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Stakeholder Engagement

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STAKEHOLDER ENGAGEMENT

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INTRODUCTION

A debate rages over corporate purpose and fiduciary duty.[1] Should corporations be managed to maximize shareholder wealth?[2] Or should managers also give independent weight to the welfare of other stakeholders, including employees, customers, and others?[3] Statements

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1. RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, at ix-x (Elizabeth Pollman & Robert B. Thompson eds., 2021).

2. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36-38 (1991); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 910-12 (2005); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003).

3. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 278 (1999); LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING

favoring a stakeholder approach are increasingly common and come from such unlikely suspects as one of the largest institutional investors in the country[4] and the association of the CEOs of America's largest corporations.[5]

A common argument against the stakeholder approach is that it reduces managerial accountability.[6] But what if stakeholder governance were to actively empower stakeholders? Companies already engage their stakeholders, and that engagement could make managers more accountable.[7] Other benefits of stakeholder engagement include providing useful information about how to best meet their interests and concerns and increasing stakeholder loyalty.[8] Even on the shareholder-obsessed understanding of corporate purpose, engagement could benefit not only stakeholders but also shareholders through improved long-run profitability.

Stakeholder engagement has received much less attention from legal scholars than either shareholder engagement or corporate purpose.[9] And yet, large corporations today engage their stakeholders in a growing number of ways.[10] They meet with them, survey them, monitor them on X (formerly known as Twitter), partner with them, and sometimes involve them in more formal ongoing councils or panels. Occasionally they bargain with their workers through unions. Sometimes corporations engage with their stakeholders on controversial political topics like climate change or diversity and equity. Other times they engage with them on mundane but crucial topics like what customers think about a new product or how employees feel about the way

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SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 104-05 (2012); LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 185-86 (2001); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 228-29 (2006); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1013-14 (2013).

4. Larry Fink, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK (Jan. 18, 2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/426F-4PG8].

5. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/N9LB-ER3M] (last visited Feb. 10, 2024).

6. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 164-68 (2020) [hereinafter Bebchuk & Tallarita, *Illusory Promise*].

7. *See infra* Section I.E.

8. *See infra* Section I.E.

9. A very significant exception is two recent articles by Stavros Gadinis and Amelia Miazad. Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1409-10 (2020) [hereinafter Gadinis & Miazad, *Social Risk*]; Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47, 53-54 (2021) [hereinafter Gadinis & Miazad, *Test*]. For an overview of the lengthy literature on shareholder engagement, see Brett McDonnell et al., *Green Boardrooms?*, 53 CONN. L. REV. 335, 371-74 (2021) [hereinafter McDonnell et al., *Green Boardrooms?*].

10. *See infra* Part II.

their supervisor treats them. All of this counts as stakeholder engagement for this study. Internal corporate governance is changing too, as boards and new types of officers become involved.[11] What kinds of engagement are most frequently used? What groups of stakeholders are most frequently engaged, and how do the types of engagement differ for different stakeholders? What board committees are focused on stakeholders? How widely adopted are new positions such as the Chief Sustainability Officer (CSO) or Chief Diversity Officer (CDO)? How is the compensation of traditional officers changing in response to the new focus on stakeholders?

This Article starts answering these questions for the largest American corporations. It finds that companies are engaging with many stakeholders in many ways. However, stakeholder engagement has not yet become serious empowerment of any stakeholders beyond shareholders.

This Article examines existing stakeholder engagement by looking at what large corporations say they are doing.[12] Most large public companies now regularly release reports—often called sustainability or corporate responsibility reports—that discuss how they are addressing the interests of various stakeholders.[13] These reports typically say something about how the companies are engaging with those stakeholders and about the internal corporate governance mechanisms being used. Annual proxy statements also provide information about governance mechanisms.[14] This Article reviews those documents for the S&P 100 corporations and produces some simple measures of the extent and type of stakeholder engagement and governance arrangements that those corporations are reporting.

Clearly there are problems with relying on such self-reporting, and one must take the results reported below with many grains of salt.[15] With no mandatory rules, there is wild variation in what companies choose to focus on and report.[16] Consider surveys of customer satisfaction with a company's products or services. Many companies choose to include such surveys in their reports as a form of customer engagement, as will this study, but many companies may not. Despite such limits, the sustainability reports do provide a readily available source of information to get a sense of what is going on, suggesting directions

11. *See infra* Part III.

12. *See infra* Section II.A.

13. *See infra* Section II.A.

14. 17 C.F.R. § 240.14a-101 (2023).

15. *See infra* notes 136-39 and accompanying text.

16. *See infra* notes 136-37 and accompanying text. This is a leading argument of those who call for mandatory ESG reporting.

for future research using other sources of information.[17] I will argue that the undercounting may well understate the qualitative results presented here.

The documents suggest that employees are the stakeholder group that companies typically engage with in the most varied ways.[18] This makes sense, as employees are of central importance to the success of companies, they have much valuable information, and they are more readily identifiable and easier to reach than some other stakeholder groups.[19] The next most engaged types of stakeholders are customers.[20] The other stakeholder groups frequently mentioned in reporting on engagement are non-profits and local communities, suppliers, government, and academic individuals and institutions.[21]

As for the most common types of engagement, I find that lower-level interactions such as meetings, surveys, and social media are most common.[22] More sustained engagement such as partnerships and formal advisory councils are not rare, but they are less common. Full-fledged empowerment giving stakeholders a formal role in corporate decisionmaking remains the least common type of engagement, with only the remnants of private unionization providing any kind of empowerment at all.

I also gathered information on the governance of relations with stakeholders at the board and officer level.[23] At the board level, I consider the composition of the board. I look at whether boards have any members who come from working in the government, non-profits, or academia (all of whom reports commonly treat as stakeholders). I also look at what board committee, if any, is charged with overseeing ESG (environmental, social, and governance) matters. An important question is the relative merit of assigning ESG oversight to the trad-

17. Gadinis and Miazad, for instance, interview persons involved in stakeholder engagement. *See* Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1430, 1439; *see also* Gadinis & Miazad, *Test*, *supra* note 9, at 55. Reviewing corporate disclosure gives less depth but covers a wider range of companies.

18. *See infra* Part II.

19. Brett H. McDonnell & Matthew T. Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 MD. L. REV. 887 (2022); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 351 (2008) [hereinafter McDonnell, *Employee Primacy*]. *See generally* GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE (2020); Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1262-66 (2022); CHRISTOPHER M. BRUNER, THE CORPORATION AS TECHNOLOGY: RE-CALIBRATING CORPORATE GOVERNANCE FOR A SUSTAINABLE FUTURE 179-84 (2022); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998); MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995).

20. *See infra* Table 1.

21. *See infra* Part II.

22. *See infra* Table 1.

23. *See infra* Part III.

itional nomination/corporate governance committee (the leading approach) versus creating a committee specifically devoted to ESG or sustainability matters.[24]

At the officer level, I examine the prevalence of two new executive positions, the Chief Sustainability Officer (CSO) and the Chief Diversity Officer (CDO).[25] Both are very common, as are councils of executive officers that coordinate on one or more ESG topic(s). I also find that a majority of companies report some connection between ESG matters and executive compensation, although that reporting is generally unclear and imprecise.[26]

The research reported here does not directly tell us about the desirability of stakeholder engagement because there is no attempt to correlate the measures generated with any outcome measures. But the research is suggestive. It helps us identify emergent common practices.[27] The research also identifies some practices that are much less widely used but are worth considering if we want to move from engagement to empowerment. The most aggressive of these are forms of employee empowerment. This could be done through unionization, works councils, or board representation.[28] Another way of engaging is through formal, ongoing advisory councils composed of representatives of one or more types of stakeholders.[29]

Should any of these suggestions be legally imposed upon companies? I say no.[30] We are still learning what does and does not work, and about costs as well as benefits. The mix of costs and benefits varies from company to company, so that one-size-fits-all mandates are questionable. The only two practices that I would impose concern disclosure. I would mandate a format for disclosing stakeholder engagement.[31] I would also mandate that companies tying executive compensation to ESG-related matters provide more concrete details about that compensation.[32]

Though I do not suggest mandating any specific engagement practices, there are good reasons (albeit with counterarguments) to think that companies are likely to do too little stakeholder engagement and especially too little empowerment.[33] Therefore, I suggest ways that

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24. *See infra* Section III.A.

25. *See infra* Section III.B.

26. *See infra* Section III.C.

27. *See infra* Section IV.A.

28. *See* McDonnell, *Employee Primacy, supra* note 19; McDonnell & Bodie, *supra* note 19; Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77 (2018).

29. *See infra* Section IV.B.

30. *See infra* Section IV.C.

31. *See infra* Section IV.C.

32. *See infra* notes 289-94 and accompanying text.

33. *See infra* notes 255-62 and accompanying text.

regulators might encourage some practices.[34] The main examples concern empowering employees. In an article with Matthew Bodie, I suggest that companies which adequately empower employees could be rewarded with lessened substantive or procedural requirements in various areas of employment regulation.[35] Following that lead, I consider ways that engagement with other stakeholders, perhaps through stakeholder councils, might be encouraged in other areas of regulation.[36]

The remainder of this Article is organized as follows. Part I provides some background, discusses some benefits and costs of engaging with stakeholders, and gives an overview of different kinds of stakeholders and of engagement. Part II presents the results of the research of company disclosure on forms of stakeholder engagement. Part III presents the results of the research on governance at the board and officer level. Part IV considers lessons learned and potential legal interventions. A conclusion follows.

I. STAKEHOLDER ENGAGEMENT: WHAT AND WHY?

This Part sets the stage for the empirical investigation to follow in the next two Parts. Section I.A briefly reviews the ongoing discussion of corporate purpose and the relative position of shareholders and other stakeholders. Section I.B considers the leading categories of stakeholders, while Section I.C considers the leading ways of engaging with them. Section I.D briefly overviews relevant developments in corporate governance at the board and officer level. Section I.E examines the benefits and costs of engaging stakeholders.

A. *Stakeholders and Shareholders*

The debate over the appropriate purpose for corporations goes back at least to the classic Berle-Dodd discussion of the early thirties.[37] It has heated up in recent years. After decades in which an exclusive focus on maximizing shareholder wealth was understood as the appropriate purpose for corporations by academics, lawyers, and businesspeople, that understanding is now up for grabs. Landmarks in the current discussion include a statement by the Business Roundtable, an

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34. *See infra* Sections IV.B-C.

35. McDonnell & Bodie, *supra* note 19, at 931-33.

36. *See infra* Section IV.C. Erik Gerding provides an example, arguing for regulatory preferences to encourage mutual insurance companies (which are owned by their customers, a very strong form of stakeholder empowerment). Erik F. Gerding, *Remutalization*, 105 CORNELL L. REV. 797, 847-48 (2020).

37. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

organization of the CEOs of leading American corporations,[38] and recent annual letters from Larry Fink, CEO of the leading institutional investor BlackRock,[39] each advocating (albeit somewhat ambiguously) a stakeholderist position.[40]

As a matter of black letter law, it is surprisingly hard to find definitive guidance on this debate. For decades, the leading, and just about the only, case stating the shareholderist norm was *Dodge v. Ford Motor Co.*[41] Delaware, the leading state for corporate law, explicitly enshrined that position in the case of sale of corporate control in the eighties in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[42] and more recently generalized that rule to a broader set of circumstances in *eBay Domestic Holdings, Inc. v. Newmark.*[43] Many states, however, have constituency statutes which allow managers to consider other stakeholder interests.[44] And many states, including Delaware, have adopted benefit corporation statutes, in which managers are required to consider the interests of various stakeholders.[45] But the limited adoption of benefit corporation status and Delaware's dominance for ordinary corporations has led most commentators to treat Delaware's position as the leading statement of American corporate law.

The pro-stakeholder position comes in weaker and stronger positions. The much more common position (especially among practitioners rather than academics) argues that robust concern for various

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38. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/EM88-HSZ9].

39. *See* Fink, *supra* note 4.

40. Debate and action over the role of corporations has spread out in many directions, leading to a proliferation of terms that reflect overlapping concerns and developments. I will often refer to stakeholderism, reflecting the debate over how corporations should reflect and reconcile the differing interests of various groups involved in and affected by what corporations do. Another common term is sustainability. Rooted in environmental concerns but spreading well beyond that, those advocating that corporations become more sustainable look at how corporations can meet current needs without compromising the needs of future generations. Bruner, *supra* note 19, at 1247-50. ESG, short for environmental, social, and governance, focuses particularly on developments in shareholder activism and corporate disclosure concerning environmental concerns, especially but not only climate change, and social concerns such as workforce diversity and human rights. Elizabeth Pollman, *The Making and Meaning of ESG*, HARV. BUS. L. REV. (forthcoming) (manuscript at 3-12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857 [https://perma.cc/FZ5U-NWN2]. Corporate social responsibility is a somewhat older term for efforts to encourage corporations to behave in ways that cause less social and environmental harm. I shall use these various terms as mostly if not entirely synonymous.

41. 170 N.W. 668, 684 (Mich. 1919).

42. 506 A.2d 173, 182-85 (Del. 1986).

43. 16 A.3d 1, 34 (Del. Ch. 2010).

44. Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1230-31 (2004).

45. Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 30 (2014).

stakeholders boosts profits in the long run and is thus consistent with the interests of shareholders.[46] Stavros Gadinis and Amelia Miazad emphasize that concern for stakeholders may benefit shareholders by avoiding major risks that could torpedo profitability.[47] The stronger position recognizes that for some decisions, there really are choices to be made between shareholders and stakeholders (and also among different stakeholders), and that there should not be automatic priority favoring shareholders in such circumstances.[48] Those opposing one or both of these stakeholderist views make a variety of arguments. Of most relevance here is the question of accountability and the two masters problem. On this argument, the shareholder wealth maximization norm provides a clear measuring rod for managerial decisions and performance. Managers themselves have a clear standard guiding them, and those who want to hold them accountable for alleged misconduct have a clear standard for judging if they have misbehaved. If one gives independent weight to the interests of stakeholders other than shareholders, though, then almost any decision can be rationalized as in the interest of some group. Clarity and accountability disappear.[49]

Moreover, shareholders are empowered to hold managers accountable, and insofar as a stakeholderist position would justify limits to that empowerment, that could decrease accountability.[50] Institutional investors have become much more active in recent years. Traditional activists focus on increasing shareholder value. They acquire substantial stakes in a target company, then apply pressure to adopt preferred measures such as higher dividends backed by the threat of a proxy fight to install new directors.[51] A newer breed of ESG activists focuses on broader, stakeholderist concerns, such as climate change and diversity of boards and workforces. They engage with companies in a variety of ways. These include shareholder proposals through the Rule 14a-8 process, informal direct conversations with managers, and most recently through proxy fights to replace directors, such as the successful campaign by activist investor Engine No. 1 to elect directors at Exxon Mobil.[52] Much academic attention has been devoted to both types of activist investors and to how companies are engaging with them.

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46. *See* McDonnell et al., *Green Boardrooms?*, *supra* note 9, at 344-45; *see also* Dorothy S. Lund & Elizabeth Pollman, Essay, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021).

47. Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1426-40.

48. *See, e.g.*, Blair & Stout, *supra* note 3, at 249. *See generally* COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES (Beate Sjåfjell & Benjamin J. Richardson eds., 2015).

49. Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 164-68.

50. *Id.*

51. *See* McDonnell et al., *Green Boardrooms?*, *supra* note 9, at 374 & n.223.

52. Bernard S. Sharfman, *The Illusion of Success: A Critique of Engine No. 1's Proxy Fight at ExxonMobil*, 12 HARV. BUS. L. REV. ONLINE, art. 3, 2021, at 1.

Engagement with stakeholders, as opposed to shareholders, has received much less attention among legal scholars,[53] and yet it is already occurring. Engaging with stakeholders has the potential to assuage the accountability critique. I will consider this as well as other benefits of stakeholder engagement, along with some potential costs.[54] But first I will discuss what I mean by "stakeholders" and by "engagement."

B. Types of Stakeholders

I repeatedly use the general term "stakeholders," but this refers to a range of different kinds of persons who interact with companies. Here I briefly consider the major kinds of stakeholders, why they matter to companies, and how the benefits and costs of engagement may differ among them.

Employees are perhaps the most significant of the stakeholders, and we shall see that they are the group companies engage with in the most ways. Employees do the actual work of providing the services or producing the goods that a company creates and sells. Attracting and retaining good employees is critical to become a flourishing business. Employees naturally acquire large and varied amounts of information about a business as a byproduct of doing their work.[55] This information combined with the importance of attracting good employees gives employees more power to hold managers accountable than other stakeholders. For these and other reasons, employees are more central to a business, more like insiders in a business, than all other stakeholders, and the benefits of employee engagement are typically greater than for other groups. By the same token, the costs of employee engagement may be greater as well. Conflicts between employees and shareholders or other stakeholders may be intense. Wages and benefits are usually among the leading expenditures for a business. Although up to some point higher wages and benefits may increase the pie for everyone by improving productivity, beyond that point, more for employees means less for everyone else. Employees may also conflict with shareholders and others over the nature of working conditions and the intensity of effort that employees are expected to provide.

Customers are also a critical stakeholder group. Without customers to buy a company's goods and services, the company cannot survive. It can grow only by expanding its customer base or the amount

53. A significant exception is several recent articles by Gadinis and Miazad. *See supra* note 9. Stakeholder engagement has received more attention among scholars in other fields. For instance, see a review of 90 articles on stakeholder engagement in business and management journals by Johanna Kujala et al., *Stakeholder Engagement: Past, Present, and Future*, 61 BUS. & SOC'Y 1136 (2022).

54. *See infra* Section I.E.

55. HAYDEN & BODIE, *supra* note 19, at 156-58; McDonnell, *Employee Primacy*, *supra* note 19, at 356; *see also* Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1440-47.

individual customers spend. So, retaining the loyalty of customers is crucial.[56] Customers know what they want, information that companies need to learn. Customers typically have less information about the internal functioning of a company than its employees possess, making them lesser vessels for holding managers accountable, but the threat of lowered sales is still a major potential accountability mechanism. On the other hand, customers also have a serious built-in conflict with other stakeholders: higher prices are bad for customers but provide more to distribute among other stakeholders to the extent that they do not reduce sales too much.[57]

Suppliers, like employees, also provide inputs to the production process of companies. Retaining the loyalty of suppliers may be important for companies, depending in part on how firm-specific inputs are. Where inputs are fungible, they can be bought on the market for the prevailing market price, but where they are firm-specific, the buying firm will have more trouble replacing a supplier that decides to withdraw.[58] Suppliers have information about the quality of what they supply and about conditions which may affect future availability and prices. This information is typically of less general importance than that possessed by employees and customers. Like employees and customers, suppliers have a built-in conflict when it comes to pricing what they sell to a company, though their conflicts are probably less wide-ranging than those of employees with shareholders and other stakeholders.[59]

Creditors are the other main suppliers of critical production inputs, along with shareholders, employees, and suppliers. Their ongoing loyalty is important, and they gain much information about a business through their relationship with it. Indeed, there is a significant literature on the role of creditors in corporate governance,[60] so they might well seem to be among the most important of stakeholder groups. Thus, it is somewhat surprising that the sustainability reporting documents I look at for this study typically do not list creditors as an identified stakeholder group or discuss their engagement with creditors. As a result, they will not feature in the analysis of this Article, which

56. Gadinis and Miazad provide useful examples of how companies during the COVID-19 pandemic engaged with their customers to help regain their trust that it was safe to return to do business with them. Gadinis & Miazad, *Test*, *supra* note 9, at 72-76.

57. Which depends upon the elasticity of demand. For more on the actual and potential role of consumers in corporate governance, see David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253 (2009).

58. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 139 (1985).

59. Gadinis and Miazad provide useful examples of how companies engaged with their supply chains during the COVID-19 pandemic. Gadinis & Miazad, *Test*, *supra* note 9, at 78-80.

60. *See, e.g.*, Charles K. Whitehead, *Creditors and Debt Governance*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 68 (Claire A. Hill & Brett H. McDonnell eds., 2012).

relies on those documents. It is an interesting question why companies do not conceptualize creditors as one of the stakeholder groups they engage with.[61] Perhaps it is because creditors already have a well-developed contractual set of provisions for protecting their interests, giving them substantial power in many business decisions through approval or veto rights. The kinds of weak engagement rights mostly discussed here are not needed for creditors who have more substantial rights.

The other stakeholders that are frequently identified in the documents analyzed in this Article, and in some cases included in corporate constituency and benefit corporation statutes, have a somewhat more tangential relationship to companies than those discussed above. They do not provide inputs or purchase outputs. However, they are frequently identified as stakeholders in the reporting that provides the main data for this study.[62] We shall see that these more peripheral stakeholders are the types that actually receive positions on corporate boards, rather than the more central stakeholders such as customers and employees.[63] And each of these categories does have some features that fit within the fuzzy definition of a stakeholder.

One important group is government regulators. Regulation can greatly increase the costs of doing business, so regulators must be appeased or persuaded. Regulators in turn care greatly about harms potentially generated by businesses. But regulators can protect those interests through, well, regulation—they do not need internal governance mechanisms to protect them, although as I shall discuss,[64] they may decide that companies with good mechanisms for protecting stakeholders do not need to be regulated as strictly.[65]

Local communities are often listed, by companies and in statutes, as a stakeholder group. Communities are a vague group. Communities may be represented by local governments, which fall into the regulator category. They may also be represented by non-profit or non-governmental organizations. Support for non-profits may be a way of improv-

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61. Many corporate constituency statutes include creditors in their list of stakeholders—22 of the 32 constituency statutes as of 2019 did so. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 117. However, the model benefit corporation legislation does not include them in the list of stakeholders to whom benefit corporations owe a duty. WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IS IT THE LEGAL FORM THAT BEST ADDRESSES THE NEED OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC, at app. A §§ 301(a), 303(a) (2013).

62. 96 companies of the 100 in this study list non-profits or local communities as an engaged stakeholder group, 65 list government regulators, and 25 list academics.

63. *See infra* notes 210-13 and accompanying text.

64. *See infra* Sections IV.B-C.

65. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Donald R. Harris et al. eds., 1992).

ing the reputation of a company with employees, customers, and shareholders. Working with non-profits may also sometimes provide relevant kinds of information and expertise.

A final type of stakeholder identified with some frequency in sustainability reporting is academics. These may provide relevant information and expertise concerning production or marketing of a company's products. Perhaps some forms of engagement with academics may also provide some signaling to other, more critical, stakeholders, thereby improving a company's reputation. Of the stakeholders discussed here, academics have the weakest case for being labeled stakeholders, and probably matter the least to most companies. And we shall indeed see that companies report engaging less with them than with the other groups mentioned here, with the notable exception of the somewhat common placement of academics on corporate boards.

C. *Types of Engagement*

What do I mean by stakeholder engagement, and in what ways can and do companies engage with their stakeholders? The AccountAbility Stakeholder Engagement Standard[66] provides a categorization fairly widely used by both practitioners and academics, and this Article uses it (with some changes) as the basis for its main measure of stakeholder engagement. It identifies ten levels of engagement.[67] The first of these is no engagement at all. The next three (monitor, advocate, and inform) involve communication in only one direction and are of limited interest. The first level of two-way interaction is "transact," which includes private finance initiatives and grant-making. This is of more interest, but is still both limited and ubiquitous, and so not studied here.

The next level is "consult," where an organization asks questions and receives answers. This includes surveys, focus groups, and meetings. We will see that these, or at least surveys and meetings, form the heart of the most quotidian stakeholder engagement practices studied here. Indeed, they are so common that some observers, and some companies, may not conceive of them as forms of stakeholder engagement, which causes a problem for this study given its reliance on voluntary self-reporting.[68] But surveys and meetings are important and useful forms of engagement. As we shall see,[69] gathering information is a main function of engagement, and surveys and meetings are good ways to do that. Surveys on their own are likely less important for the

66. ACCOUNTABILITY, AA1000 STAKEHOLDER ENGAGEMENT STANDARD 5 (2015) [hereinafter STAKEHOLDER ENGAGEMENT STANDARD].

67. *See infra* Chart 1.

68. *See infra* Section II.A.

69. *See infra* Section I.E.

accountability function of engagement, although if used intelligently as measures for guiding executive compensation,[70] they can be helpful for accountability as well.

Moving up the ladder, "negotiate" involves discussing issues with a goal of reaching consensus. This includes collective bargaining with workers. At the next level, "involve," the company and stakeholders learn together but act independently. This includes multi-stakeholder forums, advisory panels, and participatory decisionmaking processes. Such forums and panels will provide a key area of interest, where I find some degree of adoption currently but much potential for policies that encourage more engagement of this type.[71] The penultimate level is "collaborate," which involves joint decisionmaking and action. This includes joint ventures and partnerships.

The highest level of stakeholder engagement is "empower," in which decisions are delegated to stakeholders. This is the gold standard in the AccountAbility framework and for me as well. Empowerment involves the "[i]ntegration of stakeholders into governance, strategy and operations of the organization."[72] This includes workers electing board directors and works councils which include employee representatives and which are authorized to set various rules governing working conditions. Such empowerment for employees is legally entrenched in some countries, most notably through the codetermination system in Germany.[73] Such empowerment is so rare in the United States that I have revised the category to include unionization, which falls lower in the AccountAbility standard but which does give an organization representing workers the power to help set some working condition rules.

Some non-legal academics have used variations on this categorization to construct measures of stakeholder engagement.[74] This Article is patterned on that prior research. Like them, it creates measures by looking at self-reported stakeholder engagement in public disclosure. Two of those previous studies find (rather disapprovingly) that most

70. *See infra* Section III.C.

71. *See infra* Part IV.

72. STAKEHOLDER ENGAGEMENT STANDARD, *supra* note 66, at 22.

73. Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321 (2021).

74. MARCO BELLUCCI & GIACOMO MANETTI, STAKEHOLDER ENGAGEMENT AND SUSTAINABILITY REPORTING 140 (Güler Aras ed., 2019); Giacomo Manetti, *The Quality of Stakeholder Engagement in Sustainability Reporting: Empirical Evidence and Critical Points*, 18 CORP. SOC. RESP. & ENV'T MGMT. 110 (2011) [hereinafter Manetti, *Quality of Stakeholder Engagement*]; Barbara Borgato et al., Stakeholder Engagement in Mandatory Non-Financial Reporting: First Results for First-Time Reporters in Italy (Oct. 31, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479186 [https://perma.cc/P2FV-LJBN]; Peter Bruce & Rita Shelley, *Assessing Stakeholder Engagement*, 11 COMMC'N J. N.Z. 30 (2010).

engagement is at the level of consulting, not higher levels.[75] The current study provides more detailed analysis of what types of engagement are more frequently used for various types of stakeholders.

Chart 1: Levels and Methods of Engagement[76]

LEVEL OF ENGAGEMENT	METHODS OF ENGAGEMENT
Remain Passive *No active communication*	*Stakeholder concern expressed through protest *Letters *Media *Websites etc.
Monitor *One-way communication; stakeholder to organization*	*Media and internet tracking *Second-hand reports from other stakeholders possibly via targeted interview
Advocate *One-way communication; organization to stakeholder*	*Pressure on regulatory bodies *Other advocacy efforts through social media *Lobbying efforts
Inform *One-way communication; organization to stakeholders, there is no invitation to reply*	*Bulletins and letters *Brochures *Reports and websites *Speeches, conferences, and public presentations
Transact *Limited two-way engagement; setting and monitoring performance according to terms of contract*	*Public-private partnerships *Private Finance Initiatives *Grant-making *Cause-related marketing
Consult	*Surveys *Focus groups

75. Manetti, *Quality of Stakeholder Engagement*, *supra* note 74, at 117-19; BELLUCCI & MANETTI, *supra* note 74, at 143.

76. STAKEHOLDER ENGAGEMENT STANDARD, *supra* note 66, at 22.

Limited two-way engagement; organization asks questions, stakeholders answer	*Meetings with selected stakeholders *Public meetings *Workshops
Negotiate *Limited two-way engagement; discuss a specific issue or range of issues with the objective of reaching consensus*	*Collective bargaining with workers through their trade unions
Involve *Two-way or multi-way engagement; learning on all sides but stakeholders and organization act independently*	*Multi-stakeholder forums *Advisory panels *Consensus building processes *Participatory decisionmaking processes *Focus groups *Online engagement tools
Collaborate *Two-way or multi-way engagement; joint learning, decisionmaking and actions*	*Joint projects *Joint ventures *Partnerships *Multi-stakeholder initiatives *Online collaborative platforms
Empower *New forms of accountability; decisions delegated to stakeholders; stakeholders play a role in shaping organizational agendas*	*Integration of stakeholders into governance, strategy, and operations of the organization

D. *Corporate Governance*

Effective stakeholder engagement involves more than the actual interaction between companies and stakeholders. One must also consider who is doing the engaging on the company side, how that engagement is overseen, and how information from the engagement is used by the company. In other words, how does stakeholder engagement fit within the internal corporate governance structure?

There are two main levels of actors internally in corporate governance: directors and officers. At each level we can ask who is involved in engaging stakeholders. Consider first the board level. Here, there are at least two main questions one might ask. First, what is the background of the individual directors? Second, what set of directors is charged with oversight of ESG and stakeholder engagement—is it the full board, or one or more committees, and if the latter, which committees?

Over several decades, board composition has evolved from boards being composed mainly of inside officers of the company to a model focused on independent directors, who have no significant ties to the company beyond their status as directors. The CEO will almost certainly be a director, and there may be one or two other internal officers on the board, but a large majority of directors are independent.[77] Independence is conceived as a way to ensure that boards will more effectively monitor officers in the interest of protecting shareholders.[78] But from a stakeholder perspective, most independent directors are officers at other corporations. They thus do not directly represent the interests of stakeholders, although there is some evidence that board independence leads to better environmental performance.[79]

Among shareholder ESG activists, there has been a growing emphasis on ensuring that boards have directors with relevant environmental expertise. This activism has mostly occurred through informal engagement with the board,[80] though in one high-profile case, it occurred through a proxy fight.[81] The difference is significant: in the former, the board retains control over its composition; in the latter, it does not. Although most independent directors are officers at other corporations, it has long been true that a notable minority of directors come from other backgrounds. This includes officials at non-profit organizations,[82] former government officials,[83] and academics.[84] One function such directors may provide is representing a more public-spirited interest. In a different though related view, resource dependence theory conceives of directors as helping companies in accessing valuable

77. Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 135-36 (2010); Usha R. Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 452-55 (2008).

78. Fairfax, *supra* note 77, at 135-37; Rodrigues, *supra* note 77, at 454-56.

79. Ruth V. Aguilera et al., *The Corporate Governance of Environmental Sustainability: A Review and Proposal for More Integrated Research*, 47 J. MGMT. 1468, 1476 (2021).

80. McDonnell et al., *Green Boardrooms?*, *supra* note 9, at 380-81.

81. Sharfman, *supra* note 52.

82. Shili Chen, Niels Hermes & Reggy Hooghiemstra, *Corporate Social Responsibility and NGO Directors on Boards*, 175 J. BUS. ETHICS 625 (2022).

83. Richard H. Lester et al., *Former Government Officials as Outside Directors: The Role of Human and Social Capital*, 51 ACAD. MGMT. J. 999 (2008).

84. Bill Francis, Iftekhar Hasan & Qiang Wu, *Professors in the Boardroom and Their Impact on Corporate Governance and Firm Performance*, 44 FIN. MGMT. 547 (2015).

resources or networks.[85] Directors coming from government, non-profits, or academia will bring different kinds of resources and connections than those from the corporate world.

None of these patterns involve non-shareholder constituencies directly appointing any directors—no public company (to my knowledge) allows the Sierra Club or Nature Conservancy to appoint (or even nominate) a director to represent the environment. But non-profit officers, government officials, and academics do represent several categories of stakeholders.[86] Were the stakeholders themselves electing these representatives, their presence on the board would be a level of empowerment that we do not see in U.S. public corporations. Other countries, notably Germany, have a system of codetermination for large companies in which employees appoint some directors.[87] Senators Warren and Sanders have proposed that for large American companies.[88] Even in the United States, non-public companies may have boards elected by stakeholders other than shareholders, for instance in the case of consumer, producer, or worker cooperatives.[89] There have been occasional examples of employee directors on the boards of public U.S. corporations and some variation over time,[90] but in recent decades that has not been common.[91]

The other question for ESG and stakeholder engagement at the board level is what body is charged with oversight of such matters.[92] Is it simply handled by the full board, or is one or more committee specifically charged with oversight? Most modern public company boards have three standard committees: Audit, Compensation, and Nomination and Governance.[93] The Audit Committee oversees the process of gathering and verifying financial information, including relations with the external auditor. The Compensation Committee oversees the

85. Amy J. Hillman, Albert A. Cannella, Jr. & Ramona L. Paetzold, *The Resource Dependence Role of Corporate Directors: Strategic Adaptation of Board Composition in Response to Environmental Change*, 37 J. MGMT. STUD. 235, 238-39 (2000).

86. *See infra* Section II.B.

87. Hayden & Bodie, *supra* note 73.

88. Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Reward Work Act, S. 915, 116th Cong. (2019).

89. CHARLES T. AUTRY & ROLAND F. HALL, THE LAW OF COOPERATIVES 56-58 (2009).

90. Perhaps most famously, UAW President Douglas Fraser was on the Chrysler board. Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697, 736 (2019).

91. *Id.* at 735-45.

92. A prior question is whether the board oversees ESG matters at all. Even recently that was not a given, but that is rapidly changing. One study found that in 2019 only 56% of companies studied had board oversight of ESG matters, while in 2020 that percentage had jumped to 73%. DONNELLEY FIN. SOLS., BOARD OVERSIGHT OF ESG—NOW! 3 (2020).

93. *See, e.g.*, PWC, ESG OVERSIGHT: THE CORPORATE DIRECTOR'S GUIDE 28 (2022), https://www.pwc.com/us/en/services/governance-insights-center/pwc-esg-oversight-the-corporate-director-guide.pdf [https://perma.cc/W992-EN4Y].

compensation of directors and top officers. The Nomination and Governance Committee oversees the nomination of directors and the functioning of the board.[94]

Should ESG oversight be located in one of these committees, several of them, or in some other committee specifically devoted to all or some ESG matters? One observer notes that "companies will often amend a board-level committee charter to assign responsibility and authority with respect to ESG issues as a first step in developing an ESG program."[95] However, a growing number of companies have created special board committees focused on sustainability issues.[96] Leo Strine and Kirby Smith have an acute analysis of this question, focusing on how companies handle their workforce.[97] They argue that oversight of employee relations should be delegated to the Compensation Committee.[98] The same two authors plus Reilly Steel argue that oversight of various ESG matters should be parceled out to different standard committees that have a complementary focus.[99] They argue against creating a special committee devoted to ESG matters. This risks siloing ESG from the core business operations but will coordinate information flow more efficiently. However, might a special ESG committee be more truly devoted to advancing ESG concerns than a traditional committee with an expanded scope?[100] We shall see that a substantial minority of the S&P 100 do have a special committee devoted to ESG oversight.

The other level of internal governance is that of the officers in charge of actually doing stakeholder engagement and making most decisions on behalf of the company. There is a basic choice here similar to that at the committee level. One could either delegate ESG decisions and stakeholder engagement to the operating officers who oversee the relevant matters within the company, or one could create specific officer positions (and also departments of employees under the direction of those officers) charged with ESG oversight and stakeholder engagement. The advantage of ESG-specific officers is they are more likely to assign high importance to such oversight and to work hard at

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94. *Id.*

95. E. Christopher Johnson, Jr. et al., *Profound Change: The Evolution of ESG*, 75 BUS. LAW. 2567, 2606 (2020).

96. Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1423.

97. Leo E. Strine, Jr. & Kirby M. Smith, *Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism*, 76 BUS. LAW. 31 (2020).

98. *Id.*

99. Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885 (2021).

100. *See* Gadinis & Miazad, *Test*, *supra* note 9, at 95-96.

improving their company's ESG performance,[101] including engagement with stakeholders. The disadvantage is that they may be siloed and relatively powerless.[102] One way of addressing this disadvantage is to create councils of officers that include both the mainline operational officers and the ESG officers to coordinate oversight. As we shall see, two relatively new officer positions have become quite widespread.[103] The Chief Sustainability Officer oversees a variety of ESG matters, often with a particular emphasis on the environment. The Chief Diversity Officer oversees efforts to diversify a company's workforce. Executive councils on ESG-related matters are also common.

As one thinks about the role of officers in engaging stakeholders and overseeing ESG matters, an important question is what incentive they have to pay serious attention to such questions. The incentive of the specialized CSOs and CDOs is relatively clear, since ESG concerns and the interests of stakeholders is their sole focus. But what about other officers? Insofar as they too have incentives to consider stakeholder interests, the concern about siloization is lessened, as we can be more trusting of those making operational decisions. In contrast, if officer compensation is tied only to financial returns, especially to short-term financial returns,[104] the concerns about siloization will be greater.

Companies and activist shareholders have recognized the importance of executive compensation. There has been an explosion of attention paid to this subject. Many companies have started to include some stakeholder concerns as a component of executive compensation, with advocates of stakeholder interests cheering this on,[105] although

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101. "[T]here is some evidence that having someone in a corporate responsibility or ethics role on the top management team will direct management time and resources to these issues and improve the company's social performance." David Hess, *The Management and Oversight of Human Rights Due Diligence*, 58 AM. BUS. L.J. 751, 782-83 (2021). But the evidence is not conclusive as to how much a CSO helps sustainability efforts. "The overall evidence on whether a CSO improves social performance is mixed." *Id.*

102. A CSO "may represent more of a symbolic versus substantive governance mechanism." Gary F. Peters et al., *The Influence of Corporate Sustainability Officers on Performance*, 159 J. BUS. ETHICS 1065, 1065 (2018).

103. *See infra* Section III.B.

104. There has been much debate over whether executive compensation as currently structured induces an excessive focus on short-term over long-term returns. For some of my thoughts on the subject, tending to share the concern over excessive short-termism, see Claire A. Hill & Brett H. McDonnell, *Short- and Long-Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 396 (Claire A. Hill & Steven Davidoff Solomon eds., 2016). Short-termism matters here insofar as stakeholder interests have a more significant impact on financial returns in the long run. Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1455.

105. Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1419-21; Jannice L. Koors, *Executive Compensation and ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2019), https://corpgov.law.harvard.edu/2019/09/10/executive-compensation-and-esg/ [https://perma.cc/MF3B-43D6]; Brian Breheny & Joseph Yaffe, *Executive Compensation Considerations for 2022 Annual Meetings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 20,

there are concerns about the adequacy of the measures being used.[106] Shareholders have begun to consider whether and how companies do this, with such considerations influencing their advisory say-on-pay votes.[107] There is much variety in how companies may take stakeholder concerns into account in compensation. Most often ESG is incorporated into the annual bonus component of compensation, though occasionally it is incorporated into the more long-term incentive compensation component.[108] Compensation may be tied to performance on a quantitative metric or based on qualitative evaluations of executive performance.[109] The type of stakeholder concerns considered vary quite a bit, with leading items sometimes considered including performance on improving diversity and inclusion, workplace safety, and environmental goals.[110] Many applaud this move to incentivizing more sustainable behavior.[111] But there are also potential costs. Poorly designed compensation may have little effect. Or worse: it may have little effect on performance while serving as a way to pad the compensation officers receive.[112] A key question is how well and precisely performance is measured. ESG matters can be quite hard to measure accurately with quantitative metrics, but qualitative assessments run a major risk of leading to over-optimistic assessments.[113]

E. Benefits and Costs of Stakeholder Engagement

Stakeholder engagement has a variety of potential benefits, which we have already begun to consider in our discussion of the types of stakeholders and the types of engagement. I will focus on three benefits: improved accountability, increased legitimacy, and enhanced information. These benefits may apply even if one focuses solely on profitability for the benefit of shareholders—more knowledge about what

2022), https://corpgov.law.harvard.edu/2022/01/20/executive-compensation-considerations-for-2022-annual-meetings/ [https://perma.cc/LK9S-L9NN].

106. Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 697 (2016); WILLIS TOWERS WATSON, ESG AND EXECUTIVE COMPENSATION: HEARING FROM BOARD MEMBERS GLOBALLY 13-20 (2021); PHILLIPA O'CONNOR ET AL., PWC, LINKING EXECUTIVE PAY TO ESG GOALS (2021), https://www.pwc.com/gx/en/issues/reinventing-the-future/take-on-tomorrow/download/Linking-exec-pay-ESG.pdf [https://perma.cc/U6GP-FMW8].

107. EDELMAN, SPECIAL REPORT: INSTITUTIONAL INVESTORS 21 (2020), https://www.edelman.com/sites/g/files/aatuss191/files/2020-11/Edelman%202020%20Institutional%20Investor%20Trust_FINAL.pdf [https://perma.cc/ZE7A-Z3TC].

108. Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. 37, 52 (2022) [hereinafter Bebchuk & Tallarita, *Perils*].

109. *Id.* at 65-66.

110. *Id.* at 57-61; Breheny & Yaffe, *supra* note 105.

111. *See, e.g.*, Gadinis & Miazad, *Social Risk*, *supra* note 9.

112. Bebchuk & Tallarita, *Perils*, *supra* note 108.

113. *Id.*

customers think about your product, e.g., will improve the marketing of that product, and hence it will increase profits. However, these benefits are even more important if one grants independent value to the direct impact on stakeholders themselves.[114]

Stakeholder engagement can make managers more accountable. This is particularly clear for the most aggressive engagement, which directly empowers some stakeholders to be involved in making some corporate decisions. An obvious example would be codetermination, where employees elect some board members.[115] Employees know how well their employer is promoting their interests, and if they are unhappy, their representatives on the board are in a position to pressure managers to do a better job. But even weaker forms of engagement where companies only elicit feedback from stakeholders (far and away more common than empowerment, as we shall see) can increase accountability. Engagement can inform stakeholders about what is going on within a business. This can make them more willing to be involved with the business, but it can also make them less willing to be involved if they are unhappy with what they learn. The possibility of significant stakeholders (like employees or customers) deciding to cut ties if they are unhappy acts as a check on manager misbehavior.[116] Of course, this only works to the extent that stakeholders can tell what kind of job a company has done. For instance, if we think about customers, they can typically (though far from always) do a good job of telling how well a company's product or service has worked after buying it. However, when it comes to telling whether a company has believed responsibly in its treatment of its workers or the environment, it will generally be harder for customers to evaluate corporate claims of virtuous behavior. This is the problem of greenwashing, and it explains why much attention in the area of corporate sustainability has focused on improving the quality of corporate disclosure.[117]

Stakeholder engagement can also affect the perceived legitimacy and trust of a business among its stakeholders.[118] In addition to the information transmitted potentially improving their evaluation of the business as just noted, the act of engagement may be valued by some stakeholders in and of itself. People care about being treated fairly,

114. *See supra* Section I.A.

115. Hayden & Bodie, *supra* note 73.

116. Gadinis and Miazad have stressed this accountability function of stakeholder governance. *See* Gadinis & Miazad, *Test, supra* note 9, at 56.

117. Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281 (2014).

118. Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1444-46; GLOB. CORP. GOVERNANCE F., INT'L FIN. CORP., STAKEHOLDER ENGAGEMENT AND THE BOARD: INTEGRATING BEST GOVERNANCE PRACTICES 8-9 (2009) [hereinafter STAKEHOLDER ENGAGEMENT AND THE BOARD], https://documents1.worldbank.org/curated/en/791711468330347261/pdf/629800WP0Stake00Box0361496B0PUBLIC0.pdf [https://perma.cc/N423-TBGU].

and organizations which are seen as reaching out for their ideas and opinions may be seen as more legitimate. This in turn may make them more willing to be involved with the organization, improving its success.[119]

Stakeholder engagement can provide valuable information to companies.[120] Different stakeholders have different kinds of valuable information. Employees learn much about how a business functions as they do their jobs, and they obviously know a lot about how the workplace environment affects their own satisfaction. Customers know what they value in products and services. Non-profit organizations have expertise in specific areas that affect a business. And so on. Engagement can help companies learn some of that valuable information.

Though it has significant possible benefits, stakeholder engagement can come with significant costs as well. Most importantly, engagement may create conflicts. The interests of different stakeholders may differ, and engagement may sometimes exacerbate those differences (though other times it may ameliorate them).[121] Avoiding such conflict is a leading explanation for why corporations typically give voting power only to shareholders.[122] Those whose interests lose out in a conflict may feel their input was not truly valued. Conflict may also delay making decisions, leading companies to lose out on opportunities. Conflict costs are reduced by limiting engagement to below the empowerment level, but they are not eliminated. Even if management were mainly engaging with customers through social media, for instance, if a number of customers are upset and express their anger online, that can drain the time and emotional energy of managers who must deal with an onslaught of angry tweets. And such conflict can reduce the perceived legitimacy of the company with its customers—the opposite of what it intends to achieve through engagement.

A more obvious though probably less important cost of stakeholder engagement is that it takes time and money to do it. That time and money could possibly be spent on more valuable things, particularly if one is skeptical about the magnitude of the benefits of engagement. Diversion of managerial attention is perhaps the greatest concern along these lines.

Another, quite serious, concern is that stakeholder engagement may lure stakeholders and policymakers into overly trusting companies. This in turn may reduce pressure to enact legal and regulatory

119. Tom R. Tyler & E. Allen Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (2002); E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

120. Gadinis and Miazad have dwelled at length on this informational benefit of stakeholder engagement and provide many examples of it in action. *See generally* Gadinis & Miazad, *Test*, *supra* note 9.

121. Gadinis & Miazad, *Test*, *supra* note 9, at 83.

122. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (2000).

reforms that protect stakeholder interests.[123] Again, the extent to which stakeholders can accurately evaluate the behavior of companies becomes an important factor in the likely success of engagement.

II. CURRENT STAKEHOLDER ENGAGEMENT PRACTICES

This Part presents and discusses evidence on what types of stakeholder engagement practices the S&P 100 companies report that they currently engage in. Section II.A presents the methodology used in extracting information from the public reports of the companies. Section II.B presents the core data, discussing the frequency of different kinds of engagement with the different kinds of stakeholders. Section II.C drills more deeply into several specific kinds of engagement, relating the results of Section II.B with existing literature.

A. *Methodology*

The data presented in Section II.B and Part III comes from two kinds of public disclosure documents. The first is annual proxy statements that are required by federal securities law for public reporting companies. The contents of these statements are tightly regulated and thus relatively uniform across companies. The data taken from those documents concerns the background of directors, the allocation of responsibility for ESG oversight among board committees, and executive compensation, all analyzed in Part III below.

The other kind of disclosure document studied is regular sustainability or ESG reports (the term used varies). These reports are not required by securities or other law, but they have become extremely common for large public companies.[124] All of the S&P 100 companies looked at here had some such disclosure available.[125] Most companies produce an annual report, available in PDF form on the company's website. A few companies do not seem to produce a physical report or an online report in just one PDF, but rather have a section of their website devoted to sustainability or ESG issues. Because sustainability disclosure is voluntary, there is a great deal of variation in what and how companies report.[126] However, there is a lot of common ground as well. Several private standards have evolved to guide company disclosure, and most companies choose to follow one or more of those standards.[127]

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123. Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 171-73; Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167 (2021).

124. McDonnell et al., *Green Boardrooms?*, *supra* note 9, at 359-60.

125. In the case of Berkshire Hathaway, we were only able to find disclosure for a subsidiary, Berkshire Hathaway Energy.

126. McDonnell et al., *Green Boardrooms?*, *supra* note 9, at 362.

127. *Id.* at 359.

The disclosure is not at all limited to the issues of engagement and corporate governance discussed here. Most of the disclosure is about how companies are addressing major ESG topics and what kind of impact they are having. Reports typically include sections on employees, the environment, suppliers, the community, and governance, along with other possible topics.

I had research assistants first create narrative summaries for each company concerning their disclosure on stakeholder engagement (this Part) and governance of ESG matters (the next Part). These narrative summaries were organized using the relevant disclosure categories of the Global Reporting Initiative (GRI), perhaps the most widely used standard for general ESG matters. For stakeholder engagement, the disclosure items covered were disclosures 102-40 to 102-44, with disclosure 102-43 being the main item of interest.[128] For corporate governance, the disclosure items covered were some of disclosures 102-18 through 102-37.[129] Many companies that use the GRI provide an index

128. GLOB. SUSTAINABILITY STANDARDS BD., GLOB. REPORTING INITIATIVE, GRI STANDARDS (2016). The standards in this section are as follows:

- 102-40: "A list of stakeholder groups engaged by the organization." *Id.* at 29.
- 102-41: "Percentage of total employees covered by collective bargaining agreements." *Id.* at 30.
- 102-42: "The basis for identifying and selecting stakeholders with whom to engage." *Id.* at 31.
- 102-43: "The organization's approach to stakeholder engagement, including frequency of engagement by type and by stakeholder group, and an indication of whether any of the engagement was undertaken specifically as part of the report preparation process." *Id.*
- 102-44: "Key topics and concerns that have been raised through stakeholder engagement, including: i. how the organization has responded to those key topics and concerns, including through its reporting; ii. the stakeholder groups that raised each of the key topics and concerns." *Id.* at 32.

129. *Id.* The standards I considered in this section are as follows:

- 102-18: "a. Governance structure of the organization, including committees of the highest governance body. b. Committees responsible for decisionmaking on economic, environmental, and social topics." *Id.* at 18.
- 102-19: "Process for delegating authority for economic, environmental, and social topics from the highest governance body to senior executives and other employees." *Id.*
- 102-20: "a. Whether the organization has appointed an executive-level position or positions with responsibility for economic, environmental, and social topics. b. Whether post holders report directly to the highest governance body." *Id.* at 19.
- 102-21: "a. Processes for consultation between stakeholders and the highest governance body on economic, environmental, and social topics. b. If consultation is delegated, describe to whom it is delegated and how the resulting feedback is provided to the highest governance body." *Id.*
- 102-22: "Composition of the highest governance body and its committees by: i. executive or non-executive; ii. independence; iii. tenure on the governance body; iv. number of each individual's other significant positions and commitments, and the nature of the commitments; v. gender; vi. membership of under-represented social groups; vii. competencies related to economic, environmental, and social topics; viii. stakeholder representation." *Id.*

pointing to where the relevant disclosure is for each item, which gave a useful starting point in gathering information.

Once these narrative summaries were finished, my research assistants and I engaged in some basic content analysis by coding material of interest to stakeholder engagement and corporate governance.[130] For stakeholder engagement, I set up a categorization of different types of engagement, based with some modification on the AccountAbility Stakeholder Engagement Standards as discussed below.[131] Then, for each company, I and one of my research assistants coded the engagement practices disclosed by those companies. We then met to identify and resolve points where we coded differently. For a summary of the resulting measures of engagement, see Chart 2.

I looked at four of the AccountAbility levels of engagement: consult, involve, collaborate, and empower.[132] I did not include lower levels of engagement, since they mostly involve no or just one-way communication. The transact level is two-way, but the main example of that is grant-making, and contributions to non-profits are completely ubiquitous and have been for many years, so little of interest would be gained by coding for that. At the consult level, I coded separately for four types of involvement: surveys, focus groups,[133] structured meetings, and social media.[134] Coding for whether a company used surveys or focus groups for a given type of stakeholder was generally straightforward, while the other two were somewhat less so. It was not always clear what counted as a structured, recurring meeting with stakeholders. For social media, the main source of ambiguity was whether a company simply sent messages to stakeholders (a one-way communication

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- 102-29: "a. Highest governance body's role in identifying and managing economic, environmental, and social topics and their impacts, risks, and opportunities—including its role in the implementation of due diligence processes. b. Whether stakeholder consultation is used to support the highest governance body's identification and management of economic, environment, and social topics and their impacts, risks, and opportunities." *Id.* at 22.
- 102-37: "a. How stakeholders' views are sought and taken into account regarding remuneration. b. If applicable, the results of votes on remuneration policies and proposals." *Id.* at 26.

130. In the coding process, we worked from the summary, referring back to the underlying documents summarized where there was any ambiguity, unclarity, or missing information.

131. *See infra* notes 133-35 and accompanying text.

132. *See supra* Chart 1.

133. The AccountAbility standards list focus groups under both the consult and involve levels; I chose to include them in the former.

134. "Online engagement tools" are listed under the involve level in the AccountAbility standard, but the typical use of social media seems to better fit within the consult level.

that would just qualify as informing in the AccountAbility scheme) or whether companies were also monitoring social media communications received from stakeholders of a given type.

The involve level includes advisory panels, both panels of one type of stakeholder and multi-stakeholder panels (I coded separately for these). I chose to include as a separate category within this level employee resource or affinity groups, which are not explicitly accounted for within the AccountAbility standards. These are formal organizations of employees with a shared characteristic, e.g., people of color, women, gay, religious, veterans, etc. It turns out that these are now ubiquitous in large U.S. corporations and are one of the phenomena worth further study identified in this Article.[135] The collaborate level mainly includes joint projects or partnerships. This was one of the main areas of ambiguity in coding, particularly for non-profits and local communities. The dividing line between simply giving money to a non-profit and partnering with it is quite fuzzy. In coding, I looked to see whether the disclosure used words like "partner" or "partnering" to describe relationships with organizations.

The definition I used of the highest level of engagement, empower, was rather different from that used by AccountAbility. That categorization envisions arrangements like board representation or works councils, in which stakeholders or stakeholder representatives are actively involved in making decisions. Such arrangements are fairly common in much of Europe, but not at all in the United States. In the companies studied here, I only found such arrangements in some European subsidiaries. Note that I treat the inclusion of certain kinds of stakeholders on the board, namely non-profit officers, former government officials, and academics, within the discussion of corporate governance mechanisms rather than as a director form of engagement through empowerment. Were the underlying stakeholders actually given the power to elect representatives on the board, that would be an instance of empowerment as measured here. But the board itself has the power to make nominations, and shareholders vote on those nominees. Moreover, these types of directors are not typically explicitly characterized as representing the stakeholders of which they are a part. Thus, it does not strike me as properly characterized as a form of stakeholder empowerment, and I do not take the AccountAbility standards or company disclosure as treating these types of directors as such. However, having persons drawn from such positions within stakeholders does strike me as noteworthy and worth discussing, which is why I examine that practice in the next Part. I decided to include unionization at the empower level, since unionization gives employers, through their union, the power to jointly (with their employer) make some major decisions.

135. *See infra* Section II.C.

Chart 2: Types of Engagement Calculated and Presented in this Study

Level of Engagement	Type of Engagement	Description
Consult	Survey	Formal surveys of members of a stakeholder group
Consult	Focus group	Focus group discussions with members of a stakeholder group
Consult	Meet	Formal meetings of members of a stakeholder group with company representatives or executives
Consult	Social media	Interactive use of social media, both monitoring and responding to communication from stakeholders
Involve	Employee resource group	Formal affinity groups
Involve	Council	Formal ongoing councils with representatives of one or multiple stakeholder groups
Collaborate	Collaborate	Partnerships or joint ventures
Empower	Empower	Unionization of > 5% of employees; council with stakeholder representatives and decisionmaking authority; stakeholders electing directors

There are significant limits to using public disclosure, especially voluntary disclosure, as the source of information for my data. Most importantly, some companies may be more thorough than others in what forms of engagement they choose to include in their disclosure. If, for instance, a company does not mention that it engages its employees through an intranet, or that it surveys its customers, that may be because it does not do so, or because it does but did not see fit to disclose that.[136] I suspect that some variation particularly in the consult categories (especially surveys, meetings, and social media) is due to differences in disclosure rather than actual practices. Also, unregulated voluntary disclosure often gives an overly rosy view of what a company does and can be quite vague. Thus, ultimately, one would like to see other sources of information about engagement practices, including interviews[137] and surveys.

Still, public disclosure is readily available and easy to gather. Also, it is not subject to the selection bias that afflicts interviews and surveys. Thus, this disclosure at least provides a useful starting point. Moreover, differences in how companies choose to characterize some common types of engagement may themselves be of interest. If one company chooses to treat regular surveys of customer satisfaction as a form a stakeholder engagement while another does not, why might that be? A cynical explanation would be that the former company is stretching to include anything that might possibly be seen as stakeholder engagement as a way to make itself look good, in line with the greenwashing critique of corporate ESG disclosure. But, I would argue that customer surveys are a genuine and significant form of stakeholder engagement.[138] When well done, they can generate much useful information about how well a company is satisfying the interests of its customers—one of the main points of engagement.[139] A more customer-focused company may be more likely to take a broad view of the various ways in which it engages with its customers, thus discussing surveys as a form of engagement where a company that focuses less on its customers might take a more haphazard, limited approach to what it discloses and leave out such surveys.

Whatever one thinks about that last point, we must clearly try to adjust our understanding of the results on stakeholder engagement to account for the possible differences in what companies choose to disclose. As I discuss the results in Section II.B, I will do so, and suggest that most likely the undercounting effect of differences in disclosure should not change our qualitative conclusions very much. We should

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136. *See supra* notes 16-17 and accompanying text.

137. Gadinis and Miazad have done tremendously helpful work based on interviews with professionals involved in stakeholder engagement. *See* Gadinis & Miazad, *Social Risk*, *supra* note 9; Gadinis & Miazad, *Test*, *supra* note 9.

138. *See infra* notes 162-71 and accompanying text.

139. *See supra* note 129 and accompanying text.

not put very much weight on the exact figures shown in Tables 1 and 2 concerning how many companies use different kinds of engagement for different kinds of stakeholders. But the ordinal rankings of which stakeholders are most heavily engaged, and what kinds of engagement are most often used, probably reflect the underlying reality pretty well given the likely direction of biases induced by differences in reporting. Indeed, the dominance of lower levels of engagement (probably more subject to under-disclosure) is likely even greater in reality than in the figures reported here.

B. Data on Engagement Practices

Table 1 summarizes the core data gathered on the frequency of different types of engagement for different kinds of stakeholders. There are columns for eight different kinds of engagement: survey, focus, meet, social, employee resource group, council, collaborate, and empower.[140] The cells give the fraction of companies studied that engage in that type of engagement for that stakeholder group. Thus, 0.75 in the cell for employees and surveys means that three-quarters (75%) of companies in the S&P 100 say that they conduct surveys of their employees. Since I studied 100 companies, that means that 75 companies survey their employees. And so on for the other cells.

We can see various patterns in this table. By summing across a row, we find out how many different kinds of engagement the average company used for a type of stakeholder. Thus, companies on average say that they engage in with their employees using 3.26 of the 8 kinds of engagement activities studied here. That makes employees the most-engaged stakeholders by quite a margin. Next are customers with 1.38 activities, followed closely by non-profits at 1.30. Suppliers and governments are well behind that, with 0.85 and 0.71, respectively. Academics are behind that at 0.37, and others at just 0.02.

How might the likely tendency to undercount some types of engagement because some companies do not conceive of them as stakeholder engagement affect these results? The four items in the consult categories (survey, focus, meet, and social media) seem most prone to undercounting. These are common but fairly quotidian forms of interaction, particularly with respect to the two most-engaged types of stakeholders. For huge corporations like those studied here, the reported numbers for how many of those companies survey or meet with their employees and customers seem low. Simple surveys of employee or customer satisfaction might not code as stakeholder engagement of the sort addressed in sustainability reports for a number of companies. The number of companies that engage on social media, particularly with employees and customers, may also be low. Here, in addition to

140. *See supra* Chart 2.

the "too common to count" issue, there is ambiguity as to what qualifies as adequately interactive social media use for purposes of this measure—that is often hard to tell from limited and vague disclosure. If all this does indeed lead to significant undercounting of these activities particularly for employees and customers, then the slightly higher measured lead of customers over non-profits may actually be notably bigger in reality—I suspect that is the case.

Table 1: Frequency of Type of Engagement by Type of Stakeholder

	Survey	Focus	Meet	Social Media	ERG	Council	Collaborate	Empower	Total
Employees	0.75	0.09	0.59	0.28	0.95	0.26	0.02	0.32	3.26
Customers	0.41	0.08	0.35	0.33	0	0.1	0.11	0	1.38
Suppliers	0.18	0	0.39	0.06	0	0.03	0.19	0	0.85
Govt	0.02	0	0.52	0.01	0	0	0.16	0	0.71
NGOs	0.09	0.01	0.4	0.06	0	0.05	0.69	0	1.3
Academics	0.04	0	0.08	0	0	0.02	0.23	0	0.37
Others	0.01	0.01	0	0	0	0	0	0	0.02
Multi-group	0	0	0	0	0	0.18	0	0	0.18
Total	1.5	0.19	2.33	0.74	0.95	0.46	1.4	0.32	

This varying level of engagement by type of stakeholder makes broad sense. As discussed above and below, and as I and others have argued at length elsewhere,[141] employees are the stakeholder group that is most intimately connected to businesses. They have the most useful information to gather, and their satisfaction with their relationship with a company is of greatest importance to that company's success. That customers show up next also makes good sense: no business can succeed without persuading people to buy what it sells, so keeping customers happy and learning what they like is critical. That the level of engagement with non-profits is almost as high as that with customers is perhaps more surprising—and as noted above, also quite possibly not true, as significant undercounting of surveys, meetings, and social media may affect the customer engagement measures much more than for non-profits. Suppliers are well behind non-profits, even though they would seem more important to the economic success of companies.

Table 1 also contains information about the types of engagement most frequently used. Summing down a column gives for how many of the seven types of stakeholders (including "others") the average company uses a particular form of engagement. The most used form is meetings, used for an average of 2.33 groups per company. This makes intuitive sense—meetings are a natural form of interaction, particularly for a group like employees.[142] The next most frequently used types of engagement are surveys (1.5) and collaboration or partnerships (1.4). Employee resource groups are next, used by 95% of the companies. This is striking since this specific form can only be used for one type of stakeholder, employees, and almost all companies use it for that group. I shall have more to say about these types of organization below.[143] Social media only appears as used for 0.28 groups per company. Councils are used a similar amount—that, in contrast to social media, is if anything rather more than I would have expected. Companies make little use of focus groups.

The most aggressive form of engagement, empowerment, shows up at 32 companies. It is only used for employees, and for them, that represents unionization.[144] That actually seems like a large number of companies with unions, given that well under 10% of private sector employees are unionized. But, unions are more likely at larger employers such as those studied here, and I counted companies as using

141. *See* sources cited *supra* note 19.

142. That only 59 companies show as meeting with their employees reveals the limitation of looking to the voluntary disclosure documents used here—presumably all companies conduct regular meetings of various kinds with their employees.

143. *See infra* Section II.C.

144. Recall, I chose to count this as a form of empowerment. *See supra* Chart 2.

empowerment if at least 5% of their employees were unionized. That is a low threshold, and a higher threshold would reduce the 32% figure significantly.

Table 1 also reveals how the use of types of engagement varies by stakeholders. For employees, the most used forms of engagement are resource groups, surveys, and meetings, with each of those types used by a majority of companies. Engagement with customers is somewhat similar to that with employees but at a lower level: surveys, meetings, and social media are the most common form of engagement, but none of them is reported as being used by a majority of companies. For non-profits, by contrast, the most common form of engagement is collaborative partnerships.

How might the likely fact that many companies do not disclose some types of engagement affect these results? We saw above that the items in the consult category are most prone to such undercounting. That seems clearly true for meetings and surveys. These already show up as the most-used form of engagement, so the likely direction of bias suggests that they are even more strongly in the lead. We also saw that the use of social media may well be notably undercounted as well. I am less sure what to make of the very light reported use of focus groups. Even if the low use of focus groups is correct, the other three of the four consult items (survey, meet, social media) already appear as three of the five most-used forms of engagement, including the top two, and the data probably undercounts those items more than any other. Thus, consultation, the lowest level of stakeholder engagement studied here, seems to prevail as being much more frequently used than higher levels of engagement.[145]

When constructing an index of engagement for individual companies to look at engagement by industry and to compare with the use of governance mechanisms discussed in Part III, I do not treat each type of engagement equally. Reflecting the AccountAbility hierarchy, the four types of involvement only receive a weight of 1, while the resource groups, councils, and collaborations receive a weight of 2 and empowerment a weight of 3. Table 2 redoes Table 1, but with those weights. The basic results just discussed remain, with the main difference being that non-profits show as more engaged with 2.04 than customers at 1.59. This reflects the fact that the main form of engagement with non-profits is collaborative partnership, which receives a higher weight than the forms of involvement more frequently used with customers. However, given that the surveys, meetings, and possibly social media engagement with customers is, as discussed above, quite possibly significantly undercounted, and given that the non-profit collaboration

145. A result found in other studies as well. *See* sources cited *supra* notes 74-75.

category is perhaps the most ambivalently coded number in Tables 1 and 2, I would not attach a great deal of weight to that switch in the level of engagement with customers and non-profits.

Table 2: Frequency of Type of Engagement by Type of Stakeholder, Weighted

	Survey	Focus	Meet	Social Media	ERG (2)	Council (2)	Collaborate (2)	Empower (3)	Total
Employees	0.75	0.09	0.59	0.28	1.9	0.52	0.04	0.96	5.13
Customers	0.41	0.08	0.35	0.33	0	0.2	0.22	0	1.59
Suppliers	0.18	0	0.39	0.06	0	0.06	0.38	0	1.07
Govt	0.02	0	0.52	0.01	0	0	0.32	0	0.87
NGOs	0.09	0.01	0.4	0.06	0	0.1	1.38	0	2.04
Academics	0.04	0	0.08	0	0	0.04	0.46	0	0.62
Others	0.01	0.01	0	0	0	0	0	0	0.02
Multi-group	0	0	0	0	0	0.36	0	0	0.36
Total	1.5	0.19	2.33	0.74	1.9	0.92	2.8	0.96	

It is worth asking whether engagement with the different kinds of stakeholders is correlated with each other. That is, if a company engages more highly than average with its employees, is it also likely to engage more highly with its customers or other stakeholders? Table 3 suggests that the answer is yes. It shows the correlation for engagement with each type of stakeholder with that for every other type. All but two of the correlations are positive. Those two negative correlations are engagement with academics correlated with customers and governments. Of all the categories of stakeholders, companies engage the least with academics, so it makes some sense that the more-rare engagement with academics is rather more randomly related to engagement with other groups. Do the correlations among engagement with different groups reflect a real phenomenon, or are they due to the source of this data?[146] That is, do companies really tend to be either more or less engaged generally, across types of stakeholders, or is it just that some companies report their engagement more fully (and sometimes creatively) than others? Without other sources of data, I cannot say; I suspect that both are true.

146. *See supra* Section II.A.

Table 3: Correlation of Stakeholder Levels of Engagement

	Employees	**Customers**	**Suppliers**	**Govt**	**NGOs**	**Academics**
Employees	1	0.260998363***	0.31108156***	0.02073666***	0.204246606***	0.034088033***
Customers		1	0.114115822***	0.22860309***	0.035386816***	-0.02777168
Suppliers			1	0.01634329***	0.179016963***	0.070726829***
Govt				1	0.158294341***	-0.0160924
NGOs					1	0.035101966***
Academics						1

*** $p<0.01$, ** $p<0.05$, * $p<0.1$

The analysis done here is descriptive, not causal. An obvious and important question is what causes companies to be more or less engaged with their stakeholders. That question must mostly be left to future research. However, one piece of data that is easy to gather and could help shed some light is how engagement varies by industry in which companies are involved. The standard measure of a company's main industry is its NAICS code.[147] Table 4 reports on the overall engagement level (using the engagement index described above) for companies grouped by their high-level NAICS codes. For each industry grouping, it reports the average engagement level for companies in that group, with the industries listed from most to least engaged. Table 4 also reports the minimum and maximum individual company engagement index and the number of companies included within that group.

Do any interesting patterns emerge from Table 4? Not all that much, to be honest. There is not all that huge a difference between the various industries, for the most part, with a lot of variation within the groups. But there are perhaps a few suggestive points. The industry with the highest average level of engagement is energy companies and utilities.[148] One might be surprised to see this industry as the most virtuous in its engagement with stakeholders. But on reflection, perhaps that should not be a surprise at all. The industry is subject to high levels of regulatory and political pressure due to its environmental impacts. Engaging with stakeholders is one way of responding to that pressure. This point illustrates that, were one to try to correlate engagement with measures of impact, there may be a problem. Companies with problematic impacts may be induced to engage more with stakeholders. This type of endogeneity is a well-known problem in making causal inferences in studies of corporate governance.[149]

The other industry with a notably higher level of engagement is transportation.[150] One factor that helps explain this is that two of the three companies in the group are unionized, which is heavily weighted in the engagement index. If those companies were not unionized, the average engagement level would drop from 15.33 to 13.33, which is still above average but only modestly so. As I will discuss below, we see very little engagement at the highest level of empowerment, so an industry where such engagement is common scores more highly. Of course, we are dealing with small numbers of companies here, so we cannot make too much of this.

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147. *North American Industry Classification System*, U.S. CENSUS BUREAU, https://www.census.gov/naics/ [https://perma.cc/2Y78-GFC6] (last visited Feb. 10, 2024).

148. The four companies in this group are ExxonMobil, NextEra Energy, Dominion Energy, and Duke Energy.

149. *See generally* M. Babajide Wintoki, James S. Linck & Jeffry M. Netter, *Endogeneity and the Dynamics of Internal Corporate Governance*, 105 J. FIN. ECON. 581 (2012).

150. The three companies in this group are Union Pacific, United Parcel, and FedEx.

At the other end of the spectrum, the information sector (which contains the most companies, fifteen) has a noticeably low level of average engagement. Only two companies in that group have an index above the average level for the full 100 companies studied, and at fifteen, even those two are not particularly high. The information sector is a disparate category,[151] and it includes some of the most influential companies in the world, such as Apple and Facebook/Meta. Not all, but many, of these companies face large numbers of consumers (in addition to Apple and Facebook, the category includes Walt Disney and mobile companies such as AT&T, Verizon, and T-Mobile). I would have thought that such companies would face above-average pressure to engage with stakeholders, but that expectation is not borne out by this measure of engagement. Is this an artifact of reporting? Is there a reason why the companies included in the information sector might be more likely to underreport some kinds of disclosure? We have seen that the kinds of engagement most likely subject to underreporting are surveys, meetings, and maybe social media, and particularly the use of these forms with customers. Many, though not all, of the companies in this category are pretty heavily customer-facing (e.g., Apple, Disney, and Facebook). My best guess would have been that such companies are more likely to report customer engagement than others, not less. I do not have a good explanation for this result.

Table 4: Stakeholder Engagement by Industry

Industry	**NAICS**	**Average**	**Min**	**Max**	**No. of Firms**
Mining, oil & gas, utilities	21-22	16	14	19	4
Transportation	48	15.33	14	17	3
Chemical mfg.	32	13.67	7	22	13
Health care	62	13.67	5	23	3
Finance & insurance	52	13.5	4	22	12
Administrative services	56	12.33	10	14	3
Management of companies	55	11.75	4	17	4
Wholesale trade	42	11.6	8	16	5
Retail trade	44-45	11.36	1	18	11

151. The fifteen companies in this group are Apple, Cisco Systems, Texas Instruments, Intuit, Walt Disney, Comcast, PayPal, AT&T, T-Mobile, Verizon, Charter Communications, Facebook, Salesforce, Equinix, and Automatic Data Processing.

Food, apparel mfg.	31	11	6	15	5
Computer & electric part mfg.	33	10.83	1	17	12
Prof'l, scientific, & tech services	54	10.25	5	17	4
Information	51	8.6	4	15	15
Real estate	53	7.33	2	13	3
Food services	71	7	7	7	1
Other services	81	7	7	7	1

C. *Engagement in More Detail*

The data presented in Section II.B suggests some interesting patterns that deserve more exploration. This includes the ubiquity of employee resource groups and the widespread use of surveys and social media. Much less common are advisory councils or panels, but these are used sometimes and are worth considering, possibly being a future path of expansion. Below I delve into a bit more depth on these topics, reviewing some of the literature on them.

One of the findings that I have found most striking is the ubiquity of employee resource groups (ERGs) or affinity networks. These do not receive attention among the corporate governance scholars with whom I hang out, and they seem to have received relatively limited attention even in the employment law literature. Yet ERGs have been around at least since the National Black Employees Caucus at Xerox in 1970.[152] They initially focused on black employees but have expanded to a variety of other groups over time.[153] My research demonstrates that ERGs are present in most of America's largest corporations.

Advocates argue that ERGs can serve a variety of purposes. The current research literature suggests that ERGs positively contribute to community, sustainability, diversity, and visibility.[154] One article notes three main ways that ERGs can help an organization: "1) serve as focus groups to provide feedback for D&I strategists, 2) implement specific strategies, such as mentoring and onboarding, and 3) act as

152. Hala Annabi & Mina Tari, *Are Women Affinity Groups Enough to Solve the Retention Problem of Women in the IT Workforce?*, *in* PROCEEDINGS OF THE 51ST HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 5146 (2018), https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/7b5c4bb2-ff41-47ee-87a3-a1b1d6c33065/content [https://perma.cc/NN8X-NEK4].

153. Joann S. Lublin, *Employee Resource Groups Are on the Rise at U.S. Companies*, WALL ST. J. (Oct. 31, 2021, 2:00 PM), https://www.wsj.com/articles/why-ergs-are-on-the-rise-11635532232 [https://perma.cc/ZYP3-MT2A].

154. Theresa M. Welbourne et al., *The Case for Employee Resource Groups: A Review and Social Identity Theory-Based Research Agenda*, 46 PERS. REV. 1816 (2017).

agents of cultural change in the organization."[155] ERGs may work with outside groups to promote efforts at increasing diversity.[156] Some suggest that ERGs may reduce EEOC complaints and litigation.[157]

On the other hand, ERGs can potentially create new risks of litigation as well.[158] Poorly run groups "can stifle productivity and camaraderie among employees, especially if the meetings turn into unproductive 'venting' sessions."[159] ERGs can also risk alienating those they seek to empower by labelling them exclusively as minorities.[160] Some research suggests that ERGs have generally not been effective at improving diversity within companies.[161]

Other than face-to-face meetings, the most common form of engagement used for a variety of stakeholders found in our results is surveys.[162] A large majority of S&P 100 companies survey their employees, and I found close to a majority survey their customers, likely a significant undercount.[163] The literature on surveys suggests several benefits they can provide. One is that stakeholders may appreciate the process of companies soliciting their views, increasing their trust in those companies. One author says that surveys "build[] citizens' . . . trust in the service providers."[164] Another says "[s]urveys can evoke stakeholder respect for the organization and increase organizational credibility."[165] An article focused on employee surveys argues "[s]urveys give employees the chance to feel heard."[166]

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155. Annabi & Tari, *supra* note 152, at 5147.

156. Sabreena El-Amin, *Addressing Implicit Bias Employment Discrimination: Is Litigation Enough?*, 2015 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1, 23.

157. Aaron M. Glassman & Myron Glassman, *The Use of Affinity Groups by Fortune 100 Firms*, 17 J. BUS. DIVERSITY 104 (2017).

158. *Id.*; Anne-Marie Vercruysse Welch et al., *Legal Traps Associated with Affinity Groups*, 33 ABA J. LAB. & EMP. L. 267, 276 (2018).

159. Brittany L. Johnson, *Tips on Affinity Groups*, LAB. & EMP. L., Spring 2016, at 1, 8.

160. Russell G. Pearce et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2417-18 (2015); Tyler W. Garvey, Comment, *Law Firm Diversity Scholarships: Good Intentions, Incomplete Solutions—Suggestions from the Eyes of a Diverse Candidate*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 80, 90 (2014).

161. Soohan Kim et al., *Progressive Corporations at Work: The Case of Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171, 171 (2012).

162. *See supra* Table 1.

163. *See supra* Table 1.

164. MANJUNATH SADASHIVA, CIVICUS & PG EXCH., STAKEHOLDER SURVEYS 5 (2015), https://civicus.org/documents/toolkits/PHX_H_Stakeholder%20Survey.pdf [https://perma.cc/JD6W-VV8K].

165. Terrie Nolinske, *Surveys from Stakeholders Make Good Business Sense*, NAT'L BUS. RSCH. INST., https://www.nbrii.com/customer-survey-white-papers/surveys-from-stakeholders-make-business-sense/ [https://perma.cc/DGU6-T8BK] (last visited Feb. 10, 2024).

166. Scott Judd et al., *Employee Surveys Are Still One of the Best Ways to Measure Engagement*, HARV. BUS. REV. (Mar. 14, 2018), https://hbr.org/2018/03/employee-surveys-are-still-one-of-the-best-ways-to-measure-engagement [https://perma.cc/3RQX-J8VQ].

Surveys can also improve how companies function. They can provide information that helps companies improve their policies and decisions. For instance, "[s]urvey results can lead to revised policies, procedures, and systems within the value chain of suppliers . . . [and] more effective services and products that better meet consumer needs."[167] Relatedly, one article argues that employee surveys "are a vehicle for changing behavior."[168]

Surveys also pose some risks. Many of those surveyed are skeptical of them. "A 2014 survey found that 70% of employees do not respond to surveys and nearly 30% of them think they are useless."[169] That skepticism could be well-founded for a number of companies, as a concern of commentators is that many do not do a good job at translating the information learned from surveys into action. An article on pulse surveys of employees finds that issues include "[t]aking too much time to get to an action plan"; "[a]ssuming results will fully guide an action plan"; and "[n]eglecting to share the actions taken as a result of employee surveys."[170] Another article makes the following suggestion to companies as a way to improve: "do something [with] the results."[171]

Companies do not report using social media as an engagement technique as often as they report using surveys, but a substantial minority report using social media to engage employees or customers, and this is probably a notable undercount.[172] A survey of businesses found that they consider the use of social media helpful in a variety of ways: "The survey questionnaire found that social media encouraged these businesses to adopt policies that were friendly towards their employees (51%), the environment (65%), the marketplace (67%), and the community (55%)."[173]

Furthermore, employees and customers increasingly expect companies to respond to their concerns expressed via social media. A survey of employees found that "82% of employees think that social media can improve work relationships and 60% believe social media support

167. Nolinske, *supra* note 165.

168. Judd et al., *supra* note 166.

169. Peter Cappelli & Liat Eldor, *Where Measuring Engagement Goes Wrong*, HARV. BUS. REV. (May 17, 2019), https://hbr.org/2019/05/where-measuring-engagement-goes-wrong [https://perma.cc/Z292-JGYV].

170. Lauren Romansky et al., *How to Measure Inclusion in the Workplace*, HARV. BUS. REV. (May 27, 2021), https://hbr.org/2021/05/how-to-measure-inclusion-in-the-workplace [https://perma.cc/V368-HURL].

171. Cappelli & Eldor, *supra* note 169.

172. *See supra* Table 1.

173. Ananda Khanal et al., *The Influence of Social Media on Stakeholder Engagement and the Corporate Social Responsibility of Small Businesses*, CORP. SOC. RESP. ENV'T MGMT., June 2021, at 7.

decision-making processes."[174] A survey of customers found that "[s]ince 2013 the number of customers who expect a response through social media has doubled, according to research from Sprout Social, yet seven out of eight messages to companies go unanswered for 72 hours."[175]

A higher level of stakeholder engagement comes with standing councils or panels of stakeholder representatives, who provide ongoing advice to management. Some councils have representatives of just one stakeholder group, while others feature representatives from multiple groups. I find these with some frequency, but they have potential for much greater use. Some have advocated such councils as a way to give stakeholders a more effective voice than current engagement practices.[176] J. Haskell Murray has advocated them for social enterprises.[177] A study of joint stakeholder-management panels in the UK found notable positive impacts on corporate decisionmaking.[178]

In my research, advisory councils of employees are by far the most common, with twenty-six companies having these. Most of these are diversity and inclusion councils. In six companies, I find health and safety councils. These are a sort of halfway house towards German-style works councils. They focus on just one area, though an important one, and they are merely advisory, unlike works councils which have authority to set some kinds of rules. But they do provide an existing base for potential expansion to the works council system. The other kind of single-stakeholder advisory councils seen with most frequency are those with customer representatives, which makes sense since customers are probably the second-most critical non-shareholder group (after employees) for the success of most companies. I found nine companies with multi-stakeholder advisory panels. These go by names like Sustainability Advisory Council (AT&T),[179] Global Citizenship

174. Lorenzo Bizzi, *Employees Who Use Social Media for Work Are More Engaged—but Also More Likely to Leave Their Jobs*, HARV. BUS. REV. (May 17, 2018), https://hbr.org/2018/05/employees-who-use-social-media-for-work-are-more-engaged-but-also-more-likely-to-leave-their-jobs [https://perma.cc/E4HP-29YC].

175. Keith A. Quesensberry, *Social Media Is Too Important to Be Left to the Marketing Department*, HARV. BUS. REV. (Apr. 19, 2016), https://hbr.org/2016/04/social-media-is-too-important-to-be-left-to-the-marketing-department [https://perma.cc/GY75-4RTU].

176. Aalt Colenbrander & Tineke Lambooy, *Engaging External Stakeholders in Dutch Corporate Governance*, 13 INT'L & COMPAR. CORP. L.J. 1, 19 (2018); STAKEHOLDER ENGAGEMENT AND THE BOARD, *supra* note 118, at 38.

177. J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61 (2017).

178. Heiko Spitzeck, Erik G. Hansen & David Grayson, *Joint Management-Stakeholder Committees—A New Path to Stakeholder Governance?*, 11 CORP. GOVERNANCE 560, 562 (2011).

179. AT&T, STAKEHOLDER ENGAGEMENT 2 (2012), https://www.att.com/Common/about_us/downloads/stakeholder_engagement.pdf [https://perma.cc/A5M3-NTK7] ("AT&T Consumer Advisory Panel: Established in 2008, this panel is comprised of 19 national

Advisory Council (Abbott Laboratories),[180] External Stakeholder Advisory Council (Wells Fargo),[181] and National Community Advisory Council (Bank of America).[182]

Wells Fargo is an interesting case for stakeholder councils. It established an external Stakeholder Advisory Council as a response to the series of scandals that have tarnished the bank's reputation.[183] Note that the Council's creation in response to scandal echoes a point above, namely that we should not necessarily expect to see serious stakeholder engagement exclusively or even primarily in the most virtuous companies—engagement may be a response to reputational and regulatory pressures and problematic businesses.[184] The initial seven members included the president of the Center for Responsible Lending, the CEO of Ceres, the CEO of the National Urban League, the CEO of UnisdosUS, the director of CSR at the Sisters of St. Francis of Philadelphia, the director of corporate governance at the California State Teachers' Retirement System, and the CEO of the National Community Reinvestment Coalition.[185]

Sister Nora Nash, one of the original seven members, "saw the purpose of the Council as bringing an outside view to the company's problems."[186] These issues include how the bank treats its workforce and its human rights policies in lending.[187] One article looking at the Wells Fargo Council concludes:

> If corporations are now "soulless" creatures, Stakeholder Advisory Councils may be a way to implant souls in them. If nothing more, those panels can serve as a bridge from corporations to society at large,

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consumer leaders who meet quarterly with corporate leaders from AT&T to discuss ways that the company can better serve these communities and continue its efforts to become a more diverse and sustainable company.").

180. ABBOTT LAB'YS, GLOBAL SUSTAINABILITY REPORT 2022, at 24 (2022), https://dam.abbott.com/en-us/documents/pdfs/abbott-citizenship/Abbott-2022-Global-Sustainability-Report-June-2023.pdf [https://perma.cc/9XY4-6K5Z] ("Global Citizenship Advisory Council[:] External experts who provide guidance on strategic sustainability issues, including risks and opportunities.").

181. *Wells Fargo Launches Stakeholder Advisory Council*, WELLS FARGO (Dec. 21, 2017), https://newsroom.wf.com/English/news-releases/news-release-details/2017/Wells-Fargo-Launches-Stakeholder-Advisory-Council/default.aspx [https://perma.cc/2TUB-QRNC].

182. *Key Governance Topics*, BANK AM., https://about.bankofamerica.com/en/making-an-impact/key-governance-topics [https://perma.cc/DKA3-W9RH] (last visited Feb. 10, 2024) ("In 2005, we formed our National Community Advisory Council, or NCAC, a forum made up of senior leaders from social justice, consumer advocacy, community development, environmental, and research organizations from whom we solicit independent external perspectives, guidance, and feedback.").

183. *Wells Fargo Launches Stakeholder Advisory Council*, *supra* note 181; Daniel J. Morrissey, *The Promise of Stakeholder Advisory Councils*, 23 U. PA. J. BUS. L. 470, 477-79 (2021).

184. *See supra* notes 148-49 and accompanying text.

185. *Wells Fargo Launches Stakeholder Advisory Council*, *supra* note 181.

186. Morrissey, *supra* note 183, at 503.

187. *Id.*

sensitizing those firms to their impact on our common life and prodding them to serve the larger purposes of our nation.[188]

It will be interesting to see if the council helps at all.[189] There are decided limits to how far the bank is willing to go. The Committee for Better Banks, which has attempted to unionize bank employees, has pushed Wells Fargo to add an employee representative to its council, and the bank has resisted.[190] The AFL-CIO Reserve Fund attempted to introduce a shareholder proposal requesting the board to include an employee representative on the council, but the SEC allowed the bank to exclude the proposal from its proxy statement.[191] Given the central value that employees can bring to making managers more accountable—a value pretty obvious at Wells Fargo, where employees were quite intimately familiar with the problems that led to the scandal—the board's opposition to an employee representative on its Council suggests that the board intends to strictly cabin the potential for the council to rock the boat. Obviously, whether councils like this have any impact depends in good part on whether management takes them seriously. Still, they represent an interesting path forward.[192]

Cigna may help bring together and make more concrete what these engagement practices look like. It scores the highest in the total engagement measure, getting a 23 in the weighted measure used in Table 2. How does Cigna score so highly? In good part, it does so by reporting use of all four of the lower types of engagement (meetings, surveys, social media, and focus groups) for both employees and customers, as well as some use of these for suppliers, governments, and nonprofits. It surveys its employees repeatedly, with pulse surveys,[193] an annual global engagement survey,[194] an ethics survey,[195] and a "Cigna Connection survey"[196] (one imagines survey fatigue may be an issue among Cigna employees). The company lists a variety of ways in which it meets with its employees, including quarterly town halls with the

188. *Id.* at 504 (footnote omitted).

189. I am a Wells Fargo customer. I can't say I have noticed an increase in corporate soul since 2017.

190. Ross Kerber & Imani Moise, *Wells Fargo Workers Push for More Board Access, So Far in Vain*, REUTERS (June 12, 2018, 1:44 PM), https://www.reuters.com/article/us-wells-fargo-workers-idUSKBN1J82DJ [https://perma.cc/X4LR-S445].

191. Letter from Jacqueline Kaufman, Attorney-Adviser, U.S. Sec. & Exch. Comm'n, to Elizabeth A. Ising, Gibson, Dunn & Crutcher LLP (Feb. 27, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/aflcio022719-14a8.pdf [https://perma.cc/22QX-393N].

192. Colenbrander & Lambooy, *supra* note 176; Spitzeck et al., *supra* note 178; Murray, *supra* note 177.

193. CIGNA, 2020 CIGNA CONNECTS CORPORATE RESPONSIBILITY REPORT: THE POWER OF PURPOSE 114 (2020), https://www.cigna.com/static/www-cigna-com/docs/cigna-connects-2020-corporate-responsibility-report.pdf [https://perma.cc/XEW2-PXQ9].

194. *Id.* at 93.

195. *Id.* at 12.

196. *Id.* at 93.

CEO[197] and discussions with members of the Work Environment Review Team.[198] Employees were involved in COVID-19 response focus groups.[199] Cigna employees interact with the company on social media in various ways, including a company intranet, email, an Advancing the Race Dialogue, and an online hub. Cigna connects with its customers through focus groups, customer satisfaction surveys, mobile apps, call centers, and in-person conversations.

Moving to a higher level of engagement according to the measures used here, Cigna has employee resource groups for many communities of its employees. These include Black, Asian, Latin, LGBTQ+, veteran, interfaith, and female employees.[200] It also codes as collaborating with non-profits through the activities of the Cigna Foundation. This is the charitable giving and activities vehicle for the company. The disclosure here illustrates the ambiguity of this particular piece of coding. I look to phrasing discussing partnerships, and Cigna's disclosure concerning the Foundation states that its response to COVID-19 "included partnering with Give2Asia, the Centers for Disease Control and Prevention (CDC) Foundation, Feeding America, and other nonprofits on the front lines tackling food insecurity, mental health, and health care worker's needs."[201]

None of this is very exceptional. The practices are pretty basic, and other companies do similar things. Cigna just reports doing somewhat more of it than other companies do, and as noted repeatedly, it is hard to judge how much that difference reflects differences in reporting as opposed to reality. But even so, it is worth noting how widespread these basic practices of stakeholder engagement are.

Where Cigna does more distinctly stand out is in its use of a variety of stakeholder advisory councils. Cigna has joint management-employee safety committees that participate in the health and safety process.[202] It also has inclusion councils, composed of managers and employees, that focus on diversity and equity issues.[203] As we have seen, employee councils focused on safety or diversity are the two most common forms of stakeholder councils,[204] but few companies have both. Moving beyond employees, Cigna has a Health Disparities Advisory Council that consists of representatives from clients with significant

197. *Id.* at 29.

198. *Id.* at 14.

199. *Id.* at 114.

200. *Diversity, Equity, and Inclusion*, CIGNA GRP., https://www.thecignagroup.com/our-impact/esg/healthy-workforce/diversity-equity-and-inclusion [https://perma.cc/B2PE-TMFM] (last visited Feb. 10, 2024).

201. CIGNA, *supra* note 193, at 77.

202. *Id.* at 117.

203. *Id.* at 97.

204. *See supra* Section II.B.

populations in under-represented communities.[205] It also has a Health Equity and SDoH Governance Council which works with stakeholders on health equity issues.[206] I will argue that stakeholder advisory councils are the most cutting edge practice that moves closer to actively empowering stakeholders while still being currently used by a notable minority of companies.[207]

III. CURRENT CORPORATE GOVERNANCE PRACTICES

Part II looked at the different ways in which companies engage with different kinds of stakeholders. But this only gets at a part of the engagement process. Within a company, who does the engagement, and what becomes of the information gained? Who oversees the process of engaging with stakeholders and of using the results of that engagement? In other words, how does stakeholder engagement fit within the corporate governance arrangements of companies? This Part looks at those questions. It does so using additional data gathered from voluntary and mandatory reports by the S&P 100 companies, as well as discussing the literature on the questions considered. Section III.A looks at board composition and organization. Section III.B looks at developments at the corporate officer level. Section III.C considers how compensation practices are evolving to encourage managers to consider ESG matters. Section III.D explores correlations among these various governance practices and the stakeholder engagement index.

A. Boards

The board of directors is the highest level of governance within a corporation. Much legal and practical attention has been focused in recent decades on encouraging boards to be more actively involved in supervising the officers who run their company.[208] I thus start the examination of corporate governance with the board. I ask questions about board composition and board organization.

As noted above,[209] public company boards have moved to an independent director model where most board members have no significant financial ties to the company beyond what they receive as directors. To what extent are stakeholder perspectives represented in the occupational backgrounds of directors? Traditionally, three types of stakeholder groups have been somewhat commonly represented on boards: government, non-profits, and academia. These three groups are not as

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205. CIGNA, *supra* note 193, at 56.

206. *Id.*

207. *See infra* notes 283-88 and accompanying text.

208. *See supra* notes 77-78 and accompanying text.

209. *See supra* Section I.D.

clearly stakeholders as some others like employees and customers, but we have seen that they are indeed often conceived of as stakeholders.[210] As noted above,[211] although having members of a stakeholder group could be conceived as empowerment, the highest level of stakeholder engagement, the fact that these kinds of directors are not elected by stakeholders themselves, nor generally even selected with stakeholder input, makes it more appropriate to consider such directors here, as an element of corporate governance. The common inclusion of these members of stakeholder groups on boards does bear examining in a study of stakeholder engagement. How common are such directors?

That information is readily available from annual proxy statements, which give the background of company directors. From those documents, for each company I found all of the directors who had some significant employment experience in government, non-profits, or academia. The experience needed to be full-time, so for instance serving on the board of a non-profit or government advisory committee did not count. The experience did not need to be contemporaneous with service on the company's board—among other things, such a requirement would rule out government officials, who cannot serve on a board while working for the government but who quite frequently do serve on boards after leaving government. Using that definition, of the 100 companies studied, 20 had no representatives from any of the three categories. For those companies, all of the directors come from a for-profit business background. Looking at the three categories, 56 companies had at least one former government official on their board, 25 had a non-profit official, and 38 had an academic. Across all 100 companies, there was an average of 1.74 directors from one or more of the three categories. The average company had 1.19 different types of the three categories (the maximum here is 3, of course).

Thus, the inclusion of directors from these stakeholder groups is pretty common. Notably, though, the two most significant and most-engaged stakeholder groups of all, employees and customers, are not represented, aside from the internal officers that all boards still contain (in limited numbers). But top executive officers, those who serve on their company's boards, are quite a different kettle of fish from the average employees. In some respects, the interests of officers and employees do align, but in many others, they do not. Why are representatives of second-tier but not first-tier stakeholder groups included on company boards? One hypothesis is that the stronger interest of employees and customers may be perceived by boards as an obstacle: employee or customer representatives might more frequently and strongly conflict with the interests of shareholders.[212] Note also that

210. *See supra* Section I.B.

211. *See supra* notes 62-63 and accompanying text.

212. *See supra* note 121 and accompanying text.

although stakeholder representatives are common, in most companies, they are easily outweighed by directors who come from a for-profit background. The average public company board has around twelve directors,[213] and we have seen that on average under two of those come from government, non-profits, or academia.

How are stakeholder interests overseen within the structure of boards? What group is assigned primary responsibility for oversight of ESG practices, including stakeholder engagement? There are several possibilities. The entire board could retain that responsibility, not delegating it to any committee. The responsibility could be divided up among a number of committees. It could be assigned to one of the three main traditional board committees (Audit, Compensation, Nomination/Governance). Or it could be assigned to a committee specially devoted to ESG matters.[214]

We see all of these possibilities in practice among the 100 largest corporations. A substantial majority of companies, 62, lodge primary responsibility for ESG[215] oversight in one of the three traditional committees, in almost all cases the Nomination/Governance Committee.[216] However, a substantial minority, 22, lodge primary responsibility within a special committee specifically devoted to sustainability.[217] Eleven companies have a hybrid between these two models—the traditional Governance committee is significantly expanded, so that ESG matters play a major role in the committee's functions, rather than being something of a tacked-on afterthought, as in most Governance committees charged with ESG oversight. The borderline between the hybrid model and the traditional Governance Committee model is not clear. In my research, I coded a committee as hybrid based on the committee's name containing language related to ESG, sustainability, or corporate responsibility, as well as the list of assigned topics for the committee featuring ESG matters as a major portion of the listed elements. In 5 companies, no committee is charged with ESG oversight. Note too that in 45 companies, including those that assign primary

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213. Joseph E. Griesedieck, *How Many Directors Does a Board Need?*, KORN FERRY, https://www.kornferry.com/insights/this-week-in-leadership/board-of-directors-size [https://perma.cc/AH7M-EYUD] (last visited Feb. 10, 2024).

214. *See supra* notes 92-100 and accompanying text.

215. The companies sometimes refer to oversight of ESG matters, sometimes corporate (social) responsibility, sometimes sustainability, and sometimes list out the major categories of ESG, e.g., climate change, diversity, etc. On these overlapping categorizations, see *supra* note 40 and accompanying text. For similar results in a survey of the S&P's top 50 companies, see Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 375-77 (2022).

216. Only one company, Alphabet, lodged primary responsibility in the Audit Committee. T-Mobile seems to assign equal responsibility to the Audit Committee and the Nomination and Governance Committee.

217. These committees go by a variety of names. Ten committee names contain the term "Public Policy," 4 more also have the word "Public," 6 contain "Sustainability," and 6 contain "Responsibility" or "Responsibilities."

ESG oversight to one committee, the Compensation Committee is charged with oversight of a range of workforce matters, expanding beyond its traditional scope of executive compensation. Leo Strine is cheering on those companies.[218] Although maybe he is not cheering too loudly. In most companies that assign broader responsibility to the Compensation Committee, the list of responsibilities looks mainly traditional, with one or two buried bullet points added to address human capital management. One wonders if the placement within the bullet points reflects a limited prioritization.[219]

These numbers are generally consistent with what other studies have found. A Deloitte study of the S&P 500 found the following distribution of committee responsibilities: 41% Nominating and governance committee; 28% Not disclosed; 10% ESG/Sustainability committee; 8% Other committees; 7% Full Board committee; 5% Health and safety committee; and 1% Audit committee.[220] A study of 60 Toronto Stock Exchange companies found that 19 had "specialized" committees for ESG, 16 used the Governance committee for ESG oversight, 2 used the Audit committee, and 11 had multiple committees completing ESG oversight.[221]

In Section III.D and Table 5 below, I examine the correlation between the various governance practices discussed in this and the previous Parts. Those correlations contain a nugget of evidence concerning the choice between assigning ESG to a special committee versus a traditional committee. All of the correlations presented in Table 5 are positive. That includes a variable, Com, that gives an index for the type of committee to which ESG is assigned. The highest value for Com is defined as having a special committee. Thus, if the positive correlations suggest that the various practices that focus on stakeholder engagement and concern with ESG factors all tend to rise or fall together, then having a special board committee focused on ESG is one of those high-engagement and pro-ESG practices. In other words, companies

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218. *See supra* notes 97-99 and accompanying text.

219. A typical example is Cisco Systems, in which the 15th of 23 bullet points targets human capital, including "diversity and inclusion, workplace environment and safety, and corporate culture." *Compensation and Management Development Committee*, CISCO (Dec. 8, 2022), https://investor.cisco.com/corporate-governance/compensation-and-management-development-committee/default.aspx [https://perma.cc/D6SR-UV8R]. A small number of companies have gone further. For example, Linde uses the term "Human Capital Committee." Of 19 bullet points listing duties and responsibilities, 7 cover matters related to non-executive employees. LINDE, CHARTER OF THE HUMAN CAPITAL COMMITTEE OF THE BOARD OF DIRECTORS 2-4 (2021) (on file with the Florida State University Law Review).

220. KRISTIN SULLIVAN & JENNY LYNCH, CTR. FOR BD. EFFECTIVENESS, DELOITTE, ON THE AUDIT COMMITTEE'S AGENDA 2 (2020), https://www2.deloitte.com/content/dam/Deloitte/fi/Documents/risk/us-november-OTACA-final.pdf [https://perma.cc/MAD3-EF4G].

221. Charles-Étienne Borduas et al., *ESG: What Boards of Directors Should Do Now*, NORTON ROSE FULBRIGHT (Aug. 16, 2021), https://www.nortonrosefulbright.com/en-ca/knowledge/publications/bed17bb0/esg-what-boards-of-directors-should-do-now [https://perma.cc/GEF6-DYPF].

with special board committees tend on average to engage more fully with their stakeholders and to have other governance features that stress stakeholder concerns more strongly. I would not put a lot of stress on how much these correlations reveal about the choice of how to structure board committees, but it is at least suggestive.[222]

B. *Officers*

Though the board has ultimate responsibility in governing a corporation, much of the actual authority in directing and overseeing daily operations is delegated to a company's officers. Corporate law says relatively little about what officers a corporation must have,[223] and the range of positions varies greatly. Titles and power evolve, with some positions growing in popularity over time. The modern fashion for the titles of top officers is C-O, i.e., the chief [fill-in-the-blank] officer, such as the chief executive officer (CEO), chief financial officer (CFO), chief operating officer (COO), and so on. As discussed in Section I.D, two relatively new common positions are of much relevance to how companies deal with stakeholders: the chief sustainability officer (CSO) and the chief diversity officer (CDO).[224]

The CSO has exploded in a relatively short period of time. One study claims that Dupont named Linda Fisher the first CSO of a publicly traded U.S. corporation in 2004,[225] though other studies suggest the position goes back a few years earlier.[226] There has been an explosion in recent years so that the position is now standard, though not

222. A study looking at the correlation between company environmental performance and disclosure and various governance practices finds that the presence of CSR committees is correlated with better environmental performance. Jing Lu & Jun Wang, *Corporate Governance, Law, Culture, Environmental Performance and CSR Disclosure: A Global Perspective*, J. INT'L FIN. MKTS. INSTS. & MONEY, 2021, at 1.

223. *See, e.g.*, DEL. CODE ANN. tit. 8, § 142.

224. *See supra* notes 101-04 and accompanying text. Another position clearly of relevance is the Chief Human Resource Officer, or head of human resources by whatever name might be used, responsible for the oversight of many practices affecting the workforce. I chose not to include study of that position here because it has been around a lot longer than CSO and CDO and is by now basically ubiquitous at large companies.

225. WEINREB GRP., THE CHIEF SUSTAINABILITY OFFICER 10 YEARS LATER: THE RISE OF ESG IN THE C-SUITE 2 (2021), https://weinrebgroup.com/wp-content/uploads/2021/05/Weinreb-Group-Sustainability-and-ESG-Recruiting-The-Chief-Sustainability-Officer-10-years-Later-The-Rise-of-ESG-in-the-C-Suite-2021-Report.pdf [https://perma.cc/VXH7-8VUQ].

226. *The Rise of the Chief Sustainability Officer*, RENAISSANCE EXEC. FS. (Nov. 11, 2021), https://wp.ref.global/the-rise-of-the-chief-sustainability-officer/ [https://perma.cc/YUW3-VAFW] (noting that in 2001, there was 1 CSO; by 2011, there were 29; and in 2020, Fortune 500 companies hired more CSOs than the three previous years combined); Kathleen Miller Perkins & George Serafeim, *Chief Sustainability Officers: Who Are They and What Do They Do?*, *in* LEADING SUSTAINABLE CHANGE: AN ORGANIZATIONAL PERSPECTIVE 196, 197 (Rebecca Henderson, Ranjay Gulati & Michael Tushman eds., 2015) ("The number of companies with a full-time sustainability officer doubled between 1995 and 2003, and doubled again between 2003 and 2008.").

universal, for large public corporations.[227] Although Chief Sustainability Officer is the most common term, that is very far from uniform. Companies have used a wide range of titles to describe the position.[228] Examples include VP of Environmental Policy & Social Initiatives (Apple), Head of Corp Responsibility & Philanthropy (Visa), Senior VP of Corporate Affairs (Cisco Systems), Chief Impact Officer (Salesforce), Corporate Responsibility Officer (Accenture), VP for Corporate Citizenship (Texas Instruments), and ESG, Corporate Responsibility, Social Impact, & Sustainability Leader (ServiceNow, apparently determined not to miss out on any of the leading buzzwords). To some extent, the range of titles reflects some range in the scope of responsibilities. Some CSOs are mainly focused on environmental matters. Other CSOs oversee a wide range of ESG or sustainability topics. My research of the public filings[229] found that 84 of the 100 companies studied have a position that at least roughly corresponds to the CSO.

Having a CSO brings several potential benefits. A CSO can make sure that more resources are devoted to sustainability concerns.[230] Many CSOs were previously environmental advocates in other capacities and offer regulatory expertise and openness to regulators.[231] Employees may be more willing to discuss sustainability concerns with CSOs than with other officers.[232] On the other hand, the creation of a CSO may be more symbolic than real.[233] One study found that "the presence of a CSO is associated with higher levels of pollution emissions. Nonetheless, we found that the CSO has a positive influence on a firm's environmental performance if faced with strict environmental regulations."[234] Thus, the effectiveness of the CSO position remains unproven. There has been rapid growth, as my study finds, but time will tell if the position has staying power.

227. In addition to the sources in the previous note, see Morgan Stanley, *The Rise of the Chief Sustainability Officer*, FIN. TIMES (July 20, 2021) (on file with author) (noting that in 2020, 31 Fortune 500 companies hired their first CSO).

228. Though I have grouped these various titles together, some treat them separately. *See* DELOITTE, THE FUTURE OF THE CHIEF SUSTAINABILITY OFFICER: SENSE-MAKER IN CHIEF 7 (2021), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Financial-Services/gx-fsi-future-of-the-cso-report.pdf [https://perma.cc/QL6X-6KYM] ("Fewer than 15 percent of survey respondents reported having a CSO in place, although nearly half had a Head of Sustainability or equivalent and a further 12 percent had a Head of ESG.").

229. In some instances, we were unable to find a CSO (or CDO, see below) listed in the sustainability reports or proxy statement. In those case, we also did a Google search, which yielded a person filling the position for some companies (usually found via LinkedIn).

230. *See supra* note 101 and accompanying text.

231. Michael P. Vandenbergh et al., *The New Revolving Door*, 70 CASE W. REV. 1121, 1145 (2020).

232. Gadinis & Miazad, *Social Risk*, *supra* note 9, at 1443 n.213.

233. *See supra* note 102 and accompanying text.

234. Patricia Kanashiro & Jorge Rivera, *Do Chief Sustainability Officers Make Companies Greener? The Moderating Role of Regulatory Pressures*, 155 J. BUS. ETHICS 687, 687 (2019).

The CDO has similarly recent origins and a similar (perhaps even more extreme) explosion in the last few years.[235] Indeed, CDOs currently have short tenures on average because as so many companies have hired their first CDOs, they have poached the existing CDOs at other companies.[236] As with CSO, the term CDO is the most common title, but there is considerable variation. For the most part, that variation is more bounded than in the case of CSO. For CDO, the main variations consist of adding other terms along with or instead of diversity in the title. Thus, one sees Chief Diversity and Inclusion Officer, or Chief Diversity, Equity, and Inclusion Officer, or Chief Belonging Officer, and so on. Coincidentally, I also found that 84 of the 100 companies have a CDO, the same number as for the CSO. Though most companies (72) therefore have both positions, some (12) have only a CSO, others (12) have only a CDO, and a few (4) have neither.

Some research suggests that CDOs may increase diversity and improve social accountability.[237] But that is so only if they are given adequate resources and authority, which is often not true.[238]

As discussed above and below, a problem with designating special officers and departments devoted to ESG or stakeholder concerns is that they may be siloed with little effective say over operational decisions. One way of addressing this problem is to establish committees

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235. An article published in 2007 says that "[a] few years back, these Chief Diversity Officer positions didn't exist. Today they're firmly established in the executive suite across a range of Fortune 500 companies—at Johnson & Johnson, Aon, Citi and American Express as well as at GE and Lehman Brothers." Sylvia Ann Hewlett, *The Rise of the Chief Diversity Officer*, HARV. BUS. REV. (Oct. 17, 2007), https://hbr.org/2007/10/the-rise-of-the-chief-diversit [https://perma.cc/258N-DDTT]. Another states that from 2020 to May 2021, "60 U.S. companies appointed their first-ever chief diversity officer (CDO)." Gena Cox & David Lancefield, *5 Strategies to Infuse D&I into Your Organization*, HARV. BUS. REV. (May 19, 2021), https://hbr.org/2021/05/5-strategies-to-infuse-di-into-your-organization [https://perma.cc/H47N-VTRN]. Reporting of trends since the research for this Article was completed suggest that, amidst controversy over DEI, some companies have eliminated their CDO position. *See* Te-Ping Chen & Lauren Weber, *The Rise and Fall of the Chief Diversity Officer*, WALL ST. J. (July 21, 2023, 12:06 PM), https://www.wsj.com/business/c-suite/chief-diversity-officer-cdo-business-corporations-e110a82f [https://perma.cc/9Q43-KZ4C].

236. Emma Jacobs, *The Evolution of the Chief Diversity Officer*, FIN. TIMES (Sept. 19, 2021), https://www.ft.com/content/6eac296d-acf6-4b41-9349-dc9723212914 [https://perma.cc/Y8ER-4P5F] ("Turnover is high among diversity professionals. . . . [T]he average tenure of a chief diversity officer in the US is 1.8 years in 2021, down from 3.1 years in 2018, partly indicative of poaching.").

237. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July-Aug. 2016, https://hbr.org/2016/07/why-diversity-programs-fail [https://perma.cc/VKD7-HHSB].

238. Chip Cutter & Lauren Weber, *Demand for Chief Diversity Officers Is High. So Is Turnover.*, WALL ST. J. (July 13, 2020, 7:00 AM), https://www.wsj.com/articles/demand-for-chief-diversity-officers-is-high-so-is-turnover-11594638000 [https://perma.cc/LE8B-4T74] ("The role has long been marked by high turnover, with many in the position, known as CDO, leaving over a lack of resources, unrealistic expectations and inadequate support from senior executives, according to current and former CDOs."); Cox & Lancefield, *supra* note 235 ("In one recent survey, 93% of leaders agreed that D&I agenda is a top priority, but only 34% believed that it's a strength in their workplace.").

of officers devoted to ESG matters. If those committees contain both specialized ESG officers and operational officers, then the former have a formalized avenue for influencing the latter officers who make actual operational decisions. I find that most, though far from all, mention[239] having one or more of these kinds of executive committees. I find that 70 of the companies studied mentioned having at least one such committee. Many of these mention more than one committee. Half of the companies (50) have a committee or council that covers sustainability or ESG broadly. Some committees focus on just one ESG item, with diversity (25 companies) and the environment (11 companies) being the most common. A few companies (7) have committees focused on other specific ESG topics, including product stewardship (Eli Lilly), innovation (3M), human rights (Mondelez International), investment (Prologis), safety (Crown Castle), political expenditures (Duke Energy), and security and privacy (T-Mobile).

C. Executive Compensation

A major emerging trend is tying a portion of executive compensation to performance on matters of concern to stakeholders, including diversity, workplace safety, and the environment.[240] Since such compensation has the potential to strengthen the incentive of mainline operating officers to consider such concerns, I included it in this study of the 100 companies. The primary source of data on this question was the companies' proxy statements, which contain extensive disclosure on executive compensation. This area has evolved so rapidly that with the collection of data spanning over about a year and a half, I needed to return to examine disclosure for companies for which I gathered data in the first wave of research, since many had added new components to executive compensation in the interim (I also needed to search again on the existence of CSOs and CDOs for these companies).

Although there is much extensive required disclosure for executive compensation, that disclosure does not yet require specific disclosure concerning whether and how companies link compensation to ESG matters. It shows. Much of the relevant disclosure is spotty and imprecise.[241] For each company, I tried to count whether it included an ESG component in compensation, and if so, whether that component uses quantitative metrics or is instead based only on qualitative evaluations. I could mostly determine an answer to the former (whether there is any ESG component to compensation), but the latter was often hard to determine, so the estimate of that number should be taken with

239. This may be an item that is not always mentioned in the reporting we examined, so our numbers are likely an undercount of the actual presence of such committees.

240. *See supra* notes 104-13 and accompanying text.

241. For a similar concern, see Bebchuk & Tallarita, *Perils, supra* note 108.

some grains of salt. I would have liked to count what proportion of compensation is tied to ESG elements, but that was not possible to determine in the disclosure of many, really most, companies.

Those caveats made, I found that 61 companies have an ESG component in their executive compensation.[242] Of these, 18 (or thereabouts—this is the number that was quite hard to determine) used quantitative metrics as part of determining that ESG component of compensation.[243] Impressionistically, it appears that in most companies, the ESG component is a relatively small part of the total compensation package.[244]

Thus, this research confirms that ESG has become a common element in executive compensation. A majority of the top 100 corporations include some sort of element of ESG in determining executive compensation. However, the concerns about how companies are doing this are not assuaged. The imprecision and opaqueness of the disclosure itself does not inspire confidence.[245] The apparent reliance mainly on qualitative assessments rather than quantitative measures suggests a highly manipulable process, which could well increase officer pay while doing little to promote sustainability.[246] The impression that ESG components typically are a rather small part of compensation may somewhat alleviate the concern that officers are receiving a major bonanza here, but it increases the concern that the evolution of compensation so far is likely to be having little impact on the incentive of officers.

Lucian Bebchuk and Roberto Tallarita's study of ESG-based compensation covers the compensation of CEOs at the Fortune 100 companies as disclosed in 2021 proxy statements. It thus overlaps heavily with the study here, though they delve into deeper detail in their paper focused only on compensation in contrast to the broader focus of this study. I am much more favorably inclined to stakeholder governance than Bebchuk and Tallarita,[247] in good part because I envision stakeholder governance not as giving managers more discretion, but rather as making them accountable to a broader range of interests—hence this study. However, my review of current disclosure of ESG-based compensation leads me to a very similar conclusion as to the current

242. Note that the executives covered in this disclosure are the top five executives in a company. They thus would not include someone like the CSO or CDO, where ESG metrics would seem of obvious relevance. They are more generalist than that.

243. For information on some of the metrics used, see Bebchuk & Tallarita, *Perils*, *supra* note 108.

244. Bebchuk and Tallarita find that for the minority of companies for which they could determine the proportion of compensation tied to ESG elements, the proportion is typically quite small. *Id.*

245. *Id.*

246. *Id.*

247. Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6.

state of that disclosure and the underlying compensation—it is very badly inadequate. It is hard to tell what companies are doing, and to the extent one can tell, it appears that for the most part they are giving little weight to ESG factors—which is probably just as well, since ESG is so imprecisely defined and measured that current practice probably enriches managers while giving little incentive to actually improve the world (or their company). Bebchuk and Tallarita conclude that activists and scholars should stop encouraging companies to tie compensation to ESG factors.[248] Below I suggest a different response, namely revising compensation disclosure requirements to improve the quality of disclosure.[249]

D. Correlations Among Practices

In Part II, I found that the amount of engagement with different stakeholder groups was almost entirely positively correlated across companies. That is, companies that engage more with one stakeholder group also tend to engage more with other stakeholders. Does a similar positive correlation hold true among the corporate governance practices considered here in Part III and between those practices and the stakeholder engagement considered in Part II?

The answer is yes. Table 5 shows the correlation across companies of a variety of measures:

- Engage: The measure of overall stakeholder engagement by a company discussed in the previous Part;
- Com: An index on board committees, set at 3 for companies with a special ESG committee, 2 for companies with a hybrid committee, 1 for companies that assign ESG responsibility to a traditional committee, and 0 for companies with no committee given responsibility over ESG;
- Dir Types: The number of different types of stakeholder directors (government, non-profit, academic) present on a company's board (this can be 0, 1, 2, or 3);
- Dir #: The total number of stakeholder directors (again, government, non-profit, or academic) present on a company's board;
- Off Ind: An index composed of adding three 1/0 indices, namely whether a company has a CSO, a CDO, and an ESG executive council (this can thus be 0, 1, 2, or 3);
- Comp 1: An index set at 1 if a company has an ESG component for executive compensation and 0 otherwise; and
- Comp 2: An index set at 2 if a company has an ESG component for executive compensation using quantitative metrics, 1 if it has an ESG component but does not use quantitative metrics, and 0 otherwise.

248. Bebchuk & Tallarita, *Perils*, *supra* note 108.

249. *See infra* Section IV.C.

Table 5: Correlation of Governance Practices and Stakeholder Engagement

	Dir Types	Dir #	Com	Off index	Comp 1/0	Comp 2/1/0	Engage
Dir Types	1	0.740508638***	0.089084487***	0.07956277***	0.18506456***	0.184607091***	0.165248926***
Dir #		1	0.161039365***	0.16506985***	0.21804051***	0.123754657***	0.211799007***
Com			1	0.107612869***	0.530538701***	0.240473136***	0.164613779***
Off index				1	0.247087673***	0.169201601***	0.445317624***
Comp 1/0					1	0.871049613***	0.296749643***

Comp 2/1/0						1	0.331001576***
Engage							1

*** $p<0.01$, ** $p<0.05$, * $p<0.1$

Given the nature of these rather blunt measures, it is hard to interpret the size of the correlations. But, that they are all positive is at least suggestive. It would appear that not only do different kinds of stakeholder engagement tend to rise and fall together, but so do the kinds of governance mechanisms discussed in this Part. When I discussed the positive correlation among types of stakeholder engagement in Part II, I noted that it probably in part reflects differences in how companies report their engagement, although it probably reflects real underlying differences in that engagement as well.[250] With the governance practices discussed here, differences in reporting are, for the most part, likely to be less important. The background of directors and board committee functions are pretty objective and clearly discussed—there are still some borderline cases in classification, but they are less subject to variation based on how and what companies choose to disclose. It is true that some companies with CSOs and CDOs (and one also imagines executive committees) do not include those positions in their sustainability reporting, but that is fairly easy to check independently (though that is not perfect—presumably a few companies with a CSO or CDO were not counted). The only measures of governance that do appear to be notably manipulable by reporting are those concerning executive compensation. Even there, Comp 1, which simply counts whether a company has any ESG component to compensation at all, is probably mostly an accurate reflection of the underlying reality as of the time of the disclosure examined.

We have thus looked at how companies engage with a variety of stakeholders, and at how stakeholders and their concerns are incorporated into governance practices at the board and officer levels and in executive compensation. The results of the study of reporting on these matters by the S&P 100 corporations are mostly consistent with the existing literature on stakeholder engagement and ESG governance practices.[251] I find that companies are doing a considerable amount of engagement, that they are paying attention to stakeholder concerns at

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

251. *See supra* Part III; *supra* Section II.C.

the board and officer levels, and that they are beginning to put their money where their mouth is when it comes to paying officers. What remains to be discussed is whether all of this is enough, or whether there is more that should be done, and if so, how that might be encouraged.

IV. LESSONS AND POSSIBLE REFORMS

The core of this study, laid out in Parts II and III, is descriptive. It looks at what the largest American corporations are currently doing to engage with stakeholders and to address their concerns within the corporate governance structure. But inevitably (for a legal scholar, at least), one wants to ask if the resulting practices are as good as they could be, or if we should be doing more, or less, or different. This Part engages with that normative question. Section IV.A identifies that the best practices that emerge from the study are already widespread, but perhaps are worth adoption at companies that do not yet follow them and are worth improving and deepening at those which do follow them. Section IV.B identifies practices that the study shows are used occasionally though not as widely, but which may be worthy of wider adoption. For the most part, I treat these as suggestions to companies about what they might choose to do rather than as practices to be legally mandated. However, Section IV.C suggests ways that the law might usefully encourage improved stakeholder engagement without requiring it.

As discussed above, there is currently much discussion as to whether the proper objective of corporations is purely to maximize the (long-term) wealth of their shareholders or whether the interests of various corporate stakeholders deserve independent weight in the corporate objective function.[252] In this Part, I mostly evade that debate. Obviously, measures increasing stakeholder engagement will be more valuable if one gives independent weight to the interests of stakeholders. However, even with an exclusive focus on shareholder wealth maximization, we have seen that engaging with stakeholders still provides significant benefits.[253] Speaking pragmatically, incremental advances are more likely to follow from arguments stressing the benefits of such reform for shareholders as well as others.[254] More far-reaching empowerment of some stakeholders, especially employees, may however depend upon giving independent weight to their interests in the corporate objective function, given the higher potential costs.

252. *See supra* Section I.A.

253. *See supra* Section I.E.

254. *See* Lund & Pollman, *supra* note 46.

A. Best Practices

The study gives us some sense as to what the most common practices are. That does not necessarily mean they are best practices. But it is suggestive. If most of the largest, most successful companies are choosing to follow these practices, they must have something going for them. Companies typically do not get to where these companies are by making mostly foolish decisions; practices followed by so many of them most likely must be accomplishing something useful. Still, we must ask whether there are reasons why companies might be inclined to over-adopt some of these stakeholder-focused practices, or conversely, why they might under-adopt them.

As a first pass at the matter, under-adoption would seem more likely than over-adoption. American companies traditionally have been understood as focusing on advancing the interests of shareholders.[255] Insofar as stakeholder engagement may produce benefits for stakeholders that are not reflected in increased profits for shareholders, companies should be disinclined to adopt such forms of engagement. That is to say, the social value of some types of stakeholder engagement is likely to be greater than the private value to companies and their shareholders, and thus to be under-adopted (from a social perspective). This may especially lead to the under-adoption of practices with considerable costs, since social benefits outweighing those costs may not be fully recognized by corporations. For instance, this may explain why many companies have non-profit officers, government officials, and academics, but not employees or customers on the board—the conflict costs of the latter are higher.[256] Even if stakeholder engagement may lead to increased shareholder wealth in the long run (e.g., through reputational effects),[257] potential short-termism of managers and shareholders may undervalue the long-run benefits.[258] And the benefits from a stakeholder focus may be hard for managers to see and conceptualize, again leading to under-adoption.[259]

But some factors could lead to over-adoption by managers of stakeholder engagement and governance. Stakeholder capitalism may be a fad that many follow simply because others are doing it, even though the justification is weak. A stakeholder focus may also reflect managers imposing practices that benefit themselves at the expense of shareholders. The benefit may be narrow and venal, if (contra what I have argued) a stakeholder focus reduces accountability, giving managers

255. *See supra* Section I.A.

256. *See* HANSMANN, *supra* note 122.

257. Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193, 1208 (2019).

258. Hill & McDonnell, *supra* note 104.

259. Claire A. Hill, *Employees, Expenses, and Externalities* (on file with author).

more discretion to make decisions that benefit them.[260] The personal benefit to managers may instead be more subtle, with well-educated managers promoting the emerging woke values of their class, a charge about large corporations made by many political conservatives today.[261] Big companies may face pressure to pay more attention to stakeholders, and managers may make concessions to them to avoid the personal costs of that pressure even if doing so does not benefit the business. Another possibility is that companies are adopting these practices as ways to stave off potential harmful regulation,[262] although how one evaluates that dynamic depends in part on how one evaluates the threatened regulation. If the threatened regulation would be socially beneficial and induce companies to address social harms on their own, that would seem to be a good outcome. If the threatened regulation is socially wasteful, or if it is a good regulation and a company's reaction staves off that regulation but is just window dressing, then the outcome is more disturbing.

Still, though there are some factors that could cause companies to go too far in adopting stakeholder engagement, the more plausible story about the main tendencies is that companies will tend to adopt valuable practices, with probably some tendency to not go far enough because stakeholders' interests do not receive a socially optimal weight. So, we should look at what this study has identified as the most widely adopted practices, and consider them as likely best practices which other corporations should consider adopting, and those which have adopted them should continue to improve and strengthen. It is of course possible that the most common practices are good for most large companies, but not for those that have not adopted them. This heterogeneity in the net benefits of practices is a major reason why I do not suggest legal mandates. Still, given the various reasons to expect companies to undervalue stakeholder engagement, it is quite possible that companies that have not yet adopted the most common practices would be better off if they did, or at least that society would be better off.

A striking fact is the prevalence of employee resource groups. Where once upon a time unions were the leading internal organization for employees in many companies, unions have greatly declined (though we see they remain at least something of a presence in a minority of companies), so that resource groups may now be the leading form of internal organization for employees in most large companies. This evolution is a loss for employee empowerment—unions, when

260. Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 164-68.

261. *See generally* Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 543 (2020); Saura Masconale & Simone M. Sepe, *Citizen Corp.—Corporate Activism and Democracy*, 100 WASH. U. L. REV. (2022).

262. Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 164-73.

they cover most of a company's employees, do far more to empower than employee resource groups. They have actual authority to act upon behalf of their members to bargain over working conditions, and they often cover all or most workers, rather than the segmentation that occurs with employee resource groups.[263]

Still, employee resource groups are what we now have to work with. Though their adoption is near-universal in the S&P 100, a few companies have yet to adopt them, and their prevalence probably becomes less universal as one looks at smaller companies. There remains room for more companies to adopt them.[264] Within those companies that have already adopted resource groups, work could be done to increase their effectiveness. A common recommendation is that groups should be linked to high-level executives within the company to increase their influence.[265] Companies can look to expand the number of resource groups within their organization to give more employees a chance to be involved with at least one resource group. More coordination between resource groups within a company may help, as may coordination with outside organizations.[266] Companies could provide more resources to resource groups—not just money, but also organizational support, e.g., giving time and staff to help organize retreats and other events.[267]

Two other quite widespread engagement practices are social media and surveys. Each of them may have room for extension, depending on the degree of undercount in this study. Surveys are already very common among employees, but many companies do not yet use them for customers (or at least, they do not report on it if they do), and surveys of suppliers may be worth adopting as well. The reported use of social media as a way to get feedback from stakeholders of all kinds is less than I would have expected (customers are the group that have the

263. *Collective Bargaining*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers/collective-bargaining [https://perma.cc/CWA9-SUE9] (last visited Feb. 10, 2024) ("Collective bargaining is the process in which working people, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more."). This point applies more for industrial unions than for craft unions.

264. I have not been able to find thorough information on how widely adopted such organizations are.

265. SUNDIATU DIXON-FYLE ET AL., MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 6, 46 (2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf [https://perma.cc/3QM2-DEM6]; Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 114-15 (2009).

266. El-Amin, *supra* note 156; Welbourne et al., *supra* note 154, at 1827; Annabi & Tari, *supra* note 152, at 5149-50.

267. Sandra S. Yamate, *Minority Retention: What Are Other Firms Doing? (And Is It Working?)*, 55 PRAC. LAW. 17, 24, (2009).

greatest number of companies reporting the use of social media, and that is only a third of all companies—though, again, that may be a large undercount). Social media could be a useful way of aggregating information from a large number of stakeholders. A study of investor message boards shows that in the aggregate, through the wisdom of crowds, they provide useful information.[268] A Harris poll of consumers and executives found that the former appreciate it when business respond to their social media messages, and the latter expect their businesses to devote increasing resources to their social media interactions with customers.[269]

On the corporate governance side, we have seen that CSO and CDO positions have become quite widespread but are not yet universal among the S&P 100. These positions are spreading rapidly; I would not be surprised if they become nearly universal over the next few years. Innovations tend to spread from larger to smaller corporations, so I would expect that we currently do not yet see 84% adoption at all public corporations as we do with the S&P 100, but that these officer positions will continue to spread.[270] Also worthy of emulation is the use of inter-departmental executive committees to coordinate the oversight of stakeholder concerns. The exact nature of what sort of committees are useful will depend upon the nature of the business of different companies.

On the board side, a major question is how responsibility for oversight of stakeholder concerns should be assigned. The evidence from my research strongly suggests that not assigning oversight to any committee at all, thus leaving oversight to occur only at the full board level, is not the best practice. Only 5% of the companies studied did not assign such responsibility to any committee, and ESG has achieved enough importance that simply leaving it to the full board is no longer adequate in today's world. But the proper division of responsibility among committees is unclear. The prevailing approach is to assign ESG oversight to the Nomination/Governance Committee, with many companies hiving off the employee component of ESG to the Compensation Committee. Among those companies which assign ESG

268. *See generally* James S. Ang et al., *The Role of Social Media in Corporate Governance*, 96 THE ACCT. REV. 1 (2021).

269. *The Future of Social Media: New Data for 2021 & Beyond*, SPROUT SOCIAL, https://sproutsocial.com/insights/data/harris-insights-report/ [https://perma.cc/9BAH7EYE] (last visited Feb. 10, 2024).

270. A PwC survey of 1,640 companies worldwide found that about 30% had a full-fledged CSO position while another 50% had a position with a more limited role. *See* Peter Gassmann et al., *Empowered Chief Sustainability Officers: The Key to Remaining Credible and Competitive*, STRATEGY&, https://www.strategyand.pwc.com/de/en/unique-solutions/sustainable-impact-made-real/empowered-chief-sustainability-officers.html [https://perma.cc/2JGS-REPC] (last visited Feb. 10, 2024). A ZoomInfo 2020 study of Fortune 500 companies found that 39.4% had a CDO. Stephanie Tonneson, *Has Corporate America Reached a Tipping Point?*, MEDIUM (June 23, 2020), https://zoominfo.medium.com/has-corporate-america-reached-a-diversity-tipping-point-fabe8ff6f07c [https://perma.cc/G5RS-UR46].

oversight to the Nomination/Governance Committee, some have significantly expanded the formal scope of the committee, making ESG oversight a central defining concern rather than one additional bullet point among many functions assigned to the committee.[271] Although more detailed study than provided here is clearly needed, it seems that for companies which assign ESG to the Nomination/Governance Committee, this significant expansion of how the committee is conceived may well be desirable. That expansion resembles how Leo Strine and his co-authors advocate a reconception of the Compensation Committee to address employee matters.[272]

But recall that a significant minority of companies assign ESG oversight to a special committee. Moreover, there is a correlation between that and other pro-stakeholder practices.[273] Might that be a preferred approach? It would do more to assure that some directors are focusing attention on stakeholder concerns. But it could lead to siloing, and Strine argues that it may be more efficient and effective to address ESG concerns within already existing committees that handle related matters.[274] However, aside from workforce matters and the Compensation Committee, which Strine has focused on, it is not clear what other traditional committees are plausibly linked to any other specific ESG matters. The other two traditional committees are Audit and Nomination/Governance. Both have some claim to some degree of connection to ESG. The current practices surveyed here strongly suggest that, given the choice between the two, companies think that the Nomination/Governance Committee is a better home for ESG than the Audit Committee. But the Nomination/Governance Committee traditionally focuses almost exclusively on the board, so it is not clear that the kind of complementarity between that traditional focus and ESG applies in the same way that Strine argues is true for workforce issues and the Compensation Committee.

B. *Practices Worth Exploring*

Some forms of stakeholder engagement are not as frequently used currently (in the United States, at least) as the best practices explored in Section IV.A, but are nonetheless of interest. They have the potential to push stakeholder engagement further and deeper. Here, I suggest that companies and society might well benefit were more companies to voluntarily adopt these practices. In Section IV.C, I will consider how if at all regulators might encourage such adoption.

We see very little engagement at the empower level, where stakeholders have some degree of actual decisionmaking authority. All we

271. *See supra* notes 217-18 and accompanying text.
272. *See supra* notes 97-99 and accompanying text.
273. *See supra* Table 5.
274. *See supra* notes 97-99 and accompanying text.

see there is some degree of unionization at a minority of companies, often covering a relatively small fraction of workers. Even at the next most-intense level of engagement, we see relatively low use of standing councils to seek formal, ongoing advice from stakeholders. We do see somewhat heavy use of collaboration or partnerships. However, the most frequent type of collaboration is with non-profits, with collaboration also somewhat common with governments and academics. It is rather uncommon with customers and very uncommon with employees. The collaboration we see is mostly in the form of side projects that do not go to the heart of corporate activity. Indeed, as noted above, it is hard to distinguish collaboration from simple charitable giving with non-profits. Thus, as other studies using a similar methodology have found,[275] what we see in stakeholder engagement is mostly consultation, where companies hear from their stakeholders but do not give much of a formal role to them in deliberation and decisionmaking.

The stakeholders most worthy of consideration for being empowered with affirmative decisionmaking authority are employees. Elsewhere, I and others have made the case that employees are, along with shareholders, the group who have the strongest claim to being given power within a corporation.[276] I have discussed three main benefits from engaging stakeholders,[277] and all are particularly strong for employees. Through involvement in the production and sales process, employees know much about what happens in a company, information that can be critical for improving performance. Their knowledge and motivation to help the company succeed means empowering them is a promising way to increase accountability. The centrality of employees to company functioning means that increasing their loyalty is quite valuable. Our data presented here reinforces this point, as employees are by a significant margin the group that the S&P companies most heavily engage with, including being the only one that is ever actively empowered, through unionization.[278] Still, the costs of engagement and empowerment can be high for employees as well, particularly the key cost of conflict with other stakeholders, especially shareholders.[279]

How might companies more actively empower their workers? Expanded unionization is the most straightforward answer—unions of course should not be forced on employees, but most employers could do much less to discourage unionization. Unions still exist for some employees within a fair number of our largest corporations, and unionization was once more widespread. American law has a well-estab-

275. *See supra* notes 74-75 and accompanying text.

276. McDonnell, *Employee Primacy*, *supra* note 19; HAYDEN & BODIE, *supra* note 19.

277. *See supra* Section I.E.

278. *See supra* Tables 1 & 2.

279. *See* HANSMANN, *supra* note 122, at 1-5.

lished framework for unions. As I will discuss in Section IV.C, that law could be amended to encourage more unionization, but even now, unions have a known role within American industry.

There are other options for empowering workers. The codetermination system of Germany, and some other European countries, provides the leading model. Beyond unions (also a part of the German model), employees are empowered at two levels. First, employees elect some members of the board.[280] Second, workers have representatives on works councils at the plant level, which address a variety of matters related to workplace conditions.[281] Either or both of these are options worth exploring at American companies.

A level of engagement one step below active empowerment but a step or two above current prevailing U.S. practices is the use of stakeholder advisory councils. These may have representatives of just one stakeholder group (most often employees) or multiple groups.[282] As some have argued,[283] these provide a more formal and sustained type of engagement, including direct and ongoing contact with the board and top officers. Haskell Murray claims "[t]he stakeholder advisory board would give the board of directors consistent and direct access to representatives of the other stakeholders, and much better visibility of peripheral stakeholder interests and priorities."[284] Advisory panels fall at a relatively high level on the AccountAbility categorization of engagement types.[285] We have seen that these are a somewhat common form of engaging with employees, with councils mainly used to address safety and diversity in the workplace.[286] I found only 9 companies with multi-stakeholder advisory panels. For companies that want to go beyond the modest current levels of engagement without providing actual decisionmaking authority to stakeholders, such advisory panels represent an alternative worth exploring.[287] Such stakeholder councils could be further used to move closer to stakeholder empowerment if boards were to look to them for suggestions for persons to nominate as directors.

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280. *See* HAYDEN & BODIE, *supra* note 19, at 173-74. Germany has a two-level board. Employee directors are on the supervisory board which provides oversight, rather than on the management board that deals with more operational issues. The move to independent directors has made American public company boards look more like the supervisory board than the management board.

281. *Id.*

282. *See supra* Table 1.

283. *See supra* notes 176-78 and accompanying text.

284. Murray, *supra* note 177, at 97-98.

285. *Supra* Chart 1.

286. *Supra* Section II.C.

287. See Murray, *supra* note 177, at 98-100, for useful discussion of various design questions, such as what stakeholders to include, selection of representatives, and information rights, among other matters.

C. Legal Reforms

The discussion above of common best practices and of more occasional practices with promise is in the first instance meant as a discussion of options that companies can and should consider adopting on their own. For the most part, that is as far as I would go. I would not suggest mandating the practices discussed above. We are still learning about what works and what does not. Higher levels of engagement may have higher benefits, but also higher costs (particularly conflict costs that could ensue from empowering stakeholders). Practices that work when adopted voluntarily may not work when required. What works for some businesses may not work for others. These points suggest proceeding with caution and letting private experimentation continue so that we can learn more.

But there are a few legal reforms that are worth considering. The two mandates I would suggest are modest, and they concern disclosure. The first concerns disclosure about a company's stakeholder engagement itself. The SEC is in the process of considering new requirements for ESG disclosure. That disclosure could include reporting on how companies engage in stakeholder engagement. Under the current voluntary system, whether and where that disclosure exists varies quite a bit across companies. I can attest this makes finding and comparing company practices in stakeholder engagement harder than it needs to be. A few companies provided welcome relief in our research. These companies provided a chart. Along the rows were the stakeholder groups. Along the columns were categories of engagement types. The cells provided brief descriptions of how the company engaged with this stakeholder group using this type of engagement, with links to more detailed disclosure. If all companies followed that template, comparison would be much easier.

A bigger disclosure reform targets executive compensation. We have seen that current disclosure practices concerning the use of sustainability factors in executive compensation are far from clear.[288] It is often hard to tell what if any quantitative measures companies are using to measure ESG factors and how much weight they receive. I am somewhat hesitant to add more requirements to the already complex rules surrounding the disclosure of executive compensation, but given the growing interest in this area, some modest disclosure requirements that would help investors understand what companies are actually doing might help. Bebchuk and Tallarita, who provide more detail on the inadequacy of current disclosure, are skeptical that it can be improved.[289] One of their points is that improvement will require considerable shareholder pressure, because companies and their

288. *See supra* Section III.C.

289. Bebchuk & Tallarita, *Perils*, *supra* note 108, at 64, 72.

consultants do not have incentive to improve on their own. I agree, which is why I suggest a legal mandate to make more specific disclosure where companies choose to tie compensation to ESG factors.

Bebchuk and Tallarita have another, more fundamental concern. They argue that current use of ESG measures is quite fragmentary and piecemeal. They think this has the perverse effect of focusing on the interests of some stakeholders but not others, and even within one group of stakeholders of focusing on some of their interests but not others.[290] That is indeed an important question. But I tend to think that it is appropriate to focus more on the interests of some stakeholders than others. As I have argued above, current stakeholder engagement focuses most on the interests of employees, and then on customers, and that is appropriate.[291] With one exception, ESG compensation practice also seems to focus most on employees, and to a lesser extent customers,[292] so that seems roughly appropriate to me. The exception is the common use of compensation tied to environmental concerns, especially climate change. On the whole I think that climate change is best addressed through external regulation rather than through internal governance, including the use of compensation.[293] However, given the massive threat posed by climate change and the political stalemate in enacting legislative measures to address it, encouraging executives to do more about it seems appropriate.

For more substantive reforms, I would nudge rather than mandate. Companies that adopt a preferred form of stakeholder engagement could be given a measure of regulatory relief in an area of regulation related to the relevant stakeholder. I have begun to describe how this might work for the most important potential reform, empowering employees through unions, board representation, or works councils, in a recent paper with Matt Bodie.[294] In our proposals, companies that have adopted adequately robust representation through employee directors, works councils, or unions could receive regulatory relief for various matters covered by the Fair Labor Standards Act, the Employee Retirement Income Security Act, or the Occupational Safety and Health Act. We more tentatively suggest that companies with adequately empowered employee resource groups might receive some procedural benefits under Title VII cases and investigations.

More generally, protecting groups and social interests through inflexible mandatory regulations can carry high costs when those mandates are set mistakenly or when the optimal settings vary significantly for different companies. Moving protection into corporate

290. *Id.*

291. *See supra* Parts II-III.

292. *See* Bebchuk & Tallarita, *Perils*, *supra* note 108.

293. McDonnell et al., *Green Boardrooms?*, *supra* note 9, at 390, 393, 406.

294. McDonnell & Bodie, *supra* note 19.

governance provides more flexibility to adjust to the mix of benefits and costs that specific companies face. As long as the relevant stakeholders are adequately represented within the governance process, we can rely on them to ensure that their interests are properly taken into account. For a similar proposal suggesting regulatory forbearance for companies that represent stakeholders other than employees, see Erik Gerding's suggestions for encouraging mutual insurance companies, in which the insured own the company.[295]

For stakeholders other than employees, we have seen than an enhanced advisory role through stakeholder councils rather than full-fledged decision rights will generally be the more appropriate path.[296] Regulatory relief could be tied to putting in place adequately selected and robust advisory panels. That relief would presumably be less significant than relief granted for robust empowerment of employees, since a merely advisory role would do less to protect the affected stakeholders. Various areas of substantive regulation could be modified in this way, depending on the composition and use of stakeholder advisory councils within a company. Given the environmental focus of much work on sustainability, environmental regulation would seem a natural area to consider such an approach.

CONCLUSION

The debate over stakeholder governance has ignored the present reality and future possibilities of stakeholder engagement. Stakeholder governance has been treated as an evolution in how the purpose of corporations and the duties of their managers should be understood. Few have asked whether and how it might create new mechanisms of accountability towards stakeholders.

We have seen that the present reality of stakeholder engagement is fairly extensive, and sensible as far as it goes. As one would expect, employees are the most engaged group, followed by customers and then by non-profits, suppliers, and government regulators. The most used forms of engagement include meetings and surveys. Employee resource groups are nearly universally used. Partnerships, social media, and councils are used less frequently, but still somewhat regularly.[297]

Stakeholder engagement has been built into internal governance arrangements as well. Most companies assign oversight of ESG matters to a specific board committee, with a significant minority creating a special committee for that purpose. The CSO and CDO officer posi-

295. Gerding, *supra* note 36, at 847-48.

296. *See supra* Section IV.A.

297. *See supra* Part II.

tions have become quite widespread. An increasing number of companies are experimenting with ways to tie executive compensation to ESG practices and performance.[298]

And yet, the current reality falls well short of the future possibilities of stakeholder engagement. Current engagement mostly involves companies listening to what stakeholders have to say. It does not empower stakeholders to be more actively involved in corporate decisionmaking. Only such empowerment would bring strong accountability to stakeholder governance. The stakeholders most worthy of extensive empowerment are employees, who could be given more power through unionization, board representation, or works councils. Other stakeholders (especially customers) could be given more limited power through advisory stakeholder councils. I do not recommend mandating such stakeholder empowerment, but rather encouraging it through various forms of regulatory relief to companies adopting stakeholder empowerment mechanisms.[299]

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298. *See supra* Section III.C.

299. *See supra* Section IV.C.