

**Socially Responsible Lawyering: How ESG Investing is Shaking up the Role of the  
Corporate Lawyer**

**TABLE OF CONTENTS**

- I. Introduction..... 2**
- II. Background ..... 3**
  - a. ESG..... 3*
  - b. Corporate Social Responsibility (CSR) ..... 4*
  - c. Socially Responsible Impact Investing (SRI)..... 6*
- III. The Evolution of the Fiduciary Duty in a Progressive Corporate Landscape ..... 6**
  - a. Fiduciary Duty of a Director of a Public Corporation ..... 7*
  - b. The Corporate Lawyer’s Duty to the Corporation ..... 11*
- IV. Socially Responsible Lawyering: Incorporating ESG Principles in the Corporate Lawyer’s Duty ..... 14**
  - a. Duty Under the Friedman Doctrine ..... 15**
  - b. Duty under Stakeholder Primacy Model..... 17**
  - c. The Green Gatekeeper ..... 20**
- V. Conclusion ..... 23**

## **I. Introduction**

Imagine a legal interview for an in-house position in a large corporation. The opening question is what is your experience in environmental law? Surprise right? As the role of ESG investing continues to grow, attorneys might have to be prepared for questions like this when representing companies seeking to attract ESG investors.

ESG stands for Environmental, Social, and Corporate Governance principles, which are a set of factors investors are increasingly seeking from public companies. Millennials and Gen X investors are increasingly verifying their portfolios for ESG investments, demonstrating the significance that ESG is playing for companies competing for that pool of future customers.

In this paper, I will focus on the how ESG investing can impact the corporate attorney's duty to the organization. I will focus on the public corporation as the primary entity for this paper, to avoid the complexities that may arise for the different corporate structures of each entity. First, I will define ESG and the fiduciary duty in the context of a public corporation's Board of Directors, as well as how ESG investing has created a movement that challenges the Friedman "shareholder primacy" doctrine that has stood since the 1970s. Second, I will focus on how ESG can impact the in-house counsel's duty to the public corporation and Board of Directors by analyzing reports by the United Nations, Department of Labor, and law review articles on ESG. Finally, I will set out recommendations as to how the in-house counsel can fulfill their duty to the public corporation while complying with ESG standards, including what additional skills the in-house counsel will likely have to acquire.

## II. Background

The world of investing has adapted to the changing climate where investors are demanding more from corporations than profits, and corporate executives are quickly taking notice.<sup>1</sup> While the Board of Directors are the decision-making body for the public corporation, the owners of the corporation are the shareholders.<sup>2</sup> The shareholders are also entrusted with considerable authority, such as the voting power to determine who will be a Director.<sup>3</sup> Further, shareholders also contain the authority to issue resolutions to directors which, despite not legally binding, apply significant pressure to directors and tend to result in affirmative action.<sup>4</sup> Corporations have also taken steps to incorporate social responsibility as part of their corporate model, reasoning that a focus on long-term benefits will be of greater benefit to shareholders and stakeholders over a focus on short-term quarterly profits.<sup>5</sup> This section will introduce the important terms of social investing and how they are being used by corporations and shareholders to incorporate social, environmental, and governance principles in their business model.

### a. ESG

Environmental, social, and corporate governance (“ESG”) investing has quickly grown to become a staple of most corporations’ business strategy.<sup>6</sup> The ESG label represents the 3 factors

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<sup>1</sup> Robert G. Eckles & Svetlana Klimenko, *The Investor Revolution*, HBR (2019) (noting that many senior executives at global investing firms are measuring ESG performance).

<sup>2</sup> See *Shareholder Resolutions*, USSIF, <https://www.ussif.org/resolutions> (finding that shareholder resolutions that do not obtain majority support can nevertheless be an incentive for companies to take action or enter into shareholder agreements); Adam Hayes, *Shareholder*, Investopedia (Last updated Sep. 5, 2019), <https://www.investopedia.com/terms/s/shareholder.asp> (stating that shareholders have voting power to make important decisions like replacing directors and other corporate executives); Michael Useem, *How Well-Run Boards Make Decision*, HBR (2006), <https://hbr.org/2006/11/how-well-run-boards-make-decisions> (providing examples on how Board Directors make decisions for the corporation).

<sup>3</sup> See *Hayes, supra note, 2*.

<sup>4</sup> Kelly Mroz, *What is a Shareholder Resolution*, Chron, <https://smallbusiness.chron.com/shareholder-resolution-66531.html> (explaining the definition and purpose of a shareholder resolution)

<sup>5</sup> Tracey Keys, et al., *Making the Most of Corporate Social Responsibility*, McKinsey & Co. (Dec. 2009), <https://www.mckinsey.com/featured-insights/leadership/making-the-most-of-corporate-social-responsibility> (stating that a focus on social long-term success can be mutually beneficial for the corporation and the community).

<sup>6</sup> See John Divine, *7 of the Best Socially Responsible Funds*, US NEWS (Feb. 15, 2019), <https://money.usnews.com/investing/slideshows/7-of-the-best-socially-responsible-funds>; Rory Sullivan, et al.,

in measuring the sustainable and ethical impact of a company.<sup>7</sup> For example, ESG Exchange-traded funds (“ETF”) tend to consist of companies that are environmentally friendly or concentrating their efforts in socially conscious issues like LGBT rights. Given the increasing percentage of millennials beginning to invest in the market, companies are becoming increasingly focused on ESG investments to attract this new crowd of investors.<sup>8</sup> According to the Forum for Sustainable and Responsible Investment, ESG currently makes up 26% of actively managed assets in the US.<sup>9</sup> Further, a Bank of America survey showed that 63% of high-net-worth investors aged 39-54, known as Generation X, analyzed their portfolios in 2018 for ESG investments in 2018.<sup>10</sup> Seeing this trend, it is no surprise that companies are quickly jumping on the ESG bandwagon to attract new investors and please their existing investors.<sup>11</sup> As such, it is important to analyze the impact that ESG investment can have on the fiduciary duty of the corporation to its shareholders.

### ***b. Corporate Social Responsibility (CSR)***

CSR is a type of business model within the existing capitalist structure where companies are self-responsible for the implementation of their ESG contributions.<sup>12</sup> The reasoning behind CSR is

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*Fiduciary Duty in the 21st Century*, UNEPFI (Sep. 2015), [https://www.unepfi.org/fileadmin/documents/fiduciary\\_duty\\_21st\\_century.pdf](https://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf); SRI BASICS, <https://www.ussif.org/sribasics> (last visited Nov. 5, 2019).

<sup>7</sup> See Rory Sullivan, et al., *Fiduciary Duty in the 21st Century*, UNEPFI (Sep. 2015), [https://www.unepfi.org/fileadmin/documents/fiduciary\\_duty\\_21st\\_century.pdf](https://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf).

<sup>8</sup> Dieter Holger, *What Generation Is Leading the Way in ESG Investing? You’ll Be Surprised.*, WALL ST. J. (Sep. 10, 2019), <https://www.wsj.com/articles/what-generation-is-leading-the-way-in-esg-investing-youll-be-surprised-11568167440>.

<sup>9</sup> See *id.*; SRI BASICS, <https://www.ussif.org/sribasics> (last visited Nov. 5, 2019).

<sup>10</sup> See Holger *supra* note, 8; 2018 U.S. Trust Insights on Wealth and Worth, BANK OF AMERICA, 1, 4 (Jun. 2018), [https://newsroom.bankofamerica.com/system/files/2018\\_US\\_Trust\\_Insights\\_on\\_Wealth\\_and\\_Worth\\_Overview.pdf](https://newsroom.bankofamerica.com/system/files/2018_US_Trust_Insights_on_Wealth_and_Worth_Overview.pdf).

<sup>11</sup> Global Sustainable Investment Alliance, *2018 Global Sustainable Investment Review*, 1, 4 (Jun. 2019), [http://www.gsi-alliance.org/wp-content/uploads/2019/06/GSIR\\_Review2018F.pdf](http://www.gsi-alliance.org/wp-content/uploads/2019/06/GSIR_Review2018F.pdf) (stating that US ESG assets under management grew from \$8.7 trillion in 2017 to \$12 trillion in 2018, representing 26% of all assets under management in the US).

<sup>12</sup> James Chen, Corporate Social Responsibility, Investopedia (last updated Oct. 27, 2019), <https://www.investopedia.com/terms/c/corp-social-responsibility.asp>.

that by engaging in socially conscious activities such as philanthropy and environmental protection, corporations can benefit society, improve morale, and enhance the corporate brand image.<sup>13</sup> The International Organization for Standardization (ISO) published voluntary standards looking to engage in the practice of CSR in 2010, providing a definition of CSR and a set of qualitative factors for companies to use for determining whether their actions constitute CSR.<sup>14</sup> The ISO Guidance report involved collaboration between more than 90 countries, 40 “international or broadly-based regional organizations,” and stakeholders encompassing various fields in the corporate sector to ensure that the report address “a full and equitable balance of stakeholders,” efficient resource allocation, and language disparities.<sup>15</sup> The ISO standards cannot be certified but are helpful for companies seeking guidance on how to implement CSR practices and for investors researching whether a corporation’s practices are socially responsible.<sup>16</sup> CSR grants corporations the flexibility to utilize their resources in the most efficient way they estimate will enhance the corporation’s value and provide long-term benefits by utilizing a market-based approach.<sup>17</sup> However, under this discretionary model, corporations also have to be able to effectively communicate to the corporate constituents the value and benefits the socially responsible action will produce in the short and long-term.<sup>18</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> ISO 26000, Guidance on Social Responsibility, ISO (2010), <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en> (providing a definition of “social responsibility” and qualitative factors for determining whether actions are socially responsible).

<sup>15</sup> *Id.* (stating that the ISO was developed by experts in social responsibility using a “multi-stakeholder approach”).

<sup>16</sup> *Id.*

<sup>17</sup> Tracey Keys, et.al, Making the Most of Corporate Responsibility, McKinsey & Company (2010), <https://www.mckinsey.com/featured-insights/leadership/making-the-most-of-corporate-social-responsibility> (explaining the benefits of CSR for companies and how it can create value for the company and its shareholders).

<sup>18</sup> *Id.* (recommending that corporations undergo a “strategic analysis” to ensure that corporate resources are invested efficiently for the benefit of shareholders and stakeholders).

### *c. Socially Responsible Impact Investing (SRI)*

The Forum for Sustainable and Responsible Investing (US SIF) defines SRI as “an investment discipline that considers environmental, social and corporate governance (ESG) criteria to generate long-term competitive financial returns and positive societal impact.”<sup>19</sup> The US SIF reported that one of every four dollars invested by professional money managers involved SRI analysis in 2017.<sup>20</sup> Further, the organization indicated that there are likely to be a plethora of motivations for SRI investing, such as client demands, ESG contributions, personal values, but that these motivations do not take away from investors’ underlying financial interest in the corporation’s success.<sup>21</sup> SRI investors range from all financial spectrums, from the retail investor using E\*TRADE, to institutional investors like JP Morgan or Warren Buffett.<sup>22</sup> The SRI landscape is a valuable strategy for shareholders to impact the corporate trajectory by ownership of company shares.<sup>23</sup>

### **III. The Evolution of the Fiduciary Duty in a Progressive Corporate Landscape**

A fiduciary duty is an obligation to act in the best interests of another; in the case of a corporation, the obligation is to its shareholders.<sup>24</sup> Both directors and officers of a corporation owe a fiduciary duty based on state laws.<sup>25</sup> The fiduciary duty is composed of a duty of care and

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<sup>19</sup> SRI Basics, USSIF (2019) (defining what is SRI investing).

<sup>20</sup> Katherine Murray, Report on US Sustainable, Responsible and Impact Investing Trends, USSIF (2018), <https://www.ussif.org/files/US%20SIF%20Trends%20Report%202018%20Release.pdf> (finding that \$12 trillion of \$46.6 trillion of assets under management were SRI assets, compared to \$8.7 trillion in 2016).

<sup>21</sup> SRI Basics, USSIF (2019) (explaining that sustainable investors still require strong financial performance from the company but that these interests be in tandem with social, environmental, and governance investments).

<sup>22</sup> *Id.* (enumerating examples of SRI investors).

<sup>23</sup> *Id.* (explaining that shareholders can exercise control over corporate governance by electing Board directors, raising issues at corporate meetings, or issuing shareholder resolutions).

<sup>24</sup> Committee on Corporate Laws, ABA Section of Business Law, Corporate Director's Guidebook, Fifth Edition, 62 BUS. L. 1479, 1500 (2007) (stating that members on a corporate Board of Directors are fiduciaries to their shareholders).

<sup>25</sup> Committee on Corporate Laws, ABA Section of Business Law, Corporate Director's Guidebook, Fifth Edition.

duty of loyalty, which requires the fiduciary to act with the due care that would be required of a reasonable man under the circumstances.<sup>26</sup> Directors that fail to comply with their fiduciary duty are subject to derivative lawsuits by shareholders.<sup>27</sup> Examples of failure to comply with the fiduciary duty include: excessive director/officer compensation, investing in a new product likely to fail, and organizing or resisting a merger with a business for personal interest over the business's interest.<sup>28</sup> With ESG investors making up a higher percentage of company shareholders, will the fiduciary duty be modified so that directors and officers will have to incorporate socially conscious principles as part of their business decisions?

***a. Fiduciary Duty of a Director of a Public Corporation***

Milton Friedman wrote in 1970 that a company's sole responsibility is to their shareholders, and since then, the "shareholder primacy" model has dominated the global business mentality.<sup>29</sup> Companies have increasingly focused on short term profits and maximizing shareholder wealth over the long-term social impact of their actions.<sup>30</sup> However, recently there has been a shift against the tide, driven in part by the influx of ESG investors and the Business Roundtable's recent statement on stakeholder accountability.<sup>31</sup> As such, the role of ESG investing as part of the fiduciary duty of corporate directors and officers has become a point of discussion among

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<sup>26</sup> *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See Fiduciary Responsibility and Corporations*, NOLO (last visited on Nov. 7 2019), <https://www.nolo.com/legal-encyclopedia/fiduciary-responsibility-corporations.html>; Adam Barone, *What are some Examples of Fiduciary Duty?*, INVESTOPEDIA (Sep. 11, 2019), <https://www.investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp>.

<sup>29</sup> Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, NYT (Sep. 1970), <http://umich.edu/~thecore/doc/Friedman.pdf>.

<sup>30</sup> Anne M. Knott, *The Real Reason Companies are so Focused on the Short Term*, HBR, (Dec. 2017), <https://hbr.org/2017/12/the-real-reasons-companies-are-so-focused-on-the-short-term>.

<sup>31</sup> *See Statement on the Purpose of a Corporation*, Business Roundtable (2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf> (committing to deliver value to all stakeholders, including generating long-term value for corporate shareholders).

legal writers. Throughout this paper, the terms “Friedman doctrine” and “stakeholder primacy model” will be used to represent the two views on the role of the corporation.

Companies such as Adidas and Nestle have already adopted ESG principles into their business practices.<sup>32</sup> Adidas has taken steps to prepare more environmentally-friendly sourcing practices and by reducing their use of plastic in packaging.<sup>33</sup> The sports apparel giant also produced over 5 million shoes from recycled plastic waste in 2018.<sup>34</sup> Nestle has also focused on sustainable methods in agricultural development and food production to reduce the impact conventional agricultural practices have on climate change.<sup>35</sup> In fact, even Goldman Sachs has taken a stance on socially responsible investing (SRI) by investing in sustainable energy and recognizing that future clients will be more likely to focus on SRI than their more traditional profit-orientated predecessors.<sup>36</sup> A recent statement signed by 181 CEOs of the Business Roundtable committing to shift the focus from shareholder profit to stakeholder benefit also foreshadows a movement toward a new generation of investors.<sup>37</sup>

There are numerous indexes such as the Dow Jones Sustainability Index, the Socially Responsible Investing (SRI) Index, and the MSCI Global Sustainability Index, among many

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<sup>32</sup> See *Awards and Recognitions*, ADIDAS (Sep. 2019), <https://www.adidas-group.com/en/sustainability/managing-sustainability/awards-recognition/>; *Creating Shared Value Report*, NESTLE (2008), [https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate\\_social\\_responsibility/nestle-csv-report-mar2008-en.pdf](https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_social_responsibility/nestle-csv-report-mar2008-en.pdf).

<sup>33</sup> *Awards and Recognitions*, ADIDAS (Sep. 2019), <https://www.adidas-group.com/en/sustainability/managing-sustainability/awards-recognition/>.

<sup>34</sup> *Id.*

<sup>35</sup> The Nestle Sustainability Review, NESTLE (May 2002), [https://www.nestle.com/sites/default/files/asset-library/documents/reports/csv%20reports/environmental%20sustainability/sustainability\\_review\\_english.pdf](https://www.nestle.com/sites/default/files/asset-library/documents/reports/csv%20reports/environmental%20sustainability/sustainability_review_english.pdf).

<sup>36</sup> See *2018 Sustainability Report: Capital with Purpose- the Future of Sustainable Finance*, GOLDMAN SACHS (2018), <https://www.goldmansachs.com/citizenship/sustainability-reporting/report.pdf>.

<sup>37</sup> Statement on the Purpose of a Corporation, BUSINESS ROUNDTABLE (Aug. 19, 2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf>.

others that assist investors in locating ESG companies for their portfolio.<sup>38</sup> Investors can use these indexes to analyze the ESG ranking of specific companies prior to investing in them. A higher score is better for these companies because it attracts a diverse group of investors and can also provide them with additional positive publicity.<sup>39</sup> Further, companies with high ESG scores can also win entry into socially responsible ETF funds.<sup>40</sup> Such funds have a record of providing greater investor return for a similar cost as compared to their benchmark indices.<sup>41</sup>

The Department of Labor (“DOL”) issued a series of bulletins in 2018 on how fiduciaries should apply ESG factors in investment decisions.<sup>42</sup> The DOL concluded that while fiduciaries can use ESG factors, the primary focus should be on economic interest.<sup>43</sup> The DOL's report centered around ERISA fiduciaries and the role money managers have in managing retirement assets.<sup>44</sup> Accordingly, the DOL concluded that ESG factors did not modify the fiduciary duty with respect to ERISA fiduciaries.<sup>45</sup>

On the other side, the Stanford Law Review published an article in 2018 titled *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, that focused on risk-return ESG and how fiduciaries of a private trust, pension, or charitable endowment can integrate risk-adjusted ESG principles.<sup>46</sup> This article expands on DOL's analysis

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<sup>38</sup> John Divine, *7 of the Best Socially Responsible Funds*, US NEWS (Feb. 15, 2019), <https://money.usnews.com/investing/slideshows/7-of-the-best-socially-responsible-funds>.

<sup>39</sup> *What is Sustainable Investing*, BLACKROCK (2019), <https://www.ishares.com/us/strategies/sustainable-investing>.

<sup>40</sup> *See id.*

<sup>41</sup> Lisa Woll, *Critics of ESG Funds Are Wrong — Sustainable Investing Delivers Competitive Returns*, MARKETWATCH (Jul. 19, 2017), <https://www.marketwatch.com/story/critics-of-esg-funds-are-wrong-sustainable-investing-delivers-competitive-returns-2019-07-17>.

<sup>42</sup> Memorandum from John J. Canary to Regional Directors, (Apr. 23, 2018), <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01>.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See* Max M. Schanzenbach, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, Robert H. Sitkof, 72 STAN. L.REV. \_\_\_ (2020).

to explain how fiduciaries can use ESG factors to determine the risk-adjusted financial value of securities, including whether to support a finding that the security is undervalued or overvalued with respect to its socially conscious label.<sup>47</sup> For example, ESG factors might indicate to the fiduciary that an oil company is overvalued because the externalities produced by their CO2 emissions or lack of energy diversification in response to a changing economic landscape has not been priced in the stock value. Conversely, a fiduciary could find that an apparel company with a low ESG score is still worth investing in if the stock has nevertheless produced consistently solid earnings growth over time.

Therefore, a risk-adjusted ESG analysis can provide a greater overview of a security's intrinsic value, assisting fiduciaries in complying with their duty to investors.<sup>48</sup> As such, ESG factors are not necessarily inconsistent with the fiduciary duty to investors.<sup>49</sup> While it is unlikely that the fiduciary duty will be amended to reflect a required analysis of ESG factors, their role will still be consequential as a new generation of investors seek to put their money to work and as ESG securities continue to produce improved risk-adjusted returns.<sup>50</sup> Additionally, if capitalism

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<sup>47</sup> Compare Canary Memorandum *supra note*, 42 (recognizing that incorporating ESG factors into the fiduciary duty could present an economic risk to the investor portfolio); with Schanzenbach, *supra note* 46 at 32-33 (arguing against the DOL's analysis by recommending that the portfolio manager implement a risk-return strategy for ESG investments).

<sup>48</sup> See Schanzenbach, *supra note* 46.

<sup>49</sup> See Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and Esg Integration*, 90 U. COLO. L. REV. 731, 789 (2019) (finding that incorporating ESG principles into decision-making analysis may be compatible with the fiduciary duty so long as the market return is acceptable to investors); Eckles & Klimenko *supra note*, 1 (citing various studies from Harvard Business School in the 1990s to a 2018 report by Bank of America which demonstrated that companies with a high ESG rating are likely to outperform companies with lower ESG ratings).

<sup>50</sup> See Global Sustainable Investment Alliance, *supra note*, 11 (finding a 38% increase in ESG assets under management from 2017 to 2018); Eckles & Klimenko *supra note*, 1

continues to move toward the stakeholder primacy model proposed by the Business Roundtable, green investors may end up forging a path for the arrival of green fiduciaries.<sup>51</sup>

### ***b. The Corporate Lawyer's Duty to the Corporation***

According to Rule 1.13, a lawyer has a duty to represent the organization through its duly authorized constituents.<sup>52</sup> A lawyer also acts as a fiduciary for the client and therefore owes a fiduciary duty to the represented corporation.<sup>53</sup> As part of the fiduciary duty, the duties of loyalty and care are also owed to the represented organization and its duly authorized constituents.<sup>54</sup> A broader application of the stakeholder model would consequently expand the duty to constituents to include the corporation's customers, suppliers, society, and shareholders.<sup>55</sup> Inevitably, the question arises on whether the duty of the corporate lawyer extends to all those classes, imposing a higher standard of knowledge for the lawyer to competently fulfill such duty.<sup>56</sup>

A lawyer owes a duty of loyalty to the client which requires the lawyer to place the client's interests above their own.<sup>57</sup> They also owe a duty of care, which requires the lawyer to act

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<sup>51</sup> Statement on the Purpose of a Corporation, BUSINESS ROUNDTABLE (Aug. 19, 2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf>.

<sup>52</sup> ABA RPC 1.13 ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents").

<sup>53</sup> See Committee on Corporate Laws, ABA Section of Business Law, Corporate Director's Guidebook, Sixth Edition, 66 BUS. L. 975, 982-83 (2011); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and Esg Integration*, 90 U. COLO. L. REV. 731, 784-86 (2019) (explaining that the fiduciary duty includes the duties of obedience, loyalty, and care).

<sup>54</sup> See ABA RPC 1.13; Committee on Corporate Laws, ABA Section of Business Law, Corporate Director's Guidebook, Sixth Edition, 66 BUS. L. 975, 982-83 (2011) (finding that the fiduciary duty includes the duty of care and duty of loyalty).

<sup>55</sup> See ABA RPC 1.13.

<sup>56</sup> See *id.*

<sup>57</sup> See Restatement (Third) of the Law Governing Lawyers. §§16(3) (explaining that lawyers are fiduciaries to their clients); Restatement (Third) of Agency Law §8.01("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship") Gary *supra note*, 49 at 785-87; Susan N. Gary, *Values and Value: University Endowments, Fiduciary Duties, and Esg Investing*, 42 J.C. & U.L. 247, 253 (2016) (finding that fiduciary has duty to act in the "best interests of the corporation").

reasonably and live up to the standard of care of a reasonable lawyer doing similar work in similar circumstances; and a duty of confidentiality.<sup>58</sup> The lawyer’s fiduciary duty is rooted in the field of agency law and places an obligation on the lawyer (agent) to act on the client’s (principal) behalf.<sup>59</sup> The duty of care requires that the lawyer comply with the express and implied terms of the contract between the lawyer and the client,<sup>60</sup> act within the scope of their actual authority,<sup>61</sup> and inform the client of all facts material to the agency relationship and all facts the lawyer knows or has reason to know the client would want to have.<sup>62</sup> While the duty of loyalty is usually seen through the context as the lawyer’s fidelity to the client, a violation of the duty of care is most likely to result from common mistakes such as a lawyer’s incompetence, laziness, or lack of judgment.<sup>63</sup>

The Restatement also requires of the lawyer a duty of loyalty, which includes a duty of confidentiality, stating that the lawyer has a duty to “not to use or communicate confidential information of the principal for the agent’s own purposes or those of a third party.”<sup>64</sup> This duty is incorporated in Rule 1.6 of the ABA Model Rules of Professional Conduct so courts tend to treat it as separate from the duties of loyalty and care.<sup>65</sup> In this article, the duty of confidentiality will

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<sup>58</sup> See Restatement (Third) of the Law Governing Lawyers. §§16(2), 52 (requiring the “exercise of reasonable care, skill, and caution” to fulfill the duty of care).

<sup>59</sup> Restatement (Third) of Agency §1.01 (defining the agency relationship), 8.01 (“ An agent has a fiduciary duty to act loyally for the principal’s benefit for all matters related to the agency relationship”); *Burden v. Miller*, 957 F.2d 1375 (7th Cir. 1992) (Posner J.) (defining the fiduciary duty owed by an agent to the principal).

<sup>60</sup> Restatement (Third) of Agency §8.07.

<sup>61</sup> Restatement (Third) of Agency §8.09.

<sup>62</sup> Restatement (Third) of Agency §8.11

<sup>63</sup> *Breach of the Duty of Care*, WALKER MORGAN LLC (2019), <https://www.walkermorgan.com/negligence-breach-of-the-duty-of-care/> (“A breach of the duty of care occurs when one fails to fulfill his or her duty of care to act reasonably in some aspect”).

<sup>64</sup> See Restatement (Third) of Agency §8.05(2); *But see id.* (finding that the duty of confidentiality is “not absolute” and that privileged information may be revealed under certain circumstances such as protecting a “superior interest of the agent or third party” or to prevent a crime).

<sup>65</sup> See ABA RPC 1.6 (“A lawyer shall not reveal information relating to the representation of a client”); *but see id.* (enumerating 7 instances where a lawyer may reveal confidential information).

be analyzed within the duties of loyalty and care given that a violation of the former would also likely be a violation of the latter two .<sup>66</sup>

A lawyer has a legal duty to act in the client's best interest and is also required to provide candid advice to the client.<sup>67</sup> In the case of in-house counsel, this might invite moments where the attorney will have to provide their financial, in addition to legal, insight on a transaction.<sup>68</sup> The in-house counsel has an interesting dual role where they advise the corporation on fiduciary, statutory, and ethical concerns, while also focusing on the best interests of the corporation.<sup>69</sup> This is represented by the ethical requirements under the Sarbanes Oxley Act, which grants legal officers the discretion to report wrongdoing if they believe such action is in the best interests of the corporation.<sup>70</sup>

The lawyer's duty to act in the best interests of the company generally means that they also have the capacity to advise the company on financial and corporate governance matters, possibly even accounting.<sup>71</sup> In the case of a corporation, the entity is represented by its Board of Directors, which make decisions in the name of the corporation.<sup>72</sup> A well-rounded background in these

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<sup>66</sup> See Restatement (Third) of Agency §8.05(2); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHIC. L.REV. 1, 9-10 (1998) (stating that the duty of confidentiality is a moral obligation of the legal profession that attorneys should protect).

see also *Breach of the Duty of Care* (finding a breach of the duty of care where a lawyer does not act with the care of a reasonable person in the legal profession).

<sup>67</sup> Fraser Sherman, *Attorney's Fiduciary Duties to Client*, WORK-CHRON (Accessed Nov. 14 2019), <https://work.chron.com/attorneys-fiduciary-duties-clients-13456.html>.

<sup>68</sup> Michael Aprahamian, *Ethics Bear House Traps for In-House Counsel*, FOLEY AND LARDNER LLP (2010), <https://www.foley.com/-/media/files/insights/events/2010/11/business-litigation-2010-unlocking-successful-stra/files/ethics-bear-traps-for-inhouse-counsel/fileattachment/ethicsbeartrapforinhousecounsel.pdf>.

<sup>69</sup> See *id.*

<sup>70</sup> 17 CFR 205 (2003) (requiring attorneys to report material violations of securities laws or breaches of fiduciary duty "up-the-ladder" within the company structure); §307, Sarbanes Oxley Act of 2002.

<sup>71</sup> John Gilmore, *14 Top Mistakes Made by New In-House Counsel*, BARKERGILMORE (Mar. 2017), <https://www.barkergilmore.com/blog/biggest-mistakes-made-by-new-in-house-counsel> (recommending that counsel be involved in areas outside of the legal department such as finance and accounting).

<sup>72</sup> See *What Decisions are Made by a Corporation Board of Directors*, UPCOUNSEL (2019), <https://www.upcounsel.com/what-decisions-are-made-by-a-corporation-board-of-directors> (stating that Directors are required to protect investor and corporate interests).

fields allows the lawyer to advise the directors, which represent the company, on a broader range of issues and provide effective informed conclusions so that the directors may comply with their fiduciary duty to the corporation.<sup>73</sup> Given that the fiduciary duty of directors and officers of the company to act in the best interests of the corporation has historically been synonymous with short-term profit and maximizing wealth, it makes sense that the in-house counsel's fiduciary duty to the company include a background in finance and corporate governance issues.<sup>74</sup> However, if the fiduciary duty for directors and officers is modified to require these individuals to include ESG analysis as part of their fiduciary duty, then the corporate attorney's duty to the directors is also likely to change.

#### **IV. Socially Responsible Lawyering: Incorporating ESG Principles in the Corporate Lawyer's Duty**

As fiduciary to the corporation, the corporate lawyer is required to put the best interests of the corporation above their own interests.<sup>75</sup> In a society that places increasing value on the role of social corporate governance, what constitutes the best interests of the corporation is more obscure than in previous situations, and it is essential that the corporate lawyer adjust to the circumstances.<sup>76</sup> While the Business Roundtable's statement may suggest a shift against the

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<sup>73</sup> See Monica Zent, *Six Skills to Land a Job as an In-House Attorney*, LAW.COM CORPORATECOUNSEL (Jun. 2019), <https://www.law.com/corpcounsel/2019/06/11/six-skills-to-land-a-job-as-an-in-house-attorney/?sreturn=20191014150221> (recommending examples of non-legal skills in-house lawyers should have).

<sup>74</sup> See *id.*

<sup>75</sup> See ABA RPC Rule 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents"); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and Esg Integration*, 90 U. COLO. L. REV. 731, 785 (2019) ("fiduciaries... must act in the 'best interests' of the beneficiaries")

<sup>76</sup> See ABA RPC Rule 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents"); Emerson Wagner Mainardes, et al., *Stakeholder theory: issues to Resolve*, Cnt. for Studies in Mgmt. Sc., Mgmt. & Ec. Dpt. 226, 236 (2011), [https://www.researchgate.net/profile/Emerson\\_Mainardes/publication/243460719\\_Stakeholder\\_theory\\_Issues\\_to\\_resolve/links/0c960530e15ed544ea000000.pdf](https://www.researchgate.net/profile/Emerson_Mainardes/publication/243460719_Stakeholder_theory_Issues_to_resolve/links/0c960530e15ed544ea000000.pdf) (contemplating the potential complications when different stakeholder groups hold different interests).

Friedman doctrine toward a more stakeholder friendly approach, the change toward ESG has been a gradually occurring phenomenon for over a decade.<sup>77</sup> As such, ESG will inevitably influence corporate governance whether or not the business community adopts the stakeholder primacy model proposed by the Business Roundtable, and the corporate lawyer should be well-armed with the necessary knowledge to advise the corporation when the circumstances are present.<sup>78</sup> This will involve acquiring knowledge of environmental and social issues so that the lawyer may effectively fulfill their fiduciary duty to the organization and its duly authorized constituents.<sup>79</sup> However, advising the corporation and their constituents on what action to take becomes increasingly complex without a clear definition of what constitutes “sustainable” or “socially responsible” practices, and the corporate lawyer should take care to avoid providing advice that could result in a violation of their duty of loyalty or duty of care.<sup>80</sup>

#### **a. Duty Under the Friedman Doctrine**

Under the Friedman doctrine, the sole purpose of the corporation is to provide profits to the corporation’s shareholders.<sup>81</sup> The corporate lawyer’s fiduciary duty under this doctrine would most likely be more limited than under the stakeholder model proposed by the Business

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<sup>77</sup> See *Statement on the Purpose of a Corporation*, *supra* note, 37; *Nestle Sustainability Report* *supra* note, 35 (releasing first Sustainability Report in 2002).

<sup>78</sup> See *Statement on the Purpose of a Corporation*, *supra* note, 37 (recommending that businesses focus on providing value to stakeholders rather than solely shareholders).

<sup>79</sup> Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 TEX. A&M L. REV. 179, 194 (2018) (finding that a failure to assess potential risks associated with climate change could constitute a breach of fiduciary duty).

<sup>80</sup> See *What is ESG*, ADEC INNOVATIONS (2019), <https://www.esg.adec-innovations.com/about-us/faqs/what-is-esg/> (defining “sustainable investing” as a practice that seeks “positive returns and long-term impact on society, environment, and the performance of the business”). *Sustainable Investing Framework Guide*, BLACKROCK (2019) (providing a strategy for ESG investing), <https://www.ishares.com/us/literature/brochure/sustainable-investing-framework-guide.pdf>; Kelia Cowan, *ESG vs. Sustainability- What’s the Difference*, MEASURABI (Jul. 24, 2018), <https://www.measurabi.com/esg-vs-sustainability-whats-the-difference/> (stating that the broad definition of “sustainable” makes it nearly impossible to determine exactly what practices fall under the definition).

<sup>81</sup> See *Friedman* *supra* note, 29.

Roundtable but would still demand that the lawyer command a strong understanding of ESG.<sup>82</sup> Investors are provided with a variety of weapons to demand that directors and officers act toward ESG issues.<sup>83</sup> Activist investors, shareholder resolutions, and derivative lawsuits are some among the alternative methods shareholders can utilize to change corporate governance practices.<sup>84</sup> Under the existing Friedman doctrine, a corporate lawyer with environmental and social knowledge is well equipped to fulfill their fiduciary duty to the corporation by advising the corporation on the pros and cons of complying with shareholder demands.<sup>85</sup> They could also weigh the risks of compliance with shareholder demands, such as detriments to the company's long-term business plan.<sup>86</sup> Further, by assisting the Board of Directors in understanding the consequences of compliance with such demands, the corporate lawyer facilitates the likelihood that a Board will reach an agreement with shareholders.<sup>87</sup> In the case where the corporation is facing an activist investor, such a decision can be crucial to avoiding a corporate takeover and saving the positions of certain Directors.<sup>88</sup>

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<sup>82</sup> See Statement on the Purpose of a Corporation *supra* note, 37; Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 TEX. A&M L. REV. 179, 194 (2018) (citing *Innovest Strategic Value Advisors, Inc., Value at Risk: Climate Change and the Future of Governance* 1 (2002)) (“To fulfill their fiduciary duties, investors and directors now must understand which industry sectors and companies are exposed to the greatest risks, what measures if any are being taken to reduce them, and how effective they are likely to be.”).

<sup>83</sup> See Mroz *supra* note, 4 (explaining the impact of Shareholder Resolutions to initiate director action on ESG issues); Eckles & Klimenko *supra* note, 1 (“Shareholder activism is on the rise in financial markets—and ESG is increasingly becoming a focus of these interventions”).

<sup>84</sup> See Eckles & Klimenko *supra* note, 1.

<sup>85</sup> See Gary *supra* note, 49 at 787 (2019) (explaining that ESG practices that provide acceptable market returns to investors are consistent with the duty of loyalty).

<sup>86</sup> See *id.*

<sup>87</sup> See Eckles & Klimenko *supra* note, 1 (explaining that more investors are demanding that their companies take positions on ESG issues).

<sup>88</sup> See *What Decisions are Made by a Corporation Board of Directors*, UPCOUNSEL (2019), <https://www.upcounsel.com/what-decisions-are-made-by-a-corporation-board-of-directors> (stating that Directors are required to protect investor and corporate interests); Zent *supra* note, 73 (recommending that the corporate lawyer have a financial skillset to advise the corporate directors).

As such, environmental and social knowledge would assist the lawyer in fulfilling their fiduciary duty to the corporation and its duly authorized constituents under the Friedman doctrine.<sup>89</sup> By advising the corporation on how to comply with shareholder demands on ESG, the corporate lawyer is putting the client's needs above their own and preventing them from facing derivative lawsuits or long anti-takeover campaigns against activist investors, thereby saving the corporation from incurring significant resources.<sup>90</sup>

### **b. Duty under Stakeholder Primacy Model**

The modernization of the Directors' fiduciary duty to comply with ESG principles will have consequences extending to members of the corporation such as the in-house counsel, which will subsequently result in changes pertaining to the duty of the lawyer to the corporation and its duly authorized constituents.<sup>91</sup> To comply with their enhanced duty, corporate lawyers should ensure that they are well-versed in non-traditional areas such as environmental law and public policy to provide informed conclusions and recommendations to the decision-making entity of the public corporation (i.e. the Board of Directors).<sup>92</sup> Further, lawyers should disclose the sources used to determine their definition of ESG, such the industry standards outlined by the Sustainability

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<sup>89</sup> Maureen Milford, *The Character of the Corporation: ESG Faces Tests of Staying Power, Especially With the Ghost of Milton Friedman in the Wings*, DIRECTORS&BOARDS (2019), <https://www.directorsandboards.com/articles/singlecharacter-corporation-esg-faces-tests-staying-power-especially-ghost-milton-friedman> (quoting Brace Young of Arabesque Asset Management USA) ("My view is ESG is not a product. It is a component of an investment process").

<sup>90</sup> See Eckles & Klimenko *supra note*, 1; Virginia Harper Ho, Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk, 41 J. Corp. L. 647, 696 (2016) (explaining the role of "fiduciary capitalism" in integrating ESG strategies); Gary *supra note*, 49 at 788-89 ("ESG integration falls squarely within the prudent investor standard and does not implicate the duty of loyalty").

<sup>91</sup> See ABA RPC Rule 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents"); Mainardes *supra note*, 76 at 243.

<sup>92</sup> See ABA RPC Rule 1.13(a); Statement on the Purpose of a Corporation *supra note*, 37

Accounting Standards Board.<sup>93</sup> These additional qualifications might limit the inflow of in-house counsel into the labor force, resulting in higher wages for these positions to compensate for the additional specific skills that would be required.<sup>94</sup>

There is also the danger of extending the duty of the lawyer to constituents outside of the public corporation, such as consumers, employees, the general community, among others. Expanding constituents to such a broad classification would make it increasingly difficult for counsel to ensure that they are fulfilling their duty of loyalty to the organization, because there is a greater probability that the constituent interests will conflict.<sup>95</sup> For example, employee constituents might prefer to focus on cleaner supply chains over moving toward renewable energy development, to avoid incurring substantial costs that might drive the company to liquidation, whereas the community constituents might prefer reducing greenhouse gas emissions for cleaner air.<sup>96</sup> There might even be disagreement within certain constituent groups over what constitutes sustainability, such as individuals within the consumer class with distinct views whether sustainability should focus on environmental or social impact, not to mention the impact of political ideology on such views.<sup>97</sup> The lack of an established definition for what constitutes “sustainable” or “socially responsible” places an onerous duty of the lawyer in determining what

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<sup>93</sup> See Sustainable Accounting Standards Board, *Standards Overview*, SASB (Nov. 2018) <https://www.sasb.org/standards-overview/> (outlining a complete set of industry-specific standards for defining sustainability).

<sup>94</sup> See Catherine Rodgers, *What I Wish I'd Known*, GC (2014) (recollecting on the challenges faced by in-house counsel)

<sup>95</sup> See ABA RPC 1.7 (finding concurrent conflict of interest where the client interests are adverse); Mainardes *supra* note, 76 at 229-30 (assuming that the stakeholder model functions where the stakeholder's interests are united).

<sup>96</sup> See Mainardes *supra* note, 76 at 231; *supra* note, 69 (finding a broad definition of “sustainability”).

<sup>97</sup> See ABA RPC 1.7; Mainardes *supra* note, 76 at 231; see also Warren Buffett: *I'll judge Trump by how he handles the No. 1 threat to US security*, CNBC (Feb. 27, 2017 at 9:41 am),

<https://www.cnbc.com/videos/economy/warren-buffett-ill-judge-trump-by-how-he-handles-no-1-threat-to-us-security-16749.htm> (stating that mixing policies with investing is a “big mistake”) Becky Quick, *Warren Buffett: You do not want to have a political view when investing*, CNBC (Feb. 25, 2019 at 8:20 am),

<https://www.cnbc.com/video/2019/02/25/warren-buffett-you-do-not-want-to-have-a-political-view-when-investing.html> (stating that investors should not take politics into consideration when investing)

corporate actions would comply with ESG based on subjective guidelines.<sup>98</sup> In such a situation, there are no objective considerations for determining the discretion that should be given to the shareholders in finding which demands are consistent with ESG factors.<sup>99</sup>

Additionally, determining what action constitutes “in the best interests of the corporation” becomes more difficult as corporations move away from the Friedman doctrine toward a stakeholder primacy model as signaled by the Business Roundtable.<sup>100</sup> As such, counsel would likely have to conduct a more extensive analysis when drafting recommendations on corporate decisions to ensure that such decisions are in the best interests of all the constituents.<sup>101</sup> While corporate profits will maintain a factor, it is likely to be less determinative in light of the other factors such as employee satisfaction, external effects on the community (i.e. pollution, income inequality), and public perspective of the corporation.<sup>102</sup> Unfortunately, among the various skills lawyers possess, determining the future is not one of them. It is nearly impossible for counsel to consistently estimate the costs of externalities such as carbon emissions, particularly when

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<sup>98</sup> See Rory Sullivan, et al., *Fiduciary Duty in the 21st Century*, UNEPFI 1, 17-18 (2015) (finding that lawyers tend to advise clients against incorporating ESG issues into the fiduciary duty because of the difficulties in reconciling different stakeholder views on ESG and the lack of protections afforded to fiduciaries).

<sup>99</sup> See *supra* note, 80 (defining “sustainable investing” as a practice that seeks “positive returns and long-term impact on society, environment, and the performance of the business”).

<sup>100</sup> See Gary *supra* note, 49 at 785 (stating that the duty of loyalty requires fiduciaries to act in the best interests of the beneficiaries); Statement on the Purpose of a Corporation *supra* note, 37.

<sup>101</sup> See Cowan *supra* note, 80 (elaborating on the complexities companies have in defining “sustainability”); Mainardes *supra* note, 76 at 236 (citing R. Edward Freeman, *Strategic Management: A Stakeholder Approach*, (1984) (“the essence of the company is to manage the interests of different stakeholders and including changes in expectations and demands”)); Gary *supra* note, 49 at 785-86 (“A fiduciary’s decisions about investments must always be consistent with the interests of the beneficiaries, so an understanding of their interests may affect the fiduciary’s duties”).

<sup>102</sup> See Shareholder Resolutions, *supra* note, 2 (providing examples of shareholder resolutions on different ESG issues); Milford *supra* note, 89 (quoting Brendan Powers, a senior analyst of Cerulli) (“Some advisers might have trouble understanding ESG factors”); see also Eckles & Klimenko, *supra* note, 1 (recommending that companies focus on addressing “material issues” of ESG relevant to their industry to avoid financial distress); See Gary *supra* note, 49 at 789 (citing Unif. Prudent Inv’r Act § 5 cmt. (Unif. Law. Comm’n 1994) (“No form of so-called ‘social investing’ is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries--for example, by accepting below-market returns--in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause”).

factoring in how global and national politics, scientific reports, and the impact of globalization (i.e. supply chain disruptions such as trade wars) can impact the magnitude of externalities and their impact on corporate profits.<sup>103</sup>

In light of all these considerations, counsel will naturally tend to be more conservative in drafting their recommendations to avoid antagonizing one or more of these constituent sectors, to avoid any potential risks of violating their duty to the organization.<sup>104</sup>

### **c. The Green Gatekeeper**

By understanding the role of ESG in corporate governance, lawyers can protect the corporation and consumers, by identifying ESG risks and assist in preparing detailed governance structures compliant with the demands of ESG shareholders.<sup>105</sup> Beth Haddock, CEO and Founder of Warburton Advisers, outlined three ways that lawyers can act as Gatekeepers when evaluating the role of ESG in corporate governance: 1) Discover and solve governance issues; 2) prevent fraud; and 3) encourage positive business decisions and manage risks.<sup>106</sup>

Concerning the first factor, to uncover and address governance issues, the corporate lawyer can play an important role to ensure that the governing board has taken the proper steps to address

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<sup>103</sup> See Thomas Helbling, *Externalities: Prices Do Not Capture All Costs*, IMF (last updated Dec. 18, 2018), <https://www.imf.org/external/pubs/ft/fandd/basics/external.htm> (finding that estimating the exact market value of externalities is not possible).

<sup>104</sup> See ABA RPC Rule 1.13(a); See ABA RPC Rule 1.7; See Gary *supra* note, 49 at 785-86 (“A fiduciary's decisions about investments must always be consistent with the interests of the beneficiaries, so an understanding of their interests may affect the fiduciary's duties”).

<sup>105</sup> See e.g. Beth Haddock, et al., *Why Corporate Attorneys and Other Gatekeepers Should Consider ESG and Sustainability Principles*, 30 FORDHAM ENVTL. L. REV. 1 (2018). Available at: <https://ir.lawnet.fordham.edu/elr/vol30/iss1/1>.

<sup>106</sup> See *id.* at 2-9 (enumerating three reasons for why lawyers should implement ESG strategies).

ESG compliance.<sup>107</sup> If the corporation has given representations to its shareholders in the form of requests for proposals or written protocols, the lawyer might be required to verify that the corporation is in compliance with such documents or that such representations are consistent with corporate and/or regulatory guidelines.<sup>108</sup> Further, the lawyer can review the documents to ensure that shareholder demands on ESG are adequately accounted for, thus generating a more transparent relationship between the corporation and its shareholders.<sup>109</sup>

As gatekeeper, most lawyers are already taking the necessary precautions to prevent the corporation from SEC antifraud liability for misrepresentations or omissions of material facts concerning ESG and sustainability practices.<sup>110</sup> While corporate lawyers are generally required to review the corporate documents to avoid falling under these provisions, they should also review the corporation's claims on ESG performance.<sup>111</sup> As such, the lawyer's due diligence would extend to documents such as the corporation's sustainability reports and other public documents pertaining to ESG compliance and verify that such claims are consistent with the data.<sup>112</sup> ESG claims inconsistent with the impact data would subject the corporation to liability, thus subjecting the lawyer to liability for failure to conduct due diligence and violation of their fiduciary duty.<sup>113</sup>

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<sup>107</sup> *See id.* at 4 (recommending that corporate lawyer “help confirm investments are aligned with investment guidelines.”).

<sup>108</sup> *See id.* (recommending searching for governance gaps by looking to requests for proposals, documents supporting certification, and client transparency).

<sup>109</sup> *See id.* at 4-5

<sup>110</sup> *See id.* at 5 (focusing on the lawyer's role in avoiding antifraud liability under §11, §12(a)(1) and §12(a)(2) of the Securities Act and §10b-5 of the Securities Exchange Act).

<sup>111</sup> *See id.* (“compliance officers should help assess the validity of claims about [CSR] data that is often unaudited and can be subject to manipulation.”).

<sup>112</sup> *See id.* at 6-7 (warning that a corporation may assume liability for reliance on “exaggerated or inaccurate” claims).

<sup>113</sup> *See id.*

Finally, lawyers armed with a knowledge of the benefits of ESG principles can assist the corporation in making informed business decisions while simultaneously mitigating risk.<sup>114</sup> Recognizing ESG-related risks and incorporating them into a risk-adjusted business model can avoid preventable harm to the corporation and maximize profit for the corporation, along with its shareholders.<sup>115</sup> Further, an ESG analysis would comply with an enterprise risk management (ERM) plan used by corporations in recognizing and managing risks.<sup>116</sup> Incorporating ESG into ERM would provide corporations a more detailed framework on potential risks to their operations by including additional factors in the analysis such as environmental and political hazards.<sup>117</sup> On the other side, an ESG-compliant ERM might identify the benefits of transitioning to renewable energy by focusing on the likelihood that the government will ramp up regulation on this field.<sup>118</sup> As such, implementation of ESG principles into ERM is more likely to identify potential risks for the corporation, maximize the value of business investments, and avoid unnecessary liability for both the corporation and the corporate lawyer.<sup>119</sup> The value of ESG for a lawyer acting in the “Gatekeeper” role can ensure that the lawyer is compliant with their due diligence and fiduciary duty to the corporation.<sup>120</sup>

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<sup>114</sup> *See id.* at 9 (By understanding and encouraging the operational benefits of ESG principles, Gatekeepers can help manage enterprise risks and encourage good business decisions and sound operational processes that help prevent compliance breaches).

<sup>115</sup> *See id.* at 10.

<sup>116</sup> *See id.* (stating that ESG principles should be considered to ensure compliance with the duty of ERM); Will Kenton, *Enterprise Risk Management*, INVESTOPEDIA (last updated Jul. 2, 2019), <https://www.investopedia.com/terms/e/enterprise-risk-management.asp> (defining ERM and how companies use ERM strategies to identify and prepare for risks within the company and influence its decision-making).

<sup>117</sup> *See* Haddock *supra note*, 103 at 9-10.

<sup>118</sup> *See id.* at 11 (incorporating ESG principles in analysis can eliminate “blind spots that can cost a company money and reputational damage”); Kenton *supra note*, 114.

<sup>119</sup> *See* Haddock *supra note*, 103 at 10-11.

<sup>120</sup> *See id.* (applying ESG to ERM can mitigate “material risks”) (“Faulty due diligence can lead to unseen risks and liability”).

## **V. Conclusion**

Given the vital role the in-house counsel plays, it is essential for them to understand the industry the company is involved in as well as other business issues that can further the corporation's interest. While this generally implies business and financial acumen, the rising role of ESG investing may require that corporate attorneys add environmental and social knowledge to their skillset. A command of environmental and social issues would allow the lawyer to comply with their fiduciary duty to the organization either under the current Friedman doctrine, or the stakeholder model proposed by the Business Roundtable. While the proposed stakeholder model would likely impose greater responsibilities on the corporate lawyer, shareholders are already equipped with a notable arsenal of methods to pressure directors into taking socially responsible actions. Consequently, the lawyer's fiduciary duty is likely to demand that they be well equipped to protect the corporation from undesirable situations such as corporate takeover, derivative lawsuits, and shareholder resolutions, among others. So you may not want to ignore those environmental or social policy courses just yet.