No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Codes of Conduct?

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No good deed goes unpunished.
– Clare Booth Luce

Introduction

In the wake of Enron, Worldcom, and Tyco, there has been a renewed interest in corporate social responsibility (CSR), particularly as it might be embodied in corporate codes of conduct or codes of ethics. Some organizations and groups have attempted to encourage U.S. corporations to adopt codes of conduct that commit the corporations to aspirational standards of conduct with regard to their stakeholders, rather than codes that merely reiterate the corporations’ existing obligations under the law.

One concern raised about adopting codes that attempt to embody CSR is that no precise definition of CSR exists. It involves different principles for different people. David Vogel in his book The Market for Virtue notes that CSR usually is associated with “firms’ efforts to do more to address a wide variety of social problems than they would have done in the course of their normal pursuit of profits.”

Definitions of CSR can be placed into at least four categories: (1) minimalist, (2) philanthropic, (3) encompassing or stakeholder, and (4) social activist. The minimalist view is that a corporation’s only social responsibility is to increase the wealth of its shareholders. The most famous champion of this view is

4. Id. at 40.
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Milton Friedman. It still holds sway within the American business community. In a 2006 address at Aldelphi University, Thomas J. Donohue, President and CEO of the U.S. Chamber of Commerce, defined CSR as an endeavor “to earn a profit, create jobs, and make products and services that people need and that raise our standard of living.”

The philanthropic view, like the minimalist view, is that a corporation’s primary obligation is to maximize the wealth of its shareholders, but this view accepts that the corporation—in addition to its individual shareholders, managers, and employees—can engage in charitable activities. These charitable activities do not need to be tied to the corporation’s core business. They can be aimed solely at addressing moral or ethical concerns.

The encompassing or stakeholder view is that corporations should be managed to address not only the shareholders’ interests but also the interests of other groups that have a stake in the corporation, such as employees, suppliers, customers, creditors, and the community. The stakeholder definition of CSR appears to be the most common definition employed in articles in the academic and business press. The definition of CSR employed by the International Financial Corporation (IFC) fits within this category. The IFC defines corporate social responsibility as “the commitment of businesses to contribute to sustainable economic development by working with employees, their families, the local community and society at large to improve their lives in ways that are good for business and for development.” Economic definitions of CSR that are con-

7. Locke, supra note 3, at 41.
8. Id.
cerned with requiring corporations to internalize their externalities also would fit within this definition. Geoffrey Heal, a Columbia Business School professor, defines CSR as "a program of actions taken to reduce externalized costs or to avoid distributional conflicts." The stakeholder definition usually identifies consumer protection, labor rights, protection of the environment, contributions to the community, and good corporate governance practices—in addition to returns for investors—as areas of concern for corporations.

Finally, the social activist view argues that corporations are responsible to society at large for the effects of their actions. This view requires corporations to benefit society, not just particular shareholders or stakeholders of the corporation. Muhammad Yunus, the winner of the 2006 Nobel Peace Prize and the founder of the Grameen Bank, espouses this view. In his Nobel Lecture, he talked about "social business," which he defined as "a new kind of business introduced in the market place with the objective of making a difference in the world." Yunus claimed that "social business" would be able to address "[a]ll social and economic problems of the world." The wide range of possible definitions for CSR means that a particular business may be addressing only some of the issues that a particular person or group might consider an essential part of CSR, or the business may have prioritized the CSR issues in the wrong way in the view of a particular person or group. For example, since 2000, Business Ethics Magazine has published an annual list of the "100 Best Corporate Citizens." The companies on these lists change substantially from year to year. Only thirty-four of the "100 Best Corporate Citizens" in 2000 made the list in 2003. Part of the reason for these variations is that Business Ethics Magazine has modified the criteria that it uses to determine who gets on this list every year.

13. Locke, infra note 3, at 41-42.
14. Id.
16. Id.
18. The 2000 list only considered how the corporations fared with respect to revenues, net income, return to shareholders, community relations, employee relations, and customer relations. The 2003 list considered all of those factors plus how the corporations treated women and minorities, the environment, and non-U.S. stakeholders. 100 Best Corporate Citizens 2000, BUS. ETHICS MAG., available at http://www.business-ethics.com/node/83. The 2003 list also changed in part because data provider KLD expanded its underlying database of public firms beyond...
Corporations can rather easily address the concern over the vagueness of CSR’s definition by clearly defining and disclosing what they mean when they use the term, “corporate social responsibility,” and by specifying towards whom are their CSR efforts directed. Corporations will simply have to live with the fact that some may disagree with how a corporation has defined “corporate social responsibility” or may disagree with how a corporation has prioritized the issues within its definition. No one can please everyone all of the time.

Corporations that seek to adopt codes of conduct that embody the stakeholder or social activist views of CSR face another concern: such codes will expose them to legal liabilities that they would not face if they had not adopted those aspirational standards. If a corporation adopts a code of conduct with aspirational standards—or standards higher than ones prescribed normally under existing statutes, regulations, or the common law—some courts will allow stakeholders to sue the corporation if it fails to meet those standards in its code of conduct.

Thus, the law creates a perverse set of incentives that encourage corporations to adopt codes of conduct that embody the stakeholder or social activist views of CSR, which then exposes them to legal liabilities. If a corporation uses a socially screened stock index, such as the Domini Index, to draw their list of corporate citizens, they may face legal challenges if they fail to meet the standards set by the index.

See infra notes 110 to 192 and accompanying text. Proponents of CSR have tried to convince corporations to undertake such initiatives on the grounds that the market will reward them for their efforts. Usually in order to reap the biggest rewards for CSR activities, corporations have to publicize them and convince consumers and others that they are undertaking credible efforts to implement CSR principles. The only credible way to do this is through formal programs with demonstrable results, which include embedding CSR principles in the corporation’s code of conduct. Consumers and others are increasingly skeptical of corporate claims regarding CSR out of concerns that corporate CSR efforts are nothing more than public relations efforts and are not making any substantive changes to the ways that corporations actually behave.