

Investors as International Law Intermediaries: Using Shareholder Proposals to Enforce Human Rights

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ABSTRACT

One of the biggest challenges with international law remains its enforcement. This challenge grows when it comes to enforcing international law norms against corporations and other business organizations. The United Nations Guiding Principles recognizes the “corporate responsibility to respect human rights,” which includes human rights due diligence practices that are adequate for “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.” Unfortunately, many corporations around the world are failing to implement adequate human rights due diligence practices in their supply chains. This inattention leads to significant harms for the victims of these human rights abuses and a variety of risks – legal, reputational, business, and regulatory – for the companies involved. Over the years, lawsuits have been brought against Walmart, JC Penney, Hershey, Nestle, Purina, Tesla, Google, Chevron, and many others regarding their human rights practices.

As part of Berle XII’s exploration of “Corporate Capitalism and the City of God,” this Article explores how shareholders have attempted to change the human rights due diligence practices of companies by submitting shareholder proposals requesting information on a company’s human rights policies, assessments, and implementation strategies. While many of these proposals are filed by faith based organizations and other members of the Interfaith Center on Corporate Responsibility (ICCR), recent proposals have also received support from actors such as

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BlackRock and Vanguard. This Article provides a descriptive account of the proposals submitted, evaluates the various shareholder reasons for proposing and supporting these proposals, discusses the outcomes of these proposals (such as approval, exclusion, and withdrawal), and analyzes the possibilities and limitations of enforcing international human rights norms through the mechanism of shareholder proposals.

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INTRODUCTION

In 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights (UDHR)—a recognition of fundamental human rights that should be protected around the world.¹ The UDHR was subsequently followed by human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the

1. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child (CRC), among others.²

While these agreements were created with government actors in mind, corporations and other business organizations are also frequently implicated in human rights violations. For example, these actors have been accused of human rights violations ranging from forced labor, worst forms of child labor, human trafficking, and facilitating the commission of international crimes. As explained by the former United Nations Special Representative on Business and Human Rights, John Ruggie, the challenge is that “[t]he international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm.”³

One way to address corporate conduct contributing to human rights violations is by harnessing the power of state actors. Governments can use their regulatory powers to bind companies to honor human rights norms and hold them accountable when they violate them. The problem is that many governments fail to act. In some circumstances, those governments may not have signed or ratified the relevant international human rights agreements. In other circumstances, governments may be unwilling or unable to regulate the activity of companies doing business in their territories in accordance with the human rights agreements that they joined. These are some of the reasons why there are significant roadblocks to using the government pathway to encourage corporate compliance with international human rights.⁴

But there is another pathway that is increasingly used: Companies are voluntarily respecting the human rights principles recognized in these agreements, even when their own governments do not force them to do so. In some circumstances, companies may even commit to human rights agreements that their governments refuse to sign or ratify.⁵ For example, while the United States is not a party to a number of human rights treaties, many American companies have committed to those same treaties in their company policies, statements, supplier codes, and other company practices.⁶

2. *The Core International Human Rights Instruments and their monitoring bodies*, UNITED NATIONS OFF. OF THE HUM. RTS. COMM’R, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> [<https://perma.cc/P3VJ-5GQQ>].

3. JOHN RUGGIE, HUM. RTS. COUNCIL, PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS I (2008).

4. See generally Kish Parella, *International Law in the Boardroom*, 108 CORNELL LAW REVIEW (Forthcoming 2023).

5. See generally *id.*

6. See *infra* notes 79–87.

Why might companies do this when they are not compelled to do so by government actors? One explanation may be that consumers and investors pay attention to human rights issues and they express concerns when companies do not comply with human rights norms.

The problem is that companies may not always live up to their human rights commitments. Many of the companies that have adopted a human rights policy are defendants in lawsuits alleging that these same companies committed grievous human rights violations. For example, Apple's human rights policy states: "[We are] deeply committed to respecting internationally recognized human rights in our business operations, as set out in the United Nations International Bill of Human Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."⁷ However, media reports suggest that Apple adopted this new policy following recent criticism of violations in its supply chain.⁸ Apple was also sued for facilitating the worst forms of child labor.⁹

The example of Apple illustrates the gap between *corporate rhetoric*, expressed in various commitments to human rights, and *corporate practice* that ignore those commitments and instead continues to perpetuate violations of human rights. This is particularly a problem when companies commit to human rights to *appease* consumers or investors because that commitment is instrumental for achieving other objectives; once those objectives are achieved, that commitment may wane.

But these same consumers and investors may be the key to ensuring that corporate actors comply with their commitments. Specifically, if corporate actors are committing to human rights norms in order to appease them, then consumers and investors may be able to similarly incentivize corporate actors to abide by those commitments. The incentive to comply is not supplied directly by government actors, but by these various types of groups whose favor the corporation needs to survive and thrive.

7. *Our Commitment to Human Rights*, APPLE 3 (2020), https://s2.q4cdn.com/470004039/files/doc_downloads/gov_docs/Apple-Human-Rights-Policy.pdf [<https://perma.cc/LA3V-47BS>] (hereinafter *Our Commitment*).

8. Rong Shi, *Apple Announces 'Human Rights Policy' Following Criticism*, VOA (Sept. 10, 2020), <https://www.voanews.com/economy-business/apple-announces-human-rights-policy-following-criticism> [<https://perma.cc/3K8N-6XNG>]; see also Jason Murdock, *Apple: Human Rights Violations in Supply Chain Double in a Year, Report Reveals*, NEWSWEEK (Mar. 8, 2018), <https://www.newsweek.com/apple-human-rights-violations-supply-chain-double-year-reports-reveals-836247> [<https://perma.cc/8Q4Z-7W3J>].

9. See Class Complaint for Injunctive Relief and Damages, *Doe v. Apple Inc.*, No. 1:19-cv-03737 (D.D.C. Dec. 15, 2019).

This Article examines how shareholders use their unique rights under Rule 14a-8 to enforce human rights norms.¹⁰ Specifically, shareholders attempt to hold companies accountable to their commitments by submitting shareholder proposals that they seek to include in the company's proxy statement.¹¹ By doing so, the shareholder proponents are able to draw the attention of both their fellow shareholders and management to the human rights practices of the company. Specifically, these proposals often reference a company's stated human rights policies and request information on the implementation of the same, including methods for evaluating effectiveness; their human rights impact assessments; and other components of their human rights due diligence process.¹² Some shareholder proposals have even requested that the board nominate a director with expertise in human rights and/or civil rights.¹³

These proposals attempt to shame companies for the gap between their *rhetoric* and their *practices* by referencing a company's own commitments and that company's conduct that diverges from those commitments. These proposals also highlight the various risks to the company created by this gap, and some proposals go so far as to shame companies by pointing out superior human rights practices of their peer companies.¹⁴ By doing so, shareholders are supplying an enforcement mechanism for international human rights norms that is private, decentralized, and uniquely suited to target corporate conduct. By using

10. See generally Shareholder Proposals, 17 C.F.R. § 240.14a-8 (2020) [hereinafter SEC Shareholder Proposals Rule].

11. See, e.g., Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365 (2006); Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals*, 36 WIS. INT'L L.J. 298 (2019); Erika George, *Corporate Social Responsibility and Social Media Corporations: Incorporating Human Rights Through Rankings, Self-Regulation and Shareholder Resolutions*, 28 DUKE J. COMP. & INT'L L. 521, 535–538 (2018) [hereinafter *Corporate Social Responsibility and Social Media Corporations*]; Jennifer Goodman, Céline Louche, Katinka C. van Cranenburgh & Daniel Arenas, *Social Shareholder Engagement: The Dynamics of Voice and Exit*, 125 J. BUS. ETHICS 193 (2014); Emma Sjöström, *Shareholder Activism For Corporate Social Responsibility: What Do We Know?*, 16 SUSTAINABLE DEV. 141 (2008); Marcia Narine, *Disclosing Disclosure's Effects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84 (2015); Rachel Ganson, *Shareholder Proposals on HR Compliance* (unpublished manuscript) (on file with author); Robert McCorquodale, Lise Smit, Stuart Neely & Robin Brooks, *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. HUM. RTS. J. 195 (2017). See also Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217, 224 (2018); Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647 (2016).

12. See *infra* Part IV.

13. Twitter, Inc., 2021 Proxy Statement (Form DEF 14A) (Apr. 13, 2021) <https://sec.report/Document/0001140361-21-012582> [<https://perma.cc/D3PC-QXUA>].

14. See notes 212–213, *infra*, and accompanying text.

the shareholder proposal mechanism, shareholders are serving as direct pathways for international law enforcement.

While these are reasons for optimism, there are also corresponding reasons for caution. First, not all shareholder proposals share the same fate. Some shareholder proposals are supported by the majority of shareholder votes while others are not. Some proposals are opposed by management and others are not. Many others are withdrawn by the shareholder who submitted the proposal, sometimes in exchange for an agreement by company management to make certain changes. Still, others are excluded based on exceptions outlined in Rule 14a-8.¹⁵ These various outcomes caution against putting too much faith in this particular shareholder mechanism for encouraging corporate compliance with human rights. However, it is also important to acknowledge positive signs of shareholder support for human rights. For example, proxy advisory firm Glass Lewis has observed that, on average, human rights shareholder proposals are securing greater shareholder support compared to years past.¹⁶

Second, it is important to keep in mind *which* shareholders are supporting human rights proposals and their reasons for doing so; understanding these factors can help human rights advocates better predict when shareholder proposals may garner significant support and when they may not. The encouraging news is that while many of the shareholder proponents are faith-based organizations, human rights proposals are gaining support from non-faith-based organizations as well. In its 2020 report, Glass Lewis noted that while human rights shareholder proposals had historically received low levels of shareholder support, those trends have started to change in the past couple of years “due to the improved construction and targeting of these proposals.”¹⁷ Specifically, in 2019 and 2020, “many of the proposals were asking for broader, more applicable reporting at companies that had faced controversy on account of their operations or their industry.”¹⁸

For example, both BlackRock and Vanguard supported a 2021 human rights shareholder proposal at Tyson Foods that requested that the board prepare a report on “Tyson’s human rights due diligence process to assess, identify, prevent, mitigate, and remedy actual and potential human rights impacts.”¹⁹ A similar proposal at Wendy’s requested a report “addressing Wendy’s Supplier Code of Conduct and the extent to which

15. See SEC Shareholder Proposals Rule, *supra* note 10.

16. COURTENEY KEATINGE, MAX DARROW, KATELYN ROTH, KATE FLANAGAN & DIMITRI ZAGOROFF, GLASS LEWIS, 2020 PROXY SEASON REVIEW: SHAREHOLDER PROPOSALS 32 (2020).

17. *Id.*

18. *Id.*

19. Tyson Foods, Inc., Definitive Proxy Statement (Schedule 14A) (Dec. 23, 2020), <https://sec.report/Document/0000100493-20-000207/> [<https://perma.cc/FN3L-PSK6>].

Wendy's Quality Assurance audits and third-party reviews effectively protect workers in its food supply chain from human rights violations, including harms associated with COVID-19.”²⁰ This proposal was approved by an overwhelming majority of shareholders.²¹

But it is equally important to acknowledge the *different reasons* why shareholders may support these proposals. While faith-based shareholder proponents may bring these proposals out of humanitarian concerns, these proposals often highlight the risks that human rights violations create for the company. For example, a number of shareholder proposals reference lawsuits or regulatory fines against companies that have drawn negative publicity to the company. In addition to reputational risks, human rights violations also create the possibility of legal, regulatory, and business interruption risks for the companies involved. This convergence of interests may identify the limiting principle to human rights enforcement through shareholder proposals. Specifically, shareholder proposals may be an effective mechanism for encouraging corporate human rights compliance when there is common interest between various shareholders, even when their reasons are not the same.

For example, in its 2021 human rights engagement policy, BlackRock explained the significant connection between responsible human rights practices and long-term shareholder value:

Unmanaged potential or actual adverse human rights issues can not only harm the people directly affected, but also expose companies to significant legal, regulatory, operational, and reputational risks. These risks can materialize in a variety of ways, from fines and litigation to workforce and supply chain disruptions that may damage a company's standing with business partners, customers, and communities. Furthermore, these risks may call into question a company's social license to operate – the ability to maintain operations in a certain location and benefit from the labor, raw material, or regulatory structures in place – particularly if they significantly undermine its corporate reputation and purpose.²²

20. Wendy's, 2021 Proxy Statement (Form DEF 14A) (Apr. 1, 2021), <https://sec.report/Document/0001193125-21-103996> (last visited Nov. 14, 2021).

21. ICCR, *Shareholders Calling for Human Rights Protections for Essential Food Chain Workers Prevail at Wendy's Annual Meeting* (May 18, 2021), <https://www.iccr.org/shareholders-calling-human-rights-protections-essential-food-chain-workers-prevail-wendys-annual> [<https://perma.cc/6QNY-J9YF>] (“Today shareholders approved a proposal at Wendy's asking the company to disclose evidence of whether its existing policies effectively protect workers in its food supply chain from human rights violations.”).

22. BLACKROCK, OUR APPROACH TO ENGAGEMENT WITH COMPANIES ON THEIR HUMAN RIGHTS IMPACTS 2 (2021), <https://blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf> [<https://perma.cc/8MAN-C9QG>].

BlackRock therefore voted in favor of a proposal at Tyson Foods relating to human rights impact assessment because it “expect[s] companies to implement, to the extent appropriate, monitoring processes (often referred to as due diligence) to identify and mitigate potential adverse impacts, and provide grievance mechanisms to remediate any actual adverse impacts”²³ and Tyson Foods “has limited disclosure regarding its supply chain audits.”²⁴

Third, the SEC’s rules and guidance can facilitate or inhibit the ability of shareholders to enforce human rights norms. While Rule 14a-8 allows eligible proposals to be included in the company’s proxy statement, it also permits a company to seek exclusion of the proposal on several grounds.²⁵ Recent Staff Legal Bulletins from the Division of Corporate Finance have clarified the interpretation of some of these grounds for exclusion that may influence the number of exclusion requests made and the success of those requests.²⁶ Additionally, in 2020, the SEC amended Rule 14a-8’s requirements regarding both eligibility and re-submission of proposals—changes that can also curtail the ability of shareholders to hold companies accountable through shareholder proposals.²⁷

23. BLACKROCK, VOTING BULLETIN: TYSON FOODS, INC. 2 (2021), <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-tyson-foods-feb-2021.pdf> [<https://perma.cc/TH7P-C2RA>] [hereinafter BLACKROCK, VOTING BULLETIN]; see also BLACKROCK, *supra* note 22, at 2 (“Recognizing that exposure to human rights - related risks will vary by company and by industry, we ask that companies report on how they integrate human rights considerations into their operations and risk management processes, and demonstrate the steps they are taking to address these issues.”).

24. BLACKROCK, VOTING BULLETIN, *supra* note 23, at 2.

During our most recent engagement, the company disclosed that an independent third-party audits approximately 25% of Tyson Foods’ production facilities each year to verify their adherence to the company’s social compliance program. The results are published in the company’s sustainability report issued each year. In BIS’ view, the percentage of facilities subject to a third-party audit represents a very small proportion of the company’s total operations, limiting shareholders’ full understanding of the company’s approach to human rights due diligence and its effectiveness. In addition, existing disclosures lack clarity on whether the company’s suppliers and subcontractors are complying with Tyson Foods’ standards.

Id.

25. See generally SEC Shareholder Proposals Rule, *supra* note 10.

26. See *infra* notes 287–292 and accompanying text.

27. Press Release, SEC, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020). These changes have been met with criticism and opposition. See, e.g., Interfaith Ctr. on Corp. Resp. v. SEC, No. 1:21-cv-01620, (D.D.C. June 15, 2021), ¶ 2 (“The SEC’s recent amendments to Rule 14a-8 severely impair shareholders’ access to the proposal process. The amendments dramatically increase the amount of stock a shareholder must own to be eligible to submit a proposal, including a more than ten-fold increase for investments held for only one year. The amendments also prohibit shareholders from aggregating their holdings to meet the new requirements. Those changes will have a disproportionate impact on Main Street investors, for whom the proposal process is a critical mechanism for raising concern.”) (emphasis omitted).

Part I explains the various sub-national, national, and international regulatory strategies developed to improve corporate human rights practices. Part II discusses how many companies commit to human rights norms, such as in policies and codes of conduct, but routinely fail to implement them in a meaningful manner. Part III discusses ways to overcome the risk of empty rhetoric by explaining how commitments can serve as entry points for further organizational change. Part IV illustrates these strategies by discussing recent shareholder proposals that seek to hold companies accountable for their human rights commitments. Many of these proposals request that companies conform their practices to the United Nations Guiding Principles by asking for additional company disclosures on human rights risks assessments, methods for evaluating effectiveness of policies, and oversight of human rights issues.²⁸ Part V concludes by discussing the possibilities and limitations of enforcing human rights norms through shareholder proposals, including the possibilities for transplanting foreign or international regulatory design; developing a broad base of investor support; challenges posed by excluded proposals; possibilities of withdrawn proposals; and the information-forcing effects (informal disclosure) achieved through company resistance to shareholder proposals.

I. REGULATING CORPORATE HUMAN RIGHTS COMPLIANCE

It is well understood that a company's operations can have significant human rights consequences for, among others, its consumers, employees, and for the local communities in which it operates. This recognition has led to a variety of regulatory approaches to address business and human rights at the sub-national, national, and international levels. For example, several jurisdictions have mandated reporting requirements for companies in order to encourage improved human rights practices. The California Transparency in Supply Chains Act²⁹ requires covered companies to disclose their efforts to ensure that their supply chains are free from slavery and human trafficking, including information about their practices concerning verification, audits, certifications, internal accountability standards, procedures, and training.³⁰ The law requires that covered companies publish this information on their website if they have one.³¹ Similarly, the UK Modern Slavery Act (MSA)³² requires that covered companies provide an annual statement of the measures that they

28. *See infra* Part IV and note 142.

29. CAL. CIV. CODE § 1714.43(c) (West 2012).

30. *Id.*

31. *Id.*

32. Modern Slavery Act, (2015) 30 CURRENT LAW (Eng.).

take to eradicate slavery from their supply chains.³³ Section 54 of the MSA recommends a number of topics that a statement should include, such as “its due diligence processes in relation to slavery and human trafficking in its business and supply chains” and “the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.”³⁴

The problem is that these laws do not establish a floor for practices—only reporting requirements. Therefore, a company could comply with the California law, for example, by reporting that it took no actions.³⁵ These laws also lack institutional features that could harness reputational mechanisms to drive compliance. For example, they lack a list of companies required to report, thereby making it difficult to shame non-compliant companies.³⁶ They similarly lack a public database of company statements that could facilitate comparability among companies and changes within the same company over time.³⁷

Other countries have taken a different approach and mandated that companies implement human rights due diligence processes as opposed to only disclosing their efforts in that regard. For example, the French Duty of Vigilance Law imposes a general mandatory due diligence requirement for human rights and environmental impacts, requiring that covered companies establish, publish, and implement a vigilance plan that must include: “[a]ppropriate measures to identify, prevent and mitigate risks to human rights and the environment”;³⁸ “[a] means to assess the situations of supply chains, subsidiaries or subcontractors in relation to risk mapping”;³⁹ “[a] collection method for actual and potential risks, and planned actions to mitigate risks and prevent violations”;⁴⁰ and “[m]onitoring to assess the efficiency of implemented measures.”⁴¹

33. Virginia Mantouvalou, *The UK Modern Slavery Act 2015 Three Years On*, 81 MOD. L. REV. 1017, 1038 (2018).

34. *Id.* See also Modern Slavery Act, *supra* note 32, § 54(5).

35. See, e.g., KAMALA HARRIS, CAL. DEP’T OF JUST., THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE, (2015), <https://advocacy.calchamber.com/wp-content/uploads/policy/California-Transparency-in-Supply-Chains-Act-Resource-Guide.pdf> [<https://perma.cc/UE4H-T4MQ>].

36. KNOW THE CHAIN, FIVE YEARS OF THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT 5 (2015).

37. See JOINT STANDING COMM. ON FOREIGN AFFS., DEF. & TRADE, MODERN SLAVERY AND GLOBAL SUPPLY CHAINS § 2.28 (2017).

38. *Regulatory Resource Center*, ASSENT, https://www.assentcompliance.com/assentu/resource/s/article/french-corporate-duty-of-vigilance-law/?PF_Corporate_Social_Responsibility__c=true [<https://perma.cc/Y48T-EH8J>] (providing a broad overview of the French Corporate Duty of Vigilance law).

39. *Id.*

40. *Id.*

41. *Id.*

The Netherlands introduced a law consisting of both reporting and due diligence requirements concerning child labor, requiring that companies “investigate whether their goods or services have been produced utilising child labour and to devise a plan to prevent child labour in their supply chains if they find it.”⁴² Critically, the law “applies to all companies that sell or supply goods or services to Dutch consumers, no matter where the company is based or registered, with no exemptions for legal form or size.”⁴³ Additionally, in 2022, the European Commission shared its proposal for a directive on corporate sustainability due diligence that “would impose mandatory environmental and human rights due diligence obligations on companies operating in the European Union . . . and, if adopted, could have significant implications not only for EU enterprises but also for US and other non-EU companies conducting business within the EU.”⁴⁴

Over the years, the United Nations has attempted to close this “governance gap” that facilitates human rights abuses by corporations and other business actors. For example, in 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (the “Norms”).⁴⁵ The Norms clarified that “[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”⁴⁶ The Norms outlined a number of obligations of corporations relating to security, equal opportunity, non-discrimination, and other rights pertaining to the

42. Suzanne Spears & Olga Owczarek, *Mandatory Human Rights Due Diligence Laws: The Netherlands Led the Way in Addressing Child Labour and Contemplates Broader Action*, ALLEN & OVERY (Sept. 2, 2020), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-the-netherlands-led-the-way-in-addressing-child-labour-and-contemplates-broader-action> [https://perma.cc/6YAA-DR9F].

43. *Id.*

44. Brent L. Bernell, John J. Gilluly III, Brooke Goodlett, Richard Sterneberg, Jesse Medlong, Sonakshi Kapoor, Daniel Weinstein & Jack Haimowitz, *Proposed EU Corporate Sustainability Due Diligence Directive: What US Companies Need to Know*, DLA PIPER (Mar. 31, 2022), <https://www.dlapiper.com/en/us/insights/publications/2022/03/proposed-eu-corporate-sustainability-due-diligence-directive/#:~:text=The%20Proposed%20Directive%20would%20impose,conducting%20business%20within%20the%20EU> [https://perma.cc/CK3V-AZ2S].

45. Comm. on Hum. Rts., Subcomm. on the Promotion and Protection of Hum. Rts. On its fifty-fifth session, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

46. *Id.*

protection of workers, consumers, and the environment, among other concerns.⁴⁷

However, a number of businesses and governments resisted the Norms. The International Chamber of Commerce and the International Organization of Employers labeled the Norms as an “extreme case of the ‘privatization of human rights’” because, “[a]mong other things, it shifts human rights duties from States to civil society actors.”⁴⁸ The UN Commission on Human Rights ultimately declined to adopt the Norms, but it did request the United Nations Secretary General to appoint a Special Representative on Business and Human Rights (the “Special Representative”) to provide a report that, among other topics, “identif[ies] and clarif[ies] standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.”⁴⁹ In 2008, the Special Representative submitted his final report and proposed a “tripartite framework” that clarified the responsibilities of both state and business actors in protecting human rights.⁵⁰ This framework rested upon three pillars:

- “[T]he State duty to protect against human rights abuses by third parties, including business;”⁵¹
- “[t]he corporate responsibility to respect human rights”⁵²
- “and the need for more effective access to remedies.”⁵³

The report clarified that the corporate responsibility to respect human rights required due diligence, a “concept [that] describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.”⁵⁴ Specifically, the report recommended that companies consider the following three factors: (a) “country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose”⁵⁵; (b) “what human rights impacts their own activities may have within that context - for example, in their capacity as producers, service providers, employers, and neighbours”⁵⁶ and (c)

47. *See id.*

48. *Joint Views of the IOE and ICC on the Draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights”*, INT’L CHAMBER OF COM. & INT’L ORG. EMPLOY., at 19 (Mar. 2004), [<https://perma.cc/4X36-TARD>].

49. Off. of the U.N. High Comm’r for Hum. Rts., *Human Rights and Transnational Corporations and Other Business Enterprises*, Human Rights Resolution 2005/69, ¶ 1(a).

50. *See* U.N. Special Rep. on Business and Hum. Rts., *Protect, Respect, and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

51. *Id.* ¶ 9.

52. *Id.*

53. *Id.*

54. *Id.* ¶ 56.

55. *Id.* ¶ 57.

56. *Id.*

“whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors.”⁵⁷

The UN Human Rights Council adopted the framework and authorized the Special Representative to operationalize the framework.⁵⁸ In 2011, the Human Rights Council endorsed the Special Representative’s proposed Guiding Principles on Business and Human Rights (UNGPs)—a set of thirty-one principles that elaborated upon the 2008 framework.⁵⁹ Together, these principles establish a common baseline of expectations regarding the role of governments and businesses to protect human rights. UNGPs 11–24 discuss the specific role of businesses in protecting human rights.⁶⁰ UNGP 11 explains that businesses should respect human rights, which “means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁶¹ In terms of substantive content, the UNGPs clarify that “responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”⁶² The commentary to UNGP 12 further explains that the International Bill of Rights includes:

[The] Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[], coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises.⁶³

57. *Id.*

58. *See generally* U.N. Hum. Rts. Council Res. 8/7, U.N. Doc. A/HRC/Res/17/4 (June 17, 2008) (titled “Mandate of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises”).

59. U.N. Hum. Rts. Council Res. 17/4, U.N. Doc. A/HRC/Res/17/4 (July 6, 2011) (titled “Human Rights and Transnational Corporations and Other Enterprises”).

60. U.N. HIGH COMM’R FOR HUM. RTS., GUIDING PRINCIPLES ON BUSINESS & HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT, AND REMEDY” FRAMEWORK 13 (2011) [hereinafter PROTECT, RESPECT, AND REMEDY FRAMEWORK].

61. *Id.* at 13.

62. *Id.*

63. *Id.* at 14.

The UNGPs also clarify the steps a business should take (or not take) in order to respect human rights. According to UNGP 13,

[t]he responsibility to respect human rights requires that business enterprises: (a) [a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁶⁴

The UNGPs further clarify that, in order to respect human rights, a business should have in place the following: (a) a policy commitment to respect human rights; (b) a due diligence process; and (c) a remediation process.⁶⁵ The policy commitment should be “approved at the most senior level of the business enterprise”⁶⁶; “[s]tipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services,”⁶⁷ and “[i]s reflected in operational policies and procedures necessary to embed it throughout the business enterprise,”⁶⁸ among other criteria. As for the due diligence process, it should “include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”⁶⁹

Businesses should also perform human rights impact assessments and integrate the results of those assessments “across relevant internal functions and processes[.]”⁷⁰ Specifically, “effective integration” means that “[r]esponsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise”⁷¹ and “[i]nternal decision-making, budget allocations and oversight processes enable effective responses to such impacts.”⁷² Businesses should also track the effectiveness of their responses and communicate externally on the ways they are addressing human rights impacts.⁷³ Finally, “[w]here business enterprises identify that they have caused or contributed to

64. *Id.*

65. *Id.* at 15–16.

66. *Id.* at 16.

67. *Id.*

68. *Id.*

69. *Id.* at 17.

70. *Id.* at 20.

71. *Id.* at 20–21

72. *Id.* at 21.

73. *See id.* at 23.

adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”⁷⁴

Collectively, the UNGPs set a normative baseline of expectations regarding corporate conduct and human rights. The challenge is that the UNGPs are only enforced if businesses willingly abide by them or if other actors provide incentives for business to do so. There are a number of organizations that encourage companies to adopt the UNGPs. For example, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises introduced a chapter on human rights that aligns with the Ruggie Framework and the UNGPs.⁷⁵ The American Bar Association⁷⁶ and International Bar Association⁷⁷ have both endorsed the UNGPs. Despite their resistance to the UN Norms, the International Chamber of Commerce has stated that it “actively supports its members to scale up implementation of the UNGPs—including the deployment of accessible training and toolkits—and [that it] will continue to intensify these efforts to achieve the maximum on the ground impact.”⁷⁸

II. SYMBOLIC HUMAN RIGHTS: THE GAP BETWEEN RHETORIC AND PRACTICE

The previous Part highlighted the various ways that government actors are encouraging corporations and other business organizations to comply with human rights norms. The key question is whether these strategies are working. On the surface, the picture looks promising. Many of the largest companies in the world publicly commit to various human rights institutions such as the United Nations Guiding Principles (UNGPs); the International Bill of Human Rights (IBHR); the Universal Declaration of Human Rights (UDHR); and the International Labor Organization’s 1998 Declaration on Fundamental Principles and Rights at Work (ILO Fundamental Principles). Table 1 lists the Fortune 500’s Top Ten companies of 2021 and identifies the various human rights instruments or principles to which these companies have committed.

74. *Id.* at 24.

75. See OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011) (saying that the guidelines include “a new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, and Remedy’ Framework”).

76. See generally AM. BAR ASS’N CTR. FOR HUM. RTS., RESOLUTION (2012).

77. INT’L BAR ASS’N, IBA PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BUSINESS LAWYERS 7 (2016) (stating that “[i]n order to help bar associations and lawyers better understand these issues, the IBA committed to prepare [this guide] that would ‘set out in detail the core content of the UNGPs, how they can be relevant to the advice provided to clients. . . and their potential implications for law firms as business enterprises with a responsibility to respect human rights’”).

78. INT’L CHAMBER OF COM., ENGAGEMENT WITH THE UNITED NATIONS ON BUSINESS AND HUMAN RIGHTS ¶ 9.

Table 1: Human Rights Instruments in Policies of Fortune 500 Top Ten List

Fortune 500 2021 Ranking	Company Name	Company Document	Human Rights Instrument
1	Walmart	Human Rights Statement ⁷⁹	<ul style="list-style-type: none"> • UNGPs • UDHR • ILO Fundamental Principles
2	Amazon	Global Human Rights Principles ⁸⁰	<ul style="list-style-type: none"> • UNGPs • UDHR • Core Conventions of the ILO • ILO Fundamental Principles
3	Apple	Our Commitment to Human Rights ⁸¹	<ul style="list-style-type: none"> • IBHR • ILO Fundamental Principles • UNGPs
4	CVS Health	Human Rights Policy ⁸²	<ul style="list-style-type: none"> • UDHR • ICCPR • ICESCR ILO • Fundamental Principles
5	United Health	Commitment to Human Rights ⁸³	<ul style="list-style-type: none"> • UNGPs • ILO Fundamental Principles

79. *Walmart Policies & Guidelines: Human Rights Statement*, WALMART <https://corporate.walmart.com/policies#human-rights-statement> [https://perma.cc/C4H6-AXXB].

80. *Amazon Global Human Rights Principles*, AMAZON, <https://sustainability.aboutamazon.com/people/human-rights/principles> [https://perma.cc/W9ES-P48L].

81. *Our Commitment*, *supra* note 7.

82. *Human Rights Policy*, CVS HEALTH, <https://cvshealth.com/policies/human-rights#:~:text=At%20CVS%20Health%20we%20are,supporting%20internationally%20recognized%20human%20rights.&text=We%20commit%20to%20going%20beyond,impacts%20in%20our%20direct%20operations> [https://perma.cc/2BV9-53VX].

83. *Commitment to Human Rights*, UNITEDHEALTH GRP., <https://www.unitedhealthgroup.com/whoweare/ourculture/ethicsintegrity/humanrights.html#:~:text=We%20abide%20by%20all%20national,diverse%20work%20environment%20for%20all> [https://perma.cc/K32N-3EZJ].

6	Berkshire Hathaway	N/A	N/A
7	McKesson		<ul style="list-style-type: none"> • UN Global Compact (UNGC)⁸⁴
8	Amerisource Bergen	Human Rights Policy ⁸⁵	<ul style="list-style-type: none"> • UNGPs • UNGC 10Principles • ILO Fundamental Principles • United Nations Sustainable Development Goals
9	Alphabet	Human Rights Policy ⁸⁶	<ul style="list-style-type: none"> • UDHR • UNGPs • Global Network Initiative Principles (GNI Principles)
10	Exxon Mobil	Respecting Human Rights ⁸⁷	<ul style="list-style-type: none"> • UDHR • UNGPs • ILO Fundamental Principles

If these patterns are widespread, then the significance is profound: the direct audience for international human rights norms now includes business organizations that may incorporate these norms directly into their own operations regardless of the policy positions of the governments that regulate their conduct. No longer will intransigent governments serve as roadblocks to human rights agreements. Instead, these agreements may “shortcut the state” by appealing directly and independently to a second audience of non-state actors: business organizations. These organizations may conform their own activities to the prescriptions of these norms,

84. *McKesson Joins United Nations Global Compact Initiative*, MCKESSON (Nov. 10, 2020), <https://www.mckesson.com/About-McKesson/Newsroom/Press-Releases/2020/McKesson-Joins-United-Nations-Global-Compact-Initiative/> [<https://perma.cc/ZA39-BN96>].

85. AMERISOURCE BERGEN, HUMAN RIGHTS POLICY 1 n.1 (Sept. 30, 2020).

86. *Human Rights*, GOOGLE, https://about.google/intl/ALL_us/human-rights/ [<https://perma.cc/V8LB-3DNN>].

87. *Human Rights*, EXXON MOBIL (Jan. 5, 2021), <https://corporate.exxonmobil.com/Sustainability/Sustainability-Report/Social/Human-Rights#Respectinghumanrights> [<https://perma.cc/2CFA-CA43>].

which has significant implications given the global footprint of many of these companies.

Unfortunately, there are a few missing pieces in this otherwise optimistic picture. One problem is that these practices may not be widespread but instead limited to large, consumer-facing companies. Another problem is that the “market” for international human rights agreements may privilege the adoption of some agreements over others. This is a particular problem if an agreement’s popularity among *non-state* actors reflects its popularity among *state* actors. Here, the non-state audience is not compensating for state recalcitrance but instead reinforcing the preferences of state governments. This type of situation may lead to inequitable results for the beneficiaries of those agreements because some individuals and communities may receive an added layer of protection while others continue to have their rights and interests ignored.

The final problem is perhaps the most significant: the gap between company rhetoric and practice. Over the years, several lawsuits have been brought against companies alleging significant human rights practices in their supply chains—even against those companies that have committed to human rights in their policies, statements, and supplier codes of conduct. Consider the infamous case of Chevron and its environmental impact in Ecuador, which has served as the basis for numerous legal proceedings before domestic and foreign courts, international arbitral tribunals, and even the International Criminal Court.⁸⁸ Or consider the numerous lawsuits filed against chocolate companies such as Mars, Hershey, and Nestle concerning child labor in the cocoa supply chain,⁸⁹ including *Doe v. Nestle*.⁹⁰ In the technology space, examples include the lawsuit filed against Google, Tesla, Microsoft, Apple, and Alphabet on behalf of plaintiffs “who are either guardians of children killed in tunnel or walls collapses while mining cobalt in the DRC, or are children who were maimed in such accidents.”⁹¹ Similarly, there was also a lawsuit against JC Penney and The Children’s Place for harms resulting from the collapse of Rana Plaza in Bangladesh, which was the site of several

88. See generally *Texaco/Chevron Lawsuits (Re Ecuador)*, BUS. & HUM. RTS. RES. CTR. (May 7, 2003), <https://www.business-humanrights.org/en/latest-news/texacochvron-lawsuits-re-ecuador-1/> [<https://perma.cc/92CE-NBJC>].

89. See, e.g., *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016), *aff’d*, 730 Fed. Appx. 460 (9th Cir. 2018).

90. *Doe v. Nestle*, 906 F.3d 1120 (9th Cir. 2018).

91. *Lawsuit Against Apple, Google, Tesla, and Others (Re Child Labour, DRC)*, BUS. & HUM. RTS. RES. CTR. (Dec. 15, 2019), <https://www.business-humanrights.org/en/latest-news/lawsuit-against-apple-google-tesla-and-others-re-child-labour-drc/> [<https://perma.cc/D3N6-7PSD>]; see also Class Complaint for Injunctive Relief and Damages, *Doe v. Apple*, No. 1:19-cv-03737 (D.D.C. Dec. 15, 2019).

garment factories that produced goods for the defendants.⁹² Finally, consider the lawsuit against Wal-Mart brought by employees of its overseas suppliers for the labor abuses they suffered when Wal-Mart declined to enforce its own code of conduct.⁹³ The above examples show a clear gap between corporate rhetoric and practice. This gap demonstrates that while companies may commit to human rights instruments, they may not operate in accordance with these instruments and their advertised human rights policies.

The gap between rhetoric and action demonstrates the risk of “symbolic compliance” by corporations. Lauren Edelman warns about the dangers of “symbolic structures,” which Edelman defines as “a policy or procedure that is infused with value irrespective of its effectiveness.”⁹⁴ Some symbolic structures may prove effective while others do not.⁹⁵ The danger is that, when laws are ambiguous, “savvy organizations may devise forms of compliance that symbolically demonstrate attention to law while maintaining sufficient flexibility to preserve managerial prerogatives and practices that are seen as advancing business goals.”⁹⁶

It is not difficult to see how these dangers may arise in the human rights practices of corporations. It is encouraging that several of the world’s leading companies publish policies and statements that reference international human rights instruments—even ones that their own home jurisdictions did not join. But there is a strong risk that these policies may be simply “symbolic structures” at some companies that are intended to win the favor of consumers, investors, and regulators, but, ultimately, they change very little. Companies frequently adopt symbolic human rights policies to appease important stakeholders, such as consumers. But consumers may be unable to evaluate the quality of company policies. The result is that these policies can remain symbolic because we, as consumers, often reward them for that symbolism but not the results.

Imagine two companies: Alpha and Beta. Alpha has adopted policies that are symbolic but has also proved quite effective in minimizing its adverse human rights impacts in its supply chain. Beta also has a company policy that references human rights norms, but Beta does not implement its own policies in any meaningful manner. Both companies publish their policies on their websites. An external observer, such as a consumer, may be unable to differentiate between the company policies and practices of

92. *Rahaman v. JC Penney Corp.*, 2016 WL 2616375 1 (Del. Super. Ct. May 4, 2016).

93. *See Doe I v. Wal-Mart Stores*, 572 F.3d 677 (9th Cir. 2009).

94. LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 5 (2016).

95. *See id.*

96. *Id.* at 31.

these two companies. On the surface, they both appear committed to human rights. Consumers who like that commitment subsequently reward both companies similarly by purchasing their products and services. But only Alpha's policies and practices are effective and, as a result, likely more costly to maintain. If consumers favor both companies similarly, despite the differences in practices, then it may be difficult for Alpha to maintain a higher compliance standard when its rival, Beta, can win similar market rewards while expending less on its own human rights practices. There is therefore a risk that the proliferation of "symbolic structures" may lead to a "race to the bottom" as companies face limited market incentives to upgrade their practices. The equilibrium may form at the level of symbolism when companies do enough to *appear* to care about human rights even if their actual practices diverge from those symbols.

The danger of symbolism is present even when companies want to do the right thing. This is because a company's policies and practices may come to represent the ideal separate and apart from the consequences of those policies and practices. In the context of civil rights, Edelman writes:

As these policies and programs become commonplace in organizations, employers and employees alike tend to equate the mere presence of these structures with legal compliance and become less aware of whether the structures actually promote legal ideals. Eventually the ideals underlying law become so closely associated with organizational structures that legal actors, as well as organizational actors, understand compliance in terms of the presence or absence of these structures and thus fail to scrutinize their effectiveness.⁹⁷

The risk is that a well-meaning company may copy the practices of its peers, assuming that those practices are "best practices." This may be a particularly acute risk when a company sees that its peer is rewarded by consumers for those practices, irrespective of the effectiveness of those practices.⁹⁸ Companies may also copy each other when they do not know how they should operate themselves. Paul J. DiMaggio and Walter W. Powell explain that "[u]ncertainty is also a powerful force that encourages imitation,"⁹⁹ and "[w]hen organizational technologies are poorly understood . . . when goals are ambiguous, or when the environment creates symbolic uncertainty, organizations may model themselves on

97. *Id.* at 12.

98. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 34 AM. SOCIOLOGICAL REV., no. 2, Apr. 1983, at 147, 153 (discussing legitimacy and mimetic isomorphism).

99. *Id.* at 151.

other organizations.”¹⁰⁰ Critically, “[o]rganizations tend to model themselves after similar organizations in their field that they perceive to be more legitimate or successful.”¹⁰¹ Corporate human rights practices are plagued by both these problems, leading to an enhanced risk of imitation without evaluation. Company policies therefore become less about devising organizational responses that address real problems effectively and more about the replication of popular, but potentially ineffective, policies and procedures. And it is the power of symbolism that drives the popularity because those policies and practices are *equated* with compliance even when that compliance is not forthcoming.

The risk of symbolism can help explain significant shortfalls in the implementation of the UNGPs. A recent study for the European Commission found that voluntary measures are inadequate for encouraging meaningful implementation of human rights in supply chains.¹⁰² According to the study, only “one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental impacts, and a further one-third undertake due diligence limited to certain areas.”¹⁰³ Unfortunately, it appears that most of these companies are focusing their due diligence efforts to first tier suppliers only.¹⁰⁴

Other reports and assessments confirm that businesses are still falling short of implementing meaningful human rights due diligence practices. A 2018 report of the United Nations Working Group on Business and Human Rights found that “[a]ccording to human rights benchmarking and rating assessments, the majority of companies covered by the assessments do not demonstrate practices that meet the requirements set by the Guiding Principles.”¹⁰⁵ In 2020, the Corporate Human Rights Benchmark (CHRB) assessed the “disclosures of 229 global companies across five sectors [that were] identified as presenting the greatest risk of negative human rights impacts . . . agricultural products, extractives, apparel, ICT

100. *Id.*

101. *Id.* at 152.

102. *European Commission Promises Mandatory Due Diligence Legislation in 2021*, RESPONSIBLE BUS. CONDUCT (Apr. 30, 2020), <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/> [<https://perma.cc/LQ6R-P6MR>].

103. LISE SMIT, CLAIRE BRIGHT, ROBERT MCCORQUODALE, MATTHIAS BAUER, HANNA DERINGER, DANIELA BAEZA-BREINBAUER, FRANCISCA TORRES-CORTÉS, FRANK ALLEWELDT, SENDA KARA, CAMILLE SALINIER & HÉCTOR TEJERO TOBED, BRITISH INST. OF INT’L & COMPAR. L., *STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAINS: FINAL REPORT 16* (Jan. 2020) [hereinafter *STUDY ON DUE DILIGENCE*].

104. *See id.*

105. U.N. Gen. Assembly, *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/73/163 ¶ 25 (July 16, 2018).

manufacturing, and . . . auto manufacturing.”¹⁰⁶ The CHRB found that while a “number of companies are meeting the fundamental expectations of the [UNGPs], with strong commitments and rigorous procedures in place,”¹⁰⁷ two significant challenges remained. First, “[h]uman rights due diligence, despite being so crucial for the effective management of human rights risks, remains an area of poor performance across all sectors, with nearly half of the companies assessed (46.2%) failing to score any points for this part of the assessment.”¹⁰⁸ Second, “[e]ven for those companies with robust commitments and management systems, these do not automatically translate at a practical level, with allegations of severe human rights violations regularly raised, even against some of the highest scoring companies.”¹⁰⁹

Even the business sector has admitted that the implementation of the UNGPs has been lackluster. The International Chamber of Commerce stated that it “shares frustration with the international community that the implementation of the UNGPs remains incomplete”¹¹⁰ and that it is “concerned that the global collaborative approach enshrined in the UNGPs is at risk of erosion without concerted action.”¹¹¹ In its view, one of the problems is lack of engagement by government actors: “[I]t is of concern that only a limited number of governments have brought forward national action plans under the UNGPs to date. We urge all governments who have not done so to commence the development of robust action plans without delay.”¹¹² But governments are not the only actors who can encourage corporate compliance with human rights norms. The following Parts explore how shareholders, as private actors, can help to fill the void left by government involvement.

III. SURMOUNTING SYMBOLISM: SOCIALIZING COMPANIES TO HUMAN RIGHTS

Symbols can offer an important starting point; the problem arises when we treat them as the finishing line. But as the starting line, symbols can offer a foothold within an organization that can serve as an entry point for change. In the government context, Thomas Risse, Stephen Roppe, and

106. CHRB & WORLD BENCHMARKING ALL., CORPORATE HUMAN RIGHTS BENCHMARK: 2020 KEY FINDINGS 3 (2020) [hereinafter CHRB 2020 KEY FINDINGS].

107. *Id.*

108. *Id.*

109. *Id.*; see also *id.* at 9–10 (“Of the 229 companies assessed, 104 had at least one allegation of a serious human rights impact meeting the CHRB severity threshold, with 225 allegations reported in total.”).

110. INT’L CHAMBER OF COM., *supra* note 78, ¶ 7.

111. *Id.*

112. *Id.* ¶ 8.

Kathryn Sikkink discussed the “spiral model” of socializing states to improve their human rights practices.¹¹³ State practice, like company practice, is also susceptible to empty rhetoric that does not translate into meaningful change. But, according to the spiral model, rhetoric can still perform important work.

The spiral model consists of five distinct phases: repression, denial, tactical concessions, prescriptive status, and rule-consistent behavior.¹¹⁴ If transnational advocacy groups can gather sufficient evidence of human rights violations, the process moves into a phase in which the government responds to international pressure with denial that “reflect[] a continuing refusal to recognize the validity of international human rights norms and thus an unwillingness to submit themselves to international jurisdiction in such matters.”¹¹⁵ Despite these initial denials, the government may subsequently sign international treaties as part of “tactical concessions” used to get “the international human rights community ‘off their backs.’”¹¹⁶ That government may have adopted the rhetoric for purely instrumental reasons, such as responding to NGO scrutiny and shaming. But by adopting the rhetoric, the government concedes the validity of the underlying human rights norms, which can then serve as the basis for evaluating its subsequent conduct and potentially lead to greater institutionalization of those norms.¹¹⁷ The tactical concessions can then serve as a starting point for additional institutionalization that gives those human rights norms prescriptive status, such as through ratification and implementation of domestic legislation that can encourage rule-consistent behavior.¹¹⁸

The spiral model can also explain company responses to “naming and shaming” over its human rights practices. Companies may also adopt human rights policies, statements, codes of conduct, initiatives, and other measures to rehabilitate their public images following a crisis, shore up reputational capital in anticipation of a future crisis, or to gain favor with consumers who may value companies that espouse human rights values.¹¹⁹ Of course, companies may also adopt such measures if their leaders and

113. See THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS & DOMESTIC CHANGE (Thomas Risse, Stephen Ropp & Kathryn Sikkink, eds., 1999) [hereinafter THE POWER OF HUMAN RIGHTS].

114. Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in THE PERSISTENT POWER OF HUMAN RIGHTS 3, 6–7 (Thomas Risse, Stephan C. Ropp & Kathryn Sikkink eds., 2013).

115. *Id.* at 6.

116. *Id.*

117. *Id.*

118. *Id.*

119. See Nicole Deitelhoff & Klaus Dieter Wolf, *Business and Human Rights*, in THE PERSISTENT POWER OF HUMAN RIGHTS 222, 230 (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 2013).

employees genuinely desire to integrate human rights norms into company operations. But regardless of whether the motivation is instrumental or genuine, the result may be the same: the incorporation of human rights norms into company policies and procedures may serve as a “foothold” for both internal and external actors as they pressure companies to adhere to their own rhetoric.¹²⁰

For example, in several lawsuits, consumers have used companies’ symbols of human rights compliance—such as policies and codes of conduct—to criticize companies for publicly expressing that they care about human rights but then failing to implement those policies in practice. In *Hodsdon v. Mars*, the plaintiff pointed out that Mars’s human rights policy referenced the UNGPs and committed to human rights due diligence.¹²¹ Plaintiff also noted that its supplier code of conduct referenced the ILO Convention and prohibited the use of child labor.¹²² According to the plaintiff, “although Mars recognizes that the use of child and/or slave labor in its supply chain is wrong and its corporate business principles and supplier code explicitly forbid child and slave labor by its suppliers, it materially omits to disclose to consumers at the point of purchase the likelihood that its Chocolate Products are made from cocoa beans produced by Ivorian children engaged in the Worst Forms of Child Labor.”¹²³

Similarly, in *Doe v. Wal-Mart*, employees of Wal-Mart’s overseas factories referenced the codes of conduct that Wal-Mart entered into with its suppliers, which gave Wal-Mart the right to engage in on-site inspections to monitor and implement the suppliers’ compliance with Wal-Mart’s standards.¹²⁴ These standards “require[d] foreign suppliers to adhere to local laws and local industry standards regarding working conditions like pay, hours, forced labor, child labor, and discrimination.”¹²⁵ Ultimately, Wal-Mart used these codes of conduct but then failed to exercise the contractual rights it possessed: “Wal-Mart represents to the public that it improves the lives of its suppliers’ employees and that it does not condone any violation of the Standards. However, plaintiffs allege that Wal-Mart did not adequately monitor its suppliers and that Wal-Mart knows its suppliers often violate the Standards.”¹²⁶

120. *Id.* at 230.

121. Complaint for Violation of California Consumer Protection Laws ¶ 49, *Hodsdon v. Mars, Inc.*, No. 3:15-cv-04450-RS (N.D. Cal. Sept. 28, 2015).

122. *Id.*

123. *Id.* ¶ 53.

124. *Doe v. Wal-Mart*, 572 F.3d 677 (9th Cir. 2009).

125. *Id.* at 680.

126. *Id.*

More recently, in *Doe v. Apple*, the plaintiffs continually pointed to the gap between what companies *espouse*—their symbols of human rights compliance—and the realities on the ground in their supply chain. Referencing an Amnesty International report, they alleged:

Defendants Apple, Alphabet, Dell, Microsoft and Tesla all have specific policies claiming to prohibit child labor in their supply chains. Their failure to actually implement these policies to stop forced child labor in cobalt mining is an intentional act to avoid ending their windfall of getting cheap cobalt mined by forced child labor that they are acutely aware of.¹²⁷

The plaintiffs drew particular attention to Apple’s “Statement on Efforts to Combat Human Trafficking and Slavery in Our Business and Supply Chain” in which the company identifies its various contributions to promoting human rights.¹²⁸ According to plaintiffs, these and similar company and industry initiatives demonstrate the defendants’ knowledge of its human rights violations but unwillingness to address those violations meaningfully.¹²⁹

In these lawsuits, plaintiffs used the symbolic rhetoric—expressed in human rights policies, supplier codes, or otherwise—to highlight the divergence between the symbols and reality. In these strategies, we can spot some of the phases of the spiral model. Specifically, tactical concessions may serve as subsequent pressure points for change. Many of the company defendants adopted their human rights policies and initiatives in response to public exposure of conditions in their supply chains and the subsequent criticism they faced. As such, many of these policies and initiatives were likely adopted for instrumental reasons as “tactical concessions.” But the challenge for companies is that “[t]actical concessions often do not have their intended effect of pacifying the transnational public or consumers. Instead, they may serve as new anchors for the transnational networks to intensify their pressure.”¹³⁰ By adopting these symbols, the companies had conceded the validity of those human rights norms, acknowledging that those norms should influence company conduct. By making those concessions, the companies opened themselves up the possibility that stakeholders will hold them to their words. These symbols—possibly adopted as tactical concessions to external pressure—thereby exposed companies to legal liability when they subsequently failed to implement those symbols. For example, Wal-Mart adopted a

127. Class Action Complaint for Damages and Injunctive Relief, *Doe v. Apple*, No. 1:19-cv-03737, ¶ 84 (D.D.C. Dec. 15, 2019) (emphasis from original removed).

128. *Id.* at ¶ 16.

129. *Id.* at ¶ 17.

130. Deitelhoff & Dieter Wolf, *supra* note 119, at 230.

supplier code of conduct that it did not adequately monitor or implement, giving rise to a lawsuit alleging breach of contract, among other claims.¹³¹ Similarly, Mars's human rights policies and supplier codes of conduct prohibit the worst forms of child labor that continue to occur in its supply chain.¹³² And likewise, Apple and others committed to and supported various human rights organizations and efforts, including those in the DRC, while cobalt mining continues to endanger the physical security of the children working in those supply chains.¹³³

These examples illustrate two features of symbols. First, they may be adopted for purely instrumental reasons, intended for public relations, and, consequently, fail to change company practices sufficiently to eliminate the human rights violations. But, and second, they can also offer stakeholders, such as many of the plaintiffs, a "foothold" in an organization. By adopting the symbols, these companies have acknowledged both the validity of these symbols in general and their application to the companies' conduct. The subsequent gap between rhetoric and conduct does not go unobserved and can serve as the basis for both legal and reputational sanctions that further institutionalize these norms within companies.

It is also important to remember that some of the limitations of the original spiral model also apply here. The spiral model predicted that governments may move from repression into subsequent phases where transnational networks could gather sufficient evidence of human rights violations.¹³⁴ One may worry that absent such evidence, neither transnational nor domestic actors would have sufficient leverage to initiate any of the subsequent phases. That caution also applies to the human rights litigation referenced above. This is because many of the complaints rely upon reports from media, NGOs, academics, government agencies, and university research centers to illustrate how company practices are falling short of companies' rhetoric.¹³⁵ In other situations, a company or industry's human rights violations may not be well documented, thereby making litigation against the company less likely. As such, a company may remain in the first phase of the spiral model, where it continues to commit human rights violations while encountering very little pressure to move onto the subsequent phases of the model.

131. *Doe v. Wal-Mart*, 572 F.3d 677, 677–79 (9th Cir. 2009).

132. Complaint for Violation of California Consumer Protection Laws ¶¶ 34–36, *Hodsdon v. Mars, Inc.*, No. 3:15-cv-04450-RS (N.D. Cal. Sept. 28, 2015) (relying on multiples sources finding that the Worst Forms of Child Labor in the Ivory Coast are ongoing)

133. Class Complaint for Injunctive Relief and Damages, *Doe v. Apple*, No. 1:19-cv-03737 (D.D.C. Dec. 15, 2019).

134. THE POWER OF HUMAN RIGHTS, *supra* note 113, at 24–26.

135. See *supra* notes 102–110 and accompanying text.

The spiral model also teaches a second limitation: not all companies are equally vulnerable to shaming.¹³⁶ Shaming may work well depending on whether that company produces for end consumers, its brand recognition, or the emotional salience of the norm the company has violated.¹³⁷ Shaming might also work depending on the “location in the supply chain, the visibility and prestige of a product, or the size of the company,”¹³⁸ as well as “the dependency on certain areas of operation, such as the location of natural resources or the amount of sunk costs through previous investments.”¹³⁹

IV. SHAREHOLDER PROPOSALS AND CORPORATE COMPLIANCE WITH HUMAN RIGHTS

We also witness phases of the spiral model in shareholder activism concerning corporate human rights practices. Investors can play an important role in encouraging human rights due diligence practices. The EU study on mandatory due diligence, for example, found that one of the three primary drivers for corporate human rights due diligence was investors who required a high standard.¹⁴⁰ As in litigation, shareholders anchor their demands in the symbols of human rights that the companies have expressed: company policies, codes of conduct, and industry initiatives, among others. As previously explained, companies may have adopted one or more of these as “tactical concessions” in response to public scrutiny over previous wrongdoing. But once adopted, these symbols serve as pressure points for stakeholders to press for greater organizational reform.¹⁴¹

These pressure points are mapped out by the human rights instruments that the companies adopt. For example, UNGP 15 states that:

[i]n order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

136. Deitelhoff & Dieter Wolf, *supra* note 119, at 229.

137. See Kathryn Sikkink, *Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code*, 40 INT'L ORG. 815, 823 (1986) (“Industry sources believed that the emotional nature of the issue colored the dispute.”).

138. Deitelhoff & Dieter Wolf, *supra* note 119, at 228–29.

139. *Id.* at 229.

140. STUDY ON DUE DILIGENCE, *supra* note 103.

141. See generally George, *Corporate Social Responsibility and Social Media Corporations*, *supra* note 11, at 343 (“Early proposals sought policy statements on respect for human rights, later proposals asked for information about the firm’s human rights performance and board level participation and public input concerning human rights risks.[] Earlier proposals between 2005–2009 sought to secure policy commitments and structural change.[] By 2012/2015, shareholders sought the specification of criteria for country selection.”) (citations omitted).

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.¹⁴²

UNGP 17 further clarifies that a human rights due diligence process “should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”¹⁴³

The combination of policy commitment, due diligence process, and remediation processes can help deepen the commitment that companies make to human rights and facilitate rule-consistent behavior. The problem is that many companies stop their institutionalization at the human rights policy commitment. They may draft one or more human rights policies and subsequently post them on their website or otherwise market them to consumers, investors, and civil society. But the commitment stops there. This shallow institutionalization raises the risk of rhetoric without substance. This is particularly true when these policies fall short of what the UNGPs require of the policy commitment, such as approval by senior leadership and that it “[i]s reflected in operational policies and procedures necessary to embed it throughout the business enterprise.”¹⁴⁴

But even sub-optimal policies can serve as footholds that allow shareholders to identify the gap between the human rights values that the companies espouse and their actual practices. By referencing the UNGPs and other human rights instruments in their policies, companies have opened the door for shareholders to demand that company managers operate in a manner consistent with the UNGPs, including implementing the other components of the corporate responsibility to respect: due diligence and remediation.

Rule 14a-8 defines a shareholder proposal as a “recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company’s shareholders.”¹⁴⁵ The shareholder proposal “should state as clearly as possible the course of action that you believe the company should

142. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R 15–16 (2011), https://www.ohchr.org/documents/publications/guiding_principlesbusinesshr_en.pdf [<https://perma.cc/9AMG-M3BB>].

143. *Id.* at 17.

144. *Id.* at 16.

145. 17 C.F.R. § 240.14a-8 (2013).

follow.”¹⁴⁶ The shareholder proposal allows shareholders to raise important matters to the attention of their fellow shareholders and company management. If the shareholder proponent and the proposal satisfy the requirements of Rule 14a-8, then a “company must include a shareholder’s proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders.”¹⁴⁷ As discussed in Part III, companies may also omit proposals if the SEC’s Division of Corporate Finance approves the company’s “no action request,” or if the shareholder proponent reaches a settlement with the company’s management to withdraw the proposal in exchange for management’s commitment to take particular steps.¹⁴⁸ In the absence of omission or withdrawal, the company’s management is required to publish qualifying shareholder proposals in its proxy statement.

In the past few years, a number of faith-based organizations, as well as organizations dedicated to sustainable investment, have filed shareholder proposals with companies of various industries. Some of these proposals requested that a company disclose its policies on managing human rights risks. Others requested disclosures regarding the implementation of policies in place. Significantly, some proposals requested that the board nominate a candidate with expertise in human rights and civil rights in order to ensure that the company is not contributing to human rights abuses. The following Parts discuss illustrative examples of shareholder proposals submitted to companies in industries that have been consistently identified as falling short on the implementation of the UNGPs.

However, there are two disclaimers before continuing. First, faith based organizations are not the only ones filing proposals concerning human rights, specifically; or, more generally, they are not the only ones filing proposals concerning environmental, social, and governance matters.¹⁴⁹ But given the theme of the Berle XII symposium, this Article focuses on those shareholder proposals that were filed by faith-based organizations.

Second, faith based investors engage with other issues besides human rights due diligence in supply chains and other operations. For example, in 2021, faith based actors also filed proposals relating to climate

146. *Id.*

147. *Id.*

148. *See supra* Part III.

149. *See generally* HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 53, 58 (2021); HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 54, 56 (2020); HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 53 (2019); HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 53 (2018).

risk, employee benefits (paid sick leave), tobacco, and racial justice, among other issues.¹⁵⁰ This Part focuses not on those issues, but on proposals that reference the UNGPs in order to examine the ways that shareholder proposals can serve as mechanisms between international law norms and company practices.

A. Automotive Industry

As noted in the 2020 CHRB Report, the automotive industry performs poorly when it comes to the implementation of the UNGPs. The report noted that “[n]ot a single automotive company scored above 50%, and half scored below 10%.¹⁵¹ Two thirds of the companies scored 0 across all human rights due diligence indicators (B.2).¹⁵² These poor results suggest implementation of the UNGPs is weak across the sector.”¹⁵³ Furthermore, the report highlighted the following shortcomings:

- “Forty per cent of companies do not have a public commitment to respect human rights. Almost ten years since the UNGPs were endorsed, just over 10% of companies have commitments to implement them or the OECD Guidelines for Multinational Enterprises.”¹⁵⁴
- “Two thirds of companies scored 0 across all areas of human rights due diligence.”¹⁵⁵
- “On the issues of child labour . . . and forced labour . . . , just seven companies included requirements such as age verification and prohibition of recruitment fees or retention of personal documents in contractual arrangements with suppliers, or described how they worked with suppliers to eliminate these issues.”¹⁵⁶
- Only “nine companies disclosed information about their management systems to ensure the responsible sourcing of minerals . . . or other raw materials such as rubber and leather”¹⁵⁷

The automotive sector’s poor performance on human rights was further highlighted in 2019 in a class action lawsuit was filed against Tesla, among others. The class action accused Tesla and others of “knowingly

150. See HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 53, 58 (2021).

151. CHRB 2020 KEY FINDINGS, *supra* note 110, at 7.

152. *Id.*

153. *Id.*

154. *Id.* at 12.

155. *Id.*

156. *Id.*

157. *Id.*

benefiting from and aiding and abetting the cruel and brutal use of young children in Democratic Republic of Congo (“DRC”) to mine cobalt, a key component of every rechargeable lithium-ion battery used in the electronic devices these companies manufacture.”¹⁵⁸

The automotive sector’s poor performance has not gone unnoticed among the faith-based investor community. For example, Investor Advocates for Social Justice (IASJ) defines its mission as “advocat [ing] on behalf of a community of investors whose faith-based values promote human rights, climate justice, racial equity and the common good.”¹⁵⁹ The IASJ introduced an “ongoing, multi-year shareholder advocacy campaign called the Shifting Gears Initiative, in which faith-based investors are engaging with 23 auto companies in their portfolios with the goal to improve human rights due diligence.”¹⁶⁰ In its 2020 report, the IASJ found that the key weaknesses include “[g]overnance and management systems for human rights,”¹⁶¹ “embedding respect for human rights across the business,”¹⁶² and “[t]raceability and supply chain transparency.”¹⁶³

Ongoing human rights abuses by the automotive sector places a number of individuals around the world at risk. The following issues illustrate these risks: “cobalt used in electric vehicle batteries that may be sourced from mines in the DRC where child labor is prevalent”; “[l]eather used in seating may be produced using child labor, while it also contributes to deforestation, and communities and workers may be exposed to hazardous chemicals”; “[a]utomotive electronic systems require labor-intensive assembly and may be manufactured in countries where forced labor and child labor are present”; “[m]ica, a component of paints, coatings, and other parts, may come from illegal mines in India with well-documented child labor risks, which are also present in Madagascar.”¹⁶⁴

Due to these concerns, IASJ affiliates filed shareholder proposals with six automotive companies in 2020 regarding their human rights practices, with three going to a vote at General Motors, Lear, and Tesla.¹⁶⁵ Referencing the UNGPs, the GM proposal stated that “companies have a

158. Class Complaint for Injunctive Relief and Damages, *Doe v. Apple*, No. 1:19-cv-03737 (D.D.C. Dec. 15, 2019), ¶ 1.

159. *IASJ Encourages Auto Companies to Tackle Human Rights in the Supply Chain*, INVS. ADVOC. FOR SOC. JUST., <https://iasj.org/shifting-gears-campaign/> [<https://perma.cc/2GYA-SXH6>].

160. *Id.*

161. INVESTOR ADVOCATES FOR SOCIAL JUSTICE, *THE SHIFTING GEARS REPORT: AN ASSESSMENT OF HUMAN RIGHTS RISKS & DUE DILIGENCE IN THE AUTOMOTIVE INDUSTRY 3* (June 2020) [hereinafter IASJ, SHIFTING GEARS].

162. *Id.*

163. *Id.*

164. HEIDI WELSH & MICHAEL PASSOFF, *PROXY PREVIEW* 50 (2020).

165. See *IASJ Encourages Auto Companies to Tackle Human Rights in the Supply Chain*, *supra* note 159.

responsibility to respect human rights throughout their operations and value chains by conducting due diligence to assess, identify, prevent, mitigate, and remediate adverse human rights impacts.”¹⁶⁶ It then requested General Motors Company (GM) to “prepare a report . . . on GM’s systems to ensure effective implementation of its Human Rights Policy.”¹⁶⁷ More specifically, the proposal requested that the report address the human rights due diligence processes used to “embed respect for human rights into operations and the value chain,”¹⁶⁸ and “provide access to remedy for human rights impacts connected to the business,”¹⁶⁹ and give “indicators used to assess effectiveness.”¹⁷⁰

As support for its proposal, the shareholders referenced “[r]eports by Amnesty International and the 2019 Mining the Disclosures benchmark found GM’s cobalt due diligence practices to be inadequate given its awareness of the risk.”¹⁷¹ While noting that GM has human rights policies, the shareholders faulted GM for failing to “demonstrate how its Human Rights Policy, Code of Conduct, and Supplier Code are operationalized to ensure human rights are respected.”¹⁷² Specifically, the shareholders said that “GM does not provide evidence of suppliers’ compliance with labor laws and its Code, or how GM assures suppliers cascade expectations through their own supply chains.”¹⁷³ The proposal gained 32.2% support.¹⁷⁴

Tesla is a particularly poor performer within the automotive industry, scoring low on indicators related to policy, governance, supplier code, traceability, and due diligence.¹⁷⁵ The IASJ particularly faulted Tesla for disclosing limited information about human rights; for not providing a baseline human rights commitment; and for policies that are “thinly articulated” and focused on compliance and for providing “almost no evidence of implementation.”¹⁷⁶ The CHRB similarly faulted Tesla for scoring a 6.3 out of 100, which means Tesla fell within the lowest band of assessed companies within the automotive sector.¹⁷⁷ More notably, Tesla

166. PROXY STATEMENT AND NOTICE 2020 ANNUAL MEETING OF SHAREHOLDERS, GENERAL MOTORS 94 (2020), <https://sec.report/Document/0001193125-20-120812/d752756ddef14a1.pdf> [<https://perma.cc/ES92-GXZ8>].

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. IASJ Encourages Auto Companies to Tackle Human Rights in the Supply Chain, *supra* note 159.

175. IASJ, SHIFTING GEARS, *supra* note 161, at 12–14.

176. *Id.* at 18.

177. CHRB, 2020 KEY FINDINGS, *supra* note 106, at 13.

scored a zero on human rights due diligence and was subject to at least one serious human rights allegation.¹⁷⁸

The Sisters of the Good Shepherd filed a shareholder proposal with Tesla, requesting that the board prepare a report “on Tesla’s processes for embedding respect for human rights within operations and through business relationships.”¹⁷⁹ More specifically, the proposal requested that this report address (1) “board oversight of human rights”¹⁸⁰ and (2) “human rights due diligence processes, including systems for providing meaningful remedy when adverse human rights impacts occur.”¹⁸¹ Among other reasons, the shareholders justified their proposal based on the legal, reputational, and financial risks created by Tesla’s inadequate attention to human rights. The shareholders cited as evidence the class action lawsuit filed against it and the severe risks of human rights abuses that accompany its supply chain for cobalt, mica, rubber, electronics, lithium, and nickel, among others.¹⁸²

The Sisters of Good Shepherd similarly submitted a shareholder proposal with Lear Corporation, a “leading supplier of seating and electrical power management systems (E-Systems) to the automotive industry.”¹⁸³ Shareholders requested that Lear publish a report “with the results of a Human Rights Impact Assessment examining the actual and potential human rights impacts of the company’s high-risk business activities in its operations and value chain.”¹⁸⁴ Given the vast scale of Lear’s operations, they noted how mismanagement of human rights risks can lead to legal, competitive, financial and reputational risks.¹⁸⁵ While Lear had a supplier-sustainability policy and a code of conduct, shareholders were concerned that “investors and customers are unable to evaluate the extent to which these policies address its most salient risks.”¹⁸⁶ Additionally, they also raised concerns over the lack of information “on the results of Lear’s evaluations and audits ‘using industry standards and best practices’ of suppliers’ performance”¹⁸⁷ and “whether

178. *Id.*

179. Tesla, Inc., Definitive Proxy Statement (Schedule 14A), at 25 (May 28, 2020).

180. *Id.*

181. *Id.*

182. *Id.*

183. Lear Corporation, Definitive Proxy Statement (Schedule 14A), at 76-77 (filed Apr. 6, 2020) https://sec.report/Document/0001193125-20-099040/#toc908116_53 [<https://perma.cc/22CP-WSVS>].

184. *Id.*

185. *Id.*

186. *Id.*

187. *United States Securities Commission: Notice of Exempt Solicitation for Lear Corporation*, <https://www.sec.gov/Archives/edgar/data/842162/000121465920003994/m54200px14a6g.htm> [<https://perma.cc/9PP3-DTYV>].

the metrics used assess human rights impacts and the extent they align with international human rights standards, nor is the frequency with which a supplier is audited, nor the number of audits conducted per year disclosed.”¹⁸⁸ The proposal garnered 44.76% support.¹⁸⁹

B. Food and Agriculture

The food and agriculture industry also performs poorly when it comes to human rights enforcement. In its 2020 report, the CHRB assessed fifty-seven of the largest agricultural companies in the world and found that most companies expressed some form of commitment to human rights, with nearly half committing to specific standards such as those articulated in the UNGPs.¹⁹⁰ However, human rights due diligence continued to prove a problem. Many companies, for example, failed to provide any information on their processes and twenty-one companies scored zero across all human rights due diligence indicators.¹⁹¹ Kraft Heinz and Tyson Foods were among the poorest performers on human rights due diligence, reflecting industry-wide low scores, ranging from 6-7.5 points out of 26.¹⁹² In 2021, both of these companies were targeted for shareholder proposals that sought to improve their human rights due diligence practices.

The Province of St. Joseph of the Capuchin Order served as lead filer for a 2021 proposal submitted to Kraft Heinz, with several other faith-based organizations as co-filers.¹⁹³ The proposal requested that the company publish a human rights impact assessment “examining the actual and potential impacts of one or more high risk[] products sold by Kraft Heinz.”¹⁹⁴ The shareholders justified the proposal by pointing out that “[p]ublic scrutiny is intensifying reputational risks for food products companies.”¹⁹⁵ It referenced media reports by the *New York Times*, *Wall Street Journal*, and *CNN* relating to significant labor abuses in the supply chains for palm oil, tomatoes, and shrimp.¹⁹⁶ The proposal also identified the numerous ways that human rights risks pose a threat to Kraft Heinz, which Kraft Heinz itself acknowledged in its 2020 ESG materiality

188. *Id.*

189. *IASJ Encourages Auto Companies to Tackle Human Rights in the Supply Chain*, *supra* note 159.

190. See CHRB, 2020 KEY FINDINGS, *supra* note 106, at 19.

191. *Id.* at 20.

192. *Id.* at 22.

193. See *Human Rights Impact Assessment*, ICCR (2020), <https://exchange.iccr.org/node/88002/text> [<https://perma.cc/4UDQ-PUZ6>].

194. *Id.*

195. *Id.*

196. *Id.*

assessment when it stated that “Heinz ranks human rights as among the issues with the greatest impact on the company and of most importance to shareholders.”¹⁹⁷ It also referenced benchmarking reports by Know the Chain and CHRB to identify specific human rights risks, as well as the company’s poor response to those risks.¹⁹⁸ It concluded by comparing Kraft Heinz’s human rights practices to those of “[l]eading companies like Coca-Cola and Nestlé [that] have published HRIAs on high-risk food products in their supply chains.”¹⁹⁹ For these reasons, the proposal requested that the company prepare an impact assessment that identifies (a) the human rights standards and principles the company used to perform the assessment; (b) actual and potential adverse impacts of high-risk products, and (c) an “[o]verview of how the findings will be acted upon in order to prevent, mitigate and/or remedy impacts.”²⁰⁰

The shareholders subsequently withdrew the proposal as Kraft Heinz “committed to conducting a HRIA consistent with the UN Guiding Principles on Business and Human Rights (UNGPs).”²⁰¹ The lead filer stated, “[w]e will continue to work with Kraft Heinz, particularly in the area of enhanced disclosures on its implementation plans and audit findings,”²⁰² and “[w]e would like to see the company dramatically improve its Corporate Human Rights Benchmark score and become a leader among its peers in respecting human rights.”²⁰³ Altogether, this example illustrates how shareholder proposals can influence company practices even if they are subsequently withdrawn—so long as the company commits to meaningful changes in line with the shareholder’s concerns.²⁰⁴

A similar proposal was filed by the American Baptist Home Mission Society and several co-filers with Tyson Foods in 2021, requesting that “the Board of Directors prepare a report . . . on Tyson’s human rights due diligence process to assess, identify, prevent, mitigate, and remedy actual and potential human rights impacts.”²⁰⁵ The proposal also requested that

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Julie Wokaty, *Investors Commend Kraft Heinz for Efforts to Advance Human Rights Due Diligence Throughout Its Supply Chain*, ICCR (May 5, 2021), <https://www.iccr.org/investors-commend-kraft-heinz-efforts-advance-human-rights-due-diligence-throughout-its-supply-chain> [<https://perma.cc/6R XR-RRS7>].

202. *Id.*

203. *Id.*

204. See generally Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262 (2016).

205. Tyson Foods, Inc., Definitive Proxy Statement (Schedule 14A), at 24 (Dec. 23, 2020), <https://sec.report/Document/0000100493-20-000207/> [<https://perma.cc/FN3L-PSK6>] [hereinafter

the report might address “[b]oard oversight of human rights” and “[h]uman rights due diligence processes, including systems for providing meaningful remedy when adverse human rights impacts occur.”²⁰⁶

While the proposal was brought by faith based organizations, it received support from both BlackRock and Vanguard who voted in favor of it. BlackRock explained that it remained concerned about Tyson’s disclosures, noting that “the percentage of facilities subject to a third-party audit represents a very small proportion of the company’s total operations, limiting shareholders’ full understanding of the company’s approach to human rights due diligence and its effectiveness.”²⁰⁷ BlackRock also noted that “existing disclosures lack clarity on whether the company’s suppliers and subcontractors are complying with Tyson Foods’ standards.”²⁰⁸ It also noted concerns with the company’s health and safety protocols, among other concerns.²⁰⁹ Comparably, Vanguard noted that “this was the third consecutive year that Tyson received a shareholder proposal” regarding its human rights practices.²¹⁰ While the Vanguard funds did not support proposals against Tyson in the past, it voted in favor of the 2021 human rights due diligence proposal explaining “we identified that Tyson had realized legal, regulatory, reputational, and investment risks”²¹¹ and that “[w]e believe these were in part because of the board’s lack of oversight on human rights risks.”²¹²

Similarly to the proposals filed against Tyson, Wendy’s was also scrutinized for its human rights due diligence process. The Franciscan Sisters of Allegany filed a proposal with Wendy’s concerning the “well-documented history of human rights violations in the U.S. agricultural industry, including slavery, sexual assault, and workplace safety violations.”²¹³ The proposal argued that “[e]ssential workers in food supply chains—especially on farms and in meatpacking facilities—are now also at heightened risk of exposure to, and death from, COVID-19.”²¹⁴ The proposal requested that the board prepare a report on its supplier code

Tyson Foods, Form DEF 14A]; *see generally* Investor Advocates for Social Justice, *Tyson Dismisses Shareholders’ Human Rights Concerns at Annual Meeting* (Feb. 17, 2021).

206. *Id.*

207. BLACKROCK, VOTING BULLETIN: TYSON FOODS, INC. 2 (Feb. 11, 2021) <https://bit.ly/2RtBxaV> [<https://perma.cc/KC55-U8E>].

208. *Id.*

209. *Id.*

210. VANGUARD, VANGUARD INVESTMENT STEWARDSHIP VOTING INSIGHTS: OVERSIGHT OF HEALTH AND SAFETY RISKS AT TYSON 1 (2021), https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/INVTYSON_022021.pdf [<https://perma.cc/JU9F-A8DC>].

211. *Id.* at 2.

212. *Id.*

213. WENDY’S CO., DEFINITIVE PROXY STATEMENT (Schedule 14A), 91 (filed Apr. 1, 2021)

214. *Id.*

of conduct, and provide information on to what extent the company “audits and third-party reviews effectively protect workers in its food supply chain from human rights violations, including harms associated with COVID-19.”²¹⁵ In response, Wendy’s management tried to omit the proposal by filing a “no action request” with the SEC, arguing that Wendy’s “has already substantially implemented the Proposal”²¹⁶ and that the proposal “deals with matters relating to the Company’s ordinary business operations.”²¹⁷ The SEC ultimately denied the request, finding that it was “[u]nable to concur with exclusion on any of the bases asserted.”²¹⁸ Ultimately, management recommended that shareholders vote in favor of the proposal.²¹⁹ It also explained that, “[T]he Company informed the Proponent of our willingness to report on the matters requested in the proposal’s resolution. Nonetheless, the Proponent expressed their desire for the proposal to be voted on by stockholders at the Annual Meeting.”²²⁰ While recommending approval, management continued to state: “[T]he Company plans to provide stockholders with enhanced public disclosure on the subject matter contained in the proposal’s resolution as part of our ongoing ESG reporting.”²²¹ The proposal received overwhelming approval by shareholders.²²²

V. EVALUATING THE SHAREHOLDER MECHANISM FOR ENFORCING HUMAN RIGHTS: OPPORTUNITIES AND LIMITATIONS

A. Importing International and Foreign Regulatory Approaches

One of the advantages of shareholder proposals is that they can replicate regulatory norms and requirements that are otherwise absent in a domestic jurisdiction. As discussed above in Part IV, shareholder proposals can serve as mechanisms to incorporate the strategies adopted by international human rights instruments. Several of the proposals discussed in Part IV, requested that companies disclose how they were meeting one or more of the three requirements of the UNGP’s corporate

215. *Id.*

216. Letter from Michael Berner, Vice President – Corporate & Securities Counsel and Chief Compliance Officer, and Assistant Secretary, The Wendy’s Company, to the U.S. Securities and Exchange Commission (Jan. 8, 2021).

217. *Id.* at 2.

218. *Shareholder Proposal No-Action Responses*, U.S. SEC. & EXCH. COMM’N, (Oct. 26, 2021) <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/shareholder-proposal-no-action-responses.htm> [<https://perma.cc/NF8R-RM46>].

219. WENDY’S CO., DEFINITIVE PROXY STATEMENT (Schedule 14A), 92 (filed Apr. 1, 2021).

220. *Id.* at 93.

221. *Id.*

222. WENDY’S COMPANY, FORM 8-K for Period Ending May 18, 2021, at 2 (filed May 19, 2021).

responsibility to respect human rights: (1) policy commitment, (2) due diligence process, (3) and/or remediation efforts.

For example, the General Motors shareholder proposal requested a report on company's effective implementation of its human rights policy, including due diligence processes and access to remedies.²²³ The GM proposal is also notable because it illuminates another criterion that is essential for differentiating between purely symbolic structures and those that produce change: effectiveness. Namely, the GM proposal suggested that the requested human rights report include "indicators used to assess effectiveness."²²⁴ Similarly, the Tyson Foods shareholder proposal requested that the company prepare a human rights report that would "[d]iscuss how Tyson tracks effectiveness of its human rights due diligence."²²⁵

These requested disclosures are important because the UNGPs require that "business enterprises should track the effectiveness of their response"²²⁶ so that companies can know "if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement."²²⁷ Ultimately, it is critical for companies to disclose information about the effectiveness of their policies and procedures because it allows shareholders and others to differentiate between the companies that adopt purely symbolic structures and those that adopt actual effective approaches.

Mandatory disclosure laws are intended to assist with this market differentiation but may not go far enough to do so. For example, the California transparency law does not explicitly require information on the effectiveness of those approaches or how a company even assesses effectiveness.²²⁸ For that reason, recent disclosures under those laws do not discuss the effectiveness of the company's policies and procedures.²²⁹

223. See *supra* notes 161–68 and accompanying text.

224. See notes 177–179, *supra*, and accompanying text.

225. TYSON FOODS, INC., DEFINITIVE PROXY STATEMENT (Schedule 14A)24 (filed Feb. 11, 2021).

226. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R 22 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusiness_hr_en.pdf [<https://perma.cc/9AMG-M3BB>].

227. Commentary to UNGP 20, 23.

228. See, e.g., HARRIS, *supra* note 35.

229. For example, a number of companies do not even address the effectiveness of their policies and procedures in their disclosures under the California law that are published on their websites. See, e.g., PERDUE FARMS, STATEMENT ON COMPLIANCE WITH CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT OF 2010, <https://corporate.perdufarm.com/pdfs/CA-Transparency-Act.pdf> [<https://perma.cc/EGD4-YCEH>]; WHOLE FOODS MARKET, CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT DISCLOSURE (2021), <https://assets.wholefoodsmarket.com/www/pdfs/WFM%20CA%20TISCA%20Disclosure%20rev%2003-2021.pdf> [<https://perma.cc/8EU3-ZGYZ>].

While legislators have contemplated approaches that would mandate disclosure on effectiveness of human rights, such efforts have thus far proven generally unsuccessful.²³⁰

In contrast, other countries have had greater success in encouraging companies to report on effectiveness. For example, Section 54 of the UK Modern Slavery Act states that a company's human trafficking statement *may* include information on "its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate."²³¹ However, the law did not *mandate* that companies report effectiveness, thereby leading to sub-optimal reporting on effectiveness.²³² The Australia Modern Slavery Act took a different approach and *required* that covered companies "describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes"²³³ and "describe how the reporting entity assesses the effectiveness of such actions."²³⁴ According to the resource guide provided by the Australian government to companies, "[t]he Act only requires you to explain *how you assess* the effectiveness of an entity's actions. The Act does not ask you to determine whether an entity's actions *are effective*."²³⁵

In sum, the shareholder proposals served as mechanisms to replicate these disclosure requirements found in international law and the laws of foreign jurisdictions. The source of the disclosure requirements varied. In foreign jurisdictions, legislation recommended or required reporting on how effectiveness is assessed. In contrast, shareholders filed proposals in order to encourage reporting on effectiveness. Through such strategies, shareholders not only import substantive human rights norms found in international law, such as the UNGPs, but also the regulatory strategies adopted in jurisdictions to comply with those norms.

230. For example, the Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act was notable because it would have required disclosures of the "results of the human rights analysis conducted pursuant to the Act, including the ranked lists of any identified human rights risks and impacts" and "[f]or any action taken, the issuer's assessment of the action's efficacy and a description of any outcomes of the action." *ESG Legislation—Ten Bills for Public Companies to Watch in 2021*, ROPES & GRAY 14–15 (Nov. 9, 2020), <https://www.ropesgray.com/en/newsroom/alerts/2020/11/ESG-Legislation-Ten-Bills-for-Public-Companies-to-Watch-in-2021> [<https://perma.cc/YZE3-UDZQ>]. Unfortunately, it appears that the discussion draft was never formally introduced. *Id.*

231. Modern Slavery Act 2015, Pt 6 § (5)(e).

232. BUS. & HUM. RTS. RES. CTR., FTSE 100 & THE UK MODERN SLAVERY ACT: FROM DISCLOSURE TO ACTION 20 (2018) ("Effectiveness remains the lowest performing reporting area.").

233. Modern Slavery Act, 2018 (Cth) pt 2 § 16(1)(d).

234. *Id.* § (1)(e).

235. COMMONWEALTH MODERN SLAVERY ACT 2018: GUIDANCE FOR REPORTING ENTITIES 54, <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf> [<https://perma.cc/6S39-P8U9>]; *see also id.* at 60.

B. The Nature of Investor Support

The discussion in Part IV demonstrates that many of the human rights shareholder proposals relying on the UNGPs are filed by shareholders with a faith-based mission. However, even without that scope, a review of *As You Sow*'s proxy reports reveals that faith-based organizations routinely take the lead on filing shareholder proposals about human rights.²³⁶

But it is a mistake to attribute shareholder activism on human rights exclusively to faith-based groups. While faith-based groups may file these proposals, other actors have supported them. For example, in 2021, BlackRock published its approach to engaging with companies on human rights impacts, clarifying that it “ask[s] companies to implement processes to identify, manage, and prevent adverse human rights impacts that are material to their business, and provide robust disclosures on these practices.”²³⁷ BlackRock highlighted that harmful impacts on human rights can damage a range of actors and lead to reputational, legal, financial, and regulatory risks for companies.²³⁸ BlackRock clarified that it values disclosures regarding how companies are managing their human rights impacts. For example, BlackRock valued information on board oversight on human rights, “including whether the full board or a specific committee has responsibility to oversee related policies and processes, and the type and frequency of information reviewed,”²³⁹ and how the company “measures and assesses the effectiveness of its human rights management and mitigation strategy.”²⁴⁰

More broadly, BlackRock's Global Principles of Investment Stewardship state that “[c]ompanies should articulate how they address adverse impacts that could arise from their business practices and affect critical business relationships with their stakeholders.”²⁴¹ BlackRock “expect[s] companies to implement, to the extent appropriate, monitoring processes (often referred to as due diligence) to identify and mitigate potential adverse impacts, and grievance mechanisms to remediate any actual adverse impacts,”²⁴² explaining that “[t]he maintenance of trust

236. See HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 53, 58 (2021); HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 54, 56 (2020); HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 53 (2019); HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 53 (2018).

237. BLACKROCK, OUR APPROACH TO ENGAGEMENT WITH COMPANIES ON THEIR HUMAN RIGHTS IMPACTS 1 (2021) <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf> [<https://perma.cc/897V-KJKY>].

238. *Id.*

239. *Id.*

240. *Id.*

241. BLACKROCK, INVESTMENT STEWARDSHIP GLOBAL PRINCIPLES 10 (2021), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf> [<https://perma.cc/M3UX-UUVT>].

242. *Id.*

within these relationships is often equated with a company's social license to operate."²⁴³ It recommends that "companies should report on how they have identified their key stakeholders and considered their interests in business decision-making, demonstrating the applicable governance, strategy, risk management, and metrics and targets."²⁴⁴ Finally, it recommends that this approach is "overseen by the board, whose job it is to ensure that the approach taken is informed by and aligns with the company's purpose."²⁴⁵ But BlackRock has not always supported these types of proposals. In 2020, for example, BlackRock voted against a shareholder proposal requesting a report on human rights due diligence at Sanderson Farms.²⁴⁶ Similarly, it opposed a proposal requesting the establishment of a human rights oversight committee at Alphabet.²⁴⁷

Proxy advisors have also supported human rights proposals. In 2020, Glass Lewis recommended that shareholders vote in favor of proposals requesting human rights due diligence reports at Tyson Foods, Sanderson Farms, and Pilgrim's Pride.²⁴⁸ Additionally, Glass Lewis recommended in favor of a proposal at Alphabet requesting that the board establish a human rights risk oversight committee, explaining that "[a]lthough Alphabet had implied some level of human rights-related oversight through its audit committee, we believed that its significant exposure to legal, reputational, and regulatory human rights-related risks warranted additional oversight."²⁴⁹

In its 2020 guidelines for the 2021 proxy season, Institutional Shareholder Services (ISS) recommended "[g]enerally vot[ing] for proposals requesting a report on company or company supplier labor and/or human rights standards and policies unless such information is already publicly disclosed."²⁵⁰ ISS also recommended a case-by-case analysis "on proposals to implement company or company supplier labor

243. *Id.*

244. *Id.*

245. *Id.*

246. *See* BLACKROCK, VOTING BULLETIN: SANDERSON FARMS 1 (2020), <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-sanderson-mar-2020.pdf> [<https://perma.cc/Y9RZ-RS2U>]

247. *See* BLACKROCK, VOTING BULLETIN: ALPHABET, INC., 1 (2020), <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-alphabet-jul-2020.pdf> [<https://perma.cc/Y755-WTCK>].

248. 2020 PROXY SEASON REVIEW: SHAREHOLDER PROPOSALS 32 (Courtney Keatinge, Max Darrow, Katelyn Roth, Kate Flanagan & Dimitri Zagoroff eds., 2020), <https://www.glasslewis.com/wp-content/uploads/2020/09/2020-Proxy-Season-Review-Shareholder-Proposals.pdf> [<https://perma.cc/Z2QG-SKEH>].

249. *Id.* at 8.

250. ISS, UNITED STATES: PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS 65 (2020) <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf> [<https://perma.cc/U3UW-LR8Q>].

and/or human rights standards and policies.”²⁵¹ To do so, ISS recommends considering, among others, the following factors: “[w]hether or not existing relevant policies are consistent with internationally recognized standards,”²⁵² “[c]ompany participation in fair labor organizations or other internationally recognized human rights initiatives,”²⁵³; “[r]ecent, significant company controversies, fines, or litigation regarding human rights at the company or its suppliers,”²⁵⁴ and “[d]eviation from industry sector peer company standards and practices.”²⁵⁵

ISS also recommended case-by-case analysis on proposals that request a company to conduct a human rights risk assessment, or to report on its process, considering factors such as “[t]he degree to which existing relevant policies and practices are disclosed, including information on the implementation of these policies and any related oversight mechanisms,”²⁵⁶ “[t]he company’s industry and whether the company or its suppliers operate in countries or areas where there is a history of human rights concerns,”²⁵⁷ and “[r]ecent significant controversies, fines, or litigation regarding human rights involving the company or its suppliers, and whether the company has taken remedial steps,”²⁵⁸ among other factors.

In its *2021 Sustainability Proxy Voting Guidelines*, ISS explained that “[m]any [i]nvestors believe that companies would benefit from adopting a human rights policy based on the Universal Declaration of Human Rights and the International Labor Organization’s Core Labor Standards.”²⁵⁹ ISS therefore stated that “[e]fforts that seek greater disclosure on a company’s labor practices and that seek to establish minimum standards for a company’s operations will be supported,”²⁶⁰ and that “requests for independent monitoring of overseas operations will be supported.”²⁶¹ The *Sustainability Guidelines* recommended voting in favor of a number of different types of human rights proposals, including ones requesting reports on company or supplier labor and human rights statement and policies; implementing human rights standards and

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. ISS, UNITED STATES: SUSTAINABILITY PROXY VOTING GUIDELINES 2021 POLICY GUIDELINES 68 (2020), <https://www.issgovernance.com/file/policy/active/specialty/Sustainability-US-Voting-Guidelines.pdf> [<https://perma.cc/KR36-QHER>].

260. *Id.*

261. *Id.*

workplace codes of conduct; and “independent monitoring programs in conjunction with local and respected religious and human rights groups to monitor supplier and licensee compliance with codes.”²⁶²

C. Excluded Shareholder Proposals

Not all shareholder proposals reach a vote. Sometimes a company is able to exclude the proposal from its proxy materials by filing a “no-action request” with the SEC, arguing that there is a basis for excluding the proposal under Rule 14a-8. For example, in 2020, the Congregation of the Sisters of St. Joseph of Peace submitted a shareholder proposal to PPG Industries, Inc. that referenced the UNGPs and requested that the board prepare a report “on PPG’s processes for implementing human rights commitments within company owned operations and through business relationships.”²⁶³ Using Rule 14a-8(i)(10), PPG sought to omit the proposal, arguing that it had substantially implemented the proposal because it had adopted, implemented, and published code of ethics, supplier code of conduct, and sustainability policy and reports.²⁶⁴ The Division of Corporate Finance (“Division”) concurred that Rule 14a-8(i)(10) provided a basis to exclude the proposal.²⁶⁵

Another basis for omitting a proposal is Rule 14a-8(i)(7) that permits a company to exclude a proposal if it “deals with a matter relating to the company’s ordinary business operations.”²⁶⁶ “The purpose of the exception is ‘to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.’”²⁶⁷

Companies have taken advantage of this exception to exclude proposals that address human rights issues. For example, in 2021,

262. *Id.* at 69.

263. Investor Advocates for Social Justice, 2020 Shareholder Proposals: PPG, <https://iasj.org/wp-content/uploads/PPG-Human-Rights-Disclosure-Resolution-2020-FINAL.pdf> [<https://perma.cc/52EN-XNFK>].

264. December 6, 2019 Letter from Daniel G. Fayock Assistant General Counsel and Secretary (PPG) to Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission re: Omission of Shareholder Proposal Submitted by the Congregation of the Sisters of St. Joseph of Peace; Securities Exchange Act of 1934 - Section 14(a), Rule 14a-8, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/sistersstjosephppg121619-14a8-incoming.pdf> [<https://perma.cc/3BJW-LADT>].

265. SEC, Div. of Corp. Fin. 2019-2020 No Action Responses Issued Under Rule 14a-8, <https://www.sec.gov/divisions/corpfin/shareholder-proposals-2019-2020.pdf> [<https://perma.cc/CUE5-JVUM>].

266. 17 C.F.R. § 240.14a-8(i)(7).

267. SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals#_ftn1 [<https://perma.cc/X6GE-9XD9>] (quoting Release No. 34-40018 (May 21, 1998)).

American Baptist Home Mission Society and others submitted a proposal at Chevron that requested that the board commission an independent third-party report “analyzing how Chevron’s policies, practices, and the impacts of its business, perpetuate racial injustice and inflict harm on communities of color in the United States.”²⁶⁸ The proposal also stated that the report should “[a]lign with the UN Guiding Principles on Business and Human Rights to identify, assess, prevent, mitigate, and remedy human rights impacts.”²⁶⁹ Chevron sought to exclude the proposal based on Rule 14a-8(i)(7) “because the Proposal relates to the Company’s litigation strategy and the conduct of ongoing litigation to which the Company is a party.”²⁷⁰ The staff of the Division concurred that Rule 14a-8(i)(7) provides a basis to exclude the proposal.²⁷¹

In recent years, the Division issued a number of Staff Legal Bulletins (“SLBs”) that further refined the parameters of the ordinary business exception.²⁷² In SLB No. 14K, the Division clarified that the exception’s consideration of micromanagement “rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself. . . . two proposals focusing on the same subject matter may warrant different outcomes based solely on the level of prescriptiveness with which the proposals approach that subject matter.”²⁷³

SLB No. 14K further clarified that “we look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board.”²⁷⁴ According to the guidance, “a proposal framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue generally would not be viewed as micromanaging matters of a complex nature. However, a proposal, regardless of its precatory nature, that prescribes specific timeframes or methods for implementing complex policies,

268. Letter from Investor Advocates for Social Justice, to Office of Chief Counsel, Div. of Corp. Fin., SEC 2 (Feb. 16, 2021), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/stfrancischevron033021-14a8.pdf> [<https://perma.cc/AX6C-QWHU>].

269. *Id.*

270. Letter from Elizabeth A. Ising, Gibson Dunn, to Office of Chief Counsel, Div. of Corp. Fin., SEC 3 (Jan. 18, 2021), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/stfrancischevron011821-14a8-incoming.pdf> [<https://perma.cc/QAW5-UC3S>].

271. SEC, Div. of Corp. Fin., *Shareholder Proposal No-Action Responses*, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/shareholder-proposal-no-action-responses-2020-2021.htm> [<https://perma.cc/HV6B-NCYT>] (last visited July 18, 2021).

272. SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018), https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals#_edn7 [<https://perma.cc/K78A-XP8W>]; SEC Staff Legal Bulletin No. 14k (CF) (Oct. 16, 2019), <https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals> [<https://perma.cc/X6GE-9XD9>].

273. SEC Staff Legal Bulletin No. 14k, *supra* note 267.

274. *Id.*

consistent with the Commission’s guidance, [] may run afoul of micromanagement.”²⁷⁵ Critically, the guidance cautioned that “the precatory nature of a proposal does not bear on the degree to which a proposal micromanages”²⁷⁶ and that “[n]otwithstanding the precatory nature of a proposal, if the method or strategy for implementing the action requested by the proposal is overly prescriptive, thereby potentially limiting the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company.”²⁷⁷

According to the ICCR, this guidance and other decisions affect the ability of shareholders to advocate for human rights and other issues: “During the last four years, major categories of proposals that were previously found to be acceptable were swallowed up by this new expansive micromanagement doctrine.”²⁷⁸ For example, according to the ICCR, “[p]roposals that seek to discourage company involvement in financing genocide have long been permissible under Staff rulings but were disrupted by the new micromanagement principle.”²⁷⁹ This was particularly unfortunate because the “shareholder proposal process has been critical to shareholder initiatives to persuade their companies not to directly or indirectly support genocide and other human rights abuses in the supply chain.”²⁸⁰ The ICCR argued that an “important reversal of prior staff decisions relating to genocide and human rights occurred in J.P. Morgan Chase & Co. (March 13, 2019), excluding a proposal directed toward genocide prevention, overturned many Staff precedents based on ordinary business that previously allowed proposals to ask essentially the same question but came to the opposite result.”²⁸¹ ICCR argued that

275. *Id.* (internal citations omitted). In addressing the first consideration, subject matter, SLB 14K explained:

[W]e believe the focus of an argument for exclusion under Rule 14a-8(i)(7) should be on whether the proposal deals with a matter relating to that company’s ordinary business operations or raises a policy issue that transcends that company’s ordinary business operations. When a proposal raises a policy issue that appears to be significant, a company’s no-action request should focus on the significance of the issue to that company. If the company does not meet that burden, the staff believes the matter may not be excluded under Rule 14a-8(i)(7).

Id.

276. *Id.*

277. *Id.*

278. Interfaith Coalition on Corporate Responsibility, BRIEFING PAPER FOR BIDEN TRANSITION: SECURITIES REGULATION AGENCY REVIEW TEAM ON SHAREHOLDER PROPOSAL GUIDANCE AND DECISIONS AT SECURITIES AND EXCHANGE COMMISSION 17 (Dec 15, 2020), *construed in* Letter to Allison Lee, Acting Chair, U.S. Securities and Exchange Commission, Division of Finance (Jan. 26, 2021) 17, https://www.iccr.org/sites/default/files/resources_attachments/chair_lee_letter_0.pdf [<https://perma.cc/947S-N2Z9>].

279. *Id.* at 20.

280. *Id.*

281. *Id.*

“[n]umerous past decisions regarding these proposals on investment and genocide, considering the same proposal model that this proposal had followed, did not address ordinary business or micromanage and allowed the proposals to go forward.”²⁸²

However, under SLB No. 14L issued in November 2021, the Division “rescind[ed] Staff Legal Bulletin Nos. 14I, 14J, and 14K (the “rescinded SLBs”) after a review of staff experience applying the guidance in them.”²⁸³ SLB No. 14L clarified important features of the ordinary business exception going forward, including:

[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.²⁸⁴

The SLB clarified that “[u]nder this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7).”²⁸⁵ It also clarified that “[b]ecause the staff is no longer taking a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7), it will no longer expect a board analysis as described in the rescinded SLBs as part of demonstrating that the proposal is excludable under the ordinary business exclusion.”²⁸⁶

SLB No. 14L also recognizes that “the rescinded guidance may have been taken to mean that any limit on company or board discretion constitutes micromanagement.”²⁸⁷ SLB No. 14L clarified that

the staff will take a measured approach to evaluating companies’ micromanagement arguments — recognizing that proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement. Instead, we will focus on the level of

282. *Id.*

283. SEC Staff Legal Bulletin No. 14I (CF) (Nov. 3, 2021), <https://bit.ly/3gmpmWf> [<https://perma.cc/RR4Y-EDRN>].

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management.²⁸⁸

This clarification is important because the rescinded SLB guidance may have complicated the future use of the UNGPs and human rights benchmarks in shareholder requests. For example, rescinded SLB No. 14K stated that a proposal that “prescribes specific timeframes or methods for implementing complex policies . . . may run afoul of micromanagement.”²⁸⁹ But many shareholder proposals addressing human rights reference the UNGPs and its particular approach to integrating human rights into business practices, including by adopting policy commitments, due diligence processes, and remediation efforts.²⁹⁰ The UNGPs also set out particular requirements for each of these components.²⁹¹ For example, UNGP 17 states that the due diligence process should “include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”²⁹² Shareholders have relied on similar or identical language in their requests to companies regarding the latter’s human rights practices.²⁹³ The advantage of UNGP 17 and its accompanying principles is that it provides detailed guidance to companies on protection of human rights but its very specificity may now impede the ability of shareholders to invoke it in proposals because of the concern with micromanagement.²⁹⁴ SLB No. 14L recognized that

many of the proposals addressed in the rescinded SLBs requested companies adopt timeframes or targets to address climate change that the staff concurred were excludable on micromanagement grounds. . . . Going forward we would not concur in the exclusion of similar proposals that suggest targets or timelines so long as the

288. *Id.* (“We would expect the level of detail included in a shareholder proposal to be consistent with that needed to enable investors to assess an issuer’s impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input.”).

289. *Shareholder Proposals: Staff Legal Bulletin No. 14k (CF)*, U.S. SEC. & EXCH. COMM’N (Oct. 16, 2019), <https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals> [<https://perma.cc/X6GE-9XD9>].

290. UNGP 15.

291. *See, e.g.*, UNGP 15–24

292. UNGP 17

293. *See, e.g.*, Tyson Foods, Inc., Definitive Proxy Statement (Schedule 14A), at 24 (Dec. 23, 2020), <https://sec.report/Document/0000100493-20-000207/> [<https://perma.cc/FN3L-PSK6>]

294. SLB 14K also cautioned that “if a supporting statement modifies or re-focuses the intent of the resolved clause, or effectively requires some action in order to achieve the proposal’s central purpose as set forth in the resolved clause, we take that into account in determining whether the proposal seeks to micromanage the company.” *Shareholder Proposals: Staff Legal Bulletin No. 14k (CF)*, *supra* note 283.

proposals afford discretion to management as to how to achieve such goals.²⁹⁵

Another issue is the threshold requirements for re-submitting a proposal. In 2020, the SEC adopted amendments to Rule 14a-8 that changed the thresholds for re-submission of shareholder proposals by “revising the levels of shareholder support a proposal must receive to be eligible for resubmission at the same company’s future shareholder meetings from 3%, 6% and 10% for matters previously voted on once, twice or three or more times in the last five years, respectively, with thresholds of 5%, 15% and 25%, respectively.”²⁹⁶ As Glass Lewis noted, “[human rights] shareholder proposals have received very low shareholder support,”²⁹⁷ noting that, in 2018, the highest support was 19.9% and “of the eight other human rights-related proposals submitted to a vote in 2018, only two received over 10% shareholder support.”²⁹⁸ The situation improved in 2019-2020 with human rights proposals securing average support between 24%-28%.²⁹⁹ These thresholds may not prove problematic if human rights proposals continue to win support consistent with the past few years; however, if average support declines to their pre-2019 levels, then many human rights proposals will be excluded from re-submission.³⁰⁰

Finally, in 2020, the SEC also adopted amendments to the eligibility criteria that a shareholder must satisfy, incorporating a tiered system “that will require a shareholder to demonstrate continuous ownership of at least: \$2,000 of the company’s securities for at least three years; \$15,000 of the company’s securities for at least two years; or \$25,000 of the company’s

295. SEC Staff Legal Bulletin No. 141 (CF) (Nov. 3, 2021), <https://bit.ly/3gmpmWf> [<https://perma.cc/9LBE-2KHD>].

296. Press Release, U.S. Securities and Exchange Commission, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020), <https://www.sec.gov/news/press-release/2020-220> [<https://perma.cc/377D-B4AQ>]. “The final amendments “will apply to any proposal submitted for an annual or special meeting to be held on or after January 1, 2022. The final rules also provide for a transition period with respect to the ownership thresholds that will allow shareholders meeting specified conditions to rely on the \$2,000/one-year ownership threshold for proposals submitted for an annual or special meeting to be held prior to January 1, 2023.” *Id.*

297. 2020 PROXY SEASON REVIEW, GLASS Lewis 32.

298. *Id.*; see also Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217, 224 (2018) (finding low levels of shareholder support in 2014 for proposals addressing human rights risk assessments).

299. 2020 PROXY SEASON REVIEW, *supra* note 297, at 32.

300. See Jackie Cook & Lauren Solberg, *Hints of Sea Change in Big Fund Company ESG Proxy Votes*, MORNINGSTAR (May 12, 2021), <https://www.morningstar.com/articles/1039244/hints-of-sea-change-in-big-fund-company-esg-proxy-votes> [<https://perma.cc/8VEZ-2RSC>] (“However, under new SEC rules on shareholder resolutions, . . . this could be the last we hear from shareholders on these issues—a stake held by the Tyson family gives it 70% of the vote at Tyson Foods and a stake held by JBS (Pilgrim’s Pride) gives the parent 80% of the vote—preventing overall support from reaching the critical threshold of 25% for a third-time repeat vote.”).

securities for at least one year.”³⁰¹ It also “prohibit[s] the aggregation of holdings for purposes of satisfying the amended ownership thresholds.”³⁰²

D. Withdrawn Shareholder Proposals

Some shareholder proposals do not proceed to a vote because their proponent withdraws them. One reason that a proponent may withdraw a proposal is because management has agreed to make one or more changes that the proponent desires and thereby settles the proposal. These settlement negotiations occur prior to the publication of the proxy statement.³⁰³ “If the parties reach an agreement to settle the proposal, it is memorialized in writing, and may be as formal as a contract signed by both parties or as informal as an exchange of emails.”³⁰⁴

Between 2019–2021, a number of IASJ’s members withdrew proposals at companies such as Bank of America, Nucor, Pfizer, Bristol-Myers Squibb Company, SunTrust Banks, IBM, and Emerson for commitments or agreements.³⁰⁵ For example, shareholders withdrew the proposal at Kraft Heinz when the company “committed to conducting a HRIA consistent with the UN Guiding Principles on Business and Human Rights (UNGPs).”³⁰⁶ Shareholders had filed proposals at these companies on a range of issues, including drug pricing, human rights policy, greenhouse gas targets, lobbying expenditures, and board committee on human rights.³⁰⁷

The Sisters of the Good Shepherd and the Congregation of Holy Cross (Moreau Province) withdrew their 2020 shareholder proposal at Nucor, the largest steel producer in the United States. The proposal had requested that the “Board of Directors adopt a comprehensive Human Rights Policy stating the company’s commitment to respect human rights throughout its operations and value chain, and describing steps to identify, assess, prevent, mitigate, and, where appropriate, remedy adverse human rights impacts connected to the business.”³⁰⁸ The proposal noted that “Nucor does not have a human rights policy. Nucor has a Supplier Code of Conduct, but it does not include a commitment to respect human rights

301. *Id.*

302. *Id.*

303. Haan, *supra* note 204, at 280.

304. *Id.*

305. *IASJ Shareholder Proposals: 2022 Proxy Season*, INV. ADVOC. FOR SOC. JUST. Corporate <https://iasj.org/resolutions> [<https://perma.cc/5NTY-6TXK>].

306. Wokaty, *supra* note 201.

307. *IASJ Shareholder Proposals*, *supra* note 305.

308. INVESTOR ADVOCATES FOR SOCIAL JUSTICE, NUCOR 2020 SHAREHOLDER PROPOSAL <https://iasj.org/wp-content/uploads/Nucor-2020-Adopt-Human-Rights-Policy-Resolution-FINAL-.pdf> [<https://perma.cc/3RTD-VFGQ>] [hereinafter NUCOR 2020 SHAREHOLDER PROPOSAL].

and the Code's reference to child labor does not align with the ILO Minimum Age Convention."³⁰⁹ Additionally, "[w]hile Nucor does have a Forced Labor Policy, it is limited in applicability to pig iron sourced from Brazil, which may contain charcoal produced under conditions of forced labor."³¹⁰

While it may not have had a human rights policy when the proposal was presented, Nucor now has a human rights policy that is available on its website.³¹¹ This policy references both the UNGPs and the Universal Declaration of Human Rights and "complements and brings together the human rights aspects from other Nucor policies and guidelines."³¹² Among other commitments, this policy clarifies that "Nucor has no tolerance for any form of forced labor, involuntary labor, child labor, human trafficking or modern slavery in its operations and/or through its supply chain"³¹³ and that "[i]n any areas of heightened risk, Nucor engages with its contractors, subcontractors[,] and suppliers to perform diligence[] and to certify and audit supply chains to avoid directly or indirectly benefiting from or promoting any such forced labor, child labor, human trafficking, or other related activities."³¹⁴

The shareholders faulted Nucor for the narrow scope of its forced labor policy that was focused on pig iron sourced from Brazil "which may contain charcoal produced under conditions of forced labor."³¹⁵ But that scope may be due to Nucor's prior history—and agreement—with another shareholder: Domini Social Investments.³¹⁶ At the time, Nucor was the largest buyer of Brazilian pig iron and media coverage had exposed the human rights violations involved with the production of charcoal, an ingredient of pig iron.³¹⁷ Domini had submitted shareholder proposals each year between 2008-2010, requesting board review of human rights in its supply chain and disclosures regarding the same.³¹⁸ Domini withdrew its 2008 proposal in exchange for a written agreement with Nucor that

309. *Id.*

310. *Id.*

311. NUCOR, NUCOR CORPORATION HUMAN RIGHTS POLICY, https://assets.ctfassets.net/aax1cfbwhqog/1QVrXSK1NzyqxPYgLm8b0M/a20784c40dbe6344d1d6396018db779e/Nucor_Human_Rights_Policy.pdf [<https://perma.cc/A3N5-C9KX>].

312. *Id.* at 1.

313. *Id.* at 3.

314. *Id.*

315. NUCOR 2020 SHAREHOLDER PROPOSAL, *supra* note 308.

316. *Domini Reaches Agreement with Nucor on Slavery in Brazil*, INT'L LABOUR ORG. (Aug. 13, 2010), http://www.ilo.int/global/topics/forced-labour/news/WCMS_143438/lang-en/index.htm [<https://perma.cc/2B2P-HPUK>].

317. *Id.*

318. ADAM KANZER, FIGHTING SLAVERY IN BRAZIL: STRENGTHENING LOCAL SOLUTIONS 67 (2011), https://www.domini.com/uploads/legacy/fighting_slavery_v1.pdf [<https://perma.cc/852N-WM9N>].

“produced a formal policy prohibiting forced labor in its supply chain.”³¹⁹ But the investors re-filed their proposal because they “were dissatisfied with Nucor’s compliance with the remaining terms of the withdrawal agreement.”³²⁰ This second proposal received 27% vote.³²¹

In 2010, Domini again withdrew its third shareholder proposal in exchange for entering into a written agreement with Nucor.³²² As part of the discussions between the two, “Nucor will require its top-tier Brazilian pig-iron suppliers to either join the Citizens Charcoal Institute (ICC), or sign and adhere to the National Pact for the Eradication of Slave Labor.”³²³ A supplier’s membership in the ICC is important because “[e]ach ICC member has agreed to subject its entire supply chain to monitoring to ensure legal and decent working conditions.”³²⁴ Critically, “Nucor has agreed to publish annual progress reports on implementation of these policies.”³²⁵

According to Domini, “[t]he shareholder proposal was a particularly important tool.”³²⁶ Even when “the investor group did not hold a significant percentage of Nucor’s shares, the shareholder proposal provided an important point of leverage, providing access to the company’s proxy statement and its annual meeting, and providing a means of communication with Nucor’s largest institutional investors.”³²⁷ Domini’s representatives also noted that “[p]erhaps most importantly, the availability of the shareholder proposal ensures that even small shareholders can keep critical issues in front of management and the board of directors year after year.”³²⁸ Unfortunately, other shareholders may not be able to adopt similar strategies following the 2020 amendments to Rule 14a-8 regarding the re-submission thresholds.

The 2020 amendments may impair the ability of shareholders to *reach* an agreement with a company. But problems also arise even when shareholders are able to do so. In studying settlements of campaign finance disclosure proposals, Sarah Haan identifies particular concerns with proposal settlements.³²⁹ The first concern is the lack of transparency because “the process plays out completely behind closed doors, with no notice to or participation by most shareholders, other corporate

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Domini Reaches Agreement with Nucor on Slavery in Brazil*, *supra* note 316.

324. *Id.*

325. *Id.*

326. KANZER, *supra* note 318, at 68.

327. *Id.*

328. *Id.*

329. Haan, *supra* note 204, at 262.

stakeholders, or the public. The resulting agreements are not publicly filed and are rarely available to those other than the parties who negotiated them.”³³⁰ This lack of transparency leads to concerns over agency costs³³¹ and enforcement³³² of the agreements that are reached in exchange for the withdrawal of the shareholder proposal.

Not all of these concerns are necessarily implicated in the settlement of human rights shareholder proposals. For example, when Nucor failed to adequately comply with its 2008 settlement agreement, the shareholders re-submitted their proposal in the following year and received 27% support.³³³ If this is indicative of broader practice, then it does appear that shareholder proponents do care about a company’s compliance with settlements of human rights proposals.³³⁴ Unfortunately, the 2020 Rule 14a-8 amendments, along with SEC guidance, may constrain the ability of shareholders to re-file their proposals, thereby undermining the enforcement of shareholder settlement agreements.³³⁵

E. Re-Evaluating “Failed” Proposals: The Information-Forcing Effects of Company Resistance

Shareholder proposals—even ones that fail—are useful in obtaining information about company practices that might otherwise prove difficult for shareholders to obtain. Critically, the shareholder proposal *process* may successfully lead to greater disclosure even when the *proposal* requesting that disclosure is excluded or fails to gain adequate shareholder support. This is because the shareholder proposal process may shake loose information in possession of management that shareholders may not otherwise possess. To summarize, a shareholder can improve its access to information by (1) proposing a shareholder proposal for increased disclosure that is approved and implemented by management; (2) securing an agreement from management to do the same in exchange for a withdrawal of the proposal; (3) submitting a proposal in a company’s proxy statement that invites a detailed statement of opposition from the board, or (4) submitting a proposal that solicits a “no-action request” from the company to the Division. These are four distinct channels to obtain greater disclosure of information. The extent and quality of information is not the same under all of these mechanisms. The first two routes may

330. *Id.* at 269.

331. *Id.*

332. *Id.*

333. KANZER, *supra* note 318, at 67.

334. Haan, *supra* note 204, at 323.

335. See also George, *Corporate Social Responsibility and Social Media Corporation*, *supra* note 11, at 343 (noting the multi-year shareholder campaign against Chevron that ultimately resulted in an acceptable human rights statement).

secure greater information disclosure that is attentive to the shareholder proponent's interests. However, the other two mechanisms can also improve the aggregate body of information that a shareholder has concerning particular company practices on a given issue. Put simply: a *company's act of resistance is information-generating*. As a result, even shareholder proposals that "fail" can prove valuable from an information gathering perspective.

Consider the third mechanism that concerns the board's opposition statements in its proxy statements. When the board opposes a shareholder proposal, it can recommend that investors vote against it by including a statement to that effect in its proxy statement. In human rights proposals, the board often recommends voting against these proposals and justifies its position by listing all the steps that the company has already taken to address the same concern. For example, in opposing a 2020 shareholder proposal concerning human rights due diligence, Kroger's board elaborated upon the "several governance assets and compliance procedure[s]" that it had in place regarding human rights.³³⁶ Its statement referenced not only publicly available documents, such as its human rights policy, but also included information that it "expect[s] to publish an expanded statement in 2020, specifically addressing some key topics of concern like recruitment fees, which can lead to workers becoming indebted to employers as a result of paying fees for employment."³³⁷ It also clarified that "Kroger's social compliance team plans to begin in 2020 a risk assessment initiative with ELEVATE, Kroger's primary social compliance audit company, to better understand social risks in the supply chain. Results from this process will be used to refine our auditing approach."³³⁸ Some of this information was publicly available, such as the policy, but the other information may not have been widely known to the public.

The fourth mechanism for information disclosure is company no-action requests that rely upon Rule 14a-8(i)(10) for excluding a shareholder proposal. In these letters, companies outline the various steps they have already taken to implement the steps that the shareholders have requested. The review of these letters, and responses by shareholder

336. Kroger Co., 2020 Definitive Proxy Statement (Form 14A), at 59–61 (May 12, 2020), <https://sec.report/Document/0001140361-20-011379/> [<https://perma.cc/6N4J-T2MS>].

337. *Id.*

338. KROGER'S 2019 ENVIRONMENTAL, SOCIAL & GOVERNANCE (ESG) REPORT, KROGER (2019), <https://www.thekrogerco.com/wp-content/uploads/2021/07/Kroger-2019-ESG-Report.pdf> [<https://perma.cc/84V5-TBSJ>]; 2020 ENVIRONMENTAL, SOCIAL AND GOVERNANCE REPORT, KROGER (2020), <https://www.thekrogerco.com/wp-content/uploads/2021/07/Kroger-2020-ESG-Report.pdf> [<https://perma.cc/ZSG4-D3G3>].

proponents, are also useful in gaining greater information about a company's human rights practices.

We can compare these *informal* disclosures to the *formal* disclosures mandated by various laws. For example, the California Transparency in Supply Chains Act³³⁹ requires covered corporations to disclose efforts on verification, audits, certifications, internal accountability standards and procedures, and training regarding forced labor and human trafficking.³⁴⁰ The law requires that covered companies publish this information on their website if they have one.³⁴¹ For example, Kroger does not appear to include information on its risk assessment initiative with ELEVATE in its statement under the California law,³⁴² but does share this information in its 2021 human rights statement.³⁴³ If Kroger had not disclosed that information in its statement in 2019-2020, then the management's response to the 2020 shareholder proposal shares information that is otherwise absent from its website and, consequently, accessible to the public.

CONCLUSION

This Article explores the strengths and weaknesses of shareholder proposals as mechanisms for encouraging corporate compliance with international human rights norms. Specifically, it examines how companies receiving low rankings on human rights benchmarks attract shareholder proposals requesting that the company provide information on its policies, implementation and effectiveness of such policies, including human rights impact assessments, and oversight of human rights issues.

There is reason for both optimism and caution. On the positive side, this shareholder mechanism provides a way to make international law norms applicable to non-state actors, such as corporations, thereby expanding the audience for international law. This mechanism is particularly important when two conditions are present. First, when corporations and other businesses are the perpetrators of human rights violations, directly or indirectly, thus illustrating the need to bring their conduct into alignment with the international human rights framework. Second, it is also particularly needed when governments are unwilling or unable to regulate the human rights practices of corporations – perhaps

339. CAL. CIV. CODE § 1714.43 (West 2012).

340. *Id.*

341. *Id.*

342. California Transparency in Supply Chains Act of 2010, KROGER, <https://www.thekrogerco.com/vendors-suppliers/california-transparency-in-supply-chains-act-of-2010> [<https://perma.cc/95LE-NLNB>].

343. KROGER, STATEMENT ON HUMAN RIGHTS (2021), <https://www.thekrogerco.com/wp-content/uploads/2021/05/Kroger-Statement-on-Human-Rights.pdf> [<https://perma.cc/HRF4-ZLLG>].

because those governments remain unwilling to sign or ratify a number of important human rights treaties. Other promising signs include the higher levels of shareholder support for human rights proposals and the attention given to these issues by BlackRock and Vanguard, among others, as well as proxy advisors Glass Lewis and ISS.

But there are also signs that signify caution. While BlackRock and Vanguard may support human rights proposals, their reasons for doing so differs from those of the shareholder proponents. This suggests that a broad base of shareholder support is likely when there is interest convergence between the proponent, frequently motivated by humanitarian concerns, and other investors, who rely on the litigation, reputational, regulatory, and business interruption risks that arise or may have arisen because of inadequate company attention to human rights. There is a danger that this support may wane when these risks are absent or not apparent.

It is also important to recognize the effects of recent SEC guidance and amendments to Rule 14a-8 that may inhibit the success of this stakeholder channel for international law. The higher thresholds for ownership and re-submission may prevent human rights shareholder proposals in the future; the latter change is particularly problematic when shareholders rely on consecutive, multi-year engagements to encourage company management to change their practices. Similarly, a number of the rescinded SLBs suggested that management may have greater opportunities to exclude proposals on the basis of “micromanagement.” This was a problem because the specificity of the proposals allows shareholders, management, and other stakeholders to overcome the risk of symbolic human rights compliance. By referencing the specific requirements of the UNGPs, such as policy development, due diligence processes, and remediation, shareholders have a common language to (a) evaluate company performance across firms, (b) identify shortcomings, (c) formulate recommendations based on international standards, and (d) measure improvement over the years. It is in these ways that human rights norms are not merely symbolic. While SLB No. 14L suggests that such proposals may be permitted, the risk of empty symbolism may re-emerge if these very attributes serve as the basis for excluding a proposal in the future.