
ESSAY

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Oregon's Experiment with Sustainable Corporate Governance: A Friendly Critique

Over the past three years, Oregon has sought to become a leader in sustainable corporate governance. The effort began around 2007 under the leadership of Dick Roy and his organization, Oregon Lawyers for a Sustainable Future.¹ Its basic goal has been to make Oregon's statutory framework more appealing to green businesses. Presumably, the sought after result will be to both recruit new green businesses to Oregon and encourage existing Oregon businesses to improve the sustainability of their operations. If successful, the effort may also serve as an exemplar for other states to follow.

In pursuit of these goals, the first of two proposed statutory amendments was enacted by the Oregon legislature in 2007, while the second remains under consideration. At first glance, they appear to be relatively modest steps aimed at clarifying and broadening the scope of corporate decision making. Upon further reflection, however, I believe they will have a negative impact on Oregon's

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¹ The author and several of his colleagues at the University of Oregon, both past and present, have at times been participants in and supporters of Dick Roy's efforts. See generally, e.g., Judd F. Sneirson, *Race to the Left: A Legislator's Guide to Greening a Corporate Code*, 88 OR. L. REV. 491 (2009) (arguing in favor of Roy's reform agenda). Thus, this critique of Oregon's effort represents a friendly difference of opinion over tactics, rather than a serious dispute over ends. More importantly, it seeks to highlight alternative avenues for sustainable corporate law reform that are likely to have a more permanent and far-reaching impact than those currently under consideration.

economy and ultimately prove to be wrong turns on the path to a more sustainable future.

Under the first proposal, ORS 60.047(2), Oregon corporations are now expressly permitted to include in their articles of incorporation a provision that would either allow or require the board of directors to make decisions in a manner that is environmentally and socially responsible.² The phrase “environmentally and socially responsible” is intended to direct the board’s attention to the theory of the triple bottom line: businesses should seek to maximize their value with respect to “people, profits and place.”³

The second proposal, H.B. 2829, was tabled in committee in 2009 and, as of this writing, has never been voted on by the full Legislature.⁴ As a result, its future remains uncertain. According to its language, it appears intended to permit the boards of directors of any Oregon corporation, including those that have chosen not to adopt the language of ORS 60.047(2)(e), to consider more than just shareholder interests when determining corporate policy.⁵ Rather, the corporation’s impact on social, legal, ethical, and environmental issues, together with the interests of its employees, customers, and suppliers, could all be balanced against the corporation’s fundamental policy of shareholder wealth maximization.

Together, these proposals are firmly rooted in a stakeholder view of the corporation. This theory holds that corporations do not exist merely for the benefit of their shareholders, but also for the benefit of their other stakeholders, broadly defined.⁶ It resembles the triple bottom line approach, but is in many ways more expansive. For example, it includes the interests of society in general as well as those

² OR. REV. STAT. § 60.047(2) (2009) (“The articles of incorporation may set forth . . . (e) A provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible . . .”).

³ See JOHN ELKINGTON, *CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS* 2 (1998) (“The sustainability agenda, long understood as an attempt to harmonize the traditional financial bottom line with emerging thinking about the environmental bottom line, is turning out to be much more complicated than some early business enthusiasts imagined. Increasingly, we think in terms of a ‘triple bottom line,’ focusing on economic prosperity, environmental quality and—the element which business has tended to overlook—social justice.”).

⁴ OR. STATUS REPORT FOR HOUSE MEASURES UPON ADJOURNMENT, June 29, 2009, at H-106, available at <http://www.leg.state.or.us/09reg/pubs/HouseUponAdjournment09.pdf>.

⁵ See H.B. 2829, 75th Or. Legis. Ass’y, § 1 (2009).

⁶ See Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1019–21 (2009).

of creditors and future shareholders. A number of states have modest stakeholder-oriented provisions, but Oregon's is the first in the nation to include "directing" language that would become mandatory for electing corporations.⁷

Overall, I believe that Oregon's ambition to become a leader in green business is both admirable and sensible. It plays to Oregon's strengths, particularly its progressive and outdoorsy culture, while at the same time seeking to harmonize humanity's relationship with the Earth. Thus, I agree wholeheartedly that Oregon should seek to become a leader in the worldwide effort to develop a green economy.⁸ That being said, as a corporate law scholar, I find myself deeply skeptical about the tactic of attempting such reform through revisions to the corporation statute. I fear that the effort will backfire, both failing to achieve its objective and rebounding to Oregon's detriment. Instead, I propose an alternative reform agenda.

CORPORATE REFORM AS SIGNAL

My primary concern with the two amendments is that they do not appear to change the law. Both, after all, are permissive rather than proscriptive. Moreover, in Oregon and elsewhere, corporate boards of directors already possess the latitude to act in a manner that is consistent with the triple bottom line. All that these provisions do is make explicit what has always been implicit.

The cornerstone of corporate governance is the business judgment rule. This so-called rule is really a presumption that directors, when taking action on behalf of the corporation, do so in good faith, with due care, and with the honest belief that their actions are in the best interests of (or not opposed to) the interests of the corporation.⁹ The idea is that, because business decisions necessarily involve risk taking, courts should seek to avoid second-guessing strategies that

⁷ See *id.* at 1019–20.

⁸ For a recent call to arms and a description of the dangers involved in falling behind, see Thomas L. Friedman, Op-Ed., *Who's Sleeping Now?*, N.Y. TIMES, Jan. 10, 2010, at WK10.

⁹ See FRANKLIN A. GEVURTZ, CORPORATION LAW §4.1.2, at 278–79 (2000) ("The idea underlying the rule is that courts should exercise restraint in holding directors liable for (or otherwise second guessing) business decisions which produce poor results or with which reasonable minds might disagree. . . . [D]irectors frequently must make business decisions in situations in which, no matter what decision the directors make, someone is going to disagree with what the directors did.").

prove less than successful. Rather, courts should focus on the loyalty of the directors and the quality of their decision-making processes.

The business judgment rule therefore creates a broad zone of discretion that insulates from challenge board decisions that are made carefully and without the taint of self dealing, whether or not they are made strictly in the interests of the corporation's shareholders. Of course, liberal commentators have long complained that such wide discretion effectively allows corporate managers to pursue their own selfish interests without fear of being held accountable. However, this management-friendly regime allows just as much discretion for managers to do good in the name of society's welfare as to do evil in the name of profit.¹⁰

Put differently, managers already have the discretion necessary to act in the best interests of the environment and society as well as in the interests of their shareholders. Shareholder wealth maximization, though a powerful norm, has never been an absolute rule.¹¹ Rather, triple-bottom-line management has always been available to those companies brave enough to adopt it.

However, this raises an interesting question: if the legislative changes under consideration in Oregon do not seek to change the law, what is their intended purpose? Is it merely to clarify the law, or something more far reaching? In fact, the goal appears to be symbolic.¹² The amendments seem to be designed to draw attention

¹⁰ See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 226–28 (2006).

¹¹ See, e.g., *Dodge v. Ford Motor, Co.*, 170 N.W. 668, 684 (1919) (“A business corporation is organized and carried on *primarily* for the profit of the stockholders. . . . [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the *merely incidental* benefit of shareholders and for the *primary* purpose of benefiting others”) (emphasis added). Use of words like “primary” and “incidental” suggest that absolute adherence to the shareholder norm constitutes more than is required. See also Sneirson, *supra* note 1, at 496–97 (“American corporate law permits firms to pursue . . . green practices and business plans. Corporate law contains no requirement that fiduciaries maximize shareholder profits or wealth.”).

¹² It has been argued by supporters of the amendments that its real purpose is to clarify Oregon's somewhat inconsistent application of the business judgment rule. See, e.g., *Public Hearing on H.B. 2829 Before the H. Comm. on Sustainability and Economic Development*, 75th Or. Legis. Ass'y (Mar. 24, 2009) (statement of University of Oregon Assistant Professor of Law Judd F. Sneirson), available at <http://www.leg.state.or.us/listn/archive/archive.2009s/HSED-200903241243.ram> (“If anything, what it would do is clarify the business judgment rule in Oregon Oregon corporate law on this point is not as well settled as in other jurisdictions”). Even if this interpretation is correct, however, the Legislature's choice in adopting an expressly green reform agenda—when no such choice need have been made in order to clarify the law—appears intended to draw attention to the

to Oregon and its burgeoning green economy. Oregon, it appears, is seeking to attract green business entrepreneurs by signaling its new economy bona fides.¹³ But is signaling a good idea?

MIXED SIGNALS

The problem with signaling as a legislative strategy is that one loses control over the signal as soon as it is made. The signal is therefore subject to both misinterpretation and misdirection. It is this latter possibility that I fear will be the true legacy of Oregon's experiment with sustainable corporate governance. Its intended audience may overlook the signal while others inimical to its message may receive it a little too loud and clear.

Realistically, we must admit that the nuances of any state's corporation statute, not to mention its mere existence, are not widely understood by the general public, entrepreneurs, or business leaders. Moreover, to understand the implication that Oregon's statute is marginally more environmentally friendly than, say, Washington's or Colorado's would require the observer to know something about all three statutes (not to mention the other forty-seven). At best, the proposed change in Oregon law constitutes a very weak signal that is unlikely to register strongly outside the corporate law community.

Even worse, the signal is likely to be weakest among its intended audience. Since the statute does not change current Oregon law, it can have no measurable impact on existing local businesses. Rather, its intended audience is presumably out-of-state businesses that are considering relocation. To the extent such businesses remain in their start-up or entrepreneurial stage, which at this point most green businesses probably do, this sort of weak signal would probably not affect their assessment of whether and where to relocate their business. Rather, the quality and education level of the local workforce, access to raw materials and new technologies, the

provision and signal the state's commitment to sustainability. *See id.* (statement of Rep. Chris Garrett) ("The purpose of this bill is to recognize that corporations are not just profit maximizing entities, they are important social actors This bill would authorize them to account for economic, environmental, social, and ethical considerations as well.").

¹³ *See, e.g.*, Governor Ted Kulongoski, State of the State Speech 2009 (January 12, 2009), available at http://governor.oregon.gov/Gov/speech/2009_0112_stateofstate.shtml ("There is a green revolution stirring in America, and Oregon is the beating heart of that revolution.").

community's livability, and government tax and other incentives are all likely to be far more relevant.

It would be possible to send a very strong signal were one so inclined. However, it would require real substance—substance that policymakers may not be prepared to provide. For example, Oregon could simply eliminate the state income tax on any profits an organization earns from selling green technologies. It is unclear what the impact of such a suggestion would be on the state's finances, nor how such a scheme could be made workable. However, it would be certain to send the kind of signal that would attract notice. Talk, as they say, is cheap. It must be supported by real substance to hold any value.

But does this cheap talk come at a price? Even if the signal mostly misses its mark, what is the harm if it really does not change the law? Absent a significant downside, the signal would presumably yield success even if only a few entrepreneurs notice.

The real risk, it turns out, is not misinterpretation but misdirection. Anyone reading the amendments will know immediately that they are intended to signal Oregon as a progressive, environmentally friendly state with a legislature that seeks to promote a green economy. Rather, the concern is that the signal, because it is unique among the fifty states in promoting sustainable business, will appear overly salient to established companies with the legal and other resources necessary to stay abreast of legislative change. The signal, in other words, might not seem so weak to companies that already fear that Oregon is an inhospitable place to conduct business.¹⁴ Indeed, this group might even include those firms that seek to profit by developing sustainable products and technologies or support the green agenda, but are not yet ready to go so far as to change their corporate charter. Signaling, in other words, can be dangerous in that policymakers can never be sure of when they have crossed the line, accidentally identifying Oregon in the minds of business leaders as a hostile environment for all but the purest of green enterprises.

In normal times and under normal economic circumstances, one might argue that this is a reasonable risk. However, at the time of this writing, Oregon's unemployment rate is one of the highest in the

¹⁴ See, e.g., Andy Giegerich, *Some Biz Lawyers Worry Over Sustainability Effort*, PORTLAND BUS. J., Apr. 18, 2008, <http://portland.bizjournals.com/portland/stories/2008/04/21/focus7.html> (interviewing lawyers wary of changes to the Oregon corporate code).

nation.¹⁵ Although some commentators see isolated signs of a resurgent economy, much of the improvement has been limited to Wall Street and many see the potential for a second dip.¹⁶ Economic recovery in the near term remains far from certain.

What Oregon needs is jobs. Jobs provide dignity and purpose. Jobs reduce crime. They increase tax revenues and generate feelings of community and optimism. Meanwhile, job loss and associated poverty have negative impacts on the environment that are at least as significant as those resulting from economic growth.¹⁷

Certainly, Oregon needs to move forward aggressively with a pro-green business agenda, both because it is the right thing to do for the world and because it is the smart thing to do for the State's economy. Environmental remediation needs to work symbiotically with economic development. Indeed, it is difficult to conceive of a viable future without both.

That being said, policymakers need to be keenly aware of initiatives that might weaken one sector of the economy without strengthening another. My concern is that the ongoing effort to reform Oregon's corporation statute risks sending a very antigrowth message with the potential to scare off existing businesses without being sufficiently encouraging to attract new ones. Admittedly, this is an empirical question that cannot easily be answered *ex ante*. However, there appears to be a real possibility that cheap talk is not cheap—it risks damaging the economy without contributing to sustainability. Unless the Legislature is willing to put substance behind its signaling, it would be better to leave well enough alone.

THE PROBLEM OF STATE REGULATORY COMPETITION

The risks associated with weak signaling would not be so great were there not already competition among the states for corporate

¹⁵ Richard Read, *Oregon Unemployment One of Worst in Nation During 2009*, OREGONIAN, Jan. 2, 2010, http://www.oregonlive.com/business/index.ssf/2010/oregon_unemployment_one_of_wor.html (noting that, having lost more than 75,000 jobs in 2009, Oregon's 11.1% unemployment rate remains well above the national average).

¹⁶ See, e.g., Paul Krugman, Op-Ed., *That 1937 Feeling*, N.Y. TIMES, Jan. 4, 2010, at A21 (arguing that the nation could still experience a second downturn, much like what happened in 1937 when governmental efforts to rein in spending led to the deepest and most destructive period of the Great Depression).

¹⁷ See LESTER R. BROWN, PLAN B 4.0: MOBILIZING TO SAVE CIVILIZATION 106–10 (2009).

charters. The story of how Delaware won this competition and established itself as the principal seat for a majority of America's public corporations is instructive.

State regulatory competition began around the turn of the nineteenth century when New Jersey cast a jealous eye across the Hudson River. In an effort to share in the commercial activity taking place in New York, the New Jersey legislature repealed many of the most important restrictions that had, until then, been universally imposed on all corporations.¹⁸ The result was immediate and profound: New Jersey attracted so many businesses as to garner the nickname "the Mother of Trusts."¹⁹ Delaware, another small state geographically close to the major commercial centers of the Northeast, adopted a similar statute but with far less effect. New Jersey had apparently won the hearts and minds of corporate America.

The situation changed, however, when Woodrow Wilson was elected governor of New Jersey on a Progressive Era platform of reform. When New Jersey reinstated many of the prior restraints on business practice, corporate America took notice and relocated *en masse* to Delaware.²⁰ At this point, regulatory competition among the various states took hold in earnest, characterized by what Louis Brandeis contemporaneously described as a "race to the bottom."²¹ In the years that followed, all of the remaining states adopted pro-business corporation statutes comparable in effect to that of Delaware, resulting in a nearly uniform regulatory landscape throughout the nation.

The challenge facing reform-minded state legislatures has therefore become how to effect change without driving business away. Based on corporate law's internal affairs doctrine (which is itself based on

¹⁸ JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 2.01, at 33 (2d ed. 2003); GEVURTZ, *supra* note 9, § 1.1.3(b), at 21–23 (noting that, prior to this point, most state corporation statutes included limitations on their size, duration, and purpose). For a more detailed description of the events leading up to the change, see generally Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323 (2007).

¹⁹ COX & HAZEN, *supra* note 18, § 2.01, at 33–34.

²⁰ *Id.*

²¹ *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–65 (1933) (Brandeis, J., dissenting) (decrying the development of a race of laxity). *But see* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14 (1993) (arguing from the right that the same phenomenon should really be understood as a race to the top given the economic upside of deregulation).

the Constitution's full faith and credit clause), corporations are free to organize wherever they like and still retain the benefits of nationwide operations.²² Thus, Oregon's most important employers can reincorporate elsewhere if they perceive, as a result of poorly engineered signaling, that Oregon has become hostile to their presence. Although it would be more costly for an Oregon corporation to actually relocate its operations than to merely change its legal home, the Legislature risks losing control over Oregon's employers in the same manner that New Jersey ceded control to Delaware.

FEDERAL REGULATORY COMPETITION

There is a bright side to this story, however, and it suggests an alternative agenda for corporate reform. The several states, Delaware among them, now find themselves in regulatory competition not with one another but with the federal government. Corporate law, long the exclusive preserve of state regulators, is at risk of becoming federalized.²³

Again, the story is familiar but worth repeating. In response to the stock market crash that marked the onset of the Great Depression, President Roosevelt enacted the fundamental architecture of U.S. regulation of securities trading. The structure was intended to regulate behavior at the federal level primarily by requiring America's largest corporations to provide ongoing and detailed disclosure of their operations.²⁴ For the most part, companies could act as they pleased, so long as they were willing to acknowledge their behavior publicly. In practice, however, most preferred to clean up their operations rather than admit to less-than-ideal conduct.²⁵

²² STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 1.3(A), at 14–15 (2002); see also EUGENE F. SCOLES ET AL., CONFLICT OF LAWS §§ 23.2, 23.9 (4th ed. 2004).

²³ See generally Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859 (2003).

²⁴ LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 38–39 (4th ed. 2004).

²⁵ A concrete example of this phenomenon occurred in response to the Sarbanes-Oxley requirement that public companies “report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date.” Sarbanes-Oxley Act of 2002 § 302(a)(4)(D), 15 U.S.C. § 7241(a)(4)(D) (2006). Presumably, affected corporations could have simply reported that their internal controls were of sufficient but not stellar quality. However, the near-universal response was to spend millions of dollars

Since then, Congress has further federalized corporate law by enacting, among others, the Foreign Corrupt Practices Act in response to widespread bribery of foreign officials that was uncovered during the 1970s, the Williams Act in response to concern over the abuse of shareholders in the context of hostile takeovers, and the Sarbanes-Oxley Act in response to the collapse of Enron and WorldCom. Meanwhile, as of the date of this writing, both houses of Congress are actively debating major economic reform proposals in response to the recent crisis.²⁶ History, not to mention contemporary politics, suggests that we can expect a continued federalization of the regulation of corporations.²⁷

Given the near uniformity of existing state regulation, the best target for sustainable corporate reform may be the federal government. With the Democratic Party currently in control of both Congress and the White House, now would seem an opportune time for reformers to lobby for new law. More important, because the federal government has power throughout the nation, it is immune to most regulatory competition. Corporations may be able to move from state to state, but they cannot easily move from country to country—at least not if they want continued access to U.S. markets.

THREE AVENUES OF ATTACK

The most obvious strategy for corporate reform at the federal level is through the extensive disclosure obligations imposed upon most large American corporations. Under section 5 of the Securities Act of 1933, public companies are subject to continuous disclosure rules. The rules essentially require companies to disclose all information that is “material” when they have a duty to speak.²⁸ Information is

per company reforming the quality of those controls so that the companies could make favorable reports. See HERBERT S. WANDER ET AL., FINAL REPORT OF THE ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES TO THE U.S. SECURITIES AND EXCHANGE COMMISSION 32–34 (2006), available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>.

²⁶ See, e.g., David Herszenhorn, *Senate, 59–39, Approves New Rules for Wall Street: Bill Greatly Expands Oversight by U.S.—Broadly Similar to House Measure*, N.Y. TIMES, May 21, 2010, at A1.

²⁷ It would be possible to argue, at the time of this writing, that the election of Scott Brown in Massachusetts and other events have fundamentally altered the political landscape, making major Democratic-led initiatives less likely. However, given the continued popular anger directed at Wall Street, such changes in the political winds may make reform of Wall Street more rather than less likely.

²⁸ THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 12.9 (6th ed. 2009).

deemed material when a reasonable investor would think that it alters the total mix of available information.²⁹

One line of attack, then, would be to argue that existing rules require the disclosure of a public corporation's impact on the environment.³⁰ Why? Because the future value of the corporation's operations could be drastically altered by both the effects of global climate change and the environmental risks inherent in the company's specific operations. For example, most investors would want to know about the likelihood of beach erosion and rising sea levels before investing in a tropical resort company. Likewise, an energy company that ships only via double-hulled oil tankers might have a lower risk of loss than one that ships via single-hulled vessels. Both of these green issues would appear directly relevant to the corporation's near- or medium-term bottom line.

Pursuant to the securities laws, when a future event is uncertain, its materiality becomes a function of the balance between its probability and the magnitude of its impact.³¹ Thus, even under existing rules, one might legitimately argue that public companies should already be disclosing many of their potential impacts on climate change.³² Indeed, on January 27, 2010, the Securities and Exchange Commission (SEC) voted along party lines to provide interpretive guidance regarding disclosure requirements related to the effects of climate change. The announcement was made in response to a petition received by the SEC in 2007, and then renewed under the

²⁹ SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968).

³⁰ For a more detailed discussion of this possibility, see generally Thomas Joo, *Global Warming and the Management-Centered Corporation*, 44 WAKE FOREST L. REV. 671 (2009).

³¹ Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (holding that “to fulfill the materiality requirement ‘there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available’”) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

³² Note, however, that a recent report by the Government Accountability Office (GAO) concluded that existing disclosure requirements are too narrow to require such disclosure. In particular, the GAO looked at the requirement under Regulation S-K Item 103 that public companies report on their material legal proceedings. The GAO then concluded that this disclosure requirement was easily circumvented by companies that claim the outcomes of any such proceedings are invariably too uncertain to characterize. ELLEN CROCKER ET AL., U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL DISCLOSURE: SEC SHOULD EXPLORE WAYS TO IMPROVE TRACKING AND TRANSPARENCY OF INFORMATION 3–6 (2004), available at <http://www.gao.gov/new.items/d04808.pdf>.

Obama administration.³³ As of this writing, the guidance has not yet been released. However, one might expect it to be similar in many respects to the guidance the SEC released in 1998 regarding the potential for a Y2K computer meltdown.³⁴

A second possible strategy for reformers to adopt at the federal level would be to focus on environmental change not in terms of potential liabilities, but in terms of potential opportunities. As consumers increasingly prefer, and often demand, products and services that have neutral or beneficial impacts on the environment, investors may increasingly find a company's response to such interests to be material. Thus, one might argue that a company's annual report regarding management's discussion and analysis of known trends and uncertainties should discuss opportunities for gain arising from climate change.³⁵ For example, investors might find it material to know whether a given automobile manufacturer has taken advantage of possible green marketing opportunities by developing an electric or hybrid car. Presumably, if consumer demand requires climate-friendly operations and research and development, then such information is potentially already material. Corporate reformers might seek to make this clear through the selective use of lawsuits or lobbying.

Finally, there is a third federal strategy available to reformers that would be subtle in its implementation, yet revolutionary in its impact. One could attempt to push the SEC to rethink its definition of a "reasonable investor." Currently, that definition is tied to notions of profit maximization: reasonable investors desire to earn a positive return on their investment, and little else.³⁶

In reality, however, investors are people, and people are complicated and have a variety of (often conflicting) motives.

³³ See Petition for Interpretive Guidance on Climate Risk Disclosure, No. 4-547, at 13 (Sept. 18, 2007), available at <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf> (signed by, among others, the California Public Employees' Retirement System and Randall Edwards, the Treasurer of the State of Oregon).

³⁴ See Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Securities Act Release No. 7558, Exchange Act Release No. 40,277, 67 SEC Docket 1437 (July 29, 1998).

³⁵ See Regulation S-K Item 301, 17 C.F.R. § 229.301 (2010).

³⁶ See Memorandum from David B.H. Martin, Dir., Div. of Corp. Fin., SEC, to Laura Unger, Acting Chair, SEC (May 8, 2001) (noting that "the SEC staff takes the view that the reasonable investor generally focuses on matters that have affected, or will affect, a company's profitability and financial outlook"), available at http://www.uscc.gov/annual_report/2002/app5.pdf.

Moreover, given recent developments in the political economy, the notion of the rational investor has come under attack as never before.³⁷ Book after book and study after study declare that investors are fundamentally irrational.³⁸ Meanwhile, there continues to be a strong socially responsible investor movement.³⁹ Shareholders may in reality desire more than pure profits. They may desire growth in all aspects of the triple bottom line. Certainly, this desire is attested to by the success of companies such as Whole Foods Markets and Ben & Jerry's ice cream, as well as more traditional companies like General Electric and Wal-Mart, each of which seeks (or at least claims to seek) to balance profits with the social good.⁴⁰

Proponents of deep, structural reform might therefore consider focusing their efforts on the long-term goal of expanding our understanding of the reasonable investor. Under such a reimagined definition, a reasonable investor might want to know more about a corporation than its potential profits and pitfalls. He or she might also want to know about its impacts on the environment and its treatment of employees. Required disclosure, then, would necessarily encompass a great deal more than what is currently reported. Pushback from corporate America over such a proposal would without question be both strong and inevitable, but the potential upside for reformers would be profound. If a reasonable investor were deemed to care about more than mere profits, that one simple change would revolutionize our understanding of the obligations of our largest companies.

³⁷ Even such champions of our market economy as Richard Posner have been forced to publicly question the underlying theory of our markets. See RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* 2, 107 (2009).

³⁸ One example of this phenomenon is the rise of behavioral economics and the related development of a cottage industry of popular books seeking to educate the public about our brains' faulty logic. See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008); ORI BRAFMAN & ROM BRAFMAN, *SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR* (2008); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

³⁹ SOC. INV. FORUM, *2007 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES: EXECUTIVE SUMMARY* (2007), available at http://www.socialinvest.org/pdf/SRI_Trends_ExecSummary_2007.pdf.

⁴⁰ See, e.g., BEN COHEN & JERRY GREENFIELD, *BEN & JERRY'S DOUBLE-DIP: HOW TO RUN A VALUES-LED BUSINESS AND MAKE MONEY, TOO* 47 (1998).

CONCLUSION

This Essay is not intended to challenge or delay the general reform agenda put forth by Oregon Lawyers for a Sustainable Future and similar organizations in other states. Current economic and environmental conditions both point to the need for a new approach to business. However, this Essay is intended to question the tactic of relying on a very weak signal to achieve reform. Signaling is a dangerous sport, as one loses control of the signal as soon as it is commenced, and it is frequently received either too loudly or not at all. As a result, signals are subject to the twin risks of misinterpretation and miscalculation. Moreover, in a political economy that is characterized by regulatory competition and a race to the bottom, Oregon's legislature should approach any attempts to reform its corporation statute with a high degree of caution.

Instead, I have suggested that a better target of reformist zeal is the federal system of securities regulation. Targeted lawsuits could seek to establish the notion that corporations have failed in their disclosure obligations by failing to comment on the potential impact of climate change. Likewise, the SEC could be subject to lobbying efforts aimed at generating further guidance as to how existing rules should be (re)interpreted. Although this might prove more difficult than attempting to influence the lawmaking process at the state level, it is much more likely to have a lasting impact on our overall regulatory structure and business culture.

My goal is not to advocate for any particular strategy, but to suggest a series of avenues that might be more productive in advancing a triple-bottom-line agenda. How and whether each might be achieved, and what their exact implications are, I leave to those on the front lines of reform. However, it seems clear that the activities of high-profile and sometimes nonobvious opinion leaders such as Al Gore, Oprah Winfrey, and countless others have begun to put the issue of climate change front and center on the national agenda, as well as in the hearts and minds of everyday consumers.⁴¹ Change is coming, but it will come more rapidly and with better effect for both Oregon and the nation if we approach it with due care and thoughtfulness.

⁴¹ See Robert C. Illig, *Al Gore, Oprah, and Silicon Valley: Bringing Main Street and Corporate America into the Environmental Movement*, 23 J. ENVTL. L. & LITIG. 223 *passim* (2008).