The Perils and Promise of Shareholders as Stakeholder Advocates

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Environmental, Social, and Governance ("ESG") and the corresponding focus on issues impacting non-shareholder stakeholders, has taken center stage in the U.S. corporate governance arena. ESG includes a wide array of (a) environmental issues including climate change, renewable and greenhouse gas emissions, (b) social issues ranging from human capital management to addressing diversity, equity and inclusion ("DEI") issues, and (c) governance practices such as majority voting, board declassification, and proxy access.[1] These issues incorporate concerns around non-shareholder stakeholders, particularly employees, customers, and the broader community. These issues also have come to dominate corporate governance. Shareholders have prioritized ESG in their engagement efforts and voting policies.[2] Corporations not only are focusing more on ESG, but also are allocating an increasingly greater portion of their resources toward improving ESG.[3] Directors are devoting more time on oversight of ESG issues.[4] Executives and officers are more focused on incorporating ESG into their business, and taking steps to address ESG risks or take advantage of ESG opportunities.[5] There also has been a substantial increase in the amount of money flowing into ESG-related investment funds.[6] Then too, the U.S. Securities and Exchange Commission ("SEC") has proposed first-ever climate related disclosure rules and is contemplating disclosure rules associated with other ESG matters.[7]

Shareholders, particularly large institutional shareholders, have played an instrumental role in the recent effort to promote ESG and the interests of other stakeholders. It has now become common practice for the CEOs of BlackRock, Vanguard, and State Street Global Advisors ("State Street"), three of the world's largest and most influential shareholders and asset

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[1] *See* Gibson Dunn, *Shareholder Proposal Developments During the 2022 Proxy Season*, July 11, 2022, at 3-4 note 6, https://www.gibsondunn.com/wp-content/uploads/2022/07/shareholder-proposal-developments-during-the-2022-proxy-season.pdf [hereinafter Gibson Dunn, *2022 Shareholder Proposal Developments*].

[2] *See* EY Center for Board Matters, *2022 Proxy Season Review* (Feb. 2022), at 2,6, https://aseets.ey.com/content/dam/ey-sites/ey-com/en-us/topics/board-matters/cbm-2022-proxy-season-preview-final-us-score-no-15036-221us.pdf [hereinafter EY, *2022 Proxy Season Preview*].

[3] *See* Lucy Perez, et.al, *Does ESG Really Matter—and Why?,* MCKINSEY Q., Aug. 2022, at 1, https://www.mckinsey.com/business-functions/sustainability/our-insights/does-esg-really-matter-and-why.

[4] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 4.

[5] *See* Governance Insights Center, *PwC's 2021 Annual Corporate Directors Survey: The Director's New Playbook, Taking on Change,* at 8 (noting that ESG has become part of business strategy and risk management policies), 16, *https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2021-annual-corporate-directors-survey.pdf*.

[6] *See* Perez, *supra* note 3, at 1 (noting that inflows into sustainable funds rose from $5 billion in 2018 to nearly $70 billion in 2021).

[7] *See id.* at 1; *see also* Proposed Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors, https://www.sec.gov/rules/proposed/2022/33-11042.pdf [hereinafter *SEC Rule Proposal*]

managers,[8] to publish open letters to CEOs outlining their ESG expectations for corporations and their boards.[9] Shareholders also have published engagement and voting guidance around a host of ESG issues in order to ensure that corporations more appropriately address those issues.[10] Moreover, shareholders have used the shareholder proposal process to encourage corporations to address critical ESG issues.[11] In the past few years, not only have shareholder proposals related to ESG issues come to dominate the shareholder proposal landscape, but also those proposals have garnered an increasingly larger percentage of shareholder support.[12] Shareholders' emphasis on ESG has dramatically altered the corporate governance landscape.[13]

Shareholders' prominent role in advancing ESG and other stakeholder interests has garnered considerable concern and criticism.[14] One prominent concern centers around the fact that shareholders' support for ESG is clearly linked to financial returns. Indeed, shareholders have been upfront in their conviction that their focus on ESG and stakeholders is linked to financial issues rather than any moral or ethical imperative to "do the right thing." In his 2017 open letter to public companies, then Chair and CEO of Vanguard William McNabb stated that Vanguard's

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[8] *See* Shaun Bisman & Felipe Cambeiro, *Big Three Institutional Investor Updates*, HARV. L. SCHOOL FORUM ON CORP. GOV. (Apr. 13, 2022), https://corpgov.law.harvard.edu/2022/04/13/__trashed/#:~:text=Blackrock%2C%20Vanguard%2C%20and%20State%20Street,many%20U.S.%20publicly%20traded%20companies; Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 723-24 (2019); Jan Fichtner et.al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298 (2017); Liam Kennedy, *Top 500 Asset Managers 2021*, IPE (June 2021), https://www.ipe.com/reports/top-500-asset-managers-2021/10053128.article.

[9] *See e.g.,* Larry Fink, *The Power of Capitalism*, BLACKROCK (2022), at 4, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter?cid=ppc:blk:ll:na:ol:goog:na:v2:bhv:tl&gclid=Cj0KCQjw94WZBhDtARIsAKxWG--EEMiwHJKi4kJjJh3f-FfCaFYHpjmE9LVAZ4kVUlpEwY2kS5dI6nIaAjc6EALw_wcB&gclsrc=aw.ds; Cyrus Taraporevala, *Capturing the Power of Diversity,* SSGA (Oct. 25, 2021), at 1, https://www.ssga.com/us/en/institutional/etfs/insights/capturing-the-power-of-diversity; William McNabb, *An Open Letter to Directors of Public Companies Worldwide*, VANGUARD (Aug. 31, 2017), at 2, https://www.vanguard.ca/documents/literature/ceo-governance-letter.pdf.

[10] *See, e.g.,* State Street Global Advisors, *Guidance on Diversity Disclosures and Practices,* SSGA (Jan. 2022), at 5 https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf [hereinafter, *State Street Guidance on Diversity Disclosure and Practices*]; State Street Global Advisors, *Guidance on Human Capital Management Disclosures & Practices* (Jan. 2022), at 1-2 https://www.ssga.com/library-content/pdfs/global/human-capital-disclosure-practices.pdf [hereinafter *State Street Guidance on HCM Disclosures & Practices*]; BlackRock, *Our Approach to Engagement with Companies on Human Rights* (Feb 2022), at 3, https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf; Vanguard, *Global Investment Stewardship Principles* (Nov. 2021), at 3, https://corporate.vanguard.com/content/dam/corp/research/pdf/Global%20investment%20stewardship%20principles_final_112021.pdf.

[11] *See* Sullivan & Cromwell, *2022 Proxy Season Review: Part I: Rule 14a-8 Shareholder Proposals* (Aug. 8, 2022), at 1, https://www.sullcrom.com/files/upload/sc-publication-2022-Proxy-Season-Part-1-Rule-14a-8.pdf [hereinafter Sullivan & Cromwell, *2022 Proxy Season Review*].

[12] *See id.;* Gibson Dunn*, 2022 Shareholder Proposal Developments, supra* note 1, at 2.

[13] *See* Sullivan & Cromwell, *2022 Proxy Season Review, supra* note 11, at 1; Gibson Dunn*, 2022 Shareholder Proposal Developments, supra* note 1, at 2.

[14] *See* Perez, *supra* note 3, at 2 ("As ESG has gone mainstream and gained support and traction, it has consistently encountered doubt and criticism as well.")

stance supporting board diversity, is "an economic imperative, not an ideological one."[15] In his 2022 annual letter to CEOs, BlackRock CEO Larry Fink wrote: "We focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients."[16] State Street's president and CEO similarly wrote that ESG issues of equity and inclusion "weren't merely matters of values to use as individuals—of what is morally right and wrong—but of value itself as investors."[17] According to critics, the fact that shareholders have linked ESG and stakeholder issues to profit begs the question about whether shareholders can be effective advocates for stakeholders. Importantly, there is significant concern that tethering stakeholder interests to financial concerns could artificially limit or undermine the effort to advance stakeholder interests, increasing the likelihood that any embrace of ESG is rhetorical, or otherwise that corporations will focus on ESG and other stakeholders only when there is some clear and measurable economic benefit.[18]

While acknowledging these and other potential drawbacks, this chapter offers a more optimistic view. This chapter argues that available evidence around shareholder ESG efforts reveals that shareholders have been strong advocates for stakeholders, moving the needle around several critical ESG issues including disclosure, board oversight, and more specific ESG goals and initiatives. This chapter further argues that shareholders may be best positioned to ensure that corporations maintain a long-term focus on ESG and other stakeholders. Perhaps more importantly, this chapter posits that, rather than serving as a roadblock, the connection shareholders have made between ESG and financial returns may actually increase the likelihood that corporations pay appropriate attention to ESG in the long-term. In making these arguments, this chapter will draw primarily from the engagement practices, voting policies, and communications of the so-called "Big Three" institutional investors—BlackRock, Vanguard, and State Street.[19]

Part I of this chapter discusses the connection between shareholder value and ESG and some prominent concerns raised by that connection. Part II reveals that those concerns may have been overstated or misguided by highlighting the considerable effort shareholders have expended, and the considerable progress shareholders have made to ensure that corporations address vital ESG and stakeholder issues. Part II also demonstrates how the link between ESG and shareholder value may be the primary reason for both current and long-term progress on ESG and stakeholder concerns. Part III concludes.

I. The Perils of Profit

A. The Economics of ESG

Shareholders have been very transparent about the fact that their efforts to promote ESG and other stakeholders are driven by economic and financial concerns. A recent survey by the EY Center for Board Matters found that shareholders' ESG expectations stem from their "conviction

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[15] *See* McNabb, *supra* note 9, at 2.
[16] *See* Fink, *The Power of Capitalism, supra* note 9, at 4.
[17] *See* Taraporevala, *Capturing the Power of Diversity, supra* note 9, at 1.
[18] *See* e.g., Dorothy Lund & Elizabeth Pollman, *Corporate Governance Machine*, 121 COL. L. REV. 2563, 2631 (2021).
[19] *See supra* note 8.

that more effective management of environmental, social and governance (ESG) issues will lead to better financial performance."[20] Shareholder statements abound highlighting this conviction. In describing its engagement priorities, BlackRock maintains that companies that focus on ESG issues will "enhance their ability to maximize long-term financial returns."[21] As BlackRock notes, "[w]e believe that companies that build strong relationships with their stakeholders are more likely to meet their own strategic objectives and deliver durable profits."[22] Similarly, State Street has emphasized its belief that ESG considerations have both positive and negative impacts on long-term financial performance.[23]

Shareholders have tied specific ESG issues to financial returns. For example, BlackRock characterized human rights as an investment issue when explaining its approach to engaging with companies on human rights.[24] Cyrus Taraporevala, State Street's then president and CEO, wrote that issues of equity and inclusion "weren't merely matters of values to use as individuals—of what is morally right and wrong—but of value itself as investors."[25] In its published guidance on diversity disclosures and practices, State Street stated: "[w] e remain focused on our fiduciary duty to maximize the long-term risk-adjusted returns of our clients' investments."[26]

With respect to the environment, Vanguard's McNabb noted that Vanguard's position on the importance of climate risk "is based on the economic bottom line for Vanguard investors."[27] State Street has referred to climate change as a source of risk to the global financial system.[28] BlackRock's Fink wrote, "climate risk is investment risk,"[29] and: "We focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients."[30]

These views are not isolated. Instead, according to a 2020 U.S. Government Accountability Office ("GAO") study, most shareholders believe that ESG factors could have a "substantial effect on a company's long-term financial performance,"[31] and most shareholders

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[20] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 1.
[21] *See* BlackRock*, Engagement Priorities*, (Feb. 2022), at 3, https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf [hereinafter BlackRock, *Engagement Priorities 2022*].
[22] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 3.
[23] *See* State Street Global Advisors, *ESG Investment Statement* (June 2022), at 1, https://www.ssga.com/library-content/pdfs/esg-investment-statement.pdf [hereinafter State Street, *ESG Investment Statement].*
[24] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 2.
[25] *See* Taraporevala, *Capturing the Power of Diversity, supra* note 9, at 1.
[26] *See State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 5.
[27] *See* McNabb, *supra* note 9, at 2.
[28] *See* Ciara Horigan et.al., *Making Sense of Sustainability: A Policy Perspective*, STATE STREET (2022), at 15, https://www.statestreet.com/content/dam/statestreet/documents/Articles/state-street-making-sense-of-climate-sustainabilty-a-policy-perspective.pdf.
[29] *See* Larry Fink, *A Fundamental Reshaping of Finance,* HARV. L. SCHOOL FORUM ON CORP. GOV. (JAN. 16, 2020), at 1, https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/; Fink made the same statement in 2021; Larry Fink, *2021 Letter to CEOs*, BLACKROCK (2021), at 2, https://www.blackrock.com/corporate/investor-relations/2021-larry-fink-ceo-letter.
[30] *See* Fink, *The Power of Capitalism, supra* note 9, at 4.
[31] *See* GAO, *Public Companies Disclosure of Environmental, Social and Governance Factors and Options to Enhance Them* (July 2020), at 9, https://www.gao.gov/assets/710/707967.pdf.

focus on ESG issues in order to monitor and evaluate the risks and opportunities that could impact a company's financial wellbeing.[32]

B. The Perils of the Shareholder Value of Stakeholder Interests

1. ESG as Rhetoric

Some opine that the fact that shareholders and corporations continue to cling to shareholder value as a core operating principle transforms their statements about advancing stakeholders into empty rhetoric.[33] Sung Hui Kim suggests that a commitment to engage around social issues based on economic self-interest is nothing more than a commitment in the abstract.[34] Others suggest that shareholders' focus on economic issues may be a form of, or lead to, greenwashing, which is a term used to describe behavior that falsely conveys alignment with ESG issues.[35] The fact that shareholders (and by extension corporations) may not be motivated by social or moral concerns may increase the possibility of greenwashing by increasing the likelihood that shareholders may be satisfied with performative actions related to stakeholders so long as those actions advance financial returns.[36]

Some research suggests that the focus on ESG could be merely rhetorical. Thus, some corporations engaged in behavior inconsistent with ESG even after making statements supporting ESG.[37] Studies of corporate governance documents reveal that almost all of the surveyed corporations that made ESG commitments made no changes to their governance documents to incorporate those commitments.[38] Instead, those documents continued to reflect a preference for shareholders and a strong link to shareholder value.[39] Moreover, in explaining their rationale for the lack of change to their governance documents, company executives stated that their ESG commitments did not require them to make any changes towards their treatment of stakeholders.[40] By confirming that the focus on ESG and other stakeholders does not negate

[32] *See id*. at 5.
[33] *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 95-96 (2020); Jesse Fried, *The Roundtable's Stakeholderism Rhetoric is Empty*, *Thankfully*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 22, 2019), https://corpgov.law.harvard.edu/2019/11/22/the-roundtables-stakeholderism-rhetoric-is-empty-thankfully/. Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric*?, HARV. BUS. REV. (Aug. 30, 2019), https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric.
[34] *See* Sung Hui Kim, *Diversity Double Standard*, 89 N.C. L. REV. 945, 949 (2011).
[35] In its climate change rule proposal, the SEC refused to define greenwashing, but instead noted that while there is no universally accepted definition of greenwashing, greenwashing is a term generally used to describe actions that falsely convey alignment with ESG issues. *See SEC Rule Proposal, supra* note 7, at 335.
[36] *See id.* at 335; David Case, *Corporate Environmental Reporting as Information Regulation: A Law and Economics Perspective*, 76 U.COLO. L. REV. 379, 395 (2005); Miriam Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 289 (2014).
[37] *See* Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1619–20 (2021).
[38] *See* Lucian Bebchuk & Roberto Tallarita, *"Stakeholder" Talk Proves Empty Again: Two Years After Signing the Business Roundtable statement, Companies Still Prioritize Shareholders*, WALL ST. J. (Aug. 18, 2021), https://www.wsj.com/articles/stakeholder-capitalism-esg-business-roundtable-diversity-and-inclusion-green-washing-11629313759
[39] *See id*.
[40] *See id.*

the primacy of shareholders and financial performance, such statements—and the corresponding lack of changes in corporate governance documents—appear to legitimize the view that the focus on ESG and other stakeholders is merely rhetorical or "empty talk."[41]

2. Suboptimal ESG Strategies

There is also concern that ESG's link to profit increases the likelihood that shareholders and corporations will limit their ESG advocacy efforts to strategies deemed to benefit shareholders and their financial concerns, rather than the interests of other stakeholders. As Dorothy Lund and Elizabeth Pollman argue, the link between ESG and shareholder value may mean that "superior governance arrangements from a social welfare perspective may be discouraged or taken off the table."[42]

There exist research appearing to support this argument. In 2019, the Business Roundtable, the nation's leading nonprofit association of CEOS and directors, issued a statement signed by 181 CEOs, embracing a "fundamental commitment" to deliver value to all of the corporation's stakeholders.[43] However, Lucian Bebchuk and Roberto Tallarita found that while almost 100 of the Business Roundtable signatories updated their corporate governance guidelines after signing the Statement, those updates failed to add any language that focused on or elevated stakeholders.[44] Bebchuk and Tallarita also found that every corporation that signed the Statement opposed shareholder proposals designed to implement the stakeholder vision of the Statement.[45] Bebchuk and Tallarita's study supports the notion that ESG's focus on shareholder value may not result in an appropriate focus on stakeholders.

3. Stall Tactic?

Another concern with ESG's link with financial performance is that such a link may paralyze efforts to promote stakeholders by shifting focus to measurable outcomes or the pursuit of perfect empirical data. As Lund and Pollman note, ESG's focus on shareholder profits is problematic because it "favors activity that can be reduced to measurable metrics tied to risk or financial value."[46]

The experience with board diversity confirms the possibility that a focus on proving measurable economic outcomes may inappropriately hinder forward progress. Almost two decades ago, board diversity proponents intentionally shifted their advocacy efforts away from moral rationales and towards rationales associated with economic factors based on a belief that

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[41] *See id.*
[42] *See* Lund and Pollman, *Corporate Governance Machine, supra* note 18, at 2566.
[43] *See* Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans'* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [hereinafter Business Roundtable Statement].
[44] *See* Bebchuk & Tallarita, *supra* note 38.
[45] *See id*.
[46] *See* Lund & Pollman, *Corporate Governance Machine, supra* note 18, at 2631.

such rationales would better ensure that corporate leaders would promote board diversity.[47] However, evidence suggested that the increased reliance on business rationales for board diversity had no impact on board diversity efforts.[48] Instead, board diversity efforts stalled despite such reliance.[49] Commentators indicated that the stagnation may have resulted from reliance on business rationales because such reliance focused outsized attention on proving empirical results—an inherently difficult process—instead of advancing effective diversity strategies.[50] In this regard, the shift towards embracing business rationales proved to be counterproductive.[51] This experience makes clear that reliance on economic rationales raises a real concern that such reliance could undermine rather than advance ESG efforts.[52]

II. Shareholders Keeping Their Promises?

This section provides a more promising assessment of shareholders to counteract the dire predictions about shareholder's role in ESG.

A. Beyond Rhetoric—the Shareholder Push for ESG

1. Shareholders ESG Engagement

Shareholders have dramatically increased their engagement around ESG. Institutional shareholders have issued general voting and investment guidance in which ESG is prominently featured.[53] The CEOs of shareholders also have periodically posted open letters to public corporations emphasizing the importance of ESG.[54] Not only has BlackRock's Fink published an

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[47] *See* Lisa Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?,* 89 N.C. L. REV. 855, 858 (2011); Lisa Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 839-90; David Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1548-55 (2004).

[48] *See* Fairfax, *Bottom Line on Board Diversity, supra* note 47, at 858-59, 866-69; *see also* Heidrick & Struggles, *Board Monitor US 2020* (2020), at 4, 11, https://www.heidrick.com/Knowledge-Center/Publication/Board_Monitor_US_2020 [hereinafter Board Monitor 2020] (noting that "little progress" had been made with respect to racial and ethnic diversity on large boards); Peter Eavis, *Diversity Push Barely Budges Corporate Boards to 12.5%, Survey Finds*, NY Times (Sept. 15, 2020), https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors.html; Stefanie Johnson & David Hekman, *Women and Minorities are Penalized for Promoting Diversity*, HARV. BUS. REV. (Mar. 23, 2016), https://hbr.org/2016/03/women-and-minorities-are-penalized-for-promoting-diversity (noting that numbers of executives and directors of color "hasn't budged for decades*").*

[49] *See id*.

[50] *See* Fairfax, *Board Diversity Revisited, supra* note 47, at 859, 869; Robin Ely & David Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV. (Nov-Dec. 2020), https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case

[51] *See id*.

[52] *See* Thomas Lee Hazen, *Diversity on Corporate Boards: Limits of the Business Case and the Connection Between Supporting Rationales and the Appropriate Response of the Law*, 89 N.C. L. REV. 887, 890-91 (2011).

[53] *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 3; BlackRock*, Engagement Priorities 2022, supra* note 21, at 3; State Street, *ESG Investment Statement, supra* note 23, at 1.

[54] *See* McNabb, *supra* note 9.

annual open letter since 2012, but also beginning in 2017, Fink's letters have increasingly prioritized expectations around ESG and other stakeholders.[55] With respect to specific topics, State Street has issued guidance on human capital management disclosures and practices, climate disclosures and transition plans as well as diversity disclosures and practices.[56] BlackRock has issued guidance on human rights and diversity.[57] Each of BlackRock, State Street and Vanguard have issued guidelines around board diversity.[58]

This emphasis on ESG engagement activity in general is mirrored in targeted engagement. Surveys show that ESG is the top issue shareholders want to discuss in their direct dialogue with directors.[59] For example, in their engagement with managers and directors, 71% of shareholders prioritize engagement around climate while 60% prioritize engagement around board and workforce diversity, equity and inclusion.[60] BlackRock has made clear it uses direct dialogue with companies to explore important ESG topics from human rights to diversity initiatives and goals.[61] Similarly, State Street conducted over 185 engagements in 2021 around human capital management issues to help companies develop strategies around disclosure and best human capital management practices.[62] In 2020, State Street had over 275 engagements on the topic of diversity, equity and inclusion, and proactively reached out to 60 of the largest employers in its portfolio to engage around this issue.[63]

Institutional shareholders insist that engagement is a foundational aspect of their ability to impact corporate behavior.[64] As Vanguard puts it: "Engagement is a process, not an event, whose value only grows over time."[65] First, engagement enables shareholders to hear companies' views and gain a better understanding of how companies' views impact corporate policies and

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[55] *See* Fink, *2021 Letter to CEOs, supra* note 29.

[56] *See e.g., State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 5; *State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 1-2; BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 3;

[57] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 3.

[58] *See* Bisman & Cambeiro, *supra* note 8.

[59] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 5, 7.

[60] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 6.

[61] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 3.

[62] *See State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 1-2.

[63] *See State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 2.

[64] *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 3 (referring to engagement as the "foundation" of their stewardship).

[65] *See* McNabb, *supra* note 9, at 2. To be sure, in December 2022 Vanguard resigned from the Net Zero Asset Managers Initiative ("NZAM"), which is an industry-based initiative assumed at encouraging net zero goals. *See* Vanguard Corporate Statement, *An Update on Vanguard Engagement with Net Zero Asset Managers Initiative*, Dec. 7, 2022, https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/update-on-nzam-engagement.html. Some may view that decision as an indication of Vanguard's lack of commitment to climate risks and ESG considerations, and thus appearing to affirm the view that ESG commitments in general are mere empty talk. However, Vanguard made clear that its decision was based on its view that the Initiative was not advancing constructive dialogue. *See id.* Indeed, like other public ESG policies and programs, the Initiative has been politicized and thus used to attack shareholders' ESG efforts. More importantly, Vanguard made clear that its decision did not negate its continued ESG commitment, including its commitment to continually engage and disclose around climate risks. As Vanguard emphasized, "This change in NZAM membership status will not affect our commitment to helping our investors navigate the risks that climate change can pose to their long-term returns." *See id*.

practices. Second, engagement allows shareholders to pinpoint their views and concerns around vital corporate policies and practices.[66] Third, engagement serves an important feedback function and ensures that shareholders can influence the views, behaviors and ultimately practices of corporate directors and management.[67]

Finally, engagement plays a vital accountability role. Engagement not only allows shareholders to assess corporate progress against corporate goals and targets, but also allows shareholders to assess corporate goals and progress against shareholders own principles and expectations.[68] Both State Street and BlackRock have noted the important role of engagement in board accountability, emphasizing that engagement enables BlackRock to lay important groundwork around expectations so that boards can be held accountable when they fail to meet those expectations.[69] As BlackRock stated, "we do not tell companies what to do."[70] Nonetheless, BlackRock went on to say: "However, when we do not see progress despite ongoing engagement or companies are insufficiently responsive on matters we believe contribute to long-term value creation, we would signal our concern by not supporting management in our voting."[71]

Shareholder engagement represents a core component of shareholder activity and an instrumental tool for understanding and impacting corporate behavior. The fact that shareholders have wielded that tool to advance ESG and stakeholder concerns reflects their prioritization of ESG as well as the fact that their ESG commitment extends beyond mere rhetoric.

2. Shareholder Proposals and the Coming of Age of ESG

ESG has come to dominate the shareholder proposal landscape. In 2021, for the first time in history, environmental and social proposals comprised the majority of submitted shareholder proposals.[72] In 2022, such proposals represented 63% of overall submissions.[73]

The growth in ESG submissions was spurred by shareholder proposals focused on key environmental and social matters. The 2022 proxy season saw an increase in climate related proposals, including proposals requesting climate target and goals.[74] Driven by the racial reckoning and equity concerns sparked by the 2020 murder of George Floyd and other unarmed

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[66] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 3; BlackRock*, Engagement Priorities 2022, supra* note 21, at 8.

[67] *See* BlackRock*, Engagement Priorities 2022, supra* note 21, at 3, 8; *State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 1-2.

[68] *See* McNabb, *supra* note 9, at 2.

[69] *See* Fink, *A Fundamental Reshaping of Finance, supra* note 29, at 3; *State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 2.

[70] *See* BlackRock*, Engagement Priorities 2022, supra* note 21, at 9.

[71] *See id*.

[72] *See* Sullivan & Cromwell, *2022 Proxy Season Review, supra* note 11, at 1.; *see also PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 7 (noting that the 2021 proxy season saw more ESG-focused shareholder proposals than ever).

[73] *See* Sullivan & Cromwell, *2022 Proxy Season Review, supra* note 11, at 1; *see also* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 2; *see also* Jamie Smith, *Four Key Takeaways from the 2022 Proxy Season*, EY (Jul. 27, 2022), at 2, https://www.ey.com/en_us/board-matters/four-key-takeaways-from-the-2022-proxy-season (noting that the 2022 proxy season was dominated by ESG shareholder proposals, with a record number of such proposals).

[74] *See id*. at 26.

Black people,[75] social proposals also witnessed a dramatic increase in 2022. Thus, as compared to 2021, there was an 81% growth in the number of proposal submissions related to civil rights, human rights and racial equity.[76]

On the one hand, in 2022 overall shareholder support for ESG proposals decreased.[77] Experts maintain that this decrease was based largely on the fact that shareholders shied away from supporting proposals that were too prescriptive.[78]

On the other hand, experts agree that shareholder support (or lack thereof) of particular ESG proposals is not necessarily indicative of the strength of their support for ESG issues.[79] Indeed, shareholders have made clear that their voting behavior with respect to shareholder proposals is based on company-specific circumstances, and the extent to which companies are making progress towards addressing the ESG issues underlying a given shareholder proposal.[80] As a result, shareholder votes against any given proposal is not an indication of shareholders lack of concern with respect to the issues covered by the proposal.[81]

Moreover, many environmental and social proposals received record shareholder support in 2022.[82] For example, in 2022, eight shareholder proposals related to racial equity audits received majority shareholder support.[83] No such proposals received majority support in 2021.[84] In 2022, for the first time in history, two proposals calling for reports on gender/racial pay gaps received majority shareholder support.[85]

The shareholder proposal landscape has become an important mechanism for shareholders to communicate their priorities and expectations and to shape corporate behavior.[86] Corporations respond to shareholder proposals even when they are not the target of a given proposal because corporations use the shareholder proposal landscape as a barometer of shareholder priorities and preferences.[87] Corporations also respond to shareholder proposals

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[75] *See e.g.*, Lisa Fairfax, *Racial Reckoning with Economic Inequities: Board Diversity as Symptom and Partial Cure*, 106 CORNELL L. REV. ONLINE 68, 68-69 (2021).

[76] *See* Sullivan & Cromwell, *2022 Proxy Season Review, supra* note 11, at 7; *see also See* EY, *2022 Proxy Season Preview, supra* note 2, at 7.

[77] *See* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 6; Sullivan & Cromwell, *2022 Proxy Season Review, supra* note 11, at 1.

[78] *See* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 6; Sullivan & Cromwell, *2022 Proxy Season Review, supra* note 11, at 1.

[79] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 3.

[80] *See id.*

[81] *See id.*

[82] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 7.

[83] *See* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 7.

[84] *See id*.

[85] *See id*.

[86] *See* Lisa Fairfax, *The Shareholder-Stakeholder Alliance: Exposing the Link between Shareholder Power and the Rise of Corporate Social Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 14 (Elizabeth Pollman & Robert B. Thompson eds., 2021)*;* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO STATE L. J. 53, 91 (2008).

[87] *See, e.g.,* Fairfax, *The Shareholder-Stakeholder Alliance, supra* note 86, at 16-17; Fairfax, *Making the Corporation Safe, supra* note 85, at 91; Lisa Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. Rev. 1301, 1329 (2019).

even when they never come to a vote.[88] Importantly, shareholder proposals are often withdrawn as a result of negotiation between corporations and shareholders whereby corporations agree to address the issues that are the subject of the proposal.[89] Corporations also respond to shareholder proposals even when they do not receive a majority shareholder vote.[90] Research indicates that social and environmental proposals that receive a substantial percentage of shareholder support, even when they fall short of a majority, are often sufficient to capture the attention of management and thereby increase the likelihood that the board and managers will engage around those issues.[91] Finally, shareholders use the shareholder proposal process to hold corporations accountable for their progression on important ESG commitments.[92]

Given the impact of shareholder proposals on corporate behavior, shareholders' ESG activity in this area is yet another signal of the fact that their ESG commitments extend beyond mere rhetoric.

3. Shareholder ESG Voting

Shareholders have strategically used their voting power to influence corporate behavior related to ESG. While institutional shareholders agree that voting is not their first or sole engagement strategy, it nonetheless has a powerful impact on corporate behavior.[93] One survey found that 73% of shareholders indicated that ESG oversight will be a more important factor in how they evaluate and vote on directors in the 2022 proxy season.[94] Another survey noted that in 2022 investors planned to use more proactive director voting strategies to hold boards accountable for their ESG matters.[95]

Shareholders have developed voting policies around specific ESG issues. Thus, a majority of shareholders indicated that corporate oversight of climate risk would play a more important role in how they elect directors in 2022.[96] As more shareholders have made net-zero and climate pledges, they have developed voting strategies commiserate with their pledges.[97]

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[88] *See* Fairfax, *The Shareholder-Stakeholder Alliance, supra* note 86, at 16-17; Fairfax, *From Apathy to Activism, supra* note 87, at 1329.

[89] *See* Fairfax, *The Shareholder-Stakeholder Alliance, supra* note 86, at 16-17; Fairfax, *From Apathy to Activism, supra* note 87, at 1328.

[90] *See* LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 10 (2011); Fairfax, *The Shareholder-Stakeholder Alliance, supra* note 86, at 16-17; EY Center for Board Matters, *Five Takeaways from the 2019 Proxy Season* (July 2019), at 8, https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/cbm/ey-cbm-2019-proxy-season-preview.pdf [hereinafter Board Matters].

[91] *See* FAIRFAX, SHAREHOLDER DEMOCRACY*, supra* note 90, at 82; Fairfax, *The Shareholder-Stakeholder Alliance, supra* note 86, at 16-17; Board Matters, *supra* note 90, at 8.

[92] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 3.

[93] *See, e.g., State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 2; BlackRock*, Engagement Priorities 2022, supra* note 21, at 9. *See also BlackRock Investment Stewardship Global Principles*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 18, 2021), at 11, https://corpgov.law.harvard.edu/2021/12/18/blackrock-investment-stewardship-global-principles-2/ [hereinafter *BlackRock Global Principles*] (we "will express our concerns through our voting where a company's actions or disclosures are inadequate.")

[94] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 2.

[95] *See id.* at 3.

[96] *See id*. at 2.

[97] *See id*.

Shareholders have used their voting power related to shareholder proposals to influence corporate behavior on ESG. Importantly, institutional shareholder support of a given shareholder proposal is not contingent on the issues associated with the proposal.[98] Instead, institutional shareholders will determine whether or not to support a shareholder proposal based on a company's progress on the issues associated with it.[99]

Shareholders have employed withhold-the-vote policies and practices to address ESG. In 2109, BlackRock withheld votes or voted against 4,800 directors at 2,700 companies who they believed were not addressing critical ESG issues.[100] BlackRock also announced that it may withhold the vote for inappropriate ESG disclosure, noting that "we will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them."[101] Vanguard has indicated that it would generally withhold its vote against the chair of a committee responsible for overseeing material social and environmental risks, in cases there is a risk oversight failure involving ESG.[102] BlackRock may withhold support for directors if a company is not effectively addressing or disclosing material human rights-related risks or impacts.[103] BlackRock also may vote against directors responsible for human capital management decisions when there is insufficient disclosure related to oversight of such issues.[104] State Street may vote against directors of companies with insufficient human capital management disclosure.[105]

Shareholders have especially emphasized withhold-the-vote policies around board diversity. BlackRock announced its belief that boards should aspire to 30% diversity and encouraged companies to have at least two directors who identify as female and one who identifies as a member of an underrepresented minority.[106] BlackRock may vote against members of the nominating committee for any perceived lack of commitment to board diversity.[107] Importantly, insufficient board diversity was a top reason why BlackRock withheld its vote against directors in 2022.[108] Vanguard may withhold the vote from the chair of the nominating committee when there is insufficient progress on board diversity or board diversity disclosures.[109] State Street may vote against the nominating committee chair when there is no disclosure on the board's racial and ethnic composition or the board does not have at least one director from an underrepresented racial/ethnic community.[110] State Street also may withhold votes against companies that do not have at least one female director.[111] Beginning in 2023, State Street may

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[98] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 3.
[99] *See id;* BlackRock*, Engagement Priorities 2022, supra* note 21, at 9; *State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 2.
[100] *See* Fink, *A Fundamental Reshaping of Finance, supra* note 29, at 3.
[101] *See id*.
[102] *See* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 4.
[103] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 3.
[104] *See* Bisman & Cambeiro, *supra* note 8.
[105] *See id.*
[106] *See* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 2.
[107] *See* Bisman & Cambeiro, *supra* note 8.
[108] *See* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 2.
[109] *See id*. at 4.
[110] *See State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 2.
[111] *See* Gibson Dunn, *2022 Shareholder Proposal Developments, supra* note 1, at 8.

vote against the nominating committee chair of Russell 3000 companies if they do not have at least 30% female directors.[112] To be sure, the fact that these entities have announced policies indicating that they "may" vote against board members for their lack of diversity means that their policies give them discretion to choose *not* to withhold-the-vote even when board diversity is lacking. On the one hand, this discretion may suggests that these policies are illusory or mere empty rhetoric. On the other hand, the fact that entities do not withhold their vote against every corporation with problematic board diversity does not negate the impact of these policies. This is because, as mentioned above with respect to shareholder voting, entities do withhold their vote in some circumstances. Moreover, these policies represent a starting point for engagement which can have a powerful impact on corporate behavior. As noted above, engagement is a process, not an event. These policies help ensure that board diversity and other ESG issues are a part of the routine engagement with corporations, thereby establishing an expectation that corporations must focus on board diversity and other ESG issues. In the absence of such policies, it is less likely that corporations would focus on these issues and begin the important work necessary to alter their behavior.[113]

Shareholder voting and the threat of shareholder voting is a powerful motivator of corporate behavior. The fact that shareholders have crafted voting policies around ESG therefore reflects the importance they have placed on ESG issues along with their serious desire to ensure that ESG concerns influence corporate conduct.

4. The Push for ESG Disclosure

Shareholders insist that disclosure around ESG is essential for addressing ESG. Disclosure increases the likelihood that boards and executives are paying appropriate attention to ESG issues. Disclosure ensures that shareholders and other stakeholders have the information they need to understand and assess corporate ESG activity.[114] Disclosure also ensures that corporations can be held accountable for their ESG commitments by giving shareholders and other stakeholders the ability to track ESG performance from year to year and measure that performance against shareholder expectations and corporate ESG goals and targets.[115]

Given shareholders' belief in the importance of disclosure, shareholders have devoted considerable time and resources towards encouraging disclosure around ESG. Shareholders have

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[112] *See id*.

[113] *See* Lisa M. Fairfax, *Racial Rhetoric or Reality?: Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, 2022 Colum. Bus. L. Rev. 118 (2022) (finding that corporations that made commitments around racial equity were more likely to engage in behavior that supported those commitments, at least with respect to board diversity).

[114] *See SEC Rule Proposal, supra* note 7, at 7 (noted that mandated disclosure is aimed at providing "consistent, comparable, and reliable—therefore decision-useful—information to investors to enable them to make informed judgements about the impact of climate-related risks on current and potential investments.")

[115] *See State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 2; *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 7-8.

produced considerable guidance around their expectation for ESG disclosure, insisting that companies align their strategy with ESG goals and continuously improve their ESG disclosures.[116] Over 700 shareholders representing over $52 trillion in assets signed a statement emphasizing the need for more robust climate-related disclosure.[117] Both State Street and BlackRock have separate guidance around best practices for meaningful human rights disclosure.[118] Vanguard, State Street, and BlackRock all have provided considerable guidance on their expectations for board diversity disclosure.[119] In 2020 a group of shareholders representing $3 trillion in assets under management sent letters to companies on the Russell 3000 index asking them to disclose racial, ethnic, and gender data for their board.[120]

As the effort to promote board diversity disclosure has gained traction, and in the wake of the racial reckoning in the summer of 2020, shareholders have turned their sights on disclosure associated with workforce diversity.[121] While federal law requires many employers to submit so-called EEO-1 reports containing information about job categories and demographic workforce related to race, ethnicity and sex, those reports are not required to be publicly disclosed.[122] However, in the last two years shareholders have strenuously pushed for such disclosure.[123] State Street not only has formally called on its portfolio companies to publicly disclose EEO-1 reports, but also joined a coalition of 14 other financial institutions who have collectively called for such disclosure and are engaging with other entities to do the same.[124] State Street insisted that the lack of data impedes the ability to address persistent challenges with the recruitment, retention, and promotion of diverse talent.[125]

Shareholders also have devoted significant attention to working with other shareholders and groups to develop best practices and frameworks for ESG disclosure and encouraging more standardization.[126] These disclosure efforts include encouraging companies to adopt specific ESG-related reporting frameworks.[127] By encouraging standardization of disclosure, shareholders

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[116] *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 4,6; BlackRock*, Engagement Priorities 2022, supra* note 21, at 2; *BlackRock Global Principles, supra* note 93, at 11; *State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 2; Bisman & Cambeiro, *supra* note 8.

[117] *See SEC Rule Proposal, supra* note 7, at 319 n. 790; *see also id*. at 25-26.

[118] *See State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 1; BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 2.

[119] *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 4,6; *State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 2; Bisman & Cambeiro, *supra* note 8.

[120] *See* Kelsey Butler, *Investors Overseeing $3 Trillion Push for Board Racial Diversity*, BLOOMBERG (Oct. 28, 2020), https://www.bloomberg.com/news/articles/2020-10-28/investors-overseeing-3-trillion-push-for-board-racial-diversity

[121] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 6; Cyrus Taraporevala, *A Call to Lead on Racial and Ethnic Diversity,* STATE STREET (Feb. 16, 2021), at 2-3, https://www.ssga.com/us/en/institutional/ic/insights/a-call-to-lead-on-racial-and-ethnic-diversity;

[122] *See* 29 C.F.R. 1602.7-14; 41 C.F.R. 60-1.7(a).

[123] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 6.

[124] *See* Taraporevala, *A Call to Lead on Racial and Ethnic Diversity, supra* note 120, at 2.

[125] *See id*.

[126] *See* McNabb, *supra* note 9, at 2; *State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 1; Taraporevala, *Capturing the Power of Diversity, supra* note 9, at 2; *State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 1.

[127] *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 6; *BlackRock Global Principles, supra* note 93, at 11; Fink, *A Fundamental Reshaping of Finance, supra* note 29, at 2-3.

have sought to play a vital role in improving ESG disclosure practices. Indeed, the fact that companies can rely upon different frameworks to disclose ESG information has meant that disclosures are inconsistent from company to company, undermining the ability to make cross-company comparisons and thus undermining the usefulness of ESG data.[128] Shareholders have responded to this concern by engaging in strategies aimed at creating more consistent ESG reporting.

Shareholders considerable efforts regarding ESG disclosure reflect another example of the manner in which shareholders have sought to move the needle in favor of ESG and other stakeholders. Such disclosure plays a critical role in ensuring that corporations establish and maintain important ESG initiatives, while also ensuring more accountability.

5. Board Oversight of ESG

Shareholders also have pushed for disclosure around board oversight of ESG, making such disclosure a top engagement priority.[129] Shareholders have begun to outline detailed recommendations around best practices for effective board oversight.[130] As an example, State Street partnered with Russell Reynolds and the Ford Foundation to "create a playbook for effective board oversight of diversity."[131] These efforts include calls for corporations to alter their committee charters and governing documents to reflect board oversight of ESG.[132]

Shareholder focus on board oversight is a crucial component of their ESG advocacy. Board oversight of ESG ensures that corporations play close attention to ESG issues and the related commitment to other stakeholders.[133] Such oversight also better ensures corporate accountability for ESG activities because shareholders have the ability to hold the board accountable for their actions. Thus, shareholder focus on board oversight of ESG is an important reflection of their considerable effort towards ensuring that corporations effectively address ESG.

6. Board Diversity

Shareholders ESG efforts also have centered on encouraging board diversity.[134] Shareholder efforts include reaching out to hundreds of companies identified as having insufficient board diversity to call out their lack of diversity and encourage them to address such diversity.[135]

These board diversity efforts are intimately linked with ESG efforts because shareholders and other stakeholders believe that board diversity meaningfully contributes to a board's ability

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[128] *See SEC Rule Proposal, supra* note 7, at 333.

[129] *See State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 1-2; Lisa Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 201, 221 (2022); EY, *2022 Proxy Season Preview, supra* note 2, at 3.

[130] *See* BlackRock*, Engagement Priorities 2022, supra* note 21, at 8.

[131] *See* Taraporevala, *Capturing the Power of Diversity, supra* note 9, at 2.

[132] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 5; Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 1.

[133] *See* Fairfax, *Board Committee Charters and ESG Accountability, supra* note 129, at 221-223.

[134] *See* McNabb, *supra* note 9, at 2; Bisman & Cambeiro, *supra* note 8.

[135] *See e.g., State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 2.

to effectively perform their responsibilities, including around ESG.[136] Shareholders insist that board diversity helps ensure that boards better understand how to oversee and address those concerns.[137] First, some have suggested that diverse board members can have an impact on workplace culture.[138] This includes promoting equitable policies and practices that increase the likelihood that people from all backgrounds and ethnicities will receive better treatment.[139] Second, some have suggested that board diversity better enables corporations to market their goods and services to the full range of consumers and customers, or otherwise better equips boards and corporations to identify and develop new products and services that address the needs of diverse communities.[140] Finally, some have suggested that board diversity counters groupthink on boards and thus better ensures that board decision-making incorporates a more robust range of potential problems and solutions.[141]

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This section reveals that shareholders have expended considerable effort encouraging corporations to focus on ESG. As a result, this section rebuts the contention that shareholders' ESG pronouncements and commitments can be characterized as merely rhetorical.

B. Shareholders' ESG Results

Shareholder efforts have clearly garnered results. One recent survey concluded that companies have made significant efforts to address shareholder concerns and meet shareholder expectations around ESG priorities.[142] Thus, not only have companies made strides around ESG, but those strides are directly attributable to shareholder engagement. This section highlights some of the most notable areas impacted by shareholders.

1. Disclosure

Shareholders have dramatically influenced disclosure around ESG.[143] In 2020, 92% of S&P 500 companies and 70% of Russell 1000 companies publish a voluntary ESG report.[144] By contrast, in 2011 only 20% of S&P 500 companies published such reports.[145] The significant surge in ESG

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[136] *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 3.
[137] *See* Russell Reynolds Associates (RRA), *The Board's Oversight of Racial and Ethnic Diversity, Equity and Inclusion* (July 13, 2021), at 16, https://www.russellreynolds.com/en/insights/articles/the-boards-oversight-of-racial-and-ethnic-diversity-equity-and-inclusion.
[138] *See* Fairfax, *The Bottom Line, supra* note 47, at 828-29.
[139] *See id*.
[140] *See id*. at 820.
[141] *See id*. at 831-33.
[142] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 4.
[143] *See* Federico Fornasari, *Knowledge and Power in Measuring the Sustainable Corporation*, 19 WASH. UL. GLOBAL STUDY. L. REV. 167, 190 (2020) ("more and more corporations report, because of investors' demand").
[144] *See* Perez, *supra* note 3, at 1; G&A Institute, *2021 Sustainability Reporting* (2021), at 2, https://www.ga-institute.com/research/ga-research-collection/sustainability-reporting-trends/2021-sustainability-reporting-in-focus.html.
[145] *See id.* at 3.

disclosure has been driven by shareholder demand.[146] Then too, shareholder preferences have translated into a convergence around corporate adoption of the kinds of frameworks most recommended by shareholders. Such convergence helps ensure that ESG disclosures are more usable. Moreover, the SEC acknowledged that its decision to propose a first-ever mandate of climate-related disclosure was largely driven by shareholder demand.[147] To be sure, while there can be considerable disagreement around whether mandatory ESG disclosure is appropriate, there is no doubt that shareholders have played a pivotal role in helping to generate ESG disclosure.

2. Policies and Practices

Shareholder efforts also have led to sharp increases in corporate adoption of ESG initiatives. In 2021, almost all directors indicated that their companies were taking steps to address human capital and diversity issues.[148] In the 2022 proxy season, more than 90% of *Fortune* 100 companies disclosed initiatives or commitments related to climate and workforce diversity while 68% of companies disclosed goals related to greenhouse gas emissions reductions.[149]

Proxy analysts insist that the increase in ESG policies and practices results from shareholder influence. On the one hand, it is too soon to tell if these policies and practices will prove effective. However, any forward progress must begin somewhere and hence the emergence of these policies and practices is a notable development. Then too, the fact that more companies are establishing such measures increases the likelihood that companies can be held accountable for their ESG activities.[150] Hence, corporate action in this area is an important first step, and shareholders unquestionably played an instrumental role in encouraging that step.

3. Board Oversight

Companies also have answered the call for more board oversight. Thus, recent evidence demonstrates that companies not only have enhanced disclosure around board oversight of ESG, but also have increased committee level responsibility for board oversight.[151] Then too, boards have integrated ESG oversight into relevant charters.[152] My own survey revealed that 86% of Fortune 50 companies have a board-level committee or committees with oversight of ESG.[153] A 2020 survey of the top 50 companies in the *Fortune* 100 revealed that 88% of such companies have board oversight of ESG issues, and 44% of such companies increased disclosure related to

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[146] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 9 ("investors are clamoring for more information on disclosure").
[147] *See SEC Rule Proposal, supra* note 7, at 333.
[148] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 16.
[149] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 8.
[150] *See* RRA, *supra* note 137, at 13.
[151] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 6.
[152] *See id*. at 6-7. More companies also have begun to cite ESG in director qualifications. *See id*. at 7.
[153] *See* Fairfax, *Board Committee Charters and ESG Accountability, supra* note 129, at 205.

board oversight of ESG issues.[154] Board oversight is vital for corporate accountability around ESG.[155] Thus these board oversight changes ensure more appropriate attention on ESG. And such changes have resulted from shareholder engagement emphasis.

4. Board Diversity

Shareholder efforts related to board diversity also has resulted in significant change. First has been the dramatic change in board diversity disclosure.[156] State Street reports that its engagement efforts around diversity resulted in enhanced disclosures from 20 out of the 23 companies that initially had room for improvement in this area.[157] Surveys reveal that nearly all *Fortune* 100 companies (97%) voluntarily disclosed the racial and ethnic makeup of their board.[158] A 2016 Deloitte survey found that only 18% of large-cap and 9% of medium-cap companies voluntarily disclosed race-related information for their directors.[159] As experts note, the current level of board diversity disclosure represents a "sea change in board diversity disclosures in recent years."[160] Second has been the significant increase in board diversity. State Street saw 862 companies, representing 60% of the companies they identified as having all-male boards, add women to their board in the years following their targeted engagement efforts.[161] Recent surveys show that 93% of surveyed directors say their board has taken action on diversity over the previous 24 months, while 69% replaced a retired director with someone who brought diversity to the board.[162] Finally, director attitudes around board diversity have changed dramatically. In 2020, 71% of directors agreed that no action was needed to increase board diversity because boards would naturally become more diverse without any intentional efforts.[163] In 2021, only 33% of directors embraced such a belief, and directors are more supportive of almost all proactive measures aimed at achieving board diversity.[164] As a PWC survey notes "This represents a seismic shift and indicates an understanding of the fact that boards need to take deliberate actions in order to bring about changes."[165] Importantly, surveys reveal that boards are addressing diversity in new ways,[166] contradicting the contention that shareholder efforts may lead to limiting the strategies associated with addressing ESG issues.

Directors insist that the changes related to board diversity can be traced to shareholder efforts. While racial and ethnic diversity have been on the board agenda in the past, directors

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[154] *See* Era Anagnosti, et.al, *ESG Disclosure Trends in SEC Filings*, Aug. 13, 2020, 5, 9.
[155] *See* Fairfax, *Board Committee Charters and ESG Accountability, supra* note 129, at 216-221.
[156] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 11.
[157] *See State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 2.
[158] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 9.
[159] *See* Deloitte, *2017 Board Survey: Seeing is Believing* (2017), at 7, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-board-diversity-survey-seeing-is-believing.pdf (citing 2016 survey).
[160] *See* Smith, *Four Key Takeaways from the 2022 Proxy Season, supra* note 73, at 9.
[161] *See* Taraporevala, *Capturing the Power of Diversity, supra* note 9, at 2.
[162] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 11.
[163] *See id.* at 14.
[164] *See id*.
[165] *See id*.
[166] *See id.* at 11.

note that it “never had the focus it has now.”[167] In addition, although the murder of George Floyd was clearly an inflection point, directors pinpoint enhanced pressure from institutional investors as one of the most important factors driving their increased focus on this issue.[168] Thus, even as some companies “bristle” at the influence of shareholders, directors acknowledge the role that institutional investors have played in increasing corporate focus on diversity, equity and inclusion issues—and some even say that they appreciate the “huge impact” these investors have had.[169] Given the link between board diversity and appropriate attention to ESG and stakeholder matters, shareholder influence in this area is particularly notable.

C. Lingering Concerns

1. Paralysis Reconsidered

As the foregoing section highlights, ESG’s link to economics has not led to paralysis around ESG efforts. To be sure, this link runs the risk that shareholders and corporations would focus too much effort on perfecting data rather than seeking promising solutions. However, this risk has not materialized. Instead, shareholders appear already convinced by the empirical evidence. Importantly, there is considerable evidence of a link between ESG and financial concerns.[170] Moreover, no evidence is infallible, and corporations routinely make decisions based on mixed or imperfect data.[171] Thus, it is entirely appropriate that shareholders and other ESG advocates do not allow the quest for unequivocal data to distract them from moving the needle on ESG. And it appears that shareholders have not been hindered by a hyper-focus on perfect data. Thus, while Vanguard CEO made clear that its stance in support of ESG issues was driven by a desire to enhance long-term shareholder value, it did not demand that such value be proven. Instead, after pinpointing research supporting its economic premise, Vanguard announced that it had recently joined the 30% club, an organization focused on advocating for greater representation of women on boards and in leadership roles.[172] Similarly, State Street cited studies indicating that effective human capital management drives performance before detailing its efforts around promoting appropriate human capital management disclosures and practices.[173] State Street also referred to empirical studies revealing that diversity leads to innovation in the workforce while the lack of diversity harms a company’s bottom line before discussing the many ways in which it has encouraged companies to engage around diversity.[174] These actions suggest that shareholders have already been convinced of the economic link to ESG, and thus such link is not serving as a roadblock to progress in this area.

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[167] *See* RRA, *supra* note 137, at 7.
[168] *See id*. Directors rank investor pressure as the third most important motivator of enhanced attention on DE&I behind reputation and impact on financial performance. *See id*. at 6-7
[169] *See id.* at 7.
[170] *See* Chris Brummer & Leo Strine, *Duty and Diversity*, 75 VAND. L. REV. 1, 26-28 (2022) (citing studies); *see also* Lisa M. Fairfax, *Empowering Diversity Ambition*, 75 VAN. L. REV. EN BANC 131, 135 (2022).
[171] *See* Brummer & Strine*, supra* note 170, at 30-31.
[172] *See* McNabb, *supra* note 9, at 2.
[173] *See State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 1-2.
[174] *See* Taraporevala, *Capturing the Power of Diversity, supra* note 9, at 1.

2. Stakeholder Voice

The link with shareholder profit also has not limited strategies to those focused solely on shareholders. As this chapter noted, the emphasis on shareholders and financial performance could translate into an undue focus on strategies that only benefit shareholders without consideration of stakeholder concerns. However, available information indicates that shareholders have instead been mindful of incorporating stakeholder voice into their ESG engagement efforts. Thus, one disclosure topic that has received special attention centers around the manner in which companies are giving voice to other stakeholders. For example, State Street's guidance notes that it expects disclosure around "How concerns and ideas from employees are solicited (and if appropriate, acted upon), and how the workforce is engaged in the organization."[175] With respect to diversity, State Street not only encouraged companies to evaluate the impact of their operations on communities of color, but also encouraged them to include the perspective of stakeholders in board discussions.[176] State Street's guidance states that in order to include the perspective of stakeholders, you must engage with employees and understand their experience, and you must "include impacted stakeholders from outside the organization who can speak to the role the company plays in the communities where it operates."[177] BlackRock also noted that companies should disclose how they identify their key stakeholders and how they consider their interests in business decision-making.[178] BlackRock also has noted its expectation that companies both engage with stakeholders impacted by human rights concerns and collaborates with other stakeholders on initiatives to address human rights issues.[179]

3. Our best option for the long-term?

Finally, rather than undermining progress around ESG, it is entirely possible that the connection between ESG and shareholder profit may be our best option for ensuring a long-term corporate focus on those issues. Experts have argued that "[t]he most critical part of tackling ESG is to embed these long-terms concerns into company strategy."[180] In fact, 69% of shareholders have indicated that integrating ESG opportunities into a company's business strategy is core to ensuring long-term commitment to ESG issues.[181] As a result, shareholders have strenuously encouraged boards to align their business strategy with their ESG goals and commitments.[182] BlackRock expressed its hope that its engagement efforts would encourage companies to integrate ESG issues into sound business practices that "benefit relevant stakeholders over the

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[175] *See State Street Guidance on HCM Disclosures & Practices, supra* note 10, at 2.
[176] *See* Taraporevala, *Capturing the Power of Diversity, supra* note 9, at 3; *State Street Guidance on Diversity Disclosure and Practices, supra* note 10, at 5.
[177] *See* RRA, *supra* note 137, at 18.
[178] *See BlackRock Global Principles, supra* note 93, at 13.
[179] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 3.
[180] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 5.
[181] *See* EY, *2022 Proxy Season Preview, supra* note 2, at 8.
[182] *See* BlackRock*, Engagement Priorities 2022, supra* note 21, at 2.

long term."[183] This hope is rooted in their belief that a focus on other stakeholders is linked to long-term financial resilience and value creation.[184] Vanguard similarly notes that integrating ESG strategy into business strategy is vital for ensuring that companies are set up for success "today, next year, and well into the future."[185] "For Vanguard, sustainability is synonymous with long-termism."[186]

Surveys suggest that the fact that shareholders have highlighted the link between ESG and profit may be the primary reason why we experience success in the effort to ensure that corporations integrate ESG issues into their business strategy. Surveys demonstrate that directors increasingly believe that ESG has a financial impact on company performance.[187] Correspondingly, almost two-thirds of directors now say that their strategy is tied to ESG issues and that ESG is a part of their risk management discussions.[188] In this way, the belief in the financial relevancy of ESG appears to have motivated directors to integrate consideration of ESG factors into their business plans in a way that may increase the likelihood that ESG will remain an area of focus in the long-run. This integration clearly stems from a belief that ESG is tied to long-term financial returns. In other words, shareholder emphasis on the link between financial concerns and ESG may serve to promote a more sustained commitment to ESG.

III. Conclusion

It is important to remember not only that there has been a long-standing effort to encourage corporations to focus on other stakeholders and the issues underlying ESG, but also that such effort has been difficult to sustain over the long-run. It is entirely possible that promoting these issues in alignment with shareholder power and interests has a better chance of impacting corporate behavior over the long haul, especially given the increased influence of shareholders. To be clear, this chapter does not mean to overlook the serious concerns with shareholders as stakeholder advocates, including the possibility that shareholders could encourage corporations to engage in actions antithetical to stakeholders under the guise of advancing ESG. However, no advocate and no advocacy effort is perfect. Then too, to date shareholders have managed to move the needle significantly around ESG. For this reason, while we should always be prepared to address potential downsides, we also should welcome shareholder engagement around ESG because of its many promises.

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[183] *See* BlackRock, *Our Approach to Engagement with Companies on Human Rights, supra* note 10, at 1.
[184] *See* BlackRock*, Engagement Priorities 2022, supra* note 21, at 5.
[185] *See* Vanguard, *Global Investment Stewardship Principles, supra* note 10, at 6.
[186] *See id*.
[187] *See PwC's 2021 Annual Corporate Directors Survey, supra* note 5, at 8.
[188] *See id*.