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EVOLVING CORPORATE PHILANTHROPY

DAVID I. WALKER*

With the rise of corporate ESG initiatives and public benefit corporations, corporate philanthropy is evolving from an emphasis on cash contributions (contributional philanthropy) to an emphasis on adjusting operations to advance the public good (operational philanthropy). All forms of corporate philanthropy are controversial, but this article evaluates the impact of this evolution on the relative benefits and concerns of corporate philanthropy, arguing that the shift in emphasis towards operational philanthropy increases the comparative advantage of corporate philanthropy, increases agency costs, both simplifies and complicates shareholder primacy concerns, and increases the difficulty of prescriptively regulating corporate philanthropy through the tax code or otherwise. This article goes on to argue that accurate and transparent disclosure is the key to minimizing the costs and maximizing the benefits of the now ascendant operational philanthropy and concludes by offering a few observations on disclosure-based regulation of operational philanthropy.

INTRODUCTION 72
I. AN EVOLVING LANDSCAPE FOR CORPORATE PHILANTHROPY 76
A. *Corporate Charitable Contributions* 76
B. *The ESG Movement* 78
C. *PBCs* 79
D. *Is Corporate Philanthropy Profit Sacrificing?* 82
II. CONVENTIONAL CORPORATE PHILANTHROPY — ISSUES AND CONCERNS 83
A. *Corporate Governance Concerns* 84
1. *Shareholder Primacy and Sorting* 86
2. *Agency Costs and Comparative Advantage* 88

* Professor of Law and Maurice Poch Faculty Research Scholar, Boston University School of Law. I thank workshop participants at Boston University School of Law and the EITC Tax Conference for helpful comments on earlier drafts. I thank Steven Fleury (BUSL J.D. 2023) and Henry Colocotronis (BUSL J.D. 2025) for excellent research assistance.

B. *Is/When Is Corporate Philanthropy Legally Permissible?* 91
C. *Who Bears the Cost of Corporate Philanthropy?* . . . 92
D. *Is Corporate Philanthropy More Heavily Subsidized than Stakeholder Philanthropy?* 94
III. THE SHIFT TO OPERATIONAL CORPORATE PHILANTHROPY — ISSUES AND CONCERNS 95
A. *Operational Philanthropy Incidence* 95
B. *Isolating Operational Philanthropy* 97
C. *Comparative Advantage* 98
D. *Agency Costs* 99
E. *Shareholder Primacy* 102
F. *Taxation and Prescriptive (Non-Disclosure-Based) Regulation* 103
IV. TOWARDS A DISCLOSURE-BASED APPROACH TO OPERATIONAL PHILANTHROPY 108
A. *The Importance of Effective Disclosure* 109
B. *The Current Disclosure Landscape* 110
C. *Mandatory Disclosure of Public Company ESG Activities* 112
D. *The Difficulty of Applying Tax Penalties or Limitations to Operational Philanthropy May Not Doom Disclosure-Based Monitoring and Sorting* 114
E. *Intermediaries Will Play Key Roles in a Disclosure-Based Approach to Operational Philanthropy* 116
CONCLUSION 118

INTRODUCTION

The corporate philanthropy landscape is slowly being transformed. As a fraction of profits, corporate cash contributions (contributional philanthropy) have declined significantly over the last forty years.[1] Countering this, however, has been the recent rise of hybrid profit-seeking and philanthropic entities, such as public benefit corporations (PBCs), and, more significantly, the surging phenomenon of traditional corporations embracing environmental, social, and governance (ESG) missions on top of

1. *Infra* note 13 and accompanying text.

their profit seeking role.[2] While PBCs and ESG-embracing firms often engage in contributional philanthropy, these movements are really about companies adjusting their operations to advance the public good (operational philanthropy).[3]

Both contributional and operational philanthropy are controversial. From a corporate governance perspective, each raises shareholder primacy concerns. In the view of many commentators, if corporate profits are to be sacrificed for the public good, these decisions should be made by shareholders, individually, rather than collectively by corporate management.[4] To be sure, neither contributional nor operational corporate philanthropy is necessarily profit sacrificing. For many firms, contributional philanthropy is akin to advertising, generating income that partially or even fully offsets the expenditure. Similarly, some firms embracing ESG missions expect to do well financially by doing good.[5] Almost inevitably, however, some fraction of both forms of corporate philanthropy is profit sacrificing.

A second governance concern is that corporate philanthropy of all varieties increases managerial agency costs. Managers may advance their own interests through corporate philanthropy, whether that be the attainment of a personal warm glow, greater job security, or other personal benefits, rather than solely advancing corporate or societal interests. Countering these concerns and imparting a more positive spin, some commentators have argued that in some circumstances corporations may have a comparative advantage over shareholders or other stakeholders in engaging in philanthropy.

Corporate philanthropy also raises tax issues. Some commentators have lamented the existence of a tax preference favoring corporate, over individual, largess or simply the existence of an uneven tax playing field depending on the channel through which corporate profits are contributed to the public good.[6]

This article reassesses the governance and tax issues surrounding corporate philanthropy in light of the transformation

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2. *Infra* notes 20-24, 28-30 and accompanying text.

3. *Infra* notes 20-24, 28-30 and accompanying text.

4. *Infra* notes 66-68 and accompanying text.

5. Robert P. Bartlett, III & Ryan Bubb, *Corporate Social Responsibility Through Shareholder Governance* 11 (Eur. Corp. Governance Inst., L. Working Paper No. 682, 2023) (using similar language as shorthand for the enlightened shareholder value perspective on corporate governance).

6. *See* discussion *infra* Parts II.C, III.F.

noted above, reaching a number of general conclusions about corporate philanthropy and its current direction. First, the shift from contributional to operational philanthropy is likely to increase the comparative advantage of corporate philanthropy relative to shareholder or other stakeholder philanthropy. Unlike traditional contributional philanthropy, corporate operational philanthropy often cannot be replicated by individual stakeholders of profit maximizing firms. Oil company shareholders, for example, cannot directly opt to leave recoverable oil reserves unrecovered. To be sure, stakeholder cash donations can advance similar goals, but in many cases direct corporate action is likely to be more effective and efficient.[7]

Second, the shift in emphasis from contributional to operational philanthropy likely increases managerial agency costs. Relative to profit-maximizing companies engaging in limited contributional philanthropy, PBCs and ESG-embracing firms countenance greater deviations from shareholder wealth maximization. In addition, operational philanthropy often involves numerous operational and financial decisions that are opaque to outside observers and difficult to monitor. Each of these factors tends to increase the scope for managerial appropriation. Finally, boards are increasingly tying executive pay to ESG performance, which complicates executive pay and adds further scope for managerial value appropriation.[8]

Third, the shift towards operational philanthropy both simplifies and complicates shareholder primacy concerns. By explicitly adopting a social mission separate from shareholder value maximization, PBCs address shareholder primacy directly, and limit it. ESG-embracing companies, on the other hand, often appear to deviate from shareholder primacy, but by embracing a capacious, not exclusively financial, view of shareholder utility and taking into account investor portfolio impacts of externality reductions it is possible to reach reconciliation. Critical to reproachment, however, is the ability of investors and other stakeholders to sort themselves based on individual company and investment fund social priorities.[9]

Fourth, turning to tax, although costs of operational and contributional philanthropy are deductible under different sections of the federal income tax code and subject to different

7. *See* discussion *infra* Part III.C.
8. *See* discussion *infra* Part III.D.
9. *See* discussion *infra* Part IV.

limitations, in practice the tax treatment of the two is largely the same. Corporate philanthropy is deductible at the effective marginal tax rate applicable to the company. The more important takeaway from a tax perspective is that the shift from contributional to operational philanthropy increases the difficulty of taxing gains and losses from corporate charitable activities differently than gains or losses from profit-seeking activities. In other words, the shift makes it increasingly difficult to discourage corporate philanthropy through the tax code, if doing so was desired, and suggests that any leveling of the tax playing field should target the tax treatment of individual, rather than corporate, philanthropy.[10]

In sum, the major concerns arising from the shift from contributional to operational philanthropy are potentially heightened agency costs and conflict with shareholder primacy. Interestingly, the most effective response to both concerns is likely to be the same — accurate and transparent disclosure which helps mitigate agency costs and facilitates sorting by investors (and other stakeholders) based on the social priorities of firms and investment funds.[11] While both the PBC and ESG movements emphasize transparent disclosure of pro-social missions and accomplishments, at present these commitments seem unlikely to significantly mitigate these two concerns. With respect to ESG, however, the SEC has jumped into the fray, issuing proposed or final rules adopting mandatory disclosure regimes related to climate change; diversity, equity, and inclusion; and human capital management. This Article concludes by offering a few observations on disclosure-based regulation of operational philanthropy.[12]

The remainder of this article is organized as follows. Part I describes the ongoing transformation of corporate philanthropy from a focus on charitable contributions to operational adjustments in the public interest. This Part also briefly considers whether corporate philanthropy is profit-sacrificing, concluding that in some cases it is. Part II lays out the issues and concerns

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10. *See* discussion *infra* Part IV.C.

11. This article embraces the view that investor autonomy interests are adequately served as long as there exists a set of public corporations with varying financial and social missions, including a set of firms seeking to maximize shareholder value. As a result, the primary corporate governance issues with corporate philanthropy are managerial agency costs and investor sorting, not inconsistency with shareholder primacy, per se.

12. *See* discussion *infra* Part IV.

associated with corporate philanthropy generally, including shareholder primacy, agency costs, comparative advantage, and federal tax subsidization. This Part also discusses the "incidence" of corporate philanthropy asking who bears the cost when corporate philanthropy is profit sacrificing. Part III provides the reassessment that is the heart of this Article, asking how the transformation in corporate philanthropy impacts its comparative advantage, as well as the shareholder primacy, agency cost, and tax concerns of critics. Part IV turns to mitigation of concerns with operational philanthropy offering a few tentative observations with respect to the ongoing project of ensuring that disclosures minimize agency costs and facilitate investor and other stakeholder sorting based on companies' philanthropic efforts and achievements. A conclusion follows.

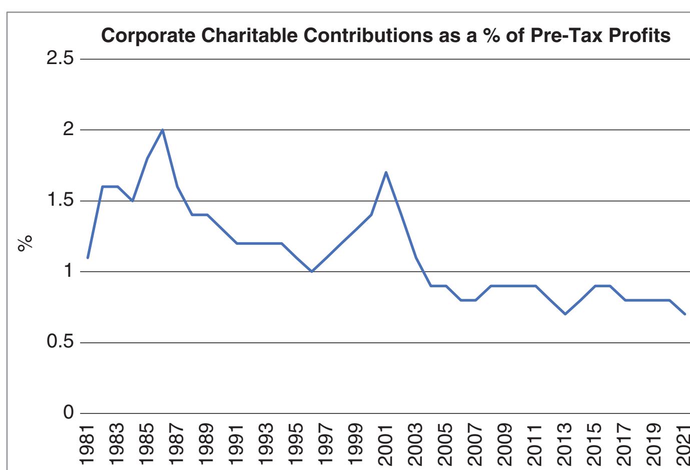
I.
An Evolving Landscape for Corporate Philanthropy

Corporate philanthropy, writ large, is slowly being transformed. As a fraction of corporate profits, traditional "contributional" philanthropy, consisting of cash and some property, such as inventory, has been trending down for decades. Countering this trend, however, has been the recent rise of hybrid entities, such as Public Benefit Corporations (PBCs), that explicitly adopt a social as well as a financial mission and, more significant economically, the adoption of ESG objectives by traditional for-profit corporations. PBCs and ESG-embracing corporations may engage in contributional philanthropy but what sets them apart are their commitments to operate their businesses in ways that promote social objectives (operational philanthropy). Neither contributional nor operational philanthropy are necessarily profit sacrificing. Each can potentially build goodwill and shareholder value over time. But almost certainly some of this philanthropy comes at a cost to shareholders, and even when it does not, philanthropy may shift value between stakeholders. This Part briefly describes these trends and transformations.

A. *Corporate Charitable Contributions*

According to Giving USA, between 2020 and 2021 U.S. corporate charitable giving (contributional philanthropy) increased by a whopping 24% to $21.1 bn, but as a fraction

of pretax profits, contributions slipped from 0.8% to 0.7%.[13] These figures reflect long-term trends. Although corporate giving is somewhat volatile, increases in giving have outpaced inflation over the past 40 years, but, as detailed in the figure below, the fraction of profits contributed has declined from an average of about 1.4% between 1981 to 2000 to about 0.9% between 2001 and 2021.[14] From the perspective of investors, corporate charitable giving has declined in significance over time.



Large corporate donors routinely funnel their charitable giving through separate foundations.[15] Of 230 Fortune 500 firms that reported their charitable giving for 2020, 80% utilized foundations.[16] Direct cash contributions to end-use charities and cash contributions funneled through foundations account for just over three quarters of corporate charitable contributions with the balance coming in various non-cash forms.[17]

13. GIVING USA FOUND., GIVING USA 2022 350, 358 (2022).
14. *Id.*
15. Corporate foundations are not necessarily independent of the corporations that fund them. Executives are not precluded from being involved in these foundations. Brown, Helland, and Smith report that CEOs were involved in foundation management at 42% of firms that channeled charitable giving through foundations. William O. Brown et al., *Corporate Philanthropic Practices*, 12 J. CORP. FIN. 855, 861 (2006).
16. CHIEF EXECUTIVES FOR CORPORATE PURPOSE, GIVING IN NUMBERS 28 (2021 ed. 2021).
17. *Id.* at 15 (reporting that in 2020, cash contributions accounted for 78% of corporate philanthropy and non-cash accounted for 22%).

In 2020, non-cash giving consisted of product donations (63%), pro bono (15%), and other non-cash contributions including used office equipment, use of facilities, real estate, and patents (21%).[18] In-kind gifts by corporations are tax advantaged in some circumstances.[19]

B. *The ESG Movement*

One factor offsetting the decline in charitable giving by traditional corporations in recent years has been their increasing focus on environmental, social, and governance (ESG) objectives. The ESG movement represents an exceptionally large tent, and what "counts" as ESG is in flux.[20] ISS's ESG database, for example, tracks over 800 indicators for more than 8,000 companies.[21] While the corporate governance prong of ESG, e.g., initiatives aimed at improving board processes and independence, executive pay policies, or shareholder rights, is not directly related to corporate philanthropy, the environmental and social prongs certainly are.[22] Depending on industry and firm-specific factors, corporations embracing "E" or "S" prongs of ESG might pledge, for example, to reduce carbon or other harmful emissions, to forego "fracking" or other environmentally harmful oil extraction practices, to improve diversity within their labor force or executive ranks, or to improve labor standards within their supply chains.[23] What these efforts have in common is a focus on the public interest in addition to providing returns to investors and on benefitting society through changes in corporate operations rather than dispensing cash in support of charitable endeavors. Although most ESG efforts

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18. *Id.*

19. Linda Sugin, *Encouraging Corporate Charity*, 26 VA. TAX REV. 125, 156–57 (2006) (describing generous tax rules applicable to certain corporate gifts of scientific equipment or other inventory).

20. *See* Elizabeth Pollman, *The Making and Meaning of ESG* 17 (Eur. Corp. Governance Inst., L. Working Paper No. 659, 2022).

21. *ESG Ratings and Rankings: Product Guide* ISS GOVERNANCE, https://www.issgovernance.com/esg/ratings/ (last visited Dec. 26, 2024).

22. I will continue to refer to these initiatives as ESG, as is conventional, despite the fact that my focus is on E&S.

23. In a guide to ESG for businesses, consulting firm KPMG includes the following among key E&S topics: climate change, greenhouse gas emissions, waste and pollution, working conditions, health and safety, and employee relations and diversity. KPMG, ESG: ENVIRONMENTAL, SOCIAL, AND GOVERNANCE: AN INTRODUCTORY GUIDE FOR BUSINESSES 2 (2020).

are focused on operational philanthropy, there could potentially be a link between ESG and contributional philanthropy. One consultant expects corporate charitable giving to trend upwards as firms increasingly emphasize ESG.[24] Thus far, however, it is difficult to see any such spillover effects in the aggregate data.

ESG reporting by public companies is now ubiquitous. According to the Governance & Accountability Institute (G&A), 92% of S&P 500 firms issued a report in 2020 highlighting their achievement or compliance with ESG, corporate social responsibility, or sustainability goals, up from 20% of S&P 500 firms that published such a report in 2011.[25] These disclosures are currently voluntary and the quality varies,[26] but G&A reports that 52% of Russell 1000 firms that published disclosures utilized a reporting standard promulgated by the Global Reporting Initiative, a standard that was first developed following the 1989 Exxon Valdez spill and has evolved to be a de facto standard for sustainability reporting.[27]

C. *PBCs*

Although thus far lacking the broad reach of the ESG effort, a more explicitly philanthropic movement afoot in the business sector is the advent of hybrid entities devoted to improving social welfare as well as delivering returns to investors. Several hybrid types exist including low-profit limited

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24. Derric Bakker, *Six Trends Likely to Impact Charitable Giving in 2022*, DICKERSON BAKKER (Dec. 23, 2021), https://dickersonbakker.com/six-trends-likely-to -impact-charitable-giving-in-2022/.

25. GOVERNANCE & ACCOUNTABILITY INST., INC., 2021 SUSTAINABILITY REPORTING IN FOCUS 3 (10th ed. 2021).

26. *See, e.g.*, Jessica Ground, *ESG Global Study 2022* (June 17, 2022), HARV. L. SCH. FORUM ON CORP. GOVERNANCE, https://corpgov.law.harvard.edu/2022/06/17/esg-global-study-2022/ ("Difficulties with the quality and accessibility of data and inconsistent ratings are hampering the ability of investors to adopt, incorporate and implement ESG.").

27. GOVERNANCE & ACCOUNTABILITY INST., *supra* note 25, at 13.
The strength of the ESG movement is also evidenced by rising institutional investor interest in ESG. Gillan, Koch, and Starks report that in 2019, 300 mutual funds with ESG mandates received $20 billion in net investment in-flows and that more than 3,000 institutional investors and their service providers representing $86 trillion in assets under management have signed on to the ESG friendly Principles of Responsible Investment. Stuart L. Gillan et al., *Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance*, 66 J. CORP. FIN. 1 (2021).

liability companies, benefit LLCs, certified B corporations, special purpose corporations, and flexible purpose corporations,[28] but the most commonly encountered to date are various forms of benefit corporations, which I will refer to generically as public benefit corporations or PBCs. As of September 2020, over 10,000 U.S. businesses had organized as PBCs,[29] although one recent study could identify only four publicly traded PBCs as of April 2021.[30]

As a creature of state law, the contours of PBCs vary based on jurisdiction, but Delaware's statute is typical. A Delaware PBC must in its charter identify itself as a PBC and identify "one or more specific public benefits to be promoted by the corporation."[31] "Public benefit" is defined as "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[32] Delaware PBCs are also required to report at least every other year on "success in meeting [established PBC] objectives and promoting [their PBC] public benefit."[33]

Although the Delaware PBC statute requires the identification of a "specific" public benefit, Professors Fisch and Solomon criticize the current PBC regime as not requiring sufficient specificity and thus vesting excessive discretion with officers, directors or shareholders.[34] They also criticize the existing regime for lacking meaningful enforcement mechanisms.[35]

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28. DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS 61–66 (2017) (discussing hybrid entity alternatives to benefit corporations).

29. FREDERICK ALEXANDER ET AL., FROM SHAREHOLDER PRIMACY TO STAKEHOLDER CAPITALISM: A POLICY AGENDA FOR SYSTEMS CHANGE 3 (2020).

30. Jill E. Fisch & Steven Davidoff Solomon, *The "Value" of a Public Benefit Corporation* 5 (Eur. Corp. Governance Inst., L. Working Paper No. 585, 2021).

31. DEL. CODE ANN. tit. 8, § 362 (2024). Professor David Yosifon has considered whether Delaware's creation of the PBC option might lead judges to require firms wishing to support social missions to adopt the PBC form, but he argues that this is not the best interpretation of the Delaware PBC statute. David G. Yosifon, *Opting out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 462–463 (2017).

32. DEL. CODE ANN. tit. 8, § 362 (2024).

33. DEL. CODE ANN. tit. 8, § 366 (2024).

34. Fisch & Solomon, *supra* note 30, at 2, 10.

35. *Id.*

Nonetheless, at least some PBCs appear to operate more in the public interest than traditional corporations.

For example, crowdfunding platform Kickstarter reincorporated as a PBC in 2015.[36] Its avowed mission is quite general: "to help bring creative projects to life."[37] But the company has made several specific public-spirited commitments, including a commitment to donate 5% of after-tax profits to arts and music education in underserved communities and to organizations fighting to end systemic inequality.[38] Kickstarter also promises not to sell customer data and not to employ "loopholes" to reduce its tax burden.[39] Kickstarter reported paying a combined federal, state, and local effective income tax rate of 24% in 2021, well above the average rate of U.S. corporations.[40]

Insurance company Lemonade went public as a PBC in 2020.[41] Its quite general mission is to "transform insurance from a necessary evil to a social good." This is accomplished through the Lemonade Giveback, a program through which the excess of premiums over claims — beyond a fixed amount per policy — is directed to charities selected by policy holders. Lemonade's total "giveback" increased from $53,000 in 2017 to $2.3 million in 2021.[42] As these examples suggest, the philanthropy engaged in by PBCs may be contributional, operational, or both.

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36. KICKSTARTER PBC, ANNUAL BENEFIT STATEMENT 2021 3 (2022).

37. *Id.* at 4.

38. *Id.* at 5–6.

39. *Id.* at 4.

40. *Id.* at 17. This is a slightly apples to oranges comparison since the U.S. average rate cited in the Kickstarter report (11.3%) is federal only. Moreover, effective corporate tax rates vary widely depending on industry and other factors. It is not clear that this is a meaningful comparison, although it is a step in favor of transparency.

41. *The Lemonade Giveback*, LEMONADE, https://www.lemonade.com/giveback (last visited Jan. 27, 2023). Lemonade received a B Corp certification in 2016 prior to going public. Nonprofit organization B Lab certifies B Corporations, "which are companies that meet high standards of social and environmental performance, accountability, and transparency." *About B Lab*, B LAB, https://www.bcorporation.net/en-us/movement/about-b-lab (last visited Dec. 11, 2024). According to B Lab, there are currently more than 9,200 Certified B Corporations in the US. *Looking for a B Corp?*, B LAB, https://www.bcorporation.net/en-us/find-a-b-corp?refinement%5Bcountries%5D%5B0%5D=United%20States (last visited Feb. 1, 2023).

42. LEMONADE, *supra* note 41; *Time to Giveback! Lemonade's 2017 Social Impact Report*, LEMONADE, https://www.lemonade.com/blog/time-to-giveback/ (last visited Oct. 23, 2024); *The 2021 Lemonade Giveback*, LEMONADE, https://www.lemonade.com/giveback-2021 (last visited Oct. 23, 2024).

D. *Is Corporate Philanthropy Profit Sacrificing?*

A common question for all of these forms of corporate philanthropy is whether public-spirited endeavors run counter to the interests of investors. Corporate finance researchers have produced thousands of studies on these questions[43] without resolving them.[44] Almost undoubtedly the answer is "it depends."

From a theoretical point of view, there are three broad possibilities. First, philanthropy in any of these forms — cash donations by traditional companies, adjustments to operations in pursuit of ESG goals, or organizing as a PBC — could increase a corporation's cash flows sufficiently to offset any costs, thus augmenting investor returns. Such philanthropy could increase cash flows if, for example, customers were willing to pay more for the products of socially responsible producers. Obviously, in this case value would be transferred from consumers to investors. Second, such philanthropy might reduce a corporation's net cash flows, but investors who value their association with socially responsible companies might nonetheless enjoy a net increase in utility.[45] Finally, such philanthropy might reduce aggregate investor utility.[46]

These are empirical issues. Professors Ronald Masulis and Syed Reza examine stock market reaction to announcements

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43. Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 210 (2015).

44. *See, e.g.*, Ronald W. Masulis & Syed Walid Reza, *Agency Problems of Corporate Philanthropy*, 28 REV. FIN. STUD. 592, 592 (2015) (finding "no clear evidence in the literature" as to whether corporate charitable contributions have "positive effects on firm revenues or performance or on shareholder wealth").

45. *See* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 582 (2009) (arguing that, contrary to the view of Milton Friedman, investors derive utility from the warm glow of socially responsible corporate activities, not just from financial returns); *see also*, Bartlett & Bubb, *supra* note 5, at 38 (noting that "shareholders' social preferences are, at least in important part, *associative*") (emphasis in original). Investor utility could also be augmented if costly reductions in the externalities produced by some firms are more than offset by reductions in costs at other firms held by the same investor, that is, by portfolio effects. Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 6 (2020) ("[I]f a subset of firms in a portfolio impose costs on the broader portfolio through the generation of negative externalities, a portfolio-wide owner should be motivated to curtail those externalities at the source.").

46. Gillan et al., *supra* note 27, at 10.

of corporate charitable contributions and find negative reactions, on average,[47] which, as Professors Stuart Gillan, Andrew Koch, and Laura Starks note, suggests that investors do not tend to value contributional philanthropy.[48] Gillan, Koch, and Stark report that 90% of more than 2000 studies find a positive relationship between ESG activities and corporate financial performance, but they caution that causation could run either way.[49] ESG activities could boost cash flows, or firms with strong performance could invest more in ESG. Researchers have attempted to deal with the causation problem, but Gillan, Koch, and Stark conclude that the causal evidence on the ESG/corporate performance relationship is mixed.[50]

Evidence concerning PBC profitability is scant. Professor Ronald Colombo notes that the degree to which PBCs sacrifice shareholder value for public benefits is untested, but he argued that "it stands to reason that the board of a benefit corporation would feel less constrained to prioritize the financial interests of its shareholders as compared to the board of a typical, non-benefit corporation."[51] With their emphasis on "giving back", the few examples of PBCs highlighted above would seem to support Colombo's prediction, but this could just be marketing. Perhaps, for example, policy holders are willing to pay significantly more for Lemonade's socially responsible insurance than for traditional insurance products.

II.
Conventional Corporate Philanthropy — Issues and Concerns

Are corporate operational and contributional philanthropy comparable? Might the former substitute for the latter in a meaningful fashion? I think the answers are yes and yes. As just discussed, each type of corporate philanthropy likely involves the creation of a mix of public and private benefits. Moreover, as developed in this Part and the next, both raise similar issues and concerns regarding shareholder primacy, agency costs,

47. Masulis & Reza, *supra* note 44, at 622.
48. Gillan et al., *supra* note 27, at 11.
49. *Id.* at 10.
50. *Id.* at 13.
51. Ronald J. Colombo, *Taking Stock of the Benefit Corporation*, 7 Tex. A&M L. Rev. 73, 100–01 (2019).

comparative advantage, incidence, and tax subsidies. This Part focuses primarily, but not exclusively, on conventional contributional corporate philanthropy. Part III will consider specifically how these perspectives should be modified given the gradual evolution from corporate contributional to operational philanthropy. For a variety of reasons, many previous commentators have been skeptical of corporate philanthropy, but there have been exceptions.

A. *Corporate Governance Concerns*

Corporate philanthropy — at least of the profit-sacrificing variety — has long been controversial. From a corporate governance perspective, corporate philanthropy can be seen as antithetical to the long-standing norm of shareholder primacy and as exacerbating the agency problems associated with the separation of ownership from control of large, publicly traded corporations.[52] Milton Friedman was perhaps the

52. The shareholder primacy norm holds that the sole objective of the corporation is to advance shareholder interests. This may be contrasted with a stakeholder primacy norm that would expand the objective function to include advancing the interests of other stakeholders including, e.g., employees, creditors, customers, and the communities in which business operate. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 549 (2003) ("At one end of the spectrum are models contending that corporations should be run so as to maximize shareholder wealth. At the other end are stakeholderist models arguing that directors and managers should consider the interests of all corporate constituencies in making corporate decisions."); *see also* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1478 (2021) ("A central debate in corporate governance concerns whether corporate leaders-directors and top executives-when making business decisions, should consider only the interests and welfare of shareholders ('shareholder primacy') or should also consider the interests of nonshareholder constituents, such as employees, customers, suppliers, local communities, and society at large ('stakeholderism')."). Professors Michael Jensen and William Meckling famously described the managerial agency problem that arises from the separation of ownership from control in large publicly held corporations. In short, the personal interests of executives, who hold a relatively small economic stake in the enterprise, will often diverge from those of shareholders, and, given a lack of transparency, monitoring executive actions to ensure that they are advancing shareholder interests will be costly. Agency costs include the cost of monitoring by shareholders, the cost of executives binding themselves to advancing shareholder interests, and the residual loss arising from executives failing to prioritize shareholder interests. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976).

most well-known proponent of this view. In a widely read New York Times Magazine article[53] and earlier book,[54] Friedman famously argued that the social responsibility of executives was to "make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom" — leaving philanthropical decisions to the shareholders.[55] Friedman's objections to corporate spending in the public interest were both normative and practical. From a normative perspective, Friedman embraced the orthodox view that executives are agents of shareholders,[56] charged with advancing their interests, which, as Judge Richard Posner argued, coalesce primarily in the shareholders' desire to increase the share price.[57] From a practical perspective, Friedman asked how executives charged with advancing societal interests were to determine the amount of profit they should sacrifice and exactly which interests should be advanced.[58] Numerous commentators have echoed Friedman's argument that if corporate profits are to go towards philanthropy, these decisions should be made by shareholders, not corporations, because otherwise shareholders will be forced to support causes they do not embrace.[59]

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53. Milton Friedman, *A Friedman Doctrine – The Social Responsibility of Business is to Increase Its Profits*, N.Y. Times Mag. (Sept. 13, 1970), https://timesmachine.nytimes.com/timesmachine/1970/09/13/223535702.html?pageNumber=379.

54. Milton Friedman, Capitalism and Freedom 133 (40th Anniversary ed. 2002).

55. Friedman, *supra* note 53. Friedman recognized that executives of eleemosynary institutions, such as those running schools or hospitals, would have a different objective function.

56. Friedman, *supra* note 53.

57. Richard A. Posner, Economic Analysis of Law 575 (8th ed. 2011) (noting that "[o]ne person's charity is another person's deviltry," and so the issue "becomes whether the shareholder would like his corporation to make a modest contribution to uncontroversial charities").

58. Friedman, *supra* note 53.

59. Friedman, *supra* note 54, at 135; Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 4 (1991) (arguing that stockholders invest in corporations seeking financial returns); *see also* Leo E. Strine & Nicholas Walter, *Conservative Collision Course: The Tension between Conservative Corporate Law Theory and Citizens United*, 100 Cornell L. Rev. 335, 351 (2015) (summarizing these arguments).
To be sure, the shareholder primacy concern is premised on the assumption that investors bear the cost of corporate philanthropy, an assumption that may not always hold and may be increasingly suspect in an age in which ESG- and PBC- based philanthropy is of growing importance. The incidence

Friedman's concerns with corporate philanthropy can really be divided into two main threads — a question of who, between the owners and managers, should control the disposition of philanthropy in terms of the amounts and beneficiaries of charitably directed corporate profits and, though less obvious on the surface, will management discretion to sacrifice profits for the public good exacerbate agency problems within firms? A third issue highlighted by commentators more sympathetic to corporate philanthropy is comparative advantage.

1. *Shareholder Primacy and Sorting*

Although shareholder primacy has often been equated with maximizing shareholder wealth,[60] Friedman did not rule out the possibility that non-financial interests of investors might be considered as well,[61] and some modern commentators conceive of shareholder primacy more broadly, encouraging directors to consider both financial and non-financial interests of shareholders.[62] As Professors Henderson and Malani argue, the increasing strength of the corporate social responsibility movement suggests that some shareholders have a taste for corporate philanthropy, as well as monetary returns, and gain utility from corporate support for social missions.[63] To be sure, some of the investors in pro-social investment funds may be motivated by an expectation that the funds will outperform the broader market, but survey and experimental evidence suggests that individuals generally are willing to sacrifice some financial returns in

question is considered at length in Part II.C. below. For now, I will assume that shareholders do indeed bear these costs.

60. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 745 (2005) (arguing that this equation conflates two separate issues).

61. Friedman, *supra* note 53.

62. Elhauge, *supra* note 60, at 745, 783 (noting that shareholders have nonfinancial interests and that "maximizing shareholder welfare is not the same as maximizing shareholder profits"); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L., Fin., & Acct. 247, 248 (2017) (arguing "that it "[I]t is too narrow to identify shareholder welfare with market value."). Note that this re-conceived shareholder primacy is not equivalent to stakeholderism, which would have managers consider non-shareholder interests even when in conflict with the financial and non-financial interests of investors.

63. Henderson & Malani, *supra* note 45, at 582–83.

order to advance social interests.[64] Broadening the concept of shareholder value maximization to include non-financial interests allows directors to address this investor demand as well as to exploit any comparative advantage that corporations might enjoy in delivering philanthropy.[65]

In the context of large, dispersely held public companies, however, this broader shareholder maximization norm raises several difficulties. In addition to potentially increasing agency costs, a point which is discussed below, there is the question of how to operationalize the inclusion of non-financial investor interests in corporate decision making — how to determine, in other words, which social missions to support and to what degree. As Professors Scott Hirst, Kobi Kastiel, and Tamar Kricheli-Katz's experimental evidence indicates, individual preferences with respect to sacrificing investment returns in the public interest are far from uniform.[66] Professors Hart and Zingales suggest the use of polling to determine and aggregate investor non-financial interests, but the more common approach is to assume that investors will sort themselves based on the degree and direction of pro-social activities embraced by corporations or investment funds.[67] While sorting is possible and perhaps likely, it is not inevitable or costless.[68] By contrast, the task of maximizing corporate financial returns alone is simpler, both conceptually and practically.

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64. *See* Scott Hirst et al., *How Much Do Investors Care About Social Responsibility?* 2023 WIS. L. REV, 977, 989–90, 1009 (2023) (summarizing survey evidence and providing original experimental evidence that the average individual is willing to sacrifice some investment gains to advance social interests).

65. Henderson & Malani, *supra* note 45, at 571; *see generally* Elhauge, *supra* note 60; Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1203 (1999).

66. Hirst et al., *supra* note 64, at 1015 (finding that 32% of experimental subjects were unwilling to sacrifice even small amounts to advance social interests).

67. *See, e.g.*, Henderson & Malani, *supra* note 45, at 589 (observing market segmentation into socially responsible and profit maximizing funds).

68. Hirst et al., *supra* note 64, at 1032–33 (discussing several obstacles to sorting including insufficient information regarding investment fund policies, fiduciary duty constraints on investment policies, and lack of variation among portfolio companies with respect to approaches to socially responsible operations).

2. *Agency Costs and Comparative Advantage*

Agency costs arise, inevitably, when the interests of agents (e.g., directors, officers, and employees) diverge from those of principals (e.g., shareholders).[69] One concern on the corporate agency cost front is that executives will direct a corporation's philanthropy towards "pet" charities that advance their personal interests in one way or another. As Professors Michael Porter and Mike Kramer put it, corporate charitable "contributions often reflect the personal beliefs and values of executives and employees" rather than being tied to business objectives.[70] Going further, Professors William Brown, Eric Helland, and Janet Smith argue that corporate philanthropy exacerbates agency costs whether managers use corporate funds to support their own "pet" charities or whether managers simply act under a belief, not shared by all investors, that corporations have a social responsibility beyond profit maximization.[71]

Another potential agency cost associated with corporate charitable contributions is increased executive entrenchment. In a study of corporate charitable contributions by Fortune 500 companies, Professors Masulis and Reza find that CEOs "appear to use corporate giving strategically to support charities in which independent directors have affiliations, possibly strengthening the CEO's social bonds with these directors and thereby weakening board independence."[72]

To be sure, other commentators are more optimistic about corporate philanthropy, minimizing the agency cost concern and highlighting the potential comparative advantage that corporations may have in engaging in philanthropy. Professors Henry Butler and Fred McChesney argue that corporate philanthropy is like any other corporate agency problem.[73] They note

69. Jensen & Meckling, *supra* note 52, at 308.

70. Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 6. An extreme example of this phenomenon might be Texaco's sixty-year sponsorship of the Metropolitan Opera's radio broadcasts which reportedly was prompted by a Texaco executive attempting to placate his opera-loving spouse after she learned of his extramarital activities. *Texaco and the Metropolitan Opera Broadcasts*, W. STATES MUSEUM OF BROAD., http://westmb.org/Exhibits/E_Texaco-Met.html (last visited Oct. 17, 2024).

71. William O. Brown et al., *Corporate Philanthropic Practices*, 12 J. CORP. FIN. 855, 856 (2006).

72. Masulis & Reza, *supra* note 44, at 631.

73. Butler & McChesney, *supra* note 65, at 1197.

that corporate philanthropy can generate value-adding goodwill for the firm.[74] Shareholders could donate individually in the name of the firm and create this goodwill, but donations emanating from the corporation may reduce transaction costs and combat free riding, thus creating a comparative advantage for corporate philanthropy.[75] Butler and McChesney accept that there will be agency problems and managerial slack,[76] but given the usual story about the limitations of judicial oversight,[77] they argue that it makes sense to give managers discretion in this realm as in so many others.[78] In a similar vein, Professors Todd Henderson and Anup Malani argue that corporate philanthropy likely reflects a mix of profit-seeking expenditure and agency slack, but they go on to argue that in certain cases corporations have a comparative advantage in delivering philanthropy given economies of scope and other benefits and that corporations should only engage in philanthropy when they have a cost or quality advantage.[79]

Going even further, Professor Einer Elhauge has argued that the agency cost concern with corporate philanthropy is overblown, that managerial discretion to sacrifice profits in the public interest is unlikely to increase the total amount of agency slack within a corporation, and thus that managerial decisions to sacrifice profits in the public interest must substitute for other, more personally beneficial forms of agency slack, such as excessive self-compensation.[80] Elhauge's argument is rooted in the idea that corporate philanthropy decisions generally are subjected to business judgment review like other operational decisions and thus that the cost of shareholder monitoring is

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74. *Id.* at 1203.

75. *Id.* at 1205.

76. "Slack" in this context refers to the divergence between an agent's actual, partially self-interested behavior and the behavior that would optimally serve the interests of the principal. *See, e.g.*, Junxiong Fang et al., *The CEO Horizon Problem and Managerial Slack in China*, 14 MGMT. & ORG. REV. 343, 345 (2018) (noting that "managerial slack promotes personal utility of managers at the expense of shareholders").

77. *See, e.g.*, Kenneth B. Davis Jr., *Once More, the Business Judgment Rule*, 2000 WIS. L. REV. 573, 580 (2000) (highlighting the "expertise" rationale for judicial deference to corporate directors as embodied in the business judgment rule, i.e., "business judgments are for the business experts – the directors and management – and judges and juries are ill-equipped to review them").

78. Butler & McChesney, *supra* note 65, at 1205.

79. Henderson & Malani, *supra* note 45, at 579, 590, 604.

80. Elhauge, *supra* note 60, at 805–07.

unaffected by rules or norms that allow corporate philanthropy.[81]

Several commentators, however, have questioned Elhauge's "fixed agency slack" view. For example, I have argued that increasing the possible channels of agency slack, e.g., by adding corporate philanthropy to the list of permissible managerial decisions, likely increases the cost of shareholder monitoring and thus the total amount of agency slack.[82] Professor Roy Shapira has argued that corporate philanthropy can be used to co-opt directors and other potential monitors, thus exacerbating agency costs.[83] In the broader context of stakeholderism, Professors Lucian Bebchuk and Roberto Tallarita have argued that stakeholderism would lead to greater managerial slack and agency costs by insulating managers from shareholder discipline and reducing accountability to shareholders.[84] This remains an important open and largely empirical question.[85]

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81. *Id.* at 807 (arguing that "[E]exercises of latent profit-sacrificing authority simply reflect the degree of agency slack managers enjoy under the business judgment rule; they do not increase it.").

82. David I. Walker, *The Manager's Share*, 47 WM. & MARY L. REV. 587 (2005). As I argued there, the impact of additional channels of agency slack on total agency costs may depend in part on the mechanism that determines managerial appropriation, which is contested. Under an optimal contracting model of the executive pay setting process, the key question would be whether shareholder monitoring costs would increase with the addition of a channel. Under the managerial power view of the pay setting process the question would be whether the investor outrage constraint is loosened with the addition of a channel of slack. It seems likely that under either model allowing executives to sacrifice corporate profits in the public interest would increase total agency costs, but this is largely an empirical question.

83. Roy Shapira, *Corporate Philanthropy as Signaling and Co-optation*, 80 FORDHAM L. REV. 1889, 1919 (2012) (arguing that corporate philanthropy "can be used by managers as mechanisms to co-opt independent directors, influence politicians, and entrench themselves by allying with activist stakeholders.").

84. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 165 (2020) (suggesting that stakeholderism would insulate managers and reduce accountability by inducing institutional investors to be more deferential and by inducing policy makers to adopt legal reforms with the same effect); *see also* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1465 (2006) (arguing that a socially responsible corporate governance scheme could lead to increased managerial slack as managers freed from a duty to account to shareholders might serve themselves rather than serving society).

85. John J. Donohue, *Comment on Elhauge: Does Greater Managerial Freedom to Sacrifice Profits Lead to Higher Social Welfare?*, *in* ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS: PERSPECTIVES FROM LAW,

B. *Is/When Is Corporate Philanthropy Legally Permissible?*

While corporate philanthropy may have been considered *ultra vires* at one point,[86] today most if not all corporate philanthropy is legally permissible under state and federal law. In all fifty states, traditional corporations are permitted by statute to make charitable contributions.[87] Moreover, despite some authority embracing shareholder primacy,[88] the caselaw of Delaware, far and away the most important jurisdiction for corporate America, explicitly authorizes charitable contributions.[89] Federal law plays a supporting role in this story authorizing deductions for certain charitable contributions by corporations in an amount capped at 10% of corporate profits each year.[90]

ECONOMICS, AND BUSINESS 77, 83 (Bruce L. Hay et al. eds., 2005) (questioning Elhauge's fixed agency slack claim and describing it as an empirical question).

86. Brown et al., *supra* note 71, at 859 ("[P]rior to the mid-1950s, the prevailing legal view was that corporate philanthropy was 'ultra vires.'").

87. Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 602–03 (1997); *see also* DEL. CODE ANN. tit. 8, § 122(9) (2024) ("Every corporation created under this chapter shall have power to: Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof.").

88. Delaware caselaw authority embracing shareholder primacy is scant and mostly old. *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders it would not be the duty of the courts to interfere."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("The corporate form . . . is not an appropriate vehicle for purely philanthropic ends . . . . Having chosen a for-profit corporate form . . . directors are bound by the fiduciary duties and standards that accompany that form. These standards include acting to promote the value of the corporation for the benefit of the shareholders. The 'Inc.' after the company name has to mean at least that. Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . .").

89. *See, e.g.*, Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (Del. Ch. 1969) (applying a reasonableness test in upholding the validity of a charitable contribution by a Delaware corporation).

90. Generally, corporations may deduct charitable contributions not in excess of 10% of taxable income. I.R.C. § 170(b)(2). Certain short-term exceptions are noted *infra* notes 130, 132. The federal tax code played a supporting role in some state court analyses of corporate philanthropy by providing a measure of reasonableness. *See, e.g.*, Theodora Holding Corp., 257 A.2d

The exact scope of a traditional corporation's power to engage in philanthropy remains subject to some debate but is of little practical significance. Professors Victor Brudney and Allen Ferrell divide corporate charitable contributions into three categories — gifts that are intended to produce "imminent, visible corporate operating gains" (clearly permissible), contributions that are intended to create corporate goodwill (also permissible), and gifts "for which absolutely nothing is received and that would be unauthorized [under state law] unless approved unanimously by the stockholders," in other words, *ultra vires*.[91] Professor Elhauge goes further arguing that managers of traditional corporations "have never had an enforceable legal duty to maximize profits, and that all state statutes authorize "unprofitable corporate donations." [92] Whether Elhauge's expansive view of corporate power in this realm is exactly right or not, surely he is correct in stating that "the law gives corporate managers considerable … discretion to sacrifice profits in the public interest."[93]

C. *Who Bears the Cost of Corporate Philanthropy?*

To the extent that corporate philanthropy is profit sacrificing, who bears the cost? We know that entities, such as corporations, cannot be the ultimate bearer of such costs, only individuals can. Elhauge argues that the managers bear the costs of profit-sacrificing corporate philanthropy. This is the upshot of his view that total agency costs are unaffected by corporate philanthropy.[94] Some commentators implicitly or explicitly assume that shareholders bear the cost of corporate philanthropy.[95] Tax scholars have devoted a great deal of effort

at 398 (IRC deduction limitations provide a "helpful guide" in determining the reasonableness of a corporate charitable contribution).

91. Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191, 1192–94 (2002); *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1417–18 (2020) ("It has long been accepted that directors and officers do not violate their fiduciary duties by devoting funds to a social cause, as long as the company explicitly states that it expects some benefit to flow back to it, however indirectly.").

92. Elhauge, *supra* note 60, at 738.

93. *Id.* at 733.

94. *Id.* at 805–07.

95. *See, e.g.*, Kahn, *supra* note 87, at 585 ("Because corporate contributions are funded from corporate profits, they are paid for–and therefore of special concern to–corporate shareholders.").

to an analogous question of who bears the cost or "incidence" of taxes, and so this seems a fruitful place to begin.

The extensive literature on the incidence of the corporate income tax suggests that while shareholders bear the burden or benefit of changes in corporate taxes in the short term, over the long haul the incidence of corporate taxes is shifted to a significant degree to non-corporate capital and to labor as investors move their capital in search of maximum after-tax returns.[96] However, while corporate philanthropy has sometimes been described as a "tax" on investors,[97] traditional contributional corporate philanthropy differs in important ways from corporate taxes, and this impacts incidence. Unlike corporate tax rates that apply systematically, corporate philanthropy is largely firm specific and endogenously determined. As a result, the cost of corporate philanthropy cannot be shifted outside the firm, and at least the cost of mid-course increases or decreases in corporate philanthropy generally is borne by current investors.[98] To be sure, there may be cases in which corporate philanthropy can be anticipated when a firm goes public, in which case a portion of the cost would likely be borne by the founders.[99] In addition, corporate philanthropy is sometimes directed at particular stakeholders, such as consumers or employees. In these cases, the cost of the corporate philanthropy may be borne in part by the targeted constituency. In general, however, it seems reasonable to assume that the bulk of the cost of conventional contributional corporate philanthropy is borne by investors.

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96. *See, e.g.*, CONG. BUDGET OFF., THE DISTRIBUTION OF HOUSEHOLD INCOME, 2018, at 43 (2021) (noting the lack of consensus among researchers as to the proper allocation of the corporate income tax and noting that the CBO allocates 75% of the burden to owners of capital in proportion to capital income and 25% to workers in proportion to labor income). I have argued elsewhere that systemic corporate agency costs, such as systemically excessive executive compensation, are analogous to corporate taxes and have similar incidence. *See* David I. Walker, *Who Bears the Cost of Excessive Executive Compensation (and Other Corporate Agency Costs)?*, 57 VILL. L. REV. 653 (2012).

97. Friedman, *supra* note 53 (analogizing profit sacrificing corporate activities to a tax imposed on shareholders by executives).

98. David P. Baron, *Corporate Social Responsibility and Social Entrepreneurship*, 16 J. ECON. & MGMT. STRATEGY 683, 695 (2007) (arguing that investors bear the cost of corporate philanthropy "surprises"). Of course, disgruntled investors can sell their shares but only at a lower price that reflects the markets assessment of the excess of the cost of the new philanthropic program over any additional investor utility arising from the philanthropy.

99. *Id.*

D. *Is Corporate Philanthropy More Heavily Subsidized than Stakeholder Philanthropy?*

Several commentators have raised concerns that corporate philanthropy may be more greatly subsidized than individual philanthropy, encouraging firms to contribute directly in lieu of distributing funds to stakeholders and letting the stakeholders manage their own philanthropy. Comparing direct corporate philanthropy to an alternative scenario in which a corporation distributes a dividend to a shareholder who then makes a charitable contribution, Professor Linda Sugin determined that, based on 1997 tax rates and rules, the funds available to the charity through the corporate philanthropy channel were 54% greater than those available via the shareholder philanthropy channel.[100] In 2009, Professors Henderson and Malani repeated and extended Sugin's analysis to include more scenarios and channels of philanthropy including the purchase of corporate altruism through shareholding, consumption of green goods, and employment by pro-social firms.[101] They concluded that the tax treatment of corporate versus stakeholder philanthropy was inconsistent and incoherent.[102]

In a separate Article, I further extend these analyses and update them for the 2017 enactment of the Tax Cuts and Jobs Act (TCJA) which significantly reduced the tax subsidy for corporate philanthropy but which also resulted in a 63% cut in the fraction of individuals who itemize tax deductions, which favors direct corporate philanthropy.[103] I find that the degree of subsidy or the tax "efficiency" of corporate relative to individual philanthropy is highly variable and depends on which stakeholder "pays" for the corporate philanthropy and how, tax rates (of course), and whether individuals itemize deductions and whether corporations have net operating losses.[104] At current tax rates, however, outsized subsidies for corporate philanthropy result to a large degree from the constriction in itemizing that followed from the TCJA.[105] And many would

100. Linda Sugin, *Theories of the Corporation and the Tax Treatment of Corporate Philanthropy*, 41 N.Y. L. SCH. L. REV. 835, 857 n.103 (1997).
101. *See* Henderson & Malani, *supra* note 45, at 625–27.
102. *Id.* at 612.
103. David I. Walker, *Reassessing Corporate Philanthropy from a Tax Perspective*, 28 FLA. TAX REV. (forthcoming 2024) (manuscript at 5) (on file with author).
104. *Id.* at 22–26.
105. *Id.* at 27.

view the effective restoration of deductions for what would be individual charitable contributions by non-itemizers as a positive feature of the system rather than as a bug. Moreover, from a tax policy perspective, corporate philanthropy is shown to provide numerous advantages over individual philanthropy that have not been discussed or emphasized in the literature. Corporate philanthropy mitigates the "upside-down" effect of the individual deduction for philanthropy[106] and the windfall arising from stakeholder contributions of appreciated securities,[107] is highly responsive to tax incentives, often provides utility to multiple stakeholders, and even transfers some of the cost of U.S. philanthropy to non-U.S. stakeholders.[108]

III. THE SHIFT TO OPERATIONAL CORPORATE PHILANTHROPY — ISSUES AND CONCERNS

This Part considers how the evolution in corporate philanthropy impacts the corporate governance, tax and other concerns discussed in the previous Part. In short, while the shift from contributional to operational philanthropy that is associated with the rise of the ESG movement and advent of PBCs likely increases the comparative advantage of corporate philanthropy, it is also likely to heighten agency cost concerns, add complexity to the incidence analysis, and increase the difficulty of regulating corporate philanthropy via taxation or otherwise. The impact of the shift towards operational philanthropy on shareholder primacy concerns is nuanced.

A. *Operational Philanthropy Incidence*

As an initial matter, by appealing to more stakeholders or constituents, the PBC and ESG movements add complexity to

106. *Id.* at 30. The "upside-down" effect refers to the fact that tax benefits structured as deductions more greatly subsidize activity, here, philanthropy, by high bracket individuals than by lower bracket individuals. The upside-down effect is particularly important in this setting because the types of charities supported by higher and lower income individuals differ systematically. *Id.* at 11.

107. *Id.* at 30. High income individuals often use appreciated securities in fulfilling philanthropic commitments thus avoiding tax on gains. Corporations that contribute appreciated securities can take advantage of the same opportunity, but I can find no evidence that they routinely do so. *Id.* at 9.

108. *Id.* at 25–30.

the corporate philanthropy incidence analysis. Of course, corporations have always used philanthropy to appeal to workers and consumers, but it seems likely that the cost of conventional contributional philanthropy beyond the financial return was largely absorbed by investors. Today, the net cost of a new firm committing to PBC status or of a traditional firm embracing ESG initiatives may be borne by a cluster of stakeholders in idiosyncratic fashion depending on the firm and its particular philanthropic mission.

Consider the following examples of operational philanthropy:

- An established oil company commits to forgoing hydraulic fracking or other environmentally harmful extraction techniques reducing potential profits. Unless oil consumers are willing to pay more for marginally greener fuel or employees are willing to accept less pay, both of which seem unlikely, shareholders of this company are likely to bear the cost of this commitment.
- An established auto manufacturer incurs increased production costs to replace some gas fueled vehicles with electric cars. It is conceivable that consumers concerned with global warming and/or wishing to project such a concern would bear most or all of the increased cost through higher prices. Investors would bear the rest. It is unlikely that employees of an established automaker would receive sufficient utility from this shift to cause them to accept less pay or other benefits.
- A newly formed manufacturer sells nothing but high production cost electric cars. The incidence here would be similar to the case just above except that the founders might bear some of the cost, employees who gain utility from working for a green manufacturer would be more likely to bear a portion of the cost, and investors, particularly those who gain utility from supporting green manufacturers, would bear a portion of the cost.
- An established company commits to improving DEI and expends funds on work-force training.

> It is conceivable that consumers and employees might bear some of this cost if they can be convinced to pay more for the products of such a company or accept lower compensation to work there. More likely, investors will bear this cost.

I do not want to overstate the difference between the incidence of operational and contributional philanthropy. Certain factors tend to homogenize the incidence question. Employment relationships, for example, are sticky. While ESG efforts may appeal to some workers, they may hold little or no appeal for others. But the difference may be insufficient to cause many workers to change jobs. Investors may sort themselves based on their ESG preferences but the driving force to do so and thus bear some of the costs of operational philanthropy may be insufficient to cause them to abandon their S&P 500 index fund. Despite these caveats, the bottom line is that, as a result of the shift in approach to corporate philanthropy, it is increasingly difficult to determine who bears the cost.[109]

B. *Isolating Operational Philanthropy*

It is also more difficult to distinguish between profit-seeking and profit-sacrificing behavior with respect to operational than contributional philanthropy. To be sure, it may be difficult to discern whether a corporate cash gift is expected to produce a near immediate financial return, a long-term financial return, or little or no financial return at all, but it is relatively easy to at least isolate the contribution. Costs associated with operational philanthropy share this difficulty, but those costs may not be distinguishable at all from profit-seeking expenditures. Compare, for example, Acme Corp. which contributes $10,000 to a public charity that provides job training for inner city youths, with Beta Corp. that increases spending on training its own work force from $40,000 to $50,000. Or, moving beyond expenditure, perhaps Acme contributes $1 million to a charity that

109. It is even possible that that the incidence of operational philanthropy might approach that of the corporate tax. Imagine a scenario in which virtually all publicly traded U.S. firms were compelled to divert resources to charitable missions as a result of institutional investor pressure. The incidence in this hypothetical is much less clear. Systemic, essentially exogenous pressure may be analogous to a corporate income tax. Current thinking suggests that the cost may be shifted to some degree to non-corporate capital and labor.

seeks to advance and secure online privacy while Beta rejects, on privacy grounds, an opportunity to sell its customers' data for $1 million. The analyst following Beta will not only have to determine whether the cost/revenue loss was profit-sacrificing, she will, in all likelihood, have to estimate the magnitude of the cost/revenue loss, unless Beta opts to estimate and disclose the information itself.

With these differences in mind, we now reassess the comparative advantage, agency costs, and other features of corporate philanthropy with a focus on operational philanthropy.

C. *Comparative Advantage*

For a variety of reasons, corporations may enjoy an advantage in engaging in philanthropy directly vis-à-vis leaving philanthropical initiatives and decisions with stakeholders. Consider first purely disinterested philanthropy. Professors Henderson and Malani suggest that a corporate philanthropy comparative advantage could arise from, inter alia, taking advantage of economies of scope to reduce the cost of providing public goods, bundling philanthropy with other goods or services to limit free-riding, or tailoring philanthropy to satisfy the demands of investors, consumers, or employees.[110] In addition, multiple firm stakeholders may enjoy a warm glow from a corporation's disinterested philanthropy while the warm glow associated with stakeholder philanthropy would generally stop with the stakeholder.

To be sure, purely disinterested contributions may be the exception. In many cases, even profit sacrificing corporate philanthropy may serve some business purpose, akin to advertising, and to this extent corporations enjoy a comparative advantage in making these contributions. Also, firms undoubtedly have a comparative advantage with respect to non-cash contributions of company property. Except for the last, however, each of these sources of corporate philanthropy comparative advantage would apply equally to conventional contributional philanthropy as to PBC or ESG-based operational philanthropy.

But the comparative advantage of corporate operational philanthropy is likely to be quite different and often much greater than that of traditional contributional philanthropy.

110. Henderson & Malani, *supra* note 45, at 590–97.

Individual shareholders simply cannot replicate operational adjustments undertaken to advance many social missions, and, in at least some cases, individual cash contributions by stakeholders will not provide the same impact on society as these operational adjustments. Consider, for example, an oil company committing to leave recoverable oil reserves in the ground, a manufacturing company deciding to keep a marginally unprofitable factory open in a rust belt city in lieu of shuttering the plant and sending the work overseas, or any company investing in employee training to heighten awareness of DEI issues within the workplace. The comparative advantage of corporate operational philanthropy in cases like these could be many times that of individual philanthropy.[111]

D. *Agency Costs*

At the same time, however, the agency costs of operational philanthropy are likely to be larger than those of contributional philanthropy. To begin, all of the agency costs concerns associated with contributional philanthropy—donations to executives' pet charities, executives' tastes for corporate philanthropy exceeding that of stakeholders generally, and increased executive entrenchment—apply equally to operational philanthropy.

However, the agency costs associated with operational philanthropy could be significantly greater than those associated with operational philanthropy for several reasons. First, as noted above, compared with cash contributions, it may be more difficult to identify operational philanthropy and distinguish it from profit-seeking expenditures.[112] It may be less clear, in other words, that there is or potentially is an agency problem. Second, operational philanthropy will often involve a great many operational and financial decisions that would be opaque to investors and simply more difficult to monitor. Third, given less clarity regarding the incidence of operational philanthropy, investors may have less of an incentive to monitor

111. Professors Hart and Zingales argue that corporate contributions are separable from profit generation and generally should be determined by stakeholders, but that ethical activities of corporations often are inseparable. They use the example of Walmart selling high-capacity weapons and suggest that "transferring profit to shareholders to spend on gun control might not be as efficient as banning the sales of high-capacity magazines in the first place." Hart & Zingales, *supra* note 62, at 249.

112. *See supra* Part III.B.

corporate operational philanthropy. Fourth, both the ESG and PBC movements countenance more significant deviations from profit maximization than one would associate with traditional contributional philanthropy of otherwise profit maximizing firms. Fifth, boards are increasingly tying a portion of executive compensation to operational philanthropy in the guise of ESG,[113] complicating executive pay and adding further scope for managerial value appropriation. Each of these factors tend to raise the upper bound on the divergence from shareholder wealth maximization.

Consider, for example, human capital management, which is a common element of ESG programs.[114] Providing job training has long been considered a best, i.e., profit-maximizing, business practice, but some firms may be going further today as an element of their ESG programs.[115] Will they go too far from a shareholder wealth maximization perspective? The forgoing provides several reasons to be concerned: It may be difficult to contest management arguments that training investments are profit maximizing. It may be difficult to even isolate and quantify such investments. Investors may be less inclined to pursue the issue if they believe that the cost will be borne by the workforce. Management may enjoy the support of major investors who embrace the ESG movement. Executive pay may even be tied to employee training metrics.

These are all reasons to be concerned in a general sense that ESG-motivated employee training programs may suffer from enhanced agency costs. But why would management spend excessively in this area even if they can get away with it? There could be any number of self-interested reasons. One study, for example, has found that companies are more employee-friendly along a number of dimensions if managers

113. MERIDIAN COMP. PARTNERS, LLC, 2020 EXECUTIVE COMPENSATION TRENDS AND DEVELOPMENTS SURVEY 3 (2020) (reporting that 20% of large companies surveyed in 2020 had adopted ESG-related compensation metrics for their senior management teams).

114. George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 639 (2021) (describing human capital management as "an expansive concept that has been used to refer to workforce training, compensation and retention issues, gender pay equity, diversity and inclusion, health and safety, matters related to corporate culture," etc.).

115. *See id.* at 667–68 (noting that human capital management emerged as an area of focus for BlackRock CEO and leading ESG proponent Larry Fink in 2017).

and employees live in close proximity and posits an agency cost explanation, i.e., that managers' private costs and benefits of employee relations are magnified when managers and employees are neighbors.[116] Protecting local jobs or investing in job training, in other words, might be profit-maximizing, it might be profit-sacrificing but contribute to investor utility, or it might simply reflect agency costs.

The difficulty of distinguishing between business as usual and operational philanthropy likely also contributes to the practice of corporate greenwashing. Greenwashing refers to the dissemination of false, misleading, or cherry-picked disclosures, often environmental disclosures, intended to place a company in a positive light with consumers and other stakeholders.[117] The practice of greenwashing increases the difficulty of assessing operational philanthropy in the environmental realm and likely undermines consumer and market confidence in claims of truly green firms in addition to greenwashers.[118] As such, greenwashing is a major concern within the ESG movement at both the firm and investment fund level.[119] While troubling from a consumer or social perspective, greenwashing could add value for shareholders of some companies, at least over the short or medium term. But greenwashing could instead or in addition be a product of managerial agency

116. Augustin Landier et al., *Trade-offs in Staying Close: Corporate Decision Making and Geographic Dispersion*, 22 REV. FIN. STUD. 1119, 1120-23 (2009) (gauging employee friendliness based on levels of employee retirement and healthcare benefits, profit-sharing, union relations, and employee involvement). The authors also find evidence supporting an information cost basis for disparate treatment of in-state and out-of-state employees. *Id.*

117. *See* Valentina Lagasio, Measuring Greenwashing: The Greenwashing Severity Index 2 (Sept. 25, 2023) (unpublished working paper) (defining greenwashing as the "deceptive practice of exaggerating or misrepresenting a company's sustainability efforts").

118. *See* Thomas P. Lyon & A. Wren Montgomery, *The Means and End of Greenwash*, 28 ORG. & ENV'T 223, 229 (2015) (citing studies finding that "exaggerated or misleading environmental claims have led to consumer skepticism about green claims in general . . . suggesting impacts of deception broadly, and greenwash more specifically, on social welfare.").

119. In 2022, the SEC issued proposed rules that would require investment funds to provide enhanced ESG disclosures "designed to create a consistent, comparable, and decision-useful regulatory framework for ESG advisory services"). Enhanced Disclosure by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, Securities Act Release No. 11068, Exchange Act Release No. 94985, Investment Company Act Release No. 34594, 87 Fed. Reg. 36654 (proposed May 25, 2022).

costs. Managers might receive enhanced compensation,[120] non-pecuniary benefits, and/or greater job security from being thought to lead a "green" company.

To be sure, if Professor Elhauge is right that total corporate agency costs are limited by the amount of discretion permitted under corporate law's business judgment rule doctrine and thus are essentially fixed, expansion of agency slack through adoption of operational philanthropy like ESG is not a concern.[121] For the reasons discussed above, however, I lack his confidence.[122]

E. *Shareholder Primacy*

The shift towards operational philanthropy both simplifies and complicates shareholder primacy concerns. Consider first PBCs, which adopt social missions in their charters. Doing so clarifies and confirms that maximizing investor returns is not the entity's sole mission. No one investing in a PBC can complain if management fails to maximize the share price, which is simplifying to some degree. Presumably, however, the executives of a PBC should not ignore share value. Profitability should be a co-equal or at least a strong secondary aim of a PBC, which creates obvious questions such as: How much profit should a PBC sacrifice in pursuit of its social mission? In this sense shareholder primacy, or perhaps we should say shareholder priority,[123] concerns may be more difficult to manage in PBCs than in traditional for-profit corporations.

Now consider traditional public corporations that have adopted ESG missions. While some companies' ESG statements seem to run directly counter to shareholder primacy,[124]

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120. *See* MERIDIAN COMP. PARTNERS, *supra* note 113, at 3 (reporting on linkage between ESG performance and executive pay).

121. *See* Elhauge, *supra* note 60, at 843; *see also* Gillan et al., *supra* note 27, at 4-5 (reporting mixed evidence on the question of whether executive pay is reduced to reflect non-pecuniary benefits associated with ESG efforts).

122. *See* Walker *supra* note 82 and accompanying text.

123. While "primacy" suggests preeminence, "priority" may encompass any rank or position within a hierarchy, e.g., "first, second, or third priority."

124. In 2020, for example, BP announced a goal of reducing oil and gas production by 40% within a decade. *See* Stanley Reed, *BP Reports a Huge Loss and Vows to Increase Renewable Investment*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/08/04/business/energy-environment/bp-renewable-investment.html. BP has since backtracked on that commitment. *See* Stanley Reed, *BP, in a Reversal, Says It Will Produce More Oil and Gas*, N.Y. TIMES (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/business/bp-oil-gas-profits.html.

the reality is more complex. First, as noted, the incidence of such philanthropy is complex. The costs of profit-sacrificing ESG activities may be borne by shareholders, but they may be borne by consumers or employees as well as or instead of shareholders. Second, consider firms prioritizing the environmental prong of ESG. Many environmental missions involve reducing externalities. For diversified investors, reductions in externalities produced by Firm A may reduce profits at Firm A but enhance profits at Firms B, C and D.[125] As a result, a very broad conception of investor welfare would include both direct and indirect financial returns.[126] Conventional contributional philanthropy, by contrast, is unlikely to produce significant spillovers of this nature such that externalities or portfolio effects can reasonably be ignored in contemplating even a very broad conception of shareholder welfare.

Third, more generally, there is growing recognition that investors care about more than financial returns and that investor utility properly includes non-financial utility arising from investor association with firms that share their ESG priorities.[127] The persuasiveness of this response to the shareholder primacy concern, however, depends on the ability of investors to sort themselves into firms or funds that reflect their social priorities, a point that is taken up in Part IV below.

F. *Taxation and Prescriptive (Non-Disclosure-Based) Regulation*

The shift in emphasis from contributional to operational corporate philanthropy has significant consequences for the taxation and regulation of corporate philanthropy. In addition to complicating the incidence picture, as discussed above,[128] the shift increases the difficulty of regulating or manipulating corporate philanthropy through the tax code or through other prescriptive, i.e., non-disclosure-based, means.

Let us first dispose, however, of what I believe to be a relatively unimportant tax consequence of the shift to operational

125. *See* Condon, *supra* note 45, at 37.

126. *See* Bartlett & Bubb, *supra* note 5, at 18 (describing, but ultimately rejecting, the portfolio value maximization strand of shareholder welfarism which require company executives to consider investor portfolio effects in decision making).

127. *See supra* Part II.A.1.

128. *See supra* Part II.C.

philanthropy. Corporate contributional philanthropy is deductible under I.R.C. § 170 while operational philanthropy generally is deductible under § 162.[129] The shift from deduction under § 170 to § 162 has two primary effects. First, it removes the limitation, set at 10% of profits, on deductible contributions.[130] However, given that U.S. corporations contribute less than 1% of profits to charity annually, on average,[131] plus the fact that corporations can carry forward excess contributions for up to five years,[132] it doesn't appear that the 10% limitation has much bite anyway. Second, some expenditures otherwise deductible under § 162 must be capitalized and recovered over time through depreciation deductions or other capital recovery provisions. This seemingly important difference is in fact relatively unimportant given that Congress has for many years allowed very rapid recovery of capitalized costs through "bonus" depreciation or other special "expensing" provisions and very taxpayer-friendly depreciation rules.[133] In other words, the economic difference between outright deduction and capitalization/recovery of expenses is today relatively trivial.

Turning to the more important consequences, several commentators including Friedman and Sugin have called for eliminating the corporate tax deduction for corporate philanthropy, which they believe to be unwarranted.[134] Readers particularly concerned with the shareholder primacy or

129. I.R.C. § 162 allows deductions for trade or business expenses. I.R.C. § 170 allows deductions for charitable contributions.

130. I.R.C. § 170(b)(2)(A).

131. According to Giving USA, aggregate corporate charitable giving as a fraction of pre-tax profits has not exceeded 1% since 2003. GIVING USA FOUND., *supra* note 13, at 358.

132. I.R.C. § 170(d)(2)(A).

133. *See* Edward Fox, *Does Capital Bear the U.S. Corporate Tax After All? New Evidence from Corporate Tax Returns*, 17 J. EMPIRICAL LEGAL STUD. 71, 87–89 (2020) (finding that as a result of "bonus" depreciation and other factors, the difference between the actual corporate income tax and a hypothetical income tax allowing for immediate deduction of all capital expenditures was essentially negligible over the 1995-2013 period and arguing that "some form of highly accelerated depreciation" should be considered the "baseline" for analysis). Given the irrelevance of the § 170/§ 162 distinction, the shift from contributional to operational philanthropy has no impact on the relative subsidy for corporate versus stakeholder philanthropy. *See* Walker, *supra* note 103, at 8.

134. FRIEDMAN, *supra* note 54, at 135 (arguing that there is "no justification for permitting deductions for [corporate] contributions to charitable" enterprises); Sugin, *supra* note 100, at 873–77 (suggesting recharacterizing and taxing corporate philanthropy as individual philanthropy).

agency problems associated with corporate philanthropy might be tempted to agree. However, as this section explains, it is increasingly impractical to curtail the tax subsidy for corporate philanthropy. Other commentators, such as Professors Henderson and Malani, have argued that the tax playing field between corporate and individual philanthropy should be leveled to avoid distorting decision making with respect to the delivery of corporate profits for the public good.[135] This section will explain why, given the shift from corporate contributional to operational philanthropy, any leveling would necessarily require adjustments to stakeholder, not corporate, tax treatment.

It is increasingly impractical to eliminate, curtail, or cap the corporate deduction for philanthropy because corporate philanthropy is increasingly indistinguishable from ordinary and necessary profit-seeking business expense deductible under § 162. Of course, to some extent, it has always been difficult to distinguish profit-sacrificing philanthropy from similar profit-seeking activities. Most corporate charitable giving can be justified to shareholders and the tax authorities as being akin to (deductible) advertising — an investment that will provide returns in excess of cost over the short or long term. To be sure, not all philanthropic campaigns will produce positive net present value results, but this is also true of conventional (and deductible) advertising, research and development efforts, etc. In any of these cases, the expenditures may be plausibly justified ex ante despite a failure to produce positive results ex post even if the expenditures were actually unjustified (economically) ex ante. But absent a smoking gun memo or something along those lines, distinguishing between profit-seeking and philanthropic endeavors is virtually impossible.

Imagine then that Congress were to reduce or repeal tax deductions for charitable contributions by corporations.[136] In many cases, managers of affected companies should be able to restructure or recharacterize their expenditures as profit-seeking expenses deductible under § 162.[137] Given the

135. Henderson & Malani, *supra* note 45, at 577.

136. Under current law, corporations may deduct charitable contributions not in excess of 10% of taxable income, although they are permitted to carryforward excess contributions for five years. I.R.C. § 170(b)(2), (d)(2). Further restrictions apply to contributions of particular types of property. *See* I.R.C. § 170 *passim*.

137. *See* Sugin, *supra* note 19, at 150–51 (arguing that the IRS and the "courts are ill-equipped to determine whether a particular payment to a

difficulty of determining whether charitable activity enhances corporate goodwill, the IRS would be in an unenviable position in seeking to challenge these characterizations.[138]

The gradual replacement over time of corporate charitable giving by the ESG efforts of traditional corporations and entities incorporating as PBCs only exacerbates this problem. Although some ESG or PBC activities consist of contributional philanthropy, much of this philanthropy consists of making operational decisions that advance social or environmental causes, but adversely impact the bottom line. I see no way of allowing deductions for profit-seeking business expenses but disallowing deductions for similar but profit-sacrificing expenses incurred to advance these causes.[139]

If it were practical to distinguish between profit-seeking and profit-sacrificing activities, eliminating the corporate deduction for the latter would tend to discourage corporate philanthropy. Of course, this would be a very blunt response. Henderson and Malani's more modest proposal is to level the tax playing field so that tax plays no role in determining the channel of philanthropy flowing from corporate profits.[140] However, for the reasons just discussed, approaching this problem from the side of the corporate tax deduction is increasingly impractical.[141] Leveling from the stakeholder tax perspective, on the

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nonprofit institution . . . qualif[ies] as a section 162 expense, or . . . for a deduction under section 170," rendering the distinction unenforceable).

138. *See id.* at 150.

139. The test for deductibility of business expenses is whether the expenses are "ordinary and necessary." 26 U.S.C. § 162. While profit-sacrificing expenses might be viewed by the lay person as neither ordinary nor necessary, in reality the ordinary and necessary test works to distinguish personal or capital expenditures from business expenditures. *See, e.g.*, Comm'r v. Tellier, 383 U.S. 687, 689–90 (1966) (noting that Supreme Court tax case "decisions have consistently construed the term 'necessary' as imposing only the minimal requirement that the expense be 'appropriate and helpful,'" while the "principal function of the term 'ordinary' in § 162(a) is to clarify the distinction, often difficult, between those expenses that are currently deductible and those that are in the nature of capital expenditures . . . . ") (citations omitted). Whatever the motivation, I cannot see the IRS challenging a deduction for, say, more expensive sustainably sourced materials on the basis that the expenditure was not ordinary or necessary. The expenditure is not personal or capital.

140. Henderson & Malani, *supra* note 45, at 577.

141. To be sure, the problem of corporate philanthropy masquerading as ordinary and necessary business expense could be avoided by eliminating the corporate income tax. This was Milton Friedman's preferred response, but one that he recognized was out of reach. FRIEDMAN, *supra* note 54, at 132–33.

other hand, is possible and would in some cases be directionally consistent with widely advocated tax policy goals.

As I discuss in a separate paper, at current tax rates, the two largest discrepancies between the tax treatment of corporate and stakeholder philanthropy arise because of (1) our failure to allow deductions for charitable contributions to non-itemizing individuals (advantages corporate philanthropy) and (2) our failure to tax unrealized gains on appreciated property contributed by individuals (advantages stakeholder philanthropy).[142] Allowing a universal "above-the-line" deduction for all individual charitable contributions and treating charitable gifts as realization events would go a long way towards neutralizing the tax treatment of corporate and stakeholder philanthropy.[143]

Before moving on it is worth noting that non-tax prescriptive methods of regulating operational corporate philanthropy are as fraught with difficulty as tax methods. For example, one could possibly imagine a corporate law response, specifically an amendment to Delaware corporate law prohibiting or discouraging corporate philanthropy, perhaps by imposing onerous procedural requirements on firms engaging in philanthropic activities. But, of course, the problem with doing

142. *See* Walker, *supra* note 103.

143. A universal or "above-the-line" deduction would be available to all taxpayers whether they itemize deductions or take the standard deduction. Many commentators propose universal deduction of individual charitable contributions above an income-based floor. The idea is that most taxpayers would give a certain amount to charity irrespective of a tax deduction, so allowing a deduction for the first dollar contributed would be wasteful. *See, e.g.*, C. EUGENE STEUERLE ET AL., DESIGNING AN EFFECTIVE AND MORE UNIVERSAL CHARITABLE DEDUCTION 9 (Tax Pol'y Ctr. 2021) (proposing a universal (above-the-line) deduction for charitable contributions above a floor of one to two percent of adjusted gross income). Full deductibility of individual charitable contributions would be most consistent with leveling corporate and stakeholder philanthropy. Thus, we have a trade-off. My inclination would be to set a modest floor on the individual deduction—sacrificing some leveling for a more efficient tax subsidy. Interestingly, the most commonly offered reform proposal for the taxation of individual charitable contributions—replacing the current deduction with a uniform tax credit—is less effective than a regime of broad deductibility in terms of leveling the playing field between corporate and individual philanthropy, as a uniform credit would create differences in the relative tax subsidy of corporate philanthropy between high and low bracket investors. As shown in the Appendix of the companion article to this one, one of the requirements for neutral tax treatment of corporate and investor or employee philanthropy is that corporate returns to individuals and charitable gifts by individuals be taxed at the same rate. A uniform credit for individual philanthropy would result in at least some stakeholders facing a different tax rate on corporate returns and charitable gifts. *See* Walker, *supra* note 103.

so would be exactly the same as the problem with curtailing tax deductions. It would be difficult to distinguish between profit-seeking and profit-sacrificing expenditures, particularly with respect to operational expenses. Imposing costs on suspected profit-sacrificing expenditures would inevitably squelch profit-seeking activities as well. Given the business judgement rule and other features of corporate law that prioritize managerial discretion,[144] it is difficult to imagine judges or regulators second-guessing managerial decisions as to what expenditures are profit-seeking.

Careful readers will note that I have attempted to carve out disclosure-based regulation from the preceding discussion of tax or prescriptive regulation. Often when prescriptive regulation of corporate activity is particularly fraught with difficulty as with, for example, the regulation of executive compensation, we turn to disclosure-based strategies in order to minimize unintended consequences. That possibly is taken up in Part IV.

IV.
Towards a Disclosure-Based Approach to Operational Philanthropy

In my view, the primary challenge of operational philanthropy is to ensure that corporate disclosures minimize agency costs and facilitate investor, employee, and consumer sorting based on companies' philanthropic efforts and achievements. The challenge is formidable because of the opacity of operational philanthropy and the difficulty of distinguishing operational philanthropy from business as usual, which, of course, is one reason that greenwashing is common and effective and which is why applying differential tax treatment

144. *See* Robert Charles Clark, Corporate Law § 3.4 (1986) (explaining "that the business judgment of the directors will not be challenged or overturned by courts or shareholders, and the directors will not be held liable for the consequences of their exercise of business judgment — even for judgments that appear to have been clear mistakes — unless certain exceptions apply."). In Delaware, corporate executives receive further insulation against claims of negligence by charter provisions promulgated pursuant to Section 102(b)(7) of Delaware General Corporation Law, which permits exculpation of directors and officers against claims for money damages, with exceptions for claims based on managerial self-interest, bad faith, or knowing violation of law.

to operational philanthropy is such a daunting prospect. This is not the place for a thorough examination of the disclosure issues relevant to operational philanthropy.[145] Instead, I will offer a few tentative observations focusing on the SEC's recent ESG disclosure efforts which can be seen as addressing the agency cost and sorting challenges.

A. *The Importance of Effective Disclosure*

As discussed above, one response to shareholder primacy concerns associated with corporate philanthropy lies in investor sorting based on the charitable philosophy and performance of firms and/or investment funds.[146] As Professors Hirst, Kastiel, and Kricheli-Katz point out, however, insufficient information on fund investment policies is one potential obstacle to such sorting.[147] Reliable, consistent, and comparable disclosure of operational philanthropy goals and achievements facilitates sorting.

At the same time, the opacity of operational philanthropy heightens agency cost concerns which can be mitigated only if investors or intermediaries have access to information. In other words, reliable, consistent, and comparable disclosure of operational philanthropy goals and achievements also helps limit agency costs. Agency cost mitigation requires more than just information; but information is a prerequisite for agency cost mitigation.

To be sure, no amount of reporting or transparency will totally eliminate agency costs or resolve the fundamental tensions inherent in multiple mission corporations: How much

145. The explosion of corporate ESG efforts and ESG investing has led to a plethora of articles on disclosure, most of which are relevant to the transition from contributional to operational philanthropy. *See, e.g.*, Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201 (1999) (predating the ESG movement, but discussing the possibility of SEC-required social disclosures); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 501 (2020); Georgiev, *supra* note 114, at 644; Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1827–28 (2021); Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 69 (2020).

146. *See supra* note 11 and accompanying text.

147. Hirst et al., *supra* note 64, at 1032–33. While these authors reasonably focus on discerning investment fund policies, transparency and disclosure must start at the firm level.

corporate philanthropy is appropriate? Which missions should be embraced? But, again, as long as potential investors have sufficient choices between corporations pursuing various transparent combinations of profit-seeking and socially oriented missions, these questions are somewhat less important. The bottom line is that the goals of minimizing agency costs and facilitating stakeholder sorting are aligned and likely have a common response in effective disclosure.

B. *The Current Disclosure Landscape*

Disclosure rules and practices vary considerably for contributional and operational corporate philanthropy. Consistent with the IRS's private foundation rules, contributions that are funneled through corporate foundations must be disclosed annually to the IRS on forms that are then made public.[148] There are, however, no mandatory disclosure requirements for direct corporate charitable contributions and voluntary disclosure is spotty. One report from 2000 indicated that fewer than fifteen percent of Fortune 100 companies revealed direct charitable giving and even fewer disclosed the names of recipient organizations.[149] One potential explanation for the lack of a general SEC disclosure regime for corporate contributional philanthropy might be that the agency cost and sorting concerns associated with such philanthropy simply are not that substantial.

Turning to operational philanthropy, consider first PBCs. PBCs must define and announce a public benefit and provide regular reports on their success in meeting their public

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148. I.R.S. Form 990-PF: Return of Private Foundation or Section 4947(a)(1) Trust Treated as Private Foundation (2023). This disclosure requirement does not guarantee transparency. Professor Patricia Banks has recently analyzed the websites of Fortune 100 companies and their foundations and has found that "[o]nly 4.5% of the companies provide a searchable grant database, only 7.5% offer a categorized grants list, and just 7.5 % provide online access to their 990-PF filings." Patricia A. Banks, *The Transparency Problem in Corporate Philanthropy*, MIT SLOAN MGMT. REV. (Dec. 19, 2022), https://sloanreview.mit.edu/article/the-transparency-problem-in-corporate-philanthropy/.

149. Sara A. Morris & Barbara R. Bartkus, *Look Who's Talking: Corporate Philanthropy and Firm Disclosure*, 5 INT'L J. BUS. & SOC. RSCH. 1, 2 (indirectly citing an SEC report); *see also*, Banks, *supra* note 148 (noting that despite demands for ESG transparency, "philanthropy remains an . . . almost entirely opaque sphere of corporate activity.").

benefit goals.[150] Thus, ideally, philanthropically-oriented investors can select a PBC from a menu of firms offering different philanthropic missions and monitor the firm's philanthropic performance. While this is a step in the right direction, in all likelihood the practice today falls woefully short of the ideal. Professors Fisch and Solomon argue that PBC mission statements tend to be excessively vague and advocate greater specificity to allow stakeholders and regulators to monitor PBC performance, ensuring accountability with respect to a PBC's mission and acting as a check against PBCs drifting back towards shareholder primacy.[151] Providing for real investor choice among PBC missions is another, clearly related, justification for demanding more specificity and transparency.

Arguably, the ESG movement also represents a step in the direction of more accountable corporate philanthropy. Over ninety percent of S&P 500 companies issue annual "sustainability" reports that include objectives and results of philanthropic activities, writ large. Voluntary sustainability reporting has been driven by institutional investors and represents a major source of data on ESG and operational philanthropy. These reports allow philanthropically-minded stakeholders to match their corporate affiliations with their own philanthropical objectives as well as monitor ESG performance and limit agency costs. Of course, some skeptics would argue that these sustainability reports are largely window dressing, or "greenwashing" in the ESG parlance.[152] Others would point out that, even if

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150. *See* DEL. CODE ANN. tit. 8, §§ 362, 366 (2024); *see also, supra* notes 31–33 and accompanying text.

151. Fisch & Solomon, *supra* note 30, at 2, 20.

152. Coming from the opposite direction, other skeptics might argue that the ESG movement has been so successful that U.S. equity investors no longer have pure profit-maximizing options—that all firms are now essentially required to embrace environmental and social missions—and thus that shareholder sorting is illusory. But I do not believe we are quite there yet. Many firms and investors embrace ESG only to the extent that doing so improves the bottom line. *See, e.g.*, Brandon Boze et al., *The Business Case for ESG*, CORP. GOVERNANCE RSCH. INITIATIVE: STAN. CLOSER LOOK SERIES, May 23, 2019, at 1 https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-77-business-case-esg.pdf (noting that investor ValueAct Capital "generally incorporates ESG factors into its [investment] process by identifying relevant stakeholders and factors, isolating and evaluating potential risks, and supporting companies as they invest in their businesses to increase returns."); Kyle Welch & Aaron Yoon, *Do High-Ability Managers Choose ESG Projects that Create Shareholder Value? Evidence from Employee Opinions*, 28 REV. ACCT. STUD. 2448, 2448 (2023) ("[F]ind[ing] evidence that high-ability managers allocate

well-intended, voluntary disclosure suffers from a lack of completeness, standardization, and consistency. For example, in promulgating proposed rules requiring public companies to disclose climate-related risks and metrics in March 2022, the SEC noted that "current disclosure practices are fragmented and inconsistent" and that "the proposed rules would help issuers more efficiently and effectively disclose these risks, which would benefit both investors and issuers."[153]

C. *Mandatory Disclosure of Public Company ESG Activities*

The SEC has been very active in recent years ramping up mandatory disclosure requirements for various public company ESG activities, including those related to climate change; human capital management; diversity, equity, and inclusion (DEI); and even cybersecurity.[154] While these disclosure mandates hardly address the entirety of corporate operational philanthropy, they do cover several of the most common and important areas and could conceivably provide much more consistent, comparable, and reliable information to stakeholders than voluntary sustainability reporting does today, facilitating sorting and helping to limit agency costs.

The usefulness of mandatory SEC ESG disclosure to stakeholder sorting and agency cost mitigation may be limited, however, in several ways. Consider the SEC's highly controversial climate-related disclosure rules. While the SEC and proponents argue that climate-related risks are important to

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resources to ESG in a way that enhances shareholder value."). Meanwhile, we are beginning to see the emergence of "anti-woke" investment funds suggesting a plurality of approaches to incorporating, or not incorporating, ESG performance into investment analysis. *See, e.g.*, Daniel Grant, Opinion, *Investment Options for the Unwoke*, WALL ST. J. (Apr. 17, 2021, 6:02 PM), https://www.wsj.com/articles/investment-options-for-the-unwoke-11618610522 (describing an investment fund that screens out liberal-leaning firms from the 1,000 largest New York Stock Exchange/Nasdaq listed companies).

153. *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures*, SEC (Mar. 21, 2022), https://www.sec.gov/files/33-11042-fact-sheet.pdf.

154. Peter Rasmussen, *Corp Fin Director Expects Quick Action on ESG Rules*, BLOOMBERG L. (May 12, 2021, 5:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-corp-fin-director-expects-quick-action-on-esg-rules (reporting statement of SEC acting director of Division of Corporate Finance, John Coates, that near-term SEC disclosure rule priorities would be DEI, climate change, and human capital management).

investors,[155] critics argue that the SEC regulations are really an impermissible backdoor attempt to regulate greenhouse gas emissions.[156] And, indeed, there is an element of schizophrenia about the rules. Companies are required to disclose material climate-related risks, such as the impact of rising sea levels on operations,[157] but also their greenhouse gas emissions, on the theory that "[t]ransitions to lower carbon products, practices, and services, triggered by changes in regulations, consumer preferences, availability of financing, technology and other market forces, can lead to changes in a company's business model" and that "[g]overnments around the world have made public commitments to transition to a lower carbon economy, and efforts towards meeting those greenhouse gas ("GHG") reduction goals have financial effects that may materially impact registrants."[158] It is not clear that the business risk associated with future regulation would support analogous disclosure rules with respect to, for example, DEI, human capital management, or cybersecurity.[159]

More generally, in the case of ESG or operational philanthropy, there is a tension between the usual rationale behind mandatory corporate disclosure—that the reporting firm faces material internal or external risks of which investors should be aware—and the disclosures that would assist sorting and mitigation of agency costs by philanthropically-minded investors or other stakeholders—that the reporting firm is taking steps to reduce harms that it imposes on the environment; improve working conditions; improve diversity, equity, and inclusion;

155. *Id.*; Working Grp. on Sec. Disclosure Auth., Comment Letter on Proposed SEC Rules Related to Mandated, Standardized Climate-Related Disclosures for Investors (Jun. 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131670-302060.pdf.

156. Richard C. Breeden et al., Comment Letter on the Enhancement and Standardization of Climate-Related Disclosures for Investors (Jun. 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132519-303005.pdf.

157. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21354 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249)

158. *Id.* at 21336–37.

159. For example, the SEC has issued disclosure rules related to public company. cybersecurity threats and incidents. *See Fact Sheet: Public Company Cybersecurity Disclosures; Final Rules*, SEC (July 26, 2023), https://www.sec.gov/files/33-11216-fact-sheet.pdf. These rules do not mandate disclosure of, for example, company commitments to forgo monetizing customer data. *Cf. id.*

etc.[160] In my view, however, the tension is largely illusory. Investors increasingly care about firm environmental and social impacts independent of their impact on firm financial returns. Mandatory disclosure of public company ESG performance is justified, even absent material financial impact, because it facilitates investor sorting into firms and investment funds that align with non-financial priorities of investors and because it helps mitigate agency cost concerns.[161] Both concerns are heightened in a world in which companies embrace, to a greater or lesser extent, ESG priorities in addition to pursuing profits for investors—or as I have termed it, shift from contributional to operational philanthropy. Meanwhile, facilitation of investor sorting and mitigation of agency costs are perfectly legitimate bases for mandatory disclosure under the SEC's remit.[162]

D. *The Difficulty of Applying Tax Penalties or Limitations to Operational Philanthropy May Not Doom Disclosure-Based Monitoring and Sorting*

I have argued that it would be difficult to adjust tax subsidies for or prescriptively regulate corporate operational philanthropy because such philanthropy is often indistinguishable

160. *See* David F. Larcker et al., *ESG Ratings: A Compass Without Direction*, CORP. GOVERNANCE RSCH. INITIATIVE: STAN. CLOSER LOOK SERIES, Aug. 2, 2022, at 2, https://www.gsb.stanford.edu/sites/default/files/publication/pdfs/cgri-closer-look-97-esg-ratings_0.pdf (describing the tension between the "view of ESG . . . that it reflects the impact a company has on the welfare of its stakeholders" and the "competing view . . . that ESG measures the impact societal and environmental factors have on the company").

161. Professor Lipton argues that mandatory corporate disclosure obligations should not focus exclusively on shareholder interests. *See* Lipton, *supra* note 145, at 503, 531. In this situation, however, I believe that simply acknowledging and embracing shareholder sorting and agency cost mitigation concerns should result in disclosures that will be useful to other stakeholders.

162. *See, e.g.*, Williams, *supra* note 145 at 1288–89 (arguing that "because people in the social investor sector of the market are using socially significant information to make investment decisions, that information is clearly material to them, irrespective of its economic implications" and that "the SEC should act to provide those investors . . . with more readily accessible sources of consistent, comparable, high-quality information about corporate social effects, precisely as it has done with financial data," i.e., via mandatory disclosure); Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995) (arguing that "the principal purpose of mandatory disclosure is to address certain agency problems that arise between corporate promoters and investors, and between corporate managers and shareholders").

from profit-seeking activity.[163] For example, the tax rule limiting deductions for contributional corporate philanthropy to ten percent of profits would not readily translate to the operational philanthropy sphere. How would one include a corporate decision to forego a revenue stream, on privacy or other pro-social grounds, into a scheme capping deductibility of philanthropy?

However, while the opacity of operational philanthropy also increases the challenges of implementing effective disclosure-based regulation, it does not necessarily doom the effort. Importantly, the type of information needed to regulate via tax may be quite different than that required by investors and other stakeholders to monitor agency costs and facilitate sorting. It is certainly not difficult to appreciate that a pledge to forego monetization of customer data might be important to stakeholders in the first instance—facilitating sorting—and one need not place a dollar value on the foregone revenue to report on whether the pledge has been honored or not—aiding monitoring.

The regulation of executive compensation may provide a useful example and model. Congress has attempted to regulate executive pay through the tax code and other prescriptive measures, in each case with at best limited success and often unfortunate unintended consequences. For example, a 1993 rule limiting the deductibility of senior executive pay led to an explosion in stock option compensation and other "performance-based" pay exempted from the rule, did nothing to slow the growth in compensation, and may have contributed to excessive risk-taking at banks that precipitated the 2007–08 financial crisis.[164] The 2011 introduction of non-binding shareholder "say on pay" voting has added to compliance costs but has done nothing to limit pay.[165]

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163. *See supra* Section III.F.

164. *See* Gregg D. Polsky, *Controlling Executive Compensation through the Tax Code*, 64 WASH. & LEE L. REV. 877, 906, 917–20 (2007) (documenting the widespread belief among informed observers that § 162(m) contributed to the stock options explosion); Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000-2008*, 27 YALE J. ON REGUL. 257, 274 (2010) (concluding that the largely performance-based compensation awarded to executives at Bear Stearns and Lehman Brothers created incentives for excessive risk-taking).

165. *See, e.g.*, Christopher S. Armstrong et al., *The Efficacy of Shareholder Voting: Evidence from Equity Compensation Plans*, 51 J. ACCT. RSCH. 909, 948 (2013) (finding "no evidence that shareholder voting for equity pay plans . . . is an effective mechanism for influencing executive compensation.").

Meanwhile, for more than 30 years the SEC has steadily ratcheted up annual disclosure requirements for the compensation of the top executives of public companies, steadily increasing their effectiveness.[166] The SEC struggled with the complexity of pay practices—for example, how to value and disclose stock option compensation—and with the opacity of pay practices—for example, shedding light on compensation delivered through above-market returns on deferred compensation.[167] The SEC or another regulator focusing on operational philanthropy would face similar challenges in getting the disclosure rules right, and we should not expect that to happen overnight.

One other lesson from the history of disclosure-based regulation of executive pay that may be instructive here is that lengthy narrative disclosures can obfuscate as well as illuminate. It was only after the SEC prescribed highly specific tabular presentation of compensation data that these disclosures became truly useful to investors.[168] It is not immediately obvious how tabular disclosure could be applied to operational philanthropy, but the lesson remains an important one.

E. *Intermediaries Will Play Key Roles in a Disclosure-Based Approach to Operational Philanthropy*

Whether disclosure remains largely voluntarily or is increasingly dictated by the SEC or other agencies, private third-party intermediaries are likely to remain critical to an effective operational philanthropy disclosure regime. Intermediaries play two

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166. Executive compensation disclosure for senior executives of public companies is required under Item 402 of Regulation S-K. Major reforms to executive pay disclosure requirements occurred in 1992 and 2006. *See* Executive Compensation Disclosure, 57 Fed. Reg. 48126, 48129 (Oct. 21, 1992) (adopting tabular disclosures); Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53158, 53159–60 (Sept. 8, 2006) (further improving tabular disclosure and adding a narrative compensation discussion and analysis section). *See generally* David I. Walker, *The Law and Economics of Executive Compensation: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 232, 245–46 (Claire A. Hill & Brett H. McDonnell eds., 2012) (providing a brief history of the SEC's executive pay disclosure efforts).

167. *See* Walker, *supra* note 166, at 246.

168. *See* Executive Compensation Disclosure, 57 Fed. Reg. 48126, 48129 (Oct. 21, 1992).

roles: as data compilers and suppliers of ratings and as auditors of compliance.

As Professor David Larcker and his colleagues detail, ESG ratings agencies are flourishing.[169] Dozens of agencies and data providers are responding to the increasing demand for ESG information by investors, regulators, and even the companies themselves.[170] One reason that intermediaries are vital to this effort is the "immense number of factors that plausibly fall under the heading of ESG."[171]

To be sure, there is concern regarding the quality of ESG rating assessments. One source of concern relates to the foregoing discussion of the SEC's climate-related disclosures: while investors and some other users of ESG data tend to believe that the ratings reflect the impact that a firm has on its stakeholders, in reality the ratings generally reflect company exposure to environmental and social risk.[172] Nonetheless, just as institutional investors rely heavily on proxy advisory firms ISS and Glass Lewis to advise them on executive compensation and other governance matters, the complexity of ESG-driven operational philanthropy will undoubtedly continue to necessitate intermediation by ratings agencies.

Of course, disclosure and rating agency intermediation alone may not fully meet the needs of stakeholders, particularly if operational philanthropy disclosure remains largely voluntary. The gap may be filled by another intermediary: a third-party auditor. Already in the PBC world, certified B Corps must undergo recertification by a nonprofit known as B Lab every three years.[173] The certification is holistic and based upon demonstration of high social and environmental performance, adoption of a governance structure ensuring accountability to all stakeholders, and transparency with respect to the forgoing.[174] Of course, this is only one approach. One can imagine other audit organizations targeting different facets of operational philanthropy.

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169. Larcker et al., *supra* note 160, at 2.
170. *Id.* at 1–2.
171. *See id.* at 2.
172. *See id.*
173. *See About B Corp Certification: Measuring a Company's Entire Social and Environmental Impact*, B LAB, https://www.bcorporation.net/en-us/certification/ (last visited Oct. 21, 2024).
174. *Id.*

Conclusion

As corporations shift from contributional to operational philanthropy, distinguishing between profit-seeking activity and profit-sacrificing philanthropy becomes increasingly difficult. In all likelihood, the comparative advantage of corporate philanthropy relative to stakeholder philanthropy rises with the shift, but agency costs and the difficulty (and importance) of stakeholder sorting based on various degrees of pro-social corporate activities likely increase as well. The shift also makes it more difficult to regulate corporate philanthropy through the tax code or through other prescriptive means. The best and perhaps only feasible response to these issues and concerns lies in enhanced disclosure of ESG and other corporate operational philanthropy. Of course, if it were easy to draw up a set of disclosures that would accurately and transparently detail operational philanthropy, greenwashing would not be a problem, agency costs would be held in check, and sorting by investors and other stakeholders would be simple. The continued prevalence of greenwashing confirms that none of this will be easy.