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From CSR and TBL to ESG and the SDGs: Roots from Resistance to Regularization

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INTRODUCTION

In 2021, the New Republic published an article entitled *The End of Friedmanomics* that described the rise and fall of the influence of 1976 Nobel Prize winning economist Milton Friedman.[1] Most recall Friedman's normative shareholder primacy theory, which posited that the social responsibility of business is to increase its profits and maximize returns to shareholders; most forget that Friedman heaped particular scorn on the precursor to Environmental, Social, and Governance (ESG), the doctrine of social responsibility, calling it a "'fundamentally subversive doctrine' in a free society."[2] Despite Friedman's opinion on corporate social responsibility (CSR), many have expressed strong reservations regarding his version of shareholder capitalism.[3] This brief Article will consider the

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1. Zachary D. Carter, *The End of Friedmanomics*, NEW REPUBLIC (June 17, 2021), https://newrepublic.com/article/162623/milton-friedman-legacy-biden-government-spending [https://perma.cc/5Y96-KN67].

2. Milton Friedman, *A Friedman doctrine-- The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/9ERZ-5JYG] (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)).

3. GUNNAR FRIEDE ET AL., STAKEHOLDERS AND SHAREHOLDERS: WHY MILTON FRIEDMAN GOT IT WRONG (2020), *available at* https://download.dws

roots and longevity of ESG-related concepts among scholars and in the public discourse, the similarly persistent resistance thereto, and the importance of regularization-standardization of ESG norms.

I. HISTORICAL PERSPECTIVE

The idea that corporations have an obligation to engage in socially responsible behavior can be traced to Roman law under which entities often had a strong social aspect.[4] As early as the 16th and 17th centuries and beyond, corporations engaged in social functions under English law, law that was exported to its North American colonies.[5] During the late 1800s and early 1900s, the many social problems produced by the industrial factory system resulted in a mix of humanitarianism and philanthropy that often blurred the lines between individual and business activity.[6] When state legislatures in the United States began passing incorporation statutes that distinguished for-profit and non-profit corporations, some questioned the social aspect of for-profit corporations.[7] The influential philosophical debates about the social responsibilities of corporate officers between leading corporate and securities law scholars A. A. Berle Jr. and E. Merrick Dodd were published in the early 1930s, reflecting the shifting corporate ownership and control from closely-held firms and partnerships to stockholder-owners and professional managers with little-to-no ownership interests.[8]

CSR, however, did not arise as a "modern definitional construct" until the early 1950s and 1960s, a period after World War II during which few

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.com/download?elib-assetguid=a74a6c3d8cca43188d452bf6b8271baf [https://perma.cc/9EFN-E6KX].

4. Mauricio Andrés Latapí Agudelo et al., *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT'L J. CORP. SOC. RESP. 1, 3 (2019).

5. Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 347, 352–53 (2017).

6. Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 21 (Andrew Crane et al. eds., 2008).

7. Chaffee, *supra* note 5, at 354. Professor Chaffee also reported the impact that *Dodge v. Ford Motor Co.* had on the "shareholder capitalism" paradigm. *Id.* at 347 n.1, 355 (quoting Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.")).

8. C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 83–99 (2002).

corporate entities engaged in socially responsible activity beyond the philanthropic.[9] In the U.S. in particular, national trends in population, pollution, labor movements, and resource depletion increased attention on the relationship between large corporations and their influence on society;[10] Rachel Carson's best seller, *Silent Spring*, was published in 1962;[11] and the polluted Cuyahoga River caught fire in 1969.[12]

Harold Bowen was one of the first academics to begin to focus on social responsibility, making him the "Father of Corporate Social Responsibility" among many corporate scholars.[13] He envisioned the social responsibility of business as an obligation to pursue policies; to make decisions; or to take actions that were desirable in terms of their impact on their stakeholders, employees, and customers and on the quality of life of society as a whole given the concentrated power and influence of large corporations.[14] CSR critics, however, rejected the vague idea of CSR, emphasizing the efficacy of the free market to resolve societal ills attributed to corporate conduct.[15]

The 1970s ushered in an era of a more widespread public acknowledgement of a, still undefined, CSR.[16] This was a time of severe economic, social, and political disruptions attributable in part to oil shortages in the U.S. and Europe. In 1970, the first Earth Day[17] ushered in a decade of significant federal regulatory advancements that took place during this decade pertaining to environmental and social-consumer issues, i.e., the creation of the U.S. Environmental Protection Agency,[18]

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9. Agudelo et al., *supra* note 4, at 3–4.

10. *Id.* at 5. *See also* Clarence C. Walton, *Corporate Social Responsibility: The Debate Revisited*, 34 J. ECON. & BUS. 173 (1982).

11. RACHEL CARSON, SILENT SPRING (1962). *See* Silent Spring, *Rachel Carson*, *1962*, SMITHSONIAN INST., https://www.si.edu/object/silent-spring-rachel-carson-1962%3Anmah_1453548 [https://perma.cc/G63A-KEJN].

12. *The 1969 Cuyahoga River Fire*, NAT'L PARK SERV., https://www.nps.gov/articles/story-of-the-fire.htm [https://perma.cc/G2BJ-B6QJ].

13. Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC. 268, 270 (1999).

14. *See generally* HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN (Univ. Iowa Press 2013).

15. *See* Wells, *supra* note 8, at 108.

16. *Id.* at 111–13.

17. *See Our History*, EARTHDAY.ORG, https://www.earthday.org/history/ [https://perma.cc/3G8R-TNVA]. Earth Day was first observed on April 22, 1970. Twenty million Americans, 10% of the total population of the U.S. at that time, attended the inaugural events at sites across the country. *Id.*

18. *The Origins of EPA*, ENV'T PROT. AGENCY, https://www.epa.gov/history/origins-epa [https://perma.cc/N3Q9-UYE3].

the Occupational Safety and Health Administration,[19] and the Consumer Product Safety Commission,[20] as well as passage of a number groundbreaking environmental statutes such as the National Environmental Policy Act,[21] the Clean Air Act (1970),[22] the Clean Water Act (1972),[23] the Endangered Species Act (1973),[24] and the Resource Conservation and Recovery Act (1976).[25]

In its 1971 publication, *Social Responsibilities of Business Corporations*, the U.S. Committee for Economic Development proclaimed that "[b]usiness functions by public consent, and its basic purpose is to serve constructively the needs of society–to the satisfaction of society."[26] Internationally, the Club of Rome, a multinational group of scientists, economists, and business leaders, published *The Limits to Growth* study in 1972, raising the issue of CSR in the context of resource depletion and pollution.[27] Also, scholar Archie B. Carroll posited one of the first unified definitions of CSR during this period: "The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time."[28] Of course, not all of Carroll's contemporaries subscribed to this CSR definition as is reflected in the title of Friedman's influential article: *The Social Responsibility of Business is to Increase its Profits*.[29]

The next several decades provided ample fodder for further examination and debate of a corporation's responsibility to serve the needs of society. The public was confronted with a series of corporate ethics scandals, major disasters, and pop culture events that kept CSR in the spotlight, including the fatal explosion of Union Carbide's facility in

19. *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/aboutosha [https://perma.cc/66FS-HWVV].

20. *Who We Are - What We Do for You*, CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/Safety-Education/Safety-Guides/General-Information/Who-We-Are---What-We-Do-for-You [https://perma.cc/JV5T-ZX8U].

21. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321–4370(m)).

22. Clean Air Act, 42 U.S.C. §§ 7401–7671(q).

23. Clean Water Act, 33 U.S.C. §§ 1251–1387.

24. Endangered Species Act, 16 U.S.C. §§ 1531–44.

25. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–92(k).

26. COMM. FOR ECON. DEV., SOCIAL RESPONSIBILITIES OF BUSINESS CORPORATIONS 1, 11 (1971).

27. *History*, CLUB OF ROME, https://www.clubofrome.org/about-us/history/ [https://perma.cc/S3XZ-NYB5].

28. Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MAN. REV. 497, 500 (1979).

29. Friedman, *supra* note 2.

Bhopal, India;[30] the release of the movie *Silkwood* based on the nuclear-safety activist of the same name, Karen Silkwood;[31] and the insider trading scandal associated with Ivan Boesky,[32] who inspired character Gordon Gecko's (in)famous line from the movie Wall Street, "[G]reed, for lack of a better word, is good."[33]

The public controversies did not escape the attention of legislators. It was during this time that states began passing and implementing corporate constituency statutes that authorize, but do not require, directors, board committees, and individual officers to consider non-shareholder interests without breaching their fiduciary duties.[34] The 30+ states that have enacted this type of legislation identify different, and various, non-shareholder interests as stakeholders that may be considered, such as employees, customers, local communities, creditors, suppliers, and, in some instances, state and national economies.[35]

Highly publicized corporate misconduct continued into the 1990s and the 2000s, such as the collapse of energy giant Enron, the related obstruction of justice conviction of Arthur Anderson,[36] and the subprime mortgage catastrophe that triggered the 2008 global financial market crisis.[37] The development of initiatives that included reporting, allowing measurability and accountability of CSR-related claims, began to gain traction.[38] The triple bottom line (TBL) was one such initiative, introduced

30. *See* Edward Broughton, *The Bhopal disaster and its aftermath: a review*, ENV'T HEALTH (May 10, 2005), http://www.ehjournal.net/content/4/1/6 [https://perma.cc/7M3M-6ETS].

31. *See* Robert Sass, *The Killing of Karen Silkwood: The Story Behind the Kerr-McGee Plutonium Case*, 56 RELATIONS INDUSTRIELLES / INDUS. RELS. 222, 222–25 (2001).

32. *See* Myles Meserve, *Meet Ivan Boesky, The Infamous Wall Streeter Who Inspired Gordon Gekko*, BUS. INSIDER (July 26, 2012), https://www.businessinsider.com/meet-ivan-boesky-the-infamous-wall-streeter-who-inspired-gordon-gecko-2012-7 [https://perma.cc/9E24-8BS2].

33. *See* WALL STREET (Twentieth Century Fox 1987).

34. BRETT OLSON, PUBLICLY TRADED CORPORATIONS HANDBOOK § 18:6 (2023).

35. *Id.*

36. *See generally* William C. Thomas, *The Rise and Fall of Enron*, 193 J. ACCT. 41 (2002).

37. *See* Seven L. Schwarcz, *Disclosure's Failure in the Subprime Mortgage Crisis*, 3 UTAH L. REV. 1109 (2008).

38. *See* Scott J. Shackelford et al., *Cyber Silent Spring: Leveraging ESG+ T Frameworks and Trustmarks to Better Inform Investors and Consumers About the Sustainability, Cybersecurity, and Privacy of Internet-Connected Devices*, 25 U. PA. J. BUS. L. 505 (2023).

by John Elkington.[39] The TBL is a financial accounting-focused system that measures the impact of social and environmental costs and benefits through monitoring and allocation of direct and indirect costs.[40] TBL expands business success metrics to include a corporation's contributions to the TBL categories, often referred to as the three Ps: people, planet, and prosperity.[41]

These concerns about CSR and an increasing interest in measuring associated claims are deeply rooted,[42] but the distillation of corporate social responsibility concepts as "ESG" first appeared in a 2004 joint communique of the United Nations Global Compact, an initiative of the former U.N. Secretary General Kofi Annan to promote environmental protection, advance anti-corruption efforts, protect human rights, and improve conditions in the workplace.[43] This communique declared that environmental, social, and governance matters are core to addressing and developing solutions to the planet's greatest challenges.[44] There are over 20,000 signatories to the Global Compact.[45] Pursuant to this non-governmental effort, businesses managing trillions of dollars developed guidelines to encourage the corporate adoption of ESG policies and reporting practices.[46]

The U.N. Environmental Programme's *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, commonly referred to as the Freshfields Report, soon followed in 2005.[47] This Report stated that investment decisions may integrate ESG considerations to give effect to the views of the beneficiaries in relation to matters beyond financial return.[48] In its next iteration, ten years

39. *See id.* at 516–17.

40. *See* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (Capstone ed., 1997). *See also* John Elkington, *The Triple Bottom Line*, *in* ENVIRONMENTAL MAN.: READINGS & CASES 49 (Michael Russo ed., 2nd ed. 1997).

41. *See generally* ELKINGTON, *supra* note 40.

42. *See* Wells, *supra* note 8, at 78.

43. *See* Shackelford et al., *supra* note 38, at 517–18.

44. *Id.* at 521.

45. *See Participation*, UNITED NATIONS GLOB. COMPACT, https://unglobalcompact.org/participation [https://perma.cc/2EXM-F9XD] (last visited Feb. 29, 2024).

46. *See The World's Largest Corporate Sustainability Effort*, UNITED NATIONS GLOB. COMPACT, https://unglobalcompact.org/what-is-gc [https://perma.cc/7HCL-HRYM] (last visited Jan. 1, 2024).

47. UNEP FIN. INITIATIVE, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT (2005).

48. *Id.* at 11–13.

later in 2015, U.N. Member States adopted the 2030 Agenda for Sustainable Development,[49] which identified 17 U.N. Sustainable Development Goals (SDGs) to achieve "sustainable development in its three dimensions–economic, social and environmental[]" in an actionable way.[50] The SDGs are global *governmental* policy initiatives, but a group of CEOs created the SDG Compass, a tool that assists corporations to align their strategies with the SDGs and measure their contributions.[51]

II. ESG: MULTIPLICITIES (& DUPLICITIES)

Thus, although the term *ESG* is a subject of fierce ideological debate in political and legislative forums; although it does not have a commonly-agreed-upon definition; and, as others have discussed elsewhere in this volume,[52] although there also is not a common definition of *materiality* in the context of ESG issues, ESG has become a ubiquitous topic in boardrooms, shareholder meetings, and investment strategies. According to the one analysis, 96.9% of the 100 largest U.S. companies by revenue discussed their ESG policies to some degree in their proxy in 2022, and, in 2021, 86% of S&P 500 firms regularly issued some kind of ESG-related report.[53] They did this in response to market interest in ESG initiatives by retail and institutional investors, fund managers, public and private corporate entities, non-profits, and asset owners. Sources report that, as of July 2021, over 6,000 investors, including asset managers and financial

49. G.A. Res. 70/1, ¶ 2 (Oct. 21, 2015).

50. *Id.* ¶ 2.

51. SDGCOMPASS.ORG, https://sdgcompass.org/ [https://perma.cc/UV7B-LHPW] (last visited Jan. 8, 2024).

52. *See, e.g.*, Joan MacLeod Heminway, *The Materiality of ESG Information: Why it May Matter*, 84 LA. L. REV. 1365 (2024).

53. Amit Batish, *ESG Disclosure Prevalence Soared in 2022*, EQUILAR (Feb. 27, 2023), https://www.equilar.com/blogs/552-esg-disclosure-prevalence-soared-in-2022 [https://perma.cc/QA64-LPDP]; Rachel Layne, *Are Companies Actually Greener—or Are They All Talk?*, HARV. BUS. SCH. (Jan. 13, 2023), https://hbswk.hbs.edu/item/are-companies-actually-greener-or-are-they-all-talk-esg-greenwashing [https://perma.cc/TLX4-57PD]. Another source reported that 90% of Russell 1000 companies published a sustainability report in 2022, and companies within the largest half by market cap of the Russell 1000 (i.e., the S&P 500) are nearing 100% reporters with 98% publishing a report in 2022. *G&A Institute's New Research Shows Big Jump in Sustainability Reporting by Mid-Cap U.S. Public Companies in 2022*, GOVERNANCE & ACCOUNTABILITY INST., https://www.ga-institute.com/nc/storage/press-releases/article/ga-institutes-new-research-shows-big-jump-in-sustainability-reporting-by-mid-cap-us-public-companies.html [https://perma.cc/8X5J-JFXK].

firms, had over $35 trillion of ESG assets, nearly one-third of the total global assets under management.[54]

This has not, however, eliminated the fierce opposition to ESG investments in general[55] and to proposals for mandatory ESG reporting,[56] including the Securities and Exchange Commission's (SEC) proposed rule, *The Enhancement and Standardization of Climate-Related Financial Disclosures*.[57] The final version of the proposed rule is a "scaled back" version of original proposal and requires public companies to disclose specified climate-related information.[58] The ubiquity of ESG investments and increased corporate ESG policies and disclosures also have not resolved the numerous problems associated with the inconsistent variants

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54. *See, e.g.*, *GSIA Resources and Research*, GLOB. SUSTAINABLE INV. ALL., https://www.gsi-alliance.org/members-resources/ [https://perma.cc/4PGB-3SZ9] (reporting on the Global Sustainable Investment Alliance, with assets under management in the ESG sector that topped $35 trillion in 2020). *See also* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) [hereinafter SEC Proposed Rule] (briefly mentioning the Net Zero Asset Managers Initiative, with 128 signatories managing $43 trillion in assets; the investor-led Climate Action 100+, with 617 global investors managing more than $60 trillion in assets; the Glasgow Financial Alliance for Net Zero (GFANZ), with 450+ financial firms from 45 countries responsible for assets of over $130 trillion; the 630 investors that signed the Global Investor Statement to Governments on Climate Change managing more than $37 trillion; the 733 global institutional investors that signed the Investor Agenda's 2021 Global Investor Statement to Governments on the Climate Crisis with more than $52 trillion in assets; and the over 4,000 signatories that signed the U.N. Principles for Responsible Investment (PRI) managing assets of $120+ trillion).

55. *See, e.g.*, Ben Winck, *Republicans Swim against Tide of ESG Money*, REUTERS (Mar. 2, 2023), https://www.reuters.com/legal/government/republicans-swim-against-tide-esg-money-2023-03-02 [https://perma.cc/9S8L-PFPT].

56. *See, e.g.*, George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REC. 101 (2022) (summarizing several of the principal objections to the SEC's climate disclosure rule, including those pertaining to the SEC's statutory authority, materiality, "major questions," and "compelled speech").

57. SEC Proposed Rule, *supra* note 54.

58. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R pts. 210, 229, 230, 232, 239, and 249) [hereinafter SEC Final Rule]. *See also* Soyoung Ho, *SEC Scales Back Requirements in Final Climate Disclosure Rule*, THOMSON REUTERS (Mar. 7, 2024), https://tax.thomsonreuters.com/news/sec-scales-back-requirements-in-final-climate-disclosure-rule/ [https://perma.cc/V6FS-E7VX].

of ESG assessments and reporting regimes.[59] As the historical record reflects, ESG issues generate controversy and are difficult to define and implement.[60]

Regarding objections to ESG, critics persist and raise many. Friedman's shareholder profit maximization doctrine is one that is commonly advanced.[61] ESG measurement and disclosure requirements incur expenditures, including increased compliance costs, increased litigation risk for issuers, impaired capital formation, and weakened public capital market competitiveness; they also may benefit non-shareholder constituents as well as shareholders.[62] ESG requirements therefore may conflict with management's emphasis on shareholder value.[63]

Consider just a few of the other objections raised against ESG practices.[64] The business community claims that mandatory ESG reporting is not only expensive but also will elicit insignificant data that will confuse investors and obscure material information.[65] If such reporting might produce limited material data, businesses argue in the alternative, it is not possible to identify universally material ESG information across reporting

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59. *See*, *e.g.*, Sung Eun Kim, *The Duality of Variance Among ESG Assessments*, 88 MO. L. REV. 409 (2023).

60. *Id.* at 430.

61. David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 528–29 (2011).

62. *Id. See also* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 306 (2022).

63. Millon, *supra* note 61, at 528–29; Ho, *supra* note 62, at 306. Friedman strongly believed that it was the government's role, not that of corporate management, to be socially responsible. *See, e.g.*, Steven Globerman, *Friedman and his ESG Critics*, *in* ESG: MYTHS AND REALITIES (Steven Globerman ed., 2022). To quote Friedman: "This is the basic reason why the doctrine of 'social responsibility' involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses." Friedman, *supra* note 2.

64. Others have discussed in great detail the opinions of ESG critics and the negative comments received by the SEC in response to its rulemaking on "The Enhancement and Standardization of Climate-Related Financial Disclosures." To review those detailed analyses, *see* Georgiev, *supra* note 56; Ho, *supra* note 62. *See also* Cynthia A. Williams & Robert G. Eccles, *Review of Comments on SEC Climate Rulemaking*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGUL. (Nov. 23, 2022), https://corpgov.law.harvard.edu/2022/11/23/review-of-comments-on-sec-climate-rulemaking/ [https://perma.cc/8BTT-WZ98].

65. Ho, *supra* note 62, at 304.

industries.[66] In the context of the SEC's rulemaking on climate-related disclosures, the business community protests that ESG concerns exceed the scope of the agency's mission, straying into major social policy choices.[67] A number of Republican politicians have entered the fray, one group arguing that "ESG represents a grave menace to America" by contributing to "higher costs for consumers, slower economic growth, and reduced returns through [an] ESG agenda[.]"[68]

While many in the business community strongly resist regulation in this arena, many members of that community have embraced private, voluntary ESG disclosure regimes.[69] There also are, however, a number of challenges associated with a lack of consistency or standardization among these regimes, a sampling of which is described below.

The most persistent challenge for investors is the multiplicity of ESG disclosure initiatives. These are just a few of the well-known frameworks: the Task Force on Climate Related Financial Disclosures (TCFD); the U.N. Global Compact (UNGC); the Partnership for Carbon Accounting Financials (PCAF); the U.N. Sustainable Development Goals (SDGs); CDP (established as the Carbon Disclosure Project);[70] the Principles for Responsible Investment (PRI); the U.N. Environment Programme Finance Initiative (UNEP FI); the Equator Principles (EP); the World Business Council for Sustainable Development (WBCSD); the Global Reporting Initiative (GRI); the European Financial Reporting Advisory Group (EFRAG); the Financial Accounting Standards Board (FASB); the International Sustainability Standards Board (ISSB); the International Accounting Standards Board (IASB); the Organisation for Economic Co-operation and Development (OECD); and the International Finance Board (IFC).[71]

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66. *See, e.g.*, Hester M. Peirce, *My Beef with Stakeholders: Remarks at the 17th Annual SEC Conference, Center for Corporate Reporting and Governance*, U.S. SEC. & EXCH. COMM'N (Sept. 21, 2018), https://www.sec.gov/news/speech/speech-peirce-092118 [https://perma.cc/2ZY7-SCFT].

67. Ho, *supra* note 62, at 304–05.

68. Letter from Will Hild, Exec. Dir., Consumers' Rsch., to Hon. Mitch McConnell, Hon. Charles Schumer, Hon. Kevin McCarthy, and Hon. Hakeem Jeffries (Mar. 8, 2023), *available at* https://www.documentcloud.org/documents/23698097-will-hild-letter-to-congress_esg-proxy-battle [https://perma.cc/9PHM-2LC5].

69. *See* Kim, *supra* note 59.

70. *About Us*, CARBON DISCLOSURE PROJECT, https://www.cdp.net/en/info/about-us#41028e32c09cb6d78b067a2e203da525 [https://perma.cc/JPS5-3JKW].

71. The webpage of Greenworks Plus, a company that supplies sustainability, supply chain, and ESG software solutions, describes these as "all the common" frameworks and standards. *See List of Key ESG Reporting Frameworks and*

Many of these are also listed on the Nasdaq Metrio unified reporting platform, as are: 3BL; B LAB (BIA); Bloomberg; Calvert; Corporate Knights (Global 100); Ethisphere; Fair360; GRESB (formerly known as the "Global Real Estate Sustainability Benchmark"); IFSR (International Financial Reporting Standards Sustainability Disclosure Standards (S1 and S2); ISS (Institutional Shareholder Services - E&S, Governance); MSCI (Morgan Stanley Capital International); S&P CSA (Global Corporate Sustainability Assessment); Sustainability Accounting Standards Board (SASB); Sustainalytics; Task Force on Nature-related Financial Disclosures (TNFD); and the World Economic Forum.[72]

The lack of commonality among these multiple regimes makes it difficult to compare company ESG disclosures, and different frameworks often rate organizations differently due to their specific matrices.[73] This is not simply an inconvenience. Several analyses have concluded that the lack of consistent measures with which to report and assess data may expose markets to volatility and is a potential source of systemic risk.[74]

Inconsistent ESG data that is difficult to compare or verify also offers opportunities for corporate greenwashing, a phenomenon that has come under increasing regulatory scrutiny.[75] ESG information is often found in unreliable reports that may have been prepared by a company's marketing or public relations team.[76] Investors may choose investment vehicles based upon fund names misleadingly suggesting ESG practices aligned with the investor's values.

Standards, GREENSTONE, https://www.greenstoneplus.com/resources/frameworks-standards/list-of-key-esg-reporting-frameworks-and-standards [https://perma.cc/B6DL-M8AD].

72. Nasdaq Metrio, *Fact Sheet: Nasdaq Metrio™ Framework & Disclosure Management*, *available at* https://www.nasdaq.com/solutions/corporate-esg-solutions/metrio/framework-disclosure-management [https://perma.cc/M83A-AACC].

73. *Framework & Disclosure Management: Efficiently Report to ESG Rating, Ranking Organizations, and Multiple Frameworks All in One Place*, NASDAQ METRIO, https://www.nasdaq.com/solutions/corporate-esg-solutions/metrio/framework-disclosure-management [https://perma.cc/B49E-GT26].

74. Ho, *supra* note 62, at 296–300.

75. For example, in September 2023, the SEC approved amendments to the "Names Rule," (Investment Company Names, 88 Fed. Reg. 70436 (Oct. 11, 2023) (codified at 17 C.F.R pts. 230, 232, 239, 270, 274)), that targets greenwashing in investment funds that falsely claim an ESG pedigree (or to be more ESG-focused than the facts reflect). The amendments to the rule are designed to increase investor protection by requiring certain funds to invest at least 80% of the value of their assets in accordance with the investment focus that the fund's name suggests.

76. *See* Shackelford et al., *supra* note 38, at 526–27.

Investors are increasingly cognizant of these risks and are demanding accessible, consistent, comparable, and verifiable ESG data. If private ordering in the disclosure space continues to fail investors, and if that failure threatens market stability, regulatory intervention will become more pressing.

CONCLUSION

ESG responsibility is not a new phenomenon. It has evolved over time, rooted in theoretical constructs such as CSR and TBL; its validity, parameters, and limits have been debated; and its definition has been more fully expressed and elaborated. Methods for its measurement and reporting have proliferated and been widely adopted.[77] Throughout its long history, there has been resistance to the concept in all of its formulations; to the very notion of its imposition in the context of foundational corporate legal theory as antithetical to shareholder primacy norms; and to its definitions, no matter how restrained or expansive.

Given the widespread acceptance of ESG reporting among corporate actors and investors, the SEC's Final Rule regarding climate-related disclosures appears to be more of an optimistic exercise in standardization at this point. The political hyperbole decrying the Rule may be the last defiant gasp of Friedmanians clinging to the concept of free-market shareholder primacy. Is it conceivable that their cries might meet the same fate as Friedman's intellectual legacy, "which, 15 years after his body gave out, . . . is finally dead"?[78]

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77. *See supra* Parts I–II.

78. Carter, *supra* note 1; Amy Merrick, *Is the Friedman Doctrine Still Relevant in the 21st Century?*, CHI. BOOTH REV. (May 24, 2021), https://www.chicagobooth.edu/review/friedman-doctrine-still-relevant-21st-century [https://perma.cc/7YWH-VDYB].