purely and simply because of its liquidity." Berle and Means, *The Modern Corporation*, pp. 250-251. As cited above, the separation of ownership from control combined with personhood-derived limited liability enables the free trading of shares and a liquid market for these shares.

15. Berle and Means, *The Modern Corporation*, p. 5

16. Lynn Stout (*The Shareholder Value Myth*, 2012) describes that the foundation of the "profit maximizing," thus stakeholder minimizing, corporate governance is the self-disproving view of social interaction symbolized by "Homo economicus": "Let us see how our friend Homo economicus stacks up against the list [of clinical sociopathic behaviors]. Lack of remorse (item 7)? Obviously; why would Homo economicus feel bad just because he hurt or misled another, if he advanced his own material welfare? Irresponsibility and reckless disregard for the safety of others (items 5 and 6)? Homo economicus feels responsible for, and cares about, no one but himself. Deceitfulness (item 2)? Homo economicus is happy to lie any time it serves his interests. Failure to conform to social norms with respect to lawful behaviors (item 1)? Whenever and wherever the police aren't around describes Homo economicus. Although Homo economicus is neither cranky nor impulsive—items 3 and 4—he has five of the seven characteristics on the list. Unburdened by pity or remorse, he will lie, cheat, steal, neglect duties, break promises—even murder—if a cold calculation of the likely consequences leads him to conclude that he will be better off. Like any sociopath, Homo economicus lacks a conscience." It is clear that most modern corporate board members are not Homo economicus, and it is within the norms of the modern corporate social construct to reciprocate back to society, beyond pure profit making. See Lynn A. Stout, "Taking conscience seriously." *Moral Markets: The Critical Role of Values in the Economy*, Princeton University Press, Princeton, 2007: 157-172.

society, a corporation arrives at its own legal identity separate from its shareholders, directors, managers, employees, and other stakeholders. Along with this legal standing, to the extent that it succeeds in satisfying the legal “claims” of all these stakeholders, public corporations have the capacity to survive many generations.

In his book *Firm Commitment*, Professor Colin Mayer of Oxford University notes that the corporation’s current decisions could have an impact long after the tenure of its current management has expired and that, as a consequence, the board is the appropriate trustee of the firm’s intergenerational commitment.<sup>17</sup> This implies that director judgment must be informed by a keen sense of the social context within which the corporation is operating, further informing the board’s oversight of the management team’s formulation and implementation of the company’s strategy. It also implies that the board is responsible for taking a long-term view and for ensuring that management reflects that view in its decision-making.

As part of executing board approved strategy, management may undertake an involved stakeholder engagement process that attempts to strengthen its ties to all corporate constituencies. However, it is the board’s responsibility—and indeed an important part of carrying out its fiduciary duty—to make the ultimate decision about what issues are material to corporate strategy.

### Audience-Focused Materiality Determination

Although materiality forms the conceptual bedrock of corporate reporting, there is no authoritative definition of it. In

“Securities Regulation,”<sup>18</sup> Louis Loss points out that the legal field offers no specific definition of the word. Court opinions on materiality have done little more than sketch its conceptual contours. As in cases involving fraud, for all U.S. legal cases in which the concept of materiality has played a relevant role, the courts have opined that materiality must be decided on a case-by-case basis.<sup>19</sup> The U.S. Supreme Court has also asserted that this determination must be based on both qualitative and quantitative factors based on the “total mix” of information made available.<sup>20</sup> Further complicating the “total mix” standard set by the Supreme Court for evaluating potentially material omissions or misstatements, the Court has left open the issue of “circularity” in its definition of materiality.<sup>21</sup> Finally, adding to the difficulty of the work of corporate decision makers, the courts have also made clear that materiality must be determined with complete clarity. That is to say, these opinions do not allow for “degrees” of materiality. A fact is either material, in which case it must be reported, or is not material, in which case it need not be reported.

Such materiality assessments must be made by the board and senior management of the corporation itself. Since investors have no voice in a company’s materiality determination process other than through lawsuits (the rulings of which produce only more “guidance” instead of specific thresholds), it is management’s, and ultimately the board’s, responsibility to ascertain what information “reasonable investors”<sup>22</sup> would want to know. In the end, materiality is determined by the corporation, and it is entity-specific.<sup>23</sup>

Since there is no easy *rule* to follow in determining materiality, companies making the ultimate decision on

17. Specifically, Mayer advocates a two-tier form of board governance called a “trust firm,” somewhat similar to the German board model (Mayer & Franks, “Ownership and control of German corporations,” 2001). Given that the trust firm is not (yet) the standard in the U.S. and other corporate domiciles, we feel that Mayer’s “trust theory of the stratified Board” applies to today’s current directors: “...the corporation is a rent extraction vehicle for the shortest term shareholders. The power of owners [controllers] with the shortest time horizon not only concentrates control and wealth amongst them and their agents, but also is the source of failure to account for the interest of any generation but their own. Competition may confer some benefits on their customers, but by focusing the horizon of the firm so closely on the near term, the wellbeing of all but the most immediate generation is disregarded. We should not therefore rely on competition to be the guardian of our offspring ... [The corporation will have to turn to trustees who are the custodians of the firm’s values] to restrain it from defaulting on the future. Their presence changes the nature of the corporation from being a pure agency one, in which the directors act as agents of the shareholders, to a mixed trust arrangement in which the [Board] acts in behalf of the designated stakeholders of the corporation.” It is our belief that these stakeholders are material and significant audiences that the firm defines and in its corporate reporting process. Mayer, *Firm Commitment*, pp. 240, 244-245.

18. Louis Loss, Joel Seligman, and Troy Paredes. *Securities Regulation*. New York: Little, Brown and Company, 1961. p.1436.

19. “It is said that a fraudulent representation must be material to have that effect. But how are we to decide whether it is material or not? It must be by an appeal to ordinary experience to decide whether a belief that the fact was as represented would naturally have led to, or a contrary belief would naturally have prevented, the making of the contract.” (Holmes, Oliver Wendell. “The common law.” (1881) in Gutenberg Project version: [308] LECTURE IX. CONTRACT- III. VOID AND VOIDABLE.). This is one of the first commercial law references to materiality. Later cases such as *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988) and *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976), as well as post-Securities Act regulations, arguably, stand on the shoulders of Holmes’ legal construction of commercial materiality.

20. [...] showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reason-

able shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of the information made available.” *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757, 1976, at page 449.

21. The circularity of this [*TSC v. Northway*] definition leaves the question of what determines the “total mix” of information unanswered. Does it refer to all other material information except for the piece in question? If so, upon what basis was all this information judged to be material in the first place, since the “total mix” of information must be constructed one piece at a time. Was the first piece of information deemed material because it was important to a reasonable investor, and then all other information is judged in the context of increasing amounts of information? Conceivably, whether a piece of information is material or not would be a function of how much other information is available. When little information is available, the relevance of an additional bit of information can be high. When a substantial amount of information is available, an additional piece may be less relevant. If the total mix of information also includes immaterial information, then the question arises regarding the basis on which the total mix is built.

22. See note 20, *TSC v. Northway*.

23. The phrase “entity-specific” is used in the Financial Accounting Standards Board definition of materiality. “Information is material if omitting it or misstating it could influence decisions that users make on the basis of the financial information of a specific reporting entity. In other words, materiality is an entity-specific aspect of relevance based on the nature or magnitude or both of the items to which the information relates in the context of an individual entity’s financial report. Consequently, the Board cannot specify a uniform quantitative threshold for materiality or predetermine what could be material in a particular situation.” See *Financial Accounting Standards Board*, “Statement of Financial Accounting Concepts,” No. 8, p. 17, [http://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175822892635&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=210323&blobheadervalue1=filename%3DConcepts\\_Statement\\_No\\_8.pdf&blobcol=urldata&blobtable=MungoBlobs](http://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175822892635&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=210323&blobheadervalue1=filename%3DConcepts_Statement_No_8.pdf&blobcol=urldata&blobtable=MungoBlobs), accessed May 2014. For another discussion on materiality for nonfinancial information see Rob- >>

which issues are material for reporting purposes should use a clearly defined *process* with solid lines of responsibility. Because materiality is a firm-specific social construct, it poses certain challenges for corporate reporting. As every board and management team protects a unique brand, what the corporation symbolizes for society is unique to each company. This means that each firm can define its own materiality threshold within the boundaries of accepted and evolving standards. In “Westphalian”<sup>24</sup> terms, materiality for the firm becomes materiality for its significant audiences.

The role of non-investor stakeholder “audiences” in long-run corporate value creation begs the question: *To whom* is the firm reporting? And in the context of materiality for corporate reporting, one must ask, “*Who* does the board address when it determines *which* issues are material, and which issues are *not*?” Although providers of financial capital are clearly a significant audience, other audiences also exert influence on the firm’s identification of material issues. Various stakeholders wield varying degrees of influence on the providers of capital and the firm itself, and the implications of that influence are often too great to ignore. Consequently, when the firm decides what information is material, it must, for its own good, take into account the perspectives of stakeholders beyond those who provide financial capital.

The Integrated Reporting (<IR>) Framework presents in its section on “Materiality” the following four-step process for determining what information is material:

1. “Identifying relevant matters based on their ability to affect value creation;
2. Evaluating the importance of relevant matters in terms of their known or potential effect on value creation;
3. Prioritizing the matters based on their relative importance;
4. Determining the information to disclose about material matters.”<sup>25</sup>

We suggest a modification of the above process that includes the following preliminary step: “Identify audiences relevant to the corporation, their interests (including where they conflict), and the relative weight attached to each.” Our recommended preliminary step is rarely carried out with any degree of rigor for two reasons. The first is the prevailing ideology that the fiduciary duty of directors requires them to place primacy on shareholders’ interests. Second, many

companies address broad stakeholder interests through general statements like “We are committed to delivering excellent returns for our shareholders and we firmly believe that addressing stakeholders’ interests further enables us to do so.” If this sounds “nice” or is consistent with emerging rhetoric in support of the “business case for sustainability reporting,”<sup>26</sup> it also ignores the difficult trade-offs that must often be made between shareholders and other stakeholders, particularly in the short term.<sup>27</sup> Moreover, there are not only trade-offs—and thus potential conflicts—between providers of financial capital and other audiences, but also conflicts between the providers of different kinds of capital (debt vs. equity), and even between different sustainability advocates (for example, those focused on environmental protection vs. those focused on a social issue like income inequality).

### The Statement of Significant Audiences and Materiality

Determining the relative importance of different providers of financial capital and of other audiences is ultimately a responsibility of the board. What does this mean in practice?

We have proposed that the board issue each year a one-page forward-looking “Statement of Significant Audiences and Materiality (The Statement).” Such a statement would aim to inform management, providers of financial capital, and all other stakeholders the board believes to be critical to the long-run profitability and survival of the corporation. More specifically, such a statement would communicate the board’s intent to invest resources and management attention in all significant audiences along with the time frames over which they are expected to materialize. In so doing, the board is communicating both its view of the role of that corporation in society, and the financial and nonfinancial (e.g., environmental, social, and governance) foundation for the company’s corporate reporting.

Although management can play a significant role in preparing The Statement, it is ultimately a statement by the board, much like the annual financial audit. While management is deeply involved in the audit—in U.S. companies, for example, the CEO and CFO must personally sign off on the adequacy of a company’s internal control systems—it is the Audit Committee of the board that chooses and engages the audit firm and signs off on the scope of the audit. The Statement, like the audited financial statement, is ultimately a responsibility of the board—not management.<sup>28</sup>

ert G. Eccles, Michael P. Krzus, and George Serafeim, “A Note on Materiality for Nonfinancial Information,” *Harvard Business School Note N9-314-033*, November 2013.

24. In academic circles, the phrase “Westphalian Sovereignty” is sometimes summarized as “The religion of the prince is the religion of the place.” Arguably, the source of the concept of “sovereignty,” the Peace of Westphalia of 1648 was: “The end of the Thirty Years War brought with it the final end of the medieval Holy Roman Empire. Authority for choosing the religion of the political unit was given to the prince of that unit and not to the Hapsburg Emperor or the Pope. No longer could one pretend there was religious or political unity in Europe. Authority was dispersed to the various kings and princes, and the basis for the sovereign state was established.” Bruce Russett, Harvey Starr, and David Kinsella, *World Politics: The Menu for Choice*, Cengage Learning, 2005.

25. “The International IR Framework”, *The International Integrated Reporting Council*, “Guiding Principles 3.18”, p. 18.

26. “[...]the current state of sustainability reporting is in some ways ‘contra-materiality’ when the proper meaning of the term ‘materiality’ is understood. In this post we will illustrate this point using the examples of GE and of the Dow Jones Sustainability Index (DJSI).” Robert G. Eccles and Tim Youmans, “In this corner, DJSI; and in this corner, materiality. Ding!”, *Materialitytracker*, User Views, July 2015, <http://www.materialitytracker.net/user-views/current/>.

27. Robert G. Eccles and George Serafeim, “The performance frontier,” *Harvard Business Review* 91, no. 5, 2013.

28. Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745, Section 301, Paragraph 2: “RESPONSIBILITIES RELATING TO REGISTERED PUBLIC ACCOUNTING FIRMS.—The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (in-

When issuing The Statement, the board must make judgments—tough judgments, since it cannot claim that all audiences are significant. Just saying “We will create value for our shareholders by meeting the needs of all of our stakeholders” is not a credible statement; it is puffery<sup>29</sup> and greenwashing. A corporation, no matter how large, has limited resources and has to set priorities in terms of how resources are allocated. Take, for example, a company that chooses to cut its R&D expenses just to meet its quarterly earnings target. In making such a decision, management could implicitly be making one of its stakeholders—likely short-term shareholders—a more significant audience than either employees or long-term shareholders, who may well benefit from this research. Or the same company might take a very different approach, such as cutting dividends to avoid shortsighted R&D cutbacks or “downsizing.” Short-term shareholders may not like this decision, but long-term investors (such as pension funds or bondholders) might applaud it.

The Statement should also be clear about the time frames in which the corporation evaluates the impact of its decisions on its significant audiences. This could be as specific as saying that The Statement covers a three-year time horizon. Or it can be as general as the board simply stating that they are focused on the long term.

In its March 2015 Annual Report, the Swedish industrial products company Atlas Copco published the first “Statement of Materiality and Significant Audiences” issued by a board of directors. Atlas Copco’s Statement<sup>30</sup> begins by noting that it is governed by the Swedish Companies Act (2005:551). The Statement then goes on to say,

*...Atlas Copco recognizes going beyond this, extending it to integrating sustainability into its business, creates long-term value for all stakeholders, which is ultimately in the best in the best interest of the company, the shareholders and society. The significant stakeholder audience, as outlined in the Atlas Copco Business Code of Practice, includes representatives of society, employees, customers, business partners, and shareholders.*<sup>31</sup>

The positive effects of increases in employee morale and efficiency might take as long as five years to show up in financial statements. And a five-year horizon is, of course, very different than a one-year horizon. Again, the board, entrusted with the interest of the corporate entity, has the right—and

indeed the responsibility—to determine this time horizon. It also needs to be clear with the investment community—and with all its other significant audiences—about the time frames that are relevant for such stakeholder investments.

In sum, it is the *right* of the corporation to make these judgments and it is the *responsibility* of the board to do so. The Statement is the basis for an open and honest conversation between the corporation and all of its stakeholders. What is important is that The Statement clearly communicates the board’s view of the company’s priorities by identifying the limited number audiences which it regards as significant and, by implication, those which are not. This way, the company’s shareholders (of all kinds and classes), bondholders, and its many other audiences can make their own resource allocation decisions in terms of the extent to which they will commit themselves to contributing to the success of the corporation.

Exercising the judgment needed to make such a determination requires board discipline, a willingness to be transparent, and an acceptance of the fact that audiences not deemed significant are likely to object. They will want to challenge the corporation on this judgment, and the corporation has an obligation to respond to such challenges by making clear the limits of its support for such “important but not significant” audiences, and the reason for such limits. But the board doesn’t have an obligation to change its mind in response to challenges from “important but not significant” audiences. Clearly there are other audiences that are important to varying degrees, and the issues they care about, however socially significant, may not be material to the company.<sup>32</sup> The company should continue to report on these issues in its sustainability report. But the material issues based on the chosen significant audiences and timeframes belong in the annual financial, or integrated, report.

## Conclusion

Recent research provides persuasive evidence of a latent investor appetite for the reporting of material ESG information that goes beyond conventional financial statements. The Statement of Significant Audiences and Materiality proposed in this paper can serve as a means for meeting the demand by this audience for value-relevant, nonfinancial information. According to a 2014 survey by EY titled “Tomorrow’s Investment Rules,” institutional investors want a clearer view of what is material, and they want it directly from the company. “Materiality,” as the survey’s authors conclude:

cluding resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.” RESPONSIBILITIES RELATING TO REGISTERED PUBLIC ACCOUNTING FIRMS.—The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

29. For an analysis of “puffery” in the context of corporate governance, see: Robert G. Eccles and Tim Youmans, “Implied Materiality and Material Disclosures of Credit Ratings,” *Harvard Business School Working Paper 15-079*, April 9, 2015.

30. [http://www.atlascopcogroup.com/content/dam/atlas-copco/documents/Corporate/investors/financial-publications/english/20160310\\_Annual\\_report\\_incl\\_sustainability\\_report\\_and\\_corporate\\_governance\\_report\\_2015.pdf](http://www.atlascopcogroup.com/content/dam/atlas-copco/documents/Corporate/investors/financial-publications/english/20160310_Annual_report_incl_sustainability_report_and_corporate_governance_report_2015.pdf).

31. *Ibid.*

32. For information on a new tool that corporations may use to help the evaluation of audience significance, see Chapter 6, “The Sustainable Value Matrix” in: Eccles, et al.

*[...]is a key concept that emerged from this survey. Investors were more likely to value information which came directly from the company itself rather than from third-party sources. In addition, among those [investors] that never consider ESG information in their decision-making process, the main reason for rejecting it was that they felt it was not material.*<sup>33</sup>

Moreover, as noted earlier, corporate boards can use The Statement as an opportunity and a platform for articulating their view of the social benefits provided by their companies, one that details all the important stakeholder groups that support and in turn are supported by the operations of the company. This multi-stakeholder view of corporate governance is enabled by companies taking a long-term view of performance. In April 2015, BlackRock CEO Larry Fink, in his now-annual letter to the CEOs of portfolio companies, said that investors “also have an important role to play, which is why we engage actively with companies on the key governance factors that in our experience support long-term, sustainable, financial performance. Chief among these is board leadership—in our view, the board is management’s first line of defense against short-term pressures.”<sup>34</sup> We believe The Statement can be a concrete way boards can establish this line of defense.

In a world increasingly sensitive to income inequality and suspicious of the corporate quest for profit, promoting

a broader understanding of the role of the corporation in society is one of the most pressing issues facing the sustainable development movement. It will become even more important now that the Sustainable Development Goals (SDGs) were ratified by all United Nations’ Member States in September of 2015.<sup>35</sup> As social expectations continue to rise about how corporations, especially the world’s largest corporations, can contribute to a more sustainable society, companies have no choice but to respond. Ultimately, the company’s license to operate comes from civil society. However, the company needs to be clear on which issues are a priority, as determined by its chosen significant audiences, and which are not. The Statement of Significant Audiences and Materiality offers the board has a unique and unprecedented opportunity to present a clear and credible view of their company’s role in society—one that can guide management’s decision-making and its interactions with its significant audiences and other stakeholders.

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The Integrated Reporting Movement: Meaning, Momentum, Motives and Materiality.

33. E&Y. “Tomorrow’s investment rules: a global survey.” p. 2, [http://www.ey.com/Publication/vwLUAssets/EY-Institutional-Investor-Survey/\\$FILE/EY-Institutional-Investor-Survey.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Institutional-Investor-Survey/$FILE/EY-Institutional-Investor-Survey.pdf), accessed May 2014.

34. <http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4>.

35. <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

## Appendix I – Global Legal Research: The Duty of Board Directors

We have argued that the board's primary duty is to the interests of the corporation as a separate legal entity, rather than maximizing shareholder value, as is widely believed. While the board can *choose* to deem shareholders as the only significant audience, it does not have to do so. The board must simply decide which audiences are most significant for the ability of the corporation to create value over the short, medium, and long term. Once the board has done so, it has laid the foundation of the materiality determination process for corporate reporting.

Unlike most academic papers, this one doesn't simply end in a call for further research, although we certainly plan to do that. Rather, this paper is one element of an action-initiative called "The Statement of Significant Audiences and Materiality Campaign (The Statement Campaign)" whose aim is to ensure that the ideas in this paper get translated into practice. The Statement Campaign is articulated in a post titled in the "Big Ideas: Sustainability" section of the MIT *Sloan Management Review* website. After conducting considerable research into the concept of director fiduciary duty with respect to significant audiences... our preliminary findings are "without exception, that the board directors' primary duty is to the corporation itself as a separate legal person."<sup>36</sup>

We are conducting this ongoing research project jointly with The American Bar Association's Sustainable Development Task Force (Task Force) and with support from and in coordination with the UN Global Compact. Other steps in this campaign include mobilizing investors to ask company boards to issue The Statement and finding companies who will lead in doing so.

This research has produced database of legal memos from 32 countries on director fiduciary duty, which are freely available to all on the Task Force web site,<sup>37</sup> which will also contain new country memos as they are added, as well as updates of existing memos will continue to be updated as more country memos are added and existing ones updated. It is our hope that this global collection of legal memos on director fiduciary duty will become a resource for other researchers, advisors, investors, board members, executives, regulators, and other stakeholders, sparking a global discourse on the role of the corporation in society.

These legal memos lend themselves to much deeper analysis and we welcome others to do so. Among many areas for research that may arise from The Statement Campaign we see immediate research opportunities in four specific areas:

1. Variations in the extent to which country laws require directors take account of other stakeholders' interests,
2. Differences in civil vs. common law jurisdictions,
3. Differences in developed vs. developing countries, and
4. Digging deeper into "dual primacy."

The goal of the Statement Campaign, further propelled by complementary and, frankly, by opposing, research, is that by 2025 the board of directors of every listed company will be issuing an annual Statement of Significant Audiences and Materiality. Given the growing demand for improved corporate accountability to audiences other than shareholders,<sup>38</sup> the Statement is the starting point for a company to do so.

36. Robert G. Eccles and Tim Youmans, "Why boards must look beyond shareholders," *MIT Sloan Management Review / Big Ideas: Sustainability*, September 2015, <http://sloanreview.mit.edu/article/why-boards-must-look-beyond-shareholders/>.

37. [http://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/sustainable\\_development\\_task\\_force.html](http://www.americanbar.org/groups/leadership/office_of_the_president/sustainable_development_task_force.html).

38. "Actions taken by banks to prevent future litigation issues included everything from changing remuneration policies to a greater focus on 'non-financial metrics', ...", Laura Noonan, "Bank litigation costs hit \$260bn — with \$65bn more to come," *Financial Times*, August 23, 2015.

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