How the EU Sustainability Due Diligence Directive Could Reshape Corporate America

Finance Working Paper N° 817/2025
May 2025

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Abstract

One of the most important developments in corporate governance is the growing divide between the US and the EU on issues of corporate social responsibility. The starkest example of this divide comes from the new EU Directive on Corporate Sustainability Due Diligence (CS3D). The Directive holds large corporations legally accountable for how they protect numerous human rights and environmental issues, such as forced labor, collective bargaining, biodiversity, and pollution. In fact, companies are required to prevent and remediate these social and environmental harms not just in their own operations, but also in the operations of their subsidiaries and even their suppliers and distributors. Importantly, the CS3D directly applies also to American corporations that generate significant revenues in the European market. The stakes of understanding how the Directive will be implemented and enforced outside the EU therefore cannot be higher. This Article examines the question of the CS3D's applicability to US companies and makes three contributions. First, the Article delineates the core requirements of the CS3D, and its territorial outreach. The upshot is that most large American corporations are affected by the Directive. But the Directive does not mandate specific corporate conduct or expect companies to guarantee outcomes. Instead, the Directive requires each company to design a due diligence process that fits its specific circumstances. Such a regulatory regime runs the risk of turning into a tick-box exercise, without affecting real change in corporate behavior. This is where the second contribution of the Article comes in, examining whether directors and officers could face personal liability if their company fails to comply in earnest with the Directive's requirements. Here the Article spotlights the interplay between the revamped oversight duty doctrine in the US and the CS3D. The main point is that the CS3D significantly increases directors' exposure to failure-of-oversight claims. Finally, the Article explains how the unique combination of the EU ambitious regulation and the US robust private enforcement landscape could reshape the way that American corporations are conducting business across the globe.

Keywords: Corporate Law, Brussels Effect, Oversight Duties, Caremark, Corporate Governance, Director Liability, ESG, Net Zero Targets, Sustainability Due Diligence, International Law

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One of the most important developments in corporate governance is the growing divide between the United States and the EU on issues of corporate social responsibility. The starkest example of this divide comes from the new EU Directive on Corporate Sustainability Due Diligence (CS3D). The Directive holds large corporations legally accountable for how they address numerous human rights and environmental issues, such as forced labor, collective bargaining, biodiversity, and pollution. In fact, the CS3D requires companies to prevent and remediate these social and environmental harms not just in their own operations, but also in the operations of their subsidiaries and even their suppliers and distributors. Importantly, the CS3D directly applies also to American corporations that generate significant revenues in the European market. The stakes of understanding how the Directive will be implemented and enforced outside the EU therefore cannot be higher. This Article examines the question of the CS3D's applicability to U.S. companies and makes three contributions.

First, the Article delineates the core requirements of the CS3D, and its territorial reach. The upshot is that most large American corporations are affected by the Directive. But the Directive does not mandate specific corporate conduct or expect companies to guarantee outcomes. Instead, the Directive requires each company to design a due diligence process that fits its specific circumstances. Such a regulatory regime runs the risk of turning into a box-ticking exercise, without affecting real change in corporate behavior. This is where the second contribution of the Article comes in, examining whether directors and officers could face personal liability if their company fails to comply in earnest with the Directive's requirements. Here the Article spotlights the interplay between the revamped oversight duty doctrine in the United States and the CS3D. The main point is that the CS3D significantly increases directors' exposure to failure-of-oversight claims. Finally, the Article explains how the unique combination of the ambitious EU regulation and the robust U.S. private enforcement landscape could reshape the way that American corporations are conducting business across the globe.

HOW THE EU SUSTAINABILITY DUE DILIGENCE DIRECTIVE COULD RESHAPE CORPORATE AMERICA

Luca Enriques, Matteo Gatti, & Roy Shapira[*]

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INTRODUCTION

Large corporations have been facing increased societal demands calling on them to better protect society and the environment.[1] Until recently, these pressures were mostly moral ("do the right thing!") or market-based ("we will not do business with you if you do not do the right thing!"). As a result, corporate legal scholars have focused on the extent to which corporate managers *could* make decisions that serve the interests of other stakeholder groups beyond just shareholders.[2]And corporate practitioners have focused on whether businesses can do well by doing good—that is, enhance profitability and market value by adopting sustainable and socially responsible practices.[3]

Recently, however, the nature of these pressures began to change. In July 2024, the European Union (EU) passed the Corporate Sustainability Due Diligence Directive (hereinafter, "CS3D" or "the Directive"). This new legislation makes companies that fail to protect human rights and the environment punishable by law,[4] thus transforming social and environmental concerns from a "nice-to-have" into a "must."[5] The CS3D is the most ambitious piece of environment, social, governance ("ESG") legislation to date.[6] Until now, ESG regulatory interventions typically focused on *reporting* requirements.[7] The CS3D, by contrast, imposes substantial obligations and

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[1] *See* Leo E. Strine, Jr. et al., Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1886 (2021).
[2] *See* Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 75 (2005).
[3] *See generally* ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT (2020) (a book-length account of this win-win approach).
[4] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 2024 O.J. (L 2024/1760) (hereinafter "CS3D").
[5] *See, e.g.*, Jena Martin, *Business and Human Rights: What's the Board Got to Do with It?*, 2013 U. ILL. L. REV. 959, 962, 977 (2013) (describing the approach up until recently, where "the issue of business and human rights was largely subsumed under the general rubric of corporate social responsibility" and companies got "to pick and choose from a smorgasbord those issues with which they feel comfortable"); *EU Adopts Mandatory Rules on Corporate Sustainability Due Diligence That Will Apply to Many US Companies,* COOLEY (Apr. 24, 2024), https://www.cooley.com/news/insight/2024/2024-04-24-eu-adopts-mandatory-rules-on-corporate-sustainability-due-diligence-that-will-apply-to-many-us-companies (noting that the Directive reframes existing "soft law" nudges as mandatory requirements, and is therefore "a heavy lift" for all companies under it).
[6] The CS3D builds upon a couple of preexisting pieces of legislation in France and Germany, namely, the Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz), in Germany, and the Law on the Duty of Vigilance (Loi sur le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre), in France. The CS3D is decidedly more ambitious both in its scope and its requirements. *See, e.g.,* Claire Bright et al., *A Comparative Analysis between the Corporate Sustainability Due Diligence Directive and the French and German Legislation*, VERFASSUNGSBLOG ON MATTERS CONST. (May 30, 2024), https://verfassungsblog.de/a-comparative-analysis-between-the-corporate-sustainability-due-diligence-directive-and-the-french-and-german-legislation/.
[7] For a recent comprehensive analysis of different ESG reporting legislations see Virginia E. Harper Ho, Corporate Climate Governance (ECGI working paper No. 804, 2024), https://ssrn.com/abstract=4934244.

mandates specific operational changes.[8] Further, it applies to any corporation that does significant business within the EU, whether that corporation is from an EU member state or not.

Understanding the extent to which this new European directive applies to American businesses is therefore extremely relevant.[9] This Article examines this applicability question and makes the following three contributions.

First, the Article explains what this new regulatory development entails and to whom it applies. The CS3D mandates that large corporations identify, prevent, mitigate, and account for the adverse effects that they create on human rights and the environment.[10] "Adverse effects" are defined very broadly, with reference to numerous international conventions on collective bargaining, child labor, biodiversity, and marine pollution, to name but a few.[11] Further, corporations must engage in such broad sustainability due diligence not only within their own operations, but also with respect to the operations of their subsidiaries and even third-party actors with whom they do business, such as suppliers and distributors. Pertinently here, the CS3D explicitly applies beyond the EU: any corporation that generates significant revenues in Europe is subject to it.[12] Most large U.S. companies fall into that category[13] and have already received memos from large U.S. law firms alerting them to the corporate governance changes that they will need to undertake to comply with the CS3D.[14]

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[8] Stephan Schmid & Chris Thomale, *Private Enforcement in the EU Corporate Sustainability Due Diligence Directive – A Critical Comparative Law and Economic Analysis of the Final Compromise*, OXFORD BUS. L. BLOG (May 22, 2024), https://blogs.law.ox.ac.uk/oblb/blog-post/2024/05/private-enforcement-eu-corporate-sustainability-due-diligence-directive.

[9] *See, e.g.*, Jeffrey N. Gordon, *Unbundling Climate Change Risk from ESG*, CLS BLUE SKY BLOG (Jul. 26, 2023), https://clsbluesky.law.columbia.edu/2023/07/26/unbundling-climate-change-risk-from-esg/ ("Perhaps the most important current development in corporate governance is the growing divide between the United States and the European Union on core questions of fiduciary duty when it comes to ESG").

[10] *See infra* Subpart I.A.

[11] CS3D, *supra* note 4, Annex pt. I (9)-(16), at 54-55.

[12] *Id*. art. 2(2), at 26.

[13] The only way for corporations to avoid the Directive's requirements is by reducing their sales within the EU so as to stay below the applicable thresholds (*infra* Part I), which is a strategy that only companies that are very close to the threshold and predict no meaningful growth of their activities within the EU can find viable.

[14] *See, e.g.*, *EU Adopts Corporate Sustainability Due Diligence Directive: Directive Imposes Human Rights, Environmental and Climate Transition Plan Obligations on EU and Non-EU Companies*, SULLIVAN & CROMWELL LLP (Jun. 7, 2024), https://www.sullcrom.com/insights/memo/2024/June/EU-Adopts-Corporate-Sustainability-Due-Diligence-Directive; *Third Time's a Charm: EU Moves to Approve the Sustainability Due Diligence Directive*, JONES DAY (Jun. 3, 2024), https://www.jonesday.com/en/insights/2024/03/third-time-is-a-charm_eu-moves-to-approve-the-sustainability-due-diligence-directive; *Unprecedented ESG Due Diligence Obligations – EU Adopts Corporate Sustainability Due Diligence Directive*, SIDLEY (May 28, 2024), https://www.sidley.com/en/insights/newsupdates/2024/05/unprecedented-esg-due-diligence-obligations.

The CS3D is very ambitious in both depth and scope.[15] But the big question mark hovering over it is not what the Directive requires and to whom it applies on paper. The question is, rather, how the Directive will be enforced on the ground. After all, the CS3D does not mandate specific corporate conduct. Instead, it requires that companies put in place risk management policies and procedures to address actual or potential "adverse impacts" across a broad range of issues concerning human rights and the environment.[16] Legislation of this ilk runs the risk of turning into an exercise in box-ticking, namely, nudging corporations to adopt nice-sounding policies on paper without really changing their behavior on the ground.[17] One way to get large corporations to truly behave more sustainably is to secure buy-in from the corporations' top management.[18]

This is where the Article's second contribution comes in, examining how the CS3D will affect the fiduciary duties of directors of U.S. companies, and how the Directive may be enforced through private litigation in the United States. The oversight duty doctrine (often dubbed *Caremark* after Delaware's leading precedent[19]) delineates the conditions under which directors can be held personally liable for not taking their company's CS3D obligations seriously. In general, *Caremark* requires directors to (1) install a system that monitors information on central risks and reports back to them, and (2) respond when the system generates imminent risks ("red flags").[20] The bar for failure-of-oversight claims is high: plaintiffs must show that directors breached their duties in bad faith.[21] Indeed, until recently, there was virtually no chance that plaintiffs could sustain oversight claims regarding how companies' practices adversely affect human rights or the environment.[22]

But a combination of the new legislation in Europe and a revamped approach to oversight duties litigation in the United States may change this trend and insert human rights and environmental issues to corporate boards'

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[15] *See, e.g.*, Matthew T. Bodie, *Shareholders All the Way Down: EU Corporate Sustainability Reforms and the Structure of Corporate Governance*, 52 GA. J. INT'L & COMPAR. L. 559, 566 (2024) (calling the CS3D the most dramatic regulatory reform to date); Schmid & Thomale, *supra* note 8 (calling the Directive "the most ambitious ESG legislation hitherto promulgated").

[16] *See infra* Subpart I.A.

[17] *See* Alessio M. Pacces, Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis (ECGI working paper No. 691, 2023), https://ssrn.com/abstract=4391121 (noting that the "vague language leaves companies plenty of room to escape liability"); David Hess, *The Management and Oversight of Human Rights Due Diligence*, 58 AM. BUS. L. J. 751, 797 (2021) (noting the inherent risk of tick-box compliance in human rights due diligence).

[18] Hess*, id*. at 772.

[19] *In re* Caremark Intern Inc. Deriv. Litig, 698 A.2d 959 (Del. Ch. 1996) *adopted by* Stone v. Ritter, 911 A.2d 362, 365 (Del. 2006).

[20] *See infra* Subpart II.A.

[21] *Id*.

[22] *See* Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 778 (2022); Andrew W. Winden, *Caremark's Climate Failure*, 74 HASTINGS L.J. 1167, 1173 (2023) (lamenting that "*Caremark* has failed to encourage Delaware directors to be sufficiently attentive to one of the greatest risks of harm to their corporations in the twenty-first century").

agendas. The CS3D interacts with the oversight duty doctrine in several important ways. For one, the CS3D changes the nature of human rights and climate issues from largely discretionary issues to central legal risks. As a result, courts are more likely to fault directors not just for what they knew about. adverse human rights and environmental effects, but also for what they did not know(culpable ignorance).[23] Further, the CS3D effectively transfers the responsibility for human rights and climate issues from sustainability or social responsibility departments to compliance departments.[24] As a result, the Directive is likely to significantly increase the number of warnings about imminent risks ("red flags") that escalate to the board level.[25] And because the CS3D instructs each EU Member State to appoint supervisory agencies to monitor each company's compliance with the Directive,[26] the number and severity of warnings coming from outside the company are also likely to increase.

The upshot is that the *combination* of ambitious European regulation and robust U.S. (read Delaware) private litigation landscape may result in American directors and officers facing scrutiny over how involved they were in preventing or reducing adverse effects on human rights and the environment.

The Article's third contribution is in analyzing the unique dynamics of that combination. To start with, the CS3D–*Caremark* combination amplifies the "Brussels effect," namely, the ability of the EU to regulate corporate behavior across the globe.[27] To illustrate with the classic example of user privacy regulation: when the EU requires stricter privacy protections, large U.S. corporations do not have to change their entire product pipeline to comply, but they nevertheless often choose to do so, simply because they want to access the highly attractive European market and do not want to design one product for Europe and another for the rest of the world.[28] Until now, scholars have mostly focused on the Brussels effect as policing *product* standards, rather than as policing *production* standards.[29] Our analysis here shows that once CS3D risk management obligations are combined with the prospect of individual oversight liability (the *Caremark* part of the equation), the Brussels effect can also reshape production standards around the globe.

[23] *Infra* Section II.B.1.
[24] *See Infra* Subpart II.B.2.
[25] *Id*.
[26] CS3D, *supra* note 4, art. 24-25, at 44-46.
[27] ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY 324 (2023).
[28] ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 27 (2020).
[29] *Id*. at 30. To be more precise, the Brussels Effect literature did explore regulations regulatory activities such as testing cosmetics on animals or controlling data used to train large language models. Like the CS3D, these regulations do not require specific ends. Still, these regulations require specific means at the micro level. The CS3D, by contrast, requires specific processes at the macro level. In the regulatory literature parlance, this is the difference between means-based and process-based regulations. Cary Coglianese, *Management-Based Regulation: Implications for Public Policy*, *in* RISK AND REGULATORY POLICY: IMPROVING THE GOVERNANCE OF RISK 162 (Gregory Bounds and Nikolai Malyshev, eds., 2010).

Adding the prospect of *Caremark* litigation also reduces the chances that U.S. corporations engage in mere "cosmetic compliance" of the CS3D requirements. In addition, it may alter their incentives to object to ESG regulation in the United States itself. Whether these effects prove beneficial from a societal perspective is an open question that we cannot fully resolve at the time of this writing. Sufficient empirical evidence can only become available years after the Directive is fully implemented. What we can do is spotlight how this combination of ambitious regulation in the EU and robust private enforcement in the United States should make us rethink our priors in longstanding normative debates. For example, the CS3D–*Caremark* combination deters cosmetic compliance by U.S. corporations, whereas the CS3D alone may well prove insufficient to deter cosmetic compliance by European companies. This imbalance raises concerns that the CS3D could inadvertently place a heavier compliance burden on U.S. corporations operating in the EU.[30] And the effects of the CS3D–*Caremark* combination on U.S. corporations' behavior might even end up reshaping the distributive effects of transnational corporate law by inverting the direction of wealth transfers between the global south and the global north.

After making these three contributions regarding the potent CS3D–*Caremark* cocktail, we evaluate how three recent policy developments could end up altering its effects. Inside the EU, key actors such as Germany and France decried the mounting regulatory burden, while the EU Commission released an "Omnibus" proposal to streamline the Directive and dilute some of its bite. Outside the EU, the Trump administration denounced the Directive's territorial outreach, implying that the Directive is part of trade negotiations following President Trump's trade war. And in Delaware, the legislature passed a serious overhaul of corporate law, which limits shareholders' ability to inspect their companies' internal documents in order to investigate potential wrongdoing. While at the time of this writing it is too early to assess the impact of any of these developments, we provide a roadmap to understand what components of the CS3D–*Caremark* combination are more (or less) susceptible to change as a consequence of these developments.

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[30] As Subpart I.A explains, amendments to the original proposal have removed all the provisions that instituted director liability for breach of sustainability due diligence from the final version of the Directive. Permanent Representatives Committee I Note to Council15024/1/22 REV 1, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937: General Approach, at 10 (Nov. 30, 2022). Still, directors of large companies could face a liability risk if their company does not comply with the CS3D, albeit via the indirect channel of oversight duties. This means that European directors are less exposed to liability than their American counterparts, because in Europe the prospect of oversight duty litigation (or corporate law litigation more generally) is remote, while in the United States it is very realistic. *See infra* Subpart III.A. Recent developments on both sides of the Atlantic could level the enforcement playing field by making it harder to hold American directors accountable as well. See *infra* Subpart IV.A.2.

The rest of the Article proceeds in four parts. Part I provides the necessary background on the CS3D. Part II details how the CS3D affects the fiduciary obligations of American directors and officers, through the conduit of the oversight duty doctrine. Part III assesses the interactions between CS3D and *Caremark* and offers concrete lessons for practitioners and policymakers. Part IV examines recent efforts to water down the potent CS3D-*Caremark* cocktail, coming from three fronts: Inside the EU, where a proposal to dilute the Directive's obligations was issued in February 2025.[31] Outside the EU, the Trump administration has threatened to retaliate against the EU if it does not roll back the Directive's territorial outreach.[32] And in Delaware, a serious legislative overhaul of corporate law has limited shareholders' ability to inspect companies' internal documents in order to investigate potential wrongdoing.[33] A short Conclusion clarifies our original contributions by juxtaposing them with the extant literature.

I. BACKGROUND: THE CS3D AND ITS EXTRATERRITORIAL REACH

The CS3D is a particularly ambitious piece of ESG legislation.[34] It imposes extensive due diligence requirements, which apply to the operations of not just large EU and non-EU companies but also their subsidiaries and their suppliers and distributors worldwide.[35] Unlike other recent ESG legislation, the CS3D does not simply mandate more reporting: it requires companies to put in place policies and procedures that may well affect their own production processes and those of their global suppliers and distributors.[36] Given the Directive's uniqueness and breadth, it is essential for practitioners, policymakers, and scholars to understand what the Directive entails, and to whom it applies. Subpart A synthesizes the main requirements of the Directive. Subpart B examines the conditions under which the Directive applies to U.S. corporations.

A. CS3D: An Overview

The EU passed the CS3D in July 2024, with the goal of promoting "sustainable development and the sustainability transition of economies and societies."[37]

[31] *See infra* Subpart IV.A.1.
[32] *Id*.
[33] *See infra* Subpart IV.A.2.
[34] *See, e.g.*, Schmid & Thomale, *supra* note 8 (calling the Directive "the most ambitious ESG legislation hitherto promulgated").
[35] *See infra* note 70.
[36] *See infra* subpart I.A.
[37] CS3D, *supra* note 4, recital 16, at 3. The EU was drawing from a set of voluntary standards issued by the Organization for Economic Co-operation and Development. Org. for Econ. Coop. & Dev. [OECD], Due Diligence Guidance for Responsible Business Conduct (2018), https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

Like any other EU directive, the CS3D is officially addressed to Member States: it requires all members in the EU to transpose the Directive's provisions into their national laws.[38] Member States must enact the laws, regulations, and other administrative provisions implementing the Directive by July 2027.[39] The companies' obligations will then be phased in starting in July 2028.[40]

At its core, the Directive requires every large corporation operating in the EU market to conduct due diligence on how its operations affect human rights and the environment.[41] But with such an open-ended obligation, the devil is in the details. This Subpart synthesizes the key aspects of the Directive: to whom it applies, what exactly is the nature of the required due diligence, who will enforce it, and how it interacts with similar EU rules.

Scope. The Directive applies only to large corporations.[42] For EU corporations, "large" means having more than 1,000 employees and generating more than €450m in turnover.[43] For non-EU corporations, the only relevant threshold is turnover, namely, more than €450 million in annual revenues in the EU.[44] Non-EU corporations are also "in scope" if they have franchising or licensing agreements that generate more than €22.5 million in royalties and €80 million in turnover,[45] and so are parent companies of corporate groups that meet the size thresholds on a consolidated basis.[46]

A stark feature of the CS3D is that its due diligence obligations extend across the company's activity chain worldwide.[47] In other words, companies must engage in due diligence with respect not only to their own operations and their subsidiaries', but also to upstream business partners (those who are involved in producing the goods that the company sells), and even many downstream business partners (those who distribute, transport, and store the

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[38] A directive is an EU legislative act which, according to article 288 of the Treaty on the Functioning of the European Union, "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 47. National authorities must transpose directives, which means introducing domestic laws consistent with them, and must also ensure directives' enforcement. *Id*. art. 291(1). For the sake of simplicity, this Article will refer to the Directive as "imposing obligations on corporations" (instead of the cumbersome "requiring Member States to enact national laws that impose obligations on corporations").

[39] CS3D, *supra* note 4, art. 37(1), as amended by Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, 2025 O.J. (L 2025/794), art. 2, at 3. The original text of the Directive provided for an implementation deadline of July 2026. CS3D, *supra* note 4, art. 37(1), at 52.

[40] *Id.* The starting date for the phase-in was originally set at July 2027. CS3D, *supra* note 4, art. 37(1), at 53.

[41] *See infra* notes 43-45.

[42] *See infra* notes 43-44.

[43] *Id.* art. 2(5), at 26; art. 2(1)(a), at 25. "Turnover" means here a company's total revenues from sales before deducting expenses. Both thresholds are assessed as an average over the last two financial years.

[44] *Id.* art. 2(2)(a), at 26. The employee threshold does not apply to non-EU corporations.

[45] *Id.* art. 2(2)(c), at 26.

[46] *Id.* arts. 2(1)(b), 2(2)(b), at 25-26.

[47] *Id*. recital 9.

goods that the company sells).[48] Every in-scope company will thus have to identify, prevent, and minimize problematic labor conditions or toxic emissions that are taking place in any of its suppliers and distributors.[49] To be sure, the Directive entails some qualifiers. For example, companies are not required to remediate actual adverse impacts that were solely caused by a business partner.[50] Still, the rule remains ambitious, calling on large companies to effectively serve as human rights and environmental regulators.

Requirements. The CS3D due diligence obligations can be grouped into three categories: (1) *identify* and assess actual or potential "adverse impacts" on human rights or the environment; (2) *prevent* and mitigate these potential adverse impacts; (3) bring actual adverse impacts to an end and *minimize* their extent, and/or remediate actual adverse impacts.[51] "Adverse impacts" here includes various human rights violations and environmental harms,[52] which the Directive identifies by reference to numerous international instruments listed in its Annex.[53] For the reader's convenience, we enumerate these instruments in the Appendix. The important point for our purposes is that adverse impacts are defined very broadly. Adverse impacts on human rights include, for instance, child and compulsory labor, unequal treatment in employment, and hurdles to collective bargaining.[54] Examples of adverse impacts on the environment include harms to biodiversity, marine pollution, and destruction of natural heritage.[55]

The Directive goes to great lengths to detail what each stage of the due diligence process entails. When identifying and assessing adverse impacts, companies must map and prioritize those impacts that are most likely to occur and to be severe[56] and obtain relevant information from their business partners.[57] When preventing or minimizing impacts, companies must seek contractual assurances from their business partners,[58] make financial investments in facilities,[59] and modify purchasing practices when necessary.[60] And when prevention does not work, companies may be required to remediate.[61] The Directive further imposes additional specific process-related obligations, such as requirements to meaningfully engage with stakeholders,[62]

[48] *Id*. art. 3(1)(g).
[49] *Id.* art. 3(1)(g)(i), at 29.
[50] *Id.* art. 12(2), at 37. In addition, it allows for conditions under which parent companies can satisfy due diligence obligations on behalf of their subsidiaries (*id.* art. 6, at 32), and vice versa (*id.* art. 2(3), at 26).
[51] *Id.* art. 5, at 31-32.
[52] *Id.* art. 3(1)(d), at 29.
[53] *Id.* arts. 3(1)(b)-(c), at 28, and annex, at 54-58.
[54] *Id.* annex pt. I(9)-(16), at 54-55.
[55] *Id.* annex pt. I(9)-(16), at 54-55.
[56] *Id.* art. 8(2)(a)-(b), at 33; art. 8(4), at 33.
[57] *Id.*
[58] *Id.* arts. 10(2)(b), (4), at 34-35.
[59] *Id.* art. 10(2)(c), at 34.
[60] *Id.* art. 10(2)(d), at 34.
[61] *Id.* art. 12, at 37-38.
[62] *Id.* arts. 3(1)(n) & 13, at 30, 38.

to establish a notification mechanism and complaints procedure,[63] to conduct periodic compliance assessments,[64] and to publicly account for due diligence compliance.[65]

The nature of these due diligence obligations is *not* to guarantee that such adverse impacts will never occur or will always be stopped.[66] The obligations are rather to take "appropriate measures" to achieve certain objectives.[67] In other words, the Directive imposes "obligations of means"[68] rather than of results. The Directive leaves it to each company to determine what measures are "appropriate" under the circumstances.[69] However, it does require effectiveness, meaning that the measures that any single company chooses must be designed and implemented in ways that, from a risk-based perspective, can realistically achieve the objectives of sustainability due diligence.[70] We return to the thorny question of how one assesses such compliance in Parts II and III of this Article.

All corporations subject to the Directive must also adopt and implement a "climate change transition plan."[71] Each corporation shall devise and put into effect a plan to ensure that its business model is compatible "with the transition to a sustainable economy and with the limiting of global warming to 1,5ºC in line with the Paris Agreement and the objective of and achieving climate neutrality" by 2050.[72] The implementation obligation is one of "best efforts:" as with the due diligence obligation, the focus is on process rather than on outcomes.[73] But the requirement is hardly cosmetic: the Directive specifies what a viable transition plan must entail, including setting time-bound targets in five-year steps, detailing the key actions planned to reach the targets, and describing the roles of directors and officers in the transition plan.[74]

Enforcement. Ultimately, compliance with the CS3D will be measured and enforced according to the national laws that each Member State will implement based on the Directive.[75] The Directive requires each state to identify an administrative agency in charge of enforcement and to introduce effective and dissuasive administrative sanctions.[76] The highest pecuniary sanctions must be at least 5% of net worldwide turnover.[77] To illustrate just how

[63] *Id.* art. 14, at 38.
[64] *Id.* art. 15, at 40.
[65] *Id.* art. 16, at 40.
[66] *Id.* recital 19, at 4.
[67] *Id*. art. 3(1)(o), at 30.
[68] *Id*. Recital 19, at 4.
[69] *Id*. art. 3(o).
[70] *Id.* recital 20, at 4; art. 5, at 31 ("companies [must] conduct risk-based human rights and environmental due diligence").
[71] *Id.* art. 22, at 43.
[72] *Id.*
[73] *Id.* art. 1.
[74] *Id.* art. 22(1)(a).
[75] *See supra* note 38.
[76] *Id*. arts. 24-27, at 44-48.
[77] *Id*. arts. 27(4), at 47.

significant such sanctions can be, 5% of Eli Lilly's turnover is over $2bn.[78] Another potentially devastating sanction is the possibility of exclusion from public procurement: the Directive instructs European government to consider a company's compliance with the CS3D when deciding with whom to contract.[79] Beyond administrative sanctions, the CS3D provides for civil liability vis-à-vis harmed private parties if a company fails to comply with its due diligence obligations and does not prevent potential or remedy actual adverse impacts.[80]

Interactions with Similar EU Legislation. The CS3D is a part of "the European Green Deal,"[81] and as such it interacts with many other EU laws meant to promote more sustainable corporate behavior. A close cousin to the CS3D is the Corporate Sustainability Reporting Directive (CSRD).[82] The CSRD is intended to enhance the availability and comparability of sustainability information provided by corporations to investors and other stakeholders.[83] It mandates comprehensive disclosures relating to sustainability.[84] Relevant to our purposes is the requirement to report on sustainability due diligence,[85] which the CS3D has extended to all companies within its own scope.[86] Another close cousin is the so-called "Taxonomy Regulation," which deals with greenwashing by regulating corporate claims about activities being "environmentally sustainable."[87] There also exist many specific EU laws that govern pinpointed aspects of corporate sustainability,

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[78] Eli Lilly & Co., 2024 Annual Report 41 (2024), https://investor.lilly.com/static-files/ff06ed54-9f64-4b7f-8529-c0278d635eac.
[79] *Id*. art. 31.
[80] *Id*. art. 29.
[81] See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM (2019) 640 final (Dec. 11, 2019) (outlining the European Commission's plan for the EU's green transition).
[82] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, 2022 O.J. (L 322) 15.
[83] *Id*. recitals 9-10, at 18.
[84] *Id*.
[85] See Article 19a(2)(f), Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements, and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 OJ L 182 19, as amended by Directive (EU) 2022/2464, *supra* note 82, at 43.
[86] CS3D, *supra* note 4, art. 16.
[87] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, 2020 O.J. (L198) 13.

such as human trafficking,[88] deforestation,[89] batteries,[90] and conflict minerals.[91] The obligations in those specific laws supersede any conflicting obligations in the CS3D.[92] But, importantly here, Member States cannot impose sustainability due diligence requirements that diverge from those of the CS3D, unless they wish to establish more stringent requirements.[93] In other words, the CS3D represents a minimum below which Member States cannot go.[94]

B. *How the CS3D Reaches Beyond the EU*

The previous Subpart noted that the CS3D extends its reach to non-EU companies. This Subpart delves into the details of what and how U.S. companies are affected. The Directive affects three categories of U.S. companies.[95] The first category is *U.S. companies with significant EU business* (annual revenues higher than €450m).[96] The second category is *U.S. parents of one or more EU subsidiaries that generate significant revenues*.[97] In this case, the U.S. company itself is not selling products in Europe, but it controls other companies that do. Most U.S. multinational groups fall into this second category, in the sense that they operate in Europe predominantly through subsidiary companies incorporated in Europe.[98]

The third category comprises *U.S. companies in the supply chain of a company subject to the Directive*.[99] To illustrate, consider Sonos, the audio equipment company. Sonos does not generate revenues exceeding €450m in Europe, but it does supply products to giant European companies that are

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[88] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L101) 1; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 2009 O.J. (L 168) 24.

[89] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, 2024 O.J. (L 150) 206.

[90] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC, 2023 O.J. (L 191) 1.

[91] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, 2017 O.J. (L 130) 1.

[92] CS3D, *supra* note 4, art. 1(3), at 25.

[93] *Id.* art. 4(2), at 31.

[94] *Id.* art. 1(2), at 25.

[95] CS3D, *supra* note 4, art. 2(2), at 26.

[96] *Id*.

[97] *Id*.

[98] U.S. Bureau of Econ. Analysis, *Activities of U.S. Multinational Enterprises (MNEs): Data Tables*, Tab. 3, https://www.bea.gov/data/intl-trade-investment/activities-us-multinational-enterprises-mnes (last visited Dec. 19, 2024) (showing descriptive statistics of majority owned affiliates of U.S. parents around the world).

[99] CS3D, *supra* note 4, art. 8, 10-12, 14, 16, at 33-40, in connection with art. 3(1)(f) and (g), at 29.

subject to the Directive, such as Ikea and Spotify.[100] Companies such as Sonos are not *directly* subject to the Directive, but they are bound to be affected by it, if only because their in-scope business partners will pressure them to comply with the obligations arising from the relevant international conventions. For example, such companies will be asked to provide information on whether their workers can freely associate, and to provide contractual assurances about their investment in pollution-abatement measures.

While the first two categories of U.S. companies affected by the Directive include only large multinational corporations, this third category includes companies of all sizes. That is, even a small U.S. manufacturer of auto components that sells products to an EU-based carmaker will effectively have to heed the Directive's human rights and environmental requirements.

Together, these categories cover virtually all large U.S. corporations. Indeed, according to a report by the *Wall Street Journal*, the CS*R*D will apply to 3,100 U.S. companies.[101] While the CS3D's turnover threshold is higher than the CSRD's, the CS3D still comfortably applies to basically every large U.S. corporation that the reader can think of.[102]

Before we analyze how the Directive's outreach will affect these U.S. corporations' behavior on the ground, let us explain the legal nature of this outreach, and how it technically differs from extraterritoriality purely construed.

The CS3D is not extraterritorial in the strict legal sense, but rather operates through "firm-level territorial extension."[103] In other words, it is not the case that the Directive applies in the absence of *any* territorial connection,[104] as would be the case of a law regulating the conduct of EU citizens wherever

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[100] *See, e.g.*, *Sonos Reports Fourth Quarter and Fiscal 2024 Results*, SONOS (Nov. 13, 2024), https://investors.sonos.com/news-and-events/investor-news/latest-news/2024/Sonos-Reports-Fourth-Quarter-and-Fiscal-2024-Results/ (reporting less than €450ml in sales in Europe); Fitz Tepper, *Sonos and Ikea are collaborating on sound products for the home*, TECHCRUNCH (Dec. 6, 2017), https://techcrunch.com/2017/12/06/sonos-and-ikea-are-collaborating-on-sound-products-for-the-home/; *Spotify on Sonos*, SONOS, https://support.sonos.com/en-us/services/spotify.

[101] Dieter Holger, *At Least 10,000 Foreign Companies to Be Hit by European Rules*, WALL ST. J. (Apr. 5, 2023), https://www.wsj.com/articles/at-least-10-000-foreign-companies-to-be-hit-by-eu-sustainability-rules-307a1406. Member states should have implemented the CSRD by July 6, 2024. However, as of our writing, eight of them, including Germany, the Netherlands, and Spain, have not done so yet.

[102] According to the SOMO CSDDD Datahub, which tracks the companies *directly* subject to the CS3D requirements based on public information, 315 U.S. companies will fall within the scope of the Directive. However, the website itself notes that the list is incomplete, because "many companies do not specifically report on their turnover in the EU, making it hard to determine whether a non-EU corporate group would be covered by the CSDDD." (*CSDDD Datahub*, SOMO, https://www.somo.nl/csddd-datahub/).

[103] *See generally* Joanne Scott, *The Global Reach of EU Law, in* EU LAW BEYOND EU BORDERS: THE EXTRATERRITORIAL REACH OF EU LAW 21, 25-28 (Marise Cremona & Joanne Scott eds., 2019) (describing the various ways in which territorial extension can operate). Firm-level territorial extension is common in fields such as financial regulation. A classic example is the Directive governing Alternative Investment Fund Managers, which places extensive requirements on non-EU fund managers, covering areas such as capitalization, liquidity, remuneration, conflicts of interest, and risk management. Directive 2011/61 on Alternative Investment Fund Managers 2011 O.J. (L174) 1, Articles 8-20. *See* Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 104-105 (2014).

[104] Scott, *The Global Reach*, *supra* note 103, at 22.

they are.[105] In fact, the CS3D does require a territorial connection, namely, that the company in question generate significant revenue *in the EU.*[106] Still, because the CS3D requires companies that operate in the EU to change how they do business across their entire activity chain (say, by changing work conditions in a Southeast Asian factory), the CS3D does extend significantly beyond Europe. Why is that the case?

One justification for the CS3D territorial outreach is to protect the interests of European consumers.[107] The idea is that European consumers have other-regarding preferences, such as not wanting to purchase products that were made through labor exploitation or environmental degradation.[108] By mandating that all major sellers in the European market engage in sustainability due diligence, the Directive supposedly protects the interests of these socially minded consumers.

A second potential justification for the CS3D territorial outreach is to protect the interests of large European companies themselves. Without it, EU companies would compete globally against non-EU peers subject to less stringent rules: their non-EU competitors could benefit from lower operational costs by, say, exploiting workers and not investing in pollution abatement. By extending territorially, the Directive simply levels the playing field, or so the rationale goes.[109]

Relatedly, the CS3D's firm-level territorial extension can be justified as preventing "regulatory arbitrage": without the extension, corporations that operate in the European market would be able to evade the CS3D requirements by incorporating some subsidiaries outside the EU. Under this reading, the CS3D's outreach is an anti-avoidance device.[110]

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[105] *See* Scott, *Extraterritoriality*, *supra* note 103, at 89-90.
[106] *See supra* note 45.
[107] The Directive itself alludes to this rationale. See CS3D, *supra* note 4, recital 4, at 1 ("It is… in the interest of companies to protect human rights and the environment, *in particular given the rising concern of consumers and investors regarding these topics*") [emphasis added].
[108] *Cf.* Communication from the Commission to the European Parliament and the Council, New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery 5, COM (2020) 696 final (Nov. 13, 2020) ("Consumers across Europe are showing a growing interest in contributing personally to achieving climate neutrality, preserving natural resources and biodiversity, and reducing water, air and soil pollution") [emphasis omitted].
[109] *Cf.* Commission Staff Working Document, Impact Assessment Report, Part 2/2, SWD (2022) 42 final, at 1, 26 (Mar. 28, 2022) (accompanying COM (2022) 71 final) (reporting that most respondents in the consultation phase leading to the Directive proposal, "regardless of their category, highlighted the objective of levelling the playing field by covering all companies, regardless of size, sector or type of incorporation, including non-EU companies with operations in the EU"). This rationale is often mentioned in other areas of EU lawmaking. *See, e.g.*, Anu Bradford, *The Brussels Effect*, 107 NW. U.L. REV. 1, 16 (2013); Stephen Kim Park, *Untangling the Extraterritoriality of ESG Regulation*, 49 N.C.J. INT'L L. 399, 406 (2024). *Cf.* Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 U. ILL L. REV. 1227 (2019) (noting that the same rationale was behind anti-corruption legislation in the U.S.).
[110] As an indication of how regulatory arbitrage and avoidance efforts were top of mind for the Directive's drafters, see CS3D, *supra* note 1, art. 36(2)(b), at 52 (instituting periodic reviews to assess the Directive's implementation and prevent its circumvention).

Finally, the rationale that the CS3D itself lays out is the EU desire to promote global goals of environmental and social sustainability.[111] If climate change is a global phenomenon, and fighting climate change requires concerted efforts on the part of all large corporations across the globe, limiting climate change due diligence requirements only to corporations incorporated in the EU makes little sense.[112] Under this reading, the EU uses its economic and political power to achieve goals neglected by other countries (because these countries suffer from collective action problems or from contrasting political preferences).[113] In other words, the CS3D is an evident example of the EU assuming the role of a global standard setter.[114]

For our purposes, we need not determine which of these —non-mutually exclusive—rationales is more convincing or played a bigger role in the legislation process, as our focus is on how the Directive will shape the behavior of U.S. corporations on the ground.[115] From that perspective, the next necessary step is to understand how the de jure and de facto extraterritorial effects of the CS3D differ from those of other prominent EU laws. International legal scholars have long recognized the "Brussels effect," which recognizes the ability of the EU to unilaterally regulate the behavior of non-European corporations.[116] The Brussels effect largely stems from the size and attractiveness of the European consumer market.[117] As multinational corporations cannot afford to ignore the EU market, they have little choice but to comply with EU legal requirements.[118] Once these corporations adapt their product to fit, say, the European user privacy requirements,[119] they often opt to sell the same adapted product worldwide, instead of offering one version of the product in Europe and another elsewhere.[120]

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[111] For more on such dynamics in international law *see generally* Cedric Ryngaert, *Cosmopolitan Jurisdiction and the National Interest*, *in* THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW 161 (Stephen Allen et al., eds., 2019).
[112] *Id.*
[113] *Id.*
[114] Bradford, *supra* note 109, at 35 (describing the EU as self-perceived "benevolent hegemon"). Indeed, this rationale was the focus of American criticisms against the CS3D. For example, several U.S. lawmakers have voiced concerns about the CS3D's effectively subjecting American companies to international conventions that the United States never ratified. *See infra* Subpart IV.A and the Appendix.
[115] To be sure, understanding the various rationales and their limitations will prove useful as a backdrop for the discussion of policy implications. See *infra* Part III.
[116] *See* Bradford, *supra* note 109 (coining the term); BRADFORD, *supra* note 102. Professor Bradford in turn drew from Professor David Vogel's theorization of a similar phenomenon known as the "California effect," whereby thanks to its market size and voter preferences California has been effectively setting certain regulatory standards across the United States on issues such as consumer and environmental law. *See* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995).
[117] BRADFORD, *supra* note 102, at 27.
[118] Bradford, *supra* note 109.
[119] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), 2016 O.J. (L 119).
[120] *See generally* BRADFORD, *supra* note 102.

The CS3D differs from the classic examples of the Brussels effect in two important ways. First, the Brussels effect operates through market mechanisms: companies can opt not to alter the way that they do business outside the EU.[121] The CS3D obligations, by contrast, have a truly global reach: companies are legally required to set up human rights and environmental due diligence processes across their entire global operations.[122] Second, the CS3D does not mandate specific behaviors or specific means by those who want to access the European market. Instead, it mandates processes, namely, that every corporation take measures that are appropriate given the specificities of that corporation's operations.[123] The effective contents of such obligations will often be determined only ex post, in enforcement actions clarifying what should have been done differently.

The upshot is straightforward: to understand how the CS3D could change the way that U.S. corporations do business, one needs to examine how the Directive would be enforced on the ground, both in Europe and in the U.S. This is where we turn our attention next.

II. How the CS3D Will Affect Fiduciary Duties

The CS3D adopts a risk-based approach: it requires companies to map relevant human rights and environmental risks, prioritize them, and prepare a plan to mitigate them. The corporate organ in charge of oversight of risks is the board of directors. The CS3D is therefore likely to achieve its purported objectives only to the extent that corporate boards take it seriously and ensure that others in their corporations do so too. From a legal perspective, the interesting question is: under what conditions will directors be liable for failing to take CS3D seriously? To answer this question, Subpart A delineates the contours of directors' oversight duties. Subpart B then examines how the oversight duty doctrine is likely to play out in CS3D-related claims.

A. Oversight Duties: A Primer

Caremark instituted a proactive role for directors in compliance.[124] To meet their oversight duties, directors cannot sit idle and wait for someone in their company to flag problems to them.[125] Instead, directors must at a

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[121] *Id*. at 2. To be sure, in some instances, foreign businesses have *de facto* no choice but to follow European product standards for their entire production, due to technical or economic "non-divisibility." *Id*. at 142-44 (providing examples of technical or economic non-divisibility in digital markets), 182-84 (OGM rules and other food safety rules hardly allow for "divisibility within food and agricultural production"). Even in these cases, however, businesses could still divide production into an EU and a non-EU production line.
[122] *See infra* discussion accompanying note 45.
[123] For the distinction between means-based and process-based regulations, see Coglianese, *supra* note 29, at 162.
[124] Caremark, 698 A.2d 959, *adopted by* Stone, 911 A.2d 362, 365.
[125] *Id*.

minimum (1) implement a system that collects information about potential problems and reports back to them, and (2) address warnings that said system generates.[126] These two requirements are often dubbed "prong one" and "prong two," or "information system" and "red flag" claims, respectively.[127] A related third requirement is that directors cannot proactively affirm a business plan that is predicated on profiting from violating the law.[128] This requirement is often referred to as a "business plan" (or *Massey*) claim.[129]

Until recently, practitioners and scholars viewed the oversight duty doctrine as largely irrelevant.[130] A combination of the procedural stance and the standard of review in failure-of-oversight claims presented a virtually insuperable pleading hurdle for plaintiffs.[131] To survive the "demand" requirement in such cases,[132] plaintiffs must provide indications that directors abdicated their duties *in bad faith*.[133] Yet it is extremely hard for outside shareholders to show already at the pleading stage (before discovery) what directors knew, when they knew it, and what they did or did not do to stop the compliance failure in question. As a result, *Caremark* claims basically amounted to a parade of early dismissals and were widely perceived as a "toothless tiger."[134]

This state of affairs changed following the 2019 *Marchand* decision.[135] Blue Bell, a leading ice-cream manufacturer, suffered a listeria outbreak in one of its product lines, causing three deaths, massive recalls, and attendant financial, legal, and reputational costs to the company.[136] Delaware's Court of Chancery routinely dismissed the shareholders' failure-of-oversight claim, reasoning that they were not able to locate evidence linking the directors to the corporate trauma (no bad faith).[137] Yet for Delaware's Supreme Court, the fact

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[126] *Id*.
[127] McDonald's I, 289 A.3d 343, 359-60.
[128] *In re* Massey Energy Co. Deriv. and Class Action Litig., 2011 Del. Ch. LEXIS 83 (Del. Ch. May 31, 2011).
[129] Roy Shapira, *Conceptualizing* Caremark, IND. L.J. (forthcoming), https://ssrn.com/abstract=4778827, manuscript at 5.
[130] *See, e.g.*, Mercer Bullard, Caremark*'s Irrelevance*, 10 BERKELEY BUS. L.J. 15 (2013) (explaining why the doctrine is supposedly irrelevant).
[131] *See generally* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013 (2019) (providing a comprehensive overview of *Caremark* claims up until 2019).
[132] Shareholder derivative litigation displaces the board's usual authority to assert its company's legal claims. The courts will allow such displacement only if shareholders can show that they made "a demand" on the board to pursue the company's purported claims or show that making such a demand would have been futile. Del. Ch. Ct. R. 23.1; *see generally* United Food & Com. Workers Union v. Zuckerberg, 250 A.3d 862 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021). The practical way to show demand futility in oversight duty cases is to link the majority of directors to the trauma that the corporation suffered (showing that they may be held liable themselves, and so cannot be trusted to decide how to handle the derivative claims).
[133] Stone, 911 A.2d at 370.
[134] *See, e.g.*, Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 216 (2010).
[135] Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).
[136] *Id*. at 812-813.
[137] Pollman, *supra* note 131.

that there was no discussion of potential listeria issues at the board level served in itself as an indication that directors were breaching their oversight duties.[138] If you are a director of a company that only sells ice cream and you do not allocate time and responsibilities to discussing potential food safety issues, you are probably not trying in good faith to oversee the company's operations.[139]

Marchand opened the door to many other successful *Caremark* claims.[140] Within a couple of years, oversight duties shifted from being irrelevant to being super-relevant.[141] Virtually every major corporate debacle these days is followed by a derivative lawsuit alleging that directors breached their oversight duty by not doing enough to prevent the debacle.[142]

The immediate cause for the newfound relevance of the doctrine is twofold.[143] First, courts have more willingly scrutinized to directors' compliance efforts.[144] Following *Marchand*, when a compliance failure involves a core risk to the company, courts may treat the absence of proof that the board discussed the issue as a pleading-stage indication that the board breached its duties.[145] Second, courts have more willingly granted shareholders access to internal company documents to investigate potential failure-of-oversight claims.[146] Shareholders have long had a qualified right to inspect their company's books and records under DGCL §220.[147] But recent decisions have liberalized the standards for receiving such access.[148] Courts have more frequently ordered disclosure of internal documents,[149] and more frequently allowed inspection of a broader scope of documents (not just formal board materials, but also informal electronic communications).[150] As a result,

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[138] *Id.* at 821.
[139] *Id.* at 824.
[140] *See, e.g.*, *In re* Clovis Oncology, Inc. Derivative Litig., 2019 WL 4850188 (Del. Ch. Oct. 1, 2019); Hughes v. Hu, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020); *In re* Boeing Co. Deriv. Litig., 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).
[141] *See, e.g.*, Ann Lipton, *Possibly the Easiest Theory in Corporation Law*, BUS. L. PROF. BLOG https://lawprofessors.typepad.com/business_law/2023/05/the-easiest-theory-in-corporation-law.html (the title inverts the well-cited, but arguably outdated, notion that *Caremark* is "the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment" (Caremark, 698 A.2d 959, 967)).
[142] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 2.
[143] Roy Shapira, *Max Oversight Duties: How* Boeing *Signifies a Shift in Corporate Law*, 48 J. CORP. L. 119, 121 (2022).
[144] *Id.*
[145] Marchand, 212 A.3d 805, 821.
[146] Shapira, Max Oversight Duties, *supra* note 143, at 121.
[147] DEL. CODE ANN. tit. 8, § 220 (2021).
[148] Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1952 (2021); Geeyoung Min & Alexander M. Krischik, *Realigning Stockholder Inspection Rights*, 27 STAN. J. L. BUS. FIN. 225, 233 (2022).
[149] *See, e.g.*, AmerisourceBergen Corp. v. Lebanon Cnty. Emps' Fund, 243 A.3d 417, 427 (Del. 2020) (clarifying that to demonstrate a "proper purpose" for inspection, shareholders do not need to show indications of an actionable claim against the directors).
[150] *See, e.g.*, *In re* Facebook, Inc. Section 220 Litig., 2019 WL 2320842, at *18 n.185 (Del. Ch. May 30, 2019) (ordering Facebook's top executives and directors to produce not just formal board materials but also private emails).

shareholders have been enjoying much better prefiling discovery powers, which they can utilize to plead with particularity facts about how the board never even discussed a critical compliance issue, or how they knew about critical problems but chose to ignore them.[151]

Yet even in its revamped mode, the oversight duty doctrine still represents a high bar for shareholder plaintiffs to clear. The courts still employ a largely deferential mode of review.[152] As a result, CS3D-related claims (like all failure-of-oversight claims) are likely to succeed only in a small subset of cases. The next Subpart delineates the specific conditions that could give rise to successful CS3D-related claims.

B. *How the CS3D Is Likely to Affect Oversight Duties*

Corporate practitioners usually refer to "due diligence" in a different context, namely, that of preparing for a major one-time transaction.[153] The board's role in preparing for mergers and acquisitions is simple: ensure that management follows all the protocols of conducting a thorough examination of the company that is about to be acquired.[154] The legal standard for evaluating directors' conduct in that regard is well known and easy to administer, namely, the business judgment rule.[155] As long as directors are informed and not conflicted, they are immunized from liability.[156] The CS3D, by contrast, uses "due diligence" to denote a continuous, dynamic process that becomes part and parcel of how the company operates. The board's role in the latter type of due diligence is much less obvious. There is no script to follow, and it is not clear what and how much information directors need to have at each point in time.

This Subpart synthesizes insights from the recent surge of oversight-duty cases to provide guidance on what can be expected of directors' oversight of the CS3D, and under what (narrow) conditions failure-of-oversight claims could prove successful. The Subpart puts special emphasis on the specific types of risks that the CS3D implicates (namely, human rights and environmental ones), which are very different from the types of risks one normally sees in *Caremark* cases.

Subpart 1 deals with information systems claims, which hinge on the question of whether human rights and environmental risks can count as central

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[151] In March 2025, the Delaware legislature amended section 220 in ways that may reverse this liberalization trend. We elaborate on this trend and what it means for oversight duty litigation *infra* in Subpart IV.A.2.
[152] *See generally* Jennifer Arlen, *Evolution of Director Oversight Duties and Liability under* Caremark*: Using Enhanced Information-Acquisition Duties in the Public Interest*, *in* RESEARCH HANDBOOK ON CORPORATE LIABILITY 194 (Martin Petrin & Christian A. Witting eds., 2023).
[153] Martin, *supra* note 5, at 974.
[154] *Id*.
[155] *Id*.
[156] *See generally* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004) (explaining how the business judgment rule effectively immunizes directors from liability).

to a given company's operations. Subpart 2 examines red flag claims, where the main question is whether the board received warnings that were imminent and actionable enough. Subpart 3 analyzes how business plan claims may arise from the Directive's "climate transition plan" requirement. Subpart 4 explains how the CS3D could also lead to a resurgence in securities fraud litigation in federal courts.

1. Information-Systems Claims

The original *Caremark* decision instructed directors to put in place a system that monitors misconduct and reports back to them.[157] Back then (1996), the compliance industry was still nascent and so *Caremark*'s credo was considered innovative.[158] These days, by contrast, every U.S. company that is subject to CS3D (namely, large multinational corporations) already boasts an elaborate compliance program.[159] The question now is therefore not whether information systems exist, but rather whether information systems are effective.[160]

When probing the effectiveness of compliance, courts remain largely deferential to directors' decisions on how to design information systems, and what types of information need to flow up to the board.[161] Courts do not expect directors of large corporations to regularly oversee every risk.[162] After all, large corporations face numerous risks, and directors' time and attention are limited.[163] At the same time, courts insist that certain compliance risks are too important to delegate away.[164] When the compliance risk is central to the company, courts may treat a lack of evidence that directors knew about problems as evidence that directors were breaching their duties.[165]

The pertinent question here is therefore whether CS3D-related risks can be considered central to a given company's operations. The way to approach this question is *not* by making general claims ("in general, human rights and environmental impacts can/cannot be central to the company's core mission"). Instead, we need to focus on the cross-sectional variation, namely, the

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[157] Caremark, 911 A.2d, 959, 969.
[158] *See, e.g.*, Claire A. Hill & Brett McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1795 (2007).
[159] Todd Haugh, Caremark*'s Behavioral Legacy*, 90 TEMP. L. REV. 611, 621 (2018) (noting that these days virtually every large company boasts an elaborate compliance program).
[160] Hamrock, 2022 Del. Ch. LEXIS 159, at *29 ("this court must look beyond the mere existence of a system to some indicia of effectiveness").
[161] Walmart I, 294 A. 3d 65, 86.
[162] *Id.*
[163] *Id.*
[164] *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 679 (*McDonald's II*) (noting that "outside of central compliance risks . . . a plaintiff will have difficulty rebutting the business judgment rule where officers or directors have made a good faith decision regarding the level of monitoring resources, if any, to assign to a risk").
[165] *Id.*

conditions under which CS3D compliance becomes critical for some companies but not for others.[166] Combining what we know from American caselaw with what we know about the Directive's features, we offer three types of circumstances where CS3D-related risks are likely to count as central to a U.S. corporation.

First, in some cases, the centrality of CS3D risks is self-evident. Such is the case, for example, with companies that supply products or services to European *governments*. One of the sanctions in the CS3D arsenal is exclusion from public procurement.[167] As a result, companies whose business model is predicated on procurement contracts cannot afford to fail CS3D oversight. Directors of these companies who do not put CS3D oversight squarely on the board's agenda may expose their company to significant risks.

Second, in other cases, courts are able to infer that CS3D risks are central based on the company's own disclosures. For example, if a company revises its enterprise risk management system to identify human rights and environmental due diligence as central,[168] courts may infer that the issue is central to that company and may be more willing to scrutinize its directors for not doing enough to oversee it.[169] To illustrate, consider the *McDonald's* case, which revolved around failure-of-oversight claims in the context of rampant sexual misconduct.[170] The *McDonald's* decision opens by highlighting that the fast-food giant prides itself on being "America's best first job," that 55% of entry-level workers are women, and that the company's code of conduct stresses the need to cultivate "respectful workplaces."[171] Against this backdrop, the decision concludes, "the court does not have to infer that sexual harassment and misconduct constituted a mission critical risk. The company said it."[172]

Finally, there are also likely to be cases where even when the centrality of the risks is not self-evident or self-disclosed, the legal and reputational ramifications of human rights or environmental degradation debacles are too significant for the board not to regularly and proactively monitor such risks. Consider, for example, the Customs and Border Protection's increased willingness to ban products made with forced labor.[173] If a company is subjected to such bans (coupled with bad press) due to forced-labor violations

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[166] *Cf.* William J. Moon, *The Brussels Effect and the Extraterritoriality of Delaware Corporate Law*, 35 EUR. BUS. L. REV. 367, 380 (2024) (conducting a similar analysis but focusing on the relevance of EU operations to "the financial viability of a Delaware corporation").
[167] CS3D, *supra* note 4, art. 31.
[168] As the Directive implores in-scope companies to do. *Id*. art. 5(a); recital 38.
[169] Walmart I, 294 A.3d 65, 86.
[170] McDonald's II, 291 A.3d 652.
[171] *Id*. at 664.
[172] *Id*. at 681.
[173] Hess, *supra* note 17, at 793.

in its supply chain, its *peers* should perhaps realize that compliance with the CS3D is critical for their own operations.[174]

2. Red Flag Claims

Since all large U.S. corporations boast elaborate compliance information systems these days, failure-of-oversight claims tend to focus more on the red flag category. That is, instead of questioning whether the board established a system that collects information on risks, plaintiffs typically question whether directors monitored and reacted to warning signs that the system generated. To sustain such red flag claims, plaintiffs must show that the warning signs were clear and obvious, and that directors deliberately ignored those signs.[175]

The initial challenge in red flag claims is therefore how to distinguish between types of warnings. Directors constantly receive new information alerting them to potential risks. It would be impracticable to treat all such reports as putting directors on notice for *Caremark* purposes. This is where the "red flag" metaphor comes in handy: courts limit the scope of oversight liability only to instances where the warning signs were clear and obvious in real time. A mere yellow flag is not enough; the warning must be code red.[176] And a small "sign" is not enough either; the warning must be waved visibly like a "flag" in directors' faces.[177]

In other words, to constitute red flags, warnings must be both actionable and visible. The main criterion for determining whether past warnings were actionable is the extent to which they are connected to the current trauma.[178] General abstract warnings do not count as red flags; only *specific* warnings do.[179] For example, if a board receives a briefing about cybersecurity concerns in the abstract, the courts may not view it as a warning of a concrete, imminent attack on the specific company in question, and therefore would not count the general briefing as a red flag for oversight liability purposes.[180] As for determining whether past warnings were visible to the directors, here the courts

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[174] *Cf.* Kishanthi Parella, *The Human Rights Obligations of Corporate Directors*, UC IRVINE L. REV. (forthcoming), manuscript at 3-5 (describing recent litigation against Jacobs Solutions over the 6,000 migrant workers who died during preparations for the 2022 FIFA World Cup in Qatar, and emphasizing just how much human rights supply chain violations can lead to attendant financial and reputational fallouts to the company and its decisionmakers).
[175] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 471.
[176] Reiter v. Fairbank, 2016 WL 6081823, at *39 (Del. Ch. Oct. 18, 2016).
[177] Wood v. Baum, 953 A.2d 136, 143 (Del. 2008) (noting that red flags "are only useful when they are either waved in one's face or displayed so that they are visible to the careful observer").
[178] Hamrock, 2022 Del. Ch. LEXIS 159, at *40 ("For a red-flag theory to work, the red flag must be sufficiently connected to the corporate trauma at issue to elevate the board's inaction in the face of the red flag to the level of bad faith").
[179] Hamrock, *id*. at *62.
[180] Bingle, 2022 Del. Ch. LEXIS 223, at *28.

focus on several indicators, such as how pervasive the misconduct was, and what the company's own disclosures said.[181]

When applying these general guidelines to the specific human rights and environmental risks that the CS3D implicates, one should keep in mind three aspects of the EU regulatory regime.

First and most basically, the CS3D shifts human rights and environmental degradation concerns from voluntary "nice-to-have" territory to mandatory "hard law" territory.[182] As a result, responsibility for human rights and environmental degradation issues are likely to move within the corporation from sustainability departments to compliance departments.[183] And because compliance officers enjoy open lines of communications to the board these days, the internal shift in responsibilities means that human rights and environmental risks will start featuring more prominently on boards' agendas.[184] These dynamics, in turn, could make the evidentiary record in subsequent *Caremark* litigation more likely to show in retrospect that directors received warnings about problematic human rights and environmental effects.

The CS3D is therefore likely to increase the number and severity of warnings about human rights and environmental risks that the company itself generates. In fact, the CS3D is also likely to increase the number and severity of warnings generated *outside* of the company. This is the second aspect of the EU regulation worth noticing: the Directive mandates that each Member State appoint a supervisory agency to police the application of the Directive.[185] Over time, these state agencies are bound to generate occasional alerts to companies whose impact on human rights and the environment fall below expectations. The Directive also instructs national courts in civil liability cases to consider ordering discovery to facilitate an investigation of the company's conduct that led to adverse impacts.[186] Taken together, these channels are likely to generate continuous alerts about things that are going wrong in the company's operations and its supply chain.

The relevant question from an oversight duties perspective is when such alerts will constitute an actionable and visible red flag. One can argue that a single warning about some actor in the company's value chain not respecting labor conditions or not abating toxic emissions is unlikely to constitute a red flag. But this would be misconstruing how courts evaluate red flags.

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[181] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 497-99.
[182] See *supra* Subpart I.A, and especially note 37.
[183] CS3D, *supra* note 4, art. 5(a) (calling for the integration of human rights and environmental issues into the company's risk management systems);Hess, *supra* note 17, at 759.
[184] *See* Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2208 (2019) (explaining that the rise of the compliance function means that compliance officers now report directly and frequently to the board, which in turn incentivizes better board oversight).
[185] CS3D, *supra* note 4, art. 24.
[186] *Id*. art. 29(3)(e), recital 83.

Instead of assessing each warning in a vacuum, courts consider the totality of warnings over time.[187] In other words, the courts apply the *aggregation principle*: the quantity of past warnings can transform into quality.[188] Single warnings about actors in the company's value chain adversely affecting human rights or the environment may not count as a red flag *per se*. But the courts may look at a multitude of small yellow flags on human rights and environmental risks and treat them as a big red flag once the number of warnings crosses a certain threshold.

Finally, the CS3D is also likely to increase the willingness of courts to infer that warnings were visible to directors. For one, the CS3D should not be viewed in isolation, but rather as a companion to the CSRD, which requires the board to provide a statement certifying the company's sustainability report.[189] This is highly relevant for our purposes, because courts can impute knowledge to directors by looking at the company's disclosures. In *Chou*, for example, the fact that the company's 10-K disclosure recognized a DOJ subpoena served as an indication that the board knew about the underlying problem.[190] The court reasoned that because directors signed off on 10-K disclosures, it could be assumed that they were aware of warning signs appearing in such disclosures.[191] The same reasoning applies to EU legislation: if a board signs off on a statement about ongoing human rights and environmental problems, directors will not be able to play the "we didn't know" card in subsequent *Caremark* litigation.

All these facets of the EU regulatory regime are likely to significantly ramp up the number and severity of warnings about human rights and environmental degradation that boards receive. Still, even when plaintiffs succeed in showing that red flags were waved in directors' faces, they also need to show that directors deliberately ignored those flags. The fact that directors were warned about a problem before a corporate trauma happened does not mean that they did not try in good faith to address the problem. The question of what responses are adequate is highly relevant in the CS3D context. After all, the due diligence requirements of the Directive entail not just identifying and assessing risks, but also reacting to risks, namely, taking preventative and mitigative measures.[192]

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[187] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 498.
[188] Collis II, No. 2021-1118-JTL, 2022 WL 17841215, at *1-2 (Del. Ch. Dec. 22, 2022), The concept of aggregation—whereby many small events can cross a threshold and turn into a big event—is familiar in other areas of law. *See generally* Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2 (2012).
[189] *See also* Timo Kaisanlahti, *How the U.S. Oversight Doctrine Gained a Toehold in Europe*, CLS BLUE SKY BLOG (Sep. 5, 2024), https://clsbluesky.law.columbia.edu/2024/09/05/how-the-u-s-oversight-doctrine-gained-a-toehold-in-europe/.
[190] Chou, 2020 WL 5028065, at *24.
[191] *Id*.
[192] CS3D, *supra* note 4, art. 7.

Based on the evolving caselaw, we can glean two types of scenarios where courts are likely to hold that the board's response to CS3D-related risks was so tepid that it indicates bad faith. The first type of scenario is when the evidentiary record shows zero follow-up. To illustrate, in *Chou* directors hired a law firm to investigate potential violations of drug repackaging regulations, but the minutes of the board and its audit committee in subsequent years did not contain a single reference to what that law firm found.[193] Applied to CS3D-related claims, if a Member State regulator notifies the company of repeated human rights infractions in its supply chain, yet the company fails to check with its contractual partners what the problem is and how it can be mitigated, courts would probably find it to be a bad faith (non)response to a red flag.

Most cases are bound to be less straightforward, though. That is, in most cases the board will respond in some way, and the courts will have to assess whether the response was genuine or merely cosmetic.[194] Here the recent opioid cases provide a blueprint for how courts look beyond nice-sounding policies and assess whether the corporation genuinely tried to mend its ways. In *AmerisourceBergen*, the court reprimanded directors for responding to warnings by adopting superficial measures while saving potent recovery measures as a bargaining chip for a future settlement with regulators (a settlement currency to obtain a global release).[195] And *Walmart* called out directors for establishing nice-sounding policies while not allocating enough resources for successful implementation of said policies.[196] In other words, the courts were willing to fault boards that redesigned written policies and programs while not redesigning the economic incentives or adequately staffing compliance. The application to CS3D is straightforward: we can envision a case where the defendants point to newly minted policies and positions that they created to supposedly comply with the CS3D, yet the court looks past these policies and admonishes the defendants for not changing the renumeration system that de facto rewards those who cut costs by exploiting labor and degrading the environment.

3. Business Plan (*Massey*) Claims

The third variant of oversight duty claims arises when directors knowingly approve acts of noncompliance. Even if the directors' decision is informed and based on the belief that skirting regulations will net profits to the company (after factoring the expected penalty), such a decision violates the

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193 Chou, 2020 WL 5028065, at *10.
194 Richardson v. Clark, 2020 WL 7861335, at *11 (Del. Ch. Dec. 31, 2020).
195 Collis II, 2022 Del. Ch. LEXIS 358, at *49.
196 Walmart II, 2003 Del. Ch. LEXIS 92, at *97-98.

directors' duty of loyalty.[197] The doctrinal hook for this business plan (or *Massey*) duty stems from the basic tenet of incorporation: Delaware General Corporation Law begins by stating that a corporation can only promote *lawful* lines of business.[198] Complying with the law thus takes priority over seeking profits, and directors who try to seek profits through noncompliance are breaching their duties.[199]

In the CS3D context, one can easily envision, for example, a *Massey* claim along the following lines: the directors knowingly signed off on a business plan predicated on increasing carbon emissions, even when their company was subject to the Directive's "climate transition plan" requirement. That is, the Directive details how companies should align their business plan with the goal of "global net zero" by 2050.[200] Accordingly, when a large U.S. corporation with major revenues in Europe decides to keep increasing emissions and deal with the consequences, that company's directors and officers could be subject to personal liability under the *Massey* doctrine.

While the *Massey* doctrine may seem straightforward to apply, in practice it is anything but, if only because directors rarely openly condone violating regulations.[201] And in the CS3D context, applying *Massey* could become even more complicated. First, the law in question is *foreign*, raising the issue of whether American corporate law courts will be as eager to enforce *Massey* duties when it comes to U.S. corporations profiting from noncompliance with it.[202] The answer to this question comes down to what the court believes to be the underlying rationale behind the business plan (*Massey*) theory.

One potential rationale for *Massey* is that noncompliance is ultimately bad for shareholder wealth maximization.[203] The underlying idea here is that managers and directors either misjudge the ability to profit from lawbreaking or suffer from short-termism. In other words, top insiders whose pay is tied to short-term performance metrics have an interest in running business plans that profit from ignoring the costs of regulation now and leaving long-term shareholders to deal with the consequences later. Under this rationale, it does not matter whether the law is foreign. All that matters is whether the *expected* legal sanctions and reputational fallouts from violating said foreign law are

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[197] Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (noting that the duty not to intentionally violate positive law is a subset of the duty to act loyally to the corporation); Disney V, 906 A.2d 27, 67 (Del. 2005) (noting same).
[198] Del. Code. Ann. Tit. 8, § 101(b).
[199] Massey, 2011 Del. Ch. LEXIS 83, at *20.
[200] CS3D, *supra* note 4, art. 22, recital 73.
[201] H. Justin Pace, *Rogue Corporations: Unlawful Corporate Conduct and Fiduciary Duty*, 85 MO. L. REV. 1, 10 (2020).
[202] For academic commentary suggesting that the duty to obey does include foreign law see William J. Moon, *Transnational Corporate Law Litigation*, DUKE L.J. (forthcoming); *id.*, *supra* note 166, at 373; Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 255 (2021).
[203] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 510.

significant.[204] In our case, the size and attractiveness of the European market mean that directors who ignore their company's "license to operate" there by violating the CS3D do so at their own company's peril. From this perspective, *Massey* liability thus clearly applies to business plans that ignore the CS3D's mandates.

Another potential rationale for *Massey* is a version of a "concession theory": [205] large business companies must obey the laws because these companies cannot operate successfully without a functioning legal and regulatory apparatus. Under this theory, it makes sense to require companies to comply not just with the laws of the country that chartered them but also with the laws of any country in which the company enjoys significant presence and revenues.[206] The CS3D fits this rule of thumb nicely, since it only applies to corporations with significant operational presence or revenues in Europe. From this perspective as well, then, *Massey* clearly applies.

But then there is also a "legitimacy" rationale for the *Massey* doctrine, according to which corporate law's tough approach toward fiduciaries who knowingly violate laws serves to bolster the legitimacy of corporate law itself.[207] Corporate law adheres to such doctrines to acknowledge that corporations exist "by grace of the state and an implicit social contract that protects public policy," and so strict allegiance to the rule of law of that state is needed.[208] But what if the law in question is not that of the state that chartered the corporation in question? Those who espouse the legitimacy rationale may decide that holding directors' feet to the fire for compliance with a contentious piece of European legislation is not helping (and may in fact be damaging) corporate law's legitimacy. Indeed, we can find traces of this U.S.-first approach to *Massey* in certain formulations of the *Massey* rationale. For example, former Chief Justice Strine discussed "an obligation to be faithful to the laws *of the chartering society* in exercising corporate powers,"[209] and explained that the "affirmative obligation to honor society's laws is the foundation that permits the principled use of the enabling form of current *American* general corporation statutes."[210]

Second, the law in question in CS3D settings is not a clear mining safety or product safety regulation, but rather a more open-ended requirement to make best efforts toward minimizing adverse impacts on the environment and human rights. Violations of laws of the former kind tend to appear much more salient and egregious, while violations of laws of the latter kind appear to be more a

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[204] Moon*, Transnational Corporate Law Litigation*, *supra* note 202.
[205] *See* Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. L. REV. 501, 535-47 (2021) (explaining the theory and its antecedents).
[206] Moon, *Transnational Corporate Law*, *supra* note 202.
[207] Pollman, *supra* note 131.
[208] *Id*. at 2028.
[209] Leo E. Strine, Jr., et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 649 (2009).
[210] Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 71 (2022).

matter of judgment. The upshot is that courts will not easily infer directors' bad faith from a company's decision to pursue a business strategy that netted more emissions. Courts will undoubtedly consider the fact that multinational corporations face numerous regulatory requirements in the countries in which they operate, and that directors of multinational corporations cannot be expected to proactively discuss compliance with each one of these requirements.[211]

Ultimately, the likelihood of *Massey* liability for CS3D violations will be insignificant if the American corporate law judge (1) espouses the legitimacy rationale for *Massey* claims, *and* (2) believes that holding American directors liable for noncompliance with EU regulations will *de*legitimize corporate law. If either (1) or (2) does not apply, the likelihood of *Massey* liability for CS3D violations will not be trivial.

4. ESG-Related Securities Litigation

While this Part focuses on individual accountability for the CS3D via corporate law's oversight duty doctrine, we would be remiss if we failed to mention the impact the CS3D might have on securities law's ESG fraud claims.[212]

Alongside the surge in oversight duty claims in corporate law in recent years, securities law claims related to ESG disclosures have also emerged.[213] The theory behind such claims is straightforward: the Securities Exchange Act prohibits fraudulent or misleading statements in connection with the sales of securities.[214] And because public companies have been disclosing more and more information about their ESG performance, they have been opening themselves up to claims that they made misleading ESG statements in ways that affect the value of their stock.[215] On paper, then, securities fraud litigation in federal courts could increase corporate accountability on issues such as human rights and the environment.

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[211] *Cf.* David Kershaw, Where is the Care in *Caremark*? (Eur. Cop. Gov. Inst. Working p. 836/2005), https://ssrn.com/abstract=5196408 (emphasizing that when courts scrutinize directors' oversight efforts they adjust to the specific situation at hand, including the informational burden on directors).

[212] *See* Jena Martin & Rachel Chambers, *The Securities and Exchange Commission as Human Rights Enforcer?*, 18 VA. L. & BUS. REV. 93 (2023) (assessing the promise of the (short-lived) efforts of the SEC to use securities fraud to tackle human rights abuses). At a more general level, *see* Emily Strauss, *Is Everything Securities Fraud?*, 12 UC IRVINE L. REV. 1331 (2022) (examining how ubiquitous securities fraud litigation is). The indirect effect of securities fraud on directors' and officers' duty of care and corporate governance more generally is hardly a new theme: *see* Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 860 (2003) (noting that "federal securities law and enforcement via securities fraud class actions today have become the most visible means of regulating corporate governance").

[213] *See generally* James J. Park, *ESG Securities Fraud*, 58 WAKE FOREST L. REV. 1149 (2023) (documenting the trend); Barbara Ballan & Jason J. Czarnezki, *Disclosure, Greenwashing and the Future of ESG Litigation*, 81 WASH. & LEE L. REV. 545 (2024) (same).

[214] 17 C.F.R. § 240.10b-5.

[215] Park, *supra* note 213.

In practice, however, such claims face an uphill battle. First, ESG disclosures, such as a commitment to become carbon neutral by 2050, are often forward-looking[216] and therefore covered by the "safe harbor" provision of the Private Securities Litigation Reform Act of 1995.[217] Companies can therefore qualify these disclosures in ways that effectively shield them from securities fraud claims.[218] Second, the SEC has recently stayed its proposed climate disclosure rules and dismantled its ESG Task Force.[219] Public enforcement of companies' human rights and environmental disclosures is therefore likely to range from sparse to nonexistent, which is likely to hamper private enforcement as well.[220]

The CS3D and its companion CSRD could, to some extent, reverse this trend and ramp up the prospect of ESG disclosure claims. Large companies "are fond of saying that a commitment to sustainability is core to their strategy and value creation."[221] When such disclosures are voluntary, companies can be selective and also opt to couch disclosures as forward-looking, in a way that will comfortably rest under the safe-harbor provision. But the CS3D and the CSRD make the disclosures mandatory and painstakingly detail what specific ESG disclosures must include regarding mapping of existing risks, managing existing adverse impacts, and so on.[222] These Directives are therefore likely to flood the market with ESG disclosures that are not shielded from fraud claims, constantly challenging large companies "to make sure their deeds match their words."[223] If a company that sells securities in the United States then ends up having an adverse effect on human rights or the environment, or if a European regulator sanctions that company for inadequate due diligence, plaintiff

[216] *See* John Armour, Luca Enriques, & Thom Wetzer, *Green Pills: Making Corporate Climate Commitments Credible*, 65 ARIZ. L. REV. 285, 312 (2023).
[217] See Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-5 (2022) (shielding issuers from private liability for forward-looking statements if accompanied by meaningful cautionary language or not made with actual knowledge of falsity).
[218] *Id*. at 287-88; Park, *supra* note 213, at 1166-72
[219] *See, e.g.*, Jamie D. McGinnis, Amy D. Roy, & George B Rain, *Reading the Tea Leaves on the SEC's Disbanding of Its Enforcement ESG Task Force*, HARV. CORP. G. FORUM. (Oct. 3, 2024), https://corpgov.law.harvard.edu/2024/10/03/reading-the-tea-leaves-on-the-secs-disbanding-of-its-enforcement-esg-task-force/.
[220] *See, e.g.*, Alexander I. Platt, *"Gatekeeping" in the Dark: SEC Control over Private Securities Litigation Revisited*, 72 ADMIN. L. REV. 27, 48-50 (2020) (showing how SEC enforcement can catalyze private litigation).
[221] *See* Robert G. Eccles, Richard Gardiner, & Andrea Webster, *The CSDDD: How the Phoenix Can Rise from the Ashes*, HARV. L. SCH. F. ON CORP. GOV. (Apr. 26, 2024), https://corpgov.law.harvard.edu/2024/04/26/the-csddd-how-the-phoenix-can-rise-from-the-ashes/.
[222] For a detailed overview see David Ramos Muñoz, The Corporate Sustainability Due Diligence Directive (CSDDD) Everything, Everywhere, All at Once?, U. GENOA EUSFIL RSCH. WORKING PAPER SERIES No. 1, 6-8 (2025).
[223] Eccles et al., *supra* note 221,

attorneys are likely to sue that company in federal courts for misleading ESG disclosures.[224]

The CS3D is likely to change not only how many ESG fraud claims are brought, but also *against whom* they are brought. In many of the existing ESG-related securities lawsuits, those who are targeted are not so much the "ESG laggards" that do not bother to report about ESG efforts, but rather those companies that wish to improve their ESG image (and in the process may overstate their efforts).[225] Now, as the CS3D enters into force, all companies will have to release significant and detailed ESG information. Entrepreneurial plaintiff attorneys will be able to focus on the real laggards—namely, those whose ESG record, as evidenced by well-publicized adverse effects or hefty fines from European regulators, is found wanting.

III. HOW THE CS3D–*CAREMARK* COMBINATION COULD RESHAPE CORPORATE BEHAVIOR

While Part I focused on the CS3D, and Part II focused on *Caremark*, this Part analyzes the unique effects of the CS3D–*Caremark* combination. Standing alone, neither the CS3D nor *Caremark* is likely to meaningfully reshape the way that large business companies behave toward human rights and the environment. The CS3D imposes open-ended requirements to adopt processes, which are susceptible to box-ticking responses.[226] To bring about major change, such a piece of legislation must be accompanied by vigorous enforcement on the ground and by mechanisms to hold managers accountable for the tone at the top.[227] *Caremark* works well in situations of clear illegalities and tangible

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[224] The likelihood of that happening will, of course, be a function of whether the adverse effect and/or the regulator's sanctions will affect the company's stock price, which may not be the case for adverse effects on non-contractual stakeholders. *See generally* John Armour, Colin Mayer, & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J. FIN. & QUANTITATIVE ANALYSIS 1429 (2017) (finding that misbehavior toward third parties and the environment carries smaller stock market ramifications than misbehavior toward contractual claimants).

[225] *See, e.g.*, Kevin LaCroix, *Breach of the Duty of Oversight Claims against Wells Fargo's Board Sustained in Part*, D&O DIARY (Sep. 26, 2024), https://www.dandodiary.com/2024/09/articles/shareholders-derivative-litigation/breach-of-the-duty-of-oversight-claims-against-wells-fargos-board-sustained-in-part/; Craig v. Target, No. 2:23-cv-599-JLB-KCD (M.D. Fla. Dec. 4, 2024) (denying defendants' motion to dismiss securities fraud claims, in the context of Target's alleged failure to disclose risks of backlash to its ESG/DEI initiatives and a 2023 Pride Month campaign).

[226] *See, e.g.*, Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELBOURNE J. INT'L L. 221, 222 (2019) (noting the susceptibility of human rights due diligence mandates to box-ticking); Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving beyond Human Rights Due Diligence*, 18 N.Y.U. J.L. & BUS. 773, 805-07 (2022) (same). *See generally* Coglianese, *supra* note 29, at 160.

[227] *See Comment: The Next Steps Will Be Crucial for the Success of the CSDDD*, RESPONSIBLE INVESTOR (Apr. 19, 2024), https://www.responsible-investor.com/comment-the-next-steps-will-be-crucial-for-the-success-of-csddd/ ("the intended positive impact of the [CS3D] will depend on how well it is enforced").

harms, such as bribes or airplane crashes.[228] It works less well (or not at all) in situations where the company is not doing enough to advance worthy societal goals such as fighting climate change.[229] After all, *Caremark* litigation is derivative litigation, which means that it is triggered once the company itself suffers a trauma. Not doing enough to better protect human rights and the environment is not, in itself, a legal violation that leads to corporate traumas.

But combine the two together—ambitious EU regulatory requirements ex ante with robust U.S. private enforcement ex post—and one sees the needle of corporate governance starting to move. The CS3D makes failure to comply with its sustainability due diligence requirements punishable by law, thereby raising the prospect that *Caremark* claims will be brought in the context of human rights and the environment.[230] And the prospect of *Caremark* claims being brought makes it more likely that top corporate decision-makers will take compliance with the CS3D seriously.

This Part highlights several counterintuitive implications of the CS3D–*Caremark* combination. Subpart A explains how Delaware's *Caremark* law shapes behavior both directly and indirectly. Beyond the possibility of imposing liability, *Caremark* litigation clarifies what is expected of directors in specific situations, thereby shaping norms, and produces information on who behaved below expectations, thereby shaping reputations.[231] Subpart B evaluates the normative implications of our analysis. It spotlights three concerns that are shared by both those who believe that corporations should be managed solely for shareholders and those who believe that corporations should consider their effects on human rights and the environment: (1) cosmetic compliance, (2) size-based regulation, and (3) distributive effects. Subpart C spotlights concrete implications for corporate practitioners and judges.

A. *When the Brussels Effect Meets the Delaware Effect*

Delaware corporate law shapes corporate behavior not just directly, by imposing legal sanctions, but also indirectly, by clarifying what is expected of directors (shaping norms) and flushing out information on who behaved below expectations (shaping reputations).[232]

When it comes to oversight duty cases, indirect deterrence effects are often more important than the direct deterrence effects of imposing legal

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[228] *See, e.g.*, *In re* TransUnion Derivative Stockholder Litigation, C.A. 2022-1103-LWW (consol.), memo. op. at 32-33 (Del. Ch. Oct. 1, 2024) (emphasizing the condition of "obvious and material" legal violations).
[229] Shapira, Mission Critical ESG, *supra* note 22, at 778; H. Justin Pace & Lawrence J. Trautman, *Climate Change and* Caremark *Doctrine, Imperfect Together*, 25 U. PA. J. BUS. L. 777, 778 (2023).
[230] *See supra* Part II.
[231] ROY SHAPIRA, LAW AND REPUTATION 36-74 (2020).
[232] *See generally* Edward Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (on the nonlegal effects of Delaware corporate law litigation).

sanctions.[233] Indeed, even after their recent resurgence, *Caremark* claims practically never culminate in a verdict against the defendant after a full trial.[234] The cases that we discussed as successful were so only in the sense that they survived the motion to dismiss.[235] Still, even the early stages of the litigation process – from prefiling discovery battles to motions to dismiss – affect behavior through at least three conduits: the expected settlement value, changes in legal advice, and reputational fallouts.[236]

Let us consider settlements first. Prior to 2019 (when *Marchand* came out), no oversight duty lawsuit culminated in a large settlement.[237] By 2024, *Caremark* settlements took over half of the list of largest derivative lawsuit settlements.[238] To illustrate, *Boeing* settled for $237m, *Walmart* settled for $123m, and *Marchand* settled for $60m.[239]

Next, consider the shift in legal advice. The volume of law firm memos dedicated to *Caremark* duties has increased twentyfold since 2019.[240] And a content analysis of these memos reflects changes in their tenor too: legal advisors now instruct directors to put compliance issues higher on the agenda, and to thoroughly document their oversight discussions.[241]

Finally, consider how information coming from the early stages of the litigation process can shape reputations.[242] *Caremark* poses a high pleading hurdle (bad faith),[243] and so public shareholders and their attorneys are incentivized to extract damning information about how the directors behaved. To clear the pleading hurdle, plaintiffs typically sift through numerous internal documents to find evidence about what directors knew and when they knew it. As a result, prefiling discovery and the complaints themselves in new *Caremark* cases tend to bring to light inside information to which the market was not privy.[244] Beyond damning internal documents, the new version of *Caremark* litigation provides ample opportunity for Delaware judges to comment on what

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[233] *See* Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1886-88 (2021).
[234] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 479.
[235] See the cases cited in *supra* notes 135, 140, 161.
[236] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 14.
[237] Kevin LaCroix, *Largest Derivative Lawsuit Settlement*, D&O DIARY, https://www.dandodiary.com/2014/12/articles/shareholders-derivative-litigation/largest-derivative-lawsuit-settlements/.
[238] *Id*.
[239] Kevin LaCroix, *Walmart Opioid-Related Duty of Oversight Derivative Suit Settled for $123 Million*, D&O DIARY (Oct. 17, 2024), https://www.dandodiary.com/2024/10/articles/shareholders-derivative-litigation/walmart-opioid-related-duty-of-oversight-derivative-suit-settled-for-123-million/. For the thorny question of whether settlements could be expected to change corporate compliance if payments mostly come out of the insurers' pockets, see Shapira, Max Oversight Duty, *supra* note 143, at 132 & n.76.
[240] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 15.
[241] *Id*.
[242] *See* Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U.L. REV. 873, 887-88 (2019) (providing a short primer).
[243] Stone v. Ritter, 911 A.2d, 365.
[244] Shapira, New *Caremark* Era, *supra* note 233, at 1884.

is expected of directors and whether the specific directors fell below market expectations.[245]

Consider, for instance, how *Caremark* opinions often engage in benchmarking, namely, comparing the conduct of the company in question to that of its peers.[246] In a string of decisions concerning the opioid pandemic, for example, the courts highlighted how some distributors, such as Walmart and AmerisourceBergen, fared much worse than the industry norm in terms of identifying and reporting suspicious opioid orders.[247] Such benchmarking is highly relevant for creating reputational discipline, because, in settings such as CS3D compliance, benchmarking would help socially and environmentally minded investors and customers ferret out who among the industry players might have fared worse on human rights and the environment.[248] Benchmarking in *Caremark* litigation is also likely to feed the media, NGOs, and regulators with relevant information on just how much top decision-makers were genuinely committed to addressing ESG issues.[249]

The relevant question for our purposes is therefore not whether the CS3D–*Caremark* combination will result in directors being found liable (it probably will not), but rather whether the combination will result in corporate boards changing their behavior.

Adding the prospect of *Caremark* litigation to the CS3D could therefore end up reshaping what we thought that we knew about the Brussels effect. International legal scholars who have studied the Brussels effect in other areas of the law tended to maintain that the effect is good at shaping standards for products, but not at shaping standards for production practices.[250] In other words, it is easier for the Brussels effect to shape what companies sell, rather than how they manufacture it. The reasoning is straightforward: the Brussels effect stems from Europe's ability to deny access to its large, valuable consumer market.[251] It is relatively easy to deny access to a foreign product that does not have a certain safety widget or a certain user-privacy default setting. It is much harder to deny access to a foreign company based on, say, how it treats individuals who work for it in other areas of the world.[252] In other words, this argument about the limits of the Brussels effect rests on difficulties in enforcement.

Our analysis here spotlights how the addition of oversight duty enforcement outside of the EU could help an EU law affect non-EU corporations' production processes. Once the CS3D imposes meaningful

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[245] *Id*. at 1887-88.
[246] *Id*. at 1887.
[247] *See, e.g.*, Walmart I, 294 A. 3d 65, 81.
[248] On how quality benchmarking is key for effective reputational discipline see Assaf Jacob & Roy Shapira, *An Information-Production Theory of Liability Rules*, 89 U. CHI. L. REV. 1113, 1115 (2022).
[249] Shapira, Mission Critical ESG, at 797-98.
[250] BRADFORD, *supra* note 102, at 30.
[251] *Id*.
[252] *Id*.

sanctions on companies for deficient human rights and environmental due diligence, the oversight duty doctrine may expose directors and officers of U.S. corporations to costly litigation. As a result, corporations may rethink their corporate governance practices and procedures with an eye on minimizing adverse impacts on human rights and the environment throughout their activity chain. A company that changes its committee charters or board-reporting protocols will not keep one set of charters and protocols for selling products in Europe and another for selling products elsewhere. Such corporate governance changes due to the CS3D are therefore likely to affect how U.S. corporations do business outside Europe as well.

A more speculative prediction is that *Caremark* litigation over CS3D compliance could end up affecting *European* companies too. The CS3D espouses a very expansive notion of risk oversight. And it leaves much room for interpretation regarding what measures are necessary to ensure compliance.[253] Directors of EU corporations looking for cues as to what is expected of them in given circumstances are unlikely to find ready-made answers in European corporate law. Open-ended directors' duties are rarely enforced in Europe, where corporate law litigation is rare.[254] One could therefore conjecture that, when it comes to the uncharted territory of mandatory ESG legislation, European directors and their legal advisors may take their cues from Delaware judicial opinions elucidating the same CS3D obligations.

To be sure, the possibility of a Delaware effect on European companies is far less certain than the effect of the CS3D-*Caremark* combination on U.S. corporations. What drives the effect in the United States is the realistic possibility of aggressive prefiling discovery, vibrant media coverage, and "panic-inducing" law firm memos. These are all elements of the U.S. ecosystem that are largely missing in Europe.[255] Ultimately, the strength of the Delaware effect on European companies will come down to two factors: the extent to which European directors *want* to proactively seek lessons from *Caremark* litigation, and the extent to which European regulators and courts take cues from *Caremark* litigation on how CS3D compliance should be handled.

But there could be another channel for U.S. private litigation to affect European companies' compliance with the CS3D, and that is the abovementioned securities fraud litigation channel.[256] EU companies that sell securities in the United States may be forced to take their sustainability due diligence requirements more seriously in order to reduce the risk of facing securities fraud litigation in the United States. Once EU companies that sell

[253] Kaisanlahti, *supra* note 189.
[254] *See, e.g.,* Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe*, 37 BROOK. J. INT'L L. 843, 848-49 (2012).
[255] *See, e.g.*, Erica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story about the Genius of American Corporate Law*, 63 EMORY L.J. 1383, 1389 (2014) ("There is no equivalent to U.S. discovery in civil law jurisdictions").
[256] See *supra*, Subpart II.D.

securities in the United States revise their structures and protocols accordingly, EU companies that do *not* sell securities in the United States could mimic those that do, if only because common consultants will advise the former to follow the latter's best practices.

B. Normative Assessment

The CS3D directly implicates two of the most hotly contested normative questions in corporate law. First, by mandating that business companies consider their impact on human rights and the environment regardless of how these issues affect the company's bottom line, the Directive is relevant to the core corporate law question of what is the purpose of the corporation.[257] Second, from an international law perspective, the Directive raises important questions within the debate over the desirability of having the EU (or any other global superpower) imposing their own standards on other polities.[258]

We do not intend to address these big-picture questions here in the abstract. Our aim is more modest, namely, to highlight how the specific CS3D-*Caremark* combination alters how one approaches the normative questions, regardless of where one stands on the big-picture normative debates. For concreteness, consider the following three considerations: the costs of cosmetic compliance, the challenges of regulating behavior based on company size, and global distributive effects.

1. <u>Cosmetic Compliance Concerns</u>

Even those who support the main premise of the CS3D (namely, that large business companies must consider the effects of their value chain on others, regardless of how it affects the company's bottom line) are wary that the Directive will generate "cosmetic compliance."[259] The reason behind the skepticism is twofold: first, the nebulous nature of the Directive's obligations

[257] *See generally* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1310 (2021) (noting that corporate purpose is the most hotly debated question in corporate law).
[258] *See, e.g.*, Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention*, OXF. BUS. L. BLOG, 21 April 2022, https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate (noting that "the [at the time] Proposed Directive attempts to de facto impose Europe's values and political preferences on the ways business should be transacted practically in every other country, an aspiration that looks particularly precarious given the nationalistic spree in modern-day geopolitics"); Roza Nurgozhayeva & Dan W. Puchniak, Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?, 22-26 (ECGI Working Paper No. 744/2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4652012 (criticizing the EU's attempt, via the CS3D, "to change the corporate purpose of companies around the world").
[259] *Cf.* Hess, *supra* note 17, at 773, 777. *See also* Rachel Griffin & Riccardo Fornasari, Risky Business? Corporate Risk Management Obligations in Sustainability Due Diligence and Digital Platform Regulation, 11-13 (working paper, 2025), https://ssrn.com/abstract=5140807 (highlighting the risk of cosmetic compliance based on the experience in France with enforcement of similar due diligence obligations).

leaves much room for the regulated companies to pass themselves off as complying without really altering the way they do business. Second and relatedly, Europe generally lacks effective ex-post enforcement mechanisms of the kind that can call out companies for merely ticking boxes and inject specificity into the Directive's vague and best-efforts obligations.[260]

The prospect of *Caremark* litigation over CS3D compliance can assuage some of these cosmetic compliance concerns. In its revamped mode, *Caremark* litigation is good at flushing out disingenuous compliance efforts.[261] The U.S. "bounty hunting" model provides very strong incentives (large fees from hefty settlements) to sophisticated actors (institutional investors and their attorneys) to extract damning information about how top corporate insiders behaved.[262] And the aggressive U.S. discovery regime provides the same sophisticated players with access to internal company communications, including in some cases informal communications, such as emails and private LinkedIn messages.[263] Directors and officers anticipate that this kind of aggressive scrutiny will apply to their compliance efforts and communications, and so they are incentivized ex ante to not turn a blind eye to red flags.

Perhaps most importantly, *Caremark* litigation incentivizes bottom-up flows of information.[264] That is, the prospect of *Caremark* litigation pushes directors to set clear expectations for managers on what the latter should escalate to the board level. This, in turn, makes it harder for directors to play the "we didn't know" card when bad things happen.

These dynamics are especially important in the context of the CS3D. The accumulated experience with supply chain due diligence laws in Germany and France illustrates just how limited these laws are in changing board behavior. For example, a study in France found that only one in five companies reports board involvement in the required supply chain due diligence.[265] *Caremark* enforcement can reverse these dynamics and prompt management to escalate human rights and environmental issues to the board level earlier and more often.

To be sure, one could claim that this anti-cosmetic compliance effect is not necessarily desirable from an American perspective. The concern is that the CS3D-*Caremark* combination could unintendedly disadvantage U.S. corporations operating in the EU. The prospect of CS3D-related *Caremark* litigation has the potential for pushing U.S. corporations to truly change how

[260] Hess, *supra* note 17, at 773, 777.
[261] Jennifer Hill & Roy Shapira, Accountability for Flawed Corporate Culture (Working paper, on file with authors).
[262] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 529.
[263] Shapira, New *Caremark* Era, *supra* note 233, at 1877.
[264] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 27.
[265] Hess, *supra* note 17, at 792; John Morrison et al., *Responsibility from the Top Down: Why Human Rights Due Diligence Must Be a Mandated Concern of Corporate Boards*, BUS. & HUMAN RIGHTS RES. CTR. BLOG (Mar. 3, 2021), https://www.business-humanrights.org/en/blog/responsibility-from-the-top-down-why-human-rights-due-diligence-must-be-a-mandatedconcern-of-corporate-boards/.

they conduct business. European companies, by contrast, being free from the fear of *Caremark* litigation, may be inclined to engage in cosmetic compliance, amending their policies to the bare minimum that the local regulators can be satisfied with.

2. Size-Based Governance

CS3D oversight claims are different from the normal pool of *Caremark* claims in that they involve large multinational corporations. Recall that the Directive only applies to corporations with turnover of more than €450m in the European market alone.[266] Historically, such size served to *dilute* the prospect of oversight liability. For example, in the prior precedent of *Allis Chalmers*, the Delaware Supreme Court based its refusal to impose oversight liability on the presumed inability of directors to monitor misconduct in massive corporations.[267] The court described at great length Allis Chalmers' sheer number of employees (over 30,000) and plants (24) and emphasized the company's inherent complexity and decentralized decision-making processes. In such giant corporations, the court reasoned, it is not practicable to expect directors to know when company employees engage in misconduct.[268]

In recent years, however, courts have shown willingness to scrutinize oversight efforts even in giant corporations. In *Chou*, for example, pharmaceutical giant AmerisourceBergen was embroiled in criminal activities regarding cancer drug repackaging.[269] The violations occurred in one of the company's many subsidiaries and involved only a tiny fraction of its overall revenues.[270] Still, the court applied the "mission critical" framework to reason that AmerisourceBergen's directors should have been more proactive about such compliance risks.[271]

It remains to be seen whether courts will show the same willingness to scrutinize oversight efforts in the context of the CS3D. On the one hand, the factual scenarios in CS3D cases could stretch the limits of oversight much more than the *Chou* scenario did: it is virtually impossible to expect directors of a multinational giant to be hands-on regarding everything that happens in their entire value chain around the world. On the other hand, too much deference could lead to "willful blindness" on the part of the directors, who will prefer not to know about adverse impacts up or down the supply chain so that they can later deny culpability.

One thing to keep in mind in that regard is that America's biggest corporations are already accustomed to playing the role of de facto regulators

[266] CS3D, *supra* note 4, art. 2.
[267] Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 129 (Del. 1963).
[268] *Id.*
[269] Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020).
[270] *Id.* at *5.
[271] *Id.*

of their supply chains.[272] In the past decade, more and more U.S. federal regulators have required the largest regulated entities to monitor and punish (by withholding business from) third-party business partners who engage in wrongdoing.[273] Environmental regulators, for example, require big oil companies to ensure that their contractors comply with environmental standards.[274] When BP settled the Deepwater Horizon case, the regulator insisted that as part of the settlement the BP *board* take upon itself to oversee the improvements of drilling safety at BP's contractors.[275] Regardless of what one thinks about the desirability of such big-firm enforcement model, for our purposes what matters is that America's biggest corporations have already accumulated experience with it, in ways that could help them adapt to the CS3D's ambitious requirements.

3. Distributive Effects

Corporate legal scholars have long noted the distributive dynamics of international corporate law.[276] Pertinently here, these scholars have lamented how certain features of corporate law, such as limited liability for human rights and environmental disasters caused by corporate groups, effectively transfer wealth from the global south to the global north.[277]

With its extraterritorial reach, the CS3D purportedly reverses these dynamics. After all, the Directive imposes liability on companies in the global north for not doing enough to reduce the adverse impacts of their operations in the global south.

The political economy rationale behind this feature of the CS3D is straightforward: certain countries in the global south may lack the regulatory capacity or political will to hold giant corporations accountable for their human rights abuses and environmental harms.[278] European lawmakers, by contrast, are well positioned to set requirements and monitor their enforcement over time.[279] Because giant corporations cannot afford to exit the European market,

[272] Rory Van Loo, *The New Gatekeepers*, 106 VA. L. REV. 467, 469 & n.4 (2020) (compiling examples).
[273] *Id*. at 493.
[274] *Id*. at 490.
[275] *Id*.
[276] *See* Mariana Pargendler, *Corporate Governance in Emerging Markets*, *in* OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE 735, 752-53 (Jeffrey N. Gordon & Wolf-Georg Ringe, eds., 2018).
[277] *See generally* Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U.L. REV. 535 (2024).
[278] *See* Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9 EUR. COMP. L. 101, 103 (2012) (explaining that developing countries are often either unwilling or unable to hold multinational corporations accountable due to concerns over not being able to attract foreign investment, weak legal systems, political repression, or fear of adversely affecting domestic markets); Michele Corgatelli, The Corporate Sustainability Due Diligence Directive: Outstanding Issues 7 (working paper, 2024), https://ssrn.com/abstract=4887184.
[279] MARIA MONNHEIMER, DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL HUMAN RIGHTS LAW 307 (2021) ("where human rights situations are worsened by the insufficient capacities of host states, regulatory efforts on behalf of the home state could help ensure effective protection"); Corgatelli, *supra* note 278.

the EU can effectively enlist the help of these corporations by requiring them to police the behavior of their global-south partners.[280]

However, there is reason to suspect that the Directive will end up achieving the opposite. Multinational corporations faced with new supply chain responsibilities may simply decide to cut off parts of their supply chains or bring them closer to home.[281] That is, large companies subject to the CS3D could decide that the lack of data and other geopolitical factors make it too hard for them to fulfill their CS3D-related supply chain due diligence requirements.[282] As a result, these multinationals may stop doing business with their global-south supply chain partners, which will in turn make the global south poorer.[283] Early experience with the supply chain due diligence law in Germany is indicative in that regard: since the introduction of the law, imports in the textile industry from high-risk countries such as Pakistan and Bangladesh have fallen by twenty percent.[284]

Our analysis here presents the possibility that the prospect of facing liability for CS3D oversight will alter the lobbying efforts of Corporate America. The leaders of the largest U.S. corporations, now within the scope of the CS3D, may begin to reconsider their anti-ESG legislation stance and potentially advocate for new ESG rules.[285] Getting legislatures in, say, California or New York to pass ESG legislation could help these large companies level the playing field with their smaller U.S. peers that are not subject to the CS3D.[286]

In short, the CS3D-*Caremark* combination may create an environment where American ESG legislation with an impact on the global south is much more politically feasible than in the past. At the same time, the current geopolitical climate offers another conduit for levelling the playing field—namely, getting the federal government to pressure the EU to reduce the CS3D's impact on U.S. corporations. We return to this possibility in Part IV.

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[280] See *supra*, Subpart I.B.

[281] Eccles et al., *supra* note 221.

[282] *See* MARK L. FAGAN, SUPPLY CHAIN MANAGEMENT 229 (2024).

[283] *See* Paul Davies et al., *Latham & Watkins Discusses 10 ESG Issues to Keep Top of Mind in 2023*, CLS BLUE SKY BLOG (Jan. 11, 2023), https://clsbluesky.law.columbia.edu/2023/01/11/latham-watkins-discusses-10-esg-issues-to-keep-top-of-mind-in-2023/.

[284] *See* GALINA KOLEV SCHAEFER & ADRIANA NELIGAN, DATA-BASED RESULTS ON THE EFFECTS OF THE GERMANY SUPPLY CHAIN ACT (2024). "High-risk countries" are defined in these studies as those with problematic enforcement of sustainability standards. *Id*. at 4. *See also* Schmid & Thomale, *supra* note 8.

[285] Similar dynamics have occurred in response to ESG legislations elsewhere in the world: for example, the largest Indian companies have altered their stance and started lobbying for stricter regulation in their own country after they became subject to U.S. public markets regulation. Afra Afsharipour, *Corporate Convergence: Lessons from the Indian Experience*, 29 NW. J. INT'L L. & BUS. (2009).

[286] California already mandates certain due diligence disclosures, which are like the ones imposed by the CS3D, only much more limited (they only apply to the risk of slavery and human trafficking). California Transparency in Supply Chains Act, Cal. Civ. Code § 1714.43 (West 2024). The New York legislature is currently discussing a similar bill. New York State Transparency in Supply Chains Act (Bill S4442), N.Y. S.B. 4442, 2023-2024 Reg. Sess. (2023), https://www.nysenate.gov/legislation/bills/2023/S4442.

C. *Practical Implications*

Beyond the question of how the CS3D could affect American oversight duties, our analysis entails more specific and counterintuitive lessons for practitioners and policymakers.

For practitioners, understanding the CS3D–*Caremark* effects should lead to reevaluating conventional wisdom on board structure and board composition. Many large law firms have already sent memos to their corporate clients advising them to (1) assess whether they, their affiliates, or their business partners will become subject to the CS3D and, if so, (2) identify the gaps between their current policies and practices and those that the CS3D requires.[287]

Historically, boards have relegated oversight duties to the audit committee, which is typically comprised of individuals with financial expertise.[288] But the CS3D extends the scope of board oversight to much broader types of risks, such as environmental degradation, supply chain issues, and labor issues.[289] Directors with an accounting background are not necessarily qualified to deal with these issues.[290] And the audit committee may have too much on its plate to properly monitor them.[291] Boards are therefore bound to rethink how they allocate responsibilities to specific committees and the entire board, as well as who they choose to serve on the board to begin with.[292]

But boards should tread carefully before establishing new "sustainability" committees or appointing new directors for their purported expertise in human rights or environmental science. These are the kind of quick-fix solutions that may end up hurting overall board effectiveness.[293] Boards may consider whether they will be better off hiring outside advisors on CS3D-related issues, instead of perturbing board dynamics by adding "specialist directors" who are strong on a specific ESG issue but may not be as strong on core business issues.[294]

As for judges, Part II already examined the primary question of how to determine breach of fiduciary duty in the context of CS3D compliance. But oversight duty litigation over CS3D compliance is also likely to test the

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[287] *See, e.g.*, Sullivan & Cromwell Memo, *supra* note 14.
[288] *See* Leo E. Strine Jr. & Laura A. McIntosh, *Board Practices in the Digital Era: Maximizing the Benefit-to-Cost Ratio of Information Technology*, DIRECTORS & BOARDS MAGAZINE (2022), https://ssrn.com/abstract=4063210.
[289] *See supra* subpart II.B.
[290] *See* David A. Katz & Laura A. McIntosh, *Integrating ESG into Corporate Culture: Not Elsewhere, but Everywhere* (Mar. 24, 2021) https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.27431.21.pdf.
[291] *Id*.
[292] *Cf.* Kishanthi Parella, *International Law in the Boardroom*, 108 CORNELL L. REV. 839, 858 (2023) ("If a corporation claims to respect international human rights, then the vital question is whether its board includes directors with expertise and experience to provide oversight over that corporation's compliance with international human rights norms.")
[293] Yaron Nili & Roy Shapira, *Specialist Directors*, 41 YALE J. ON REG. 652, 688-91 (2024).
[294] *Id*. at 692-94.

contours of ostensibly procedural doctrines such as inspection rights and judicial notice.

Perhaps no question is more practically important than that of the scope of prefiling discovery. As Part II explained, failure-of-oversight claims tend to rely heavily on shareholder inspection rights. Without access to internal communications, public shareholders will find it hard to hold corporate insiders accountable for their oversight failures. Yet granting too much prefiling discovery comes with its own set of costs, such as raising the specter of "fishing expeditions."[295] Adjudicating these Section 220 actions has become a major point of contention in Delaware law over the past couple of years.[296]

The CS3D context is bound to complicate the prefiling discovery question even further. CS3D claims will typically involve not just the company's behavior, but also that of the company's subsidiaries and business partners. Shareholders investigating failure-of-oversight claims are therefore likely to ask not just for access to their company's board materials, but also for access to their company's formal and informal communications with its subsidiaries and business partners. Extending the scope of inspection right requests beyond the company's own documents is bound to raise thorny issues.

Delaware's Section 220 entitles a parent corporation's shareholders to inspect all the documents of subsidiaries that the parent possesses.[297] However, the statute contains qualifiers: if, for example, the parent agreed to keep certain communications confidential, the parent's shareholders may not be able to access those communications.[298] Here the courts may well have to grapple with various national European confidentiality laws and specific confidentiality stipulations between different parties.

Another seemingly procedural issue with a potentially outsized impact on directors' behavior is how corporate law courts will treat findings by noncorporate law forums. Oversight duty claims often come on the heels of regulators' press releases, public enforcement actions, or private enforcement of noncorporate law claims.[299] CS3D-related oversight claims will likely be no different. That is, American plaintiffs will likely investigate failure-of-oversight claims and file lawsuits only after their company has been penalized by Europeans courts (say, in tort claims) or regulators for adversely impacting human rights or the environment. As a result, CS3D-related oversight claims

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[295] On "fishing expeditions" more generally (namely, the concern that parties will file discovery requests even needlessly to strategically raise the costs of litigation for their counterparties), *see* Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2039 (2018).
[296] *See* James D. Cox et al., *The Paradox of Delaware's "Tools at Hand" Doctrine: An Empirical Investigation*, 75 BUS. LAW. 2123 (2020) (documenting the rise of prolongated Section 220 cases).
[297] Weinstein Enters. v. Orloff, 870 A.2d 499, 2005 Del. LEXIS 125 (Del. 2005). In Subpart IV.A.2 we explain how recent (March 2025) developments in Delaware law could alter the scope of Section 220 and complicate our analysis here.
[298] 8 Del. C. § 220(b)(2)b.1-2.
[299] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 473 (providing examples).

will likely implicate the question of how decisions in these other forums should affect corporate law failure-of-oversight claims.

The relationship between noncorporate law forums and corporate law oversight claims was recently addressed on first impression in the *AmerisourceBergen* case.[300] There, the issue was whether to treat decisions of other forums as a notice of what the law is or as a notice of what the facts are.[301] When it is the latter, corporate law courts do not take adjudicative notice of noncorporate law decisions unless the underlying facts are undisputed.[302] In other words, Delaware courts are not necessarily bound in *Caremark* cases by other courts' determinations of how the company's directors and officers behaved. We conjecture that in CS3D-related litigation, these seemingly procedural judicial notice questions could become confounded with political economy questions. As the next Part will elaborate, U.S. lawmakers and practitioners have shown hostility toward the overly ambitious EU Directive,[303] and in today's political climate it is hardly palatable for an American jurist to adopt interpretations that would effectively give European forums a strong say in the fate of American corporate law litigation.

IV. COULD FUTURE DEVELOPMENTS WATER DOWN THE CS3D-*CAREMARK* COCKTAIL?

We have focused thus far on how the combination of the Brussels effect (from EU regulatory activity) and the Delaware effect (from U.S. private litigation) makes for a potent legal cocktail. But as of this writing, policymakers and practitioners around the world are taking multiple steps to water it down.

Subpart A explores recent movements on three fronts. Inside the EU, key European actors, including the German and French Governments, are

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[300] Collis III, 2023 Del. LEXIS 422. The case revolved around the role that AmerisourceBergen Corporation (ABC), the giant drug distributor, played in the opioid crisis. Shareholders who sought to hold ABC's directors accountable conducted a thorough prefiling discovery through Section 220, and then filed a highly detailed complaint that pled with particularity facts sufficient to create an inference of bad faith. But right before the Court of Chancery was going to reject the motion to dismiss, a West Virginia court ruled in favor of ABC in a public nuisance case. To the West Virginia court, ABC's anti-diversion efforts complied with relevant regulations. The Chancery viewed this finding as pulling the rug out from under the shareholders' claims in the corporate law case: if the company did not violate laws, its directors cannot be liable for failing to oversee or for proactively affirming violations of law. The Chancery therefore dismissed the case. Plaintiffs appealed, and Delaware's Supreme Court reversed the dismissal. Collis III, at *10.

[301] *Id*. at *42-43.

[302] *Id*. at *46. In reality, the West Virginia decision was hardly undisputed: the plaintiffs immediately appealed it, and a seven-judge panel found it unpersuasive. Jeff Overley, *Landmark Opioid Opinion "Not Persuasive," W. Va. Panel Says*, LAW360 (Aug. 5, 2022). *Id*. at *46.

[303] *See, e.g.*, *Hagerty, Barr Sound Alarm on Europe's Regulatory Encroachment, U.S. Senate* (Sep. 27, 2024), https://www.hagerty.senate.gov/press-releases/2024/09/27/hagerty-barr-sound-alarm-on-europes-regulatory-encroachment/ (a letter from Senator Hagerty and Representative Barr to Treasury Secretary Yellen, raising concerns that the CS3D imposes significant compliance costs on U.S. businesses).

pushing to streamline and reduce the regulatory burden of the CS3D.[304] Outside the EU, key global actors such as the Trump administration are threatening to retaliate against Europe if it does not roll back the CS3D's territorial outreach. And inside the United States, Delaware legislators have just passed a significant overhaul to its corporate law, curtailing, *inter alia*, shareholder inspection rights. Subpart B examines how each of these proposed changes could affect the CS3D's impact on U.S. corporations. By introducing modularity to our analysis,[305] the Section also produces broader lessons about how the Brussels effect and corporate compliance work more generally.

A. *Proposals to Weaken the Brussels Effect and Delaware Effect*

1. Curtailing the Brussels Effect: The Omnibus Proposal and Trade Wars

The Brussels effect has traditionally stemmed from the ambitions and capacity of the EU to promulgate strict regulations. However, key actors *within* the EU have recently questioned the desirability of such regulatory zeal, arguing that it hampers economic growth.[306] The skepticism toward its regulatory agenda has led the European Commission to appoint a committee headed by former Italian Prime Minister Mario Draghi to investigate EU competitiveness.[307] The Draghi report came out in September 2024, just two months after the CS3D was promulgated.[308] The report explicitly singled out "the sustainability reporting and due diligence framework" (of which the CS3D is a key competent) as "a major source of regulatory burden."[309] The report also detailed various flaws in the CS3D and its close cousins, lamenting the lack of guidance for companies on how to comply with a sprawling set of ESG laws.[310]

Following the Draghi report's criticism, the EU began exploring ways to roll back some aspects of the CS3D.[311] These efforts culminated in February

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[304] *See, e.g.*, *France Asks EU to Delay 'Burden' of New Environmental, Human Rights Rules for Business*, FRANCE24 (Jan. 24, 2025).
[305] "Modularity" refers here to analyzing the impact of each political development separately, to understand how each piece individually (and then in combination) affects the overall *Caremark*-CS3D combination.
[306] European Commission, *The Future of European Competitiveness: In-depth Analysis and Recommendations* (Sept. 2024), https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en#paragraph_47059.
[307] *Id*.
[308] *Id*.
[309] European Commission, *The Future of European Competitiveness: In-depth Analysis and Recommendations* (Sept. 2024), https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en#paragraph_47059.
[310] *Id*. at Part B, p. 318.
[311] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Competitiveness Compass for the EU 17, COM(2025) 30 final (Jan. 29, 2025) (anticipating publication of the "first of a series of Simplification Omnibus packages … [that] will, among others, cover a far-reaching simplification in the fields of sustainable finance reporting, sustainability due diligence and taxonomy").

2025 in the so-called Omnibus Proposal for a Directive aimed at simplifying the rules on sustainability reporting and due diligence.[312] As of this writing, the Omnibus Proposal is just that: a proposal.[313] It still needs to pass through the European Parliament and the European Council before becoming law. However, the political momentum inside the EU in favor of reducing regulatory burdens, coupled with strong pressures from outside the EU (particularly from the Trump administration), makes it safe to predict that many of the Omnibus' proposed amendments to the CS3D will pass.[314]

Most of the proposed amendments tinker with relatively minor details and will not alter our argument about the CS3D's impact on U.S. corporations. For example, clarifying how companies should engage with stakeholders[315] may streamline companies' obligations, but it does not detract from the main thrust of getting American companies to convert numerous human rights and environmental issues from "nice-to-have" business risks into unavoidable legal risks.

However, three aspects of the proposal could alter our analysis under certain circumstances. First, the Omnibus Proposal narrows the scope of due diligence obligations, so that they will apply only to the company's *direct* business partners.[316] In other words, the proposal reduces the layers up and down the supply chain that large companies must monitor. Second, the proposal waters down the climate transition plan requirement: while it still requires that companies come up with a plan to mitigate climate change, it does not require that companies actually implement their plans.[317] Finally, the proposal dilutes the expected sanctions for noncompliance in several ways. For example, it removes the "minimum cap" of sanctions reaching five percent of the net worldwide turnover of the misbehaving company.[318]

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[312] Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM (2025) 81 final (Feb. 26, 2025), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52025PC0081.

[313] Yet, Directive 2025/794, *supra* note 39, was speedily approved to postpone the CS3D's entry into force by one year. See *supra* note 39-40.

[314] *Cf.* Council of the European Union, Note from the General Secretariat of the Council to Antici Group (Simplification), Presidency Compromise Text on Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, Doc. 8465/25, at 47-55(May 14, 2025) (proposing secondary amendments to the European Commission Proposal, *supra* note 311).

[315] Proposal, *supra* note 311, art. 4(2), at 38.

[316] *Id*., art. 4(4)(a), at 38.

[317] Interestingly, the regulatory regime for pollution prevention planning in various U.S. states follows a similar path: it installs a process-based regulation that requires planning but does not require firms to implement their plans. Coglianese, *supra* note 29, at 170. Even more interestingly, initial evidence suggests that such regulatory approach leads to improvement in corporate behavior. *Id*. at 171.

[318] See *supra* notes 76-79 and accompanying text. Instead, the proposal suggests that the European Commission will issue "guidance" to assist national supervisory agencies in determining the level of penalties. Proposal, *supra* note 312, art. 4(11), at 41.

Still, we should not overstate the impact of these proposed amendments: even if all three pass, they will lower the CS3D's regulatory burden only moderately. For example, while the proposal supposedly limits the due diligence measures to direct business partners, companies are still required to conduct an in-depth assessment of *indirect* business partners when they have plausible information suggesting an adverse impact, or if the indirect relationship seems to be an artificial arrangement to circumvent the rules.[319] And as for the sanctions regime, while the proposal removes the EU-wide specific civil liability regime, it still instructs Member States to ensure that victims of adverse impacts have effective access to justice and the right to full compensation.[320] In other words, the change implies that national regimes on civil liability apply; it does not necessarily mean a reduction in the protection of victims' interests. All in all, it seems that even if the Omnibus Proposal passes in its entirety, the CS3D will remain highly relevant for U.S. corporations.

The bigger threat to the outreach of the CS3D comes from outside the EU, in the form of mounting pressures from the new Trump administration to scale back the CS3D's application to U.S. corporations. For example, in February 2025, newly confirmed Secretary of Commerce Howard Lutnick supposedly threatened to use "trade tools" to retaliate against the EU if the CS3D ends up adversely impacting U.S. corporations.[321] And in March 2025, Senator Hagerty introduced the "PROTECT USA Act", which explicitly aims to shield U.S. companies from the CS3D, including downright prohibiting certain U.S. companies from complying with any foreign sustainability due diligence regulation.[322] While it is hard to predict how these background threats or proposed bills will materialize, it is safe to assume that attempts by the EU to enforce the CS3D against U.S. corporations will be met with strong backlash, which in turn may deter the EU from aggressively enforcing the CS3D to begin with.

2. Curtailing the Delaware Effect: Senate Bill 21

319 *Id*., art. 4(4)(b), at 38-39.

320 Id., art. 4(12), at 41-42. While the Proposal prevents member states from imposing punitive damages in this matter, punitive damages are extremely rarely used in Continental Europe anyway. *See, e.g.,* Ina Ebert, *The Power of Punitive Damages, Is Europe Missing out*, 4 J. EUR. TORT L. 95, 95 (2013).

321 Frances Schwartzkopff, *Lutnick Is Exploring 'Trade Tools' to Target ESG Rules in EU*, BLOOMBERG LAW (Feb. 12, 2025). On April 2, 2025, the United States imposed a round of significant tariffs, which were not explicitly linked to the CS3D. See Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits, Exec. Order (Apr. 2, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/regulating-imports-with-a-reciprocal-tariff-to-rectify-trade-practices-that-contribute-to-large-and-persistent-annual-united-states-goods-trade-deficits/). If the EU and the United States ever engage in trade negotiations, it is fair to predict that the CS3D may become part of the talks.

322 Prevent Regulatory Overreach from Turning Essential Companies into Targets (PROTECT USA) Act of 2025, https://www.hagerty.senate.gov/wp-content/uploads/2025/03/HLA25119.pdf.

In March 2025, Delaware passed Senate Bill 21.[323] The new bill overhauls key aspects of its corporate law, including section 220 and shareholders' inspection rights. As amended, section 220 now limits the kinds of documents that shareholders can obtain to core materials, such as the certificate of incorporation, minutes of shareholder and board meetings, and financial statements.[324] To be sure, the amendment leaves courts some discretion to order other documents turned over. But that discretion is limited to a narrow set of circumstances: either the company admits that it does not have formal documents (say, no proper board minutes), or plaintiffs meet the very high hurdle of demonstrating "compelling need" with "clear and convincing evidence" that informal documents are "essential and necessary."[325]

Such changes to shareholder inspection rights could limit the ability of public shareholders to hold corporate insiders accountable for oversight failures. Formal documents such as board minutes are usually drafted after the fact, by paper-trail-generating lawyers. Informal electronic communications are created in real time and tend to be more candid. By reducing the chances that shareholders can inspect such informal communications, the amended section 220 thus reduces the chances that shareholders will be able to expose directors' bad faith oversight. Indeed, one way in which plaintiffs in the *Boeing* case were able to create inference of bad-faith oversight is by pointing to emails that the directors themselves exchanged.[326]

On paper, such changes could reduce the "Delaware effect" side in our equation: directors of U.S. corporations will have to worry less about their companies' sustainability due diligence and climate transition plans, if only because the directors' chances of facing litigation will be much lower compared to the current situation. But a closer look reveals that the specific type of claim that we deal with here, namely, CS3D oversight, may be less dependent on shareholders' prefiling discovery rights than other typical claims, for the following two reasons.

First, in failure-of-oversight cases, it is usually the *defendants* who are incentivized to maintain and produce detailed documentation of every CS3D-related discussion. This is due to the nature of "information-system" claims post-*Marchand*: to protect against the claim that they did not even discuss a central compliance risk, defendants divert from their usual routing of producing only short, non-substantive descriptions of discussions.[327] Once defendants provide detailed documents on their own, the issue of plaintiffs' access to informal documents is largely moot. Second, in CS3D-oversight cases, the

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[323] Del. S. Substitute 1 for S.B. 21 (2025).
[324] Del. Code Ann. tit. 8, § 220 (2025), as amended by Del. S. Substitute 1 for S.B. 21.
[325] *Id.*
[326] *In re* Boeing Co. Deriv. Litig., 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).
[327] *See, e.g.*, Gail Weinstein et al., *Chancery Rejects Dismissal of Caremark Claims against Walmart's Officers and Directors*, HARV. CORP. GOV. F. (May 13, 2023), https://corpgov.law.harvard.edu/2023/05/13/chancery-rejects-dismissal-of-caremark-claims-against-walmarts-officers-and-directors/.

plaintiffs are bound to have much more access to information on the companies' compliance efforts, simply because the companies will have to report such information to the European regulators. In other words, instead of seeking to sift through countless internal memos and emails in section 220 battles, the plaintiffs could tap information that the European regulators already extracted from the U.S. corporations.[328]

B. How Changes in Brussels and Delaware Could Alter the CS3D Impact on U.S. corporations

To understand the conditions under which the recent developments will water down the impact of the CS3D-*Caremark* cocktail, let us first reiterate the ingredients of this cocktail. Our argument thus far has been a four-link chain: (1) new EU regulatory requirements, (2) backed by sanctions at the company level, (3) increase the threat of derivative actions in the United States, which in turn (4) leads directors and officers of U.S. corporations to implement behavioral shifts within their companies.

How are the recent developments in Brussels and Delaware likely to affect each link in this chain? The impact on the EU regulatory requirements (link (1)) is likely to be limited. As Subpart IV.A explained, even if the Omnibus Proposal passes in its entirety, it may delay a bit and dilute a bit the regulatory burden, but the CS3D will still remain a *much* more ambitious ESG legislation than anything that U.S. corporations are currently subject to. In a political environment where the chances of new U.S. ESG legislation are slim, and the SEC is rolling back its climate-related regulations,[329] even a streamlined version of the CS3D is something that U.S. corporations must prepare for.

By contrast, the impact on sanctions (link (2)) could be substantial. That is, while the CS3D will remain a formidable new regulatory burden in all scenarios, in some scenarios its enforcement will be lacking. To be precise, the dilution of expected enforcement is not likely to come from the Omnibus Proposal itself. The dilution is rather likely to come from political economy considerations. If the EU targets U.S. corporations with heavy sanctions for noncompliance before it establishes a track record of sanctioning European companies, the backlash from the United States is likely to be fierce, to the point of downright forbidding U.S. corporations from adhering to the CS3D, or imposing sanctions on the Member State that sanctioned U.S. corporations. If, on the other hand, the EU targets European companies with heavy sanctions first, the backlash from inside the EU is likely to be fierce as well. We therefore conjecture that European enforcers will tread lightly when it comes to imposing

[328] For a detailed analysis of how U.S. private litigation in other legal fields relies on information submitted to foreign regulators *see* Diego A. Zambrano, *How Litigation Imports Foreign Regulation*, 107 VA. L. REV. 1165, 1179 (2021).

[329] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Two Investment Advisers for Custody Rule Violations (Mar. 26, 2025), https://www.sec.gov/newsroom/press-releases/2025-58.

sanctions on CS3D noncompliance, at least in the first months of the Directive's implementation.

If EU enforcement at the company level will be diluted, how likely is it that plaintiffs will file CS3D-oversight derivative actions in the United States? On the face of it, undercutting the sanction at the company level (link (2)) will tumble the derivative actions against directors and officers as well (link (3)). After all, *Caremark* litigation only comes on the heels of large corporate traumas.[330] For our purposes, this means that plaintiff attorneys will not invest in investigating internal documents and filing lawsuits unless the U.S. corporation has suffered major legal sanctions in Europe for CS3D violations. Out of the pool of potential *Caremark* claims to bring, plaintiff attorneys are less likely to pick typical violations of the CS3D that lead to the company being slapped on the wrist by a state supervisory agency. Attorneys are only likely to pick the cases where the violation of CS3D was so egregious that it led to, say, the sanction of being excluded from government contracts, or a very large pecuniary sanction.

But there is a plot twist regarding the specific claims that we deal with here. With environmental and human rights harms, the trauma could come from elsewhere: not necessarily a sanction for noncompliance with the CS3D, but rather a legal or reputational sanction for actual environmental or human rights harms (say, a fine by an environmental regulator or tort liability). In these scenarios, the CS3D regime could still increase the risk of *Caremark* liability, albeit through a different channel: instead of riding the coattails of CS3D sanctions, American plaintiffs could use the information produced pursuant to the CS3D to pursue their claims.[331] The information that companies submit to European regulators pursuant to the CS3D (and its close cousins, such as CSRD) could be useful to show what directors knew and when they knew it, thereby increasing the chances that environmental and human-rights *Caremark* claims will survive the motion to dismiss. As a result, the channel of bringing CS3D-oversight claims may remain enticing for American plaintiff attorneys, even if all the proposed changes from Subpart IV.A above are adopted.[332]

It follows that these changes are also unlikely to significantly affect the behavioral shifts in companies that we expect directors and officers to implement (link (4) in our argument). As long as plaintiffs probe board oversight of sustainability due diligence, their efforts are likely to make boards change their behavior even if no individual director is found personally liable. This is the old argument about how Delaware corporate law works through

[330] Shapira, Conceptualizing *Caremark*, *supra* note 129, at 473.

[331] On the distinction between piggybacking on foreign regulatory sanctions and using information submitted to foreign regulators as evidence see Zambrano, *supra* note 328.

[332] In fact, one could claim that the CS3D-*Caremark* channel will be relatively *more* enticing for plaintiff attorneys following the recent changes. SB 21 greatly reduced the feasibility of winning self-dealing and other types of claims, thereby potentially funneling the resources of plaintiff attorneys to other channels where they can get available information on board behavior.

indirect channels, such as information production (shaping reputations) and commentary on what is expected of directors (shaping norms).

Ultimately, the potency of the CS3D-*Caremark* interaction will largely depend on the vigor of enforcement efforts at the EU level (link (2) in our chain). In this context, vigorous enforcement could take the form of imposing meaningful sanctions or extracting valuable information on how companies behaved. That vigor will be shaped less by the eventual text of the Directive itself and more by the broader political climate, influenced by both internal EU dynamics and external pressures from the United States. Accordingly, if the proposals are enacted, American firms will be less likely to suffer stricter scrutiny than European counterparts.[333] As we write, it is hard to envision EU regulators being aggressive with U.S. firms for CS3D noncompliance; but the political climate could quickly shift.

This modular analysis produces lessons that extend beyond our context of corporate law and ESG. The Brussels effect literature has largely ignored the role of litigation in translating European regulatory zeal into on-the-ground changes in corporate behavior.[334] Ignoring the role of non-EU (here: U.S.) litigation makes sense when the regulation in question forbids a product from selling on the market if it has certain features. European regulators can relatively easily enforce straightforward entry-based regulation: if a product does not have a certain component, regulators will find it easy to detect and easy to bar it from entering the market. However, when the regulation in question is process-based, and is predicated on companies adopting certain processes, the background threat of litigation is crucial to determine the extent to which companies will change their behavior (beyond checking boxes). In these scenarios, the key determinants of the Brussels effect are the ability of European regulators to extract material information from U.S. corporations and the ability of plaintiffs to use this information in U.S. litigation to hold corporate insiders accountable.

CONCLUSION

By enacting the CS3D, the EU has taken a crucial step in the debate over corporate social responsibility, turning numerous human rights and environmental issues from discretionary to mandatory. The extent to which this ambitious piece of ESG legislation will affect corporate behavior on the ground depends on the approach that businesses take to its implementation.[335] And the corporate approach to implementation is largely a function of how the Directive

[333] *See supra* Subpart III.B.1.
[334] For an exception that laments the rule see Zambrano, *supra* note 328, at 1176.
[335] Eccles et al., *supra* note 221.

will be enforced.[336] More precisely, the question is not just whether the Directive will be enforced at the company level, since companies may find ways to tick boxes or treat sanctions as part of the costs of doing business, without truly integrating sustainability into their core strategy. The question of enforcement is also, and mainly, about holding individual decision-makers accountable for how their companies perform on human rights and environmental issues.

This Article focused on how the CS3D implicates the oversight duties of the directors and officers of the largest U.S. corporations. It concluded that the CS3D may significantly increase the exposure of directors and officers to oversight claims in the context of human rights and environmental risks. The combination of the EU CS3D and the U.S. oversight duty doctrine is likely to have ripple effects on company reporting protocols, board committee structures, board composition, prefiling discovery rules, and so on. Understanding this newfound role for corporate law in promoting sustainability and evaluating its normative desirability is quickly becoming one of the most hotly debated issues in corporate governance.

The Article corresponds with a vast literature on corporate social responsibility. What separates our analysis from the bulk of that literature is focusing on legal mandates: both at the company level (the most ambitious piece of ESG legislation to date), and at the individual decision-maker level (the revamped oversight duty doctrine). Because the CS3D was enacted very recently, the academic literature on it is relatively thin.[337] European scholars did weigh in on the Directive as the legislative process was unfolding, focusing on whether the political compromise went too far or fell short.[338] Our focus is rather on the Directive's reach, and specifically how it will affect corporate America. Among the few U.S. studies to touch on this question,[339] ours stands

[336] One could also envision a "regulatory arbitrage" scenario, whereby the threat of *Caremark* is a function of the European Member State through which the American company sells. Under the Directive, the Member State that is responsible for public enforcement of the Directive is the one where the non-EU company generates most of its revenues (other than in the case in which that company has only one branch in the EU). CS3D, *supra* note 4, art. 24(3), at 44-45. Companies that sell through more "business-friendly" Member States may be subject to lax public enforcement of CS3D. As a result, such companies will be subject to a weaker threat of *Caremark* litigation relative to companies that sell mostly through countries that take the CS3D more seriously.

[337] There have been several analyses of human rights due diligence mandates, but these analyses did not explore the CS3D (if only because they predated the Directive's enactment) or corporate law's role via the oversight duty doctrine. *See* Chambers & Martin, *supra* note 226; Chambers & Martin, *supra* note 212.

[338] *See, e.g.*, *In Focus: CSDDD – Too Big to Fail?*, ECGI NEWSLETTER (Mar. 2024), https://mailchi.mp/ecgi/infocus11.

[339] *See* Bodie, *supra* note 15 (suggesting that, while the CS3D represents an ambitious attempt at shifting US corporations' attitudes to sustainability, more structural changes are needed, such as labor representation in the boardroom); Rachel Chambers & David Birchall, *How European Human Rights Law Will Reshape U.S. Business*, 20 UC L. SF BUS. J. 3, *passim* (2024) (contrasting the breadth of the CS3D requirements with the limited scope of current US human rights laws and voluntary corporate practices).

out for offering an in-depth analysis of the CS3D's effects on American oversight duties,[340] and its potential impact on corporate governance.

This Article faces several limitations, as any single article trying to cover such an extensive and contested topic would. We have focused here on sticks for companies that fail to comply (oversight duties), but one should also discuss potential carrots to support those companies that truly embrace the spirit of sustainability. We have focused on the stakeholder-vs.-shareholder governance issues, but the CS3D is bound to raise inevitable tradeoffs between stakeholders themselves, such as pitting workers' interests against environmental protection considerations. More generally, we have focused mostly on the descriptive and doctrinal analysis of how the Directive is likely to shape corporate behavior on the ground, but future work will have to take on more seriously the question of how normatively desirable it is to address first-order problems by enlisting large corporations as environmental and human rights regulators.

Perhaps the Article's biggest strength is also its biggest limitation—namely, that it deals with a current legal development. The CS3D was just enacted, and precisely because it is so ambitious, policymakers, practitioners, businesses, and even governments around the world are already lobbying to dilute its requirements.[341] As Part IV explained, it remains to be seen how the new developments inside and outside the EU, such as the ongoing trade war, will influence the dynamics that we described here. Whatever ends up happening in these political tugs-of-war, the Directive has already reset the benchmark on corporate attitudes toward human rights and the environment, and future practices and academic discussions will have to refer to it as their starting point. This Article represents a first step toward understanding what this starting point is.

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[340] Soon after the Directive Proposal was issued, two of us were the first to make the connection between the new CS3D obligations and Delaware's duty of oversight. *See* Enriques & Gatti, *supra* note **Error! Bookmark not defined.**. Moon's analysis covers some of the same ground as ours. Moon, *supra* note 166, at 373-380 (focusing on how the EU directive may extend the scope of human rights and environmental requirements US companies are subject to). Similarly, Chambers and Birchall's analysis briefly discusses the relevance of CS3D violations to the *Caremark* doctrine. Chambers & Birchall, *supra* note 339, at 42-43.

[341] *See, e.g.,* Andrew England & Alice Hancock, *Qatar Will "Stop" EU Gas Sales if Fined under Due Diligence Law*, FIN. TIMES (Dec. 22, 2024) (reporting Qatari energy minister's threat to stop supplying gas to EU countries if QatarEnergy were fined for an amount equal to 5 per cent of the company's annual global revenue).

ANNEX I: THE DIRECTIVE'S INSTRUMENTS AND WHERE THE US STANDS ON THEM

	PART 1 1. VIOLATIONS OF RIGHTS AND PROHIBITIONS INCLUDED IN INTERNATIONAL HUMAN RIGHTS AGREEMENTS	POSITION OF THE UNITED STATES
1.	The right to life, interpreted in line with Article 6(1) of the **International Covenant on Civil and Political Rights**. The abuse of that right includes, but is not restricted to, private or public security guards protecting the company's resources, facilities or personnel causing the death of a person due to a lack of instruction or control by the company	Ratified but subject to reservations, understandings, and declarations (the United States reserves the right to impose capital punishment in certain circumstances)[342]
2.	The prohibition of torture, cruel, inhuman or degrading treatment, interpreted in line with Article 7 of the **International Covenant on Civil and Political Rights**. This includes, but is not restricted to, private or public security guards protecting the company's resources, facilities or personnel subjecting a person to torture or cruel, inhuman or degrading treatment due to a lack of instruction or control by the company	Ratified but subject to reservations, understandings, and declarations (the United States' reservation to the ICCPR provides that '"cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States')[343]
3.	The right to liberty and security, interpreted in line with Article 9(1) of the **International Covenant on Civil and Political Rights**	Ratified but subject to reservations, understandings, and declarations (the United States issued a general declaration that means art. 9 of

[342] International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, T.I.A.S No. 92-908, 999 U.N.T.S. 171 (signed by the United States Oct. 5, 1977, entered into force for the United States Sept. 8, 1992) [hereinafter ICCPR]. The United States' instrument of ratification can be found in 1676 U.N.T.S. 543. In addition to reservations, understandings, and declarations that affect specific provisions of the ICCPR, the United States has made a general declaration 'that the provisions of Articles 1 through 27 of the Covenant are not self-executing': 1676 U.N.T.S. 545. The United States has also issued an understanding that 'this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant': 1676 U.N.T.S. 545.

[343] *Id.* The relevant reservation is at 1676 U.N.T.S. 543.

		the ICCPR is not self-executing)[344]
4.	The prohibition of arbitrary or unlawful interference with a person's privacy, family, home or correspondence and unlawful attacks on their honour or reputation, interpreted in line with Article 17 of the **International Covenant on Civil and Political Rights**	Ratified but subject to reservations, understandings, and declarations (the United States issued a general declaration that means art. 17 of the ICCPR is not self-executing)[345]
5.	The prohibition of interference with the freedom of thought, conscience and religion, interpreted in line with Article 18 of the **International Covenant on Civil and Political Rights**	Ratified but subject to reservations, understandings, and declarations (the United States issued a general declaration that means art. 18 of the ICCPR is not self-executing)[346]
6.	The right to enjoy just and favourable conditions of work, including a fair wage and an adequate living wage for employed workers and an adequate living income for self-employed workers and smallholders, which they earn in return from their work and production, a decent living, safe and healthy working conditions and reasonable limitation of working hours, interpreted in line with Articles 7 and 11 of the **International Covenant on Economic, Social and Cultural Rights**	Not ratified (but signed)[347]
7.	The prohibition to restrict workers' access to adequate housing, if the workforce is housed in accommodation provided by the company, and to restrict workers' access to adequate food, clothing, and water and sanitation in the workplace, interpreted in line with Article 11 of the **International Covenant on Economic, Social and Cultural Rights**	Not ratified (but signed)[348]
8.	The right of the child to the highest attainable standard of health, interpreted in line with Article 24 of the **Convention on the Rights of the Child**	Not ratified (but signed)[349]
	The right to education, interpreted in line with Article 28 of the **Convention on the Rights of the Child**; The right to an adequate standard of living, interpreted in line with Article 27 of the **Convention on the Rights of the Child**	Not ratified (but signed)[350]
	The right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, interpreted in line with Article 32 of the **Convention on the Rights of the Child**	Not ratified (but signed)[351]

[344] *Id.* The relevant declaration is at 1676 U.N.T.S. 545.
[345] *Id.*
[346] *Id.*
[347] International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 933 U.N.T.S. 3 (signed by the United States Oct. 5, 1977) [hereinafter ICESCR]. The Covenant was submitted to the U.S. Senate but never ratified: S. Treaty Doc. No. 95-19.
[348] *Id.*
[349] Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (signed by the United States Feb. 16, 1995).
[350] *Id.*
[351] *Id.*

	The right of the child to be protect ed from all forms of sexual exploitation and sexual abuse and to be protected from being abducted, sold or moved illegally to a different place in or outside their country for the purpose of exploitation, interpreted in line with Articles 34 and 35 of the **Convention of the Rights of the Child**	Not ratified (but signed)[352]
9.	The prohibition of the employment of a child under the age at which compulsory schooling is completed and, in any case, is not less than 15 years, except where the law of the place of employment so provides in line with Article 2(4) of the **International Labour Organization Minimum Age Convention, 1973 (No 138)**	Not ratified and not signed[353]
	interpreted in line with Articles 4 to 8 of the **International Labour Organization Minimum Age Convention, 1973 (No 138)**	Not ratified and not signed[354]
10.	The prohibition of the worst forms of child labour (persons below the age of 18 years), interpreted in line with Article 3 of the **International Labour Organization Worst Forms of Child Labour Convention, 1999 (No 182)**. This includes: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, as well as forced or compulsory labour, including the forced or compulsory recruitment of children for use in armed conflicts; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production or trafficking of drugs; and (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children	Ratified[355]
11.	The prohibition of forced or compulsory labour, which means all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself or herself voluntarily, for example as a result of debt bondage or trafficking in human beings, interpreted in line with Article 2(1) of the **International Labour Organization Forced Labour Convention, 1930 (No 29)**	Not ratified and not signed[356]
	Forced or compulsory labour shall not mean any work or services that comply with Article 2(2) of the **International Labour Organization Forced Labour Convention, 1930 (No 29)**	Not ratified and not signed[357]
	or with Article 8(3), points (b) and (c) of the **International Covenant on Civil and Political Rights**	Ratified but subject to reservations, understandings, and declarations (the United States issued a general declaration that means art. 8 of the ICCPR is not self-executing)[358]
12.	The prohibition of all forms of slavery and slave-trade, including practices akin to slavery, serfdom or other forms of domination or	Ratified but subject to reservations,

352 *Id.*
353 International Labour Organization Convention (No. 138) concerning Minimum Age for Admission to Employment, *adopted* June 26, 1976, 1015 U.N.T.S. 297.
354 *Id.*
355 International Labour Organization Convention (No. 182) concerning the prohibition and immediate action for the elimination of the worst forms of child labor, *adopted* June 17, 1999, T.I.A.S. No. 13045, 2133 U.N.T.S. 161 (entered into force for the United States Dec. 2, 2000).
356 International Labour Organization Convention (No. 29) concerning forced or compulsory labour, *adopted* June 28, 1930, 39 U.N.T.S. 55.
357 *Id.*
358 ICCPR, *supra* note 1. The relevant declaration is at 1676 U.N.T.S. 545.

	oppression in the workplace, such as extreme economic or sexual exploitation and humiliation, or human trafficking, interpreted in line with Article 8 of the **International Covenant on Civil and Political Rights**	understandings, and declarations (the United States issued a general declaration that means art. 8 of the ICCPR is not self-executing)[359]
13.	The right to freedom of association, of assembly, and the rights to organise and collective bargaining, interpreted in line with Articles 21 and 22 of the **International Covenant on Civil and Political Rights**	Ratified but subject to reservations, understandings, and declarations (the United States issued a general declaration that means arts. 21 and 22 of the ICCPR are not self-executing)[360]
	Article 8 of the **International Covenant on Economic, Social and Cultural Rights**	Not ratified (but signed)[361]
	the **International Labour Organization Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)**	Not ratified and not signed[362]
	the **International Labour Organization Right to Organise and Collective Bargaining Convention, 1949 (No 98).** Those rights include the following: (a) workers are free to form or join trade unions; (b) the formation, joining and membership of a trade union must not be used as a reason for unjustified discrimination or retaliation; (c) trade unions are free to operate in line with their constitutions and rules, without interference from the authorities; and (d) the right to strike and the right to collective bargaining	Not ratified and not signed[363]
14.	The prohibition of unequal treatment in employment, unless this is justified by the requirements of the employment, interpreted in line with Articles 2 and 3 of the **International Labour Organization Equal Remuneration Convention, 1951 (No 100)**	Not ratified and not signed[364]
	Articles 1 and 2 of the **International Labour Organization Discrimination (Employment and Occupation) Convention, 1958 (No 111)**	Not ratified and not signed[365]
	Article 7 of the **International Covenant on Economic, Social and Cultural Rights**. This includes, in particular: (a) the payment of unequal remuneration for work of equal value; and (b) discrimination on grounds of national extraction or social origin, race, colour, sex, religion, political opinion	Not ratified (but signed)[366]
15.	The prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions,	ICCPR: Ratified but subject to

[359] *Id.*
[360] *Id.*
[361] ICESCR, *supra* note 6.
[362] International Labour Organization Convention (No. 87) concerning freedom of association and protection of the right to organize, *adopted* July 9, 1948, 68 U.N.T.S. 17.
[363] International Labour Organization Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively, *adopted* July 1, 1949, 96 U.N.T.S. 257.
[364] International Labour Organization Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value, *adopted* June 29, 1951, 165 U.N.T.S. 303.
[365] International Labour Organization Convention (No. 111) concerning discrimination in respect of employment and occupation, *adopted* June 25, 1958, 362 U.N.T.S. 31.
[366] ICESCR, *supra* note 6.

	excessive water consumption, degradation of land, or other impact on natural resources, such as deforestation, that: (a) substantially impairs the natural bases for the preservation and production of food; (b) denies a person access to safe and clean drinking water; (c) makes it difficult for a person to access sanitary facilities or destroys them; (d) harms a person's health, safety, normal use of land or lawfully acquired possessions; (e) substantially adversely affects ecosystem services through which an ecosystem contributes directly or indirectly to human wellbeing; interpreted in line with Article 6(1) of the **International Covenant on Civil and Political Rights** and Articles 11 and 12 of the **International Covenant on Economic, Social and Cultural Rights**	reservations, understandings, and declarations (the United States issued a general declaration that means art. 6 of the ICCPR is not self-executing)[367] ICESCR: Not ratified (but signed)[368]
16.	The right of individuals, groupings and communities to lands and resources and the right not to be deprived of means of subsistence, which entails the prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise using land, forests and waters, including by deforestation, the use of which secures the livelihood of a person, interpreted in line with Article 1 and 27 of the **International Covenant on Civil and Political Rights**	Ratified but subject to reservations, understandings, and declarations (the United States issued a general declaration that means arts. 1 and 27 of the ICCPR are not self-executing)[369]
	Article 1, 2 and 11 of the **International Covenant on Economic, Social and Cultural Rights**	Not ratified (but signed)[370]
	PART 1 **2. HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS INSTRUMENTS**	
	The **International Covenant on Civil and Political Rights**;	Ratified but subject to reservations, understandings, and declarations (the United States has issued various specific and general reservations, understandings, and declarations)[371]
	The **International Covenant on Economic, Social and Cultural Rights**;	Not ratified (but signed)[372]
	The **Convention on the Rights of the Child**;	Not ratified (but signed)[373]
	The International Labour Organization's core/fundamental conventions:	
	Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87);	Not ratified and not signed[374]

[367] ICCPR, *supra* note 1. The relevant declaration is at 1676 U.N.T.S. 545.
[368] ICESCR, *supra* note 6.
[369] ICCPR, *supra* note 1.
[370] ICESCR, *supra* note 6.
[371] ICCPR, *supra* note 1 and accompanying text.
[372] ICESCR, *supra* note 6.
[373] Convention on the Rights of the Child, *supra* note 8.
[374] International Labour Organization Convention (No. 87) concerning freedom of association and protection of the right to organize, *supra* note 21.

	Right to Organise and Collective Bargaining Convention, 1949 (No 98);	Not ratified and not signed[375]
	Forced Labour Convention, 1930 (No 29) and its 2014 Protocol;	Not ratified and not signed[376]
	Abolition of Forced Labour Convention, 1957 (No 105);	Ratified[377]
	Minimum Age Convention, 1973 (No 138);	Not ratified and not signed[378]
	Worst Forms of Child Labour Convention, 1999 (No 182);	Ratified[379]
	Equal Remuneration Convention, 1951 (No 100);	Not ratified and not signed[380]
	Discrimination (Employment and Occupation) Convention, 1958 (No 111)	Not ratified and not signed[381]
	PART II **VIOLATIONS OF INTERNATIONALLY RECOGNIZED OBJECTIVES AND PROHIBITIONS INCLUDED IN ENVIRONMENTAL CONVENTIONS**	
1.	The obligation to avoid or minimise adverse impacts on biological diversity, interpreted in line with Article 10, point (b) of the **1992 Convention on Biological Diversity** and applicable law in the relevant jurisdiction	Not ratified (but signed)[382]
	the **Cartagena Protocol on the development, handling, transport, use, transfer and release of living modified organisms**	Not ratified and not signed[383]
	the **Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity of 12 October 2014**	Not ratified and not signed[384]
2.	The prohibition on the import, export, re-export or introduction from the sea of any specimen included in the Appendices I to III of the	Ratified[385]

375 International Labour Organization Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively, *supra* note 22.
376 International Labour Organization Convention (No. 29) concerning forced or compulsory labour, *supra* note 15.
377 International Labour Organization Convention (No. 105) concerning the abolition of forced labor, June 25, 1957, S. TREATY DOC. NO. 88-11, 320 U.N.T.S. 291 (entered into force for the United States Sep. 25, 1992).
378 International Labour Organization Convention (No. 138) concerning Minimum Age for Admission to Employment, *supra* note 12.
379 International Labour Organization Convention (No. 182) concerning the prohibition and immediate action for the elimination of the worst forms of child labor, *supra* note 14.
380 International Labour Organization Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value, *supra* note 23.
381 International Labour Organization Convention (No. 111) concerning discrimination in respect of employment and occupation, *supra* note 24.
382 Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 69 (signed by the United States June 4, 1993). The Convention was submitted to the U.S. Senate but never ratified: S. TREATY DOC. NO. 103-20.
383 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *adopted* Jan. 29, 2000, 2226 U.N.T.S. 208.
384 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, *adopted* Oct. 29, 2010, 3008 U.N.T.S. 3.
385 Convention on international trade in endangered species of wild fauna and flora, with appendices, *adopted* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

	Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 3 March 1973 without a permit, interpreted in line with Articles III, IV and V of the Convention	
3.	The prohibition of the manufacture, import and export of mercury-added products listed in Annex A Part I to the **Minamata Convention on Mercury of 10 October 2013** (Minamata Convention), interpreted in line with Article 4(1) of the Convention	Ratified[386]
4.	The prohibition of the use of mercury or mercury compounds in the manufacturing processes listed in Annex B Part I to the **Minamata Convention** after the phase-out date specified in the Convention for the individual processes, interpreted in line with Article 5(2) of the Convention	Ratified[387]
5.	The prohibition of the unlawful treatment of mercury waste, interpreted in line with Article 11(3) of the **Minamata Convention**	Ratified[388]
	Article 13 of **Regulation (EU) 2017/852 of the European Parliament and of the Council**	N/A (EU law)
6.	The prohibition of the production and use of chemicals listed in Annex A to the **Stockholm Convention of 22 May 2001 on Persistent Organic Pollutants (POPs Convention)**, interpreted in line with Article 3(1), point (a), point (i) of the Convention	Not ratified (but signed)[389]
	Regulation (EU) 2019/1021 of the European Parliament and of the Council	N/A (EU law)
7.	The prohibition of the unlawful handling, collection, storage and disposal of waste, interpreted in line with Article 6(1), point (d), points (i) and (ii) of the **POPs Convention**	Not ratified (but signed)[390]
	Article 7 of **Regulation (EU) 2019/1021**	N/A (EU law)
8.	The prohibition of the import or export of a chemical listed in Annex III to the **Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) of 10 September 1998**, interpreted in line with Article 10(1), Article 11(1), point (b) and Article 11(2) of the Convention and indication by the importing or exporting Party to the Convention in line with the Prior Informed Consent (PIC) Procedure	Not ratified (but signed)[391]
9.	The prohibition of the unlawful production, consumption, import and export of controlled substances in Annexes A, B, C and E to the **Montreal Protocol on substances that deplete the Ozone Layer to the Vienna Convention for the protection of the Ozone Layer**, interpreted in line with Article 4B of the Montreal Protocol and licensing provisions under applicable law in relevant jurisdiction;	Ratified[392]

[386] Minamata Convention on Mercury, *adopted* Oct. 10, 2013, T.I.A.S No. 17-816, 3201 U.N.T.S. 3 (signed by the United States Nov. 6, 2013, entered into force Aug 16, 2017).

[387] *Id.*

[388] *Id.*

[389] Stockholm Convention on Persistent Organic Pollutants, *adopted* May 22, 2001, 2256 U.N.T.S. 119 (signed by the United States May 23, 2001). The Convention was submitted to the U.S. Senate but never ratified: S. TREATY DOC. NO. 107-5.

[390] *Id.*

[391] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, *adopted* Sep 10, 1998, 2244 U.N.T.S. 337 (signed by the United States, Sep 11, 1998). The Convention was submitted to the U.S. Senate but never ratified: S. TREATY DOC. NO. 106-21.

[392] Montreal protocol on substances that deplete the ozone layer, *adopted* Sep. 16, 1987, T.I.A.S. No. 89-101, 1522 U.N.T.S. 3 (signed by the United States Sep 16, 1987, entered into force Jan. 1, 1989).

10.	The prohibition of the export of hazardous or other waste, interpreted in line with Article 1(1) and (2) of the **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 (Basel Convention)** (and **Regulation (EC) No 1013/2006 of the European Parliament and of the Council**)	Basel Convention: Not ratified (but signed)[393] Regulation (EC) No 1013/2006: N/A (EU law)
	(a) to a party to the Convention that has prohibited the import of such hazardous and other wastes, interpreted in line with Article 4(1), point (b) of the **Basel Convention**	Not ratified (but signed)[394]
	(b) to a state of import that does not consent in writing to the specific import, in the case where that state of import has not prohibited the import of such hazardous wastes, interpreted in line with Article 4(1), point (c) of the **Basel Convention**	Not ratified (but signed)[395]
	(c) to a non-par ty to the Basel Convention, interpreted in line with Article 4(5) of the **Basel Convention**	Not ratified (but signed)[396]
	(d) to a state of import if such hazardous wastes or other wastes are not managed in an environmentally sound manner in that state or elsewhere, interpreted in line with Article 4(8) the first sentence of the **Basel Convention**	Not ratified (but signed)[397]
11.	The prohibition of the export of hazardous wastes from countries listed in Annex VII to the **Basel Convention** to countries not listed in Annex VII for operations listed in Annex IV to the **Basel Convention**, interpreted in line with Article 4A of the **Basel Convention** (and Article 34 and 36 of **Regulation (EC) No 1013/2006)**	Not ratified (but signed)[398]
12.	The prohibition of the import of hazardous wastes and other wastes from a non-party that has not ratified the **Basel Convention**, interpreted in line with Article 4(5) of the **Basel Convention**	Not ratified (but signed)[399]
13.	The obligation to avoid or minimise adverse impacts on the properties delineated as natural heritage as defined in Article 2 of the **Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972** (the World Heritage Convention), interpreted in line with Article 5, point (d) of the World Heritage Convention and applicable law in the relevant jurisdiction	Ratified[400]
14.	The obligation to avoid or minimise adverse impacts on wetlands as defined in Article 1 of the **Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971** (Ramsar Convention), interpreted in line with Article 4(1) of the **Ramsar Convention** and applicable law in the relevant jurisdiction	Ratified[401]
15.	The obligation to prevent the pollution from ships, interpreted in line with the **International Convention for the Prevention of Pollution**	Ratified[402]

393 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *adopted* Mar. 22, 1989, 1673 U.N.T.S. 57 (signed by the United States Mar. 22, 1990). The Convention was submitted to the U.S. Senate but never ratified: S. TREATY DOC. NO. 102-5.

394 *Id.*

395 *Id.*

396 *Id.*

397 *Id.*

398 *Id.*

399 *Id.*

400 Convention concerning the Protection of the World Cultural and Natural Heritage, *adopted* Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force for the United States Dec. 17, 1975).

401 Convention on wetlands of international importance especially as waterfowl habitat, *adopted* Feb. 2, 1971, T.I.A.S. No. 11084, 996 U.N.T.S. 245 (entered into force for the United States Dec. 18, 1986).

402 Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, *adopted* Feb. 17, 1978, S. TREATY DOC. NO. 96-3, 1340 U.N.T.S. 61 (ratified by the United States Aug. 12,

	from Ships of 2 November 1973, as amended by the Protocol of 1978 (MARPOL 73/78). This includes:	
	(a) the prohibition on the discharge into the sea of: (i) oil or oily mixtures as defined in Regulation 1 of **Annex I to MARPOL 73/78**, interpreted in line with Regulations 9 to 11 of **Annex I to MARPOL 73/78**	Ratified but subject to reservations, understandings, and declarations (the United States considers that the Annex only applies to 'seagoing ships')[403]
	(ii) noxious liquid substances as defined in Regulation 1(6) of **Annex II to MARPOL 73/78**, interpreted in line with Regulations 5 and 6 of **Annex II to MARPOL 73/78**	Ratified but subject to reservations, understandings, and declarations (the United States considers that the Annex only applies to 'seagoing ships')[404]
	(iii) sewage as defined in Regulation 1(3) of **Annex IV to MARPOL 73/78**, interpreted in line with Regulations 8 and 9 of **Annex IV to MARPOL 73/78**	Not ratified and not signed[405]
	(b) the prohibition of unlawful pollution by harmful substances carried by sea in packaged form as defined in Regulation 1 of **Annex III to MARPOL 73/78**, interpreted in line with Regulations 1 to 7 of **Annex III to MARPOL 73/78**;	Ratified[406]
	(c) the prohibition of unlawful pollution by garbage from ships as defined in Regulation 1 of **Annex V to MARPOL 73/78**, interpreted in line with Regulations 3 to 6 to **Annex V of MARPOL 73/78**	Ratified but subject to reservations, understandings, and declarations (the United States issued an understanding that it 'would make every reasonable effort to have the Gulf of Mexico designated a "special

1980, entered into force Oct. 2, 1983) [hereinafter Protocol of 1978]. Article I of the Protocol of 1978 provides that Parties to the Protocol will give effect to the 1973 Convention for the Prevention of Pollution from Ships, as modified by the Protocol, hence the creation of a combined MARPOL 73/78. At the time of signing the Protocol of 1978, the United States issued a declaration jointly with the United Kingdom and France on the Soviet Union's declaration to the Protocol: 1341 U.N.T.S. 327. The United States' declaration concerned the rights of the Federal Republic of Germany and the application of the Protocol of 1978 to the Western Sectors of Berlin. The declaration no longer appears relevant to the United States' ratification of the Protocol.

[403] *Id.* For the text of the United States' reservations, understandings, and declarations to Annex I to the Protocol of 1978, see Int'l Maritime Org. [IMO], *Status of IMO Treaties*, at 153–54 (May 13, 2025), https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%202025.pdf

[404] *Id.*

[405] As per 1340 U.N.T.S. 62, the United States did not sign onto annexes III, IV and V to the Protocol of 1978. However, as noted below, the United States later signed annexes III and V.

[406] Annex III, Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Forms or in Freight Containers, Portable Tanks or Road and Rail Tank Wagons, *adopted* Feb. 17, 1978, S. TREATY DOC. NO. 101-7, 1340 U.N.T.S. 255 (entered into force for the United States July 1, 1992).

		area" under the Annex')[407]
16.	The obligation to prevent, reduce and control pollution of the marine environment by dumping, interpreted in line with Article 210 of the **United Nations Convention on the Law of the Sea of 10 December 1982** (UNCLOS) and applicable law in the relevant jurisdiction	Not ratified and not signed[408]

[407] Annex V, Regulations for the Prevention of Pollution by Garbage from Ships, an Optional Annex to the 1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships, S. TREATY DOC. NO. 100-3, 1340 U.N.T.S. 263 (entered into force for the United States Dec. 31, 1988). For the text of the United States' reservations, understandings, and declarations to Annex V to the Protocol of 1978, see Int'l Maritime Org. [IMO], *supra* note 62.
[408] United Nations Convention on the Law of the Sea, *adopted* 10 December 1982, 1833 U.N.T.S. 3.

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