"Green" Performance: The Future of Performance-Based Executive Compensation?

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I. INTRODUCTION

Some have called it "The Best Answer to Every Legal Question,"[1] while others roll their eyes and call it the "typical lawyer answer." After all, can the public really blame lawyers for this ambiguous answer when we are taught to analyze legal problems under the guise of "Getting to Maybe"?[2] Of course, this inquiry is rhetorical, but it is indisputable that the phrase "it depends" has certainly left a particular taste of disdain in the public's mouth.

Undeniably, many legal problems are heavily fact-specific and require a particular amount of individualized assessment and cannot be answered with a simple "yes" or "no." Certainly, "it depends" seems, at the very least, a fair answer when the extrapolated effects of a specific proposal have yet to be ascertained. Like most legal inquiries, "it depends" is a perfectly calculated response to a corporation that might inquire whether introducing sustainability performance measures to its executive compensation plan is a good idea.

As corporations continue to innovate and adapt with the changing economic times, and the corresponding regulatory environment, many have introduced new policies and measures in executive compensation.[3] In addition to pay-for-performance becoming the industry norm,[4] some corporations are going further by introducing sustainability-based performance measures. It is no secret that sustainability practices are affecting corporations throughout the United States, as evidenced by the onslaught of sustainability committees and other corporate-wide sustainability practices;[5] however, the introduction of meaningful sustainability initiatives and the use of sustainability performance measures as a means by which to compensate executives are two entirely separate ideas.

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1. Stephen Futeral, *The BEST Answer to EVERY Legal Question*, CHARLESTON LAWYERS BLOG (Nov. 10, 2013), http://www.charlestonlaw.net/best-answer-every-legal-question-charleston-lawyers/.

2. RICHARD FISCHEL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (1999).

3. Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. PA. J. LAB. & EMP. L. 227, 228 n.3 (1999–2000) (acknowledging that some have linked the pay-for-performance philosophy to the Protestant Reformation and some have gone even further as to tie the principle to Julius Caesar before the birth of Christ.).

4. *See generally Pay for Performance*, GLASSLEWIS.COM, http://www.glasslewis.com/issuer/pay-for-performance/ (last visited Nov. 22, 2013) [hereinafter *Pay for Performance*, GLASSLEWIS].

5. *See* Jayne W. Barnard, *At the Intersection of Corporate Governance and Environmental Sustainability*, 2 WM. & MARY BUS. L. REV. 207, 213 (2011).

Although sustainability performance appears to be a logical extension of the traditional performance-based compensation model, the effect and result of such performance remains unclear and untested across the market.[6] The adoption of broad-based sustainability performance measures may be dangerous because, often times, these measures are tailored to the corporation and may decrease total shareholder return in the short run.[7] Regardless of whether or not the corporation decides to introduce these measures, their effect on total shareholder return[8] and other corporate interests requires an individualized analysis.

Part II of this Comment discusses the current state of executive compensation, including the use of peer group benchmarking in establishing executive pay and the use of performance-based compensation. This overview will describe the characteristics of a peer group and considerations that compensation consultants evaluate before they select peer groups. Part II also discusses how performance-based compensation became prominent, the basic reasoning for performance-based compensation, and other tax related reasons for adopting performance-based compensation under Section 162(m) of the Internal Revenue Code.

Part III, the primary purpose of this Comment, examines sustainability in corporate America. Specifically, this section defines "sustainability" and "sustainability performance measures," and discusses how corporations currently embrace sustainability through an industry sample featuring three uniquely situated corporations. Finally, Part III concludes by examining the primary concern with embracing sustainability performance measures: accurate measurement.

Part IV engages in a broad-based examination of corporate social responsibility concerns that must be vetted before introducing corporate sustainability measures. This section examines the Shareholder Primacy

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6. A small minority of corporations go as far as to include sustainability performance measures in performance-based compensation plans. *See* Michael Meehan, *Tying Executive Pay To Sustainability Performance*, FORBES (Oct. 25, 2010), http://www.forbes.com/2010/10/25/executive-compensation-linkage-technology-sustainability-goals.html.

7. These measures may also be dangerous to introduce to proxy materials due to an influx of recent lawsuits arising for "incomplete" or "misleading" disclosures of pay practices. *See* The Hay Group, Executive Compensation 2013: Data Trends and Strategies 15 (2014).

8. *Id.* at 4 ("The say-on-pay provision of the Dodd-Frank Act has heightened concerns about the alignment of pay-for-performance with total shareholder return, making this a top consideration in 2013.").

View,[9] as advocated by prominent free-market economist Milton Friedman, and the Triple Bottom Line[10] approach. This section concludes by reviewing the emerging theory of the Sustainability Model of Corporate Social Responsibility.[11] Part V offers concluding reflections on the individualized considerations that must be discussed before introducing sustainability performance measures into a corporation's executive compensation plan.

II. Current Practices in Executive Compensation

In accordance with federal law,[12] the New York Stock Exchange listing standards and the NASDAQ listing standards,[13] publicly-held corporations must establish a compensation committee comprised of "independent" members of its board of directors. The compensation committee is responsible for establishing and governing the compensation and benefit policies of the corporation. Specifically, a compensation committee "assists the [b]oard of [d]irectors in its responsibilities with respect to the compensation of the [c]orporation's executive officers and other key employees, and administers all employee benefit plans . . . ."[14] The compensation committee, typically through a compensation consultant, considers numerous criteria including: the executive officer's annual base salary, target annual incentive bonus, target long-term incentive compensation, performance-based compensation goals and target total direct compensation for executives among peer group companies,[15] as well as tenure, future potential, cost of living, and the corporation's performance against various pre-established internal operational and qualitative goals.[16]

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9. *See* discussion *infra* Part IV.A.
10. *See* discussion *infra* Part IV.A.1.
11. *See* discussion *infra* Part IV.B.
12. SEC Listing Standards Relating to Compensation Committees, 17 C.F.R. § 240.10C-1 (2014); 26 U.S.C. § 162(m) (2014); 15 U.S.C. § 78j-3 (2014).
13. Order Approving NYSE Proposed Rule Changes Relating to Compensation Committees, Exchange Act Release No. 34-68639, 78 Fed. Reg. 4570 (Jan. 11, 2013); Order Approving NASDAQ's Proposed Rule Changes Relating to Compensation Committees, Exchange Act Release No. 34-68640, 78 Fed. Reg. 4554 (Jan. 11, 2013).
14. SJW, Corp., 2013 Proxy Statement, at 10 (Mar. 16, 2013), *available at* http://www.sec.gov/Archives/edgar/data/766829/000076682913000010/sjw2013proxy.htm#s41B92A74A5D428673F9D50F7830C5CD7.
15. Starbucks Corp., 2013 Proxy Statement, at 31 (Jan. 25, 2013), *available at* http://www.sec.gov/Archives/edgar/data/829224/000119312513024028/d455402ddef14a.htm.
16. SJW, Corp., *infra* note 14, at 44.

Many industry leaders[17] and corporations[18] believe that executive compensation plans and policies need to be closely tied to the corporation and its shareholders. Compensation consultants and many corporate officers posit that if the primary duty of the corporation is to increase its profits,[19] then aligning executive compensation practices with the performance of the corporation's stock, in relation to its peers, will most closely align the executives' interests with that of the shareholders.[20]

A. Peer Grouping

Typically, "peer grouping" is initiated by the compensation committee's retention of a compensation consultant who "advise[s] on the design and balance of the whole executive reward plan."[21] The compensation consultant then attempts to put the proposed compensation plan into market perspective by "construct[ing] a framework of comparative metrics based on the level and structure of pay at companies deemed similar."[22]

According to corporate governance provider, Institutional Shareholder Services ("ISS"), peer groups generally contain between fourteen (14) to twenty-four (24) corporations that are "reasonably similar to the subject company in terms of industry profile, size, and market capitalization."[23] These peer groups also consider criteria such as global reach, geographic

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17. *Pay for Performance,* GLASSLEWIS, *supra* note 4.
18. Guess?, Inc., 2013 Proxy Statement, at 30 (May 29, 2013), *available at* http://www.sec.gov/Archives/edgar/data/912463/000091246313000014/0000912463-13-000014-index.htm.
19. Milton Friedman, *A Friedman Doctrine -The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32–33.
20. To see how performance and executive pay correlated for a small sample of corporations during the last fiscal year, *see* Theo Francis & Joann Lublin, *CEO Pay Rising but Not for All*, THE WALL STREET JOURNAL (Mar. 26, 2014, 7:50 PM), http://online.wsj.com/news/articles/SB10001424052702304026304579448961007000986?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304026304579448961007000986.html.
21. Executive Compensation, THE HAY GROUP, http://www.haygroup.com/us/services/index.aspx?id=1690 (last visited Sept. 21, 2014).
22. Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups and Overcompensation: Cause, Effect and Solution*, 38 J. CORP. L. 487, 494 (2012).
23. *2015 U.S. Compensation Policies: Frequently Asked Questions*, ISSGOVERANCE.COM (Feb. 9, 2015), http://www.issgovernance.com/file/policy/2015comprehensivecompensationfaqs.pdf; SJW, Corp., *infra* note 14, at 45 (noting that peer companies were selected "on the basis of objective industry classifications, geographic location and financial size criteria.").

location, brand recognition, performance, and companies with which the corporation may compete for executive talent or customers.[24] Although critics suggest that peer groups are one leading cause of executive overcompensation,[25] the industry continues to whole-heartedly embrace the comparative process.[26] In general, corporations use their peer group's compensation plans as a benchmark off which they evaluate their own proposed compensation plan.[27] After the compensation consultant and committee complete the peer group market analysis, they revise the proposed compensation plan in an attempt to create a plan in or around the fiftieth percentile of the peer group as to avoid being an outlier and being subject to heightened Say-on-Pay scrutiny.[28]

B. Performance-Based Compensation[29]

In addition to the applicable state and federal law, publicly-held corporations must also adhere to 26 U.S.C. § 162(m) ("Section 162(m)"),[30] which is commonly referred to as the "million-dollar-cap rule."[31] Section 162(m) limits the amount that a public corporation can deduct as compensation paid to any "covered employee" to one million dollars, per

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24. Starbucks Corp., *supra* note 15, at 31.

25. Elson and Ferrere, *supra* note 22, at 497–500 (discussing the problem with peer group analysis).

26. For a general discussion of pay-for-performance methodology and peer benchmarking, *see* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004); *see also* Stephen M. Bainbridge, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation, by Lucian Bebchuk and Jesse Fried*, 83 TEX. L. REV. 1615, 1659 (2005)(book review); James McConvill, *Executive Compensation and Corporate Governance: Rising Above the "Pay-for-Performance" Principle*, 43 AM. BUS. L.J. 413, 417 (2006).

27. *See* Elson and Ferrere, *supra* note 22, at 494 ("The boards of most U.S. public companies set executive compensation through a mechanistic process referred to as peer grouping.")(internal quotations omitted).

28. In 2010, Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act codified the advisory "Say-on-Pay" vote of the Named Executive Officers by shareholders. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376 (2010)(codified as amended at 12 U.S.C. §§ 5301–5641).

29. As used in this Comment, the term "performance-based compensation" refers to compensation based on objective performance measures, such as profits, return on equity, earnings per share and other more individual and specific criterion. Other commentators may also use the term "contingent compensation" interchangeably.

30. 26 U.S.C. § 162(m)(2014).

31. Charles M. Yablon, *Bonus Questions-Executive Compensation in the Era of Pay for Performance*, 75 NOTRE DAME L. REV. 271, 287 (1999) ("Under § 162(m) of the Internal Revenue Code . . . compensation to an executive of more than one million dollars per year is not deductible by the corporation unless it is performance-based.") (internal quotations omitted).

person, per year.[32] However, Section 162(m) provides several exceptions to the million-dollar-cap rule. Pertinently, Section 162(m) excludes performance-based compensation[33] from its definition of "applicable employee remuneration."[34] Therefore, publicly-held companies incorporate performance-based compensation into their compensation plans, not only because it purportedly motivates executives to create shareholder value,[35] but also for alternative tax purposes.

In the 1990s, performance-based compensation rose in popularity when protests broke out over rising levels of executive compensation.[36] In light of these protests,[37] performance-based compensation became the primary method by which corporations based their compensation plans because it was seen as an objective benchmark to measure executive performance.[38] Today, similar to the 1990s, "performance continues to be the name of the game,"[39] with leading compensation consultants observing that "executive incentives are shifting to reward performance in both short- and long-term incentives."[40] In justification of performance-based compensation, experts argue that such performance methodology "[provides an] incentive for executives to perform in ways that maximize corporate/shareholder

32. 26 U.S.C. § 162(m)(1)(2014) ("[N]o deduction shall be allowed under this chapter for applicable employee remuneration with respect to any covered employee to the extent that the amount of such remuneration for the taxable year with respect to such employee exceeds $1,000,000.").

33. For a further discussion of the performance-based compensation exemption, see P. GARTH GARTRELL & STEVEN LAPIDUS, EXECUTIVE COMPENSATION FOR EMERGING GROWTH CORPORATIONS § 2:80 (3d ed. 2013).

34. 26 U.S.C. § 162(m)(4)(C)(2014).

35. *See* Mark J. Loewenstein, *The Conundrum of Executive Compensation*, 35 WAKE FOREST L. REV. 1, 14 n.78 (2000) (noting that some scholars have suggested that Section 162(m) indicates that Congress "believes that performance-based plans motivate executives to create shareholder value.").

36. *See* Graef S. Crystal, *CEOs and Incentives: The Myth of "Pay for Performance"*, L.A. TIMES, Jan. 8, 1995, http://articles.latimes.com/1995-01-08/business/fi-17839_1_pay-plan.

37. Linda J. Barris, *The Overcompensation Problem: A Collective Approach to Controlling Executive Pay*, 68 IND. L.J. 59, 61 (1992) (arguing that executives are overcompensated).

38. *See* Andrew R. Brownstein & Morris J. Panner, *Who Should Set CEO Pay? The Press? Congress? Shareholders?*, HARV. BUS. REV., May-June 1992, at 28, 31 (referencing a report that noted that more than 80% of the largest U.S. corporations tie long-term performance of the corporation to executive compensation).

39. The Hay Group, Executive Compensation 2013: Data Trends and Strategies, *supra* note 7, at 4.

40. *Id.* at 16.

wealth" and "[pays] executives commensurately with their contribution to a corporation's growth and performance."[41] Although academic studies disagree on whether performance-based compensation plans are effective,[42] compensation experts generally agree that "[p]ay for performance makes the most sense when the link between compensation and performance is clear."[43] With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[44] the Say-on-Pay process "heightened the emphasis on ensuring that [executive] pay appropriately reflects performance,"[45] thus pressuring corporations to set forth readily measureable performance-based goals. Despite the difficulty in setting performance goals,[46] it is critical in effectively crafting a performance-based compensation plan that is compliant with Section 162(m) and satisfies the shareholders through the Say-on-Pay process.

Performance-based compensation is typically comprised of both short-term and long-term incentive compensation. Although each compensation plan is unique, the typical composition includes an annual base salary with short-term performance incentives, including annual bonuses, discretionary performance awards, and long-term performance incentives, typically comprised of performance-based restricted stock units and performance shares. Leading compensation consultants also note that compensation plans once dominated by stock options[47] have now shifted towards a combination of restricted stock, restricted stock units, and performance-based restricted stock, depending on the industry.[48] Other post-employment benefits may also be included as part of an executive compensation plan including retirement benefits, deferred compensation, and severance benefits. In addition, most compensation plans also include executive perquisites, namely, the use of the corporate aircraft, financial

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41. *See* Stabile, *supra* note 3, at 229–30.
42. *Id.* at 239–41.
43. Loewenstein, *supra* note 35, at 13.
44. For a summary of the Dodd-Frank Act, see P. GARTH GARTRELL & STEVEN LAPIDUS, *supra* note 33, at § 3:82.
45. The Hay Group, Executive Compensation 2013: Data Trends and Strategies, *supra* note 7, at 13.
46. Katherine Connor, *CEO pay shifts to long-term, performance-based equity*, THE DAILY TRANSCRIPT, Mar. 20, 2014, *available at* http://www.sddt.com/News/article.cfm?SourceCode=20140320czf&utm_medium=email&utm_source=NightlyNews&utm_campaign=2014-0320&_t=CEO+pay+shifts+to+longterm+performancebased+equity#.UyuS5O29LCQ ("Setting the goals was probably the most challenging part . . . helping to frame and set those long-term goals for performance shares.").
47. A stock option is a right to purchase company stock at a defined exercise price over a specified option term. *See, e.g.*, BLACK'S LAW DICTIONARY 1554 (9th ed. 2009).
48. Connor, *supra* note 46.

planning services, company cars, security, supplemental life insurance, and physical exams.[49]

All told, corporations, their compensation committees, and compensation consultants generally design compensation plans to recruit and retain top executive talent, to reward the achievement of financial and operational goals, and to align the executives' interests with that of the corporation's long-term strategy, the shareholders' interests, and the interests of the corporation's customer base.[50] Despite some recent examples of excessive compensation,[51] empirical research has generally indicated that the structure of the compensation plan directly correlates to the positive financial return of the corporation.[52]

III. SUSTAINABILITY PERFORMANCE IN EXECUTIVE COMPENSATION

Before current sustainability performance measures can be reviewed and evaluated, we must attempt to define sustainability and sustainability performance measures. Despite how casually the term "sustainability" is used, it is fairly ambiguous and deserves a closer look.

A. What is Sustainability?

The term "sustainability" is consistently used by environmentalists, politicians, and the news media, but there is little consensus regarding a

49. The Hay Group, Executive Compensation 2013: Data Trends and Strategies, *supra* note 7, at 10.

50. Many leading scholars have criticized performance-based compensation as an effective method of compensating executives. *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, *supra* note 26; John E. Core et. al., *Is U.S. CEO Compensation Inefficient Pay Without Performance?*, 103 MICH. L. REV. 1142, 1142 (2005) (summarizing Bebchuk and Fried's thesis "that executive compensation practices in the U.S. benefit corporate executives at the expense of shareholders through implicit and explicit corruption of the pay-setting process.").

51. Kenneth R. Davis, *Taking Stock-Salary and Options Too: The Looting of Corporate America*, 69 MD. L. REV. 419, 419-20 nn.1–10 (2010) (discussing various excessive and egregious executive compensation plans).

52. *See* Robert T. Masson, *Executive Motivations, Earnings, and Consequent Equity Performance*, 79 J. POL. ECON. 1278, 1278–79 (1971) (stating that "firms with executives whose financial interests are more closely parallel to the goals of the stockholders and the long-run profitability of the firm do indeed outperform other firms in stock return."); John R. Deckop, *Determinants of Chief Executive Compensation*, 41 INDUS. & LAB. REL. REV. 215, 224–25 (1988) (noting "that among firms of equal size, CEO compensation tends to increase directly with profits.").

functional definition.[53] Some commentators have suggested that sustainability means "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[54] Consequently, some commentators posit that sustainable businesses attempt to "tread[] as lightly as possible on the earth and its natural resources."[55]

While each of these definitions are helpful as a starting place, for purposes of this Comment, "[e]nvironmental 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."[56] This thorough framework will provide a useful starting point to evaluate and discuss the sustainability performance measures currently used by publicly-held corporations.

B. What is a Sustainability Performance Measure?

Most often, sustainability performance measures are closely tied or synonymous to sustainability principles and policies referred to elsewhere as Environmental, Social and Corporate Governance ("ESG") measures.[57] While ESG measures may sometimes include categories outside of the

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53. *See Sustainability in Executive Compensation*, EXECCOMP.ORG, http://www.execcomp.org/Issues/Issue/corporate-governance/sustainability-in-executive-compensation (last visited Nov. 30, 2013) ("A discussion of sustainability with regard to executive compensation typically refers to the growing interest by stakeholders of linking executive pay to sustainability measures, often referred to as environmental, social and governance (ESG) metrics, although definitions vary considerably among activists and investors."); *see also* Barnard, *supra* note 5, at 214 ("[W]hen asked 'how does your company define sustainability?' 32.4 percent of [companies] answered 'we avoid definitions and focus on actions.'").

54. Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 990 (2009).

55. *Id.* at 990–91.

56. Barnard, *supra* note 5, at 209–10 n.4; Matteo Tonello, *Sustainability in the Boardroom, A 2013 Update*, THE CONFERENCE BOARD 1, 1 (2013), https://www.conference-board.org/retrievefile.cfm?filename=TCB-DN-V5N6-13.pdf&type=subsite (defining sustainability as "an all-inclusive descriptor of any business initiative that the corporation pursues based on considerations involving the interest of any stakeholder that appears critical to the success of the business.").

57. *See Key Characteristics of Prominent Shareholder-Sponsored Proposals on Environmental and Social Topics, 2005–2011*, IRRC INSTITUTE 1, 4 (referring to ESG measures as "E+S topics").

environmental scope,[58] a significant portion of quantifiable research specifically relates to these measures.[59]

For example, CERES, the leading non-profit organization advocating for sustainable leadership, with the help of Sustainalytics,[60] published a 2012 report[61] examining and evaluating numerous ESG measures. Pertinently, the report evaluated six hundred (600) of the largest U.S. corporations "on their progress towards meeting the expectations laid forth in the CERES Roadmap for Sustainability."[62] According to CERES, the data indicated that the use of ESG performance measures in executive compensation plans is an emerging trend, but "still an anomaly."[63] Only seven percent (7%) of the six hundred (600) corporations "formally tied ESG performance to executive compensation"[64] and nine percent (9%) of those corporations did so without publishing specific targets.[65] The 2010 CERES Roadmap for Sustainability[66] set forth twenty (20) expectations broken into four specific categories: (1) governance; (2) stakeholder engagement; (3) disclosure; and (4) performance.[67] Although these categories have varying degrees of integration, the performance category will be the main focus for the purpose of this analysis because it is the typical measure used when evaluating executive compensation plans.[68] Thus, this Comment will discuss sustainability performance measures, most commonly,

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58. ESG measures sometimes encompass measures other than environmental sustainability including employee morale, animal testing and diversity initiatives.

59. *See G3: Executive Compensation tied to ESG Performance*, CERES, http://www.ceres.org/roadmap-assessment/company-performance/governance-for-sustainability/copy_of_executive-compensation-tied-to-esg-performance (last visited Nov. 30, 2013) [hereinafter *G3*, CERES].

60. For more information about this sustainability research firm, see *About Us*, SUSTAINALYTICS.COM, http://www.sustainalytics.com/about-us (last visited Dec. 1, 2013).

61. CERES, The ROAD TO 2020: CORPORATE PROGRESS ON THE CERES ROADMAP FOR SUSTAINABILITY, *available at* http://www.ceres.org/roadto2020 [hereinafter CERES, ROADMAP FOR SUSTAINABILITY].

62. *See G3*, CERES, *supra* note 59.

63. CERES, ROADMAP FOR SUSTAINABILITY, *supra* note 61, at 16.

64. *Id.*

65. *Id.*

66. CERES, *The 21st Century Corporation: The Ceres Roadmap for Sustainability*, *available at* http://www.ceres.org/resources/reports/ceres-roadmap-to-sustainability-2010/view [hereinafter CERES, *The 21st Century Corporation*].

67. CERES, ROADMAP FOR SUSTAINABILITY, *supra* note 61, at 5 (discussing the 2010 Roadmap expectations).

68. *See* discussion *supra* Part II.B.

the reduction in the overall carbon footprint of the corporation and broader environmental goals in the areas of energy, water and recycling.

C. An Overview of Current Corporate Sustainability Measures

As highlighted by CERES, approximately fifty percent (50%) of the six hundred (600) corporations participating in the research were making progress in decreasing one main ESG measure—overall greenhouse gas ("GHG") emissions.[69] Typically, corporations achieved this through a reduction in energy demands, acquiring alternative energy sources, and focusing on energy efficiency,[70] but only one-third of the sample corporations had set a time-bound target for reducing such emissions.[71] In addition to the goals and results relating to GHG emissions, CERES found that only twenty-five percent (25%) of corporations had undertaken assessments relating to water management and, similarly, only twenty-five percent (25%) of corporations currently maintained any degree of supply chain monitoring.[72] The lackluster data reported by CERES begs the following question: why is there such reluctance by U.S. corporations to embrace ESG performance criteria? If corporations are so reluctant to embrace ESG measures in any capacity, then perhaps it should not be a large surprise that so few corporations and compensation committees embrace ESG performance in their executive compensation practices and policies.[73] While these statistics are certainly not dispositive, it certainly indicates, at a minimum, a reluctance to embrace ESG performance measures in any large scale.

D. Industry Sample

How do corporations use sustainability performance measures in their executive compensation plans, and what are their standard measurements? The answer to each of these questions can be found in the 2013 compensation discussion and analysis ("CD&A")[74] sections of three publicly-held corporation's proxy disclosures: (1) Intel Corporation; (2) XCEL Energy; and (3) Alcoa, Inc. These unique corporations span three different industries including: (a) technology, (b) energy and (c) aluminum production, and

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69. CERES, ROADMAP FOR SUSTAINABILITY, *supra* note 61, at 6.
70. *Id.*
71. *Id.*
72. *Id.*
73. Tonello, *supra* note 56, at 11 (noting that more than 60% of respondent companies "do not embed sustainability-related metrics into their top-executive compensation policy.").
74. For a further description of the CD&A section in an annual proxy disclosure, see P. GARTH GARTRELL & STEVEN LAPIDUS, *supra* note 33, at § 3:42.

each take a different approach to sustainability performance as incorporated by their executive compensation plans.

1. Intel Corporation

Intel Corporation ("Intel") has long been considered one of the leading corporations in terms of corporate sustainability. Intel has gone further than any other corporation, tying the compensation of all employees, not simply executives, to sustainability metrics.[75]

As disclosed in its annual proxy statement, "Intel's pay-for-performance programs include performance-based cash compensation that varies depending on financial and operational performance . . . ."[76] The operational component of Intel's compensation plan is tied to the "company['s] performance in several key areas, including financial performance, product design and development roadmaps, manufacturing, cost, and productivity improvement, customer satisfaction, and corporate responsibility and environmental sustainability."[77] Most notably, Intel's compensation committee selects operational goals that are also used in the "broad-based employee annual incentive cash plan and are prepared each year as part of the annual planning process for the company, so that all employees are focused on achieving the same company-wide operational results."[78] Interestingly enough, Intel also recognizes that some of its operational goals have "non-quantitative measures that require some degree of subjective evaluation."[79]

Although Intel does not disclose more specific information in its CD&A, the company does confirm that operational goals have scored, on average, 98.9% over the past five years.[80] Intel has achieved incredible results through the use of the above-stated performance-based operational component in that it "has reduced [its] energy use by [eight] percent and its GHG emissions by [twenty-three] percent"[81] since the introduction of the component. While Intel's results are certainly impressive, the open publication of specific ESG performance goals would: (i) encourage other

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75. *G3*, CERES, *supra* note 59.
76. Intel Corp., 2013 Proxy Statement, at 37 (Apr. 3, 2013), *available at* http://www.intc.com/intelProxy2013/static/pdfs/Intel_2013_Proxy_Statement.pdf.
77. *Id.* at 54.
78. *Id.*
79. *Id.* at 55.
80. *Id.*
81. *G3*, CERES, *supra* note 59.

corporations to publicly disclose similar data, (ii) reflect an industry trend towards corporate sustainability, and (iii) provide further empirical data to support the economic feasibility of such ESG performance goals.

2. XCEL Energy

On a year-over-year basis, XCEL Energy ("XCEL") achieved incredible results relating to its pre-established sustainability performance goals. In its 2013 proxy statement, XCEL stated that it met its financial and operational sustainable performance goals for fiscal year 2012, thereby increasing its annual dividends to shareholders for the ninth consecutive year by 3.8%.[82]

Relating to environmental leadership, XCEL claims to have maximized its "demand side management programs," allowing customers to save energy at a rate of 18.4% over 2011 for which the corporation earned $81.7 million in incentives. Furthermore, the corporation earned the following achievements: a spot on the Dow Jones Sustainability Index for a sixth time, a position on the Carbon Disclosure Leadership Index for the fifth consecutive year, named number two in sustainable operations among public U.S. utility companies by Target Rock Advisors, LLC, and earned the Energy Star Sustained Excellence Award for the third time.[83] In addition to its sustainability accolades, XCEL also surpassed other ESG performance goals in employee and executive diversity.[84]

XCEL's compensation philosophy is heavily weighted for performance-based compensation under the theory that executives will be motivated to achieve in the area of financial, operational, and stock price performance.[85] Under its theory, XCEL awards executives "performance units," which make up almost two-thirds of its entire compensation plan over a three (3) year performance period. Approximately one third of the performance units "have a performance goal based on achieving environmental commitments, while maintaining a competitive price for service provided to [its] customers as measured relative to [its] peers."[86] As evidenced by its 2013 proxy statement, XCEL has not waivered in its short-term or long-term commitment to environmental leadership all whilst achieving annual increases in revenue and shareholder dividends.[87]

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82. Xcel Energy Inc., 2013 Proxy Statement, at 37 (Apr. 8, 2013), *available at* http://www.sec.gov/Archives/edgar/data/72903/000119312513145419/d448819ddef14a.htm.
83. *Id.* at 38.
84. *See id.* at 37–38 (highlighting Operational Excellence and Corporate Stewardship).
85. *Id.* at 38.
86. *Id.*
87. *Id.* at 37–38.

3. Alcoa, Inc.

Alcoa, Inc. ("Alcoa") bases eighty-seven percent (87%) of the Chief Executive Officer's target pay based on performance, sixty-eight percent (68%) of which is earned in the form of equity compensation.[88] By relying heavily on performance and directly correlating its equity compensation with the corporation's stock price, Alcoa believes that it aligns its executive compensation practices with shareholder interests.

Specifically, Alcoa "reinforces pay for performance through annual and long-term incentive targets focused on achieving strong financial and operational performance *in respect of goals over which Alcoa managers have direct control*."[89] In a shift from Intel and XCEL, Alcoa specifically clarifies that the performance goals are strictly related to matters in which the executives have control. Alcoa contends that since this has been a standard practice for many years, its "management team is highly focused on achieving productivity gains and other operational and strategic improvements that benefit [the] top and bottom line performance."[90] Alcoa also reports that twenty percent (20%) of all cash incentive targets are based on an increase in energy efficiency and the minimization of the corporation's carbon footprint, which intimately aligns with its "financial and societal commitments."[91]

Despite economic and political uncertainty across its four businesses, Alcoa managed to generate approximately $1.3 billion in productivity gains and overhead costs reductions in fiscal year 2012. Alcoa has also achieved an almost twenty-nine percent (29%) reduction in year-end debt level since 2008 and, overall has significantly strengthened its liquidity position. Despite a declining price of aluminum and an adverse impact on total shareholder return, Alcoa's common stock price remained stagnant—increasing minimally from $8.65 per share on December 30, 2011 to $8.68 per share on December 31, 2012.[92] Although the falling price of aluminum has caused a decrease in total shareholder return and stock prices, Alcoa remains steadfast in its corporate commitment to environmental sustainability

88. Alcoa Inc., 2013 Proxy Statement, at 35 (Mar. 14, 2013), *available at* http://www.sec.gov/Archives/edgar/data/4281/000130817913000074/lalcoa2013_def14a.htm.
89. *Id.* at 36 (emphasis added).
90. *Id.*
91. *Id.* at 37.
92. Alcoa Inc., *supra* note 88, at 50.

and its incorporation of such a commitment to its executive compensation plan.

E. Difficulties Facing Sustainability Performance Measures

Similar to the difficulties of implementing performance-based compensation, the introduction of sustainability performance measures also face its fair share of criticism and critiques, the leading of which relates to accurate measurement.

1. Accurate Measurement

As applicable to executive compensation, sustainability performance measures face one big hurdle: accurate measurement. In executive compensation, a performance-based measure needs to be easily measured and clearly communicated to shareholders through regulatory disclosures.[93] The difficulty with some sustainability performance measures is that they are not easily measureable in the short-term. For example, many ESG performance measures are part of a long-term corporate strategy (e.g, decreasing energy output over five years), and are thus unable to be measured for the annual executive compensation bonuses. While some metrics are certainly measureable, such as a decrease in GHG emissions or a decrease in energy usage, others are more difficult to scale down in the short term. Although minor instances of difficult measurement is not a major concern, we must remember that corporations utilize performance- based compensation as an avenue around Section 162(m),[94] thus any sustainability performance criteria must be readily measureable, which only further highlights the importance of accurate measurement.

However, criticism of sustainability performance measures is certainly not a reason to completely abandon the practice. Rather, compensation committees, compensation consultants, and others must take this into account when considering an addition to the proxy disclosures. In fact, many of the measurement issues would be greatly diminished in importance if the sustainability measures were omitted from the compensation plans. Thus, prior to the introduction of sustainability measures, a corporation must, among other things, consider if the measure is quantifiable, and, if so, determine its feasibility in the context of recruiting and retaining top executive talent while upholding the corporate commitments.

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93. Failure to do so can result in litigation for "incomplete" or "misleading" disclosure of pay practices. For more information, see The Hay Group, Executive Compensation 2013: Data Trends and Strategies, *supra* note 7, at 15.

94. *See* discussion *supra* Section II.B. and nn.19, 21.

IV. GOING FORWARD

There has been a long-held disagreement among those in academia about the role of the corporation:[95] whether the corporation's sole duty is to maximize shareholder profits[96] or whether the corporation's primary, but not exclusive, duty is to maximize shareholder profits.[97] Before a corporation can effectively evaluate whether sustainability performance measures are appropriate, it must determine its approach to corporate social responsibility.

A. Shareholder Primacy View

Friedman and Fischel argued that anyone who "declaim[s] that business is not concerned 'merely' with profit but also with promoting desirable 'social' ends . . . [is] preaching pure and unadulterated socialism . . . and [is] [an] unwitting puppet[] of the intellectual forces that have been undermining the basis of a free society[.]"[98] While this is a fairly strong position, the threshold question is whether Friedman and Fischel have a point here. Does the corporation have a duty to "promote desirable social ends" by using a sustainability performance measure? Assuming arguendo, that the corporation has no duty to promote social ends,[99] are sustainability performance measures inappropriate in all circumstances? This is likely not the case in today's efficient marketplace.

95. *See* Friedman, *supra* note 19; *see also* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982). *But see* Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 U. MICH. J. L. REFORM 19, 30 (1988).

96. Granada Invs., Inc. v. DWG Corp., 823 F. Supp. 448, 459 (N.D. Ohio 1993) ("[T]he sole duty of a corporation's officers is to maximize shareholder wealth.").

97. David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 530–31 (2011) ("The constituency approach sees attention to nonshareholder interests as a cost that comes at the expense of profit and therefore of shareholder value. This is the trade-off or zero-sum assumption. In contrast, the sustainability perspective sees attention to nonshareholders—including investment in their well-being—as essential to the viability and success of the firm and therefore also to the enhancement of shareholder value.").

98. Friedman, *supra* note 19, at 33.

99. Although this is certainly a theory discussed in corporate law, it is almost certain that shareholder primacy is not legally binding. *See* Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968) (the court deferred to Wrigley's business judgment and upheld his decision regarding the installation of stadium lights).

Hypothetically, by embracing Friedman's view, the corporation's sole duty is to increase the profit of the shareholders. Friedman's shareholder primacy view, of course, allows the use of sustainability performance measures in a scenario where it would benefit the corporation's financial bottom line. For example, a resource-intensive company may expend significant waste and energy usage to provide a specific good, but the corporation may be able to incentivize its executive officers by offering an annual bonus to decrease the amount of energy usage while still increasing production levels of that specific good. The corporation, of course, would be seeking to align its interests in driving down production costs (e.g., a decrease in energy expense or achieving certain production efficiencies) with the shareholder's interests (e.g., profit or total shareholder return). In the current example, the shareholder would experience greater profits because the costs of producing the good would decrease, while production of the good would increase incrementally, thus spurring increased profit upon sale. Should the corporation fail to achieve this goal, the executive would not be rewarded for failure to perform under the pre-established compensation goal.

It is apparent that manufacturing, energy, automobile, and other resource-intensive corporations will likely have more opportunities than other companies, such as investment banks, insurance providers, and professional service firms, to make business decisions that promote sustainability measures as well as benefit the corporation's bottom line.[100] Although it accounts for a small overall percentage, The Conference Board found that manufacturing companies account for the highest percentage of entities that embrace a combination of financial and extra-financial metrics of performance. Consequently, the question becomes: "how do non-resource intensive companies increase shareholder profits while instituting a sustainability performance measure?" Certainly, and unsurprisingly, the answer to this inquiry is: "it depends."

1. Triple Bottom Line

Even if the corporation full-heartedly embraces Friedman's shareholder primacy view, it is entirely possible that such sustainability measures may actually better the corporation's bottom line. The "triple bottom line" approach, as it is often called, views corporate performance in three dimensions: (1) economic prosperity, (2) environmental quality, and (3) social justice.[101] Proponents of the "triple bottom line" approach argue that a sustainable mindset will not only increase financial performance (often

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100. Sneirson, *supra* note 54, at 992.
101. *Id.* at 991.

expressed in terms of profits, return on investment, shareholder value, and total shareholder return), but also help the environment and society as a whole.[102] While embracing Friedman's shareholder primacy principles, the triple-bottom-line adherents note that "efforts to reduce waste and pollution often result in greater efficiency and the discovery of innovative techniques and materials, all of which in turn can benefit the [corporation] . . . in the short and long runs."[103] Under the triple-bottom-line approach, not only is it very possible to increase corporate profitability while embracing sustainability principles, but it will also require a fact-specific, individualized assessment. Failure to do so may result in a decrease in shareholder profits, which would put the corporation at odds with the shareholder primacy view and may subject the corporation to heightened Say-on-Pay scrutiny.

Although it appears possible to embrace sustainability performance measures under the shareholder primacy view, this Comment would never purport to suggest a broad, one-size-fits-all solution to this problem. However, there are characteristics that, through qualitative data gathering, may help a corporation evaluate whether or not a sustainability performance measure is feasible to incorporate in its executive compensation plan.

B. Sustainability Model of Corporate Social Responsibility[104]

In part, the Sustainability Model of Corporate Social Responsibility ("Sustainability Model") takes the position that the corporation has a duty to enhance profits only so far as survival requires it, but does not extend as far as to require profit maximization as required under the shareholder primacy theory. Under the Sustainability Model, the case for a sustainability performance measure is much more straightforward, but still contains some technical difficulties.

102. *Id.*
103. *Id.* at 992; E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can a Director Service? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 764–65 & n.9 (2008) ("[O]perating a business in an environmentally sustainable way [may] make[ ] good business sense and therefore increase[ ] long-term financial value.").
104. For ease of reference, this refers to the alternative method proposed by Professor Millon. *See* Millon, *supra* note 98.

As *Dodge v. Ford Motor Co.*[105] set forth, a corporation is only organized and carried on primarily for the profit of its shareholders.[106] This noteworthy opinion implies that shareholder profit is the primary purpose, as opposed to the exclusive purpose, of the corporation. In support of this interpretation, the American Law Institute ("ALI") published its Principles of Corporate Governance (the "Principles"). Section 2.01 of the Principles states:

> (a) Subject to the provisions of Subsection (b), a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain; (b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of the business . . . (2) [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and (3) [m]ay devote a reasonable amount of resources to public welfare, humanitarian, education, and philanthropic purposes.[107]

In light of the Principles, *Dodge v. Ford Motor Co.*, and other constituency statutes,[108] there is a strong case for the Sustainability Model.[109] Assuming the various authorities above were not present, it is likely that corporate executives would still have the latitude to pursue shareholder profit as the primary purpose, rather than the exclusive purpose, under the Business Judgment Rule.[110] Under the Sustainability Model, there is little debate whether the corporation and the board of directors would be insulated from any liability should they decide to pursue environmental measures.

As the regulatory environment surrounding sustainability continues to evolve, corporations must ask: "where do we want to go from here?" As the industry sample demonstrates, each corporation takes a unique approach to sustainability. The decision to invest in infrastructure to create

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105. 204 Mich. 459 (1919).

106. *Id.* at 507 ("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. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.") (emphasis added).

107. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, Section 2.01 (1994).

108. For an example of a constituency statute, see ALAN PALMITER & FRANK PARTNOY, CORPORATIONS: A CONTEMPORARY APPROACH 99–100 (2010).

109. *See generally* Millon, *supra* note 98.

110. For a discussion of the Business Judgment Rule, see Stephen M. Bainbridge, *The Business Judgment Rule As Abstention Doctrine,* 57 VAND. L. REV. 83, 84 (2004); Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects A Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 635–39 (2007).

manufacturing efficiencies, to make a concentrated effort to decrease energy costs, or to sponsor a corporate-wide initiative on recycling, comes at no small cost, especially to a corporation's shareholders. Shareholders face an unstable economy and an increasingly polarized government in Washington D.C. that lends itself to uncertain regulations. Furthermore, shareholders may frown upon unnecessary financial risks that put their total shareholder returns in jeopardy. Despite these shareholder concerns, nearly seven hundred U.S. corporations have publicly called for action on climate change.[111] If U.S. public companies feel a "social" responsibility to act on climate change, the next logical question becomes "how should the companies react?"

The answer to this question is: "it depends." With nearly sixty percent (60%) of corporations having already established renewable energy goals and greenhouse gas reduction goals,[112] it appears clear that companies feel comfortable taking unilateral steps to affect climate change. However, the issue this Comment presents is whether or not a corporation should take the initiative to introduce the sustainability performance measures to its executive compensation plan.

First and foremost, corporations need to reconcile the dichotomy between shareholder primacy and the Sustainability Model and weigh each accordingly before moving forward. With this at the forefront of their decision-making, corporations can move forward to identify meaningful ESG concerns and determine if it should focus on profit alone or balancing profit and CSR.

If the answer is solely shareholder profit, then the question becomes whether or not the companies within their peer group compensate executives by this standard. This is important because if the peer group companies do not use sustainability performance metrics, then the corporation will be an outlier and may face a more difficult time in recruiting and retaining top executives. With such a small existing sample, this may be a unique situation for compensation consultants, but, undoubtedly, should be a primary consideration. From that point, the decision becomes an individual analysis based on current market share, financial performance, and goodwill.

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111. Mindy Lubber, *Why Microsoft, eBay (And 650 Other Businesses) Are Calling for U.S. Climate Action*, FORBES (Sep. 27, 2013, 2:43 PM), http://www.forbes.com/sites/mindylubber/2013/09/27/why-microsoft-ebay-and-650-other-businesses-are-calling-for-u-s-climate-action/.

112. *Id.*

If it becomes a balancing act between profit and CSR, then the corporation is likely better off by embracing corporation-wide sustainability initiatives facilitated and monitored by a sustainability committee or a Chief Sustainability Officer.[113] The formation of a board committee on sustainability alone indicates that the corporation has made corporate sustainability a priority.[114]

From this point, corporations can gather quantitative data off of which they can determine the feasibility of introducing such a performance measure to its executive compensation plan. This analysis would consider the relationship between the ESG measures and the financial performance of the corporation. The ultimate conclusion of whether or not this would be appropriate for an individual corporation would be solely based on the feedback and data gathered by the committee or Chief Sustainability Officer. This cautious and restrained approach prevents swift and drastic corporate initiatives that have the potential to cause a decrease in total shareholder return and loss in profits. Additionally, the more data that is gathered over time, the more precise a corporate sustainability initiative can be, should it be established in the future. This precision, effectively, limits the amount of wasted resources that could be invested in a failed performance measure and adds value to the corporation.

V. CONCLUSION

Each component of an executive compensation plan has a specific purpose to comply with a very complex collection of state and federal laws and regulations. Assuming a corporation clearly identifies and establishes an objective, readily-measurable sustainability performance measure it would almost certainly be protected by the Business Judgment Rule to establish the desired environmental measures. This conclusion too, however, presents an issue: whether or not sustainability performance-based compensation is the most efficient means to achieve corporate sustainability goals. There is, of course, an easy answer to this question as well: "it depends" on the conclusion of a fact-specific, individualized assessment of a variety of factors particular to that corporation.

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113. For an example of a corporate sustainability initiative not integrated into an executive compensation plan, see *Corporate Responsibility and Sustainability Report, Fiscal Year 2014*, BEST BUY, *available at* https://corporate.bestbuy.com/wp-content/uploads/2014/06/csr-2014-final.pdf.

114. Barnard, *supra* note 5, at 218 ("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.").

Although significant debate can exist regarding the role of a corporation in the environmental movement, it remains clear that without changes in the regulatory landscape, current trends indicate that we will likely see an influx of different corporate sustainability initiatives in the near future.[115] Exactly how these will look, whether they are incorporated in executive compensation plans, appear solely on corporate websites, command a presence on board-level sustainability committees, or otherwise, remains to be seen.

115. *Id*. at 225 (noting that the mini-trend of board-level sustainability committees "may be a leading indicator (a 'green shoot') of things to come.").