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Corporate Social Responsibility, ESG, and Compliance

Elizabeth Pollman
University of Pennsylvania Carey Law School

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Introduction

In 2019, the CEO and chairperson of BlackRock, the world's largest asset manager, called for corporate leaders to embrace corporate purpose and create value for stakeholders, and 181 CEOs of the Business Roundtable committed to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities, and shareholders. The idea that corporations should engage in socially responsible business practices ("CSR") or initiatives relating to environmental, social, and governance matters ("ESG") is gaining prominence, but remains highly contested. Deeper examination reveals that these terms—CSR and ESG—each lack a singular meaning. From aligning shareholder and stakeholder interests for shared value and risk management, to going beyond compliance and profit-maximizing strategies, there is no consensus on what socially-responsible activity entails and the rationale for its pursuit.

This chapter aims to illuminate the landscape of CSR, ESG, and their connection to compliance. Varying usage and mixed empirical research reveals that CSR and ESG lack a clearly defined connection to compliance. This indeterminacy extends to (1) whether CSR and ESG are correlated with or refer to greater levels of legal compliance, as well as (2) what it means for a corporation to "comply" with CSR or ESG goals in light of the proliferation of standards and metrics pertaining to sustainability and social impact. Exploring these topics through the U.S. perspective reflects that the business world is in a state of flux regarding how companies take account of their impact on stakeholders and the environment, and laws are evolving on issues such as sustainability disclosures that could help us better understand existing practices.

I. Introduction to CSR and ESG

The scope and contours of CSR is disputed and has shifted over time. Discussion of whether corporations primarily serve an economic role for shareholders or whether they more broadly serve society dates back to the famous Berle-Dodd debate of the 1930s (Bratton & Wachter 2008). The rise of large public corporations with separation of ownership and control raised concerns about corporate accountability and the question of whether corporate managers are trustees for shareholders or stewards with broader social obligations. The debate has never been fully resolved to a consensus view, nor have commentators agreed upon what constitutes socially responsible business practice.

The use of the term "social responsibility"—referring to the concept of incorporating stakeholders and their interests in how companies are run—emerged in the 1950s (Carroll 1999; Jackson 2010; Ostas 2004). Economist Howard Bowen's landmark book, *The Social Responsibilities of the Businessman* launched discussion of "the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society" (Bowen 1953:6). Bowen's framing identified social duties that stemmed from the consequences of business activity and encompassed ethics to protect the well-being of workers and the general public (Carroll 1999; Ostas 2004).

Other mid-twentieth century thinkers built on this idea, such as Keith Davis who espoused the "Iron Law of Responsibility" that "social responsibilities of businessmen need to be commensurate with their social power" (Davis 1960:71). According to Davis, social responsibility refers to "business[persons'] decisions and actions taken for reasons at least partially beyond the firm's direct economic or technical interest" (ibid. p. 70). Such responsibility has two aspects: "a broad obligation to the community with regard to economic developments affecting the public welfare" and an obligation "to nurture and develop human values" (ibid. p. 70). Some socially responsible business decisions can be justified by aligning with long-term economic value for the corporation (ibid.). But, together with other scholars in this period such as Adolf Berle and Peter Drucker, Davis further recognized that society has certain expectations of business and that government regulation will intervene to the extent that business leaders do not use their power responsibly (Ostas 2004; Pollman 2019). This view appreciated that social expectations could be addressed by the business community or through regulation, and if the former failed to live up to the task, the law would step in.

By the 1970s, the modern regulatory state indeed began to take shape with the rise of regulation concerning the environment, worker safety, and consumer protection. Expansive conceptions of corporate social responsibility were met with criticism from economists and legal academics such as Milton Friedman and Henry Manne who presented a different view of how corporations should be run (Carroll 1999). Friedman famously argued that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud" (Friedman 1962:133). In Friedman's view, corporate managers are agents working on behalf of the shareholder-owners, and it is "pure and unadulterated socialism" to encourage such corporate managers to spend "other's people money" in pursuit of stakeholder interests that do not align with the profit motive (Friedman

1970). Along similar lines, Henry Manne expressed skepticism that "socially responsible" corporate expenditures were truly voluntary and independent acts of altruism, and argued they were instead examples of corporate public relations or agency costs in the form of self-interested executives pursuing their own prestige to appear as "corporate statesmen"—both representing an abandonment of the free market in favor of ineffective programs that by his account were unlikely to increase social welfare (Manne & Wallich 1972).

This narrow view of corporate responsibility to maximize profits for shareholders "within the rules of the game" became known as the "shareholder primacy" view, and as it gained dominance in the U.S. through the late twentieth century, it came to stand in contrast to the preceding broader vision of CSR (Hansmann & Kraakman 2001). While the shareholder primacy view gained adherents, the literature on CSR nonetheless continued to flourish in the late-twentieth century and writings multiplied on alternative concepts, theories, and models (Carroll 1999).

Approaches to the topic of CSR also became more diverse. Researchers studied relevant disclosures in annual reports, executive perceptions of CSR, and the relation between CSR and financial performance (ibid.). Business practice expanded to include mechanisms of self-reporting, such as corporate codes of conduct and sustainability reports, and the adoption of non-binding standards from NGOs and international organizations. Assets in socially screened portfolios and investment funds for "socially responsible investing" increased substantially. Several legal scholars in the 1990s and 2000s developed a body of scholarship known as "progressive corporate law," which argues for more comprehensive, mandatory changes in corporate law in order to serve the public interest (Greenfield 2007).

In the twenty-first century, greater interest in whether there is a "business case" for corporate social responsibility apart from altruistic and ethical justifications has shifted the debate to concepts of "sustainability" and environmental, social, and governance ("ESG") practices and risks. ESG is used "to refer not only to sustainability measures or to environmental, social, or governance practices specifically, but to all nonfinancial fundamentals that can impact firms' financial performance, such as corporate governance, labor and employment standards, human resource management, and environmental practices" (Harper Ho 2016:651). Underlying ESG initiatives is "evidence that accounting for both financial and nonfinancial risk can drive firm and portfolio performance" (ibid. p. 647)—and an understanding that ESG is an important tool for mitigating risk, which is particularly valuable for large asset managers (Gadinis & Miazad 2019).

II. Legal Compliance and CSR / ESG

With groundwork set out on CSR and ESG, this section now turns to examining how each concept is connected to legal compliance. First, this section parses how various definitions of CSR and ESG relate to the law, demonstrating that each term has been used in reference to obedience or compliance, rooted in discourse on ethics or risk management. Second, this section reviews the related empirical literature and concludes that there is mixed support for a positive relationship between CSR or ESG and financial performance, and that some explanations for this linkage include compliance, regulatory and litigation risk, but empirical support exists for alternative explanations as well.

A. Conceptual Connections

Although the debate on CSR has been wide ranging, as the discussion above illustrates, usage of the term CSR could be understood in terms of three categories—references that “reduc[e] CSR to mere compliance with existing laws and market demands” (Kerr 2008:854); references that equate CSR with going “beyond compliance” (Rosen-Zvi 2011:532); and references that are broadly stated without relation to law, that “CSR merely implies that businesses share responsibility for societal conditions” (Jackson 2010:52).

The first usage, equating corporate responsibility with compliance and market demands, does not claim to take a capacious approach, but instead typically references Delaware case law on fiduciary duties owed to the corporation and its shareholders and emphasizes the importance of government regulation to ensure that corporations do not generate excessive externalities (Strine 2012; Strine 2015). In this account, corporate fiduciaries are subject to a legal duty to aim to increase the value of the corporation for the benefit of the shareholders, and stakeholder interests should be pursued insofar as they coincide with this goal or are required by law. Notably, the notion that the law requires shareholder primacy is contested (Stout 2012), and corporate law varies around the world (Berger-Walliser & Scott 2018). Furthermore, some jurisdictions have evolved to mandate conduct that was formerly understood as voluntary CSR engagement, such as India’s mandatory corporate charity policy and California’s supply chain transparency law—a trend some scholars have called the “legalization of CSR” (ibid. p. 169). One concern expressed about this trend of hardening socially responsible practices into law is that it may ultimately reinforce a paradigm of shareholder primacy and undermine the understanding of CSR as a moral or ethical responsibility (ibid. p. 170).

The second usage of CSR requiring more than compliance envisions that CSR is voluntary, self-regulatory action (Afsharipour & Rana 2014). Myriad definitions, pledges, and programs use this framing of CSR as encouraging “companies to conduct business beyond compliance with the law and beyond shareholder wealth maximization” (Lin 2010:64; see also

Bénabou & Tirole 2009). This usage "suggests that companies should do more than they are obligated under applicable laws governing product safety, environmental protection, labor rights, human rights, community development, corruption, and so on; it also suggests that companies should consider not only the interests of shareholders but also those of other stakeholders" (Lin 2010:64). One criticism of this definitional approach is that as certain areas that were once in the realm of voluntary CSR activity have become regulated, the notion of CSR as "an extralegal, voluntary activity" is called into question (Berger-Walliser & Scott 2018). Further, notions of CSR and what is required by law varies widely around the world so that activity that would be considered CSR in some countries is mere compliance in others (ibid.).

The third usage similarly presents a pro-stakeholder perspective, but does not reference a concept of acting "beyond compliance" or state a particular position with respect to the law. For example, some scholars have proposed a definition of CSR as "activities that internalize costs for externalities resulting directly or indirectly from corporate actions, or processes and actions to consider and address the impact of corporation actions on affected stakeholders" (Berger-Walliser & Scott 2018:214–215). Many variations on these themes exist, such as the concept of "shared value" and "responsive CSR" which includes "acting as a good corporate citizen, attuned to the evolving social concerns of stakeholders, and mitigating existing or anticipated adverse effects from business activities" (Porter & Kramer 2006).

The newer term of ESG typically coincides with the second usage of CSR as it envisions a scope that includes legal compliance as well as additional concerns. The difference is that whereas CSR is often framed in terms of social obligations, rooted in ethical or moral concerns, ESG is generally discussed in terms of risk management for firms and investors, individually or systemically. For example, a majority of U.S. public companies have adopted enterprise risk management systems that "take account of nonfinancial or ESG risks, including compliance, regulatory, environmental and other operational risks, as well as strategic risks" (Harper Ho 2016:663). Risk management can contribute to financial performance "by reducing the cost of future liabilities due to enforcement actions, legal claims, and other negative risk events, as well as losses to investors when these events become known to the market" (ibid. p. 664).

Framed in terms of risk management and the business case, "ESG investing, once a sideline practice, has gone decisively mainstream" (Goldman Sachs 2016; see also Bank of America Merrill Lynch 2017). An ESG investment strategy "emphasizes a firm's governance structure and the social and environmental impacts of the firm's products or practices" (Schanzenbach & Sitkoff 2019). For example, as framing has shifted from socially responsible investing to ESG, "instead of avoiding the fossil fuel industry to achieve collateral benefit from reduced pollution, the new suggestion [is] that a fossil fuel company should be divested because its litigation and regulatory risks were underestimated by its share price, and therefore divestment would improve risk-adjusted return" (ibid. p. 4). Further, ESG has a broader focus than compliance as it targets not only legal risk, but also business risk from a wide variety of sources and can flexibly take account of a range of stakeholders (Gadinis & Miazad 2019).

The boundaries of these terms, however, are not precise—sometimes CSR and ESG are used interchangeably, and although ESG is frequently used in the context of risk management and risk-adjusted returns, it is also used sometimes to refer to social benefits.

B. Empirical Literature

The variation and evolution of definitions of CSR and ESG, and the lack of a standardized set of metrics, have posed challenges for empirical study (Clarkson 1995; Aguinis & Glavas 2012). The voluntary nature of much of this activity presents significant selection problems (Christensen et al. 2019). Notwithstanding these challenges, an enormous amount of research has focused on the key empirical question—whether there is a connection between CSR or ESG and financial performance—and the literature is mixed.

A minority of studies finds a negative relationship between various ESG or social performance indicators and financial performance. For example, one study of UK firms used a set of disaggregated indicators for environment, employment, and community activities and found a negative relationship between stock returns and environmental performance and, to a lesser extent, community activities, over a one to three year period (Brammer et al. 2006). Another study examined a panel of socially responsible investing funds over multiple decades and found that community relations screening increased financial performance, but environmental and labor relations screening decreased financial performance (Barnett & Salomon 2006).

A majority of empirical studies, however, find "that although not all firm sustainability efforts translate into higher returns for investors, positive social performance has a positive or neutral effect on risk-adjusted returns, profitability, and other standard measures of financial performance at the firm and portfolio level" (Harper Ho 2016:665; see also Clark et al. 2015; Friede et al. 2015; Mahon & Griffin 1999; Margolis et al. 2009; Orlitzky et al. 2003). One survey of 159 articles found that "[t]he majority of studies show a positive relationship between [corporate social performance] and financial performance (63%); 15% of studies report a negative relationship, and 22% report a neutral or mixed relationship" (Peloza 2009:1521).

It is not clear whether a positive relationship between CSR or ESG and financial performance evidences the business case, and if so, by what mechanism. The generation of financial performance might occur through improving relationships with stakeholders such as customers (Brown & Dachin 1997) or employees (Turban & Greening 1997). Several other explanations exist and some connect to compliance, regulatory and litigation risk.

One alternative finding or interpretation of the empirical evidence is that CSR or ESG activity is a proxy for compliance or it creates goodwill that functions like insurance to protect the company if negative events occur such as an investigation or enforcement action (Armour et al. 2018; Godfrey et al. 2009; Husted 2005). One study found that participation in CSR activities aimed at a company's stakeholders or society can create value by tempering negative judgments and reducing sanctions (Godfrey et al. 2009). Companies with better CSR and ESG practices might better mitigate downside risks from environmental disasters, employee strikes or health and safety issues, product recalls and boycotts, or corporate criminal or civil liability (Koehler & Hespenheide 2013). A broader framing of this explanation is that CSR or ESG activity might help to quantify or mitigate compliance, regulatory, litigation, and other business risks (CFA Institute 2017). Monitoring and managing nonfinancial risk might also lower the cost of capital (Goss & Roberts 2011; Sharman & Fernando 2008).

Another possibility is that CSR or ESG indicators might instead be a proxy for management quality. A recent survey of portfolio managers and research analysts found that 41% reported using ESG issues in investment analysis and decisions for this reason (ibid.). One way the quality of management might be linked is that CSR might prevent short-sighted managerial decisionmaking or it could be a strategic move to strengthen market position, "placat[e] regulators and public opinion to avoid strict supervision in the future, or to attempt to raise rivals' costs by encouraging environmental, labour or safety regulations that will particularly handicap competitors" (Bénabou & Tirole 2009:9–10). For example, "[a] firm that is better at regulatory compliance and at anticipating legal and political exposure with respect to environmental and social factors may be better managed in general, making environmental and social factors a useful proxy for better management" (Schanzenbach & Sitkoff 2019:19). Another linkage might be that high-quality managers choose to work for companies with pro-social and environmental policies for their own reputational capital, self-image, or personal values (ibid.).

III. Corporate Governance and CSR and ESG Initiatives

Finally, CSR and ESG intersect with "compliance" in another meaning of the term – rather than focusing on legal obedience and related risks, a separate inquiry looks into what standards or metrics companies that claim to have CSR and ESG aims are trying to comply with or meet. The big picture is an evolving mix of internal governance mechanisms, private principles, and third party ratings and rankings—without a clear set of content or standardized disclosure. Thus, companies may independently determine their own particularized CSR or ESG aims, and there is a high degree of variability and lack of a reliable mechanism to determine compliance with the stated aims.

In broad terms, the approaches can be categorized as "self-regulation," referring to internal corporate governance mechanisms that are adopted on a voluntary basis, and "meta-regulation," referring to external measurements (Gill 2008). Both are complements to formal governmental regulation and companies may engage in these "voluntary" activities in response to a range of internal factors or external social pressures (Aguinis & Glavas 2012; Howard-Grenville et al. 2008; Kagan et al. 2003). Recent years have witnessed a growing number of approaches in both of these categories and increasingly vociferous calls for improved disclosure and standardization.

Corporate governance mechanisms of "self-regulation" include corporate codes of conduct, CSR board committees, business ethics units, and supply chain assurance (Gill 2018). Corporate codes of conduct vary widely in addressing corporate ethics and articulating the norms and standards that a corporation voluntarily adopts on a range of key issues such as human rights, labor, and the environment. Such codes gained prominence in the 1990s particularly with multinational corporations operating in developing countries, but have come under criticism as ineffective window dressing that may not actually improve corporate behavior unless accompanied with more significant organizational change (Gill 2018; Kaptein & Wempe 1998). This criticism is reflected in the variety of reasons that motivate corporations to adopt codes of conduct, including: "to prevent governmental intervention in the form of mandatory regulation…; to limit political opposition to the growing globalization of markets; as a response to pressures from consumer groups; and as a means to protect their reputation" (Rosen-Zvi 2011:537).

Although corporate codes of conduct are among the "softest" form of voluntary self-regulation and are typically expressed in abstract and non-binding language, in some instances they succeed in diffusing global standards (Toffel et al. 2015), and NGOs and advocacy groups have attempted to hold corporations to their stated commitments (Rosen-Zvi 2011:536, 538–540). Code-of-conduct audits and inspections in production and service settings can also improve operations (Alizamir et al. 2020). Other internal governance mechanisms such as CSR board committees and business ethics units are means of carrying out and monitoring the principles adopted in the corporate code of conduct throughout the organizational hierarchy. These complement compliance departments within corporations, which also function to bring broader social interests into the firm (Griffith 2016). Supply chain assurance extends the corporation's voluntarily adopted principles into its external contracts through private ordering, requiring suppliers to use international business norms and standards of human rights, labor protection, and social responsibility, or otherwise providing incentives to do so (Alizamir et al. 2020; Blair et al. 2008; Park & Berger-Walliser 2015).

External forms of "meta-regulation" arise from institutional investors, regulators, NGOs, and other groups that develop schemes that guide, measure, and monitor corporate conduct. This area of "soft law" and "private regulation" has become a veritable alphabet soup of acronyms as third-party standards, ratings, and rankings have multiplied (Hall & Huber 2019; Park & Berger-Walliser 2015). Some provide substantive principles for incorporating CSR or ESG into corporate operations or investment practice, whereas others provide standards and metrics for disclosures. Prominent examples of frameworks with substantive standards on topics such as social impact, human capital, and the environment include the UN Global Compact (UNGC), the Global Reporting Initiative (GRI) Standards, and the Organization for Economic Co-Operation and Development's (OECD) Guidelines for Multinational Enterprises.

In the United States, federal securities regulation requires public companies to disclose "material" risk-related information, and the SEC has recognized that material ESG risks such as related to climate change must be disclosed under standard reporting requirements (SEC Guidance 2010). To date, the SEC has not required general sustainability disclosure, however, and a significant amount of the data available comes from voluntary reports that a majority of U.S. public companies issue to describe their commitment to stakeholders and the environment (Fisch 2019; Harper Ho 2010). Uniform reporting and audit standards for this kind of "nonfinancial" reporting have not yet been widely adopted, and most disclosure regimes do not use standardized quantitative metrics (Harper Ho 2016). The Sustainability Accounting

Standards Board (SASB) has made significant progress in providing a baseline for reporting CSR and ESG data, but researchers find that companies report data in more than 20 different ways with considerable inconsistencies (Kotsantonis & Serafeim 2019). Scholars have called for mandatory disclosure and reform in the United States (Fisch 2019; Lipton 2019; Williams 1999), and several jurisdictions around the world have imposed or are considering mandatory "nonfinancial" or "sustainability" disclosures such as the 2014 European Union Directive on the Disclosure of Non-Financial and Diversity Information and the stakeholder disclosure provision of the U.K. Companies Act (Fisch 2019; Grewal et al. 2019; Harper Ho 2010).

On the investing front, a group of twenty leading institutional investors developed the United Nations' Principles for Responsible Investment (PRI), which promote institutional investor engagement with portfolio firms around ESG performance (Harper Ho 2010). Hundreds of institutional investors, representing trillions of dollars in assets under management, have signed onto the PRI (ibid.). In addition, a number of international corporate governance codes direct institutional investors to promote better governance and risk management through their influence over asset managers, such as the International Corporate Governance Network (ICGN) Global Governance Principles, the Organization for Economic Co-Operation and Development's (OECD) Principles of Corporate Governance, and stewardship codes in the United Kingdom, Canada, Australia, Japan, and the European Union (Harper Ho 2016).

Institutional investors, asset managers, and financial institutions increasingly use ESG third-party raters in assessing risk and managing their investments (Hall & Huber 2019). ESG rating agencies such as MSCI, Sustainalytics, RepRisk, and ISS are hobbled, however, in their efforts by non-standardized disclosures, and their varying methodologies produce conflicting ratings subject to biases (Doyle 2018). Scholars and commentators have therefore observed that “[w]hile rigorous and reliable ratings might constructively influence corporate behavior, the existing cacophony of self-appointed scorekeepers does little more than add to the confusion” (Porter & Kramer 2006). In turn, researchers have found that ESG investing is an “essentially unregulated market” and the use of factors relating to the environment, social issues, and governance is generally opaque (Brakman Reiser & Tucker 2019).

In sum, social responsibility initiatives are on the rise in the form of both internal governance mechanisms and “meta-regulation,” but the dizzying array of approaches and frameworks impedes a clear understanding of what it means for a company to comply with aims for CSR or ESG. Companies have flexibility to create their own structures for internal governance, their own channels for stakeholder engagement, their own selection of third-party guidelines or standards, and in many jurisdictions, their own level of disclosure. The lack of a singular, universal system is beneficial insofar as it allows for customized approaches to CSR and ESG rather than one-size-fits-all governance and regulation.

As corporate leaders and investors increasingly appreciate the importance of social responsibility and sustainability, however, the need for standardized, accurate, and audited information that provides transparency and allows for comparability becomes more pressing. Better information would in turn aid efforts to understand the relationship between CSR, ESG, and financial performance, as well as related topics such as compliance. New insights could further inform evolving norms and laws on issues of particular significance for workers, customers, communities, and the environment.

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