

# Trends in the Use of Corporate Law and Shareholder Activism to Increase Corporate Responsibility and Accountability for Human Rights<sup>1</sup>

## I. Introduction

In the United States, there are two principal mechanisms for compelling corporate conduct: governmental action (through legislation and judicial enforcement) and shareholder action. Currently, international human rights standards do not create binding legal obligations on U.S. corporations and state law fiduciary duty standards do not compel corporate Boards of Directors to act in furtherance of international human rights. In the United States, shareholders of a corporation can direct the Board of Directors to act through shareholder proposals. Accordingly, a shareholder group could initiate a shareholder proposal, to be presented to a vote of all of the shareholders, to compel the corporation to adhere to international human rights standards. Historically, however, corporate social responsibility proposals have not received widespread shareholder support.

## II. International Human Rights Standards

1. The Universal Declaration of Human Rights (“UDHR”) is a statement of principles adopted by the United Nations General Assembly in 1948 outlining human rights that it believes should be guaranteed to all people. While the UDHR creates aspirational goals, it is not a legally binding document in its own right.<sup>2</sup> However, there are arguments that parts of the UDHR have achieved the status of customary international law and thus are binding on states.<sup>3</sup>
2. The United Nations Global Compact, an initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies, sets forth 10 suggested principles of corporate behavior in the areas of human rights, labor, the environment and anti-corruption.<sup>4</sup>

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1 This memorandum has been prepared by the law firm of Fried, Frank, Harris, Shriver & Jacobson LLP *pro bono* to help inform the mandate of the UN Special Representative on business & human rights. This project was undertaken as part of Fried Frank’s long-standing tradition of public service, which includes providing representation to people of limited means and to worthy public interest and other non-profit organizations. Fried Frank is a leading international law firm with more than 600 attorneys in offices in New York, Washington, D.C., London, Paris, Frankfurt, Hong Kong and Shanghai. The Firm has an association with Huen Wong & Co. in Hong Kong. More information on Fried Frank can be found at [www.friedfrank.com](http://www.friedfrank.com).

2 See *Know Your Rights, Universal Declaration of Human Rights*, <http://www.udhr.org/UDHE/default.htm>; <http://www.un.org/Overview/rights.html>. See also *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

3 See *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>.

4 See <http://www.unglobalcompact.org> (2007).

3. The International Covenant on Civil and Political Rights (“ICCPR”) is a United Nations treaty setting forth certain human rights principles (e.g., equal protection under law, freedom of thought, liberty, etc.) and establishing a Human Rights Committee to monitor human rights issues in the states party to the ICCPR.<sup>5</sup> Although the United States has ratified the ICCPR, U.S. circuit courts have held that the ICCPR does not create obligations enforceable in the federal courts because the United States ratified it on the express understanding that it is not self-executing.<sup>6</sup>
4. The International Covenant on Economic, Social and Cultural Rights, which commits states parties to work toward the granting of economic, social, and cultural rights to individuals, was signed by President Jimmy Carter in 1977, but the U.S. Senate failed to ratify it.<sup>7</sup> Therefore, it does not create enforceable obligations in the United States.
5. The International Labour Organization (“ILO”) is a United Nations agency that brings together governments, employers and workers of its member states to promote decent work throughout the world. The ILO Declaration on Fundamental Principles and Rights at Work (the “ILO Declaration”) promotes the adoption of principles and rights in 4 areas: collective bargaining, freedom from forced labor, abolition of child labor and elimination of discrimination in employment, and provides follow up procedures.<sup>8</sup>

### III. Fiduciary Duties

1. Under Delaware law, the most significant state law governing U.S. corporations, there are two main fiduciary duties a director owes to a corporation, the duty of care and the duty of loyalty:<sup>9</sup>
  - (a) The Duty of Care. The duty of care requires generally that before making a decision directors inform themselves of all material facts and give the matter due deliberation.<sup>10</sup> Directors have a duty to perform their functions in good faith and in the manner they

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<sup>5</sup> See Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights* (2006), <http://www.ohchr.org/english/law/ccpr.htm>; <http://www2.ohchr.org/english/bodies/hrc/index.htm>.

<sup>6</sup> See, e.g. Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001).

<sup>7</sup> See Office of the High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, [http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm); Wikipedia, *International Covenant on Economic, Social and Cultural Rights* (2007), [http://en.wikipedia.org/wiki/International\\_Covenant\\_on\\_Economic%2C\\_Social\\_and\\_Cultural\\_Rights](http://en.wikipedia.org/wiki/International_Covenant_on_Economic%2C_Social_and_Cultural_Rights).

<sup>8</sup> See International Labour Organization, *Mission and Objectives*, [http://www.ilo.org/global/About\\_the\\_ILO/Mission\\_and\\_objectives/lang--en/index.htm](http://www.ilo.org/global/About_the_ILO/Mission_and_objectives/lang--en/index.htm) (2007)

<sup>9</sup> Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). See also, 1-4 Corporate Governance: Law and Practice § 4.03

<sup>10</sup> Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)

believe is in the best interests of the corporation, with the care an ordinarily prudent person would be expected to exercise in a similar situation. The duty of care creates obligations to monitor, to make inquiries, to make reasonable decisions, and to employ a reasonable process to make decisions.<sup>11</sup>

- (b) The Duty of Loyalty. The duty of loyalty requires that directors act in the best interest of the corporation and its shareholders and refrain from using their positions to further personal gain.<sup>12</sup>
- (c) Business Judgment Rule. The courts presume that business judgments are made in an informed and prudent manner and give deference to business judgments, unless the duties of care or loyalty are breached.<sup>13</sup>

2. Set forth below is a comparison of the statutory provisions relating to the fiduciary duties of directors under New York, California, Florida, Illinois and Pennsylvania state law (and, with respect to Illinois, the relevant case law as well).

New York	California	Florida	Illinois	Pennsylvania
<p><b>New York Business Corporation Law § 717(a). Duty of directors.</b></p> <p>A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.</p>	<p><b>California Corporate Code §309(a):</b></p> <p>A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.</p>	<p><b>Florida Business Organizations Code § 607.0830.</b></p> <p>(1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:</p> <ul style="list-style-type: none"> <li>(a) In good faith;</li> <li>(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and</li> <li>(c) In a manner he or she reasonably believes to be in the best interests of the corporation.</li> </ul> <p>(3) In discharging his or her duties, a director may consider such factors as the director deems relevant,</p>	<p><b>Illinois Business Corporation Act of 1983 § 805 ILCS 5/8.85:</b> In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon</p>	<p><b>Pennsylvania Business Corporations Code § 1712. Standard of care and justifiable reliance.</b></p> <p><b>(a) Directors.--</b>A director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes</p>

<sup>11</sup> Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1983)  
<sup>12</sup> Guth v. Loft, 23 Del. Ch. 255, 5 A.2d 503, 510 (Del. 1939).  
<sup>13</sup> Aronson, 473 A.2d at 812

New York	California	Florida	Illinois	Pennsylvania
		<p>including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the corporation or its subsidiaries, the communities and society in which the corporation or its subsidiaries operate, and the economy of the state and the nation.</p>	<p>employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors.</p> <p>Generally, a director of a corporation, though not responsible for errors of judgment, is a fiduciary charged with duty of caring for property of a corporation and of managing its affairs honestly and in good faith, and if his duty has been so violated as to result in an impairment of corporation's assets or loss of its property, director can, without aid of statute, be compelled to make restitution. <u>Precision Extrusions, Inc. v. Stewart</u>, App.1962, 36 Ill.App.2d 30 (Ill. 1962).</p>	<p>to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.</p>

IV. Breach of Fiduciary Duty

1. In Delaware, there are two kinds of actions that may be brought against a director for a breach of fiduciary duty. These actions are direct suits and derivative suits.
  - (a) A direct suit is brought on behalf of a shareholder for injury sustained by, or to enforce a duty owed to, a shareholder. Non-shareholders can sue for an injury to themselves, but they

cannot sue for breach of fiduciary duty to the corporation or shareholders.<sup>14</sup>

- (b) A derivative suit is brought on behalf of the corporation for injury to the corporation for, among other things, the breach of a fiduciary duty by a director. A derivative suit may be brought by a shareholder on behalf of the corporation only if that shareholder was a shareholder at the time of breach and remains a shareholder throughout the pendency of the action.<sup>15</sup>
- (c) If a violation can be shown to injure a shareholder and the corporation, direct and derivative suits can be brought simultaneously.

- 2. (a) A director owes a duty to the corporation to act in the best interests of the corporation.<sup>16</sup> Traditionally, this has been interpreted to mean that directors must act in ways calculated to maximize corporate profits.<sup>17</sup> However, that view has since been expanded to include actions that are not normally thought of as contributing to profit maximization. Under Delaware law, a corporation may “make donations for public welfare or charitable, scientific or educational purposes and in time of war or other national emergency in aid thereof” so long as the ultimate goal of the contribution is to benefit the corporation and make a profit.<sup>18</sup> The courts generally will not second guess business decisions as long as the director making the decision was informed, acted in good faith and had the honest belief that the action was in the best interests of the corporation.<sup>19</sup>

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<sup>14</sup> Delaware General Corporations Law (“DGCL”) § 327.

<sup>15</sup> DGCL § 327.

<sup>16</sup> Pay 'n Pak Stores, Inc., v. Court Square Capital Ltd., 1998 U.S. App. LEXIS 5481, at \*11 (9<sup>th</sup> Cir. 1998).

<sup>17</sup> Dodge v. Ford Motor Co., 204 Mich. 459 (Mi.1919) (holding that Ford’s withholding of dividends in order to enact socially beneficial policies was a breach of fiduciary duty).

<sup>18</sup> DCGL§ 122(9). See also, A. P. Smith Mfg. Co. v. Barlow, 26 N.J. Super. 106 (Ch. Div. 1953) (finding that a corporation could make a donation to a private college in order to foster good public relations); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) (“Corporate managers have never had an enforceable legal duty to maximize corporate profits. Rather, they have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interest . . . the implicit version of this discretion could not be eliminated without destroying the business judgment rule”).

<sup>19</sup> See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985). A court will “not substitute its views for those of [a corporation's] board if the latter's decision can be attributed to any rational business purpose.” *Id.* See also Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). Under the business judgment rule, “a court will not interfere with the judgment of a board of directors unless there is a showing of gross and palpable overreaching.” *Id.* See also Aronson, 473 A.2d 805 (finding that plaintiff stockholder’s action against directors should be dismissed because plaintiffs failed to allege facts implicating bias or lack of independence.) “The burden is on the party challenging the decision to establish facts rebutting the presumption . . . that in making a business decision the directors of a corporation acted on an informed basis,

- (b) Directors may be found liable for breach of fiduciary duty if they have wasted corporate assets.<sup>20</sup> However the standard for waste is high. “[A] claim of waste will arise only in the rare, unconscionable case where directors irrationally squander or give away corporate assets.”<sup>21</sup> The business judgment rule provides wide protection for corporate decisions and if there is a good faith judgment that under the circumstances the transaction is worthwhile, there should be no finding of waste, even if a later inquiry makes the transaction seem unreasonably risky.<sup>22</sup>
3. Based on the current non-binding state of international law and well-established fiduciary duty principles, it appears that a claim against directors for a breach of fiduciary duty based solely on a corporate violation of international human rights standards (without a violation of law) is unlikely to succeed. On the other hand, it is unlikely that a claim against directors for breach of fiduciary duty for adopting a policy of adherence to international human rights standards would be successful.
4. One commentator notes that every state has a statute authorizing managers to make corporate donations, without limiting this authority to donations that increase profits (although 41 states have statutes that provide that such authority can be limited in a company’s charter).<sup>23</sup>

## V. Shareholder Proposals

1. In the United States, activist public pension funds (such as CalPERS and NYCERS) and socially responsible investors have tried to influence corporate behavior through shareholder proposals relating to social and environmental issues. Mutual funds, on the other hand, have generally not advanced shareholder proposals relating to social and environmental issues.

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in good faith and in the honest belief that the action taken was in the best interests of the company.” *Id.* at 812.

<sup>20</sup> In re Walt Disney Derivative Litigation, 906 A.2d 27, 121 (Del. June 8, 2006) (The claim of corporate waste “is rooted in the doctrine that a plaintiff who fails to rebut the business judgment rule presumptions is not entitled to any remedy unless the transaction constitutes waste.”).

<sup>21</sup> *Id.* at 121-26. (affirming dismissal of a corporate waste claim because the shareholders failed to show that the directors approval of no-fault termination terms in an employment agreement was not a rational business decision.).

<sup>22</sup> Kamin v. Am. Express Co., 86 Misc. 2d 809, 812-14, 383 N.Y.S.2d 807, 810-11 (Sup. Ct. N.Y. County 1976) (dismissing plaintiffs derivative action against directors for their decision to issue a dividend because questions of policy and business management are better left to the discretion of the board.) “Courts will not interfere with [business decisions] unless it be first made to appear that the directors have acted or are about to act in bad faith and for a dishonest purpose.” *Id.* at 812. See Also, Aronson, 473 A.2d 805.

<sup>23</sup> See Elhauge, *supra* note 16, at 738, 867 (“None of the fifty states has a statute that imposes a duty to profit-maximize or that makes profit-maximization the sole purpose of the corporation. Every state has a statute authorizing unprofitable corporate donations.”).

2. The Securities Exchange Act Rule 14a-8 provides that, subject to the conditions set forth therein, an eligible shareholder has the right to compel a corporation to include a “shareholder proposal” and an accompanying supporting statement in such corporation’s proxy materials delivered to its shareholders. Corporations may choose to exclude a shareholder proposal for the reasons enumerated in Rule 14a-8(i); such rules, among other things, permit exclusion of a shareholder proposal if the proposal relates to operations accounting for less than 5% of the company’s total assets, net earnings or sales for the most recent fiscal year and is not otherwise significantly related to the company’s business.
3. While traditionally corporations have been allowed to exclude “social responsibility” proposals, in recent years the Securities Exchange Commission (the “SEC”) has compelled corporations to include them under Rule 14a-8. The current policy of the SEC is that “significant social policy issues” may not be excluded as a matter of course from shareholder voting materials, and instead must be evaluated for possible exclusion on a case-by-case basis.<sup>24</sup> Several examples of proposals required to be included in proxy statements are set forth below. None of these shareholder proposals passed.
  - (a) Kmart was required to include a proposal recommending incorporation of the ILO principles.<sup>25</sup> The proposal was brought jointly by shareholders including the New York City Teachers Retirement System and the Connecticut Retirement Plans and Trust Fund. The proposal requested that the board (1) amend the Kmart Buying Policy and standard purchase contracts to reflect full adoption of the principles defined by the ILO, (2) establish an independent monitoring process that assesses adherence to these principles and (3) report annually on adherence to the amended policy through an independent and transparent process.
  - (b) American Eagle was barred from excluding a proposal asking it to adopt international human rights standards.<sup>26</sup> The proposal was submitted by the Amalgamated Bank of New York LongView Collective Investment Fund, a shareholder. The proposal asked that American Eagle adopt ILO principles because “corporate violations of human rights... can lead to negative publicity, public

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<sup>24</sup> In 1992 the SEC allowed Cracker-Barrel to exclude a proposal requiring a non-discriminatory hiring policy. However the SEC reversed this decision in 1998. Amendments to Rules on Shareholder Proposals Exchange Act Release No 34-40018 (May 21, 1998).

<sup>25</sup> SEC No Action Letter, 2001 SEC No Act LEXIS 392 (Mar. 16, 2001).

<sup>26</sup> SEC No Action Letter, 2001 SEC No Act LEXIS 430 (Mar. 20, 2001).

protests and a loss of consumer confidence, which can have a negative impact on shareholder value ...”<sup>27</sup>

(c) Lowe’s was similarly barred from excluding a proposal asking it to adopt UN draft Human Rights standards. The shareholder proposal was brought by shareholders including the New York City Employees’ Retirement System and the New York City Teachers’ Retirement System. The proposal asked that Lowe’s commit itself to the implementation of a code of conduct based on the conventions of the ILO and the United Nations draft Norms on the Responsibilities of Transnational Corporations with Regard to Human Rights.<sup>28</sup>

4. The SEC held three roundtables in May 2007 focusing on the relationship between the federal proxy rules and state corporation law, proxy voting mechanics and binding and non-binding shareholder proposals. The SEC roundtable discussion on shareholder proposals, held on May 25, 2007, addressed the issue of whether the SEC should prohibit or further restrict the ability of shareholders to bring precatory proposals under Rule 14a-8. Most state corporation laws provide that a corporation’s charter or bylaws can specify the types of proposals that can be brought to a shareholder vote.<sup>29</sup> The SEC has requested public comment on whether a company or its shareholders should have the ability to propose and adopt bylaws that would establish the procedures the company will follow for including precatory proposals in the company’s proxy statement.<sup>30</sup>

A precatory proposal is an advisory suggestion that directors are not legally bound to enforce.<sup>31</sup> This type of proposal is usually phrased in the form of a request. For example, a precatory resolution proposed by shareholders of Xerox in 2007 stated that the “Shareholders *request* the Board of Directors to: [a]mend our company’s standard purchase contracts and supplier code, based on the ILO standards. . . .”<sup>32</sup>

Arguments advanced during the roundtable discussion to limit precatory resolutions include the following:

- Precatory proposals are a creation of federal law and inconsistent with state law. The argument as to why precatory proposals are

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<sup>27</sup> NO-ACT, WSB File No. 0402200115 , American Eagle Outfitters, Inc., (Mar. 20, 2001)

<sup>28</sup> NO-ACT, WSB File No. 0301200461, Lowe's Cos., Inc. (Mar. 01, 2004)

<sup>29</sup> DGCL § 102(b) provides, for example, that the certificate of incorporation may also include provisions for the “management . . . and . . . conduct of the officers of the corporation . . .” including regulating the powers of the stockholders, to the extent not contrary to relevant law.

<sup>30</sup> Securities and Exchange Commission, 17 CFR PART 240, [Release No. 34-56160; IC-27913; File No. S7-16-07], available at <http://sec.gov/rules/proposed/2007/34-56160.pdf>.

<sup>31</sup> James J. Hanks, Jr., Maryland Corporation Law § 7.1 (1995).

<sup>32</sup> Xerox Corp. filed this DEF 14A on 04/10/2007.

inconsistent with Delaware state law in particular is that Delaware law only permits stockholders to vote on substantive matters such as directors, major transactions, and amending the by-laws, not “imaginary voting” as precatory voting is described,<sup>33</sup>

- shareholder proposals, which cost corporations time and money to address, should be reserved for binding resolutions. In other words, from a business standpoint, it is not efficient to allow shareholders to propose precatory resolutions; and
- most precatory proposals are not intended to further a director’s objective to earn money for the corporation’s stockholders, rather they are focused on social responsibility type issues, which undercuts the corporate model of profit maximization.

Arguments advanced in support of the current treatment of precatory proposals, include the following:

- Precatory proposals are not a creation of federal law and may be brought pursuant to state law as part of the broad right to participate in an annual meeting. Specifically, it was argued that §211 of the DGCL authorizes precatory resolutions by stating that “Any other proper business may be transacted at the annual meeting.”<sup>34</sup>
- From a practical standpoint, certain issues that investors raise can only be brought in precatory form. Precatory proposals often deal with matters that are traditionally within the province of the board of directors or management (such as operational matters), rather than matters that are traditionally within the province of the shareholders (such as election of directors and mergers). Accordingly, such proposals might not be a proper subject for shareholder action alone if they were cast as binding proposals, as opposed to precatory proposals. Therefore, prohibiting precatory proposals would fundamentally disenfranchise stockholders.

Many commentators have publicly urged the SEC to permit precatory proposals.<sup>35</sup>

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<sup>33</sup> Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law, Monday, May 7, 2007, available at <http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf>.

<sup>34</sup> Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law, Monday, May 7, 2007. The scope of what “proper business” includes has not been defined by Delaware statute or case law.

<sup>35</sup> These public statements have been made by individuals such as Frank Rauscher, Senior Principal, Aquinas Associates, Dallas, Texas; Jim Madden, Senior Portfolio Manager, Progressive Investment Management; and Rian Fried, President, The Clean Yield Group. Additional public statements against restricting precatory proposals can be found at <http://www.sec.gov/comments/4-537/4-537.shtml>.

In addition to the threshold issue of whether a company and/or its shareholders should have the ability to propose and adopt bylaws that would limit or restrict precatory proposals, the SEC is also requesting comments concerning the following related issues:

- if shareholders approve a bylaw procedure for precatory proposals, whether the interpretation and enforcement of that procedure should be the province of state court, rather than the SEC; and
- whether the board of directors, without shareholder consent, should be able to adopt bylaws setting up a separate procedure for precatory proposals.<sup>36</sup>

If the SEC does prohibit precatory proposals, then social responsibility related proposals could only be brought in binding form.

5. According to the Institutional Shareholders Services website, 108 “social responsibility” shareholder proposals were included in proxy statements during the spring season of 2007<sup>37</sup> – see the shareholder proposal chart attached hereto for an analysis of the social responsibility shareholder proposals included in proxy statements during 2006 and the spring season of 2007. Eight shareholder proposals were omitted by the corporation, forty seven were withdrawn by the shareholders, and fifty one were voted on. Only two proposals were approved by shareholders.

- (a) Newmont Mining shareholders approved a proposal submitted by Christian Brothers Investment Services, Christus Health, and General Board of Pension and Health Benefits of the United Methodist Church requesting that the company conduct a global review and evaluation of the company’s policies and practices relating to existing and potential opposition from local communities to the company’s operations and the steps taken to reduce such opposition. The proposal also required that the results of the review be included in a report for the 2008 shareholder meeting. The shareholders were concerned about issues such as the company’s mining waste disposal practices, the potential for water pollution, development on sacred sites, and community resettlement. Newmont’s Board recommended voting for the proposal, stating that it had already established a committee for safety and environmental welfare that reviewed these types of

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<sup>36</sup> Securities and Exchange Commission, 17 CFR PART 240, [Release No. 34-56160; IC-27913; File No. S7-16-07], available at <http://sec.gov/rules/proposed/2007/34-56160.pdf>.

<sup>37</sup> See Institutional Shareholder Services, Knowledge Center – 2007 Proxy Season Watchlist, [http://www.issproxy.com/knowledge\\_center/proxy\\_season\\_watchlist/](http://www.issproxy.com/knowledge_center/proxy_season_watchlist/) (last visited July 25, 2007).

concerns. The proposal passed with shareholder support of 95.30%.

- (i) At the same shareholder meeting where the Christian Brothers Investment Services shareholder proposal was approved, Newmont shareholders rejected a shareholder proposal submitted by the NYC Employees Retirement System that would require Newmont to report to shareholders on the potential environmental and public health damage resulting from the company's mining and waste disposal operations in Indonesia. Newmont's Board had recommended voting against this proposal because the company already had conducted studies regarding any environmental or public health impact caused by the company's mining operations.
- (b) Micron Technologies shareholders approved a proposal submitted by the New York City Employees' Retirement System (NYCERS) requesting that the company adopt a sexual orientation non-discrimination policy. The board recommended against the proposal, stating that the company's current equal employment policy was in accordance with federal law and that extending protection to groups not covered by the law undermined its purpose. The proposal passed with shareholder support of 55.5%.

## VI. Alternative Approaches

Commentators have suggested the following methods for fostering corporate social responsibility:

- Adoption of a multilateral instrument specifying human rights obligations for corporations.<sup>38</sup>
- Expansion of the Alien Tort Claims Act (28 U.S.C. §1350 (2000)), which grants jurisdiction to federal courts over an alien for a tort committed in violation of the law of nations or a U.S. treaty, to cover a broader range of international human rights violations committed by private defendants.<sup>39</sup>

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<sup>38</sup> In 2003 there was an attempt to impose legally binding human rights obligations on corporations through the United Nations draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, but the draft Norms were never adopted by the Commission on Human Rights. UN Commission on Human Rights [CHR] Dec. 2004/116, UN Doc. E/CN.4/DEC/2004/116 (Apr. 22, 2004).

<sup>39</sup> See Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 84-94 (2005).

- SEC action under Rule 14(a) of the Securities Exchange Act of 1934 to require corporations to disclose in their annual proxy statements management’s policies and practices with respect to social issues.
  - A useful precedent is the UK Companies Act 2006 which requires quoted companies to produce an annual “business review” for shareholders, including, “to the extent necessary for an understanding of the development, performance or position of the company’s business,” information concerning environmental matters, and social and community issues, including information about company policies and their effectiveness.
- Adoption by individual governments of programs to incentivize international corporate social responsibility by offsetting the risk of enhanced liability through tax credits, insurance programs, legal assistance, purchasing preferences and limitations on derivative suits.<sup>40</sup>
- Expansion of the interpretation of the U.S. Sentencing Guidelines for Organizational Defendants to encompass respect for human rights as part of “ethical conduct.”
- Expansion of investment criteria among institutional investors and analysts to include corporate social responsibility, in much the same way as it has been expanded to include corporate governance, and encouragement of shareholder activism for social responsibility purposes.<sup>41</sup>
  - Since 2004, mutual funds have been required to disclose how they vote on shareholder resolutions, which is expected to lead to greater accountability.<sup>42</sup>
  - The business case for corporate social responsibility includes: improved shareholder relations, improved employee recruitment and retention, reduced risk of consumer protest, enhanced reputation and brand image and more sustainable relationships with business partners.<sup>43</sup>

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<sup>40</sup> See Richard Reibstein, *Time to Get Real: The Necessity of Legal Accountability for Responsible Transnational Commerce*, 37 ELR 10414, 10421 (2007).

<sup>41</sup> See Williams & Conley, *supra* note 38, at 94-98; Freshfields, Bruckhaus Deringer, *A legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* 115 (2005), available at [http://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf).

<sup>42</sup> Williams & Conley, *supra* note 38, at 96.

<sup>43</sup> See Reibstein *supra* note 39, at 10418.

- A 2005 survey by Mercer Investment Consulting revealed that environmental, social, and ethical considerations are becoming part of mainstream investment analysis, particularly where such considerations potentially yield superior financial performance by targeting companies with socially responsible practices and thereby avoiding future liabilities.<sup>44</sup>
- Fostering the adoption of voluntary standards of responsible corporate behavior (such as the ILO Declaration) so that they become the new “best practices” or corporate norms.<sup>45</sup>

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<sup>44</sup> See Freshfields, *supra* note 40, at 23.

<sup>45</sup> See Williams & Conley, *supra* note 38, at 100-02.