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Information For the United States Concerning Legal Perspectives on an Annual Board “Statement of Significant Audiences and Materiality”¹

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The following is an academic contribution of the authors and editors in response to a questionnaire developed by Robert G. Eccles, Professor of Management Practices at the Harvard Business School, to assist Professor Eccles in analyzing the viability of an Annual Board Statement of Significant Audiences and Materiality. The information provided is general in nature and based solely on the laws of the United States. It is neither legal advice nor a full and comprehensive legal report on the subjects

¹ This template is largely adapted from "PRELIMINARY TEMPLATE FOR THE CORPORATE LAW TOOLS PROJECT, MAY 2009", United Nations Mandate of the Secretary-General's Special Representative for Business & Human Rights (SRSG) (<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-template-for-corporate-law-tools-project-May-2009.pdf>)

covered. This project was initiated through Lee DeHihns, Chair of the American Bar Association's Sustainable Development Task Force.

Setting the Legal Landscape

1. Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders.

Corporate legal entities in the United States are regulated by state law, and the fiduciary duties of a corporation's directors are governed by its state of incorporation. There is a significant concentration of U.S. corporate entities incorporated in Delaware. More than 50% of all public companies in the United States and more than 60% of Fortune 500 companies are incorporated in Delaware.² While there are some differences between Delaware law and the laws of other states, this section focuses on and addresses Delaware law.

The Delaware General Corporation Law (the "DGCL") governs Delaware stock and non-stock corporations, while the Delaware Limited Liability Company Act (the "DLLCA") governs limited liability companies ("LLCs"). Corporations and LLCs are the two most common types of limited liability entities. Both the DGCL and the DLLCA could be viewed largely as enabling statutes. They both provide corporations and limited liability companies with flexibility with respect to organization and operations, but the DLLCA providing much greater flexibility. Delaware courts have significant corporate expertise, and a large body of corporate jurisprudence has developed in Delaware over the course of several decades.

Under Delaware law, directors owe fiduciary duties to the shareholders and the corporation, which is to be managed for the benefit of its shareholders.³ Shareholders rely on directors who act in a fiduciary role to protect their interests. Directors must abide by the primary duties of "care" and "loyalty." The duty of care requires that directors act in the same manner as a reasonably prudent person in their position would act. The duty of loyalty requires that directors act in good

² See STATE OF DEL. DEP'T OF STATE, DIV. OF CORPS., <http://corp.delaware.gov/aboutagency.shtml> (last visited June 18, 2015).

³ See, e.g., *North American Catholic Education Programming Foundation, Inc. v. Gheewalla*, 930 A. 2d 92, 99 (Del. 2007).

faith in the best interests of the corporation and its shareholders. Shareholders have a contractual claim to the “residual value” of the corporation once all of its other claims have been satisfied. Other securities issued by corporations (*e.g.*, debt securities and preferred stock) may contain contractual or other obligations that the entity and relevant security holders have agreed to observe. However, Delaware courts have been reluctant to expand directors’ duties to benefit other stakeholders.

Since 2010, several states (including Delaware) have adopted laws recognizing “public benefit corporations” which may consider social or environmental concerns over profits. Public benefit corporations may be required to provide regular reporting of the company’s efforts to meet its public good goal—known as a “public benefit assessment.”

Regulatory Framework

2. To what legal tradition does the jurisdiction belong, *i.e.*, civil/common law, mixed?

The United States derived its legal system from the common law of England, and common law principles remain applicable where there is no binding statutory law. The U.S. Constitution establishes the U.S. Supreme Court and gives Congress the authority to establish the lower federal courts. Congress has established two levels of federal courts below the Supreme Court: the U.S. district courts (courts of first instance) and the U.S. circuit courts of appeals (intermediate appellate courts). At its discretion, the U.S. Supreme Court may hear appeals from the federal circuit courts as well as the highest state courts (usually called state supreme courts) if the issue on appeal involves the interpretation of the U.S. Constitution or federal law.

The U.S. Constitution also establishes a federal system of government. The Constitution gives specific powers to the federal (national) government. All power not delegated to the federal government remains with the states. Each of the 50 states has its own state constitution, governmental structure, legal codes, and judiciary. The U.S. Constitution does not establish the powers of the states; these are derived from their respective state constitutions. However, the U.S. Constitution does place certain restrictions on state government, and the U.S. Constitution’s supremacy clause dictates that valid federal laws preempt conflicting state laws. Because the scope of federal law is limited by the U.S. Constitution, most law in the United States which citizens experience on a day-to-day basis (*e.g.*, contract, tort, property, criminal, and family law) is primarily state law and often varies significantly across individual states. Adding to this complexity, states

have further delegated certain lawmaking authority to various agencies, townships, counties, cities, and special districts.

3. Are corporate/securities laws regulated federally/nationally, provincially or both?

Corporate laws are generally regulated at the state level, with Delaware being the most prominent state in this regard.

Securities laws are primarily regulated at the federal level, though states have also enacted what are known as “blue sky laws” applicable to the offering and sale of securities with the state. Blue sky laws generally require the registration of securities offerings and sales, stockbrokers, and brokerage firms.

The primary federal securities laws are each summarized briefly below:

- Securities Act of 1933
 - Requires that investors receive financial and other material information concerning securities being offered for public sale; and
 - prohibits deceit, misrepresentations, and other fraud in the sale of securities.
- Securities Exchange Act of 1934
 - Creates and empowers the Securities and Exchange Commission (the “SEC”), which is the primary regulatory agency;
 - prohibits certain types of conduct in the markets and provides the SEC with disciplinary powers over regulated entities and persons; and
 - empowers the SEC to require periodic reporting of information by companies with publicly traded securities.
- Investment Company Act of 1940
 - Regulates the organization of companies, including mutual funds, that engage primarily in investing, reinvesting, and trading in securities, and whose own securities are offered to the investing public.
- Investment Advisers Act of 1940
 - Regulates investment advisers, requiring firms and individuals in the business of advising others about securities investments to register and comply with certain investor-protection regulations.

In the wake of financial scandals that roiled the U.S. capital markets, Congress adopted the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of

2010, each of which included regulations and required SEC rulemaking impacting the federal securities laws.

4. Who are the government corporate/securities regulators and what are their respective powers (in summary only)?

The SEC is the primary regulatory agency responsible for the interpretation and enforcement of federal securities laws, for the issuance of rules related to the securities industry, and for overseeing firms and individuals operating in the securities industry. The SEC consists of five presidentially appointed Commissioners (with one designated by the President as Chairperson), with staggered five-year terms. No more than three of the Commissioners may belong to the same political party; a measure intended to maintain non-partisanship. The SEC is organized into five divisions: the (i) Division of Corporation Finance, (ii) Division of Trading and Markets, (iii) Division of Investment Management, (iv) Division of Enforcement, and (v) Division of Economic and Risk Analysis. The SEC is responsible for:

- interpreting and enforcing federal securities laws;
- issuing new rules and amending existing rules relating to the securities industry;
- overseeing the inspection of securities firms, brokers, investment advisers, and ratings agencies;
- overseeing certain regulatory organizations in the securities, accounting and auditing fields (*e.g.*, the New York Stock Exchange (“NYSE”), the NASDAQ Stock Market (“NASDAQ”), the Financial Accounting Standards Board (“FASB”), the Public Company Accounting Oversight Board (“PCAOB”), and the Financial Industry Regulatory Authority (“FINRA”)); and
- coordinating U.S. securities regulation with federal, state and foreign authorities.

5. Does the jurisdiction have a stock exchange(s)?

Yes, the United States currently hosts several independent stock exchanges, the largest and most important of which are the NYSE and the NASDAQ.

The NYSE is the world's largest stock exchange by market capitalization of its listed companies. Intercontinental Exchange owns the NYSE and is a publicly owned American holding company that is listed on the NYSE. Previously, the NYSE was part of NYSE Euronext, which was formed by the

NYSE's 2007 merger with the fully electronic stock exchange Euronext. The NYSE and Euronext now operate as divisions of Intercontinental Exchange.

NASDAQ is the second-largest exchange in the world by market capitalization of its listed companies. NASDAQ is owned by The NASDAQ OMX Group, which is publicly owned and listed on NASDAQ, and which also owns the OMX stock market network and several other U.S. stock and options exchanges.

These exchanges exercise important influence over their listed companies through oversight of listing, maintenance and disclosure requirements in both a self-regulatory capacity and on behalf of U.S. regulators.

Incorporation and Listing

6. Do the concepts of “limited liability” and “separate legal personality” exist?

Yes, the concepts of “limited liability” and “separate legal personality” do exist and are actively enforced. Although there are several types of business entities with limited liability, the three predominant forms of business organization with limited liability are the corporation, limited liability company, and limited partnership. All three of these are treated as legal personalities separate from their owners and management. All three also generally provide that owners are not personally liable for any liabilities of the entity, except to the extent those owners have contributed or committed to contribute capital. Every limited partnership must have at least one general partner with unlimited personal liability for the obligations of the limited partnership, but the general partner may itself be an entity whose owners have liability limited to the extent of their capital contributions committed to the general partner.

Entity owners may voluntarily subject themselves to liability for the obligations of an entity with limited liability. This may be done by the terms of the entity’s organizational documents or by third-party contract. It is common practice for a commercial lender to a smaller entity to require the personal guaranty of its principal owner or owners.

Malfeasance is also generally recognized as an exception to limited liability. The contours and application of this concept, otherwise known as “piercing the corporate veil,” traditionally have been the province of the courts, born out of judicial opinions. The law in this area is more of a mosaic of common law and statutory law. As with all fundamental issues concerning business entities, veil piercing is governed by state law and varies from state to state. However, common

grounds for imposing owner liability for entity obligations are failure to treat the entity as distinct from its ownership (this often involves commingling of funds or debts), fraud, criminality, and insufficient capitalization. Corporations, limited liability companies, and limited partnerships are all subject to veil piercing. Limited partners are also subject to imposition of entity liability if they are overly active in the management of the business of the limited partnership.

As there is no national law providing for the establishment of companies by the private sector, all business entities are formed under state statutes. Each state has its own set of entities laws, so particular exceptions to limited liability do arise on a state-by-state basis. For example, Section 630 of the New York Business Corporation Law imposes liability for unpaid wages on the ten largest shareholders of a corporation that is not listed on a stock exchange nor regularly quoted in an over-the-counter market. Statutory exceptions to limited liability such as this are uncommon, but the applicable entity law of the state of formation should always be consulted.

7. Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company’s social or environmental impacts, or to respect its stakeholders?

[For these purposes, the term “stakeholders” is distinct from “non-shareholder” and from “shareholder” in that it encompasses both “material audiences” (the providers of financial capital, both debt and equity), as well as “significant audiences” (non-financial stakeholders such as: employees, customers, suppliers, communities, contractors and subcontractors, regulators etc. some of whom may be material to a firm at an entity specific level)].

Formation of a business entity did not historically and does not today require any such recognition.⁴ The overriding purpose of a business entity has been and remains the maximization of the value of its equity. In fact, management of a business entity may well face shareholder lawsuits for giving social factors anything close to the weight afforded economic considerations, or any

⁴ In the earliest days of granting corporate charters, when the granting of a charter was truly at the discretion of the relevant governing body (generally the individual state government), businessmen were often called upon to show that the corporate endeavor would provide some benefit to society. As granting of charters has become routine, this concept has evaporated from U.S. business law both as a matter of practice and through legal precedent.

weight at all. A different entity, the non-profit corporation, has traditionally been used for the purposes of the pursuit of charity, conservation, and societal betterment.

Public benefit has been making inroads into the realm of business corporations, however. Since the first adoption of such legislation in 2010, over half of the states now recognize for-profit benefit corporations. Management of a benefit corporation is allowed, and is generally required, to consider public benefit in making business decisions. Status as a for-profit benefit corporation, and the concomitant ability to consider factors other than stockholder return, remains a choice by degree. The existence of a for-profit benefit corporation status does not impose any duty on standard for-profit corporations to consider the societal or environmental impacts of their decisions.

Stock exchange listing historically has not imposed any such recognition and today does not directly impose any such recognition. To be listed on a stock exchange, the company must have a code of ethics applicable to all directors, officers, and employees. However, the required contents of such code mainly address conflicts of interest, compliance with law, public disclosure, and reporting of violations of the code itself. Section 303A.10 of the New York Stock Exchange Listed Company Manual does prescribe that the code of ethics for its listed companies should address that “[e]ach employee, officer and director should endeavor to deal fairly with the listed company's customers, suppliers, competitors and employees . . . and [n]one should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair-dealing practice.”

In addition, the SEC, in Release No. 33-9106, issued interpretive guidance that the effects of climate change may trigger disclosure requirements for listed companies. That guidance emphasized consideration of the effects of legislation and regulation concerning climate change, market changes due to climate change, and the physical impacts of climate change, such as severe weather and changes in sea levels.

8. Do any stock exchanges have a responsible investment index, and is participation voluntary? (See e.g. FTSE4Good⁵, Dow Jones Sustainability Index⁶, the Johannesburg Stock Exchange’s Socially Responsible Investment Index⁷.)

In addition to the Dow Jones Sustainability Indices, in which participation is voluntary, there are many other sustainability indices that select companies for inclusion. Perhaps most notable is the MSCI KLD 400 Social Index (formerly the Domini 400 Social Index).

Directors’ Duties

9. To whom do directors owe duties?

Depending on the state, directors may owe duties only to the corporation, to the corporation and its shareholders, or, when insolvency is an issue, to the corporation and its creditors. *See, e.g., N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A. 2d 92, 99 (Del. 2007); *A.R. Teeters & Assoc. v. Eastman Kodak Co.*, 172 Ariz. 324, 836 P.2d 1034. (Ariz. Ct. App. 1992).

Because corporate law is largely a function of the individual states, the specific nature of director or officer duties and the degree of discretion may vary from state to state. What follows is a general overview that provides the essence of corporate principle and law in the U.S.

10. What are the duties owed by directors – please state briefly. Please indicate if there are express or implied duties to avoid damage to the company’s reputation?

Directors owe three fiduciary duties to their company: (i) good faith, (ii) loyalty, and (iii) ordinary care. So long as all three duties are fulfilled, courts will apply the “business judgment rule” and presume that the director’s judgment was sound. In such a situation, courts are unlikely to find a director liable for decisions even if the decision ultimately harmed the corporation. A plaintiff seeking to impose liability on a director for a business decision gone sour must first show that the director did not fulfill her duties to the company.

⁵ <http://www.ftse.com/products/indices/FTSE4Good>

⁶ <http://www.sustainability-indices.com/>

⁷ <https://www.jse.co.za/services/market-data/indices/socially-responsible-investment-index>

The duty of good faith requires directors to be fair and open in their dealings and to base decisions on a sincere belief that the company will benefit. Loyalty requires directors to put the company's interests ahead of their own. Though decisions that equally benefit the director and the corporation may be acceptable, a director has breached his duty of loyalty if he puts his interests before the welfare of the company by, for instance, usurping a corporate opportunity or self-dealing. Directors fulfill their duty of care when they behave prudently and exercise "ordinary care" in making decisions. Ordinary care means employing the level of care that an ordinary person would use in the same circumstances by, for example, being reasonably informed during the decision-making process.

To ensure their duty of care is met, directors usually consult with attorneys, accountants or other professionals, and/or form a special committee to study the issue and advise the board as a whole before the directors vote. If a board undertakes such a process, shareholders will be very unlikely to win a claim that directors breached their duty of care.

Though established corporate law does not include an express duty to protect a corporation's reputation, a director who failed to exercise ordinary care to protect the company from a known reputational risk might be vulnerable to allegations that she breached her duty of care. Whether the question concerns corporate reputation or some other business issue, the same analysis applies.

It is rare for directors to be found in breach of the duty of care because the business judgment rule confers a high degree of protection from liability and the plaintiff bears the burden of proof. Directors will only be liable for failure to protect a corporation's reputation if a plaintiff can show that (i) they knew or should have known of the reputational risk; (ii) they failed to make a good faith effort to prevent or remedy the harm; and (iii) their failure to act proximately caused the damage sustained by the corporation. *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 968 (Del. Ch. 1996).

11. More generally, are directors required or permitted to consider the company’s impacts on non-shareholders, including impacts on the individuals and communities affected by the company’s operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

The United States is a “shareholder primacy” jurisdiction, meaning that the primary focus of corporations is to return profits to shareholders. If stakeholder needs are considered, they are a secondary concern.

Though U.S. law has no mandate to consider stakeholder needs, directors have discretion to include stakeholder concerns in their deliberations. So long as their decisions serve a rational business purpose, directors may consider and act on issues concerning the company’s impacts on non-shareholders. The root of this discretion is the business judgment rule. Though the downside of the business judgment rule is that the presumption of validity it confers makes it difficult to hold directors accountable if they choose to narrowly focus on shareholder gain with minimal consideration of stakeholder needs, the upside is that directors who choose a broader focus are also protected.

The business judgment rule provides an incentive to take risks such as considering the needs of a broad stakeholder coalition, imposing policies on suppliers or partners (both in and outside of the corporation’s home country), and even spending corporate assets on a broad range of initiatives with only a tangential relationship to shareholder profits. Some question the extent to which the business judgment rule provides management or the board with protection for considering interests beyond shareholder gains.⁸ Directors can undertake these actions in the name of protecting the company’s social license to operate. Imposing specific policy initiatives on suppliers or business partners is commonly done through supplier codes of conduct that require specific commitments from all suppliers or partners.

As compared to suppliers and partners, directors should exercise greater caution in their relationships with subsidiary companies. Though directors of a parent company can impose certain

⁸ See, e.g., Leo E. Strine, Jr., (*The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, Wake Forest L. Rev. (forthcoming) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576389.

mandates on subsidiaries, some U.S. laws will consider the degree to which the parent company's leaders directed the affairs of the subsidiary in determining parent-company liability for regulatory violations. For example, under some environmental regulations, parent companies that direct the operations and policies of subsidiaries can be held directly liable for violations caused by the subsidiary. Therefore, subsidiaries usually determine their own policies.

12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance different factors including such impacts? What, additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

Thanks to the business judgment rule, directors enjoy a high level of discretion in their decision-making. They may consider impacts on non-shareholders to protect the company's social license to operate. Yet, directors may not disregard shareholder welfare or place impacts on non-shareholders above shareholder welfare.

Corporations must have procedures in place to detect and report wrongdoing by directors, officers, and employees. If internal policies are in place to root out wrongdoing, and if directors seek guidance from professionals or create a board committee to study an issue and make decisions in good faith, then they enjoy a very high degree of protection for those decisions. This protection is backstopped by indemnification policies that corporations extend to their directors. If a director faces an allegation that she breached her duties, the corporation may pay for her defense.

13. What are the legal consequences for failing to fulfill any duties described above; and who may take action to initiate them? What defenses are available? Can these issues give rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its actions?

There are two routes by which directors may be held liable: a direct lawsuit or a derivative lawsuit. The two are distinguished from one another in a number of ways, including different procedural requirements and different available remedies. A direct lawsuit may name both the corporation and an individual, typically, targeting an individual director or executive. By contrast, shareholders may file a derivative suit on behalf of the corporation when the board or officers are failing to act.

Direct lawsuits are an appropriate tool to vindicate a shareholder's right that was not honored. Direct suits allege that as a result of the wrongful interference with the shareholder's right, she suffered direct harm. Examples of such rights include the right to vote or to inspect certain corporate books or records. A successful plaintiff in a direct suit will personally benefit from any remedy ordered by the court, including equitable remedies. In many states, direct lawsuits are not useful for shareholders seeking to hold directors accountable for their business decisions.

In a derivative suit, technically the plaintiff is the corporation, which is why derivative suits are styled *In re* (e.g., *In re Caremark*). A derivative suit alleges harm to the corporation caused by the third party under circumstances where the corporation's board is unwilling or unable to bring suit. Harm to the shareholder arises only as a result of damage done to the corporation by the third party (e.g., directors who wasted or misappropriated corporate assets). Because state corporate law varies, the exact process and legal doctrine varies by jurisdiction. However, derivative suits are generally difficult for shareholders to pursue or win. Most states have barriers to derivative suits. For example:

- Requiring shareholders first to file a demand on the board asking the board to act;
- allowing the board time to accept, reject, or not act on the demand; and
- if, after 90 days, the demand has been rejected or not acted upon, then shareholders may file suit.

Derivative suit plaintiffs also face enhanced pleading requirements and defendants may take advantage of some powerful bulwarks to fend off a suit, including the business judgment rule's presumption of validity and deployment of "special litigation committees." If the shareholder-plaintiff prevails, the corporation and not the shareholder will receive any remedy ordered by the court. If plaintiffs successfully rebut the business judgment rule's presumption of validity, then they will only win if they successfully argue that the directors wasted corporate assets. Waste requires a successful showing that the directors' decisions had no rational business purpose. So long as any rational businessperson would do it, then it is not waste. Without doubt, this is a very high hurdle for shareholders to overcome.

If the plaintiff can show that the directors involved in the decision-making process lacked independence, held an interest in the transaction, or otherwise breached a fiduciary duty, then courts apply the "entire fairness" standard of review, which shifts the burden of proof to the defendant-directors. The "entire fairness" test requires the board to show that the transaction is inherently fair to the stockholders because it resulted from both fair dealing and a fair price.

Viewed together, “fair dealing” considers questions of process (timing, structuring, negotiations, and disclosures) while “fair price” concerns the financial terms, including factors that affect stock value.

Beyond litigation, stakeholders may choose to draw negative public attention to corporate behavior or to litigate using other causes of action. Historically, shining a spotlight on unsavory corporate behavior has been an effective tool for driving change. Advocacy groups have effectively used litigation, for example, to pursue environmental pollution or labor and employment issues to push corporations into more sustainable practices.

Shareholder resolutions are an additional tool, available only to shareholders who meet certain requirements. Shareholder resolutions are proposals on specific issues submitted by shareholders to a company for consideration and a vote by all shareholders at the company’s next annual meeting.

Stock exchanges in the United States commonly require listed companies to comply with certain specific requirements to get or remain listed for sale. Typically, the requirements concern financial issues such as total market value, stock price, or the number of publicly traded shares and shareholders a corporation has. However each exchange sets its own standards and they are not uniform. In addition, some exchanges confer special designations (*e.g.*, the Dow Jones Sustainability Index) on companies that meet specific elevated criteria. A company’s spot on an enhanced index group within an exchange is reevaluated periodically and companies that fail to maintain the necessary standards for performance are removed from the list. If listing is a point of pride, then directors have an incentive to maintain their company’s place on the enhanced index.

Other liabilities may arise from director or officer duties under reporting requirements, as discussed below in questions 16 through 19.

14. Are there any other directors’ duties that are relevant to the interests of stakeholders?

No

15. For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures. What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

In the U.S., senior managers (“officers”) are selected by the board of directors and are charged with carrying out the overall strategic priorities established by the board. Officers periodically report

to the board, providing data on corporate performance as compared to goals and benchmarks. By law, officers and directors owe the same duties to the corporation: good faith, loyalty, and care. Like directors, officers can be and usually are indemnified by the corporation for their business decisions. Generally, corporations provide such indemnification in their founding documents and carry insurance policies to guarantee that funds are available should a director or officer need to defend against a breach claim.

Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.

The disclosure requirements under the federal securities laws focus on providing information that is material to investors. In the seminal case of *TSC v. Northway*, 426 U.S. 438 (1976), the Supreme Court defined material information to be information that has a substantial likelihood of altering the total mix of information available to the reasonable investor. Such information is substantially likely to be considered important by the reasonable investor in making investment or voting decisions. Companies have the responsibility to determine which information is material and then disclose that information in accordance with reporting requirements. With a few exceptions discussed below, companies are not explicitly required to disclose impacts of their operations on non-shareholders in their SEC filings or financial reports. Nor are companies required to disclose any action taken or which they intend to take to address such impacts. Yet, companies are not prohibited from disclosing the impacts of their operations on non-shareholders, either in SEC filings or other reporting channels.

Two disclosure requirements under Regulation S-K of the Exchange Act indirectly relate to the impacts of a company's operations on non-shareholder stakeholders. First, Item 101(c)(1)(xii) of Regulation S-K expressly requires disclosure in the Form 10-K report regarding certain costs of complying with environmental laws:

Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or

otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.

Second, Item 103 of Regulation S-K requires companies to briefly describe any material pending or contemplated legal proceedings. Instructions to Item 103 provide specific disclosure requirements regarding administrative or judicial proceedings where a government authority is a party and the company's potential liability exceeds US \$100,000. The company must disclose an action that meets the threshold of liability when the proceeding concerns laws and regulations, targeting discharge of materials into the environment or primary atmosphere, for the purpose of protecting the environment.

Although both of these disclosure requirements are focused on information that is material to investors, they indirectly provide information on how a company's operations impact non-shareholders in terms of environmental issues.

In 2010, the SEC published guidance regarding disclosure related to climate change.⁹ This interpretive release discusses how existing SEC disclosure requirements relate to the disclosure of climate change impacts on companies. In addition to recognizing the increasing prevalence of companies providing climate change information that impacts a wide range of stakeholders, the Commission noted that some of that information may need to be disclosed in SEC filings pursuant to various disclosure requirements under Regulation S-K. Although the Commission emphasizes that materiality is the standard for disclosure of climate change in periodic filings, such disclosures indirectly address how a company's operations impact non-shareholder stakeholders in a manner that is similar to the effect of the Items 101(c)(1)(xii) and 103 disclosures.

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Conflict Minerals Rule") concerning the presence of conflict minerals in a company's products or manufacturing processes also addresses the impact of a company's operations on non-shareholder stakeholders. Section 1502 added Section 13(p) to the Exchange Act, which requires the SEC to promulgate rules requiring companies with conflict minerals that are necessary to the functionality or production of a product manufactured by the company to disclose annually whether any of

⁹ Securities and Exchange Commission, Commission Guidance Regarding Disclosure Related to Climate Change. [Release Nos. 33-9106; 34-61469; FR-82] February 8, 2010. <https://www.sec.gov/rules/interp/2010/33-9106.pdf>

those minerals originated in the Democratic Republic of the Congo (“DRC”) or an adjoining country (collectively, the “Covered Countries”).

The legislative intent of the rule is to reduce the use of conflict minerals. Congress reasoned that disclosure of conflict minerals use would decrease the amount of money provided to armed groups engaged in conflict in the DRC and promote and security in the Covered Countries. The premise of the rule is that money from U.S. company purchases of conflict minerals provides funding for conflict and violence in the DRC, particularly sexual and gender based violence. The rule is intended to curtail that flow of funds.

Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

Mandatory federal reporting requirements are discussed above. SEC requirements support transparency to enable better shareholder decision-making. The Conflict Minerals Rule is intended to promote transparency regarding company activity that contributes to violence in the Covered Countries. The belief is that transparency can help change company behavior and create humanitarian benefits.

Disclosure requirements also exist at the state level. One of the most prominent examples is the California Transparency in Supply Chains Act of 2010 (“Transparency Act”). The Transparency Act requires retailers and manufacturers doing business in California who have more than US \$100 million in annual worldwide gross receipts to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for goods offered for sale. The disclosure must be posted on the entity’s website with a conspicuous link from the homepage.

In terms of voluntary initiatives, some shareholders and non-governmental organizations are calling on companies to produce sustainability and CSR reports and disclose the impact of climate change on their operations and future prospects. A growing number of companies are publishing sustainability and CSR reports. Many reports are published in accordance with the Global Reporting Initiative (GRI) framework and cover a wide variety of topics as outlined in that framework. In 2011,

about 20% of S&P 500 companies published a sustainability or CSR report; in 2012, the percentage had increased to 53%, while in 2013 approximately 72% of S&P 500 companies published a sustainability or CSR report.¹⁰

One voluntary initiative that has its roots in the U.S. is the Sustainability Accounting Standards Board (“SASB”). SASB develops industry-specific disclosure and accounting standards on sustainability topics to help U.S. public companies report material information in the Form 10-K and 20-F, especially in the Management’s Discussion & Analysis section. In developing its standards, SASB follows the definition of materiality announced by the Supreme Court in *TSC v. Northway* (1976). The SEC does not mandate use of SASB standards. Disclosure using the standards can help companies provide investors with material information on how the company’s sustainability performance affects the company’s financial and operational performance. The same disclosures can provide information on how the company’s sustainability performance impacts non-shareholder stakeholders, although that is not the intended purpose of the standards. Through 2016, SASB plans to publish provisional, non-binding standards for 80 industries in 10 sectors.

17. Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

Legal reporting obligations, such as the financial statements and other disclosure requirements under Regulations S-X and S-K, cover the company’s and its subsidiaries’ activities worldwide. A few reporting obligations (*e.g.*, the Conflict Minerals Rule and the Transparency Act) extend to the company’s supply chain.

¹⁰ “Seventy-Two Percent (72%) of the S&P Index Published Corporate Sustainability Reports in 2013 - Dramatically Up from 52% in 2012 & Just About 20% in 2011.” June 2, 2014.
<http://www.ga-institute.com/nc/issue-master-system/news-details/article/seventy-two-percent-72-of-the-sp-index-published-corporate-sustainability-reports-in-2013-dram.html>

18. Who must verify these reports; who can access reports; and what are the legal or regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints of misreporting?

The company's periodic filings with the SEC are subject to verification. Under Section 302 of the Sarbanes-Oxley Act of 2002, the CEO and CFO must certify that there are no material weaknesses in the company's disclosure controls and procedures or its internal controls over financial reporting. Disclosure controls and procedures refers to controls and procedures designed to ensure that financial and non-financial information required to be included in reports filed under the Exchange Act is recorded, processed, summarized, and reported to management in a timely manner to allow assessments regarding disclosure. In its 2010 climate change guidance, the Commission reminded companies in a footnote that disclosure controls and procedures must also cover information potentially subject to disclosure:

As we have stated before, a company's disclosure controls and procedures should not be limited to disclosure specifically required, but should also ensure timely collection and evaluation of "information potentially subject to [required] disclosure," "information that is relevant to an assessment of the need to disclose developments and risks that pertain to the [company's] businesses," and "information that must be evaluated in the context of the disclosure requirement of Exchange Act Rule 12b-20." Release No. 33-8124 (Aug. 28, 2002) [67 FR 57276].

Internal controls over financial reporting refers to a process designed by, or under the supervision of, the registrant's principal executive and principal financial officers, or persons performing similar functions, and effected by the registrant's board of directors, management, and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.

The SEC can bring an enforcement action for a false Section 302 Sarbanes-Oxley certification in violation of Section 13(a) of the Exchange Act, and private actions can be brought under Section 10(b) of the Exchange Act and Rule 10b-5. If a Form 10-K or 10-Q report is incorporated by reference into a registration statement (*e.g.*, Form S-1), there could be liability for a false certification under Sections 11 and 12(a)(2) of the Securities Act. An SEC enforcement action can include monetary penalties and/or injunctions. A private action can result in monetary damages.

Under Section 906 of the Sarbanes-Oxley Act, the CEO and CFO must certify that the report containing the financial statements fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act, and that information contained in the periodic report fairly presents, in all material respects, the company's financial condition and results of operations. In the context of this certification, Item 303 of Regulation S-K, the Management's Discussion and Analysis, requires the company to identify and disclose known trends, events, demands, commitments, and uncertainties that are reasonably likely to have a material effect on its financial condition or operating performance. In accordance with Item 303(a), registrants must also disclose any other information a registrant believes is necessary to an understanding of its financial condition and changes in financial condition and results of operations.

The consequences of a false Section 906 certification include criminal penalties, including a monetary fine and prison sentence. These penalties increase for a false Section 906 certification that is provided willfully.

The SEC reviews the periodic filings of companies. If reporting or certification issues are found, the SEC can choose to issue a comment letter to the company asking for clarification and/or further discussion or disclosure, to investigate the company for potential violations of disclosure or certification requirements, or to bring an enforcement action against the company depending on the circumstances.

For periodic reports with the SEC, external auditors are required to issue an opinion on whether effective internal control over financial reporting was maintained in all material respects by management. The external auditors must also issue an opinion regarding the accuracy of the company's financial statements. The SEC has clarified that if the company includes non-financial information in its filings (*e.g.*, the impact of climate change on its operations), the company's disclosure controls and procedures must extend to that information.

The Public Company Accounting Oversight Board ("PCAOB") has the authority to investigate and discipline registered public accounting firms and persons associated with those firms for noncompliance with the Sarbanes-Oxley Act, the rules of the PCAOB and the SEC, and other laws, rules, and professional standards governing the audits of public companies. When violations occur, the PCAOB can impose sanctions, including censure, monetary fines, and orders for the auditors to implement policies and procedures to address the violations.

SEC filings are available to the public free of charge through the EDGAR database.

In contrast, sustainability and CSR reports made outside of SEC filings do not have to be verified. However, as discussed in response to Question 19, some companies who publish such reports choose to have the reports assured by a third party.

There are no express legal or regulatory consequences for failing to produce a sustainability or CSR report. However, in situations where certain information contained in a report is material, the company faces the risk of a suit for securities fraud under Section 10(b) of the Exchange Act and Rule 10b-5 if the information can be alleged to be materially misleading or false and the other elements of a Rule 10b-5 claim can be adequately alleged.

Companies often post their sustainability or CSR report on their website.

Sustainability and CSR reports are not policed or monitored by any regulator.

19. What is the external assurance regime for reporting on a company's impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance.

Companies who report on their impacts on stakeholders through sustainability and CSR reports occasionally seek external assurance for the reports. The company can choose to have their sustainability and CSR reports assured by third parties, but is not required to do so.

Two common types of assurance are reasonable assurance and limited assurance. Limited assurance is where the third party reviews the report for whether any material modifications to the subject matter should be made because, for example, of non-conformity with the guidelines of a reporting framework (*e.g.*, GRI). The review might apply analytical procedures, interview people responsible for the subject matter, and understand the data management systems and processes used to develop, aggregate, and report information on the subject matter. The third party provides a negative opinion that nothing came to its attention to conclude that the assertions have not been presented in all material respects based on the criteria. This type of assurance is the prevailing practice for the assurance of sustainability and CSR reports in the US. Reasonable assurance is where the third party provides a positive opinion that the assertions have been presented in all material respects based on the criteria. It involves an examination that is more robust and sometimes broader in scope than a review. U.S. companies do not often use this type of assurance.

The American Institute of Certified Public Accountants (AICPA)'s assurance standard, adopted by the PCAOB as AT Section 101, applies to attest engagements. AT 101 is often used by accounting firms when providing assurance for sustainability and CSR reports of U.S. companies. Companies

that receive assurance from consulting or engineering firms would not use AT 101. AT 101 was not specifically developed for the assurance of sustainability information.

With the goal of developing an assurance standard that is tailored to engagements that address sustainability information, the AICPA has established a Sustainability Assurance and Advisory Task Force. The Task Force is working to develop guidance or a sustainability assurance standard as soon as 2016.

Please summarize any regulatory guidance on reporting that relates to impacts on non-shareholder stakeholders.

The SEC provides reporting guidance on two topics that impact non-shareholder stakeholders: conflict minerals and climate change. Although these topics impact non-shareholder stakeholders, the guidance is intended to promote reporting regarding impacts on shareholders.

Some government agencies provide regulatory guidance on reporting impacts on non-shareholder stakeholders outside of SEC filings. For example, since 2010 the Environmental Protection Agency (EPA) has required large emitters of greenhouse gas emissions to report such emissions under the Greenhouse Gas Reporting Program.

Stakeholder engagement

20. Are there any restrictions on circulating shareholder proposals that deal with impacts on non-shareholders, including stakeholder impacts?

Rule 14a-8 of Section 14(a) of the Exchange Act regulates shareholder proposals. It provides that any shareholder may submit a shareholder proposal to be included in the company's proxy material for a vote during the next shareholder meeting if the submitting shareholder owns at least 1%, or \$2,000 worth of the company's stock, for at least one year prior to the date of submission, and holds that stock through the date of the meeting. The proposal must be limited to 500 words and must be submitted 120 days before the issuance of the company's proxy statement for the previous year's annual meeting.

A shareholder proposal is a "recommendation or requirement that the company and/or its board of directors take action." Under Rule 14a-8, a company must include a shareholder proposal in its proxy statement unless it violates one of the rule's eligibility or procedural requirements or falls within one of thirteen bases for exclusion.

The company can ask the SEC for permission to exclude the proposal from its proxy statement by requesting a “no action” letter. A “no action” letter is guidance from the SEC staff as to whether it would recommend any enforcement action or no action in response to a given set of circumstances. Although widely relied on by practitioners, “no action” letters are not binding on the SEC. Companies often request “no action” letters to exclude proposals that address matters within the scope of day to day management decisions (the “ordinary business” exclusion), and when the company has already substantially implemented the proposal. These are two of thirteen substantive grounds for granting a “no action” request to exclude a shareholder proposal.

Since 2009 the SEC has increasingly chosen to decline companies’ “no action” requests to exclude shareholder proposals that deal with significant policy matters including environmental, financial, and health risks. In 2010 the Commission rejected a “no action” request from a company where the proposal focused on the environmental impacts of the company’s operations. In 2011 the SEC staff broadened its approach to declining “no action” requests to include risks that do not arise directly from the company’s operations, but may nevertheless have an impact on the company (*e.g.*, impact of climate change on the company). In 2013 the staff rejected a company’s “no action” request on the grounds that the proposal addressed “the significant policy issue of climate change.”¹¹ Environmental and health risks can fall under stakeholder impacts of corporate activity. Thus, under certain circumstances, shareholders may be asked to vote on a shareholder proposal that deals with impacts on stakeholders.

21. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is legal duty that pension funds owe with regard to investment decisions in this regard?

Institutional investors who are fiduciaries may both be required and permitted to consider impacts on non-shareholder stakeholders in their investment decisions. Fiduciary investors, including pension funds and endowments, owe legal duties to their beneficiaries. These investors have common law fiduciary duties of care, loyalty, and impartiality as described by the American

¹¹ Letter from Ted Yu, Senior Special Counsel, U.S. SEC, to George P. Long, The PNC Financial Services Group (Feb. 13, 2013) available at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/bostoncommon021313-14a8.pdf>.

Law Institute’s Restatement of Trusts. The duty of care obligates the fiduciary to manage the investments, diversification, and risks of the fund as a prudent investor would, considering the purposes, terms, and distribution requirements of the fund. The fiduciary investor is therefore permitted to consider impacts on non-shareholder stakeholders as a prudent investor would do in light of the investment circumstances.

The duty of loyalty means the investor must act solely in the best interest of the fund’s beneficiaries and the purpose of the fund. The working presumption is that beneficiaries are interested in making a profit from their investments. In circumstances where the impacts on non-shareholder stakeholders affects fund performance, the investors may be required or permitted to consider the environmental and social impacts of their investment decisions.

The duty of impartiality requires the investor to consider the interests of diverse beneficiaries and to remain impartial between beneficiaries. This duty means that the interests of current and future beneficiaries should be treated equally. Because environmental cleanup and climate risks can shift wealth across generations, the investment approaches of fiduciary investors are implicated. Fiduciaries may therefore need to consider certain environmental and other stakeholder impacts to meet their fiduciary duties.

Private pension funds are regulated by the Employee Retirement Income Security Act’s (ERISA) fiduciary standard. The fiduciary responsibilities enumerated in ERISA are: (1) acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them; (2) carrying out duties prudently; and (3) following the plan documents, unless such documents are inconsistent with ERISA. The Department of Labor has issued interpretive guidance that ERISA fiduciaries “may never subordinate the economic interests of the plan to unrelated objectives, and may not select investments on the basis of any factor outside the economic interest of the plan.” ERISA fiduciaries may consider non-financial factors if they do not negatively affect risk or returns.¹² The guidance does not prevent using an investment approach that evaluates environmental and social factors as part of an analysis to select an investment portfolio that satisfies the long-term investment objectives of beneficiaries.

¹² United States Department of Labor. (2008, October 17). Interpretive Bulletin relating to Investing in Economically Targeted Investments, 10/17/2008. Federal Register: October 17, 2008 (Volume 73, Number 202).

How does the legal duty of the fund align with term and contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?

The fund’s legal duties of care and loyalty may or may not align with the term and contractual performance criteria of fund managers, depending on the term and performance criteria. A shorter term may deter consideration of such impacts, as the emphasis might be on immediate or short-term returns. A longer term may facilitate consideration of such impacts by emphasizing longer-term returns and performance so as to promote alignment with the duty of loyalty.

Regardless of the fund’s term, the fund’s manager might have considerable discretion in crafting an investment strategy to meet the fund’s purposes and distribution requirements. That might not be the case, however, if the fund’s provisions specifically call for or prohibit certain investment strategies, such as consideration of environmental and social impacts. However, contractual performance criteria are not necessarily an obstacle to consideration of such impacts. The key question is whether such impacts will affect the fund’s performance and align with the performance criteria of fund managers.

22. Can non-shareholders address companies’ annual general meetings? What is the minimum shareholding required for a shareholder to raise a question at a company’s AGM?

Yes, non-shareholders may address a company’s annual general meeting (“AGM”). While AGMs are required by law and shareholders have certain minimum rights (*e.g.*, choosing the board of directors), some companies use their AGM to communicate important messages about their business and strategy. In these instances, non-shareholders may address the audience subject to the company’s approval. One example of this is Berkshire Hathaway, the legendary company founded by Warren Buffett. Berkshire Hathaway AGMs have become a mecca for capitalists who line up before dawn for an opportunity to hear Buffett respond to questions from journalists and others who may or may not be shareholders. Allowing non-shareholders to address an AGM is entirely at the company’s discretion.

A shareholder may raise one proposal per meeting if she owns at least \$2,000 or 1% or total outstanding shares that she has continuously held for no less than one year prior to the date the proposal is submitted and holds through the date of the AGM. See the response to Question 20 above for additional information about shareholder resolutions.

Other issues of corporate governance

- 23. Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the UN Global Compact, the OECD Guidelines for Multinational Enterprises etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?**

Yes. As sustainability initiatives have taken root, it is not uncommon for companies to include clauses in their contracts that effectively force the boards of directors of other companies (*e.g.*, suppliers) to consider their impacts on stakeholders. For example, a company may impose a human rights code of conduct on all its suppliers. Companies unwilling to consider their treatment of workers and other stakeholders may lose business opportunities.

Adhering to a voluntary sustainability reporting practice such as the Global Reporting Initiative is one way to encourage a systemic consideration of company impacts on stakeholders. GRI's standards also factor in stakeholder engagement. Because the OECD's Guidelines for Multinational Enterprises set forth principles for corporate practices related to a wide range of stakeholders and also call for robust corporate disclosures, these guidelines also support board consideration of stakeholder concerns. Corporate support for the U.N.'s Millennium Development Goals provides another example of how principles can cause companies to engage with and consider stakeholders.

- 24. Are there any laws requiring representation of particular stakeholder constituencies (i.e., employees, representatives of affected communities) on company boards?**

No. If anything, the legislative and regulatory trends in the United States have discouraged employee participation on company boards, at least for publicly traded companies listed on stock exchanges. In response to the corporate financial scandals of the early 2000's, symbolized by the implosion of Enron, director independence became one of the focal points for corporate governance reform. A prevailing view was that this malfeasance came about, at least in part, due to excessive coziness and overlap between the directors and management. As a result, both the New York Stock Exchange (Section 303A.01 of the New York Stock Exchange Listed Company Manual) and the NASDAQ Stock Market (Rule 5605(b)(1) of the NASDAQ Stock Market Rules) require a majority of board members of listed companies to be "independent." Under the rules of both exchanges, a

director is not independent if employed by the company (Rule 5605(a)(2) of the NASDAQ Stock Market Rules and Section 303A.02(b)(i) of the New York Stock Exchange Listed Company Manual).

25. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder representation; or non-discrimination generally, on company boards?

No. The closest any U.S. governmental entity has come to such a requirement is the California Senate, with its passage in 2013 of Concurrent Resolution No. 62.¹³ Although not legally binding, it “urges that, within a three-year period from January 2014 to December 2016, inclusive, every publicly held corporation in California with nine or more director seats have a minimum of three women on its board, every publicly held corporation in California with five to eight director seats have a minimum of two women on its board, and every publicly held corporation in California with fewer than five director seats have a minimum of one woman on its board.”

In 2009 the SEC adopted a requirement that publicly held companies include as part of their periodic disclosure “whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.”¹⁴ The SEC, however, gave very broad discretion to reporting companies in complying with this requirement:

We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in

¹³ S. Con. Res. 62, 2013 Leg. Reg. Sess. (Cal. 2013).

¹⁴ 17 C.F.R. § 229.407(c)(2)(vi).

ways that they consider appropriate. As a result we have not defined diversity in the amendments.¹⁵

Title VII of the United States Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin. However, the agency responsible for enforcement of this statute, the United States Equal Employment Opportunity Commission, has made it clear that this law generally does not apply to members of boards of directors.¹⁶

26. In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?

In the United States, the general rule is that parent corporations will not be liable for the acts of their subsidiaries. It is widely accepted that a corporation or other form of limited liability corporate entity may be formed for the purpose of shielding its principals from personal liability, and courts are reluctant to “pierce the corporate veil” to impose personal liability on its principals. In general, closely held corporations are more susceptible to veil piercing. Such corporations are more likely to have a dominant—or sole—shareholder, and may be less likely to strictly observe corporate formalities.

As with most other corporate law, veil-piercing jurisprudence is a matter of state law, and it is primarily based on common-law precedents with no bright-line rule. A court considering veil-piercing arguments will most often engage in a “totality of the circumstances” inquiry; however, common grounds for veil piercing include:

- Alter-ego liability (failing to observe corporate formalities, commingling assets of the corporation and its owners or using the corporation as a “façade” for personal dealings)
- Fraudulent, reckless or criminal behavior (misusing the corporate form by engaging in fraudulent or criminal transactions or otherwise behaving recklessly)
- Undercapitalization (failing to provide adequate capital relative to the corporation’s operations and business risk)

¹⁵ SEC Release No. 33-9089 (Dec. 16, 2009) at 38-39.

¹⁶ EEOC Compliance Manual Section 2-III.A.1.d

Specific statutory exceptions to the general rule also exist at the federal level. For example, a parent corporation may be liable for environmental harm caused by a subsidiary under the Comprehensive Environmental Response, Compensation and Liability Act if they are directly involved in the subsidiary's management of hazardous substances. In addition, actions by corporate subsidiaries that negatively impact stakeholders pose the risk of reputational harm to a parent company.

There are no known viable proposals to impose such responsibility beyond the exceptions discussed above.

27. Are you aware of any incoming law or proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.

We are not aware of any incoming federal laws that are relevant to the matters discussed above. In the United States, individual members of Congress may introduce legislative proposals from time to time, whether or not those proposals have any realistic probability of becoming law. While we are not at this time aware of any such proposals relevant to the matters discussed above, sustainability, as a topic of popular interest, may be a target of legislative proposals in the future.

As discussed in Questions 1 and 7 above, many states have enacted public benefit corporation statutes allowing for the creation of business entities that may emphasize social or environmental concerns over profits. Similar legislation has been proposed in additional states.

There are currently various ongoing global initiatives to encourage greater reporting on sustainability issues by public companies. While these are not legal requirements, the impact of some could have a similar market adoption effect. For example, the Sustainable Stock Exchanges ("SSE") initiative is a global group of stock exchanges committed to improving corporate transparency and performance on environmental, social and governance ("ESG") issues. NASDAQ and NYSE, the world's largest stock exchanges, and the most important exchanges in the United States, have both become Partner Stock Exchanges within SSE by committing to promote improved ESG disclosure and performance among their listed companies. Though NASDAQ and NYSE have currently only committed to developing new sustainability-related products, the SSE is also developing model guidance that stock exchanges can provide to their listed companies on ESG disclosure. It is expected that the model guidance could be finalized as early as September 2015.

Similarly, SASB is developing sustainability accounting standards designed to facilitate and standardize market uptake regarding the identification and resulting disclosure of material sustainability information in mandatory SEC filings, such as Form 10-K and 20-F.