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Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility

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TABLE OF CONTENTS

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Would you tell me please which way I ought to go from here? That depends a good deal on where you want to go.
-The Cheshire Cat to Alice in Wonderland.

In the area of corporate social responsibility, where to go and how to get there are major questions facing corporations, their lawyers, investors, and governmental agencies alike.[1] Questions of "where to go" facing corporate execu-

1. *See, e.g.*, R. BAUER & D. FENN, THE CORPORATE SOCIAL AUDIT 3 (1972), reviewing "rhetoric from businessmen and public officials alike" calling on "corporate management . . . to solve the problems of Urban America once and for all" and the confusion that has resulted:

> Ralph Nader, consumerism, ecology, Africa, misleading advertising, Campaign GM, student and church criticism all tumbled over one another seeking attention to the point

tives and others include how much corporate social responsibility is enough[2] and what forms social responsibility should take. Other questions concern which of the socially responsible measures corporations could take portend the greatest good for the greatest number, or on the more pragmatic scale, which measures will win the greatest amount of public or governmental acceptance. What roles government, citizen groups, or investors should play in inducing or in monitoring corporate social responsibility are questions of "how to get there."[3] Much debated and often

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> where the businessman of the seventies is caught up in a confusing turbulence of demands and charges and concerns, all marching under the umbrella of "social responsibility."

On the quandary facing institutional investors over how to inject corporate responsibility into the investment selection process see B. LONGSTRETH & H. ROSENBLOOM, CORPORATE SOCIAL RESPONSIBILITY AND THE INSTITUTIONAL INVESTOR 41-70 (1973). For a description of similar problems facing not-for-profit institutional investors, J. SIMON, C. POWERS & J. GUNNEMAN, THE ETHICAL INVESTOR (1972) [hereinafter cited as THE ETICAL INVESTOR]. *See also* authorities cited note 4 *infra.*

2. This article presumes that corporations do have responsibilities over and above providing goods and services to meet demand and beyond maximizing profits for the benefit of stockholders. Most scholars who have addressed the question now agree that corporations do have such a responsibility. *See, e.g.*, notes 176-88 *infra* and accompanying text. There are, however, a few who believe that any corporation attempting to fulfill social responsibilities is, indeed, an Alice in Wonderland. The most notable of these is Professor Milton Friedman, who states:

> Most of the talk has been utter hogwash . . . . [T]he question is, do corporate executives, provided they stay witbin the law, have responsibilities in their business activities other than to make as much money for their stockholders as possible? And my answer to that is, no, they do not.

McClaughry, *Milton Friedman Responds*, BUS. & SOC'Y REV. 5, 6 (Spring 1972). *See also* M. FRIEDMAN, AN ECONOMIST'S PROTEST 147 (1972) (remarking that corporate social responsibility is "pure and unadulterated socialism"); Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times, Sept. 13, 1970, § 6, at 32 (corporate responsibility "could thoroughly undermine the very foundations of our free society" and "is a fundamentally subversive doctrine"). The other notable devotee of profit maximization as the corporation's sole goal is Professor Henry G. Manne. *See, e.g.*, Manne, *Financial Intermediaries and Corporate Responsibility*, 17 N.Y.L.F. 725 (1971); Manne, *Good for General Motors*, BARRONS, May 18, 1970, at 1; Manne, *The Myth of Corporate Responsibility*, 26 BUS. LAW. 533 (1970). Indications, though, are that Professor Manne is softening a bit. *See* Manne, *The Limits and Rationale of Corporate Altruism: An Individualistic Model*, 59 VA. L. REV. 708 (1973), discussed in notes 182-88 *infra* and accompanying text. This article avoids that debate, however, and assumes that corporations do have social responsibility, confining itself to a discussion of how much social responsibility should be exercised and in wbat directions it lies and the use of accounting and disclosure to answer those questions.

3. These inquiries are not new. For instance, to whom corporations are responsible—to the sbareholders alone or to labor, consumers, and society as well—was the subject of the famous Berle-Dodd debates. *See* Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); Dodd, *For Whom Are Corporate Managers Trustees*, 45 HARV. L. REV. 1145

heavy-handed or economically wasteful devices have been proposed as means of achieving desired levels of corporate social performance. These proposed devices include federal chartering of corporations, federal minimum corporate law standards, use of shareholder public interest proxy campaigns, installation of public interest directors on corporate boards of directors, and directors' election by specified constituencies drawn from labor, consumers, or suppliers.[4]

This article's supposition is that perhaps none of these devices offers as much promise in getting corporations to an optimum level of social performance as does corporate social accounting. Indeed, combined with some disclosure of accounting results, corporate social accounting will aid in defining what an optimum level of social performance might be. The corporate social audit, together with public reporting, can be the Cheshire Cat of today's corporate world. As such, it is more benevolent—sitting on the rail telling corporations where to go and how to get there with less acrimony, delay, or inefficiency—than federal chartering of corporations, public interest proxy campaigns, or any

(1932); Dodd, *Is Effective Enforcement of the Fiduciary Duty of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935). In 1919, Mackenzie King stated that the corporation must seek to serve the objectives of its employees and of the community. *See* G. GOYDER, THE FUTURE OF PRIVATE ENTERPRISE 20 (1951). As early as the 1950's, Howard R. Bowen recommended that businessmen undergo an examination by independent experts every 5 years in order to evaluate their performance from a societal point of view. H. BOWEN, SOCIAL RESPONSIBILITIES OF BUSINESSMEN 155-56 (1953).

4. *See, e.g.*, Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 GEO. L.J. 71 (1972); Note, *Federal Chartering of Corporations: A Proposal*, 61 GEO. L.J. 89 (1972). Ralph Nader is convinced that federal chartering is the answer to controlling major corporations as irresponsible power centers in modern society. For that reason he has created a Nader subsidiary, the Corporate Accountability Research Group, to gather evidence, marshall arguments, and advocate federal chartering. *See* Nader, The Case for Federal Chartering, in CORPORATE POWER IN AMERICA 67 (R. Nader & M. Green eds. 1973). Professor William Cary is the latest on the scene with a new proposal—federal minimum standards. *See* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). Shareholder proxy proposals and campaigns are reviewed in LONGSTRETH & ROSENBLOOM, *supra* note 1, at 3-19, and reviewed and advocated in Schwartz, *Proxy Power and Social Goals—How Campaign GM Succeeded*, 45 ST. JOHN'S L. REV. 765 (1971); Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971); Schwartz, *Toward New Corporate Goals: Co-existence With Society*, 60 GEO. L.J. 57 (1971). The public directors device and its pitfalls are analyzed in Schwartz, *Governmentally Appointed Directors in a Private Corporation—The Communications Satellite Act of 1962*, 79 HARV. L. REV. 350 (1965). Concise reflection on directors for varying constituencies can be found in Symposium, *Corporate Machinery for Hearing and Heeding New Voices*, 27 BUS. LAW. 195, 197-208 (1971) (remarks of Professor Alfred Conard). Notes 272-99 *infra* and accompanying text discuss all of these proposed reforms and juxtapose them to social accounting and disclosure.

other device reformers propose.

To demonstrate this, the article reviews the progress that has taken place in the field of social accounting. In that review, social accounting's virtues and its superiority in accomplishing the aims of corporate social performance should become evident. The discussion also lists the questions and imponderables that remain as limitations on social auditing techniques. Those limitations notwithstanding, the article recommends that the Securities and Exchange Commission mandate corporate disclosure on certain basic social responsibility issues. Although other writers have recommended disclosure on corporate social responsibility,[5] they have done so based upon various new views of the corporation as a public, socioeconomic entity, with responsibilities to consumers, labor, the community, and the society as a whole.[6] They have abandoned the present corporate law model of a private, primarily economic entity owing its main responsibility to its owners, the shareholders. The difficulty is that the bridge to such a new model seems too long to transit in a single step.

This article's premise is that the time has come when regulation can require disclosure on corporate social responsibility based upon the present corporate law model. Disclosure has become justifiable not through some newly emerging view of corporations as major power centers in our society or in response to shrill calls to utilize disclosure to tame the runaway beast or to cure social ills. Rather, it is justifiable based upon traditional rationales for disclosure:[7]

5. The principal works are Blumberg, *The Public's "Right to Know": Disclosure in the Major American Corporation*, 28 BUS. LAW. 1025 (1973) and Schoenbaum, *The Relationship Between Corporate Disclosure and Corporate Responsibility*, 40 FORDHAM L. REV. 565 (1972).

6. *See* text accompanying notes 322-29 *infra*. Nor have they discussed the accounting tbat necessarily must precede disclosure.

7. Such an exposition seems timely. The Securities and Exchange Commission (SEC) bas evidenced an intransigence toward such disclosure, most recently in bearings a federal court felt constrained to order so as to determine the "extent of 'ethical investor' interest" in information on corporate social performance. Natural Resources Def. Council, Inc., v. SEC, 389 F. Supp. 689 (D.D.C. 1974), discussed in text accompanying notes 274-321 *infra*. Probably due to tbe sbrill rhetoric surrounding issues of corporate social responsibility generally, and a lack of clear tbinking about disclosure's many purposes, tbe Commission has concluded hearings without requiring significant disclosure. Moreover, the Commission seems to retain the view tbat it can require disclosure, if at all, only as "the promotion of social goals unrelated to the objectives of the federal securities laws," Exchange Act Release No. 11,733, at 1 (Oct. 14, 1975), and not based upon the rationales upon wbich the Commission has traditionally premised disclosure.

to enable investors to make sound investment decisions; to even the flow of information about different companies to disparate groups of investors; and to deter or to force revelation of questionable acts or practices that can make an individual's investment drastically lose value. The call to action is sounded in response to the growing number of judicial and legislative pronouncements that entail significant liabilities for the polluter or the discriminating corporation. Those liabilities meld together with the public's and the investors' growing expectancy that corporations should be socially responsible and that such a corporate posture may indicate good management or, indeed, lead to long-run corporate prosperity. Thus, a need for before-the-fact disclosure to enable investors to ascertain if a company's environmental programs are sound is just as strong as a need for before-the-fact disclosure to determine if directors could have serious conflicts of interest or if a company's product-development program seems sufficient for the future.

In the meanwhile, the Alice in Wonderland analogy will work on a theoretical level. Disclosure will aid theory in telling "where to go" and "how to get there." Some social auditing and disclosure can teach how and why corporations impinge on society. In that way, accounting and disclosure can help to define a new model of the body corporate before the old model is cast aside. Lurching into the unknown before a new paradigm has evolved will become unnecessary. Thus, disclosure acts as a needed half-way measure, or bridge, to corporate law reform.

The article's conclusion is that in its more modest forms social accounting and disclosure should be commenced, both as a means of further, forced development of social accounting techniques, and as a means of further, forced contemplation about what the modern corporation is and to whom it is responsible.[8] Social accounting and

8. Although this article may seem primarily a public law piece, the content has many here-and-now private law ramifications. Any lawyer who has as a client a large publicly held corporation should begin learning the rudiments, strengths, and the shortcomings of social accounting. If for nothing more, the wise counselor will do so as part of the good management practice of knowing where the corporation stands on all fronts and as a device to provide management with data for defense should the corporation be attacked as socially irresponsible, through a public interest proxy campaign or otherwise.

Moreover, corporate law reform discussion has intensified as of late. Federal chartering disclosure can serve in the meantime to force some corporate effort in reducing the social costs corporations impose and improving the positive good they do, and thus act as a device wisely and seasonably to heed even some of the more shrill cries for corporate accountability.

I. AN INTRODUCTION TO SOCIAL ACCOUNTING

The social accounting process denotes many things. In terms of either content or intent, a company might call the process "a 'Social Action Evaluation' or 'Human Investment Analysis' or 'Social Performance Measures,' or even 'Figuring How to Do Well and Good,' or even . . . 'Benevolence for the Profit-Seeking Rationalist.' "[9] Neither does a "unified concept of what a social audit is emerge from the literature," nor in one view, "is there even any crude indication of common trends" in social auditing.[10] The roots of the process, however, can be traced. The calls of corporate activists and critics for corporate social responsibility prompted concern among corporate executives. Within corporations the new consciousness thus created caused accountants and other corporate managers to realize that in the

> [p]resent system of business reporting, we do not measure—or include in any statement of its stewardship prepared by management—the damage done to a stream when the poisonous pollutants are dumped into it, or to the landscape when the land is scarred . . . by machine efficient strip mining. Nor do we give proper reporting credit for the "good" that management does.[11]

That realization was coupled with knowledge that "[t]he reporting

advocates have introduced a chartering proposal in the Congress. Some reform seems near. *See, e.g.*, notes 394 & 427 *infra*. And although none of the reform proposals discuss disclosure at length, every current reform proposal contains social responsibility disclosure as a central ingredient. *See* text accompanying notes 423-24 *infra*. Thus, the wise counselor should advise the client to begin some internal social accounting and perhaps limited disclosure. In that way, when reform does come, whether disclosure itself is the reform or is merely part of a wider scaled reform, attorney and client will be able to comply with less stress and at lower cost.

9. C. Abt, An Introduction to Social Audit Methods (undated memorandum, Abt Associates, Inc.). Abt Associates, Inc., a Massachusetts consulting firm, is a leader both in developing social audit techniques and in applying them to companies' operations. *See* notes 77-88 *infra* and accompanying text.

10. BAUER & FENN, *supra* note 1, at 25-26. In their review the authors conclude that:

> At this point the social audit is far from a standardized product. Its character is as much a function of the industry, the particular circumstances of the firm in question, and the interests of top management.

Id. at 29.

11. Measuring Social Programs in Business, Address by David F. Linowes, American Accounting Assoc. Southwest Region Annual Meeting, Baton Rouge, La., Apr. 28, 1972.

of corporate 'good deeds,' . . . has been largely confined to institutional advertising and annual reports showing the company in a favorable light." It amounts to "self-aggrandizement," or pure public relations.[12] Corporate managers realized that the inaccuracies, vagueness, and puffery in traditional corporate social responsibility statements could leave them vulnerable to a vengeful attack by corporate activists.[13]

Faced each day with yet another set of new and differing demands from corporate activists, enlightened corporate executives also began to realize that, ofttimes quite legitimately

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12. Sethi, *Getting a Handle on the Social Audit*, BUS. & SOC'Y REV. 31, 33 (Winter 1972-73). The softness of much of present annual reports' and other documents' discussions about corporate giving is discussed generally in Note, *Corporate Altruism: A Rational Approach*, 59 GEO. L.J. 117 (1970). Neither is such information required of any corporation nor subjected to close scrutiny by the SEC or others. *Id.* at 143-44. *See also* Marlin & Marlin, *What is a Responsible Annual Report?* BUS. & SOC'Y REV. 118 (Spring 1973). The annual report itself has no specified format and little required content. *See* Schoenbaum, *supra* note 5, at 588-89. The courts have turned down requests that the annual report be deemed "filed" material within the meaning of the securities laws. Hence, the annual report generally is not subject to any detailed SEC regulation other than the broad-based antifraud provision, Rule 10b-5. *See* Dillon v. Berg, 326 F. Supp. 1214 (D. Del. 1971). *But see* recent SEC efforts to dictate more of annual reports' content, note 221, and text accompanying notes 433-35 *infra*. Rule 10b-5, of course, would require both that the annual report make a misleading statement about a material fact and that a plaintiff purchase or sell securities on the basis of such a statement. Heit v. Weitzen, 402 F.2d 909 (2d Cir.), *cert. denied*, 395 U.S. 903 (1968).

13. Writing in 1962, Professor William Cary stated that the wise corporate manager and his or her counselor will attempt to anticipate possible future regulation. They will minimize vulnerability from any quarter. One area in which Professor Cary felt corporations were vulnerahle was the then hurgeoning number of soft euphemistic statements corporations were making about social responsibility:

> [C]orporate managements themselves seem to suggest that the modern corporation has a duty to disclose everything to almost everybody. Quite frequently we may read the following in a company annual report:
>
> > [N]o commercial organization, particularly one of [our] size, can exist without creating social influence and, thereby, acquiring responsibilities beyond those of a purely business nature. These responsibilities will certainly grow in the future . . . .
> >
> > In addition, [a corporation] . . . has civic responsibilities to the various communities where its affiliates operate, financial responsibilities to the educational institutions from which it draws many of its key employees, and—under many categories—responsibilities to government.
>
> If the company really believes, and says, that it has a responsibility to these numerous groups, must it not at least account to these groups by full disclosure?

Cary, *Corporate Standards and Legal Rules*, 50 CAL. L. REV. 408, 420 (1962). *Accord*, Knauss, *A Reappraisal of the Rule of Disclosure*, 62 MICH. L. REV. 607, 648-51 (1964). Both Professor Cary and Professor, now Dean, Knauss seem to have wanted some form of social accounting; they also seemed to have called for formal disclosure, including disclosure of hard data, in the corporate social responsibility field. *See* notes 322-25 *infra* and accompanying text.

> A society's expectations change continuously . . . . Yesterday's goals become today's values, and future actions may call for different cost considerations and yield a different distribution of benefits . . . .
>
> [T]hese considerations may call for a restructuring of existing social institutions to make them more responsive to changing social needs . . . . A necessary first step in this direction will then be to find out exactly what business is doing in the areas that might legitimately fall under the rubric of new social expectations, and what it should be doing . . . .[14]

Thus arose one characteristic of social accounting that distinguishes it from financial accounting. The social audit developed as a tool "to help break down the broad term 'social responsibility of business' into identifiable components."[15] The social audit included not only a formal examination or verification of accounts, as the term audit connotes, but also an extensive determination of the accounts the company was to recognize and audit. The social audit was a means of keeping track of what a sometimes quixotic public wanted or expected the corporation to do. Thereafter, the social audit became more like a traditional audit, a means of monitoring and demonstrating what the corporation was doing in the social responsibility area.

This first dimension of the social audit—which social accounts the company chooses to recognize and audit—can vary widely. The audit might consider only some or all of those matters in which, by consensus, corporations should play an active role—product safety, plant safety, environmental matters, corporate charitable contributions, minority hiring and promotion, energy conservation and development. Alternatively, the social audit might range over more controversial or esoteric matters such as doing business in apartheid nations, contracting to provide weapons to the defense establishment, admitting and then doing away with subliminal or allegedly misleading portions of advertising and marketing strategies, and much, much more.[16] In short, the social audit attempts

14. Sethi, *supra* note 12, at 32-33. Bauer and Fenn have observed that social responsibility, once the "plaything of the business community" and once a "soul-satisfying" hobby for the businessman,

> [h]as become instead a carrier of great anxiety. Under such circumstances, the business executive is more to be pitied than censured. He never knows when or from what quarter the attack will come, he has few tools and little experience to determine the viability of this or that particular charge, and he has no way of defending himself because no one, least of all the onrushing legions, has even any really useful measurements of performance or definition of social responsibility to tell him what he ought to be doing.

BAUER & FENN, *supra* note 1, at 11.

15. Sethi, *supra* note 12, at 33.

16. The subjects run the gamut. Dr. Clark Abt in C. Abt, Management Decisions Made Better with Social Audits: Social Audit Aids to Corporate Decision Making 2 (unpublished manuscript, Abt Associates, Inc., 1973), lists 20 areas with social ramifications. These range

to define the moving target called social responsibility. It then tries to point to the corporation's commitments and its beneficial opportunities on that endless spectrum.[17]

Once the corporation determines the breadth of the corporation's social responsibility or the breadth of its undertaking in that direction, the social audit has a second dimension—depth. Depth of the audit depends upon several considerations. One is the purpose for which the company intends the audit. In increasing order of complexity, the social audit can be used: "to satisfy the conscience of corporate officers; to anticipate and avoid community (including employee, stockholder, and government) pressure; to solve social problems."[18] Further, the social audit can attempt not only to solve social problems, but to do so with the most efficient allocation of corporate resources and, perhaps, simultaneously to enhance the firm's long-range profit potential.[19] The social audit can be a bread

from product safety to supplier selection and sources of financing. Bauer and Fenn list no less than 20 items including charitable giving to artistic and cultural endeavors and the makeup of the firm's hoard of directors. BAUER & FENN, *supra* note 1, at 73-74. *See also* text accompanying notes 107, 317-20 *infra*.

17. More colloquially, this portion of the social audit lets an executive determine "what the field is and where the yardline markers are drawn." BAUER & FENN, *supra* note 1, at 14. In Dr. Clark Aht's view, the question of where corporate social responsibility lies is no different from what is to teachers at the Harvard Business School the central question facing any business:

> What business are we in? That is, what combination of markets, products, and factors of production is most desirable for the firm? This question is fundamental for investment decisions for diversification, acquisition (buy) or R & D (make), plant location, personnel policy, and . . . associated . . . decisions.

Abt, *supra* note 16, at 6.

18. BAUER & FENN, *supra* note 1, at 47.

19. There is a growing conviction on the part of executives, money managers, institutional investors, and others that corporate social responsibility enhances long-run profitability. Evidence of that conviction is reviewed in conjunction with evidence of investors' desires to obtain disclosure in notes 123-88 *infra* and accompanying text. These attitudes range from the view that corporate social responsibility is needed if only for government and the public to allow the corporation as we know it to survive, *see* the views of Henry Manne, text accompanying notes 182-87 *infra*, to the view that an aware public will purchase more of the products of enterprises that have demonstrated corporate responsibility. *See, e.g.*, BAUER & FENN, *supra* note 1, at 61-63; Abt, *supra* note 16, at 6. The evidence most often cited is J. BRAGDON & J. MARLIN, IS POLLUTION PROFITABLE? THE CASE OF THE PULP AND PAPER INDUSTRY (1971), which concludes that of 17 companies in the industry there is a direct correlation between good records on pollution control and excellent per share earnings growth. In most areas of corporate social responsibility or in other industries, however, there has been no demonstration of a positive correlation, let alone causality, between social responsibility and better profits. Such a correlation may be intuitively plausible on the premise that the management which stays ahead on the social front will also be on top of things in its regular business, or that an increasingly aware public will even pay a few pennies more for the responsible manufacturer's product. No empirical proof of relationship between profitability and social responsibility, however, exists as a basis for such assertions. *Cf.* the Princeton

crumb the company throws to the public. It can be a device with which to satisfy astute institutional investors interested in socially responsible companies. Like financial accounting, it can primarily be a serious public reporting tool for the use of investors generally. Finally, social accounting can surpass financial accounting to become a management or systems analysis tool for deciding how most efficiently to achieve social responsibility.

The third dimension of the social audit that distinguishes social accounting from traditional accounting and determines the audit's depth or complexity relates to the precision demanded by corporate managers, stockholders, or public interest groups in the measurement of a company's efforts and achievements in the social responsibility area. Typically, the question involves the degree of quantification desired in the social audit's measurement of goals and performance. Unlike the financial accounting field, social auditing confronts expenditures of resources or, more particularly, indicia of results that are not readily translatable into comparable, understandable dollar terms. The impact of company's program on inter-city rehabilitation is more difficult to ascertain than are sales or profits figures.[20]

Again, on this count social audit forms vary. One writer classifies these audits as non-monetized, monetized, and supermonetized.[21] Non-monetized can be broken down into nonquantified, quantified, or quantified and partly monetized. On the one hand, a report can be a description of what the company is doing on various social responsibility fronts, with quantification in terms of number of minority workers hired, reduction in levels of effluents, and the like. Which measure the company uses depends upon the accuracy and availability of the data. At the other extreme, the social audit can seek to emulate or surpass financial accounting. Such an audit can quantify every item in dollar terms or go further and seek to determine opportunity costs[22] for assets the firm uses in

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University finding that the return on endowment investments with operations in South Africa, a supposed sign of social irresponsibility to some, had an average of 3% higher return than other portfolio investments. Malkiel & Quandt, *Moral Issues in Investment Policy*, 49 HARV. BUS. REV. 37, 43 & 46 (Mar.-Apr. 1971).

20. *Cf.* the false sense of certitude some believe complete monetization has brought to financial accounting, notes 430-34 *infra* and accompanying text, and the increasing use of narratives, rather than numbers and dollars, both in financial statement footnotes and in SEC-required disclosure, notes 200-06 *infra* and accompanying text.

21. Merrill, Social Accounting for Decision-Making: A Survey of Approaches to Date, (unpublished paper presented at The Social Measurement Workshop, Boston, Mass., Nov. 18-20, 1973).

22. The opportunity cost, of course, is not just the out-of-pocket expenditure financial

social programs. Some social audits then determine the net yearly dollar addition to society's welfare that the corporation's activity generates and develop a running tabulation of the firm's social assets and liabilities. Such an advanced audit contemplates a social responsibility profit and loss statement and balance sheet showing stocks of social assets with flows to and from those stocks.

At the outset, any social accounting process must determine the social audit's three dimensions: what areas the audit will cover; for whom the company intends the audit—management, shareholders, investors, or government; and how precise the audit is to be.[23] In making this determination, corporations and their managers do nothing more than attempt to answer the questions Gardiner Means, Adolf Berle, and E. Merrick Dodd raised over forty years ago. Upon whom and in what way does the multifarious activity of the modern corporate entity impinge, and to whom, how, and why are the corporation and corporate managers accountable?[24] By using the social audit to define the areas in which management perceives the corporation to have social responsibility, managers indicate to whom the corporation feels it is responsible. With a determination of the purpose of the audit, the firm says something about to whom it feels a need to account. The precision and care with which management carries out those tasks reflect a similar sentiment. The social accounting process may thus force corporate managers themselves to consider, and perhaps reach, the heart of the matter—the largely unanswered question of exactly for whom modern corporate managers are trustees.

II. An Inventory of Types of Social Audits

A. *The Process Audit*

The process audit is the simplest and oldest form of social accounting. It contemplates a limited range of subjects or accounts for

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accounting uses but the dollar benefit foregone in not using the assets expended in their best alternative use. Hence, the $100 the company invests in a social program represents a $125 opportunity cost if the company could have made a $25 profit by investing the $100 in its manufacturing operation. *See* notes 72-73 *infra* and accompanying text.

23. Similarly, Sethi contends that to make a social audit "operational," three determinations have to be made:

(1) *Definition.* What is socially responsible behavior?

(2) *Measurement.* How can it be measured?

(3) *Accountability.* To whom should the corporation be responsible?

Sethi, *supra* note 10, at 33.

24. *See, e.g.*, the works cited in note 3 *supra*. Of course, a seminal classic is G. Means & A. Berle, The Modern Corporation and Private Property (1932).

audit, rather than attempting to measure the total societal impact of the corporation's activities. The process audit is not overly ambitious with respect to quantification of the amount or value of resources the company commits to a program or the results the social program achieves. Rather,

> [A] process audit would ascertain the following: the reason for undertaking a particular program, the goals of the program, the rationale for the action, a description of what is actually being done, and intermediate measures of performance if they are readily available.[25]

The process audit may limit itself further. The audit may attempt only to describe and measure the effects of affirmative action programs and not deal with or emphasize the company's shortcomings. Such a positive-action process audit emphasizes what the company is doing; it does not dwell upon what the corporation has not done or is not doing.[26]

The use of the process audit is widespread. For several years Eastern Fuel and Gas Associates, Inc., a leader in the social accounting field,[27] has devoted four or five annual report pages to the company's social responsibility. The pages include hard data such as year-to-year figures on minority hiring, training, and promotion programs. The annual reports of Bank of America each contain a process audit of a number of social accounts such as solid waste recycling, contributions and grants, equal employment opportunity, student and minority business loan programs, "rebuilding California Cities" program, and the work of the Bank's "Social Policy

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25. BAUER & FENN, *supra* note 1, at 84.

26. For that reason, process audits may be criticized as being little or no improvement over the puffed, vague, noble-sounding social responsibility statements contained in many annual reports. *See* notes 12-13 *supra*, and text accompanying notes 392-96 *infra*. The positive-action process audit, however, is 1 or 2 steps removed from that type of statement. The process audit does contemplate recitation of hard facts—number of manhours expended, level of funding, number hired, and the like. The process audit and the positive action process audit do have supporters, for example, the SEC's chief accountant. *See* Burton, *Commentary on Let's Get on With the Social Audit*, BUS. & SOC'Y REV. 42-43 (Winter 1972-73):

> In light of what we are trying to communicate, it seems we should steer clear of the traditional accounting approach of matching bad things (costs) with good things (revenues) in order to develop a net dollar figure out as a basis for objectively evaluating the periodic performance of corporate management. Dollar-matching does not seem appropriate when benefits are primarily external to the firm . . . . In fact, that which is not done should not be subtracted from what is done, since it does not reduce the benefit of what has been achieved.

27. That was largely the work of the late Eli Goldston, the company's president, who also delivered the 1971 Benjamin F. Fairless Memorial Lectures at Carnegie Mellon University on the subject of social accounting. *See* E. GOLDSTON, THE QUANTIFICATION OF CONCERN—SOME ASPECTS OF SOCIAL ACCOUNTING (1972).

Committee."[28] Dayton Hudson Corporation has in its annual reports a process audit bearing the title "Toward Fulfilling Our Social Responsibility." Quaker Oats similarly includes in its annual report a "Social Progress Plan for Fiscal Year . . . ."[29]

Other annual reports contain process audits pertaining only to one or two issues of particular concern to the company or the industry. Atlantic Richfield Company includes a description of the company's program to remove billboards, including a listing of resources devoted to that end, and data on the company's program to do business with minority owned banks. Jones & Laughlin Steel Corporation sets forth data on its pollution abatement program. The annual reports of General Motors Corporation have contained narrow process audits of sorts, with data on expenditures for and results achieved in bulwarking the company's opposition to development and installation of certain automotive pollution control and safety devices.[30]

Still other companies have published broader process audits but through mediums other than the annual report.[31] Ralston Purina Corporation has produced a special edition of the *Ralston Purina Magazine* dealing with the company's social responsibility. Metropolitan Life Insurance Company does the same with its magazine, *Metropolitan*.[32] Chase Manhattan Bank publishes its *Action Report*.[33] The First Pennsylvania Bank publishes a "Social Scorecard," describing the rationale for the goals of and the operation of the bank's social programs. The "Scorecard" sets out year-to-year

28. *See, e.g.*, Bank America Corp., 1974 Ann. Rep. 44-45 (1975).

29. Reviewed in Blumberg, *supra* note 5, at 1035. Other process audits are also described, *id.* at 1036-37. *See also* LONGSTRETH & ROSENBLOOM, *supra* note 1, at 24-29.

30. *See generally* Bauer & Fenn, *What is a Corporate Social Audit?*, 51 HARV. BUS. REV. 37 (Jan.-Feb. 1973); *Spreading the Word about Good Works*, N.Y. Times, Apr. 8, 1973, § 3, at 16, col. 2.

31. One possible reason for doing so may be that a firm wishes to avoid dissemination of information to certain shareholders, *viz.*, those who may be irritated when confronted by corporate expenditures for social programs. If management is to solicit proxies in any large publicly held firm, it must send the annual report to all shareholders prior to or simultaneously with the proxy materials. 17 C.F.R. § 240.14a-3(h) (1971). All shareholders therefore would receive information about corporate social expenditures and activities if the company includes the social audit results in the annual report. Companies may choose to use a different medium of publication to avoid the usual wide dissemination of the annual report. Whether any companies act on the basis of such a rationale, however, is conjectural.

32. METROPOLITAN, Aug.-Sept. 1969; RALSTON PURINA MAGAZINE, Nov. 1972. A survey of the known efforts to date was provided to the author in a letter from John N. Bailey, Executive Director, International Ass'n of Business Communicators, Dec. 11, 1973.

33. Reviewed, along with similar efforts, by Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, at 466 & n.235 (1971).

comparative figures on minority employment and loans and contributions to minority group businesses and organizations.[34] Under pressure of some shareholder proxy proposals requesting disclosure, General Motors published, apart from its annual report, "Record of Progress" in 1970 and "Progress in Areas of Public Concern" in 1971.[35]

Besides companies themselves, public interest organizations and corporate activist groups have undertaken another series of process audits. These organizations publish audits, or at least external assessments of several companies' programs in several areas of corporate social responsibility. Other, similar corporation watchdog groups publish audits of many companies or of an entire industry on one issue, such as environmental pollution. The Council on Economic Priorities, a nonprofit independent organization, has been instrumental in the latter effort by publishing data about pollution control efforts in the pulp and paper and electric utility industries. The Council also has inventoried industry in general on defense contracts and on antipersonnel weapons development and production.[36] The Corporate Information Center of the National Council of Churches compiles and makes available process audits of corporations' activities in five areas: environment; consumer health, welfare, and safety; foreign investment; military procurement; and minorities and women.[37] Ralph Nader's Project on Corpo-

34. First Pennsylvania Bank, Social Scorecard (1973). Limited process audits of this type also have been popular in the environmental field. *See, e.g.*, Marlin, *Accounting for Pollution*, 135 J. OF ACCOUNTANCY 41 (1973); Parker, *Accounting and Ecology: A Perspective*, 133 J. OF ACCOUNTANCY 41 (1971).

35. Schwartz, *Towards New Corporate Goals: Co-Existence With Society*, 60 GEO. L.J. 57, 62 (1971). In 1973, General Motors agreed to supply shareholders with a booklet describing its operations in South Africa. Wall Street J., Jan. 17, 1973, at 5, col. 2.

36. COUNCIL ON ECONOMIC PRIORITIES, THE BUSINESS OF WAR: 523 CORPORATE CONTRACTORS FOR THE WAR IN INDOCHINA (1971); COUNCIL ON ECONOMIC PRIORITIES, CRACKING DOWN (1975) (air and water pollution at oil refineries); COUNCIL ON ECONOMIC PRIORITIES, EFFICIENCY IN DEATH (1972) (antipersonnel weapons manufacturers); COUNCIL ON ECONOMIC PRIORITIES, PAPER PROFITS: POLLUTION IN THE PULP AND PAPER INDUSTRY (1971); COUNCIL ON ECONOMIC PRIORITIES, PETROLEUM INDUSTRY OVERVIEW (1972); COUNCIL ON ECONOMIC PRIORITIES, THE PRICE OF POWER (1972) (utilities). In addition, the Council publishes a bimonthly newsletter, entitled the Economic Priorities Report that contains research on the social action or nonaction of various companies. *See* BAUER & FENN, *supra* note 1, at 40; LONGSTRETH & ROSENBLOOM, *supra* note 1, at 27. For a profile on Alice Tepper Marlin, the Council's progenitor, see BUS. & SOC'Y REV. 28 (Summer 1973). The Council also has published reports on minority hiring and promotion practices of large banks and on pollution in the steel industry. *Id.*

37. BAUER & FENN, *supra* note 1, at 39. For another description of the National Council of Churches auditing and clearinghouse organization and for a listing of a number of similar organizations see *A Who's Who of Corporate Responsibility Action Groups*, BUS. & SOC'Y REV.

rate Responsibility has attempted in-depth process audits of E.I. duPont Nemours & Company and of the First National City Bank.[38]

Other outside groups do process audits of companies exclusively for the groups' clientele and do not make them publicly available. The Institute of Life Insurance has a Clearinghouse on Corporate Social Responsibility to make information available to insurance companies for use in investment selection.[39] The Investment Company Institute, the mutual funds trade group, has a similar clearinghouse for its membership's use.[40] Other process audits are conducted by the so-called "do-good mutual funds," also known as social funds.[41] The Dreyfus Third Century Fund examines and rates

81 (Winter 1972-73). The National Council of Churches, through its Corporate Information Center, also publishes a monthly newsletter entitled the Corporate Examiner. The newsletter contains information about and process audits of various corporations.

38. D. LEINSDORF & D. ETRA, RALPH NADER'S STUDY GROUP REPORT ON FIRST NATIONAL CITY BANK—CITIBANK (1973); J. PHELAN & R. POZEN, RALPH NADER'S STUDY GROUP REPORT ON DUPONT IN DELAWARE—THE COMPANY STATE (1973). *See also* Blumberg, *supra* note 5, at 1037. Professor Blumberg noted that First National City Bank (now Citibank) refused to let the Nader group conduct a second study after the group had termed its first audit "inconclusive." The bank's grounds were that the bank had devoted 10,000 manhours in helping Nader's staff conduct studies. *Id.* On the other hand, in its "Corporate Social Performance Roundup," *Business & Society Review* singled out First National City Bank as a "Super Performer," partly as a result of information the Nader audit had produced. BUS. & SOC'Y REV. 93, 94 (Summer 1972). One suspects, therefore, that the Nader efforts may have failed because Nader auditors have concentrated on the development of derogatory information and not on evaluation of the company's existing programs or of its relative performance. The absence of later similar audits by Nader subsidiaries perhaps confirms that conclusion. For one, Citibank would agree. In a 50 page news release to book editors and reviewers, Citibank refutes the Nader group charges, accuses the group of "reckless misuse of facts and unsupported allegations to reach predetermined conclusions," and labels the Nader report a "presumably scholarly study" based "on the assumption that most, if not all, business relationships are essentially conspiratorial." Public Affairs Dep't, First National City Bank, statement of Walter B. Wriston, Chairman, at 1 (Jan. 16, 1974).

39. Described in a letter from Stanley G. Kaison, Director, to Editor, Wall Street J., Feb. 3, 1975, at 11, col. 1-3.

40. Blumberg, *supra* note 5, at 1039. Such organizations pose a problem. Without securities law disclosure of corporate social responsibility, such organizations' existence fuels the problem of preferential access to social responsibility information. Affluent or influential investors interested in such information can obtain it more easily than can ordinary investors—from companies themselves, from government agencies, and from such trade group's clearinghouses. *See, e.g.*, note 42 *infra*. Providing equality of access, therefore, is one argument for required disclosure. *See* notes 233-46 *infra* and accompanying text.

41. *See* Shapiro, *Social Funds: Trying to Do Well by Doing Good*, INSTITUTIONAL INVESTOR 64 (Feb. 1972); Zerkin, *The Social Investors*, BUS. & SOC'Y REV. 121 (Summer 1973). Shapiro reviews the stated aims of 5 social funds. None of the 5 has performed well. *See, e.g.*, Gapay, *Losing Cause—Do-Good Mutual Funds Find Customers Rare, Profits Elusive Indeed*, Wall Street J., Aug. 9, 1972, at 1, col. 6. An exception is the Dreyfus Third Century Fund. Besides attributing its success to the size, support, and reputation of the parent Dreyfus mutual fund complex, the fund's managers cite another factor. All of the other social funds have begun by eschewing investment in anything but the clean company—the company

companies on four bases—equality of employment opportunity, ecology, product safety-purity, and occupational health and safety.[42]

Process audits do have advantages that render them viable. For example, the process audit forces a corporation to establish priorities among possible areas for corporate involvement and, in any given area, among candidate projects. In choosing four or five processes to monitor and to consider for public reporting, the corporation must decide where in the broad spectrum of possibilities the corporation believes its social responsibility lies. "For example, lending policies would be relevant for banks; product safety for toy manufacturers; reliability and safety for applicance manufacturers; exploration . . . practices for oil companies."[43] Yet beyond areas

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without a blemish on its social record, or further, one that is affirmatively engaged in socially responsible activity as its principal business, such as a manufacturer of pollution control equipment. The clean company has proved to be elusive and, when found, not very profitable. On the other hand, Dreyfus has approached the matter of choosing socially responsible investments on a relative basis, giving up trying to develop the "model of a perfect firm." Dreyfus will take an industry under consideration, and will conclude that, on a relative basis, 4, 5, or 6 of, say, 12 companies in the industry are socially responsible. From those firms, Dreyfus chooses an investment on traditional investment grounds—earnings, sales, etc. *See* Shapiro, *supra*, at 69-70. This relative decisional approach the Dreyfus organization uses, one suspects, has become more prevalent as the fruitlessness of the search for clean companies has become evident. That observation provides several bases from which to argue for social accounting and disclosure.

With the change in emphasis from the search for the clean company to a relative approach, a company can report the results of a social audit and need not fear that any negative item will condemn the company in the eyes of socially minded investors. Secondly, relative comparisons may be more difficult without the data social accounting could provide. Although few in number, the clean companies may be easy to identify. As a pollution control equipment manufacturer, an Alpine Geophysical Co. is visible. Without published data available, however, investors may find it more difficult to identify the relatively more responsible companies in the chemical industry. Without some social accounting and disclosure, the chances increase that a company with a good social performance track record will be passed over by the growing number of investors who, other things being equal, will invest in the more socially responsible companies. The relative approach to choosing socially responsible investments thus gives companies an incentive, or would at least lower opposition, to accounting and disclosure. *See* text accompanying notes 440-41 *infra*.

42. BAUER & FENN, *supra* note 1, at 35-36; Shapiro, *supra* note 41, at 69-70. As opposed to the other social funds, most of which are quite small, Dreyfus Third Century Fund has been able to obtain data from companies for use in the fund's process audits. Dreyfus attributes this to the size and power of the parent Dreyfus fund complex. BAUER & FENN, *supra* note 1, at 36. The other social funds have had a more difficult time obtaining data from companies. *Id.* at 37. This is one example of the preferential access, *supra* note 40, to which absence of required disclosure leads. Additional evidence of similar preference is reviewed in notes 238-45 *infra* and accompanying text.

43. BAUER & FENN, *supra* note 1, at 84. A mere process audit can make the firm's choice of projects and the matching of its resources with social responsibility more efficient. The authors conclude that the evidence suggests that heretofore "companies 'fall into' these

obviously applicable to a given company or industry, and beyond processes which have near universal application, such as those dealing with minority hiring and promotion matters:

> [T]he range of issues involved in present conceptions of corporate social responsibility is highly diverse. Even if we bypass the more politico/philosophical issues such as investment in South Africa, producing munitions . . . and so on, we are confronted by . . . black capitalism; . . . community development; physical rehabilitation of cities; support of various levels of education; crime; mass transportation; the impact of plant location on population distribution; consumerism; advertising and marketing practices; and so on.[44]

Obviously, some corporate decisions on concentration are necessary.[45] Also, new social responsibility issues will arise that the corporation will have to face and about which the corporation will have to make a decision.[46] Thus, the process audit makes some management decisions necessary.

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programs rather than select them from the hundreds of alternatives presented to them." Confirmation of that observation is found in the popular notion that charitable giving, for example, "either reflects the charitable preferences of the sitting president's wife" or "the personal concern of past chief executives frozen into tradition." *Id.* at 61. In fact, a major criticism of corporate social programs is that companies fall into projects, are ill-equipped to carry them out, and are generally inefficient in doing good. Forced accounting, with the establishment of priorities and increased efficiency accounting would entail, is one benefit disclosure could bring to the corporate social responsibility area, as notes 359-64 *infra* and accompanying text attempt to demonstrate.

44. *Id.* at 85. Of course, along with other constraints, the need to make a profit, or indeed, to maximize profits will limit a firm's involvement. Given those constraints, however, a company without a process audit or some other method of establishing priorities can splinter its efforts, achieving no significant result in any single area. On the ability to maximize profits and simultaneously engage in socially responsible, affirmative action, see the discussion notes 176-88 *infra* and accompanying text contain.

45. One method, reviewed by Sethi is the "Reaction to Perceived Reality Approach" to the social audit:

> A firm may argue that there are really no fixed criteria for determining what is socially responsible behavior and how much of it would be acceptable to the general public or to special interest groups . . . . Consequently, social responsibility is no more than whatever public expectations are, and a firm would do well to satisfy those expectations . . . . It is not the "real" social needs, however well defined, that are important; it is the "perceived" needs.

Sethi, *supra* note 12, at 34. According to Sethi, some well-known firms are following "perceived reality" approaches in structuring their social action programs. *Id.*

One variation of the "perceived reality" approach is not to match programs to what the public perceives the social problems to be but to determine which company the public or special interest groups perceive to a leader on a given issue. The company doing the social audit then fashions its programs after those of the industry leader. Sethi describes one retailer's employment of a consulting firm. The firm "interviews 18,000 individuals and asks them to rate five large retail chains such as Montgomery Ward and Sears, Roebuck on various consumer services." The retailer intends to pattern its own consumer services after those of the chain which the public believes to be the best. Sethi, *supra* note 12, at 34.

46. As corporate social responsibility has received more widespread acceptance and

Another virtue of the process audit is that it does satisfy most public or investor demands for corporate accountability, yet it is not overly broad in scope. At least in the area of positive action programs, the primary concern of many individuals is not the success or failure of a company's effort on social responsibility fronts, but whether a corporation is making an effort at all and whether it is earnest in that effort.[47] A process audit can demonstrate this, and in fact, from the public's viewpoint the process audit may be the preferable method.[48] Because the process audit need not cover all areas of potential social responsibility, including the more controversial or esoteric ones, the audit may enhance public or stockholder receptivity simply because limited breadth would lead to limited length for the reader. Moreover, an audit that purports to discuss all the social responsibility aspects of a large corporation's

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otherwise matured in recent years, the areas of concern seem to have stabilized a bit and new issues seem to arise with less frequency. *See, e.g.*, notes 317-20 *infra* and accompanying text.

47. Bauer & Fenn, *supra* note 30, at 41. *See also* BAUER & FENN, *supra* note 1, at 71-72 (footnote omitted).

> [I]n many areas, the public will be content with a statement of what is being *done*, as contrasted to what is being accomplished . . . . Here is where process audits come in. Finally, in some areas it is easy to produce objective and apparently complete measures of performance (if not useable comparative data)—such as minority and female employment practices, and pollution abatement.

48. Some commentators would argue that the social audit reaches its goal if the public is satisfied.

> After all, Ralph Nader's main objective, laid out explicitly in *Unsafe at Any Speed*, is to make corporations responsive. One can hardly attack them for "doing things just to stay out of trouble," if responsiveness is the ultimate objective, because that is *precisely* the characteristic they are displaying: responding to community demands and pressures . . . . Experience shows that there is no necessarily perfect fit between the most well-intentioned of corporate actions and the expectations of other interested and affected parties. This is particularly true in an era in which the expectations of corporate responsibility are in such a constant state of change.

BAUER & FENN, *supra* note 1, at 50. Of course, ultimately Marie Antoinette lost her head for "giving them cake." Ralph Nader, too, is speaking to responsiveness to social needs, not just social pressures. Nevertheless, such an approach, like the perceived reality approach, *supra* note 45, has advantages as well as disadvantages, as Sethi points out:

> It helps a corporation keep its goals in tune with public expectations. Evolving shifts in public expectations can also be spotted so that necessary changes in a firm's long-range objectives can be made. The problem . . . is that a firm may maximize its short run gains by advertising and public relations campaigns without actually improving its performance . . . .
>
> A totally external orientation in goal orientation does not take into account a firm's own strengths and weaknesses in attacking certain problems and may therefore result in a distorted allocation of resources.

Sethi, *supra* note 12, at 34-35.

In establishing goals and priorities, then, what the corporation must achieve is a delicate balance—some perceived reality consideration along with some consideration of the most effective utilization of its resources and of the most egregious de facto social problems.

myriad activities may impart a sense of false accuracy to the reader—even if the audit has a high degree of certitude.

In addition, from the standpoint of the general complexity of modern accounting,[49] the public may find the process audit preferable. If the social audit attempts to monetize every item across the broad spectrum of corporate activity, and if it attempts to tie each item to overall corporate profitability, readers may find the process by which the company does so difficult to understand. Inaccuracies may creep in as quantification moves farther away from raw data. The report of the social audit may thicken and gray. The formidable appearance and conceptual difficulties in understanding the audit may scare potential readers away.[50] Arguably, this is the case with many of today's financial statements, prospectuses, and other disclosure documents.[51] In its developmental stage, particularly in taking the process audit format, social accounting has the opportunity to avoid the complexity that characterizes much of financial reporting.

This accounting complexity may forestall corporate attempts at social accounting in the first place if the corporation attempts to go beyond a process audit. The corporate executive will proceed with trepidation and unease at each new level of self-examination if he or she proceeds at all. If the social audit is initially outlined as the complete monetization of every item across the sweep of the corporation's activities, its sheer formidability may further repel management, and executives may succumb to the temptation to refrain altogether from monitoring social performance. The process audit has shown some accountants in the field that "the biggest mistake . . . at this juncture is to try to design techniques which will fully satisfy all dimensions."[52] The same may be true for the corporate executive; inordinate accounting complexity may be the added increment that convinces the executive altogether to resist corporate self-examination.

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49. *See* notes 192-95 & 430-34 *infra* and accompanying text.

50. *See* notes 72-93 *infra* and accompanying text for an outline of some "super" audits' dimensions and conceptual complexity.

51. *See, e.g.*, Schneider, *Acquisition Under the Federal Securities Acts—A Program for Reform*, 116 U. PA. L. REV. 1323, 1333 (1968), on the formidability of traditional, required disclosure: "It is doubtful whether anyone ever read the prospectus other than the parties preparing it, the SEC staff (which developed an extensive comment letter), and the printers, who charged $15,000 for their efforts."

52. Linowes, *supra* note 11, at 4.

B. The Complete Audit

The task of trying to design social audit techniques that will satisfy all dimensions is complex; yet the complete audit attempts to do so. The complete audit attempts to measure the social impact of the entire spectrum of a corporation's activities, not merely to measure several processes or accounts. Measurements include those dealing with the detrimental effects or social costs inherent in the corporation's day-to-day operations, as well as measurements dealing with the corporation's affirmative action programs in traditional "do-good" areas. Besides assessing the level of effort in those areas, the complete audit also attempts to measure the effect corporate efforts achieve. Furthermore, the complete audit attempts to quantify the level of social effort and performance and to convert that quantification into monetized terms.

An example of the complete audit is the concept of the "socioeconomic operating statement" developed by David F. Linowes, a partner in a New York accounting firm. Mr. Linowes proposes that corporations prepare a socioeconomic operating statement each time they prepare an annual balance sheet and profit and loss statement.[53] The socioeconomic statement would cover the entire range of corporate activity. Detriments resulting from environmental pollution corporate operations cause, failure to hire minority group members, and shortcomings in any social sense, would be offset against benefits the company bestows on society through social programs. When benefits are conferred on society as a result of corporate action that comes about through compliance with governmen-

53. Linowes, *Let's Get on With the Social Audit: A Specific Proposal*, Bus. & Soc'y Rev. 39 (Winter 1972-73).

> The profit and loss statement and balance sheet alone are no longer adequate measures of performance—a means must be found which will reflect all facets of management's efforts. Some argue that before we seek to implement social program reporting, we should fully define what we mean by social action or nonaction. I disagree. Because social programs are difficult to define does not mean we should not deal with them. Justice Potter Stewart said, "I can't define obscenity, but I know it when I see it." In the same way, we need not wait until we can clearly define social action or nonaction; we know it when we see it.

Id.

According to Mr. Linowes' thesis, the means of defining what social action is in the "socioeconomic operating statement." *Cf.* Moskowitz, *Choosing Socially Responsible Stocks*, Bus. & Soc'y Rev. 71-72 (Spring 1972):

> [W[hile a company may be strong in one area such as pollution control, it may be laggard in another, such as minority hiring. After four years of closely monitoring businesses' social involvement, however, I have observed a number of company names cropping up time after time with regard to positive responses to social problems.

Apparently, Moskowitz knows corporate social responsibility when he sees it.

tal regulations or collective bargaining agreements, however, the social audit would exclude such action from the benefits list.[54] Every item would be monetized. For example, the company would include a "[p]rorated portion of salaries and related expenses for personnel who spend time in socially beneficial actions" as a benefit.[55]

Presumably, the socioeconomic operating statement would produce a bottom line dollar figure denominating the entire corporate operation as either a benefit or detriment to society.[56] Although one

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54. That suggestion has been criticized as eliminating an important indicator of social responsibility:

> [E]ven where the law is apparently clear on matters of employment and pollution, the issue is not whether or not they are in compliance . . . but the rate of speed and earnestness of the effort with which they are striving to achieve compliance. This is likely to be true of most laws and regulations . . . .

Bauer, *Commentary on Let's Get on With the Social Audit*, BUS. & SOC'Y REV. 43 (Winter 1972-73). To ask that corporations demonstrate how they are not in compliance with the law may be unrealistic: the request is for a firm to incriminate itself. On the other hand, a firm could demonstrate with a social audit that it has complied ahead of schedule or even before regulation has come into being.

55. Linowes, *supra* note 53, at 40. In the Linowes scheme,

> "[b]enefits" or "improvements" are measured as the financial cost to the company of taking a social action and not as the impact of that action. The theory . . . is that something is worth what you pay for it, one of the most basic valuation approaches used in financial accounting.

Merrill, *supra* note 21 (unpaginated manuscript). Mr. Linowes, however, does not indicate how a company should compute detriments in monetary terms. The problem arises because with detriments to society a company would not have even the first approximation out-of-pocket costs gives in the area of affirmative programs and other "benefits." Mr. Linowes does not discuss a method to place a valuation on a failure to hire minorities or on the social cost pollution imposes. Whatever the method the company finally uses, however, he argues that the subjective nature of valuing detriments to society is probably no more subjective than ordinary accounting's determination of "research and development costs, work in progress inventories, bad debt allowances, depreciation charges, and price earnings ratios." Linowes, *supra* note 53, at 41.

On the benefit side of the ledger, Mr. Linowes does admit to the shortcoming perceived by Merrill, namely that with the use of cost as a valuation method the socioeconomic operating statement does "fail to measure the quality of outputs." Nevertheless, he contends that "we must begin somewhere." Use of cost, as financial accounting does, as a starting point is a sufficient beginning. *Id.* at 42.

The problem runs throughout social accounting: even in its nascent form both critics and proponents seem to hold social accounting to standards higher than financial accounting has ever had or purports to have. *See, e.g.*, text following note 103 *infra*. In this area, though, the problem is compounded because in financial accounting the "quality of outputs" can be deduced from the bottom line profit figure in the instant year and as opposed to prior years' profit figures. But it is nevertheless a deduction. Financial accounting does not purport to measure the quality of output obtained for each dollar a company spends, as many would have social accounting do.

56. Mr. Linowes does not say so explicitly, but neither does he contemplate separating areas of corporate responsibility and reporting on each separately, as the process audit contemplates. Complete monetization and the inclusion of all findings in one socioeconomic statement, therefore, necessarily would lead to some sort of a bottom line figure.

final figure indicating that a company is either an asset or a liability to society in a particular year might seem harsh to corporate executives, its value over time is emphasized. The trend and magnitude of a company's year-to-year efforts and progress would become evident from a comparison of several successive years' socioeconomic operating statements.[57]

C. *The Complete Audit—Another Approach*

Another form of the complete audit is the "maximum capability utilization and best effort" approach.[58] The maximum utilization audit goes somewhat beyond the socioeconomic operating statement into the traditional management preserves of systems planning and systems analysis. Thus, the maximum capability utilization approach aims at producing not only data on the level of corporate effort and the results that effort obtains, but also data with which management will *best* be able to correct deficiencies in the company's social milieu. It aims to select "[t]hose projects that will make the best use of the firm's capabilities in undertaking socially desirable programs and practices at the least cost. It is internally oriented, deliberately planned for the long term . . . ."[59] The approach contemplates cost-benefit analyses of all the alternatives for social action a corporation faces at a given time. This contrasts with the traditional accounting approach with its year-to-year comparative feature, as exemplified in the social accounting area by the socioeconomic operating statement. Thus, the maximum utilization approach

> typically . . . starts by inventorying what is being done in the corporation's various departments . . . . The next step relates these findings to certain performance criteria and identifies areas of strength . . . . This is followed by developing new goals and setting up programs to achieve those goals.[60]

In fashioning those programs, the task is "to compare existing progress against other alternatives (making changes where efficiency and adaptability can be improved) and the effectiveness of a firm's

57. Linowes, *supra* note 53, at 41. In part, such a trend would obviate the inadequacy in not having any specific criteria by which to measure tbe company's deficiencies or detriments, save the company's own goals. *See* note 55 *supra*. The trend shown by various years' socioeconomic operating statements would not make the initial statement of a deficiency any less arbitrary, but would give a relative gauge to improvement if the initial method of assessing the deficiency was followed consistently in subsequent years.

58. Reviewed in Sethi, *supra* note 12, at 34-38.

59. *Id.* at 34.

60. *Id.*

programs against those of other firms."[61]

The approach envisions monetization "somewhat akin to financial statements which purportedly show the company's state of financial health and performance."[62] In its ultimate form, the maximum utilization social audit hopes to cause and demonstrate a "judiciously" selected range of projects for which the firm's "physical and manpower resources make it particularly suitable." The audit will "report a corporation's performance not merely in terms of output" but "in terms of effectiveness and benefits to society (*e.g.*, whether an alternative use of those resources would have provided larger social gains)."[63] Thus, the maximum capability utilization social audit goes beyond the process audit, the socioeconomic operating statement, and, indeed, any traditional form of accounting or accounting format. It would attempt to show not only corporate efforts and the magnitude of those efforts but also the corporation's reasons for selecting certain courses of action and levels of effort from the various alternatives open to it.[64]

A number of corporations are attempting to develop a complete social audit. Among them are Chase Manhattan Bank, Bank of America, ARA Services, Inc., and Eastern Gas and Fuel Associates, Inc.[65] Whether the audits under development are of the socioeconomic variety, the maximum utilization variety, or some other genre, however, is not evident from the publicity surrounding the development. None of the audits has yet been made public. Several committees of professional accounting associations also are undertaking

61. *Id.* at 37.

62. *Id.* at 34. Sethi is unclear as to the amount of monetization the "maximum utilization" approach would incorporate. On the one hand, he lists areas of social involvement susceptible to "early quantification and measurement," including aid to the arts, employee related programs on health, safety, and self-development, minority group relationships, community related activities, and consumerism. *Id.* at 38. Since the results programs in some of those categories achieve obviously would be difficult to quantify, the statement strongly infers that Sethi believes complete monetization desirable. On the other hand, Sethi warns against the McNamara fallacy, the tendency for "technically oriented people to rush toward the quantification of concepts even though the variable may be imprecisely defined and the necessary data unavailable." *Id.* at 37. Without quantification, however, Sethi opines that reporting of social audits may become "devoid of objectivity and loaded with puffery . . . poorly disguised window dressing." He seemingly concludes that until quantification and acceptable reporting standards are developed, social audits will have low credibility and that, therefore, quantification should proceed. *Id.* at 34.

63. *Id.* at 38.

64. Another similar type of audit, aimed at accomplishing some of the same internal corporate goals, is the so-called performance audit, reviewed in BAUER & FENN, *supra* note 1, at 54-58.

65. LONGSTRETH & ROSENBLOOM, *supra* note 1, at 24; *see* Blumberg, *supra* note 5, at 1036-37.

to develop the social audit.[66] These committees are working toward uniformity as well as development; it is not yet evident whether their efforts have focused upon any one variety of the complete audit.

Whatever the form of the audit, in pursuing their endeavors the various committees and companies will encounter conceptual difficulties common to all forms of the complete audit. One principal objection corporate activists raise is that, realistically, corporations will not "identify and report social nonactions." The general reply to that objection is twofold:

> (1) For decades, businesses have been accounting for and giving visibility to adverse fiscal conditions when they report on contingent liabilities. (2) Many . . . organizations such as those connected with Ralph Nader, the United Church of Christ, the Dreyfus Third Century Fund, and the Council on Economic Priorities are already identifying the antisocial actions or nonactions of specific companies.[67]

In this regard the notion that "corporations have an interest in making their own audits before they are audited by others" is quite persuasive. "[T]he very fact they audit themselves is a real plus in terms of a firm's relations with social pressure groups; such corporate self-effort, if done honestly, is a prime objective" of corporate activist groups.[68]

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66. *See* text accompanying notes 99-101 *infra.*

67. Linowes, *supra* note 40, at 41. Compare this to the current controversy over the inaccuracy of corporations' statements concerning contingent legal liabilities. Traditionally, lawyers have given auditors so-called clean letters, stating tbat in pending or threatened litigation the lawyers believe tbe company to have "meritorious defenses" or "a good chance of prevailing on the merits." They have often done so despite the statements' misleading nature because they believe that divulging the true state of affairs may tip the lawyers' hands or derail a potential settlement prior to the litigation. Further, accountants until recently have accepted such soothing and optimistic statements of contingent liabilities at face value. *See* ABA Section of Corporation, Banking and Business Law, *Report of the Committee on Corporate Law and Accounting on Scope of Lawyers' Responses to Auditors' Request for Information* (Rev. Exposure Draft, Oct. 20, 1974), in 30 BUS. LAW. 513, 988 (1975); Stabler, *What Should Lawyers Tell the Accountants about Legal Problems*, Wall Street J., Feb. 27, 1974, at 1, col. 6. Thus it is not perfectly clear that corporations "for decades" have been accurately reporting all contingent liabilities, or for that matter, adverse fiscal conditions of other sorts. On the new-found suspicion of financial accounting in other areas, *see* notes 430-34 *infra* and accompanying text.

68. BAUER & FENN, *supra* note 1, at 45. An immediate all-out corporate attack on deficiencies the audit reveals is probably not the prime objective of most serious activists. Also, the change in emphasis from the search for the clean or perfect company to the view that corporate social responsibility is relative, *supra* note 41, will give corporate executives some assurance that they will not be condemned if a public social audit report reveals negative factors or nonfeasance. Another result of a relative approach is that the potential corporate public relations cost is reduced, thereby making disclosure on corporate social responsibility politically more feasible than other proposed and politically objectionable corporate law reforms. *See* text accompanying notes 440-41 *infra.*

The other principal objection to complete audits, one found with near universality, is that complete, forced monetization of a social audit shades reporting even further away from the true state of affairs than does attempted quantification in terms of raw data, such as manhours expended, persons hired, improved test scores, and the like. In the literature, the argument that no such monetized social audit can be precise, is met with the observation that "income statements and balance sheets are far less than precise."[69] These social audit monetization problems are mostly problems of valuation. Everyday financial accounting encounters similar problems, as in the ageing of receivables, depreciation computations, or inventory valuations. The problems always have been a source of controversy in some accounting situations and probably always will be; yet no one argues that traditional accounting should not attempt to deal with such problems.

Another observation one can make is that accounting is not a static art. It has evolved new methods for dealing with perennial valuation problems, tests to check obliquely the accuracy of older, more established methods, and accounting systems that have evolved from a simple to a more complex system as a company has grown. Social accounting does not have these advantages; it is a new method devoid of evolutionary experience. Moreover, the social audit is an attempt to insert a totally new accounting system into a mature, large corporation, rather than to finetune an accounting system that has evolved with the company. Nevertheless, to some degree, social accounting can borrow methods and checks from financial accounting; to what extent is not yet certain. Moreover, social accounting has at its disposal tools and a reservoir of expertise that traditional accounting has not always had available as it has evolved—computers, systems analysis techniques, mathematical

69. Lews, *Commentary on Let's Get on With the Social Audit*, BUS. & SOC'Y REV. 45 (Winter 1972-73). Linowes, *supra* note 53, at 39-40 also expands on the criticism at length:

> Many socially helpful programs can be quantified for measurement even now. We have enough standards available in social areas to begin.
>
> I must add that the softness of much of the economic and fiscal data used today . . . leads one to suspect that given all their present limitations, social measurements may be just as reliable. The dollars involved in social costs incurred by businesses are clearly determinable. The fact that a statement of these costs may not be complete has its counterpart in the fact that traditional financial statements have never fully reflected significant aspects of business affairs—the value of trained manpower, the extent of provision for executive succession, the potential profitability of new inventions and product development, the contingent liabilities that include potential adverse legal actions for faulty products.

skills, and the like. On balance, then, one might expect social accounting to evolve more rapidly than has financial accounting.

Whether the monetization of social audits should be accelerated is not the important consideration at this time. That social accounting will evolve with the principal variable being time,[70] is the important realization. Unlike the relatively established process audit, the complete social audit is still very much in the developmental stage, making evaluation of the present objections to this approach difficult. While the complete audit may not be "far down the road," as some suggest,[71] the complete audit is still at the stage where objections and realizations about the complexities involved are adding to the shaping and improvement of the final product.

D. The Super Social Audit

As has been seen, the complete social audit tries to show the entire social impact of all a corporation's activities. The complete audit then reviews a company's present social programs both in the way of affirmative action and in neutralization of social costs the company's operations impose on the community. In that review the audit attempts to demonstrate the level of effort expended on those programs, the effects those programs achieve in ameliorating social impacts and problems, and possibly, the quality of those effects. In its most refined form, the complete audit also attempts to juxtapose the costs and benefits of a firm's own programs against the costs and benefits of alternative social responsibility programs open to the firm.

The super audit attempts to do all of the foregoing and more. For example, the super social audit attempts to derive opportunity costs for corporate resources the company utilizes either in initiating social action programs or in negating the deleterious effects the company's regular operations produce. The opportunity cost, of course, is the benefit foregone in using an asset in such a social venture instead of devoting the asset to its best alternative use.[72] In the case of social programs the best alternative use will usually be the firm's principal profit making activity. Thus, if a firm devotes money, management skills, overhead, and other resources to pollu-

70. *See also* the comment on uniformity, as well as evolution through time, as a solution to these problems, and the need for required disclosure as a means of forcing more rapid development in social accounting techniques, text following note 107 *infra*.

71. Bauer & Fenn, *supra* note 30, at 38.

72. R. Lipsey & O. Steiner, Economics 177 (3d ed. 1972). *See also* note 22 *supra*.

tion abatement, the super audit computes not only the out-of-pocket cost of those resources but also attempts to compute the additional profits the corporation would have made had it devoted those same resources to the production of widgets.[73] The most refined complete audit attempts to compare the cost of social responsibility programs only with those of other social responsibility possibilities and not with alternative commercial uses.

Closely aligned with the super audit's attempt to derive opportunity cost is its more ambitious attempt to evaluate the benefits a corporation's social activities produce. Instead of merely evaluating the relative merit of various social alternatives, as the complete audit does, the super audit attempts to evaluate the contribution to long-run corporate profitability that each possible social action might produce. This is a difficult, if not impossible task.[74] The super audit then compares the contribution to long-range profitability with the potential profitability of resources used in their best alter-

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73. The next best alternative use might be selected, for example, if the company is producing widgets at 100% of capacity. Normal accounting practice, of course, does not involve an attempt to measure opportunity costs for resources expended in production, marketing, and the like. *See, e.g.*, LIPSEY & STEINER, *supra* note 72, at 180-84 for a comparison of the accountant's methods of valuation, principally historical cost, with the economist's opportunity cost method. Rather, in present day business, opportunity costs and cost-benefit analyses of various choices open to the firm are management's professional bailiwick, not the accountant's. Opportunity costs have not often been reduced to the nicety of accounting format; they remain the province of systems analysis and other management subjects.

By attempting to integrate opportunity cost concepts into an accounting framework, the super social audit is attempting to do what traditional accounting and most managements have never before attempted in any area. Sethi intimates that the attempt is an outgrowth of dissatisfaction with traditional accounting as well as with accounting's failure to treat social factors. He sees:

> [t]rends concerning the public view of business . . . unfolding, giving strength to the call for new kinds of measurement. One was the disenchantment with the use of the GNP as the measuring rod of national health.

Sethi, *supra* note 12, at 32.

74. BAUER & FENN, *supra* note 1, at 64 (footnote omitted) concludes that the "[t]ask of conducting a social audit for 'optimizing' a corporation's profit would be formidable and is not likely to be undertaken in the near future by a well-advised firm." Among the complexities are the quantification of various additions to long run profit which socially responsible actions might produce through making the firm a more attractive investment, through attracting more consumers to a company's goods and services, and through "making the local community and the society at large a better place to do business." *Id.* at 63. For example, with regard to consumers

> [a] survey of consumers might reveal what proportion were patronizing the firm's goods or services because of its image for social responsibility. If, however, the firm's social programs added to the price of its goods and services, an estimate would also have to be made of the proportion of potential customers who were lost . . . . Such information . . . would be rather expensive to come by . . . .

Id. at 63-64 (footnote omitted).

native commercial use; in other words, the audit compares the long-range profitability of social programs with the opportunity cost of assets the company uses in such programs. The resulting dollar figure is either an addition or a subtraction to profit in the firm's regular financial statements.[75]

Before tying the firm's social activities into its regular financial statements, however, another goal of the super audit is the development for the social sphere of analogues to traditional accounting statements.[76] The social balance sheet shows stocks of social assets, matched against social liabilities, debt to society, and society's equity. In each accounting period the social income statement would show flows to these stocks—the additions and subtractions to the social asset and social liability accounts the balance sheet contains. Flows might include corporate tuition reimbursements as additions to the human-employee resources account or governmental services the company consumes over and above those paid for by corporate taxes as additions to a social balance sheet liability account.

The best existing example of these items and of a super social audit is the social audit of Abt Associates, Inc., a Massachusetts consulting firm.[77] Positing that a consulting firm's most important resource is its staff, Abt computes a number of benefits and costs to the staff by means of a social income statement. Thus, against health and life insurance, vacations, holidays, tuition reimbursements, food services, child care, parking, and spaciousness and quality of work space provided by the firm, the Abt Associates' income statement offsets layoffs and involuntary terminations, overtime worked but not paid, and inequality of opportunity. In other areas, the statement debits to asset accounts contributions to knowledge through company publications and environmental improvements, such as reduction in solid waste. It characterizes as credits to liability accounts local governmental services the company receives, net taxes paid, and the cost of pollution caused by

75. *See, e.g., id.* at 21-22.

76. *Cf.* the socioeconomic operating statement in text accompanying notes 53-57 *supra*.

77. Abt Associates, Inc., 1972 Ann. Rep. & Social Audit X-XXV (1973); Abt Associates, Inc., 1973 Ann. Rep. & Social Audit 22-34 (1974) [hereinafter cited as 1972 or 1973 Abt Social Audit]. Besides preparing a super audit of its own operations, Abt Associates stands willing to conduct such an audit, or any lesser form of social audit, for clients who retain the firm to do so. Letter from Peter Merrill, Vice President for Operations, Abt Associates, Inc., to author, Dec. 13, 1973. Mr. Merrill notes that since there "[is] no one set of established and generally accepted procedures," the form of the social audit Abt Associates will prepare "[v]aries according to the communications goals of the company involved." A sample list of Abt's auditing for clients is found in Abt Associates 1973 Ann. Rep. 11.

its employees' commuting and by Abt's own consumption of electric power.[78]

On its social balance sheet, Abt lists as assets its staff resources less training obsolescence, organizational assets, including the capital cost of reconstructing the organization, and its accumulated research in social responsibility areas such as child care and social accounting. On the right-hand or liability side of the balance sheet, Abt lists the company's financing requirements (as an opportunity cost to society), its staff and resources engaged in company activities not considered socially productive, and pollution the company generates.[79] To balance Abt lists the excess of social assets over social liabilities as society's equity, which is broken down to show whether the Abt staff, its stockholders, or company operations produce the equity.

Abt Associates would incorporate the results of its social audit into the firm's financial balance sheet by first eliminating from total social assets those items the financial balance sheet duplicates. Such items as land and retained earnings, which also are considered social assets because they are available for social programs, are eliminated from the social asset total because they also appear on the financial balance sheet. That elimination, of course, leaves social assets such as staff, social research programs in progress, and social projects the financial balance sheet does not reflect. From the remaining social assets Abt then subtracts social liabilities. The resulting figure then appears on the left-hand side of the financial balance sheet as net social assets; on the right hand side, the figure appears as net social surplus, above equity but below debt and other liabilities.[80]

The Abt super audit procedure no doubt is a valuable tool for

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78. 1972 Abt Social Audit, *supra* note 77, at XV, and notes accompanying the social income statement. *See also* BAUER & FENN, *supra* note 1, at 32, notes 84-86 *infra* and accompanying text. The 1973 Abt social audit is even a bit more ambitious, as it no longer presents completely separate social accounting statements. Although in substance the same as the data in the 1972 social statements, Abt completely integrates the social responsibility data with financial accounting statements in a "Social and Financial Income Statement" and a "Social and Financial Balance Sheet." 1973 Abt Social Audit, *supra* note 77, at 24-32.

79. 1972 Abt Social Audit, *supra* note 77, at XIII-IV; 1973 Abt Social Audit, *supra* note 77, at 24-25.

80. 1972 Abt Social Audit, *supra* note 77, at XXI-XXII. In the 1973 Annual Report Abt does not go through the elimination of duplicated items. The "Social and Financial Balance Sheets" *ab initio* lists all assets together, and italics denominate those items Abt considers social rather than financial assets. 1973 Abt Social Audit, *supra* note 77, at 24-27. *See also supra* note 78.

management introspection, systems analysis, and planning.[81] Yet, when one reads the Abt social accounting statements a feeling of discomfort arises, in part, perhaps, due to the complete monetization of every item in the audit. Although detailed footnotes describe the monetization, they do not describe the alternative measures for quantification that the audit could have used.[82] Traditional accounting statements do not always describe alternative valuation methods either, but at least in reading traditional accounting statements an individual familiar with accounting already will be acquainted with some alternative valuation methods. Additionally, in some instances, traditional accounting statement footnotes will describe why the company has chosen a particular valuation method over other methods. A social audit cannot presume that a reader is familiar with alternative valuation measures. The dilemma's other horn is that since social accounting is such a nascent process, explanation of why the company has not used alternative measurements would take reams of paper. Social accounting has not the complete panoply of tag words and shorthand that regular accounting has at its disposal to explain items in a statement. Regular accounting's nomenclature assumes a familiarity on the part of the

81. Dr. Clark Abt claims tbe following "immediate benefits" from the use of the Abt social audit form: "earnings increase, budgeting efficiency, early warning of opportunity and risk, positive public and governmental relations, and marketing improvements." BAUER & FENN, *supra* note 1, at 19. At this stage, however, management introspection and planning are the primary purposes of attempts at the super social audit. Yet since the super audit is also intended for external use and, indeed, Abt has published its own super audit in its annual report, the super audit also must be evaluated from the reader's standpoint. Even from the standpoint of the super audit's use as a management tool, however, BAUER & FENN, *supra* note 1, at 32 intimate that such an audit might be possible only in "[a] small company manned by top officials of a like mind both on social audits and on the issues with which the audit was concerned . . . ." Used merely as a management tool in a larger firm, executives' disagreement over tbe breadtb and depth of the audit the firm is to undertake and sensitivity to or anguisb over such deep introspection might inhibit a super audit process.

82. The 1973 Abt Social Audit, *supra* note 77, at 24, n.1 describes the valuation of staff as a social asset. "Valuation . . . is based on year-end payroll, discounted to present value, the discount rate being a function of mean staff tenure (averaged over previous years) and salary profiles over time." Apparently, then, Abt values staff at cost. Alternatively, one could value staff based upon financial productivity, or in context, social productivity. Another measure could be staff time devoted to social projects not otherwise reflected in social assets. At least to tbe naive reader, cost valuation of staff as a social asset seems to presume that employment of persons is *a priori* a social good, regardless of employers' duties, or that Abt employees all are thoroughly good and efficient persons. *See also* the Abt social audit footnotes accompanying note 84 *infra*, costing abatement of pollution Abt causes at $.02 per kilowatt of electricity Abt consumes, $.01 per mile of automobile travel Abt employees generate, and $35 per ton of paper Abt uses. Abt gives no explanation of the basis for those particular valuations or for alternatives Abt might have used.

reader that social accounting cannot assume.[83]

Even when the measurement of valuation is explained, the reader remains skeptical of the valuation or of any conceivable measurement method. For example, with regard to Abt's social liability for pollution, the notes to Abt's social income statement read:

> NOTE 13—The company consumed 1,723,593 KWH of electric power in 1973 . . . . The cost of abatement of air pollution created by the production of this power is estimated at $.02 per KWH.
> NOTE 14—The company generated 1,727,440 commuting trip miles in 1973 . . . . The cost of abatement of air pollution caused by automobile commuting is estimated at $.01 per mile.
> NOTE 15—A substantial portion of the company's activities are expressed . . . through the printed word. The company used 170 tons of paper in 1973 . . . . The cost of abatement of water pollution created by the manufacture of this paper is estimated at $35 per ton.[84]

Perhaps those statements are accurate. Perhaps, too, pollution is a social cost everyone should bear. Given the propriety of those items' inclusion in the social audit, however, one remains skeptical that Abt Associates or any firm can put a monetary value on the prorated portion of pollution damage the production of paper the firm uses causes in a faraway, unknown stream.[85]

A feeling seems to arise of the impropriety of accounting in the first place for externalities, such as automobile commuting by em-

83. The problem is an evolutionary one. As more social accounting statements appear with some degree of uniformity, *see* text following note 107 *infra*, and with several professional accounting groups' movement toward those goals, text accompanying notes 99-102 *infra*, some readers will become familiar with the methods of valuation and the non-traditional accounting concepts used in social audits.

Yet it may be insufficient. For many individuals, accounting is taught and not learned. Other than business persons, the accountant, and the financial analyst who work with accounting statements on a daily basis, most individuals probably learn what they know of accounting, its short band, terminology, and methods through formal training. Certainly most lawyers do, either as undergraduates or in a summary accounting course in law school. Social accounting, therefore, and its methods of valuation may not become really meaningful until social accounting evolves, becomes somewhat uniform, and is taught in accounting courses, probably in the elementary course most individuals encounter. That would seem to be far, far in the future. *But see* the recommendations for teaching rudiments of social accounting, to accountants at least, in McCullers & Van Daniker, *Socio-economics and Accounting Education*, 47 ACCOUNTING REV. 604 (1972).

84. 1973 Abt Social Audit, *supra* note 77, at 27.

85. One wonders whether the Abt social audit carried out tbe exercise of tracing the paper Abt consumes to the specific plants of specific paper companies which pollute, do not pollute, or pollute at some given level. For the audit to be accurate, a similar task would involve an inventory of tbe pollution quotient for each employee automobile used in commuting to and from work at Abt or an inventory of at least tbe make and model of each automobile so used and tbe distance traveled. If tracing has been carried out, tben one bas to wonder whether the task of carrying out the exercise or of trying to account for such items in the first place is wortbwhile, except perhaps as an expression of management's concern.

ployees, for which the company is only one of thousands of causes.[86] This feeling arises partly because of the attribution and valuation problems, but more because of the reasoning that the paper company or the manufacturer of employees' automobiles can best account for pollution they cause most directly, either because of their proximity to the source or their ability to determine what the optimum level of pollution is.[86]

Absent a valuation problem, the propriety of other items' inclusion in the super social audit also is apparent. Including items such as land and retained earnings as social assets merely because they are available for social programs seems suspicious. An inference arises that the item's full inclusion on the social balance sheet is merely to fatten the social assets total because Abt eliminates the items before inserting the social assets total into the financial balance sheet. Instead, the company should list as social assets only that portion of those fixed or other assets the firm uses or reserves for social programs. Moreover, if the company intends to integrate social and financial accounting statements, it should leave standing on the balance sheet's financial portion only the remaining historical cost or market valuation of those assets partly used for social programs.[88]

86. An exception might be where the audited firm consumes most or all of the polluter's output and would be in a position to account and to persuade or exert pressure on the polluter. Anotber possible nexus might be if the good whose manufacture gives rise to environmental damage is the principal raw material used by the audited firm, even if the audited firm consumes only a small portion of the polluter's output. But to have social audits account for pollution caused in the production of all the myriad raw materials, parts, and other goods tbe audited firm consumes seems of little use, save as an internally oriented conscience-raising and conservation device.

87. Economists and ecologists agree that optimal levels of pollution, not zero pollution, are the proper goals. There are goods which the society will still desire even when the society has been made fully aware of the social cost those goods' production poses. With other goods, consumers will tolerate a price rise to accommodate some pollution abatement efforts by the manufacturer. Beyond some level of cost, however, the public utility in having the goods at a given price will be greater than the utility in having the pollution manufacture causes eradicated further. See LIPSEY & STEINER, *supra* note 72, at 227-28. The Abt social audit seems to presume that all pollution must be eradicated. If such presumptions are dispelled, social audits such as Abt's will have even greater difficulty in determining a firm's proper share qua consumer of the cost of reducing its suppliers' and others' pollution, because the audit will first have to determine what the optimal level of pollution is. With a few exceptions, then, the social audit would probably do best to leave accounting for environmental matters to the manufacturer and others closer to the source, such as the company which consumes most or all of the polluter's output, *supra* note 86.

88. Perhaps more wisely, the entire item should remain a financial asset if its primary purpose is use in the regular business of the company. Only if the fixed assets use is primarily social, such as recreational facilities for employees or day care centers, should the item be a social asset. Occasional or part time use of other company facilities for social programs could

The Abt statements raise many other questions of accounting nicety. The discreteness of apportionments between accounts and of valuation that the statements suggest does not seem warranted in such a new field. Furthermore, the Abt type audit calls on corporate executives to make an examination of conscience the likes of which few, if any, individuals ever make in their personal lives. For the corporation to admit to itself and maybe to the outside world that its operations pollute will be painful; to expect a corporation to compute as a liability the governmental services it consumes over and above those its taxes pay for, or its financing as an opportunity cost to society, is to carry accounting accuracy and accountability to extremes.

There are others, though, who would overlay the super social audit with further complexity. For instance, some would have a social environmental audit precede the social audit. The environmental audit provides statistics and other information on the whole range of social problems the corporation could face within its community and its industry. Statistics on unemployment, income distribution, health care, public safety, housing, education, environment, transporation, and culture describe the environment in which the corporation operates.[89] The super social audit then describes the rationale for the choices the firm makes and the priorities it assigns in its quest to remedy social problems the environmental audit has highlighted.[90]

Another complexity some would stir into the pot is the inclusion of comparative data about other companies in a corporation's own social audit.[91] The firm would glean the data from public reports,

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be reflected in the social income statement as accretion to a social asset and as a cost of conferring a social benefit.

89. *See* First National Bank of Minneapolis, Social Environmental Audit Rep. (1972).

90. The principal criticism that can be offered seems to be that while such a process is worthwhile, the workload involved in formally preparing such an audit for public disclosure would be great. The better course might be to prepare an informal environmental audit for management's use. The company's social audit could then show relevant portions of the environmental audit through the social audit's discussion of the priorities the company has assigned to the social problems it intends to treat. Alternatively, all of the firms in a particular community could operate from a social environmental audit a government agency, a central planning authority, or an industry trade group develops and furnishes.

91. *See e.g.*, BAUER & FENN, *supra* note 1, at 72, suggesting that, along with data about one's own firm, a social audit should include 4 types of comparative norms:

> [P]erformance by other companies in the industry, by similar firms in the same geographical location, local legal requirements, and some norm of what is possible in a given location (e.g., minority employment as a function of the proportion . . . of minority group members in the area).

including those of government agencies, public interest groups,[92] and other companies' social audits. Companies might include comparable firms in the same industry and companies of a similar size in the same geographical region. This seems spurious. Public reports and public interest groups' data would be available to readers through other sources. An interested individual will be able to make his or her own summarization of other companies' performances, compare results, and reach conclusions. Such a comparison, along with the comparison of the company's data for the present year with that of prior years is the normal practice with financial matters and in investment selection.[93] The provision by a company of summarizations about other companies' social performance could lead to liability for disparagement or some other sort of action, especially if a company follows the temptation to make its own performance seem, on a relative basis, salubrious. The social audit would do well to leave the whole task of comparison to the social audit's readers, to investment advisors, and to public interest groups. In time, too, the comparison process will become more facile as the use of social audits evolves and spreads and as auditing practices become more uniform.

In fact, as with the complete audit, whatever the difficulties with the super social audit or with the layers of complexity some would pile upon it, judgment must be reserved. Advanced social accounting is in a state of evolutional fiux. Until developers of social accounting methods achieve some uniformity and some wider familiarity with social accounting, and companies complete some number of more sophisticated social audits, criticism can be nothing more than constructive.

III. Present Prospects and Recommendations for Future Progress in Social Accounting

The debate over quantification and monetization will continue. A few commentators still argue that there should be no monetization at all. These authorities reason that in social accounting:

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92. *E.g.*, through the sources listed in notes 36-38 *supra* and accompanying text. Presumably, were the SEC to require some social accounting and disclosure, those public interest organizations would continue to extrapolate and summarize information corporations' social audit disclosure documents contain.

93. *See* Kripke, *Bicentennial Paper: A Search for a Meaningful Securities Disclosure Policy*, 31 Bus. Law. 293, 305 (1975). Professor Kripke, however, intimates tbat perhaps the present process is backwards and, for that reason, SEC-required disclosure might enhance instead of forbid comparative data in companies' financial disclosures.

> The theoretical justification for an expenditure approach is questionable. For economic goods, the price mechanism assures the relevance of dollars as a measure of utility, for the person bidding is the one to receive the utility. With social goods . . . the price mechanism is not as effective. Items of very low cost might be required to avoid significant unfavorable social impact. A management can fail to incur many small social expenditures and emerge with a high . . . rating, regardless of the negative social impact of the firm.[94]

The danger that social accounting could become bogged down in a morass of monetization problems in attempting to account for miniscule corporate social impacts is very real. Ambiguities about the social impact of some items or programs will remain. "For example, a 'vice-president . . . serving on a government Product Safety Commission' could be speeding progress or inhibiting progress." Under most present forms of social accounting, the company employing such a vice-president could list his or her salary as a social asset. The company "would score either way."[95]

The range of issues that the social audit and corporate social responsibility should cover will be a continuing source of controversy. The lists of possible issues are long. New areas for corporate social responsibility come into vogue, but many of the older issues remain on the list.[96] Whether a firm should list as a liability activities in apartheid countries, or whether the firm should list those activities as an asset, on the premise that a company is ameliorating conditions by its operations there, will be a continuing debate within and without the firm. Defense contracting and supply raises similar issues. Even legally permissible political activity is a source of fierce debate. One list of social audit items includes a recommendation that a firm assess how much democracy or disenfranchisement the firm has meted out to its shareholders,[97] a recommenda-

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94. Mobley, *Commentary on Let's Get on with the Social Audit*, BUS. & SOC'Y REV. 48 (Winter 1972-73). *Accord*, Bauer, *supra* note 54, at 44:

> Often a company can make its most important social contribution by adopting policies for which there is no identifiable cost, but which may he socially positive, such as enlightened marketing and advertising practice.

95. Bauer, *supra* note 54, at 44.

96. *See, e.g.*, one corporate official's lament:

> Now its women, before it was air pollution and before that the urban crisis. Some honest efforts are made, and then it's swept under the rug until the next crisis.

Bralove, *Despite Much Hoopla, Few Women Capture Companies' Top Jobs*, Wall Street J., Apr. 18, 1974, at 1, col. 6.

97. BAUER & FENN, *supra* note 1, at 73-74. When the problem of issues that social accounting should treat is analyzed, though, the air clears. Most "social responsibility" issues fall into one of three categories. First, there is a range of issues on which most everyone agrees private companies do have a responsibility and, further, a consensus exists as to the direction, if not the magnitude, to which responsibility points. Minority hiring and pollution abatement

tion sure to touch deeply corporate officers' sensibilities. Another recommendation that further obfuscates is a suggestion that a firm account for its past sins as well as for its present malfeasance or nonfeasance. The suggestion asks that a firm's audit hazard a guess about the social position a community would have been in had the firm not inflicted social costs *ab initio*.[98] The process' complexity alone seems staggering, even when viewed apart from the masochistic posture the recommendation calls for corporate management to assume.

These and other debates, however, should not dishearten those who await a meaningful social audit. Progress in achieving a method, terminology, and degree of uniformity for the social audit is well underway. The National Association of Accountants has an active Committee on Accounting for Corporate Social Responsibility. The Committee has outlined the issues it intends to face in its "Statement of Objectives and Procedures"[99] and currently is following up on that Statement. The American Institute of Certified Public Accountants has begun a similar program with its Committee on Social Measurement. The Committee already has issued several reports.[100] A number of seminars, workshops, and symposia have

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are such issues. Secondly, there is the group of issues as to which everyone agrees corporations bave a responsibility but no consensus exists concerning its direction. For example, most believe that private American companies are obligated not to foster apartheid. Whether not to operate in South Africa or to continue operations there in an enlightened manner, however, is a question over which many disagree. Finally, there is a category of issues over which many disagree whether corporations have any responsibility in the first place, *viz.*, to refrain from defense contracting. Many would argue that a strong national defense is a social good. As social responsibility has matured, a consensus has come into being about what lies in the first category of issues. *See, e.g.*, notes 107 & 317-20 *infra* and accompanying text. This category of issues would be a good point from which to base social accounting and required disclosure of accounting results. *See* note 451 *infra* and accompanying text.

98. Of course, for the enlightened company, the recommendation can have a reverse effect. The company can trace the community benefits of years of the company's social programs. *See, e.g.*, BAUER & FENN, *supra* note 1, at 59, n.12:

> By virtue of broad social forces a community may be going "up" or "down." The contribution of any social program to a community should be measured in terms of where the community is relative to where it would have been in the absence of the program. If statistical series are available for the community . . . an extrapolation can be made from the time the program begins to estimate where it would have been in the absence of the program.

99. The statement is reproduced in the National Ass'n of Accountants' periodical MANAGEMENT ACCOUNTING, Feb. 1974, at 39-41.

100. The committee is the so-called Toan Committee, headed by Arthur B. Toan of Price Waterhouse & Co. Its reports include: AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, SOCIAL MEASUREMENT—POINTS OF VIEW OF SOCIOLOGISTS, BUSINESSMEN, POLITICAL SCIENTISTS, ECONOMISTS, CPA'S (1973) and Committee on Measurement of Social Programs, *Report*, 47 Accounting Rev. 337 (Supp. 1972).

been held to gather information and to disseminate lessons learned in the art of social accounting.[101] Several business consulting firms are now in the field evolving social audit methods for client corporations' use.[102] Hence, an attempt to resolve the issues is being made and some semblance of uniformity in and widespread use of the social audit could be in sight.[103] In the drive for uniformity, however, several different steps could be taken and several distinctions could be made. They would enable both the social audit's potential user and the casual observer to evaluate the progress that social accounting is making and better to determine just how far down the road the maturation of the social audit lies.

Emphatically, consideration and refinement of the social audit in the sense of traditional accounting and with a view toward even-

101. The Public Affairs Council, an organization of some 200 major corporations whose purpose is to stimulate increased corporate involvement in society's mainstream, has held 2 such workshops since 1971. LONGSTRETH & ROSENBLOOM, *supra* note 1, at 25. A second was held in 1972. Sethi, *supra* note 12, at 33. The National Ass'n of Manufacturers has had a similar conference. *Id.* The Institute for Social Research at the University of Michigan also has been studying the issues. Likert, *The Influence of Social Research on Corporate Responsibility*, in COMMITTEE FOR ECONOMIC DEVELOPMENT, A NEW RATIONALE FOR CORPORATE SOCIAL POLICY (1970) (Supp. No. 31). *See also* Merrill, *supra* note 16, on the Boston Workshop and other movements; Abt Associates, Inc., 1973 Ann. Rep. 11 (1974), for a description of symposia in which Abt has participated.

102. These include Abt Associates, Inc., *supra* note 77; Arthur D. Little Co., a large, well-known consulting firm; Sethi, *supra* note 12, at 33; and BAUER & FENN, *supra* note 1, at 28. The Hudson Institute has been formulating checklists for 6 major corporate clients to evaluate their performance in the area of corporate social responsibility. LONGSTRETH & ROSENBLOOM, *supra* note 1, at 24.

103. *Cf.* Briloff, *Comment on Let's Get on With the Social Audit*, BUS. & SOC'Y REV. 46 (Winter 1972-73):

> [I] am not inclined to wait until . . . my profession, i.e., certified public accountancy, develops the configurations required . . . . My misgivings are noted in the belief that [a social audit] program would be implemented, if at all, much too little and much too late.
>
> As to the "too late." Experience informs me that before our professional hodies go through the agonies of determining what costs are to be allocated, . . . how is the standard of materiality to be applied, what should be the auditor's responsibility . . . , there will have elapsed a whole generation of nondisclosures and even deceptive disclosure. To discern how deliberate "all deliberate speed" can be, we need but refiect on the time lags in the development of standards of disclosure by diversified entities . . . , to say nothing of the purchase-pooling trauma, and we discern how deliberate "all deliberate speed" can be.

On tbe trauma and equivocation in the 10 years it took public accounting to resolve the purchase-pooling question, see Briloff, *Accounting Practices and the Merger Movement*, 45 NOTRE DAME LAW. 604, 610-14 (1971). Professor Briloff, a persistent critic of public accounting, is the author of a book quite critical of all phases of modern accounting. A. BRILOFF, UNACCOUNTABLE ACCOUNTING (1972). But see the other recent trauma caused by and the lack of certitude found in the financial accounting and disclosure modern public accounting produces in notes 430-36 *infra* and accompanying text.

tual disclosure must be separated from the social audit as an internal management tool. The latter is accompanied by difficult concepts such as cost-benefit analyses of management's social alternatives, opportunity cost computations, social environmental audits, and measuremnts of the quality of effects social programs produce. Those concepts are beyond the public's and most investors' abilities to comprehend. By combining all possible measurements of corporate social performance for all possible uses under the head "social audit," social accounting's developers certainly are doing much more than traditional accounting has ever done or purported to do. The task of adopting traditional accounting concepts to the company's efforts in the social responsibility area is a prodigious enough task. When social auditing also considers what social responsibility actions corporations could have taken or should have taken, the accounting task becomes herculean. Traditional accounting has left cost-benefit analyses and discussion of quality as opposed to quantity to management's subjective comments, which usually accompany accounting statements in annual reports and elsewhere. During its development, social accounting should be content to do the same.

Failure to separate the areas of accounting for disclosure and managerial accounting-systems analysis has inhibited social accounting's progress by binding up the entire field with conceptual difficulties. That failure also has hidden the accomplishments social accounting has made thus far. The pseudo-complexity and false accuracy imported into social auditing may have prolonged the avoidance of social accounts by many corporations; because of the purported weightiness, companies have thought the entire field to be less advanced than it really is. With some unity of format and some quantification having been introduced, social accountants could now encourage companies to include process audits and some forms of the complete audit in annual reports.

Some corporations have weathered for too long the misguided attacks of corporate activists,[104] while other companies have done little in the social responsibility area because they have had no need to account. With a modest, regularized social accounting format, some corporations would be able to reveal the good they believe they

104. When coupled with some disclosure, this seems to he a benefit social accounting might bestow. At present, corporate activists sometimes direct attacks toward a relatively social responsible corporation while the activities of the worst polluter or of the silent, less responsible corporation go unchallenged. See the examples discussed notes 371-79 *infra* and accompanying text in tbe cost benefit analysis of disclosure on corporate social responsibility.

do as well as admit to shortcomings of which they are aware. Regularity of format would enhance comparison of social audits, induce readability, and in part avert misguided attacks. On the other hand, social accounting would force other companies to begin thinking about and formulating social programs. A relatively simple form of process audit could accomplish those aims. At present, however, the process audit and the thought of public reporting are mixed in the morass of loftier thought and rhetoric about efficient allocation of resources, opportunity costs, and demonstrable relationships to profitability.

Henceforth, social accounting in the nature of traditional accounting, for public reporting purposes, should be a separate area for study. Accounting organizations should split apart the conceptual framework into treatment of social accounting and treatment of managerial systems analysis. The various social accounting committees should spawn separate subcommittees for the two areas. Textual treatment in reports and in the literature should be distinct and clearly labeled. Last of all, the terms social audit and social accounting should be used in contradistinction to the internal social audit and management systems analysis. With those steps, some of the confusion and blurriness that has so pervaded social accounting's development will disappear.

That the social accounting which such a separation produces may not be discrete enough or take into account every effect corporate activity has on its environment is no objection. The interested public, interested investors, and, indeed, many of the more severe critics of corporate methods do not call for an omnipotent, detailed audit. Instead, they have begun to realize that in pursuing social responsibility companies are subject to restraints, that in some form profit maximization is a necessary constraint if the production of desired goods and services is to continue.[105] Room for corporate activity in the social responsibility area has limits. Those limits also include the time and effort corporations can give to assessing and reporting on social considerations. In other words, time and profit constraints limit the social audit's breadth and complexity just as

105. These and similar ohservations have been made elsewhere in this article: with reference to the process audit's virtues, notes 47-48 *supra* and accompanying text, with reference to investors' relative approach to choosing socially responsihle investments displacing the search for the clean company, note 41 *supra*, and with reference to the public's desire to know the earnestness with which companies are pursuing social responsibility and not necessarily for a discrete measurement of all corporate efforts, note 55 *supra*. The observation is also implicit in much of the criticism of the super audit's complexity in notes 81-88 *supra* and accompanying text.

those constraints limit the activities upon which a social audit reports. Many investors and corporate critics have come to understand this.

In the last analysis, most individuals interested in corporate social responsibility merely want assurances that corporate executives have adopted a concerned attitude; they do not desire a detailed accounting. They want assurances that executives have engaged in some earnest introspection about the corporation's role in modern society and about company policies, that they have assigned some priorities, that they are attempting to foresee and then avoid the liabilities social irresponsibility may cause, and, finally, that they have begun doing something. Forms of the social audit for demonstrating these things now exist. If these social accounting forms can now only be freed from consideration of more lofty and complex stuff, as this article recommends, and if some social accounting results are required to be disclosed, the art of social accounting would make a quantum jump down the road of progress.

IV. Progress in the Art of Social Accounting—A First Argument for Disclosure

Despite whatever faults and inaccuracies remain in the simpler social accounting forms that now exist, the Securities and Exchange Commission should begin requiring those forms for public accounting purposes, bearing in mind that "we can sometimes outwit uncertainty by a wilful assault on it. Incremental insights into urgent matters can often be gained by forcing imperfect designs upon stubborn problems."[106] Social accounting has reached the turning point where the ability and incentive to improve its substance and methodology can only be achieved through some application. Social accounting is now developing largely in the abstract or in those concrete situations where the problems social accounting meets are easy ones. Accounting organizations and consulting firms are engaged in research on social audit methods, but research can proceed only so far. At some point, widespread use of the techniques developed is necessary to iron out the ambiguities and inaccuracies that

106. Gray, *Commentary on Let's Get on With the Social Audit*, Bus. & Soc'y Rev. 47, 48 (Winter 1972-73). These stubborn problems are not those of social accounting alone. The whole area of evolving a new legal model of the modern, publicly held corporation and of corporate law reform generally, with proposals for federal chartering of corporations, expanded use of shareholder proxy proposals, and so on, are faced by the SEC. Social accounting and disclosure could also give the SEC "incremental insights" on those "urgent matters." *See, e.g.*, notes 176-88 & 460-63 *infra* and accompanying text.

remain. The widespread application of audit techniques also is needed to discover those imperfections in accounting methods one can discover only through oft-repeated use. Seemingly, that point is near. SEC-required disclosure would transfer social accounting's development from a realm largely filled by theory to the realm of practice.

SEC-required disclosure also could introduce some needed uniformity and comparability. Social accounting has proceeded to the point where its forms are beginning to proliferate more at a geometric than an arithmetic rate. For social accounting to move more forward than sideways, some rough-hewn uniformity must be introduced to the social accounting field. Choosing some of the best from the various social accounting techniques now available, the SEC can aid in consolidating the progress social accounting has made thus far. A base in which uniformity exists will enhance comparison of techniques varying beyond that base. Discussion and development can then isolate on frontiers; every discussion of social auditing techniques will not have to begin at ground zero, as is now the case. SEC-required disclosure could impose a core of uniformity to speed social accounting's development. Moreover, a consensus can be contrived as to which areas or what minimal breadth a social audit should take. Minority hiring and promotion, environmental matters, product safety, employee welfare and plant safety, energy conservation and development, and corporate giving now appear on every list of subjects the social audit should treat.[107] Social accounting and disclosure could move forward in this minimal core of areas if that core were given the legitimacy of an SEC mandate.

The principal impediment to social accounting now seems to be the complexities its progenitors have injected into it. That problem seems soluble by a realization that the complexities are more the ken of traditional management thought processes than is public accounting in financial matters or needed accounting in the corporate social responsibility area. Once that catharsis is passed, the two social accounting areas can proceed along separate but parallel

107. *See* BAUER & FENN, *supra* note 1, at 72; Linowes, *supra* note 53, at 40-41; Schoenbaum, *supra* note 5, at 587; Sethi, *supra* note 12, at 38. See also the areas of interest to the various corporate activist and auditing groups discussed in notes 36-42 *supra* and accompanying text; areas about which institutional investors want disclosure, text accompanying note 145 *infra*. Although each of these and other authorities may differ concerning the inclusion of certain areas in the social audit, each has as the core of its proposal auditing and reporting on all of the topics the text lists. Quite unconsciously, a working consensus seems to have evolved through the writing and comment of diverse individuals. That consensus provides a basic field of topics with which almost any attempted social audit must deal.

tracks. Both would develop with greater speed if the SEC were to require public accounting. Through use and application in preparing required disclosures accountants and corporate managers will learn social accounting by doing, and they will have bases for comparison and improvement.

The other side of the coin—progress as it is presently being accomplished—consists of consideration of all social accounting forms under one head with thought of use delayed until social accounting reaches quintessent form. As the guardian of the principal disclosure schemes, the SEC seems to want such a quintessent social accounting form, including demonstrable linkage of social responsibility with profitability along the lines super social audits comtemplate, before the Commission requires significant disclosure on corporate social responsibility.[108] Hence, social accounting will evolve to an anomalous position. With all the hope social accounting offers for telling corporate managers "where to go" and "how to get there" in this troublesome area of social responsibility, the public, interested investors, and corporate managers will remain confused. Then, suddenly, the SEC, some other governmental agency, or the accountants will present them with "too much, too late." In modest forms social accounting and disclosure should begin now.

V. Incongruities in the Present Disclosure System—Another Argument for Disclosure

A. *The Purposes of Disclosure—in General*

"The keystone of . . . Federal securities legislation is disclosure."[109] Many writers cite Professor Louis Loss: "[T]here is a recurrent theme throughout these statutes of disclosure, again disclosure, and still more disclosure."[110] Commentators have used Professor Loss' words to buttress countless arguments for extending accounting and disclosure into the nooks and interstices the original regulatory scheme left vacant or for using accounting and disclosure as the solution to each new problem that arises in the securities area.[111]

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108. The point is best illustrated by the recent case Natural Resources Def. Council, Inc. v. SEC, 389 F. Supp. 689 (D.D.C. 1974) that was discussed in the text accompanying notes 274-321 *infra*.

109. Knauss, *supra* note 13, at 607.

110. 1 L. Loss, Securities Regulation 21 (1961).

111. *See, e.g.*, Knauss, *supra* note 13, at 607-08 (citing Loss in argument for extending disclosure requirements to over-the-counter securities); Sommer, *The Annual Report: A Prime Disclosure Document*, 1972 Duke L.J. 1093 (citing Loss in argument for extending and upgrading disclosure requirements for annual reports).

Commentators have identified several purposes these disclosure requirements and the accounting rules and regulations that necessarily precede disclosure seek to serve. Most often mentioned is the function of accounting and disclosure in informing investors, thus enabling investors to make rational investment decisions.[112] The investor chooses to buy, sell, or hold investment securities on the basis of full disclosure of material facts about the security and about the company that has issued the security.[113]

The other oft-cited purpose of accounting and disclosure is the prevention of fraud, manipulation, and questionable acts and business practices. The theory here is that "many things are not done by corporate managements which would be done if they could be done without disclosure."[114] Thus, accounting and disclosure "restrain because of sensitivity to public reaction" or "the possibility of legal action." Disclosure operates in a "deterrent manner."[115] The reason disclosure attempts to deter questionable acts and practices is to prevent the visitation upon investors of catastrophic investment losses that management's speculative or questionable actions might cause. Without disclosure of management's proposed course of action, investors have no way of evaluating the risk of loss or the potential reward that management's action poses. The corollary is that if disclosure does not restrain, and management decides to proceed with the speculative or questionable scheme, but discloses what is involved, investors can evaluate the risk of loss.

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112. The emphasis on disclosure . . . [r]elates to the proper function of Federal government in investment decisions. Apart from the prevention of fraud and manipulation, the draftsman of the '33 and '34 Acts viewed that responsibility as being primarily one of seeing to it that investors and speculators had access to enough information to enable them to arrive at their own rational decisions.

SEC, DISCLOSURE TO INVESTORS: A REAPPRAISAL OF ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 SECURITIES ACTS 10 (1969) [hereinafter cited as the WHEAT REPORT]. *See also* Cary, *supra* note 13, at 410; Schoenbaum, *supra* note 5, at 575.

113. Disclosure, however, does not contemplate subjective evaluations of the security's investment merits, either by the security's issuer or by the SEC. The federal disclosure philosophy leaves the ultimate question, evaluation of the security's investment merits, to the investor, with or without the aid of a broker or investment adviser. *See, e.g.*, WHEAT REPORT, *supra* note 112, at 43-44.

114. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"*, 56 CORNELL L. REV. 1, 18 (1970). Professor Ratner opines that disclosure is "the most effective control over management that has been developed during the last thirty-five years—disclosure of financial information, of transactions by insiders, of other types of information through which shareholders and others can measure management's performance against general standards of competence and integrity."

115. Cary, *supra* note 13, at 411. The WHEAT REPORT, *supra* note 112, at 10 posits "the belief that appropriate publicity tends to deter questionable practices and to elevate standards of business conduct."

One also can detect a number of other goals for disclosure. These goals exist either independently of or subsidiarily to the more oft-cited purposes of disclosure. For instance, supplementing both of those traditional disclosure goals is the aim to present a rough parity of information across the spectrum of a company's affairs. Through its disclosures, a company cannot emphasize its strengths, for instance an order backlog, and ignore its weaknesses, for instance a possible dearth of plant capacity to capitalize on that backlog. Another of disclosure's goals is to insure that an equal amount of information be available about different companies. That is, disclosure aims to produce availability of information of roughly the same scope about all companies having a certain size or status.[116] Pre-Securities Act history has shown that many companies were willing to make the financial disclosures the securities acts eventually made mandatory. Before the legislation, however, some firms refrained from making the disclosures because they feared that other firms, competitors in the same industry or in the general market for capital, would not disclose, leaving the disclosing firm standing in isolation, a good target for criticism. The firm that had not discosed would do so only if its performance exceeded that of the firm first disclosing.[117]

Another parity proponents of disclosure mean it to achieve is some rough-hewn equality of access to information for various classes of investors. The theme of much of development of Rule 10b-5 has been assurances to investors that, in theory at least, all participants start the investment process on roughly the same informational footing. Assurances of equality of access foster investors' trust in the capital markets.[118] In part, the same equality of access theme inspires affirmative disclosure requirements for documents companies file with the SEC.[119]

116. In part, that status is defined by the Securities Exchange Act of 1934, §§ 12(b), 12(g), 15 U.S.C. §§ 78*l*(b), 78j(g) (1970). Section 12(b) companies are those that have a class of securities listed on a national stock exchange. Section 12(g) companies are those that have $1,000,000 or more in assets and a class of equity securities held by 500 or more persons. Under §§ 13a-c of the Act, 15 U.S.C. §§ 78m (a-c) (1970), such companies must file annual and other periodic reports containing detailed financial and other information with the SEC.

117. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132, 133 *passim* (1973).

118. See SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 848 (2d Cir. 1968) that began an analysis of Rule 10b-5 with the premise that "the Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information . . . ." *See also In re* Cady Roberts & Co., 40 S.E.C. 907 (1961).

119. *See, e.g.*, Benston, *supra* note 117, at 133-36.

Without disclosure on corporate social responsibility the present disclosure system produces incongruities that result in the system's failing to meet even the goals it sets for itself. This section's purpose is to identify those incongruities, document them, and use them as arguments for Securities and Exchange Commission mandated social accounting and disclosure. The section's other purpose is to demonstrate that social accounting and disclosure have become necessary because they would serve all the traditional purposes for which securities regulation has in the past required disclosure in financial and other areas. Neither the SEC nor advocates of social responsibility accounting and disclosure need premise accounting and disclosure on some new view of corporations as the principal power centers in our society or as quasi-public institutions. Some disclosure on corporate social responsibility is now needed to enable investors to evaluate securities' merits, to prevent surprise or catastrophe that social irresponsibility might produce, and to provide a parity of information about all of a company's activities, a parity of information about different companies, and a parity of access to that information for all interested investors.

B. *Utility in the Investment Process—An Argument for Disclosure on Social Responsibility*

(1) Introduction

In the mid and late 1960's bull market, investors did not seem to have much interest in choosing "socially responsible" investments or, once they had invested, in encouraging socially responsible management. It can be surmised that investors, preoccupied with making money in a seemingly ever-rising market, were not much concerned with social responsibility. In the late 1960's, the investor decision rule that prevailed was the so-called "Wall Street Rule." Its tenor was suggested by the following observation:

> The overwhelming majority of the shareholding public probably prefers reading ball scores to proxy statements . . . . If they do become dissatisfied with the performance of management, the best thing to do is sell. During the past 20 years, there have always been many profitable corporations into which they could switch their bets at the cost of two commissions. This generally happy situation . . . has had at least one predictable result. Despite the concern expressed by some scholarly observers . . . there has been no word of protest from shareholders in general.[120]

120. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 253 (1969) (footnote omitted).

Since investors could easily "switch their bets at the cost of two commissions," they did not and needed not scrutinize social responsibility factors in choosing investments in the first place.

In particular, commentators noted that the Wall Street Rule was descriptive of institutional investors' behavior. Institutions such as pension funds, bank trust departments, mutual funds, and insurance companies had large amounts of money to invest and, in the competition for the funds of those on whose behalf they would be investing, a felt duty to maximize profits. In institutions' investment management, the Wall Street Rule theorized that "to invest in a company was to invest in management and if one does not like what management is doing, one sells the stock." It was a "love it or leave it" approach.[121] In investment selection, the Wall Street Rule dictated that institutions choose investments solely on the basis of corporations' ability to maintain constant earnings per share growth.

For a variety of possible reasons, in the few years since the late 1960's a metamorphosis in investor attitudes has occurred. The Wall Street Rule has been steadily on the wane. The fallout from the Viet Nam War, the equal rights movements, the death of Martin Luther King, Earth Day in 1970 and the ensuing ecology movements, and the bear markets of 1969-70 and 1973-75, all occurring in a short time frame, have converged and led to ever increasing investor interest in corporate social responsibility and disclosure. A more cyclical stock market has fostered the realization that investment selection must be much more discrete to result in profit on investments. Choosing socially responsible investments may be one more hedge an investor can make in attempting to choose profitable stocks. Whatever the reasons,[122] many investors, and especially institutional investors, claim that corporate social responsibility is a factor both in their selection of investments and in the voting of shares they own. In addition these investors almost universally complain about the lack of information upon which to base a social responsibility appraisal of some companies and the unevenness of information about other companies' social performance.

121. Schwartz, *supra* note 33, at 495 (footnote omitted). This phenomenon, the Wall Street Rule, was well known and much discussed. *See, e.g.*, LONGSTRETH & ROSENBLOOM, *supra* note 1, at 4-5; THE ETHICAL INVESTOR, *supra* note 1, at 46-64; Ratner, *supra* note 114, at 25-27.

122. These and some of the other more tractable hypotheses about increased investor interest in corporate social responsibility are discussed in notes 146-88 *infra* and accompanying text.

(2) Evidence of Investor Interest in Social Responsibility Disclosure

The first indications of the Wall Street Rule's possible future demise came through shareholder public interest proxy proposals. Campaign General Motors involved social responsibility proxy proposals in two successive proxy seasons, 1970 and 1971. In 1970 a proposal for a shareholder's committee on General Motors' corporate social responsibility, which would prepare and make disclosures to General Motors' shareholders on the company's social performance, drew a significant "2.73 percent of the votes cast representing 7.19 percent of the shareholders voting."[123] The New York City Pension Funds, the Carnegie and Rockefeller Foundations, the Teachers Insurance Annuity Association, and the College Retirement Equity Fund voted for the proposal.[124] Other institutions voted with General Motors management against the proposal. In doing so, however, many did express sympathy with the proposal, noting that "their votes could be different the next time."[125]

In the 1972 proxy season, thirty-four shareholders submitted disclosure proposals that appeared in the proxy statements of twenty-two companies listed on the New York Stock Exchange.

> Disclosure proposals . . . involved 15 of the 22 corporations in question, including . . . Bristol Meyers, Chrysler, Eli Lilly, Ford Motor, GM, Goodyear Tire and Rubber, Gulf Oil, Honeywell, International Telephone and Telegraph, Jewel Companies, Merck . . . , Standard Oil of California, and Warner Lambert.
>
> Support for the disclosure proposals ranged from a high of 5.50% at Standard Oil . . . to a low of 0.5% at Eli Lilly. It should be noted that the use of percentages underestimates support. For example, holders of approximately $950,000,000 market value of General Motors stock voted in favor of a proposal for disclosure . . . .[126]

123. Schwartz, *supra* note 33, at 430. In 1971 a proposal for disclosure directly from the company, instead of through a shareholders' committee, received 2.36 % of the votes cast, representing 4.43 % of the shareholders. The disclosure proposal received roughly double the votes which other 1971 General Motors public interest proxy proposals received. Schwartz, *supra* note 35, at 64 & n.30.

124. Schwartz, *supra* note 33, at 494 *passim*.

125. Mintz, *Campaign GM Likely to Stir New Conflict on Campus*, Wash. Post, May 24, 1970, § A, at 3, col. 2. Still other institutions indicated, some directly to General Motors' officers, that they would have voted for the proposal had it been better drafted. Schwartz, *supra* note 33, at 505-07.

126. Blumberg, *supra* note 5, at 1029-30 (footnotes omitted). Numerous proposals for disclosure made to other major corporations are listed in Henning, *Corporate Social Responsibility: Shell Game for the Seventies?*, in CORPORATE POWER IN AMERICA 151, 162-63 (R. Nader, M. Green eds. 1973). *See also* Schwartz, *supra* note 33, at 422-23.

In the 1973 proxy season, shareholder proposals appeared in the proxy statements of 224 listed and unlisted companies governed by the SEC's proxy rules.[127] As a symposium on the role of the SEC notes, "It is noteworthy that most of the proposals have simply sought *disclosure* on the facets of corporate activity thought to impact on societal problems."[128]

Direct evidence of institutional investor use of social responsibility criteria exists in the investment selection as well as in the proxy area. A 1973 Ford Foundation study attempted to canvas 196 major institutional investors on their investment attitudes.[129] Of the 115 institutions responding, 57.4 percent stated that they took corporate social responsibility considerations into account in decisions on both the selection and retention of investments.[130] Moreover, thirty-nine institutions or 33.9 per cent, surprisingly mostly banks and mutual funds rather than university endowments or foundations, stated a belief that some correlation existed "between socially responsible business enterprise and those that will produce a satisfactory return."[131] Such beliefs added a traditional economic as well as moral incentive to choosing socially responsible stocks.

Of insurance companies, twenty-one responded to the study's inquiries. The responses revealed that among profit making institutions, insurance companies were "notable both for the degree of interest they expressed in the social aspects of investment policy and the extent of present involvement they claimed."[132] Apparently, all twenty-one insurance companies claimed an interest of one sort or another in corporate social responsibility and investment selection.[133] Nine of seventeen large mutual funds claimed that "they

127. SEC, 39th Ann. Rep. 37 (1974). In addition to NYSE listed companies such figures include companies listed on other stock exchanges, principally the American, and over-the-counter companies having so-called 12(g) status, as described in note 116 *supra*. Comparable figures for prior years were 489 proposals and 204 companies in 1971, 37th Ann. Rep. 53-54 (1972), and 411 proposals and 193 companies in 1972, 38th Ann. Rep. 30-31 (1973).

128. *Corporate Social Responsibility Panel: The Role of the SEC*, in Symposium, *Corporations Under Attack: Response to New Challenges*, 28 Bus. Law. 215, 218-19 (special ed. 1973) (comments of Bevis Longstreth) [hereinafter cited as *Corporate Social Responsibility: The Role of the SEC*].

129. Longstreth & Rosenbloom, *supra* note 1.

130. *Id.* at 42.

131. *Id.* at 43.

132. *Id.* at 58. Some insurance companies voice a desire to seek socially responsible investments based not only upon a belief that such investments gain the best long run success but as a matter of principle as well. Thus, many insurers feel that liquor and tobacco stocks pose health hazards "inconsistent with the basic interests of a life insurance company." *Id.* at 39.

133. *Id.* at 58 *passim*. Of course, bound by state law requirements, many insurance

take social factors into account on the ground that these factors bear importantly on the economic success of an investment."[134] Fifteen of eighteen commercial banks took a similar stand.[135] Hence, the Ford Foundation Study indicated that a sizeable percentage of a representative sample of institutional investors do attempt to take corporate social responsibility into account in investment selection.[136]

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companies must limit their common stock investments, have less investment liquidity than do other types of institutional investors, and therefore do not come completely under the aegis of a Wall Street Rule. *See* Note, *SEC Rules 144 and 146: Private Placements For the Few*, 59 VA. L. REV. 886, 892 (1973). Due to that lack of liquidity, insurers cannot always take a "love it or leave it" approach; rather, since they are more likely to have to "live with it," insurance companies may take more care in examining all of an investment's facets, including social responsibility factors, before buying. This may explain why the life insurer's trade group has established a social responsibility information clearinghouse for its members' use. *See* text accompanying note 39 *supra*.

134. LONGSTRETH & ROSENBLOOM, *supra* note 1, at 67. That finding may also be the result of urging by the Investment Company Institute (ICI), the mutual funds' trade group. The ICI has established a clearinghouse so that its members can obtain information on investments' relative social merit. Note 40 *supra* and accompanying text. It also has published a report to its members concluding that "a general qualitative appraisal of management's corporate responsibility . . . could have significant long-term investment implications." I.C.I. COMMITTEE ON BUSINESS STANDARDS, CORPORATE RESPONSIBILITY AND MUTUAL FUNDS 2 (1971). The report urges investment companies to consider portfolio companies' and possible investments' environmental product safety, advertising, and minority hiring and promotion as "an additional input into the investment decision making process." *Id.*

135. LONGSTRETH & ROSENBLOOM, *supra* note 1, at 62. Many responding banks harmonized their investment policy with their fiduciary duties as trustee. They stated that they indeed must "be conscious of social factors because there exists some coincidence between those corporations that are 'socially responsible' and those that will be sound investments." *Id.*

136. A surprising study result was that profit-making institutions (banks, mutual funds, and insurers) seem to view their roles as compelling the selection of socially responsible investments. On the other hand, those institutions which one might intuitively feel would take an activist role, universities and charitable foundations, downplay social criteria's use in investment selection.

Eighteen of 22 universities responding did have a policy of taking social responsibility into consideration in endowment management. *Id.* at 48. Only 2 universities, however, expressed the view that socially responsible corporate managements produce better long-run portfolio yields. *Id.* at 51. Furthermore, most felt that they would maximize utility to themselves and to society by maximizing portfolio yield rather than by accepting lesser yields in more socially responsible investments in order to induce overall corporate responsibility. As one university official stated, the feeling seems to be that a university can best implement the public good

> [t]hrough the excellence of its education program, . . . the search for . . . knowledge and the education of young men and women. Thus, to carry out its function [a university] needs the maximum income available.

Id. at 49. An alternative rationale for low-key university involvement is the academic freedom rationale, typified by the University of Chicago Kalven Committee report:

> There is no mechanism by which [the university] can reach a collective position without inhibiting the full freedom of dissent on which it thrives . . . . This creates a heavy

More recent studies indicate that the Wall Street Rule is of little import today. A 1974 congressional survey[137] of sixteen of the nation's largest banks and insurance companies and ten investment advisors to mutual funds shows that only one still professes allegiance to the Wall Street Rule.[138] Six of the banks and insurers expressly disclaim reliance on anything resembling a Wall Street Rule, and five others not only reject such a principle but report that they scrutinize social responsibility even more closely or that they are more likely to vote against portfolio company management on that issue than any other. They also note that they attempt to utilize social performance in investment selection.[139] Chase Manhattan Bank's response is especially lucid:

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presumption against the university . . . modifying its corporate activities . . . .

University of Chicago, The Report of the Committee on the University's Role in Political and Social Action 2 (1967).

Twenty-seven of the 44 foundations questioned responded, although only a meager 9 responded in a "substantial way." LONGSTRETH & ROSENBLOOM, *supra* note 1, at 55. Noting that there "does not appear to be a widespread sense of urgency among foundations," the study's authors speculated that "One reason may be that foundations . . . are not subject to the constant pressures of a close, large, and vocal constituency." *Id.* From the foundation's own point of view, the reasoning seemed similar to that behind a university's hesitancy in cranking social responsibility into investment decisions:

> [O]ur investment activities must be for the sole purpose of realizing a maximum return to charity . . . through our charitable activities we may be able to strengthen our social and political institutions.

Id. at 56 (quoting a foundation's treasurer). Nevertheless, 5 of the 9 responding foundations voiced a belief that social responsibility affects a corporation's long-run economic success. *Id.*

The other not-for-profit institutional investor category, churches, take the most activist investor role of all, profit or non-profit. Alone among the categories of institutions the study surveyed, they expressed a willingness not only to select an investment in the more socially responsible company, other things being equal, but also to accept a lesser monetary return on portfolio investments, if need be, in exchange for "social returns." *Id.* at 46. Many churches were also "prepared to become involved in the affairs of large . . . enterprises in which they invest." *Id.* at 47.

137. *Hearings on Corporate Disclosure Before the Subcomm. on Budgeting, Management, and Expenditures and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations*, 93d Cong., 2d Sess., Pt. 1, at 245-377 (1974) [hereinafter cited as *Hearings on Disclosure*]. The hearings' subject is disclosure by institutional investors of their portfolios' makeups, not disclosure by companies on social responsibility. A byproduct, however, of a survey to determine how institutions in general vote the shares they hold is a relatively complete picture of how some large banks and insurance companies embrace corporate social responsibility.

138. [W]e only invest . . . in organizations in the management of which we have the highest confidence. Accordingly, voting against management does not normally arise.

Id. at 361 (letter from W. Perry Neff, Executive Vice President, Chemical Bank of New York to Senator Lee Metcalf, dated Oct. 29, 1973).

139. *Id.* at 282 *passim* (tabulation by the author).

> As managers of other people's money, our primary responsibility is to achieve the best investment results . . . . This primary obligation, however, does not relieve us of our concomitant responsibility to demonstrate a due regard for the *manifest priorities* of society as a whole. It is becoming increasingly evident that the . . . success of any business depends upon a thoughtful concern for the society it serves. When a company does not respond affirmatively to . . . public aspirations, whether from intentional disregard or economic necessity, clearly its prospects for healthy long-term growth are impaired.
>
> . . . [C]ertain socially negative factors can be isolated, and these aspects of corporate policy or performance are considered in arriving at our investment decisions. When careful analysis shows them to persist . . . they may result in a negative attitude regarding the company's prospects as a suitable investment.[140]

Of the ten investment advisors to mutual funds, six have responsibilities for voting portfolio shares.[141] None describe a procedure resembling the Wall Street Rule, and one advisor recounted several incidents when it has voted against portfolio companies' managements.[142]

The Wall Street Rule no longer describes institutional investors' behavior. Evidence shows that many, if not fully a third, of representative samples of institutions now profess to take corporate social responsibility into account in selecting and in managing investments.[143] They believe that such factors have utility in investment decisions and in determining long-run yields. Moreover, these institutions would like to see accounting and disclosure on corporate social responsibility, including better quality, more comparable information than that now obtainable. Hence, within the SEC's own definition of the term, information on corporate social responsibility

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140. *Id.* at 286 (Enclosure to letter from L. F. Loree II, Vice Chairman, The Chase Manhattan Bank, to Senator Lee Metcalf, dated Oct. 30, 1973). Of a slightly different ilk is Aetna Insurance's response. Aetna indicates that it generally follows the policy embodied in the Wall Street Rule. However,

> A major exception to this policy is: On items involving corporate social responsibility . . . we submit them to our Vice President in charge of Corporate Social Responsibility. He makes recommendations to our top management, who in turn, depending upon the situation, will refer it to our board of directors. This procedure is considered a very serious matter . . . and such items get very careful attention.

Id. at 326 (letter from Wm. Ingelhart, Vice President, Common Stock Dept., Aetna Life and Casualty Ins. Co. to Senator Lee Metcalf, dated Oct. 29, 1973).

141. *Id.* at 388-95.

142. *See, e.g.*, Fidelity Management and Research Co.'s response, *id.* at 391. Two other advisory firms single out corporate social responsibility issues as non-routine proxy matters which receive special reviews by higher-ups within the firm. *Id.* at 393 (Loomis-Sayles & Co., Inc.) & 394 (T. Rowe Price Associates, Inc.).

143. Other observers agree with, and some document, that finding. *See, e.g.*, BAUER & FENN, *supra* note 1, at 8-11; Doctors, *Who Uses Social Criteria In Institutional Investing*, BUS. & SOC'Y REV. 95 (Summer 1972); Shapiro, *supra* note 41.

has become material[144] and the Commission should require companies to make some disclosures. Unfortunately, by and large, the Commission has not moved in the social responsibility area, which has led one large bank's trust department manager to deplore SEC nonaction:

> It would certainly be helpful to an investor if he was informed periodically about the practices of corporations in connection with minority hiring, pollution control, employee relations, consumer policies, community activities and charitable contributions. It seems to us that such information would give us an insight into the company attitudes and practices which in the long run will have substantial impact upon its ultimate success as a corporation.[145]

(3) Individual Investor Attitudes

Other than supposition based upon statistical inferences, little evidence exists as to individual investors' desires for disclosure on corporate social responsibility.[146] Individual shareowners' greater votes for these public interest proxy proposals calling for disclosure, as opposed to votes on proxy proposals calling for corporate structural changes, may be one indication of interest.[147] Another may be

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144. SEC rules define as material "those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered." SEC Rule 12b-2, 17 C.F.R. 240.12b-2 (1965). *See also* SEC Rule 405, 17 C.F.R. 230.405 (1964). In its administration of those rules, however, the Commission endeavors "to provide investors with the disclosure they want," given that the information has some colorable value in investment selection. *Corporate Social Responsibility: The Role of the SEC* 233 (remarks of SEC Commissioner Phillip A. Loomis, Jr.). Since a significant investor subpopulation desires disclosure on corporate social responsibility and since arguably social responsibility is related, or at least not unrelated, to long run corporate profitability, some information on corporate social responsibility is material. *See also* notes 307-11 *infra* and accompanying text.

145. Quoted in LONGSTRETH & ROSENBLOOM, *supra* note 1, at 63.

146. There may be several reasons for the dearth of evidence. A statistically valid, individual investor attitudinal survey would entail much more cost and expertise than do institutional investor attitudinal surveys such as those reviewed notes 129-42 *supra* and accompanying text. For example, the New York Stock Exchange considers a survey of 78,000 individuals adequate for its shareownership studies. Letter from S. West, Vice-President-Research, New York Stock Exchange to Editors, Wall Street J. Dec. 22, 1975, at 9, col. 2. *Cf.* the 196 institutions the Ford Foundation surveys, text accompanying note 136 *supra*. Another reason may be that since institutional investors' activities increasingly dominate the stock market, inquiries into investors' attitudes immediately focus on institutions rather than individuals as investors. Still another reason may be that researchers interested in attitudes about corporate social responsibility may think that an individual investor survey may be too unproductive to undertake in the first place. Individuals' attitudes would vary so widely that a survey would produce no clear consensus, whereas institutional investors, with their own literature, trade groups, and communications networks, constitute a relatively small coterie of investors whose attitudes and opinions reinforce one another. A survey of institutions' attitudes, then, is much more likely to produce a consensus or signs of trends in current thinking.

147. Disclosure proposals often receive twice the vote that more heavy-handed or obtrusive structural reform proposals receive. *See, e.g.*, notes 123-28 *supra* and accompanying text.

the attitude of the public at large. One attitudinal survey indicates that a majority of the public believe that corporations have not contributed "as much as they should to the problems facing society." In the poll, two-thirds of the sample say that they believe "business has an obligation to help other major institutions to achieve social progress, even at the expense of profitability."[148] Whether or not those public attitudes carry over into the investor subpopulation, who may have more at stake when the corporations in which they invest use assets for social programs, and who may have stronger profit motives than the public at large, is, however, a matter of conjecture. Nevertheless, a number of statistical inferences and other observations do suggest that individual investor interest in corporate social responsibility disclosure is quite plausible.

Although institutional investors account for 70 percent of the trading in New York Stock Exchange (NYSE) listed stocks, institutions' disclosed ownership accounts for only 33 percent of the NYSE list.[149] On the other side of the line, a 1970 NYSE Shareholder Census shows that individual investors own $683 billion in publicly traded stock, 64.1 percent of the total.[150] More recently, individuals' direct ownership has been estimated at over $750 billion.[151] Yet individuals do only 30 percent of the trading. Whether because of reluctance to realize paper losses or a reluctance to realize paper gains until retirement and the benefit of lower tax brackets, private investors do not trade nearly as much as do institutional investors. The "great bulk" of their stock is said to be "locked up and . . . seldom traded."[152]

That many individuals' stockholdings are locked up might indicate that the Wall Street Rule may not be practicable for them. If individuals are dissatisfied with a corporate management's social performance, they nevertheless may not be able to "switch their bets at the cost of two commissions," as some have maintained.[153] That may be more true in the 1970's up-and-down stock market, which would lock in many more investors with paper losses, than it

148. OPINION RESEARCH CORP., PUBLIC OPINION INDEX, Oct., 1970 at 4-5.

149. NYSE 1975 FACT BOOK 50 (Institutional ownership is 33%); Wall Street J., June 27, 1973, at 3, col. 1 (individual trading dropped to below 30% of share volume for the first time); NYSE 1975 FACT BOOK 52 (institutional trading equaled 69% of the 1974 NYSE volume).

150. NYSE, SHAREOWNERSHIP 1970, at 25.

151. Welles, *The Public: Who Needs Em?*, INST. INVESTOR, 33, 35 (Mar. 1972).

152. *Id.*

153. Hetherington, text accompanying note 120 *supra*.

was in the rising market of the 1960's. Hence, individual investors interested in social responsibility may have more of an incentive to choose socially responsible stocks in the first place, or to work from within to persuade management to become socially aware, than do institutions. Thus, individual investors' desire for disclosure on corporate social responsibility could be as great or greater than the institutional desires revealed by the studies as described above.

The current prevalence of a relative approach to corporate social responsibility, one that measures a company's social responsibility against other firms or its own past performance, also may make individual investor interest in social responsibility, its accounting, and disclosure more plausible now than five or ten years ago. The early investor social responsibility emphasis was on finding the clean company, one that not only produced minimal social costs but whose raison d'etre was to "do good."[154] That emphasis could dictate investment in a pollution control equipment manufacturer or a text book publishing firm. The search for such an investment, however, often proved fruitless, since many clean companies were likely to be in the developmental state, or unprofitable, or both. The search's fruitlessness led some investors to take a more realistic approach. Socially conscious investors realized that "it is hard to imagine a company completely free of connections that might be considered objectionable on moral, political, or social grounds."[155] Thus, investors began to focus on a relative approach: given three companies in an industry having roughly equivalent profit prospects and risk, from among the three the investor will choose the company that seems to be the more socially aware.[156]

Another aspect of the relative approach makes it less righteous or harsh. Progress in social issues over time may make a company that imposes some social costs just as attractive an investment as a clean company. The relative approach to socially responsible investment selection and management connotes a time dimension that looks to a company's year-to-year improvement on social issues

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154. *See* the experience of the social mutual funds, note 41 *supra*.

155. Malkiel & Quandt, *supra* note 19, at 41. For example, Princeton University found that Xerox, a supposed paragon of social responsibility, had extensive South African investments, a supposedly irresponsible activity to many corporate critics. *Id.*

156. This is the approach the Dreyfus social fund, note 41 *supra*, uses. It is also the approach THE ETHICAL INVESTOR, *supra* note 1, at 26 suggests. The relative approach can, however, take other and even more relaxed forms. One observer finds prevalent "the more general notion that investment policies should be at least scrutinized in search of particularly significant social offenders." Preston, *Corporation and Society: The Search for a Paradigm*, 12 J. ECON. LIT. 434, 445 (1975).

rather than just the present picture in frozen isolation.[157] Thus, an investor interested in social responsibility need not sell stock in a steel producer that has made good progress on pollution abatement even though, on an overall basis, that producer presently produces more effluents than others of comparable size.

Indications are that a relative approach to socially responsible investing is becoming well-known and widespread.[158] Many more investors can live with a standard which says that companies in which they invest ought to have among other goals such as profit maximization, the aim of not harming through pollution or employment discrimination the society in which they function. The realization that corporate social responsibility is a relative thing, or that it is a goal which the investor should weigh with other goals, such as desired risk and return on one's portfolio, has undoubtedly made social responsibility much more palatable to an increasing number of individual investors.[159] Since that palatability probably has increased investor interest in social responsibility, an expanding number of investors probably want some accounting and disclosure to aid them in investment decisions.[160]

Another, perhaps perverse, reason why many investors might want disclosure on corporate social responsibility is simply that accounting and disclosure are the least costly, drastic, and obtrusive of the competing measures for corporate law reform. They will entail less cost for the companies in which those investors have interests and therefore mean less damage to their investment's worth. This is the lesser of evils when juxtaposed to federal chartering of corpo-

157. *Cf.* the quotation from Moskowitz, note 53 *supra*.

158. *See, e.g.*, Preston, *supra* note 156, at 445; Rockefeller, *Corporate Capacity for Public Responsibility*, 28 BUS. LAW. 53, 55-56 (1973).

159. In turn, corporations' realization that many more investors take a relative rather than an ahsolutist approach to socially responsible investing should lessen the corporations' cost and opposition to disclosure. Companies need not fear that disclosure of some negative results on social responsibility fronts will cause investors to shun their stock, or will damage their corporate image. *See* the discussion of disclosure's costs, notes 440-41 *infra* and accompanying text.

160. The question that then arises is why such investors do not come pouring forth in SEC proceedings dealing with the question, such as those described in text accompanying notes 302-08 *infra*. The answer is that for most individual investors the cost of doing so is too large given their limited investment activity. Likewise, the transaction costs in their joining together to name a spokesperson is, on a relative basis, large. On the other hand, corporations who oppose disclosure perceive much more to be immediately at stake and do speak up. Those, however, are precisely the reasons why part of the SEC's mission is to act on behalf of investors and demand disclosure that individual investors themselves cannot obtain or which the market for information does not produce but for which significant although dispersed demand exists. *See, e.g.*, note 255 *infra*.

rations, federal minimum corporate law standards, and the like.[161] That phenomenon explains why shareholder proxy proposals for disclosure receive greater support than do other intracompany reform proposals.[162] For institutional investors, simple disclosure proxy proposals put far less strain on the institutional money manager called upon to vote. For that reason, "[d]isclosure . . . is a more saleable idea that tends to attract institutional support."[163] Similarly, many institutional investors reason to a position in favor of SEC mandated corporate social responsibility disclosure over other proposed reforms.[164] Disclosure is desired even if only from a belief that when and if further legislative corporate law reform comes, accounting and disclosure preceding it will result in its more careful and less "knee jerk" consideration.[165]

The concept of shared values probably makes individual interest in disclosure on corporate social responsibility most plausible. Corporate spokespersons have long spoken of the corporate "good citizen."[166] More and more, the most respected business community leaders speak out on social responsibility[167] and their comments reach the popular press and investors. Whether or not business leaders speak on social responsibility with tongue in cheek, as some maintain that they do,[168] the impression reaching the public and

161. *See* notes 385-422 *infra* and accompanying text on the political feasibility and costs and benefits of other reforms proposed to induce more socially responsible corporate behavior, discussed from companies' and government's rather than investors' points of view.

162. *See* notes 123-28 *supra* and accompanying text.

163. Blumberg, *supra* note 5, at 1025-26, reviewing votes of Harvard, the Ford Foundation, First Pennsylvania Bank and Trust, and others for disclosure proposals while voting against substantive shareholder proposals.

164. *See, e.g.*, Mundheim, *Book Review: The University as a Shareholder and Investor in Publicly Held Corporations; A Comment on the Ethical Investor*, 1972 DUKE L.J. 1061, 1073, n.37.

165. *Corporate Social Responsibility: The Role of the SEC* 225 (Remarks of Bevis Longstreth).

166. "Like the ubiquitous reasonable man of tort law, the corporate good citizen is invisible, but his presence is proved by the testimony of executives and other reputable witness." Hetherington, *supra* note 120, at 277. *See also* the testimony *supra* note 3. In the literature with which business executives are likely to have contact, talk of the corporate good citizen and of corporate social responsibility appears with an increased frequency. *See, e.g.*, Ackerman, *How Companies Respond to Social Demands*, 51 HARV. BUS. REV. 88 (July-Aug. 1973); Andrews, *Can the Best Corporations be Made Moral*, 51 HARV. BUS. REV. 57 (May-June 1973); Henderson, *Towards Managing Social Conflict*, 49 HARV. BUS. REV. 82 (May-June 1971).

167. *See, e.g.*, the work of the late Eli Goldston, *supra* note 27; J.D. ROCKEFELLER, THE SECOND AMERICAN REVOLUTION (1973).

168. Henning, *supra* note 126, at 157, calls the reputation of big business as a "social benefactor" or good citizen "self-made and unfulfilled." Hetherington, *supra* note 120, at 278 says that "the purpose of such pronouncements is to protect [corporate management's]

individual investors is that more and more corporations have an abiding interest in social responsibility. In turn, investors' impressions cause their own expectations to evolve. Investors take on the same value business leaders profess to have and come to expect social responsibility of corporations. Quite naturally, some of those investors want evidence that companies are living up to investors' and executives' expectations. The most obvious way in which such evidence would be forthcoming would be through social accounting and disclosure. Individual investors also must encounter and come to share institutional investors' beliefs in corporate social responsibility and social responsibility's worth in the investment process. Institutional investors' statements on corporate social responsibility find their way into the popular press where individual investors might encounter them.[169]

Last of all, some significant number of individual investors must share the attitude and expectations of the public at large, and the public's expectation of what constitutes normative corporate behavior has changed.[170] In most of the post-war period, the public, including investors, consumers, academicians, and politicians, have wanted ever increased amounts of goods and services. Beyond a certain level of affluence, however, many individuals have begun to focus on the quality as well as the quantity of corporate outputs.[171]

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autonomy and freedom from interference by outsiders . . . and to create a public image that diminishes and forestalls pressure for increased governmental regulation . . . ." However that may be, with the volume of "good citizen" pronouncements one senses that many business leaders are becoming true believers in social responsibility.

169. *See, e.g., Investor Panel Favors Social Minded Firm with Slower Growth,* Wall Street J., May 14, 1971, at 1, col. 1; *More Money Managers Reconsider Their Role in Shareholder Voting: Some Institutions Now Buck Companies on Social Issues,* Wall Street J., Apr. 21, 1971, at 1, col. 6. And institutional investors' attitudes affect the posture of publicly held companies' managements, always eager to curry investors' interest and thus keep share prices up:

> We are starting to pay attention to ecology because we think that the young financial analyst who is calling on us has it in the back of his mind. It may never hecome explicit in his reports, but we suspect it is going to affect them one way or another.

BAUER & FENN, *supra* note 1, at 8 (quoting a corporate executive).

170. Indeed, business executives' expectations for social responsibility may now lag behind, and are being shaped by public expectations. Bell, *The Corporation and Society in the 1970's,* THE PUBLIC INTEREST 5, 7 (Summer 1971), opines that "[t]he sense of identity between the self interest of the corporation and the public interest" has been replaced by "a sense of incongruence." Other evidence, that benign public attitudes towards corporations have receded, exists. *See, e.g.,* note 148 *supra* and accompanying text; NATIONAL INDUSTRIAL CONFERENCE BOARD, PERSPECTIVES FOR THE 70'S AND 80'S (1970); D. YANKELOVICH, INC., A CONTINUING STUDY OF THE NEW DEMANDS ON BUSINESS (1972).

171. Many onlookers pinpoint Earth Day in April 1970 as the turning point, when with almost revolutionary momentum public attitudes began to change. *See, e.g.,* D. CURRIE, CASES AND MATERIALS ON POLLUTION XI (1975) (Earth Day 1970 marks "an explosion of popu-

Concern over quality of the environment, quality of corporate employees' working conditions, quality of the goods and services corporations produce, the quality of opportunity corporations offer to minorities, and other concerns have produced broadened public expectations of what constitutes proper corporate behavior. These changed expectations have even produced governmental responses, such as the National Environmental Policy Act, the Occupational Health and Safety Act, the Consumer Product Safety Act, automobile safety legislation, and a welter of equal employment opportunity laws and commissions.[172] It is extremely difficult to deny that a significant number of the 31 million or so individual investors, a number significant enough for the SEC to provide some disclosure on corporate social responsibility, share those public values and public expectations on corporate social responsibility, or to deny that some of those investors would like some accounting by large corporations of what those corporations are doing on social responsibility fronts.

Finally, there are the teachings of the academicians and the theorists who, both on the practical level and the theoretical level, make plausible widespread individual investor interest in corporate social responsibility disclosure. On the practical level, the texts and primers on how to invest are replete with statements that when one evaluates prospective investments concentration should be on the ability, imagination, and overall quality of corporate management. The pedants teach that good management indicates a probability that a company's earnings growth and favorable public and investor images are likely to continue.[173] Indeed, the SEC gears some required disclosure towards helping investors evaluate the quality of corporate management.[174] One method of evaluating management

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lar concern"); P. SARNOFF, THE NEW YORK TIMES ENCYCLOPEDIC DICTIONARY OF THE ENVIRONMENT 91 (1971). Other phenomena, close in time to Earth Day, signal a fundamental change in attitude towards corporate behavior. Campaign General Motors, the Dow Chemical Corporation proxy fights over napalm manufacture, and Ralph Nader's first real striking of responsive chords in the public consciousness all date from around the turn of the decade.

172. These and other legislative commands for corporate social responsibility and the disclosure that legislation presently requires are reviewed, notes 217-22 *infra* and accompanying text.

173. *See, e.g.*, B. GRAHAM, D. DODD & S. COTTLE, SECURITY ANALYSIS PRINCIPLES AND TECHNIQUE 668 (4th ed. 1962): "The appraisal of management is considered . . . perhaps the essential . . . fact in determining whether an investment should be made . . . ." Of the same import are B. GRAHAM, THE INTELLIGENT INVESTOR 261 (3rd rev. ed. 1965); D. HAYES, INVESTMENTS: ANALYSIS AND MANAGEMENT 10-11 (2d ed. 1966).

174. *See, e.g.*, proxy statement requirements to describe the principal occupation, employers and employers' business of all executive officers and directors, their remuneration,

that the texts and primers mention is for the investor to observe the way in which management reacts to current problems and looks to and plans for the future. In today's milieu of rapid change, the management that "stays on top of things" is good management; in a sense, it is management's ability to track details that is "material." In possibly no other management preserve is the ability to "stay on top of things" as necessary as it is in the social responsibility area. In that area, consumer, shareholder, public, legislative, and other governmental demands call for management to respond to an array of problems. The astute investor will utilize management's response to social responsibility's challenges as a bellweather of management's ability to stay current. An investor should regard as good "[a] management that has brought about increased sales at a profit, maintained a good financial position, and been able to raise long-term capital." In addition, he or she should regard as better a management "that can change with secular . . . changes, that can maintain good community, employee, stockholder, and union relationships, and that can be flexible in its work with government . . . ."[175] It is, therefore, plausible that investors who believe that the best way to evaluate investments is to evaluate management would want some data or disclosure in order to be able to follow through on their beliefs.

On the more ethereal plane, academicians' and theorists' teachings make plausible not only investor, but also governmental, business executive, and public interest in corporate social responsibility and, possibly, disclosure. Theorists and academicians, principally economists, have been tinkering with the theoretical underpinnings upon which most corporate enterprises have been thought to be based. Traditionally, the business firm's primary responsibility was to its owners, the shareholders. On the shareholders' behalf, the sole duty of management was thought to be to maximize profits, which is reflected both in state corporations statutes and SEC disclosure requirements. The last twenty-five years, however, have shown a rising consciousness that profit maximization alone and responsibility to shareholders are no longer adequate goals or sufficient rationales for the existence of business entities.[176] First the economists,

including bonuses, stock options, and profit sharing, their interests in items to be voted upon, and other data. Schedule 14A, items 4-11, 17 C.F.R. § 240.14a-101 (1975). With directors who would be, if elected, new to the company's board, the company must disclose similar information on background and principal occupations for the previous five years. *Id.* at item 6.

175. *See* F. AMLING, INVESTMENTS 379 (1965).

176. The current version of the corporation-society problem . . . can certainly be

and later, business executives themselves, have come to realize that earnings figures or other bottom line financial figures alone do not describe how firms operate or, in allocating society's scarce resources, what firms' goals should be.[177]

That is not to say that theorists have evolved a new model to replace the old model for the firm.[178] Various theorists have advanced several concepts by which firms do and should operate: long-run profit maximization; some secure minimum level of earnings and then the technostructure's pursuit of self preservation; sales maximization; social responsibility as the paramount consideration; and others.[179] What is common to all efforts to evolve a new theory of the firm is the inclusion of social responsibility as an ingredient in the formula.[180] Perhaps the most prominent element in "current economic mainstream literature" is

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> dated from the publication of H. Bowen's *Social Responsibility of the Businessman* (1953). Two contemporaneous works—K. E. Boulding's *The Organizational Revolution* [1953] and A. Berle's *The 20th Century Capitalist Revolution* [1954]—present closely related theses.

Preston, *Corporation and Society: The Search for a Paradigm*, *supra* note 163, at 435. Another, more substantive summary is Cyert & Hedrick, *Theory of the Firm: Past, Present, and Future; An Interpretation*, 10 J. ECON. LIT. 398 (1973).

177. *See* Furubotn & Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LIT. 1137, 1149 (1972), remarking that observation alone indicates that profit maximization is not the typical corporation's sole objective.

178. LIPSEY & STEINER, *supra* note 72, at 309-24 describe and evaluate many of these theories. One may cite Professor Galbraith as one example of a search for a new model to describe the corporation-society relationship. J. GALBRAITH, AMERICAN CAPITALISM (1952) (countervailing power); J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967) (the technostructure, some secure minimum level of earnings, and sales maximization thereafter); and J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE (1973) (recommending nationalization of large industry and permitted cartelization of small producers to bring about the corporate social responsibility natural forces have not produeed) all represent milestones in one person's search. In the words of Preston, *supra* note 163, at 439, Professor Galbraith "has not been successful and in eaeh successive book, he seems to acknowledge that the previous analysis was inaccurate or incomplete." *Accord*: Nossiter, *Economics and the Public Purpose*, Wash. Post, Book World, Oct. 7, 1973, at 1. *See also* note 331 *infra* and accompanying text.

179. This article thus recommends disclosure as the reform, rather than other reforms like federal chartering, which would require government to embrace new regulation based upon some new theory of firm which has not yet achieved substantial theoretical support. *See, e.g.*, notes 388-436 *infra* and accompanying text. It also may be the reason why the SEC has not yet required disclosure on corporate social responsibility. Heretofore, advocates of disclosure have based demands on new theories of the firm or to cure social ills rather than upon the traditional rationales for disclosure, utility in the investment process, etc. *See* text aecompanying notes 322-29 *infra*.

180. *See* Preston, *supra* note 163, at 435. That is not, however, to say even that the term social responsibility is a well-defined one:

> The term . . . means something, but not the same thing, to everybody. To some it conveys the idea of legal responsibility of liability; to others it means socially responsible behavior in an ethical sense; to still others the meaning transmitted is that of "responsi-

> [a]nalysis of social costs, externalities, and . . . "market failures." . . . [T]his literature elaborates and illustrates the *well-known* proposition that optimizing behavior by the component units of a system [society] may lead to suboptimal results for the system as a whole.[181]

Concurrently, an even more surprising consensus also has come into being: many of corporate social responsibility's staunchest opponents now admit that in almost every major corporation, room for social activity does obtain, even given profit maximization. This realization, that some social responsibility is at least not inconsistent with profit maximizing, is important—even if its proponents do not agree with their more liberal counterparts that social responsibility leads to long-range profits.

No less an incorrigible foe of social responsibility than Professor Henry Manne has made some of these points.[182] Professor Manne now admits that corporate managers may engage in socially responsible action to maximize their personal utility, if not profits.[183] In today's world, in fact, for the complete profit maximizer, political and other pressures for social responsibility "represent costs for businesses as real, and in a sense at least, as natural as an earthquake."[184] Social responsibility thus may be not only permitted but necessary for traditional profit maximization.

Professor Manne makes another interesting point. Within the large corporation, he observes, after expenses have been paid, ex-

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> ble for," in a causal way; . . . some take it to mean socially "conscious or aware;" many of those who embrace it . . . see it as a mere synonym for "legitimacy," in the context of "belonging" or being proper or valid; a few see it as a sort of fiduciary duty imposing higher standards of behavior on businessmen than on citizens at large.

D. VOTAW & S. SETHI, THE CORPORATE DILEMMA 11-12 (1973). Indeed, social accounting and disclosure would aid in narrowing what is or is not acceptable as being "socially responsible." That is a function of accounting and especially of social accounting, *see* text accompanying notes 14-17 *supra.*

181. Preston, *supra* note 163, at 437 (emphasis added).

182. Manne, *The Limits and Rationale of Corporate Altruism: An Individualistic Model,* 59 VA. L. REV. 708 (1973). For Professor Manne's early caustic statements on social responsibility, see the works cited note 2 *supra.*

183. *Id.* at 709-10.

184. Regulatory agencies, congressional investigating committees, consumer organizations, and environmental groups, to name only a few, exist, function and influence events as a matter of legal right, and . . . each has the political power to impose costs on business by threats or other legal activity. Corporate responses to these threats are really no different from business responses to more normal kinds of production costs, bad weather, increased demand or any other exogenous circumstance.

Id. at 714-15. Manne further suggests that for corporate management itself "survival today may be geared as much to warding off unfavorable political action as to paying dividends." Hence, corporate social responsibility may even be "nondiscretionary" representing "essential operating costs." *Id.* at 718.

pansion budgeted, and dividends distributed, a not insignificant amount of cash remains. In the past, these "discretionary funds" may have gone to executive salaries and bonuses, or, fearing an attack for breach of fiduciary duty arising out of adverse shareholder reaction to high executive salaries, executives have channeled discretionary funds into indirect forms of compensation such as "luxurious office furnishings, attractive co-workers, company jets, lavish expense accounts."[185] Due to fear of adverse reaction to even these indirect forms of compensation, coupled perhaps with feelings of insecurity over past corporate failures to engage in socially responsible behavior, corporate executives may now direct some discretionary funds towards corporate social programs.[186] An environment that rewards the executive's ego for being a "corporate statesman or stateswoman" reinforces the trend toward socially responsible use of discretionary funds. Such an altruistic use of corporate monies is thought, by even the most conservative of onlookers, to be consistent with profit maximization.[187]

Professor Manne's views are indicative of the extent to which both liberals and conservatives have moved toward center ground.[188]

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185. *Id.* at 721; *accord*, N. CHAMBERLAIN, THE FIRM: MICROECONOMIC PLANNING AND ACTION 74 (1962) (expatiating on a similar "discretionary funds" concept).

186. Manne, *supra* note 182, at 719-20.

187. Professor Manne does make a serious misstatement. He states that for the corporate executive "Maximum utility would come from paying himself the entire amount of available discretionary funds." *Id.* at 720. He or she does not do so because of pressures external to the corporation that keep salaries down. Manne does not take into account that in terms of executive compensation, those discretionary funds will have declining marginal utility. The 251,000th salary dollar will not have nearly the marginal utility as the 51,000th dollar. On the other hand, the executive may derive much more utility from the 251,000th dollar by having his or her alter ego, the corporation, use that dollar to ameliorate externalities the corporation has produced. In fact, the phenomenon of modern executives' over-identification with the corporate enterprise, a valid point Galbraith makes in his development of the technostructure concept, J. GALBRAITH, THE NEW INDUSTRIAL STATE 63-71 & 167-78 (1967), indicates that the executive may derive more utility through having the corporate alter ego use the funds than if the executive himself had first received the funds and then personally used those funds for altruistic purposes. Or the executive may realize that from public relations, efficiency, or other standpoints, the corporate entity can use funds earmarked for altruistic purposes with much greater productivity than he or she, the executive, can in personal charitable endeavor.

188. As Henning and Preston, *supra* note 133, at 152, *supra* note 163, at 444, indicate, Milton Friedman appears to be the sole holdout. He does not regard any quantum of social responsibility as necessary or salubrious. *See* note 2 *supra*. Furthermore, he retains a view of the uninhibited market mechanism achieving pinpoint accuracy in the distribution of corporate wealth and in the allocation of resources. Therefore, in Friedman's view, discretionary funds simply do not exist within the corporate entity.

> Take the corporate executive who says "I have responsibilities over and above making a profit." . . . Where does he get the money? Perhaps from the company's employees. If

To some extent, such views undoubtedly have filtered down to the business and investor communities. The agreement on center ground removes one of the last obstacles to some accounting and reporting on corporate activity in the social sphere. It also makes individual and other investor interest in corporate social responsibility and in disclosure quite plausible. In fact, given discretionary funds' existence within the corporate enterprise and the alternative uses for those funds—executive frills versus social programs—one could argue that many investors would want some form of accounting and reporting, including social accounting, if only on the basis that management should account for the use of discretionary funds.

Despite these developments, the SEC still limits its disclosure requirements to those that focus on "optimizing behavior," profit maximization, and on traditional financial and business information. As has been seen, significant institutional investor interest in corporate social responsibility, if not in disclosure, exists.[189] Also, there are a number of reasons why institutional and individual interest in social responsibility is quite plausible and quite reasonable. Many of these reasons are of a traditional nature, for instance a belief that evaluating management's social responsibility response is a good method for evaluating management overall, or a belief that social responsibility portends better long-run profitability. Investors' primary emphasis on disclosure is traditional; they wish to use it in the investment process, not as a club with which to bludgeon corporate managements into solving all of society's problems. At most, investors, and even corporate managers themselves, want disclosure to ascertain if corporations' performances comport with the new and less unidimensional goals modern economic theory has been attempting to evolve.

> he can pay his employees lower wages than otherwise, he'll have some extra money to spend. It may come from the company's customers, if he can charge them more than they would otherwise pay. Or it may come from the company's stockholders . . . .
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> . . .
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> Have you ever heard anybody suggest that the "Mom and Pop" corner grocery store should sell food below cost to the poor people who shop there? Well, that would obviously be absurd. Any corner grocery store tbat operated that way would be out of business very soon. The same is true on tbe larger scale. The large enterprise can have money to exercise social responsibility only if it has a monopoly position . . . .

McClaughry, *supra* note 2, at 6 (quoting Milton Friedman).

189. Institutional desires for disclosure may not parallel similar interests in social responsibility because institutions can obtain the needed information on corporate social responsibility through their trade groups' clearinghouses, notes 40-41 *supra* and accompanying text, or using their bargaining power and muscle, through other sources, *see* notes 238-40 *infra* and accompanying text, sources to which most individual investors do not have access.

C. *Parity as a Goal of Disclosure—Presentation of a Well-Rounded Picture of the Firm*

(1) Expanding Financial Accounting Requirements

An unarticulated goal of SEC-required disclosure is to force companies to disclose good as well as bad, across the entire spectrum of a company's affairs. Under the prevailing disclosure philosophy, a corporation cannot accentuate the positive and downplay or fail to reveal the negative.[190] To implement that function of disclosure, in recent years the SEC has required corporations and their accountants to undertake extensive additional accounting and auditing.[191] The Commission also is requiring more frequent account-

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190. United States v. Simon, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970), is a dramatic illustration. In *Simon*, the Second Circuit upheld a national accounting firm members' criminal convictions. In auditing a client corporation, the accountants had pressed for disclosure of certain financial results, described by Judge Friendly as "so dismal" that the accountants believed release of the corporation's annual report would surely cause the company to fail. 425 F.2d 809. Having so pressed for disclosure of the company's bleak outlook on almost every front, the accountants relaxed. They did not insist upon detailed disclosure of a controlling person's defalcation of corporate funds for use in personal stock market ventures or that his securities, which the accountants had insisted be put up to collateralize the "loans" to the controlling person, were of dubious worth. The court upheld a verdict finding, *inter alia*, that the accountants were criminally liable for "wilfully and knowingly" making a false or misleading statement of a material fact in reports the securities acts require to be filed with the SEC. Securities Exchange Act of 1934 § 32, 15 U.S.C. § 78 ff (1970).

One of the case's principal lessons is that not only for companies, but for their accountants, even criminal liability could lie for failure to disclose the entire picture, no matter how dismal or how favorable the picture may be on other fronts.

In the administrative context, an example of disclosure's aim to present a well-rounded picture of a firm and of its affairs is recent SEC action to require bank holding companies to account for and disclose more detail on delinquent or bad loans which banks have either charged off or charged off and then subsequently recovered. Wall Street J., July 7, 1975, at 6, col. 1.

191. The SEC does so through its own extensive accounting manual, Regulation S-X, 17 C.F.R. §§ 210.1-01 (1975). Regulation S-X is a complete, uniform set of accounting requirements applicable to all documents corporations file under the various securities acts. The SEC also supplements and amends Regulation S-X through its Accounting Series Releases (ASR's) of which, as of Jan. 1, 1976, there are 185. *See* 5 CCH FED. SEC. L. REP. ¶ 72,207. From 1937 to 1969, there were 114 Accounting Releases, an average of about 3.4 per year. *Id.* ¶¶ 72,002-72,769. In 1973-75, Accounting Releases averaged 17 per year. *Id.* ¶¶ 72,156-72,207.

Recent expansions of the amount of accounting which must be done and is reflected in the increased frequency of SEC accounting pronouncements, include ASR No. 147 (Oct. 5, 1973) (increased accounting for lease commitments in footnotes to financial statements); ASR Nos. 136 (Jan. 11, 1973) & 148 (Nov. 13, 1973) (increasing accounting for compensating balance and other borrowing requirements and the effect thereof); ASR No. 149 (Dec. 3, 1973) (increased accounting for income tax expenses); ASR No. 164 (Nov. 21, 1974) (increased accounting for long term contracts and risk and liquidity problems involved in amassing inventories for performance thereof or involved in collecting receivables generated thereby); ASR 166 (Dec. 23, 1974) (increased accounting for unusual risks or uncertainties showing how ing.[192] The quasi-independent Financial Accounting Standards Board, its predecessor, the Accounting Principles Board, and the parent of them both, the American Institute of Certified Public Accountants, the accountants' self-regulatory organization, also have quickened the pace, often upon prodding by the SEC. These groups are pouring out new pronouncements and expanding the reach of modern financial accounting.[193] The volume of material on SEC-related accounting has become so bewildering that legal periodicals have devoted entire issues to keep lawyers abreast of the subject.[194] One commercial publisher is devoting a new section of its weekly securities law reports just to SEC accounting and disclosure regulation.[195]

One development in the SEC drive for pervasive accounting

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financial results would vary if estimates of such matters as loan loss reserves, market value of securities held, or uncertain raw materials costs are varied); ASR No. 175 (July 10, 1975) (more, separate accounting for subsidiaries).

192. The SEC has recently fattened the 10Q, the quarterly report that sections 12(b) and 12(g) companies must file with the Commission. The 10Q must now contain income statements, sales figures, balance sheet data, comparisons with previous years' quarterly figures, and a narrative describing current trends in the company's business. In addition, the annual report's financial statement footnotes must review quarter-by-quarter sales and profit figures for the 8 prior quarters. SEC Accounting Series Release No. 177 (Sept. 10, 1975); Wall Street J., Sept. 12, 1975, at 5, col. 2-3. The requirement, however, is applicable only to those 12(g) companies whose securities are eligible collateral for purchase money loans under the Federal Reserve Boards' credit regulations. About 300 over-the-counter stocks fit that description. *Id.*

Another requirement for more frequent accounting centers around more frequent use of non-periodic SEC accounting and disclosure forms as soon as deteriorating conditions in some division or quarter of a company's business raise the likelihood of a subsequent writeoff or credit to income, rather than reporting quarterly or annually. SEC Accounting Series Release No. 138 (Jan. 12, 1973).

193. *See, e.g.*, BNA SEC. REG. & L. REP. No. 322, at D-4 (Oct. 8, 1975) (FASB proposes more accounting on operations in industries other than those which are a company's main pursuit; more accounting on foreign operations and export sales); FASB Statement No. 5 (April 1975) (more accounting for loss contingencies); FASB Statement No. 4 (April 1975) (gains and losses from the extinguishment of debt must in certain cases be reported as extraordinary items with more descriptive material); FASB Exposure Draft-Inflation Accounting, BNA SEC. REG. & L. REP. No. 284, at A-13 (Jan. 8, 1975); Financial Accounting Standards Board [FASB] Statement No. 3 (Jan. 1975) (requires restatement of prior periods' data when accounting method changes made at other than year's beginning).

194. *See, e.g.*, 30 BUS. LAW. 1-227 (spec. issue 1975), an entire issue on *Responsibilities and Liabilities of Lawyers and Accountants*; Symposium, *Accounting and Federal Securities Laws*, 28 VAND. L. REV. at 1-279 (1975), in which the editors set aside an entire issue for articles on the subject.

195. The Bureau of National Affairs' *Securities Regulation & Law Report*, in announcing its new regular feature "Financial Disclosure and Accounting Practices," states that such a section is necessary to keep pace with the "initiation and acceleration" of financial accounting and disclosure proposals and regulations. BNA SEC. REG. & L. REP. No. 297, at A-1 (April 9, 1975).

emphasizes the rule of accounting across the board of a company's affairs. The area is corporate political slush funds, and donations and bribes some companies have paid to foreign government officials. The Commission action is to force accountants to audit with such illegalities in mind and to require disclosure. The SEC cast aside accountants' contentions that political donations or bribes are not material under traditional SEC litmus tests for materiality, such as ten percent of sales or five percent of profits. The Commission expects corporations and accountants to account for and disclose corporate funds' use for bribery or for political donations even if such expenditures amount to one-tenth of one percent of sales or profits.[196]

To contrast SEC-generated financial accounting to Commission action on social accounting is to reveal an incongruity. The Commission, while constantly expanding financial accounting's reach and detail, has not moved to glance at, study, or encourage social accounting. As one result, the disparity between financial accounting and social accounting grows at an accelerated rate.

(2) Expanding Financial Disclosure Requirements

Overlaid upon more extensive accounting requirements are SEC requirements for companies to disclose more and more of the information accounting generates, as well as to disclose increasing amounts of unquantified, narrative information. Again, one underlying rationale for increasing disclosure is to present investors and others with a complete, well-rounded picture of an issuer of securities. SEC-mandated disclosure in 1933 Act registration statements and in 1934 Act periodic reports always has been extensive.[197] Nevertheless, in recent years the SEC has moved to expand vastly that disclosure, to include, *inter alia*, disclosure of inflation accounting results, the effect of energy scarcities, disagreements between auditors and the companies they have audited, expanded information on quarterly results, product line reporting data, and much, much more.[198] One corporation has recently formed a subsidi-

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196. A good summary of this development is Andrews, *Accountants Reassess Disclosure Standards after Business Scandals*, Wall Street J., June 12, 1975, at 1, col. 6.
Curiously, however, the Commission has used those same "ten percent of sales" litmus tests of materiality to characterize information on corporate social responsibility, including conduct illegal in nature as not material, and hence not to be disclosed. *See, e.g.*, note 28, *infra* and accompanying text.

197. *See generally* Schoenbaum, *supra* note 5, at 566-71.

198. *See, e.g.*, notes 191-92 *supra*; SEC Exchange Act Release No. 10580 (suggests that

ary, Disclosure, Inc., that has as its sole activity keeping users of its services abreast of new developments in the disclosure area and of the substantive information about companies disclosure requirements produce. The service provides an information retrieval system that includes "some 270,000 entries posted against 10,000 terms citing significant events disclosed by some 12,000 corporations."[199]

Not all of the disclosure the SEC requires is in an accounting format, much less in quantified or monetized form,[200] as some would insist that all corporate social responsibility information should be before disclosure is required.[201] For example, in the public offering context:

> [T]he 1933 Act requires disclosure of all information relevant to the investment decision that the potential buyer must make . . . . [T]he statute focuses on a detailed description of the "product" offered.[202]

To produce a detailed description of the product offered, disclosure requirements include many items that companies can present only through textual material. Such items include information about a company's management, the character of its business, the character of its products, the nature and condition of its capital assets, its marketing and sales programs, and the like.[203] Indeed, the narrative,

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a firm disclose how inventory profits may be akin to a non-recurring item if inventory has been sold at inflated price but acquired at lower pre-inflation prices); Form S-1, Item 9, CCH FED. SEC. L. REP. §§ 7123, 6207 *et seq.* (line of business reporting); SEC Exchange Act Release No. 5534 (Oct. 11, 1974) & 11147 (Dec. 10, 1974) (increased disclosure on disputes between or other changes in the relationship between independent accountants and audited companies). Another entirely new disclosure area opened through the Rule 10b-5 lever is disclosure not only about companies themselves but also about the market for their securities. *See also* Fleischer, Mundheim & Murphy, *An Initial Inquiry Into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798 (1973).

199. DISCLOSURE, INC., DISCLOSURE JOURNAL USER'S GUIDE 1 (1974) (a subsidiary of Reliance Group, Inc.). *See also* the Bureau of National Affairs' expanded efforts to keep apace of disclosure's expansion, *supra* note 195.

200. *See* Hawes, *Truth in Financial Statements: An Introduction*, 28 VAND. L. REV. 1, 10-11 (1975). He points out that under pain of liability the courts require narrative textual material "that goes beyond and may even contradict" the quantified or monetized information disclosure documents and financial statements contain.

201. *See, e.g.*, the comments of SEC Commissioner Loomis on requiring disclosure of social responsibility information: "[I]f there is no dollars and cents impact that can be discerned, then is the fact material. The traditional interpretation of the securities laws has been 'No'." *Corporate Social Responsibility: The Role of the SEC*, *supra* note 128, at 232. *See also* the search for complete monetization in social auditing which such misinterpretation in part may have engendered, notes 82-86 *supra* and accompanying text.

202. Hetherington, *supra* note 120, at 262 (footnote omitted). *See generally* CCH FED. SEC. L. REP. §§ 8120 *et seq.*

203. Indeed, in SEC Exchange Act Release No. 10967 (Aug. 12, 1974), the SEC pressed accountants and companies to compose even more narrative to explain numbers themselves. Through footnotes to the financial statements or otherwise, the Commission wants disclosure

textual material the SEC requires in the footnotes to financial statements alone often exceeds in amount all the quantified, not to mention monetized, information contained in the typical prospectus or annual report.

Not all the information the SEC requires in disclosure documents is of the historical variety. In disclosure documents corporations must review matters that although not currently material in terms of a percentage of sales or profits, could become so.[204] Although the SEC recently has permitted issuers to project sales and profits into the future,[205] in the prospective area the Commission has required companies to describe the perceived competitive outlook, anticipated product development, expected or possible future cash flow squeezes, and other contingencies that have not materialized at the time disclosure is made. These extensive, forward-looking disclosure rules require no small amount of frank peering into the future.[206]

By contrast, in the social responsibility area, present disclosure requirements not only fail to but do not even attempt to beget "a detailed description of the product offered." Indeed, without some disclosure on corporate social responsibility, disclosure can never provide that detailed description. In the social responsibility area,

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documents to include narrative explanation of items described in financial statements.

204. In the Practicing Law Institute's Annual Institute, discussing trends in disclosure, SEC Commissioner Sommer broke with the traditional, superficial analysis. He noted that "disclosure in the past has not been confined to historical financial information" and that "information bearing on future prospects is highly material." BNA SEC. REG. & L. REP. No. 327, at A-3 (Nov. 12, 1975). As for information which is both narrative and does peer into tbe future, *see, e.g.*, the new regulations for quarterly reports, *supra* note 199, requiring companies to review trends or possible trends quarterly reports reveal.

205. For some time, the Commission has been struggling to facilitate projections in disclosure documents should corporations wish to make projections. It also wants to require companies that already do make projections in the press and elsewhere to put those projections in disclosure documents, available to all investors and subject to constraints on puffing and the like. In SEC Exchange Act Release No. 9984 (Feb. 2, 1973), the Commission put forth a definite proposal. Due to an avalanche of adverse comment on the proposed rule's form, the Commission had delayed the rule's implementation BNA SEC. REG. & L. REP. No. 320, at D-1 to D-4 (Sept. 24, 1975) and then dropped the proposal altogether. SEC Securities Act Release No. 5699 (April 23, 1976). In doing so, however, the Commission stated that its "longstanding policy not to permit projections in Commission filings" no longer existed.

206. *See, e.g.*, amendments to, *inter alia*, forms S-1 and S-2 under the 1933 Act and to form 10K under the 1934 Act, requiring "more meaningful" and extensive disclosure as to proposed "new lines of business, product development, competitive conditions in the particular industry and management personnel," SEC Securities Act Release No. 5395 (June 1, 1973); SEC Exchange Act Release No. 10041 (Mar. 15, 1973) (guidelines for when reporting cash flow per share and similar data is undertaken); SEC Securities Act Release No. 5551 (Dec. 26, 1974) (disclosure in registrations and in periodic reports of unusual risks or uncertainties the company is facing or may face in the future).

the SEC requires only one category of information to be disclosed and that only after a long fight, including a lawsuit against the SEC by environmental groups.[207] The category is corporate violations of federal statutory environmental standards, and the disclosure required is only of the after-the-fact historical variety.[208] This disclosure will do little to aid investors in evaluating what corporate managements perceive as future problems, or in determining if management is on top of matters that are not presently material in the sense of five percent of profits or the like, but could become so. The paucity of social responsibility disclosure, or the lack of a requirement that management describe what it perceives the social responsibility outlook to be, pales further when one compares it to the "almost embarassing abundance of information"[209] the SEC requires companies to disclose about financial and other matters. Again, the result is that disclosure fails to achieve another of its goals—provision of a rough parity of information about all of the various aspects of a corporation's activities. Moreover, with the recent Commission drive for even more financial disclosure, each day the gulf grows wider.

(3) Expanded Accessibility to and Dissemination of Financial Information

Another function SEC accounting and disclosure requirements serve is to make the well-rounded picture of a firm's affairs that disclosure supposedly produces available at a central source or clearinghouse, namely, SEC offices. Moreover, in recent years, especially since the Wheat Report's publication in 1969, the Commission has strived to place upon corporations themselves the affirmative duty to disseminate widely to investors, investment managers and advisors, other securities industry professionals, and the public the

207. Reviewed notes 274-321 *infra* and accompanying text.

208. The proposed requirement is that disclosure documents filed with the Commission append as an exhibit thereto a "list of the most recently filed environmental compliance reports which indicate" that the company "has not met, at any time within the previous 12 months, any applicable environmental standard established pursuant to any Federal statute." SEC Exchange Act Release No. 11733 (Oct. 14, 1975); CCH FED. SEC. L. REP. ¶ 80,310, at 85,762 (violation of state or local law standards would not have to be disclosed). The Commission's emphasis in proposing to order even that limited disclosure was based upon the dictates of the National Environmental Policy Act, not upon the information's use to investors or any other traditional rationale for disclosure. After some reflection, however, the Commission has backtracked and withdrawn even that limited disclosure proposal. SEC Exchange Act Release No. 12414 (May 6, 1976); CCH FED. SEC. L. REP. ¶ 80,495.

209. Sommer, *supra* note 111, at 1093.

information that reports filed with the SEC contain.[210] It is reasoned that the well-rounded portrait of the firm at which disclosure aims will not implement the ultimate goals of disclosure legislation—utility to investors in the investment process, protection of investors against speculative or questionable schemes, and the like—unless investors have access to, or better yet, some actual possession of, the information disclosures contain.

Hence, the SEC has conditioned the important privilege of acceleration of a registration statement's effective date upon how effectively underwriters have disseminated the preliminary prospectus.[211] Likewise, the Commission has conditioned use of abbreviated registration forms and availability of safe harbor rules on whether or not a corporation makes generally available financial and business information.[212] In addition to the glossy, picture-filled variety of annual reports that companies must send to all shareholders along with or before the annual proxy statement is sent, the SEC has required that companies send to all shareholders who request it the 10K, the heavy, gray, disclosure-laden annual report companies file with the SEC.[213] Moreover, the glossy annual report will have

210. The WHEAT REPORT, *supra* note 112, gave extensive attention to increased dissemination of disclosure documents and of the information contained therein. *See id.* at 106-26, Chapter IV, "The Dissemination of '33 Act Prospectuses," and at 313-27, Chapter IX, "The Breakthrough in Dissemination of '34 Act Reports."

211. Rule 460 under the 1933 Act, 17 C.F.R. § 230.460 (1957). *See also* Rule 15c2-8 under the '34 Act, making it a deceptive act or practice for broker-dealers not to take reasonable steps to furnish preliminary prospectuses, 17 C.F.R. § 240.15c2-8 (1970). On the other hand, delivery requirements for final prospectuses are relaxed somewhat if the issuer of securities files periodic reports under the 1934 Act, Rule 174 under the 1933 Act, 17 C.F.R. § 230.174 (1970).

212. Use of Form S-7, an abbreviated and less costly registration form for securities, is conditioned upon the company having been a filing company in good standing under the 1934 Act for three or more years. *See* CCH FED. SEC. L. REP. ¶ 7190. The form itself is reproduced at *id.* ¶ 7192. Allowance of more widespread use of Form S-7, depending upon the amount of information generally available ahout the company to issue the securities, is recommended by The WHEAT REPORT, *supra* note 112, at 96-98.

As to the insurance policy for exemptions from the costly registration process that new SEC rules provide and the availability of that insurance policy depending upon the amount of information about the company generally available, *see, e.g.*, Rule 144c, 17 C.F.R. § 230.144c (1975), Rule 146f, 17 C.F.R. § 230.146f (1974).

213. SEC Exchange Act Release No. 11079 (Oct. 31, 1974), amending rules 14a-3, 14c-3 under the 1934 Act, 17 C.F.R. §§ 240.14a-3, 240.14c-3 (1974) (effective Jan. 1, 1975). The Commission went ahead with increased dissemination of the 10K despite indications that few investors were interested in obtaining it. Of a 1000 company sample, 31% voluntarily notified shareholders that the 10K was available before the rule became effective. Chrysler Corp. had only 56 requests, Budd Co. 20, General Motors 40. Other companies had similar experiences. *See* Wall Street J., July 11, 1974, at 1, col. 5. *Cf.* the Commission's denial of social responsibility disclosure requests because only 2-3 of 1% of the estimated aggregate value of the securi-

to contain a great deal more required information than has been the case in the past.[214] The overall picture is not only one of much more SEC-required disclosure, but also one of much more required, ready availability to investors of the disclosed information.

An investor might find financial information about companies in any of several scattered repositories: in other government agencies' files, in standard financial manuals, with stock exchanges or broker-dealers, or at a company's headquarters. SEC reporting requirements channel all this information, which otherwise might be scattered, into one central source or clearinghouse and into comparable form.[215] Further, SEC requirements see to it that much of the information so filed in the central source is disseminated back out to interested parties.

By contrast, on the social responsibility side information that colorably has worth in the investment process is filed by corporations with a multitude of governmental agencies. Even when such agencies do disclose such information to inquirers the information is not available in anything resembling a central source. An investor investigating certain companies' postures on various social responsibility issues would have to visit the widely scattered offices of sev-

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ties held in this country took the time to travel to Washington and appear before it, SEC Exchange Act Release No. 11733 (Oct. 14, 1975); CCH FED. SEC. L. REP. ¶ 80,310, at 85,719, reviewed notes 305-16 *infra* and accompanying text.

214. For years the Commission had kept its hands off the annual report, fearing that intervention might make the annual report a litigation-avoiding disclosure document and, hence, less attractive to or readable by investors. *See generally* Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968); Sommer, *supra* note 111. In the interest of increased availability of disclosure, however, the SEC now believes on balance that mandatory increased annual report disclosure should win out over any contention that such disclosure would make reports less readable. Ergo, SEC Exchange Act Release No. 11079 (Oct. 31, 1974) amends rules 14a-3, 14c-3, and 14c-7, 17 C.F.R. §§ 240.14a-3, 240.14c-3 & 240.14c-7 (1974), to expand significantly required annual report disclosure. Companies' annual reports must now include certified financial statements for the past two years, along with a management summary and analysis of the last five years, certain background information on executives, and reports on the company's stock market performance and dividend records. Corporate management, however, retains discretion to choose the most suitable format for presentation of the information. *See generally* Gapay, *SEC Moves to Force Corporations to Put More Financial Data on Their Annual Reports*, Wall Street J., Jan. 11, 1974, at 26, col. 1-3.

215. In its clearinghouse functions, as opposed to enforcing requirements that companies affirmatively disseminate information, notes 211-13 *supra* and accompanying text, the SEC has installed a low cost microfiche system for the use of those seeking information. Also, to increase the amount of information available, the Commission makes available packages of information, such as all 10K reports of New York Stock Exchange listed companies. *See generally* Wheat, *The Disclosure Policy Study of the SEC*, 24 BUS. LAW. 33, 40-41 (1968). And, of course, the SEC makes most all the information in its files available to those persons who would come to the SEC offices, review, compare, and evaluate it. In part, Rule 24b-3 under the 1934 Act implements that policy. 17 C.F.R. § 240.24b-3 (1951).

eral dozen federal agencies, if he or she could first identify the proper agencies to which inquiries should be addressed.[216] Visiting the proper agencies still might not produce a complete picture. The investor would have to be fortunate enough to have gone to agencies that make information readily available. Despite legislation requiring such availability, many agencies do not comply, at least without a fight. To round out the contrast, even of the most visible and cooperative agencies that gather various types of corporate social responsibility information, none distributes the information or places an affirmative duty to distribute on the corporations that file with it, as the SEC does. Those persons or investors who seek the social responsibility information must actively go after it.

Many corporations make various filings on social responsibility issues. The Consumer Product Safety Commission maintains test reports and product-caused injury records for many kinds of corporate products.[217] Under the Occupational Safety and Health Act, corporate employers of any size must log occupational injuries and report compliance with safety standards that the Department of Labor promulgates.[218] The Equal Employment Opportunity Act dictates that large interstate businesses file Employer Information Report EEO-1 setting forth company practices and statistics on minority hiring and advancement.[219] When a capital improvement or extractive resources activity is planned, many large companies have to file an environmental impact statement with the Environmental Protection Agency.[220]

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216. There are, of course, private organizations which perform a social accounting and clearinghouse function for social responsibility information. *See, e.g.*, notes 37-42 *supra* and accompanying text. These clearinghouses, however, may not he known to many investors. Secondly, the private clearinghouse's files are not nearly as complete as would be the SEC files if it required some social accounting and disclosure. Thirdly, many of the better clearinghouses, those with less of a mission and with a more objective view toward such information's worth in the investment process, are open only to certain classes of investors, such as mutual funds or insurance companies. *See* notes 40-41 *supra* and accompanying text.

217. Created in 1972, the Commission has assumed the functions of HEW, the Environmental Protection Agency, the Department of Commerce, and the FTC, among others, in the product safety area. Consumer Product Safety Act § 30, 15 U.S.C. § 2079 (Supp. II, 1972). Jurisdiction over the safety of food and drugs remains with the Federal Drug Administration. *Id.* The Commission is to maintain an Injury Information Clearinghouse open to interested individuals. 15 U.S.C. § 2054 (Supp. II, 1972).

218. Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 651-78 (1970). *See also* 1 CCH EMP. SAFETY & HEALTH GUIDE ¶ 6520.1 (forms for filing).

219. 42 U.S.C. § 2000e-8(c) (1972).

220. *See, e.g.*, National Environmental Policy Act § 120, 42 U.S.C. § 4332 (1970). The requirement is subject to the provision that government is in some manner involved in the corporate activity. Since governmental involvement, however slight, usually is enough to

An investor who wants accounting or information of those types must first realize that under some statute or regulation corporations have to file such information with some federal agency. Then the investor must know to which agency he or she should make inquiry. It is not always straightforward. For example, corporations file equal employment opportunity information with one or the other of a welter of public agencies, including the Equal Employment Opportunity Commission, the Department of Labor's Wage and Hour Division, the Civil Service Commission, the Office of Federal Contract Compliance, and with specialized agencies such as the FCC, CAB, or FPC.[221] An investor seeking a corporation's equal employment opportunity record must know which of over a dozen agencies would have the data relating to the particular company. Hence, even if the information is available somewhere in the federal system, the information is likely to be scattered all over Washington.

Moreover, information is not always available. Legislation requiring corporations to report to federal agencies sometimes makes the filings confidential, as in the case of Equal Employment Opportunity Report Form EEO-1.[222] By and large, though, the Freedom of Information Act states that government agencies shall make available the bulk of such information to citizens who are willing to defray search and reproduction costs and who follow agency procedures under the Act.[223] At the outset, however, one difficulty is that

trigger NEPA impact statement requirements, many corporations wind up preparing and filing impact statements. *See generally* Symposium—*Complying With the NEPA; Practice, Problems and Potential*, 29 BUS. LAW. 1315 (1974).

221. There has been some consolidation of agencies receiving corporate filings. For instance, the Department of Labor has consolidated its own three antidiscrimination units into one new Office of Federal Contract Compliance Programs. Wall Street J., June 17, 1975, at 3, col. 1. Similarly, the Product Safety Commission, note 217 *supra*, represents a consolidation of functions. Nonetheless information remains widely scattered.

If, however, the information is not scattered among agencies, the obvious agency is not always the correct agency to which an investor should address inquiries. For example, although companies file many of the required environmental impact statements with the Environmental Protection Agency, the impact statements themselves are available through the Dep't of Commerce. Before making a request of Commerce, though, the investor must find the particular impact report's National Technical Information Service (NTIS) number. Only then can the investor make a proper request. *Cf.* legislative history evincing an intent to make environmental impact statements freely available to the public, 115 CONG. REC. 17455 (daily ed. Dec. 20, 1969) (remarks of Sen. Henry M. Jackson).

222. Equal Employment Opportunity Act §§ 709(d)-(e), 42 U.S.C. § 2000e-8(d)-(e) (1970). Even though those statutory provisions make leaks of reports by government employees a misdemeanor evidence exists that such information may be selectively leaked to institutional and other affluent investors. *See, e.g.*, notes 238-40 *infra* and accompanying text.

223. The Freedom of Information Act is 5 U.S.C. § 552 (1970), *as amended*, (Supp. IV, 1974). Section 552(a)(2) requires every federal agency to make the following available for

each government agency publishes its own rules and procedures and sets its own search and reproduction charges under the Freedom of Information statute.[224] An investor seeking information under the Freedom of Information Act, therefore, may encounter a proliferation of varying agency procedures and forms,. each having its own pitfalls.

Assuming that the investor finds the right agency, that the legislation which requires corporations to report information does not classify the report, and that the investor ascertains what the particular agency's Freedom of Information Act procedures are, the investor still might not obtain the social responsibility information he or she desires. The Freedom of Information Act has a number of exemptions which experience shows agencies can and do expand or contract depending upon a particular agency's willingness to disclose.[225] Thus, depending upon the agency, officials may or may not deny a Freedom of Information Act request because of the exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[226] There is also an exemption for "investigatory files compiled for law enforcement

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public inspection and copying: "final opinions" and orders, "statements of policy and interpretations," and "administrative staff manuals and instructions to the staff that affect a member of the public." 5 U.S.C. § 552(a)(3) states that "each agency on request for identifiable records made in accordance with published rules . . . shall make reports promptly available to any person."

224. 5 U.S.C. § 552(a)(1) (1970). The Freedom of Information Act's 1974 amendments do require agencies to publish schedules of "reasonable fees" applicable to all units of an agency. 5 U.S.C. § 552(a)4(A) (Supp. IV, 1974). This requirement for reasonable fees is significant. Prior to the amendments, evidence indicates that agencies have used prohibitive search and reproduction fees to foil information requests. *See, e.g.*, Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345, 367 (1969) (FTC charges $200-250 for copy of one day's transcript of hearings before the FTC); Rothchild, *Finding the Facts Bureaucrats Hide*, THE WASHINGTON MONTHLY, Jan. 1972, at 18 (some agencies require posting of $2000 or more in costs before they will undertake development of a program and printout retrieving computer-stored data).

225. *See, e.g.*, Nader, *Freedom from Information: The Acts and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, at 4-5 (1970): "Information which is claimed to be exempt from disclosure in one agency is freely given in another agency;" Katz, *The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970); *Blasting Facts Free*, TIME, Dec. 2, 1974, at 98: exceptions to the Act are still "so numerous and broad" that they take away "most of what was previously granted" by the Act (remarks of Yale Law School Professor Thomas Emerson).

226. 5 U.S.C. § 552(b)(4) (1970). *See, e.g.*, Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971) (VA denied Consumers Report access to VA hearing aid test report on trade secret exemption grounds); J. YANACONE, ENVIRONMENTAL RIGHTS AND REMEDIES 174-75 (1972) (FDA uniformly used trade secrets ground to deny environmentalists access to information about pesticides).

purposes." Judicial gloss has extended the investigatory exemption to files that an agency claims might reveal its investigatory practices or techniques, although the file itself will never become the subject of an enforcement action.[227] There is an exemption for matters "related solely to the internal personnel rules and practices of an agency."[228] Still other exemptions exist.[229]

Because of these Freedom of Information Act exemptions, an agency in possession of information about a corporation or industry might block an investor's request for information or force the investor to litigate the issue. The underlying reason for the agency doing so might be the age-old problem of specialized agencies' loyalty to the industry regulated rather than to the public.[230] For instance, under the Occupational Health and Safety Act, reports of work-related injuries remain undisclosed. The Department of Labor's position is reported to be that the Act "is not an employee law, but a law for employers. Therefore, we don't have to show . . . any of this data."[231]

Another reason the Freedom of Information Act has not lived

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227. Frankel v. SEC, 460 F.2d 813,817-18 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), involved the investigatory exemption found in 5 U.S.C. § 552(b)(7). In a derivative action against directors on the corporation's hehalf plaintiff shareholders requested information the SEC had developed in an SEC civil action against the director. The SEC action had resulted in a consent decree. Nonetheless, the court held that the SEC could continue to label the file investigatory in order to preserve investigatory techniques' secrecy.

Another practice under the investigatory exemption is to label files "investigatory" on an indefinite basis, thus suggesting that the agency may bring enforcement proceedings at some future date. *See* Bristol Meyers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

228. 5 U.S.C. § 552(b)(2) (1970).

229. *See generally* 5 U.S.C. § 552b(1)-b(7) (1970). The 1974 Freedom of Information Act amendments, relative to reasonable charges for search and reproduction, *supra* note 231, and legislating a requirement that agencies determine whether or not they will comply with a request within 10 days after receipt, 5 U.S.C. § 552a(6)(A) (Supp. IV 1974), basically do not touch the exemptions. Nevertheless, several agencies have let the information flow a bit more freely since the amendments' passage. A possible explanation is that by the act of amendment alone Congress had indicated to federal agencies that it is serious about the Freedom of Information Act. *See* Wall Street J., May 16, 1975, at 1, col. 5 (better flow of information from the CIA, FBI, and IRS after the 1974 amendments); *Blasting Facts Free*, TIME, Dec. 2, 1974, at 98.

230. For instance, one commentator speculates that product safety information has "stayed buried" either because of agencies' "non-consumer orientation" or because of "a commitment to an industry constituency." Gross, *Not for Publication*, 905 SCIENCE NEWS 508 (1969). *See also* Engel, *Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U. L. REV. 184 (1973).

231. CENTER FOR THE STUDY OF RESPONSIVE LAW, INFORMATION ADMINISTRATION HEARINGS 1509-10 (1970) (discussion of Dept. of Labor's use of the Freedom of Information Act's trade secrets exemption to accede to corporation's requests to classify work-related injury information).

up to its promise is that the Act has confused aims. Under one disclosure principle and the same set of exemptions, the Act attempts to provide citizens both with access to the practices and internal workings of the regulators and access to information about the corporations which an agency regulates. Often, sensing an interest in an attack on the agency itself, rather than on the companies or industry the agency regulates, agencies lose much of their commitment to disclosure of any kind.[232] For whatever reason, the Freedom of Information Act is not a panacea for the investor who seeks information on corporate social responsibility or for the lack of SEC required social accounting and disclosure.

As matters now stand, the picture is a patchwork. Disclosure on corporate social responsibility made to government is available to investors or to citizens only on a spotty basis. Moreover, to reap the incomplete amounts available, an investor would have to pound Washington's pavement, visiting many a governmental agency, bureau, or commission. He or she would have to master a variety of Freedom of Information rules and procedures. Still, an information-seeker would have to be willing to face journeys up many blind alleys. Information freely available to some might be available to another investor only after litigation. The result of the search would only be that one individual or one private organization would have some data and a glimmer of whether or not a particular industry or particular companies are moving forward on some social responsibility fronts. No disclosure would be available to all investors or even merely to those who might be interested and would expend some modest effort to obtain information.

By not requiring some modicum of social responsibility information, disclosure is failing to achieve its aims. SEC accounting rules and activities proliferate, forcing financial accounting techniques to improve and increasing the volume of accounting that corporations must do. At an accelerated rate, financial accounting outdistances social accounting, both as to its forced development and as to its volume. Disclosure becomes pervasive, except on social responsibility, where regulations require only a bit of after-the-fact disclosure on environmental matters. Information on many of the issues is not available elsewhere. Through governmental action, the amount of information available and the disclosure on financial

232. *See, e.g.*, Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (law professors requesting information in order to study the NLRB's practices in regulating voting in union elections, the requested information to include data on the regulators as well as on the regulated).

matters becomes well-nigh all inclusive—the gulf widens. Finally, and perhaps most egregious of all of present disclosure's failings, nothing resembling a central clearinghouse for social responsibility information exists. Disclosure fails because few investors in the United States can obtain anything resembling a relatively full and well-rounded picture of the typical, modern, publicly-held firm.

D. *Another Parity As a Goal of Disclosure—Equality of Access to Information for Investors or Categories of Investors*

One of disclosure's central purposes is to produce, in theory at least, a condition whereby "all investors, big and small, insiders and outsiders," institutional or individual, have equal access to relevant investment information.[233] Nowhere is the working hypothesis, that all investors begin the investment process on roughly the same informational footing, more evident than in the expanding Rule 10b-5, insider trading, and tipper-tippee liability areas. As the court in the *Texas Gulf Sulphur* litigation remarks, any analysis of disclosure or a failure to disclose begins from that premise.[234] Relatively equal access to information is just as much a central purpose of the securities acts' affirmative disclosure requirements—such as the periodic reporting requirement and the proxy rules under the 1934 Act—as it is a central purpose of rules like 10b-5 that deal with a failure to disclose.

Indeed, the SEC pointedly has premised an important recent disclosure proposal on equality of access. The Commission wants to adopt a requirement that if a corporation makes sales and profit projections, the corporation also must include those projections in the required disclosure documents it files with the SEC.[235] As matters presently stand, some investors can obtain projections of future profits directly from corporate officials while others cannot or do not. "The Commission expressed concern . . . that all investors do not have equal access to this significant information" and, based principally upon a belief that investors should have access to projec-

233. Benston, *supra* note 117, at 133.

234. *See supra* note 118. Of course, perfect equality of access or simultaneous distribution of investment information is impossible. For example, a broker-dealer in possession of new, important information necessarily must call some customers before others. *See, e.g.*, Herman & Safanda, *Allocating Investment Information*, FINANCIAL ANALYSTS J. 23, 27 (Jan.-Feb., 1973). Nevertheless, a rough parity of access is a goal for which Rule 10b-5 and much of present securities regulation incessantly strive.

235. *See* note 205 *supra*. Despite its evident desire, due to adverse reaction the Commission recently withdrew the proposal.

tions, proposed required disclosure of them in SEC filings.[236]

Assuming that information on corporate social programs has worth in the investment process, is conducive to long-run profitability, or is a useful tool in evaluating management quality,[237] without disclosure of some social responsibility information, SEC-mandated disclosure is failing to achieve its goal—equality of access to information. Evidence indicates that some investors, most notably institutional investors, can and do obtain social responsibility information, not only from their trade groups' clearinghouses but also from corporations themselves, while many individual investors cannot obtain such information.

Thus, the social performance fund of a large mutual fund complex can obtain the social responsibility information it feels it needs.[238] The fund even obtains from companies the confidential Equal Employment Opportunity Report.[239] Other institutional investors indicate that prior to investing they seek information on social questions from corporate managements. Some institutions go so far as to conduct a "personal interview with top management prior to investing," including an interview on corporate social performance or vulnerability.[240] This is access that most individual investors do not have, or, even if they have potential access to information, they cannot avail themselves of the access that interviews with management present. With a small investor the benefit to be gained outweighs the time and cost that traveling and meeting with corporate officials involves.

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236. BNA Sec. Reg. & L. Rep. No. 320, at D-1 (Sept. 24, 1975). In withdrawing its projections proposal, note 205 *supra*, the Commission restated its concern "about the problem of selective disclosure of material non-public information" and for that reason referred the projections problem to its Advisory Committee on Corporate Disclosure. SEC Securities Act Release No. 5699 (April 23, 1976).

237. Even assuming that, justifiably or not, a significant number of investors believe that social responsibility may be a key to long-run corporate profitability or to an evaluation of management competence, some investors will purchase some corporations' securities upon receiving, along with business and commercial disclosures, information that particular companies' social responsibility outlook is good. If such purchasing takes place, increased demand will cause those corporations' stock prices to rise, regardless of whether social responsibility does in fact contribute to profits. Thus, those investors who do not have the social responsibility data are deprived of an opportunity to share in the gains stock price rises generate. Inequality of access to such information, and hence, inability to participate in the stock market gain social responsibility may portend exacerbates problems of investors' dwindling confidence in the capital markets' fairness. See, for example, the investor attitudinal studies discussed note 246 *infra*.

238. *Viz.*, the Dreyfus Fund, *supra* note 41.

239. Shapiro, *supra* note 41, at 66-67.

240. Longstreth & Rosenbloom, *supra* note 1, at 69.

Preferential access to social responsibility information contained in government agencies' files is another privilege institutions and some classes of individuals enjoy. Under the Freedom of Information Act, one study finds "an established system of preferential access" to industry or commercial groups.[241] Paradoxically, some public interest groups now enjoy access to social responsibility information that ordinary citizens or investors cannot obtain.[242]

Without disclosure of corporate social responsibility information in the proxy statement, or in the annual report that must precede the proxy statement, the present system produces further inequality of access to social responsibility data.

> Once a shareholder could address the [stockholders'] meeting, today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the shareholder has of expressing his judgment comes at the time when he considers the execution of the proxy form . . . . [T]hat is the time he should have the full information before him.[243]

Under current SEC regulations, proxy statements or annual reports need not contain social responsibility materials. Yet those shareholders who can attend annual meetings do raise issues of social responsibility at those times. In response to shareholders' questions, many managements make disclosures.[244] Organized shareholder groups, perennial attenders of annual meetings, and corporate gadflys who attend the meetings obtain disclosures on corporate social responsibility. Concerned investors or shareholders who cannot attend do not get the disclosures.[245] Without some social accounting and disclosure, proxy statements and annual reports do not fulfill

241. CENTER FOR THE STUDY OF RESPONSIVE LAW, INFORMATION ADMINISTRATION HEARING, *supra* note 231, at 3. *See also* Nader, *supra* note 225, at 8.

242. Schorr, *Public-Interest Units Gain More Influence with Federal Agencies*, Wall Street J., July 15, 1975, at 1, col. 1 (Pac. ed.). (Aviation Consumer Project, Center for Science and the Public Interest, Environmental Defense Fund, Citizen Communication Center, etc., gaining preferential access to information in various agencies' files).

243. Statement of SEC Chairperson Purcell in *Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce*, 78th Cong., 1st Sess., pt. 2, at 174-75 (1943).

244. In his review, Blumberg finds that:

> [I]nformation otherwise not publicly available, such as the amount of corporate contributions to charitable . . . institutions, amount of expenditures for environmental purposes, extent of black and other minority employment and similar matters, have been elicited through the direct question at the Annual Meeting.

Blumherg, *supra* note 5, at 1034. *See also* Yaeger, *Evelyn Y. Davis: Unhappy Gadfly's Limited Success*, Washington Post, June 23, 1974, at M-1; the discussion of public interest proxy proposals, notes 123-28 *supra* and accompanying text.

245. Unless they are willing to pay for it. Yaeger reports that investors can obtain some of this information by subscribing to gadfly Davis' annual publication *Highlights and Lowlights of Annual Meetings of Corporations*. Yaeger, *supra* note 244, at M-1.

the goal of being near substitutes for the annual stockholders' meeting for those who cannot attend or otherwise be represented. Instead, preferential access to arguably relevant investment information goes to those investors who can attend corporations' annual meetings.

Thus absent some disclosure on corporate social responsibility, investors do not start the investment process on roughly the same informational footing. Failure to reach a parity of access among various classes of investors means that institutional and other influential investors continue to receive even more information while individual investors and members of the public fall farther behind. Public confidence in the fairness of the investment process dwindles,[246] and a goal of the securities acts—equality of access to investment information—goes unsatisfied.

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246. There probably is widespread interest in information on corporate social responsibility. *See* notes 146-88 *supra* and accompanying text. The intensity of that interest or investor's propensity to utilize it once obtained, however, is an unknown. But even given marginal use of such information in the actual investment process, in order to promote public confidence in the capital markets and in their fairness, the Commission should require any disclosure that would eliminate any actual or perceived inequality of access to investment information. Individual investor confidence in the market is a central problem the Commission faces today, and any inequality of access to any arguably relevant information exacerbates that problem.

Thus, attitudinal surveys of individual investors show that a belief in preferential distribution of investment information is a principal reason why many individuals have withdrawn from direct equity investment. MARKET FACTS, INC., MARKETING SECURITIES TO THE SMALL INVESTOR—A REPORT TO NYSE MEMBER ORGANIZATIONS 42 (1973) states the "belief, held by six in ten small investors, that large investors are making money on the basis of 'inside information.'" The survey also finds that "Potential Investors are even more likely than current small investors (79% vs. 60%) to believe that tips, inside information, and other services are available to large investors but not to small investors." The Securities Industry Association's attitudinal study finds that 61% of tbe subpopulation individual investors feel that institutional and other wealthy investors are favored with more research, information, and disclosure. OPINION RESEARCH CORP., THE PUBLIC AND INVESTORS EVALUATE THE SECURITIES INDUSTRY 24 (1972). A proprietary study by Arthur D. Little, Inc., finds that of 2,000 individuals 70% of the investors, 74% of the ex-investors, and 64% of the non-investors feel that the markets are manipulated through "unfair advantages and access by institutions, brokers and other insiders." Wall Street J., May 4, 1973, at 30, col. 3-4. *See also* OPINION RESEARCH CORP., *supra* at 24; Welles, *The Public: Who Needs Em?—How the Street Is Putting the Little Man Out of the Market*, INSTITUTIONAL INVESTOR 37, at 92-93 (Mar. 1972); BUSINESS WEEK, Apr. 17, 1971, at 86; Wall Street J., May 4, 1973, at 30, col. 3-4. One writer feels that an important step the SEC can take to restore public confidence in the securities markets is to eliminate potential informational advantages some investors may have over others. Social responsibility disclosure seems to be one area in which the SEC might move to insure equality of access. Sargent, *The SEC and the Individual Investor: Restoring His Confidence in the Market*, 60 VA. L. REV. 553, 557-72 (1974).

E. A Third Parity As a Goal of Disclosure—Equivalent Amounts of Information Available About Different Corporations and Classes of Corporations

The time period preceding the passage of the Securities Act of 1933 indicated that without legislative command many corporations had been providing investors with much of the information a 1933 Act prospectus would disclose.[247] While that may have been true, other companies disclosed little. Even among companies that did disclose, legislators and others felt that investors' manifest desires and other demand and supply forces would not produce all the disclosure regulators felt would be beneficial.[248] Another problem was that those disclosures which were provided were not nearly identical in content, or in format and, therefore, were not readily comparable by investors.[249] Then, too, it was felt that some corporations disclosed too much. Some were engaged in puffery and in outright misrepresentation.[250] Last of all, prior to the 1933 Act some corporations wanted to disclose, but to avert being upstaged by others, would not until other corporations had disclosed.[251] Thus,

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247. *See* Benston, *supra* note 117 at 133. Mr. Bentson also found that 62% of New York Stock Exchange listed companies made relatively full financial disclosures prior to the 1934 Act's passage and that the percentage had been increasing "fairly steadily" prior to 1933.

248. Professor M. P. Dooley, in *The Effects of Civil Liability on Investment Banking and the New Issues Market*, 58 VA. L. REV. 776, 835 n.257 (1972), gives a cogent explanation:

> Government intervention to prescribe what is "adequate" [information] is justified if it is assumed that the true demand for information is greater than that which is reflected in market transactions. There are good reasons for believing that these conditions exist and that governmental intervention is justified . . . . In the first place, the class of investors is large and many will invest only small sums. Consequently, the costs of bargaining for adequate information may exceed the value of that information in improving the investment decision. The bargaining process is also complicated by the "free rider" problem. To the extent that the use of information provided to one investor cannot be kept from other potential investors, some or all of such potential investors will refrain from purchasing information in the hope that they can take a "free ride" on the information purchased by others.

Despite the small number of shareholder requests to corporations who voluntarily had undertaken to furnish to shareholders the annual 10K report, the SEC made mandatory its requirement that companies furnish the report. *See* note 213 *supra*. Despite a demonstrated paucity of demand, the SEC apparently concluded that disclosure, or the availability thereof, would be beneficial. Precisely the same statement might be made of social responsibility information, although in that area the SEC persists in counting heads. *See* notes 305-10 *infra* and accompanying text.

249. *See* Knauss, *supra* note 13, at 631 ("lack of standardized accounting reduces the value of disclosure . . . .").

250. *See, e.g.*, Benston, *supra* note 117, at 134-36.

251. *Id.* at 144; Knauss suggests that the "legal requirement of disclosure removed any competitive disadvantage incurred by those who had volunteered full information." Knauss, *supra* note 13, at 616.

one principal impetus behind the securities acts' passage and subsequent administration has been to require certain disclosures by all corporations of a certain size.[252] Those corporations must disclose in roughly the same format and with the same frequency.[253]

Today, in the social responsibility disclosure area, precisely the same state of affairs exists as that which prevailed before the securities acts' adoption.[254] Some corporations do conduct social audits. Many disclose audit results in the annual report.[255] Other companies try to make the social responsibility data available to investors and to the public generally.[256] Other corporations, who are wont to disclose, do not because their competitors do not. They feel that even though they are relatively socially responsible for their industry or region, if they disclose while other corporations refrain, when viewed in isolation, their disclosures will result in some activists typecasting them as corporate ne'r-do-wells.[257] Many corporations disclose their positive social responsibility results while failing to disclose nonfeasance or other failures. Still other firms disclose re-

252. *I.e.*, so-called 12(g) status, described in note 116 *supra*.

253. *See, e.g.*, Blumberg, *supra* note 5, at 1055-56. Knauss, *Disclosure Requirements—Changing Concepts of Liability*, 24 Bus. Law. 43-44 (1968), describes past SEC generated "pressure for uniformity in accounting standards and reporting practices." In 1974-75, low share prices and Securities Exchange Act housekeeping and periodic reporting requirements induced some publicly held firms to consider "going private." They do so tbrough buying back shares held in investors' hands and reducing the number of shareholders below 300. With less than 300 shareholders, the company can deregister and discontinue periodic disclosures to the Commission under the Securities Exchange Act. *See* Securities Exchange Act § 12(g)(4), 5 U.S.C. § 78*l*(g)(4) (1970); Brudney, *A Note on "Going Private"*, 61 Va. L. Rev. 1019, 1032-33 (1975). *See also* Note, *Going Private*, 84 Yale L.J. 903 (1975).

254. The similarities are uncanny. Compare the 62% of New York Stock Exchange listed companies wbo were disclosing financial information prior to 1934, *supra* note 247, with the 76% of a similar sample who report that they have undertaken some sort of Social audit, if not public reporting. J. Corson & G. Steiner, Measuring Business' Social Performance: The Corporate Social Audit 24 (1974).

255. *See* notes 27-30 *supra* and accompanying text.

256. *See* notes 31-35 *supra* and accompanying text.

257. The late Eli Goldston described how the company of which he was president, Eastern Fuel and Gas Associates, Inc., did disclose. Although competitors were non-disclosing worse polluters, Eastern bore the brunt of environmentalists' attacks. *See* Goldston, Book Review, Foundation News 30, 31 (July-Aug. 1970). *See also* Note, *Corporate Altruism: A Rational Approach*, 59 Geo. L.J. 117, 118-20 (1970) (pointing out many of the good deeds companies perform but do not disclose, partly out of fear of attack from some quarters). Of course, this damned if you do and damned if you don't dilemma has been eased by the softer, relative approach, notes 41 & 154-60 *supra* and accompanying text, adopted by many parties interested in social responsibility. That may be one incentive behind the increased amount of social auditing companies are undertaking, note 284 *supra*. On the otber hand, required disclosure by all large publicly-held firms would be, for relatively responsible firms, the best relief or protection from misguided attacks. *See* notes 271-77 *infra* and accompanying text.

sults, good or bad, but on only one issue of social responsibility.[258] Last of all, some corporations disclose, but only as part of glossy, saccharine, and heavily financed public relations efforts.[259] These firms have been accused of puffing by some and outright misrepresentation by others.[260]

By not containing any significant amount of corporate social responsibility disclosure, SEC disclosure requirements thus fail to achieve yet another goal of parity—a roughly equivalent reservoir of information available about each large, publicly held firm. In addition, present disclosures fail to meet the subsidiary goals that disclosures be somewhat comparable and that they not be misleading or the products of imaginations prone to exaggeration. As a result, some responsible corporations suffer misgnided attacks when they do disclose. Others fail to reveal the good they do for fear of attack. At the same time, other corporations take the opportunity that lack of governmental constraints presents to bootstrap themselves into images of social responsibility. The uneven and incomparable amounts of disclosure now available lead investors to misallocate their investment resources, not only in a way that might offend their own moral sensibilities, but possibly in ways that affect their pocketbooks as well.

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258. *Compare* Calame, *Stonewalling It at Gulf Oil*, Wall Street J., Apr. 18, 1975, at 8, cols. 3-6, *with* Newman, *GE's Hiring of Blacks, Long Its Commitment Slow But Sure*, Wall Street J., Dec. 10, 1974, at 1, col. 6 (after two years' pressure from stockholders General Electric Co. begins disclosing its minority hiring and advancement record) *and* Bank America Corporation's and similar publicly reported social audits, notes 27-35 *supra* and accompanying text (statistics with historical comparisons on minority biring as well as disclosure on a balf dozen other social responsibility issues thought relevant to the disclosing company's business).

259. *See* Connor, *Mobil's Advocacy Ads Head a Growing Trend, Draw Praise, Criticism*, Wall Street J., May 14, 1975, at 1, col. 6 (IBM, IT&T, Mobil, and other campaigns reviewed); notes 380-84 *infra* and accompanying text.

260. The principal beneficiary of the current flood of corporate social concern has been the media. The so-called "public" utilities spend well over three hundred million dollars per year for advertising, much of it expressing their concern for the environment. One might think they were in the business of wilderness preservation . . . until one examines their dismal record . . . . Their ads do not reveal that utilities rank at rock bottom wben it comes to hiring . . . blacks. The four biggest can makers . . . have been heavily advertising their "recycling centers," but privately the industry admits the campaign involved no investment.

Henning, *supra* note 126, at 154. As to outright misrepresentation, *see, e.g., id.* (discussion of a forest products producer's advertising involving water purification efforts—with pictures of a stream taken upstream from the company's pulp plant).

F. *A Traditional Purpose of Disclosure—Prevention of Fraud and Forced Revelation of Risk*

Of the reasons for which all acknowledge disclosure is required, the last to be discussed is an important one—disclosure's role in the prevention of fraud and in the discovery of questionable acts or practices that have been committed. In this fraud area, disclosure operates in two ways. First, the requirement of full and fair disclosure before a company may sell securities tends to make management lessen conflicts of interest and to deter other questionable or speculative practices or ventures.[261] Students of disclosure have termed the registration process a "housecleaning:"

> [O]ne of its most valuable consequences is the elimination of conflicts of interest and questionable business practices which, exposed to public view, have what Justice Frankfurter once termed a "shrinking quality."[262]

It is important to note, however, that disclosure requirements do not prohibit conflicts of interest or other questionable practices. If, despite disclosure's "shrinking quality," management nevertheless decides to proceed with the questionable act, disclosure only requires that management spell out the proposed scheme's details and nuances.[263] This is the full and fair disclosure philosophy often juxtaposed to some states' Blue Sky regulations. Federal regulation does not pass on the enterprise's investment merits or on the fairness of the participation offered to investors.[264] Indeed, assuming

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261. *See also* Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1352 (1966):

> [T]he act of making information public, where it *may* be read, is a prophylactic of uncommon effectiveness: many a transaction that could not stand the light of official or public scrutiny has not occurred (or has been undone) simply because it would have been exposed to that light.

While Chairperson of the SEC, Professor William Cary gave some examples:

> I firmly believe that disclosure does operate in this deterrent manner. It is illustrated by following various registration statements in their journey through the registration process. Upon filing, a statement may disclose that insiders are getting seventy percent of tbe company for five percent of the cash. Ofttimes, in response to requests by . . . the Commission that benefits to insiders be . . . clearly spelled out, this percentage share may be substantially reduced.

Cary, *supra* note 13, at 411.

262. WHEAT REPORT, *supra* note 112, at 51.

263. For instance, in the dilution example, *supra* note 261, the SEC only requires that insiders disclose. Thus, the registration statement must contain pie charts, hydrographs, or other bar charts showing that insiders will receive 70% of the stock in return for 5% of the cash. SEC Securities Act Release No. 5278 at 6-10 (July 26, 1972). But the practice is not forbidden if disclosure bas been made. *See In re* Universal Camera Corp., 19 S.E.C. 648 (1945).

264. Despite full disclosure on the federal level, some state securities administrators

proper disclosure, the Commission cannot block a security's sale, no matter how insubstantial or amoral the issuer of that security may be.

Disclosure's second purpose in this fraud area is to force management to tell the entire story. The aim is not really to prevent fraud because the essence of fraud is prevarication or failure to give the complete picture. Rather, disclosure's aim becomes protection of investors against significant or catastrophic losses, the risk of which they could not otherwise evaluate. Disclosure is made so that investors can knowingly assume or refrain from assuming risks.[265]

New legislative enactments, emerging consciousness in the judiciary and among regulators of the social costs companies' operations impose, and public values and expectations all are creating significant risks for socially irresponsible companies. In the equal employment opportunity area judgments and settlements have ranged as high as $30 million.[266] For regulated industries the costs of employment discrimination may range even higher, as plaintiffs are claiming and will continue to claim that regulatory agencies must or can take into account in rate-making and licensing matters

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may block a sale of securities on the grounds that the sale would be unfair or tend to work a fraud on that state's citizens. The comparison between state and federal regulation is made in Heller, *Disclosure Requirements under Federal Securities Regulation*, 16 BUS. LAW. 300, 301 n.6 (1961).

265. Another example is investment in a company touched by criminal or shady conduct. Thus, even if insiders are to receive 70% of the stock offered for only 5% of the cash, as in the example in note 261 *supra*, knowing investors may still believe the idea behind the company or its product to have such a high probability of success that future profitability outweighs any disadvantage inherent in management receiving so much stock for so little. Investors may purchase even after full disclosure of a questionable scheme.

266. The AT&T consent order called for $15 million in payments to 13,000 women and 2,000 minority male employees. New promotion and pay policies entailing future outlays were also part of the consent order. 8 BNA LAB. REL. REP. FAIR EMPL. PRAC. No. 431, at 73 (Jan. 18, 1973). In all actions against AT&T, the backpay and raises to date total $75 million. *Thinking Smaller*, NEWSWEEK, July 2, 1975, at 541-55. The steel industry consent decrees required nine steel producers to pay $30.94 million in back pay and damages as well as adopt hiring, promotion, and pay raise timetables which will entail added future costs. 8 BNA LAB. REL. REP. FAIR EMPL. PRAC. No. 431, at 125 (Apr. 18, 1974). United States v. Allegheny-Ludlum Industries, Inc. 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd* 517 F.2d 826 (5th Cir. 1975). *See also* United States v. Georgia Power Co., 301 F. Supp. 538 (D. Ga. 1968); Estate of Rogers v. Exxon Research & Co., 2 CCH EMP. PRAC. GUIDE ¶ 5311 (D.N.J. 1975) (jury verdict of $750,000 to one individual on age discrimination grounds). The Supreme Court generally has upheld back pay awards, adding that an employer must pay for past discrimination even if it has done its best to eliminate such practices. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). *See generally* Wong, *Lawyer William Gould Prods Courts to End Job Bias; His Activism Sometimes Irks Peers*, Wall Street J., Aug. 21, 1974, at 26 cols. 1-3 (judgments as high as $50 million sought from a numher of corporations).

a company's progress in ending discrimination.[267] Capital costs for eliminating one narrow form of environmental pollution are cited as $795 million.[268] In the product safety area, one lawsuit calls for $284 million in damages resulting from the use by Cleveland, Ohio area butchers of cancer-causing polyvinyl chloride wrap. Other, similar lawsuits are predicted to follow.[269]

Yet in disclosures filed with the SEC companies need not describe programs or actions to lessen or eliminate the risks of social irresponsibility. The only social responsibility disclosure the SEC requires is of the after-the-fact variety—only when governmental enforcement action or other litigation has commenced need companies disclose, which they do most often in the financial statements' footnotes discussing contingent liabilities.[270] This paucity of disclosure contrasts with other SEC disclosure requirements looking to the making of future profits or the avoidance of future liabilities. In the central portion of prospectuses and in other disclosure documents, corporations must size up the competition in advance, describe progress for developing new products, tell how the company will utilize a public offering's proceeds, or set forth information to enable the investor to judge on the basis of present management affiliations and interests the significance of possible conflicts of interest on the company's future.[271] Under present SEC requirements, however, nowhere must a company describe programs and progress in elimination or minimization of job discrimination claims, perceived environmental liability or exposure and programs to reduce that exposure, or product safety defects or difficulties and proposed cures. Yet failure to have programs such as those may for the investor entail a risk of loss or result in as precipitous a decline in the value of his or her investment as would failure to develop saleable new products.

Should the SEC extend disclosure requirements to certain social responsibility areas, planning benefits and the avoidance of

267. *See* NAACP v. FPC, 520 F.2d 432 (D.C. Cir.), *cert. granted*, 423 U.S. 890 (1975). The U.S. Commission on Civil Rights has also recommended to the President a number of steps the independent regulatory agencies should be taking to promote equal employment opportunity. Wall Street J., Nov. 12, 1974, at 2, cols. 3-4.

268. Occupational Health and Safety Act proposed standards would require such an outlay by steel companies to control coke ovens' carcinogenic emissions. *See* Proposed Standard, 40 Fed. Reg. 32,268 (July 31, 1975), *amended*, 40 Fed. Reg. 40,849 (Sept. 4, 1975); Wall Street J., July 28, 1975 at 2, col. 2 (Pac. ed.).

269. Wall Street J., Aug. 21, 1974, at 4, cols. 3-4.

270. *See, e.g.*, text accompanying notes 277-84 *infra*.

271. *See, e.g.*, Heller, *supra* note 264, at 305 *et seq.*

questionable acts or practices would obtain, just as in the financial area.[272] The requirement to disclose would force companies to concentrate on areas where liability could result or where adverse publicity could tarnish the corporate talisman. With a view towards ultimate disclosure, the next stage would be the corporate undertaking of a no-nonsense description and evaluation of the company's programs for avoiding harm to the firm from social irresponsibility. Based upon what a working copy of the social responsibility disclosure reveals, a reordering or restructuring of some corporate programs might then be in order. The company would disclose this information, and fraud would be prevented. Under this type of disclosure information would be available to the investor on what steps issuers of securities are taking or are not taking to prevent occurrences that pose a chance that the investor could sustain a loss or reap a reward from investment in a socially regressionist, socially pragmatic, or socially enlightened corporation. In this way, some harm to pocketbooks as well as to investors' moral sensibilities might be averted.

VI. The Present Position and Attitude of the Securities and Exchange Commission

A. *Introduction*

After testing the various theses that corporate social responsibility disclosures are needed at least to enable regulation by disclosure to fulfill its traditional goals, it is appropriate to review the SEC's present posture on social accounting and disclosure. Whether because of limited agency resources that the Commission feels unable to stretch to police social disclosure, an antagonistic attitude toward its critics, a lack of clear thinking about disclosure's traditional purposes, or some other factor or factors, the SEC has proven obdurate on this issue. The Commission has required disclosure on only one issue of social responsibility—not much more than would have been required if the SEC had never spoken on the matter.[273]

272. Preparing registration statements or periodic disclosure reports has always been thought to have a value independent of having a legal, public market for a company's securities. Preparing elaborate disclosure tends not only to deter questionable acts and practices, *supra* note 253 and accompanying text, but also to force introspection about corporate goals, programs, products, weaknesses, and future vulnerability. The 1933 Act registration process especially is thought to be a highly beneficial planning exercise.

273. Some onlookers have emphasized this point. *See, e.g.*, Schoenbaum, *supra* note 5, at 572, which points out that in its release mandating minimal disclosure on "material legal proceedings" involving civil rights or environmental matters, discussed notes 276-80 *infra* and

Moreover, in its most recent encounter with requests for disclosure, the Commission acted only after receiving a court order. A fair reading of the Commission's pronouncements that the court ordered hearings have produced suggests an intransigent agency doggedly reasoning toward a preordained conclusion against disclosure. Those pronouncements further show the Commission engaging in almost childish obfuscation of the issues.

Because the Commission has deservedly earned the highest marks as a federal agency, its action on social accounting and disclosure seems mystifying. In view of various commissioners' remarks, which reveal favorable individual attitudes, the SEC's latest pronouncement is even more difficult to understand. In part the latest reaction may be reflected of the shrill voices who have called for disclosure. Further, many of those who call for SEC-required disclosure do not do so with the traditional corporate model or disclosure's traditional purposes in mind. Instead, many of the individuals the Commission encounters call for disclosure on the theory that corporations have become quasi-public entities who through disclosure should demonstrate fulfillment of responsibilities to labor, consumers, the local community, and society in general. Others argue, conversely, that disclosure should be required with the purpose of forcing corporate ne'r-do-wells, or all corporations, for that matter, to incriminate themselves, or with the aim to generate adverse public reaction that will force corporations to attempt the cure of social ills rather than to focus on economic missions such as long-run profit maximization.

Understandably, the Commission may have shied away, but it has overreacted. When one views disclosure on social responsibility as fulfilling disclosure's traditional goals, its necessity becomes apparent. Any self-incrimination or adverse publicity that disclosure produces should be considered as only an incidental by-product of a disclosure system living up to its stated aims. In that light, some required accounting and disclosure becomes only the moderate choice. Viewed in comparison with the many other corporate-securities law reforms others propose, requiring some social accounting and disclosure appears to be the wisest action the Commission could take.

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accompanying text, "[a]lthough the Commission announced this release as its response to changing national priorities, it is evident that little more is required . . . than was already necessary under prior laws and regulations."

B. *Formal Action by the SEC*

On June 1, 1971, the Nader Project on Corporate Responsibility and the Natural Resources Defense Council petitioned the SEC to adopt disclosure rules on certain environmental and employment discrimination matters.[274] The petition proposed that the SEC require a company to describe with regard to each product it produced the nature and extent of the resulting injury to natural resources and the feasibility of and plans for correcting that injury. The petitioning groups also requested that the Commission mandate disclosure on whether or not a company had changed products, production methods, or advertising in order to enhance environmental values. In the employment discrimination area, petitioners requested the SEC merely to require that those companies who had made public claims about their equal employment records provide substantiation as reflected by data in filings with the Equal Employment Opportunity Commission.[275]

The Commission's first response to the petition was the promulgation of a July 19, 1971 interim release stating the SEC's position.[276] That position was that companies must disclose only "if material, when compliance with *statutory* requirements with respect to environmental quality . . . may necessitate significant capital outlays, may materially affect the earning power of the business, or cause material changes in registrants' business . . . ."[277] For a definition of materiality, the SEC referred readers to its existing rules.[278] On civil rights matters, the Commission reiterated its views that companies need disclose such matter only "if material"

274. BNA SEC. REG. & L. REP. No. 106, at D-1 (June 16, 1971); Wall Street J., June 10, 1971, at 22, col. 3.

275. The petition's contents are more thoroughly reviewed in Natural Resources Defense Council, Inc. v. SEC, 389 F. Supp. 689, 693-94 (D.D.C. 1974). Petitioners also requested that the SEC define as material and therefore subject to disclosure any litigation against a company under Title VII of the Civil Rights Act of 1964 or under equal employment regulations governing parties contracting with the federal government. *Id.* at 694. The then and current SEC position is that disclosure need be made about equal employment matters only if legal proceedings actually have commenced under statutory requirement, and if the possible penalty is cancellation of a government contract, termination of further business with government, or similar material and tangible effects on business or profits. SEC Securities Act Release No. 5170 (July 19, 1971).

276. SEC Securities Act Release No. 5170 (July 19, 1971).

277. *Id.* (emphasis added).

278. A term "which limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before buying or selling a security." Rule 12b-2 under the Securities Exchange Act of 1934, 17 C.F.R. § 240.12b-2 (1965). *Cf.* note 144 *supra* and accompanying text.

and, in general, only "if arising in legal proceedings under statutory requirements."[279] The SEC's interim determination thus fell far short of what petitioners had requested. Indeed, it required nothing more than previously existing general disclosure requirements had mandated.[280]

In February 1972, however, the Commission had an apparent change of heart. New environmental proposals with some guide to materiality appeared. Companies were required to disclose any impact of state or federal environmental requirements carrying a cost of compliance equaling ten percent of a company's consolidated "current assets."[281] The SEC declared all governmental legal proceedings material, although guidedly remarking that "it is obvious that is not necessarily true for purposes of security valuation."[282]

After more than fourteen months of deliberation, the SEC formalized its guidelines for environmental disclosure and, as a court was to remark later, "in no way enlarged and in some respects retreated from those changes which the SEC had proposed" in February 1972.[283] Companies were to disclose governmental or private litigation only if potential liability exceeded ten percent of the company's consolidated current assets.[284] All governmental actions need not be disclosed; they need only be generally described in groups, according to the generic nature of the claims involved. The Commission made no mention of equal employment opportunity, presumably resting on what traditional disclosure rules might bring forth in an instance or two.

In the meanwhile, the Commission had given the Natural Resources Defense Council short shrift. In December 1971, the Commission had announced it would not issue the rules petitioners had

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279. *See* note 275 *supra.*

280. The position was roundly criticized. Schwartz viewed the release as

> [A] myopic response . . . because it is a rejection of the most important device available for the Government to further an important social objective. It is a needlessly narrow concept of the role of the SEC . . . .

Schwartz, *supra* note 35, at 98. *Accord*: Schoenbaum, *supra* note 5, at 572-73.

281. SEC Securities Act Release No. 5235 (Feb. 16, 1972). The test had been 15% of current assets. *Id.* A 10% test would still require drastic outlays before the company need disclose. For forest products producers, the outlay for environmental remedial action might have to be $48 million, Weyerhauser Corp. 1973 Ann. Rep. 26, or $47 million, Boise Cascade Corp. 1973 Ann. Rep. at 38, before disclosure need begin. For a large oil producer, the figure triggering disclosure would be a $577 million capital expenditure, Gulf Oil Corp. 1974 Ann. Rep. 26.

282. SEC Securities Act Release No. 5235 (Feb. 16, 1972).

283. Natural Resources Defense Counsel, Inc. v. SEC, 389 F. Supp. 689, 695. (D.D.C. 1974).

284. SEC Securities Act Release No. 5386 (April 20, 1973).

requested.[285] Along with its cohorts, Natural Resources Defense Council went to court.[286] Petitioners characterized the SEC's treatment of their claims as violative of both the National Environmental Policy Act (NEPA)[287] and the Administrative Procedure Act (APA).[288] The SEC never had complied with NEPA requirements, or with an implementing Executive Order requiring agencies to reform their programs and policies so as to aid in the enhancement of environmental values. Finally, after two deadlines for reports on agency compliance with NEPA had passed,[289] in its February 1972 release the Commission announced that "[t]his action is being taken pursuant to the National Environmental Policy Act."[290] Petitioner Natural Resources Defense Council complained that if, as the SEC maintained, the rules the SEC proposed in February 1972, and adopted in revised form in April 1973, fully satisfied NEPA, then the notice of the February 1972 proposed rules failed adequately to inform the public that this was to be the agency action meant by the SEC to satisfy NEPA once and for all. Petitioners argued that such a failure to give adequate public notice of what rule-making action an agency intended to take violated the APA.[291]

The District Court for the District of Columbia, per Judge Charles Richey, upheld virtually all of petitioners' NEPA and APA claims. The court ordered the SEC to conduct new rule-making procedures, including public hearings. Out of those proceedings the SEC was to provide the court with a narrative sufficient to enable the court to review "the SEC's concept . . . of its statutory obliga-

285. 389 F. Supp. at 694.

286. After first filing in the Court of Appeals, No. 72-1148 (unreported dec. D.C. Cir.) (Feb. 8, 1973) and after dismissal, petitioners refiled in the District Court.

287. 42 U.S.C. § 4321 (1970), *as amended*, (Supp. II, 1972).

288. 5 U.S.C. § 500 (1970), *as amended*, (Supp. IV, 1974).

289. The NEPA requires each federal agency to review its " . . . regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies . . . therein which prohibit full compliance with the purposes" of the Act, that is, enhancement of environmental quality. Agencies were to "propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures" of the Act. 42 U.S.C. § 4333. Exec. Order No. 11,514, 3 C.F.R. 285 (Supp. 1973) implementing NEPA § 4333, directed all agencies to "develop programs and measures to protect and enhance environmental quality." Further, agencies were to make a preliminary review of the type NEPA contemplated, submitting the review to the Council on Environmental Quality not later than Sept. 1, 1970.

290. SEC Securities Act Release No. 5235 (Feb. 16, 1972). The release announcing the adoption of a revised version of the Feb. 1972 proposals also announced the SEC opinion that the revised version would "promote the purposes of the NEPA." SEC Securities Act Release No. 5386 (April 20, 1973), discussed notes 283-84 *supra* and accompanying text.

291. 5 U.S.C. § 553 (1970) (APA rule-making notice provision).

tion to the public under the securities acts and NEPA."[292] The court also ordered the SEC to develop a record to resolve the "overriding factual issue" of "the extent of 'ethical investor' interest in the type of information which Plaintiffs have requested."[293]

The tenor of Judge Richey's decision was quite illuminating. He began with the premise that Natural Resources Defense Council, the Project on Corporate Social Responsibility, and similar groups "want information about corporations to make socially responsible investment decisions" and "to further public education."[294] Moreover, as evidence of such information's usefulness in investment decisions, the judge took notice of the "large number of 'ethical investors' in this country—individuals and institutions . . . which . . . need the information Plaintiffs seek in order to make investment and voting decisions in accordance with their high principles and societal interests."[295] He viewed the SEC's prior history in providing social responsibility disclosure as "an apparent decision" by the Commission that "no reasonable investor in this country wants the type of information which Plaintiffs seek," a conclusion the judge was not about to accept:

> There are many so-called "ethical investors" in this country who want to invest their assets in firms which are concerned about and acting on environmental problems . . . . This attitude may be based purely upon a concern for the environment, but it may also proceed from the recognition that awareness of and sensitivity to environmental problems is the mark of intelligent management. [T]his Court is not prepared to say that they are not rational inves-

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292. 389 F. Supp. at 701.

293. *Id.*, citing THE ETHICAL INVESTOR, *supra* note 1. Judge Richey's reliance upon that volume is a bit misplaced. *The Ethical Investor* reaches the conclusion that in the management of their endowments, investors should observe only what the authors describe as the Kew Gardens principle. *Id.* That is, to avoid possible infringement on others' academic freedom, etc., *see* note 136 *supra*, universities should interfere only when a portfolio company is doing affirmative harm to other persons. The authors derive the principle from an incident in which bystanders stood by while a young woman was attacked in New York's Kew Gardens area. *Id.* at 22-25. Commentators have criticized *The Ethical Investor* as going only a very short way towards encouraging socially responsible investment selection and management. *See, e.g.*, Mundheim, Book Review, *supra* note 164, at 1073, n.37. Much better evidence exists as to the extent institutional investors, at least, take social responsibility into account in investment management. *See* notes 129-42 *supra* and accompanying text. Judge Richey might have relied upon much of that better evidence.

294. 389 F. Supp. 692. Those particular groups' motive behind the desire to obtain information may be more for use as evidence with which to incriminate corporations or as fodder with which to generate adverse publicity. *See* notes 345-51 *infra* and accompanying text. Perhaps Judge Richey should have characterized the wants as those of investors generally, or a subpopulation thereof, rather than as of the Project on Corporate Responsibility, a severe and vocal critic of corporate behavior.

295. 389 F. Supp. 693.

tors and that the information they seek is not material information within the meaning of the securities laws.[296]

The SEC resolved to heed the letter of Judge Richey's order. Using the order's exact wording, the Commission announced public hearings to commence April 15, 1975.[297] As to the spirit of the judge's opinion, however, the SEC agreed not at all. The release announcing hearings characterized the scope of the planned inquiry to be "the basis and extent, *if any*, of the Commission's authority to require disclosure of matters primarily of social concern but of doubtful economic significance . . . ."[298] The Commission did not announce the scope of the inquiry to be if social responsibility information has economic significance in the first place, or even if a significant number of investors believe that it has, or even if a number of investors merely desire such information, economically significant or not.[299] The Commission also all but foreclosed inquiry into equal employment opportunity disclosure. Its announcement read:

> The Commission feels that it would be difficult, if not impossible to make a meaningful evaluation of a company's current hiring and promotion practices . . . . [to the extent that unequal educational opportunity or . . . incentive has produced a lack of qualified women or minority group members . . . , individual employers would find it most difficult to recruit . . . . Raw statistics, reflecting only the fact that a company has not successfully recruited persons within these categories would provide little or no insight into the quality or extent of the company's recruitment efforts].[300]

Despite its foregone conclusion, the SEC held hearings on social responsibility disclosure. Predictably, the final results those hearings produced reflected the same negative tone with which the Commission had announced hearings. The Commission's opening gam-

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296. *Id.* at 697-700.

297. SEC Securities Act Release No. 5569 (Feb. 11, 1975).

298. *Id.* (emphasis added). The SEC noted: "The fact that the Commission is conducting these proceedings should not be taken to indicate any view as to its authority to assist members of the investing public in matters primarily of social rather than financial concern." *Id.* at n.2.

299. After all, members of the Commission have stated in the past that "[W]e do endeavor to give investors what they want." *See* note 144 *supra*.

300. SEC Securities Act Release No. 5569 at n.9 and accompanying text (Feb. 11, 1975). Of course, one could make the exact same statement about the naked sales, profit, or other financial statistics present disclosures contain. Any statistics, including minority hiring data, gain value only through comparison with those of other companies and by comparison with the same company's statistics for prior years. *See, e.g.*, notes 154-57 *supra* and accompanying text. Furthermore, disclosure uses narratives and other communication devices to show the quality or the promise in business or financial areas, whether or not the statistics support that viewpoint. *See* notes 200-06 *supra* and accompanying text. Likewise narratives or data other than final results can show something of the quality or extent of a company's minority hiring efforts, as the process audit, notes 25-52 *supra* and accompanying text, contemplates.

bit was again to stereotype disclosure on social responsibility as the "promotion of social goals unrelated to the objectives of the federal securities laws."[301] In nineteen days of formal hearings, the Commission had heard fifty-four oral presentations and had reviewed 353 written comments.[302] Deep in the text of the lengthy release summarizing those hearings, the Commission noted that:

> [T]hose investor participants who supported social disclosure were virtually unanimous in stating that such information is economically significant. They argued that non-compliance with environmental, equal employment, or similar laws could lead to extensive costs and liabilities; that the ability to avoid such problems provides an index to management's overall quality; and that in the long run corporate social responsibility determines the public relations and regulatory framework within which a company operates. Relatively few investor-participants expressed interest on non-economic grounds.[303]

Nevertheless, casting aside the manifest weight of at least that testimony before it, the Commission made characterizations of social disclosure throughout its conclusions as "being for the sole purpose of promoting social goals unrelated to those underlying the Acts."[304]

One *raison d'etre* for a Securities and Exchange Commission has always been to require corporations to disclose information when investor demand for it exists but is not readily apparent because of the widely scattered or defused nature of that demand and the small monetary stake of those interested in the information. "Consequently, the costs of bargaining for adequate information may exceed the value of that information in improving the investment decision."[305] Similarly, an SEC mission is to require disclosure of information for which perhaps no overwhelming demand exists but which regulators nonetheless feel would be beneficial for investors.

Despite that vital SEC role, in its social responsibility disclosure proceedings the SEC counted heads as a determinant of whether the demand for social responsibility information was sufficient to require disclosure. More egregiously, or perhaps with a bit of duplicity, the Commission counted only the heads who had ac-

301. SEC Securities Act Release No. 5677 (Oct. 14, 1975); [Current] CCH FED. SEC. L. REP. ¶ 80,310 at 85,706.

302. [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,706.

303. *Id.* at 85,713.

304. *Id. See also id.* at 85,716, refusing to take hearing participants' words at face value and maintaining that they want disclosure "as a weapon to influence, if not control, most of the activities in the private sector which have an impact" on social responsibility issues.

305. *See* the quotation from Dooley, note 248 *supra. See generally* Benston, *supra* note 117.

tually traveled to Washington and appeared before the Commission or who had taken the time to submit written comments as being seemingly indicative of total demand for social accounting and disclosure.[306] Nevertheless, the results were not insignificant. Of those persons who took the time and expense to appear before or to comment to the Commission in favor of social responsibility disclosure, many "did not identify their investment portfolios." Impressively, though,

> [t]he holdings of those who did . . . [seven foundations, 22 religious groups, 11 educational institutions, two mutual funds, five environmental groups, 37 individual investors, and one state, Minnesota . . . .] constitute approximately 2/3 of 1% of the estimated aggregate value of the common and preferred stock and corporate bonds held in this country at the end of 1974.[307]

Although the SEC had never before counted the heads appearing before it as indicative of the demand for or the wisdom of complying with requests for disclosure, the interest in social responsibility disclosure actually arrayed before the Commission seemed to exceed the total demand upon which the Commission has based earlier commercial disclosure requirements.[308]

In the social disclosure hearings, the Investment Company Institute, the mutual funds' trade group, The American Bankers Association—Trust Division, and the Financial Analysts Federation all submitted written comment stating that social responsibility criteria should be part of the investment process. The mutual funds group and the bankers also submitted long-standing policy statements to their members recommending use of such criteria in investment management.[309] The Commission noted that

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306. *See* [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,719-23. The Commission made no attempt to project the interests of investors before it to the investor population as a whole, or to warn readers of its release that such a task might be in order to determine the true investor demand for social responsibility information.

307. *Id.* at 85,719 & n.49.

308. *See, e.g.*, the Commission's implementation of the requirement that companies send the 10K report despite experimentation showing that only 40 General Motors or 20 or so shareholders in similar large corporations wanted it, *supra* note 213; the Commission's foray into the breakdown of sales and profit figures according to the corporate products which produced them at the behest of several New York financial analysts who felt that they needed the information, *see, e.g.*, Wall Street J., Jan. 14, 1974, at 4, col. 3-4 (analysts requesting expanded line of business reporting).

309. [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,720. In a representative year before the 1973-75 market slide, mutual funds held $79.6 billion in assets, mostly in stocks, and bank trust divisions managed $185.5 billion in personal and common trust funds. 32 SEC STATISTICAL BULLETIN 866-67 (1973). Pension funds held $150 billion. *Id.* As many pension funds' assets are invested by banks, any indication of interest or a policy statement to members on socially responsible investment by the most influential mutual fund and bank-

"[u]nfortunately there was no broad participation by financial institutions in the hearing." The trade groups comments were deemed only "indirect indications" of interest in social responsibility information.[310]

Well-known indications of institutional investor interest in social responsibility are available to the Commission.[311] An open review of the question, however, would have told the Commission that, despite that professed interest, many financial institutions neither appeared before the Commission nor pressed for social responsibility disclosure by written comment. One possible reason for this lack of response is that financial institutions do not actually use social criteria in investing; hence, they have no need for disclosure. In view of many institutions' strong and repeated expressions of interest, however, that explanation is not likely to be universally true. The other explanation for institutions' failure to appear before the Commission to support disclosure might be that large institutional investors already have the needed social responsibility information that disclosure would provide. Institutional investors can and do obtain the information from their trade groups' social responsibility information clearinghouses, directly from portfolio companies themselves, or through preferential access to other information sources their size and bargaining power give them.[312] In its reasoning to a preordained conclusion, however, the Commission discusses neither possibility.

The Commission indicates that little evidence of individual investor attitudes toward social responsibility exists.[313] That is prob-

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ers' trade groups might lead to an inference of substantial demand for social responsibility information.

310. [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,719.

311. *See, e.g.*, the Ford Foundation study and the Senate study, *supra* notes 129-42 and accompanying text. In that regard, Commissioner Sommer discussed and agreed with the Ford Foundation study's findings of a high degree of institutional interest in a symposium in which other Commission members participated. *See Corporate Social Responsibility, The Role of the SEC, supra* note 128, at 215-16 & 220-21.

312. *See* notes 39-42 and 238-42 *supra* and accompanying text. Of course, the question arises as to why public interest groups' clearinghouses, notes 36-38 *supra* and accompanying text, cannot satisfy individual investors' demands for information just as trade groups' clearinghouses satisfy some institutions' demands. One answer is that, given knowledge of clearinghouses' existence, many moderate individuals may not relish using those clearinghouses. Many of the information sources to which individuals can gain access are, however well-intentioned they may be, biased or messianic in outlook. The National Council of Churches or Council on Economic Priorities are not as likely to produce assessments as dispassionate as are the insurance industry or mutual funds group clearinghouses.

313. [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,719.

ably true.[314] On the other hand, in its hearings the Commission unfairly infers that the only credible evidence of individual investor interest on social responsibility would be an in-depth statistical survey of the country's 30 million investors.[315] The Commission itself, however, inconsistently gave credence to evidence of doubtful validity for the proposition that individual investors have very little interest in corporate social responsibility.[316]

One further part of the proceeding amply demonstrated the SEC's bias against social responsibility disclosures. In addition to implying at one point that anything resembling worthwhile environmental disclosure effectively would require disclosure documents to reproduce the thousands of pages typical environmental impact statements contain,[317] the Commission forwarded other weak *reductio ad absurdum* arguments against social accounting and disclosure. One was that investors had expressed interest in information on over "100 different" social responsibility matters. Inclusion in disclosure of data on all these categories would make "disclosure documents wholly unmanageable."[318] In a bewildering, small-print footnote, without any discernment whatsoever, the Commission listed all matters in which " 'ethical investors' were said to be interested," including the vague ("[c]ommitment to the 'human community' "), the esoteric ("expenditures on the land grant college system"), and the ridiculous ("discrimination against persons less than six feet tall").[319] The Commission's inference was that, if implemented, social responsibility disclosure would have to speak to all or most of those matters, or that corporate social responsibility is a frivolous notion.

314. *See* notes 146-48 *supra* and accompanying text.

315. [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,712.

316. The Commission's evidence is the poor performance of two, and the marginal performance of a third, of four "Social Fund" mutual funds. *Id.* at 85,719. The literature presents ample evidence to show that the late 1960's limited social fund experiment failed because of its nature. The social funds tried to combine a sense of mission and searches for clean companies rather than adopting a relative approach to socially responsible investment. *See, e.g.*, note 41 *supra*. The poor investment performance that resulted caused the funds to lose attractiveness to investors. Moreover, the Commission's evidence comes from a period when investor interest in mutual funds generally spiraled downward. *See* Wall Street J., Mar. 21, 1972, at 1, col. 6; the 1973 MARKET FACTS SMALL INVESTOR SURVEY, *supra* note 246, at 26 (asked to invest a $10,000 windfall, 65% of the small investors and 72% of the active small investors would not invest in mutual funds at all, feeling that their commission charges are too high and the financial return too low).

317. [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,712 & n.27.

318. *Id.* at 85,724-25.

319. *Id.* at 85,724 & n.72.

Moreover, what the Commission failed to note is important. For example, the Commission might have noted that in any open, plenary proceeding dealing with financial disclosure generally, investors and others probably would also posit needs for over a hundred categories of information. That would be especially likely if no prior financial disclosure requirements were in existence, as is the case in the social responsibility area. The Commission could have made a serious review of corporate social responsibility's recent history, which would show that serious interests of investors and academicians have focused on five or six areas of concern, out of the multitude of social responsibility areas activists had pointed to a few years ago.[320] The Commission, however, failed to probe such considerations.

All in all, the SEC's October 22, 1975, refusal to require significant social responsibility disclosures seemed less than a good faith effort.[321] Whether through oversight or not, the Commission altogether failed to comply with a statute (NEPA) and an executive order implementing that statute. Once the agency acted, it acted in an incomplete and somewhat arbitrary manner, at least in one judge's and some commentators' opinions. A court order was necessary to force the SEC to hold something like a wide-ranging inquiry into corporate social responsibility disclosure. In announcing those hearings, the SEC adopted a very negative and chilling tone. And the SEC pronouncements those hearings produced seem a parody, a thinly veiled charade. Moreover, the process took five years. So indications are that the SEC will act with less than alacrity and will move fitfully, if at all, in the social responsibility area. Why the Commission finds this area so troublesome is mystifying. Perhaps an inquiry into and a clarification of this question may lead to a melting away of some of the agency's recalcitrance.

320. *E.g.*, product safety, minority hiring and advancement, employee health and safety, environmental matters, corporate philanthropy, energy conservation and development, and perhaps involvement in community affairs. *See, e.g.*, note 107 *supra*.

321. The hearings did result in one slight proposed expansion of the environmental disclosure requirements—that a company must file as an exhibit to disclosure documents, but not in the documents themselves, a backward-looking review of cases in the past year where it has failed to meet federal, but not state, statutory environmental requirements. *See* note 208 *supra*. But in a later, seemingly begrudging move the Commission backtracked to square one and retracted even the small expansion of disclosure requirements the Natural Resources Defense Council had apparently won in the five year proceeding. SEC Securities Act Release No. 12414 (May 6, 1976).

C. *The Revolution on the Theory of the Corporation*

The reasons for the Commission's formal stance against disclosure are no doubt many, and some are posited in the introduction to this section. The Commission's position has not been supported by other authorities.[322] Serious and able commentators have been calling for some social responsibility disclosure for a long time. In the current period, calls for disclosure date as far back as the early 1960's. Writing in 1962, Professor William Cary, then SEC Chairman, argued for some sort of social responsibility reporting.[323] More recently, other writers have entered the field.[324] The difficulty with that writing, however, has been that, able as they are, the commentators have not called for disclosure on traditional grounds. For example, one writer in the 1960's echoed the view that a major "role of disclosure" is

> [a]s a method of regulating the major economic centers of power within our country . . . . [A]n important by-product of the disclosure required . . . is that management of these major centers of power . . . must operate in a goldfish bowl . . . . The interests of employers, consumers, and the general public are protected by the required disclosures.[325]

Such early thinking reinforces the SEC's conviction that most social responsibility disclosure is sought as a "weapon to control" corporate activity,[326] and not primarily to satisfy investors' needs.

Later commentators have given further grounding to the SEC's conviction. For example, one commentator criticizes "the entrenched concept" of disclosure as relating merely to investors. Rather, the proper view is that:

> [D]isclosure is . . . society oriented. The efficient allocation of resources is secondary to the ethical and moral aspects of disclosure . . . . The heart of the problem is getting at the impact of corporate behavior on society, not only as to its financial affairs . . . .[327]

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322. *See* note 13 *supra*.

323. Knauss, note 13 *supra*; *see also* Knauss, *supra* note 253 at 43-44.

324. *E.g.*, the authorities cited note 5 *supra*.

325. Knauss, *supra* note 253, at 43 (footnotes omitted); *see also* Knauss, *supra* note 13, at 647 (footnotes omitted):

> It is frequently stated that the large corporation has an obligation not only to its shareholders, but also to its employees, its consumers, and the community in which it operates. The officers and directors of large corporations have been compared to public officials . . . . [A]ny evaluation of . . . disclosure . . . must acknowledge that the disclosures required . . . enable employees, consumers, and the general public to obtain information and thus exercise pressure . . . .

326. Even Professor Cary's 1962 article dwells upon the operation of the "public consensus" to restrain modern corporate management. Cary, *supra* note 13, at 417-18.

327. Schoenbaum, *supra* note 5, at 578. Professor Schoenbaum also shares the idea of disclosure "regulating corporations as major power centers of our society." *Id.*

The opening paragraph of another recent article calling for social responsibility disclosure goes farther:

> The American corporation has emerged as one of the primary sources of power in the society, with profound impact on the lives and fortunes of those subject to its influence. It has become a major political and social, as well as economic, institution inseparably inter-related with the fundamental problems in the society . . . . In brief, "private" has become "public."[328]

Such views only cloud the issue, if not inflame feelings already sensitized by dealing with such a touchy subject.

Indeed, in the corporate law reform area generally, the most oft-heard premise is that the modern, publicly held corporation is no longer primarily an economic entity but has become something else or something more—a public institution, a socioeconomic or social entity, a major uncontrolled power center in society that must be made accountable.[329] The corporation is a runaway trust with no *cestui qui* of influence who can control the "trustee" or a quasi-public institution: disclosure or other reforms are needed not to fulfill the traditional goals but to tame or check the "runaway beast," to reassert the lack of accountability separation of ownership and control causes, or to force corporations to set and make progress toward social as well as economic goals.

The steady chain of literature opining that the existing large company is not an accurate reflection of what the model corporation law envisions began in 1932 with Adolf Berle's and Gardiner Means' *The Modern Corporation and Private Property*. Berle and Means predicted the separation of ownership and control. That is, in a large country, with a vast population and efficient capital markets, public shareholders and their stock ownership would become so diffused that seldom could or would public shareholders band together to exercise the control over the corporation their ownership interest and voting power had given them. Instead, a small group of investors, owning perhaps fifteen to twenty percent of the stock and holding directorships and the principal corporate offices, would be able to perpetuate themselves in control of the corporation, an-

328. Blumberg, *supra* note 5, at 1025.

329. A leading exponent of that view is John Galbraith:

> The public view of the corporation . . . holds that not only Lockheed and General Dynamics but also AT&T, General Motors . . . and the other great corporations involve a clear break from the economy and polity of the classical market. As they grow and become more powerful, such firms acquire, increasingly, a public character. They become public institutions.

Galbraith, *On the Economic Image of Corporate Enterprise*, in CORPORATE POWER IN AMERICA 3, 5 (R. Nader-M. Green eds. 1973).

swerable only to themselves. The check on management corporate laws presumed to exist, shareholders' votes, no longer would be effective.[330]

After Berle and Means a succession of writers perceived other forces rising up over time to supply the missing check on corporate management. Each, however, later admitted the fallacy infecting their analysis. For example, Galbraith saw organized labor and other forces as a "countervailing power," reinstating some control over management or as a group to which management would have to account.[331] He, however, later recanted, realizing that labor's goals were often so similar to management's—increasing sales, production, and so on—as to render labor nugatory as a countervailing force.[332]

After the American discovery of the British takeover bid, or tender offer, many saw forces in the market for shares as another check on management that might substitute for the vanquished notion of accountability to shareholders. If management's activities did not win acceptance among shareowners, they sold and share prices fell. Lower share prices posed the threat of market purchases by insurgents who, upon obtaining enough voting power, deposed management. Hence, most directors managed well for fear of the market holding them accountable.[333] That theory did not hold either. In certain accommodating jurisdictions, courts permitted poorly performing incumbent managements to use any number of tactics to defeat threats to their control. To dilute insurgents' interest and voting power, management could issue a large block of stock to a friendly third party, or management could use corporate funds to bribe would-be usurpers by purchasing their shares at a premium over market price.[334] Next, federal tender offer legislation gave management more means with which to defeat a challenger's tender

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330. To date, most writers have agreed with Berle and Mean's thesis. *See, e.g.*, Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CALIF. L. REV. 1 (1969); Hetherington, *supra* note 120; Manning, Book Review, 67 YALE L.J. 1477 (1958); Ratner, *supra* note 93.

331. *See generally* J. K. GALBRAITH, AMERICAN CAPITALISM (1952).

332. *See generally* J. K. GALBRAITH, THE INDUSTRIAL STATE (1967).

333. The best statement of the theory is Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

334. The Delaware cases best illustrate courts' approval of such tactics. *See* Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (Sup. Ct. 1964) (stock purchases); American Hardware Corp. v. Savage Arms Corp., 37 Del. Ch. 59, 136 A.2d 690 (Sup. Ct. 1957) (stock issuance).

offer.[335] Thus another new model of corporate accountability faded away.[336]

Accompanying the realization that corporate managements were no longer accountable to shareholders was a movement that said if corporate accountability were to be reinstated, it should also run to groups other than shareholders—employees, consumers, the local community, and society. Instead of having a single goal of profit maximization for shareholders, corporations should have in a coequal position, along with profits for shareholders, the goals of safety and welfare for employees, clean air and water for society, and safety and utility for consumers.[337] This viewpoint is reflected in recent proposals for legislative reform that have followed recognition of the failure of gradually rising forces to reassert control over corporate managements. These reformers do not want to reassert legal control as of old, by returning it to shareholders. They want legislative controls to take cognizance of and define corporate responsibilities to consumers, the community, and the society as a whole. The federal government would be the representative of the society to whom those responsibilities would flow. Federal chartering of corporations, legislatively imposed public interest directorates, and federal minimum corporate law standards are part of that movement.[338]

The SEC may misunderstand social responsibility disclosure to be but one device competing with others to force government to take cognizance of a new corporate model that would impose hydra-headed rather than just shareowner-oriented responsibility upon corporations and view them as quasi-social, quasi-public institutions. Indeed, disclosure could do that, but, as has been seen,[339] unlike most other proposed reforms some social accounting and disclosure also can rest on traditional rationales for regulation by disclosure. Social accounting and disclosure also can rest on the tradi-

335. *See generally* Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231; Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 HARV. J. LEGIS. 431 (1968).

336. In a bit of overkill, certain states have passed legislation not only limiting the tender offer's effectiveness but making it virtually impossible to depose incumbent management via tender offer if the target company is domiciled in the state. *See, e.g.*, NEV. REV. STAT. §§ 78.376-78.3778 (1969); OHIO REV. CODE ANN. § 1707.041 (Supp. 1975); VA. CODE ANN. §§ 13.1-528 to -531 (1973); Wysocki, *To Stall Takeover Bids, Many Companies Use Obscure New Statutes*, Wall Street J., Nov. 19, 1975, at 1, col. 6.

337. W. CARY, CASES AND MATERIALS ON CORPORATIONS at 229-49 (4th ed. 1969) summarizes these developments.

338. *See* notes 397-435 *infra* and accompanying text.

339. *E.g.*, notes 120-272 *supra* and accompanying text.

tional model of the corporate entity as a primarily economic, private entity with major responsibility to shareholders and to prospective shareholders (investors).

The confusion of disclosure with other more radical reforms, based as they are on new theories of the corporation, presents a difficulty. The difficulty is that although as a reform measure disclosure is not radical, the Commission may believe that the premise upon which the reform is based has vague and far-ranging implications. Those who first called for disclosure may have thus done a disservice by failing clearly to think out the purposes such disclosure would serve. Calls for disclosure, or for some other reform, based upon some new view of the corporation have upstaged the evolution of investor expectations that has made disclosure on traditional grounds possible. Change in the fundamental policy upon which not only regulation by disclosure, but also the traditional corporate model, is based, to be replaced by a nebulous model of unknown dimensions,[340] is feared.

Widespread belief or possible governmental acceptance that the large corporation is a public entity has possible ramifications that would worry the SEC. Such a view might transform corporations' actions into state action to which the fourteenth amendment's due process and equal protection clauses apply.[341] Governmental acceptance of the view that a corporation is a public entity, implemented through disclosure premised upon such a view, could have far-reaching antitrust law implications. Such a view might be found to subsume a view that like stock ownership, competition no longer exists as a check on the large corporation. Just as agencies could

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340. All of the economists and theorists have discarded the old model but no two can agree upon a new paradigm. *See* notes 176-81 *supra* and accompanying text. So the SEC view, believing that social responsibility disclosure must be based on some new view of the corporate entity, if at all, is a view like that of Adolf Berle in *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932):

> You cannot abandon emphasis on the view that business corporations exist for the sole purpose of making profits for their stockholders until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.

341. Mr. Justice Douglas has articulated a view that the equal protection clause applies to prevent invidious discrimination by private groups whenever the activity involved is governmental or public in nature. *See* Reitman v. Mulkey, 387 U.S. 369, 384 (1967) (concurring opinion) (private group's action to rezone neighborhood to foster segregation violates equal protection); Evans v. Newton, 382 U.S. 296, 301-02 (1966) (privately owned park's "mass recreation" function is "municipal in nature" and equal protection applies); Lombard v. Louisiana, 373 U.S. 267, 282-83 (1963); (concurring opinion) (restaurant's function is public in nature). With the heretofore private entity, the corporation, being considered a public entity, equal protection and due process might touch a broad spectrum of corporate affairs. *See generally* Ratner, *supra* note 114, at 42-43.

require disclosure on that basis, courts could exact antitrust remedies to reassert control over the unchecked corporate entity.[342]

Then, too, the SEC may have resisted disclosure on social responsibility issues because many of the voices calling for disclosure, or for other proposed reforms, not only premised reform upon a new view of the corporation, with much wider responsibility than traditional profit-making,[343] but they did so with radical, threatening, and shrill voices. Many have taken a confrontation approach by portraying their programs or reforms as efforts to "tame the corporate tiger."[344] Painting all corporations as the protagonists behind the society's doomsday has made the path to reform neither easy nor clear.

Premising disclosure on a new view of the corporation with hydra-headed but undefined responsibilities, and doing so with shrill voices, makes any social responsibility disclosure the SEC might require take on more the complexion of the stick than the beguile of the carrot. Reformers would have the SEC implement disclosure much like that other areas of the law contemplate, and this may cause the Commission to bridle. For example, under the Labor Management Reporting and Disclosure Act of 1959, labor union officials must disclose information about the use of union

342. Galbraith, *supra* note 329, at 4-5 expouses such a view, as does Henning, *supra* note 126, at 152.

343. One of the most shrill is M. MINZ & J. COHEN, AMERICA, INC.: WHO OWNS AND OPERATES THE UNITED STATES (1971), called a "one sided and distorted picture" by even one of the more vocal, yet responsible corporate law reformers. *See* Blumberg, Book Review, 50 TEXAS L. REV. 598 (1972). Other shrill voices are M. TANZER, THE SICK SOCIETY (1971) and CORPORATE POWER IN AMERICA (R. Nader-M. Green eds. 1973). In surveying that literature, Preston characterized these and similar works as expounding on the "exploitation thesis" of the modern corporation, not through careful analysis, but through "popular and anecdotal presentations." Preston, *supra* note 156, at 439.

344. N. Y. Times, Feb. 8, 1970, at 44, col. 1 (statement of R. Nader christening the launch of Campaign GM). *See also* Henning, *Federal Chartering For Big Business: An Idea Whose Time Has Come*, 21 DEPAUL L. REV. 915, 923-82 (1972) advocating federal chartering with a perhaps eloquent but less than conciliatory tone:

> [T[here are those who reject a fundamental structural approach [*i.e.*, federal chartering[to corporate reform. Some men who have held high office in business and government believe the better alternative is to surrender society to the corporation . . . . Others are equally prepared to surrender to . . . the conquering corporations but prudently throw themselves upon their mercy, pleading for "corporate social responsibility." . . . [T[hey urge business managers to assume economic statesmanship, to balance the interests of all corporate constituencies and the general public . . . . These supplicants ignore Lord Acton's rule concerning power in the hands of unaccountable, self-perpetuating rulers. They also conveniently overlook the palpable evidence of corporate irresponsibility in our air, water and food, on our highways, railroads and television sets, and in our sacked and gradually abandoned cities.

funds.[345] Presumably, they must do so because union officers have fiduciary duties and because unions have some appearance of quasi-public institutions.[346] Legislation requires such disclosure for reasons similar to securities law disclosure requirements—to allow union members to evaluate how well management is doing its job. An added aim, however, is to force union officials to reveal illegal conduct so that corrupt union officials may be prosecuted. On the other hand, if corrupt union officials do not incriminate themselves, the government will prosecute them for disclosure law violations. Such a use of disclosure is known as "the enforcement effect."[347]

Disclosure's enforcement effect is not unknown to the securities law area,[348] but most onlookers do not regard the enforcement effect as a principal aim of the securities law disclosure system. Some of the more vocal of those who seek social responsibility disclosure, however, do so to import larger amounts of disclosure's enforcement effect into securities regulation and into the social responsibility area.[349] Based upon information the SEC would require, government agencies other than the SEC would prosecute firms for substantive law violations SEC disclosure reveals, such as environmental law or

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345. 29 U.S.C. § 401 (1970). Union officials must make still other disclosures under the Welfare and Pension Plans Act, 29 U.S.C. §§ 301-09 (1970).

346. *See, e.g.*, Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609 (1959).

347. Union officers must disclose both illegal conduct, such as payments and loans to themselves, and conduct giving rise to perhaps only civil liability or political opprobrium. 29 U.S.C. §§ 431-433 (1970). The discussion in Note, *Disclosure as a Legislative Device*, 76 HARV. L. REV. 1273, 1274 (1962), uses the first type of conduct and disclosure laws requiring public reporting of the same as a use of disclosure to achieve an enforcement effect.

348. One recent application with which the SEC has been grappling is the forced revelation of corporate campaign contributions and bribes to foreign officials, note 196 *supra* and accompanying text. SEC-forced disclosure may ease the prosecutor's task in investigating crimes under statutes making corporate political contributions or bribes illegal. Another example might be the Securities Exchange of 1934's short swing profit provisions. Under the threat of § 16(a) penalties, insiders must report their purchases and sales of their company's securities. The revelation of purchases and sales, however, may give use to certain civil liability under § 16(b) Securities Exchange Act of 1934 § 16, 15 U.S.C. 78p (1964). Knauss reviews other governmental uses of disclosure to aid in enforcement of substantive law measures such as a means of uncovering politicians' and governmental employees' conflicts of interest, or as a means of forcing revelation of the imposition of usurious costs in borrowing money. Knauss, *supra* note 13, at 648.

349. In mild form, Schoenbaum recommends use of disclosure to achieve an enforcement effect. That is, to

> [e]xpose those areas of corporate behavior which cannot be reformed internally, but which must be dealt with through government action and legislation . . . . [T]here will be matters which can be corrected only through direct action by government.

Schoenbaum, *supra* note 5, at 588. Schwartz perhaps similarly seeks disclosure in the way of "adding costs to the type conduct we wish to discourage" in order to "force managers to direct business more in the service of our entire society." Schwartz, *supra* note 35, at 91.

anti-discrimination statute violations. Other information that disclosure reveals would be the basis for legislative proposals to make certain types of conduct illegal.

Another use to which some laws outside the securities area put disclosure is the "publicity effect."[350] Certain corporate activists would have the SEC use social responsibility disclosure in much the same way.[351] To produce a publicity effect, regulators with whom persons or corporations file disclosures give wide dissemination to those disclosures that reveal certain failures of persons to meet minimum performance standards. The purpose of this dissemination is not to bring criminal or civil prosecutions, as with an enforcement effect, but to generate adverse peer-group and public reaction and to increase pressure on the exposed persons to reform themselves. In the corporate social responsibility area, dissemination of disclosed corporate irresponsibility would result in investor pressure on the firm to make amends for laggard performances. Wider dissemination might produce pressure not only from investors, as present SEC disclosure and dissemination might try to do in the financial area, but from consumers who would stop purchasing a company's products, from more responsible, peer-group corporate managers who might hesitate to do business with notorious corporate ne'r-do-wells, and by the popular press, who would fuel the fire.

The use of disclosure under the securities laws heretofore has largely been designed to achieve what is termed "an information effect."[352] An information effect does not require a new view of the corporation as a socioeconomic institution with responsibilities to many groups beyond shareholders, as do publicity or enforcement effects.[353] Under disclosure whose primary purpose is to achieve an

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350. *See* Note, *supra* note 347, at 1282-83.

351. *E.g.*, Schwartz, *supra* note 35, at 96-98 illustrates a publicity effect as a principal, if not the principal value of social responsibility disclosure.

> The disclosure of unflattering information imposes a cost—the cost of embarassment—which might turn into the cost of consumer retaliation. To avoid paying that cost, companies would have to change the facts required to be disclosed . . . .

See also the quotation from Knauss, text accompanying note 325 *supra*.

352. Indeed, Note, *supra* note 347, at 1276-79 uses securities law disclosure requirements as a prime example of a legislative-regulatory use of disclosure to achieve an "information effect."

353. Except perhaps on the part of investors themselves. Indeed, the gradual realization by investors, especially institutional investors, and by corporate executives, economists, and theorists, notes 170-81 *supra* and accompanying text, that a corporation's sole goal can no longer be profit maximization, or profit maximization pure and simple, is one reason why social responsibility information has come to have utility in the investment process. But private realizations are one thing; abrupt governmental policy shifts, such as using a new legal model of the corporate entity as the hasis upon which to base disclosure, are another.

information effect, companies file disclosures, including some social responsibility disclosures, with the SEC. The SEC merely makes such information available, primarily for investors' use in investment selection and management. Dissemination to other classes of individuals, to prosecutors, to the public in general, or to the popular press is not the primary goal. Commercial, business, financial, or social responsibility disclosures are required to achieve an information effect alone—a passive regulatory function of disclosure to be utilized by individuals, rather than groups, as each should choose.

SEC-mandated social responsibility accounting and disclosure necessarily will produce some enforcement effects and a bit of a publicity effect, at least as respects some absolute scofflaws. Nevertheless, congruence with the end for which the Commission requires most of the currently enforced disclosure, that is, an information effect, is the ground upon which requests for corporate social responsibility disclosure should stand or fall. The Commission should not and cannot deny requests for some social accounting and disclosure merely because as a by-product such disclosure produces a substantive-law enforcement action here and there or gives rise to public or investor pressure for a corporation to put its social house in order.

It is probably true that many corporations are no longer accountable to shareholders. It may also be true that no sufficient check has come into being to replace the missing constraint of accountability to owners. Sudden SEC and corporate immersion into that reality's cold waters, however, may delay or prevent any corporate reform; the transformation of the corporate model from economic entity into something much more would raise more questions than it would provide answers. Disclosure or any other reform measure specifically aimed at producing enforcement effects and concomitant publicity effects, or legislative or administrative denigration of the traditional accountability to shareholders, without a new well defined legal model to replace the old, only delays reform and obfuscates the issues.[354] At most, if disclosure produces enforcement and publicity effects and thereby induces more corporate social

354. In one respected chronicler's view, it is precisely why previous reform efforts, whether for disclosure or of any other type, have failed. "The principal pressures for reform . . . came from outside forces that are primarily concerned not with business itself, but with social goals and values." Hetherington, *supra* note 120, at 292. At least as to one reform measure, disclosure, viewed in the proper light, changing investor and shareholder attitudes make that no longer true.

awareness, those results should be viewed as incidental benefits, only by-products of a traditional disclosure system. Both the SEC and those who will press it for disclosure reform should bear those considerations in mind in analyzing the social disclosure requests that undoubtedly will appear before the Commission. Clear thinking about disclosure's purposes and whether or not the particular disclosure requested will serve those purposes, not the motives of those seeking the disclosure, should control both the Commission's and reformers' thinking.

Social responsibility disclosures should be sought for the same reasons securities regulation has sought disclosure in other areas: utility in a still primarily economic investment process; prevention or revelation of irresponsible or questionable acts and practices that could cause market losses for investors; a parity of roughly comparable information about different companies; a well-rounded presentation of each particular company's affairs; and a rough equality of access to an available reservoir of information for all investors, large and small, concerned with social responsibility or not. On those bases, securities regulation can require some social accounting and disclosure now.

In the meanwhile, disclosure based on traditional rationales nevertheless can cause concrete, reform movement toward that new corporate model, for which academicians and theorists have been clamoring for forty years. Social responsibility disclosure would show how the modern corporation impinges on some elements of society. Through whatever public and investor reactions this information produces, disclosure might define the new model's normative corporate behavior. Disclosure would begin the evolution of a clear and reasonably enforcible scheme of responsibilities to replace, without immediately forsaking the old, shopworn, and much criticized corporate law model.

VII. A Cost-Benefit Analysis from Noninvestor Points of View

A. *Introduction*

Utility in the investment process, equality of access to relevant investment information, and similar end products are the benefits investors would obtain from social accounting and disclosures.[355]

355. The major cost social responsibility disclosure could impose upon an investor is the chance that his or her investment would be misdirected. Unwittingly, emphasis on corporate social responsihility could bring returns lower than those desired by the investor. See, for example, the finding by one sizeable institutional investor that investment in companies

Incidental by-products of such disclosure would be benefits flowing to society. Those by-products might include some adverse publicity and group pressure on companies that disclosure reveals to be lagging in progress toward limiting social costs to desired levels. Also must be considered are the costs and benefits to the principal sectors other than investors and society involved in a social responsibility disclosure program. Those sectors are the corporations themselves—who would be doing the social accounting and making disclosures—and government—which must first require the disclosures and then police the system to insure that companies are providing the information.

The intent of this section, then, is to provide a cost-benefit analysis of social accounting and disclosure from the government's and corporations' points of view. It will be seen that the benefits of accounting and disclosure are many. Significant costs also are involved. As will be seen, however, depending upon the precise way the disclosure system embraces social responsibility, the costs for industry and for government can be sidestepped or minimized in such a way that the benefits to be gained will far outstrip the costs to be incurred.

B. *Benefits Social Accounting and Disclosure Might Bestow*

(1) Uniformity, Comparability, and Resulting Benefits

Much as some may protest, investor demands and governmental action have stuck corporate managers with some public expectation of social responsibility.[356] Corporate social accounting, coupled

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engaged in an activity some think socially irresponsihle brings a return three percent higher than the remainder of the portfolio, *supra* note 19. Several factors, however, militate against such a result. First, beginning social responsibility disclosures would be quite modest in scope, with disclosure documents placing no undue emphasis thereon. *See* notes 450-59 *infra* and accompanying text. The data provided by disclosure would be available only to be used or not, as each investor individually decides. Second, most interested investors would adopt a relative approach to social responsibility. *See* text accompanying notes 154-60 *supra*. Given an industry, they would choose those companies whose securities provide roughly the same desired risk and return. Thus only at the margin would social responsibility considerations intervene in the investor's selection process. Thirdly, no comprehensive evidence exists to say that socially responsible enterprises provide lesser returns; indeed, many believe that social responsibility leads to increased long-run corporate profitability, notes 19 & 138 *supra* and accompanying text.

356. An expectation "as real, and in a sense at least, as natural as an earthquake," in the words of Henry Manne, text accompanying note 184 *supra*. Many business leaders view social responsibility as a matter of survival. Corporations "will survive only if the public is convinced that they are contributing more to the public good." *Corporate Social Responsibility Panel: The Constituencies of the Corporation and the Role of the Institutional Investor*, 28 BUS. LAW. 177, 208 (1973) (remarks of George D. Gibson) [hereinafter cited as *Corporate*

with some required disclosure, will result in comparable social responsibility information being available about most large companies. In turn, available information about other companies, in the comparable format required disclosure would produce,[357] will aid corporate managements in defining what social responsibility means for their company and in measuring how much of it is enough. The benefit to corporations is that social disclosures will do much to aid corporate executives who, up to now, have struggled with the question of what constitutes "normative behavior."[358]

Of course, profit maximization, the neoclassical economic model explaining how corporate managers operate, is a theoretical abstract. The observer cannot ascertain whether or not a company is maximizing profits.[359] Instead, normal practice by corporate managers is the same as that of investors.[360] Executives set a number of comparable corporations' sales and earnings figures side by side with those of their own company. By comparing the figures and by comparing the year-to-year trends in their own company, managers can shade toward an opinion as to what profit maximization may resemble for their company or for their industry. As a goal, "social responsibility" is similar. Required social responsibility disclosures will better enable corporate managers to form an idea of what "social responsibility" is and to determine whether or not their own firm is moving toward that end.

Social Responsibility Panel]. Other executives have become more attuned to social responsibility because the radical demands social responsibility has in the past connotated have softened into more realistic expectations held by larger segments of the populace. Executives, also being members of the society, also have come to share values and expectations of social responsibility. *See* notes 166-72 *supra* and accompanying text. But executives need a device to aid them in defining what is social responsibility for their company and industry and to help sort out "the confusing turbulence of demands and charges and concerns all marching under the umbrella of 'social responsibility.'" *See* note 1 *supra*.

357. *See, e.g.*, notes 15-17 *supra* and accompanying text.

358. *Corporate Social Responsibility: The Role of the SEC*, *supra* note 128, at 227 (remarks of Bevis Longstreth).

359. Hetherington, *supra* note 120, at 257-58, and Schwartz, *supra* note 33, at 468-70, the former having a slight bias against corporate involvement in "social responsibility" activities, and the latter favoring more social responsibility, nonetheless both agree that the present construct, profit maximization, is not as definable as some think it to be. Indeed, both authors agree that in actuality profit maximization cannot be pinpointed. For that reason, courts have never adopted profit maximization as a goal the law imposes. Instead, the law judges corporate waste and other legal claims against the standard of whether or not an activity arguably confers a "long term benefit" on the corporation. *See, e.g.*, Shlensky v. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968) (minority shareholder action challenging baseball club policy against night baseball struck down on the basis that management claim that the absence of night baseball kept ballpark neighborhood stable, and thus conferred long-term benefit on corporate image and treasury, was colorable).

360. *See* note 93 *supra* and accompanying text.

(2) More Efficient Allocation of Corporate Resources Devoted to Social Responsibility

One widespread criticism of corporate attempts at social responsibility programs is the questionable competence of corporate management to undertake such activities. One observer postulates a "serious question as to both the technical competence and social legitimacy of any efforts by business executives to identify and take account of the 'public interest.' "[361] Another commentator questions "the competence of management to make such determinations and the effect of such activities on the ability of outside institutions, such as the stock market, to evaluate managerial institutions."[362] A further common criticism is that when corporate managers do order or undertake social responsibility activities, they mysteriously fail to impose upon such activities the accounting and other managerial controls they would place upon any profit making venture.[363] One oft-cited anecdote is the extreme of complete corporate acquiescence in the company president's choice of altruistic goals. At the other extreme is the power of any single director to veto a proposed program.[364]

Required SEC disclosure would force some corporate accounting on social responsibility issues. Although simple in form, the accounting required might produce more sophisticated internal accounting. Management might extend cost-benefit studies and other forms of systems analysis to social responsibility as well as to pure profit making.[365] One author has stated "[I]f business has any expertise, it is management and technology. Our current social crises have moral, legal and political dimensions which only incidentally (if at all) require business skills."[366] The contention here is to the contrary—that what many attempts to solve social problems need is more, not less, management and technical skill. Seldom found is

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361. Preston, *supra* note 156, at 435.

362. Hetherington, *supra* note 120, at 286. One can question even more the ability of outside institutions, such as the stock market, to evaluate managerial performance when data is not available or when it is available on only a spotty basis, as is now the case.

363. *See, e.g.*, Address by A. C. Neal, Toward the Efficient Pursuit of Happiness, Oct. 1, 1965, quoted in W. CARY, CASES AND MATERIALS ON CORPORATIONS 242 n.21.

364. The funny thing is that you can get all sorts of people that can spend a half a million dollars, can keep seven fellows who earn twenty thousand a year on tbe payroll . . . but if you want to give fifty bucks to some charity, it has to come to the head office.

Corporate Social Responsibility Panel, *supra* note 356, at 211 (remarks of Eli Goldston). *See also* Bauer & Fenn, *supra* note 1, at 84, discussed note 43 *supra*.

365. As some social accountants and consulting firms want to accomplish completely under the label "social accounting," notes 72-88 *supra* and accompanying text.

366. Henning, *supra* note 126, at 157.

an activity of a governmental or large private institution that managers do not submit to a cost-benefit analysis.[367] Given normal management treatment and skills application, corporate social responsibility might exceed in effectiveness any governmental program or any endeavor social scientists alone could conduct. Even if social problems have "moral, legal, and political dimensions which only incidentally require business skills," for better or for worse corporate managers are stuck with expectations of social responsibility. Corporations will be engaged in social responsibility activities. Given that reality, most managers should welcome as a benefit the efficiency that disclosure-forced accounting would bring to the area.

Given a fixed amount of corporate resources devoted to social responsibility progress, the amount of social responsibility produced might increase. Moreover, as disclosure forces accounting systems to evolve and produces a greater ability to determine if corporate programs are succeeding, corporate managers might become even more interested in social responsibility for its own sake, irrespective of the public relations mileage to be gained.[368] Business managers seem more willing to engage in activities "where they have some opportunity of influencing the outcome of a series of events by their own actions and by knowing concretely what those actions have accomplished."[369] Revelation of what other large corporations are doing, another product of required disclosure, also may aid in producing more social responsibility outputs. Disclosure of what others are doing may give corporate managers ideas on how to improve upon what other companies have done in achieving social responsi-

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367. As pointed out in Abt, Social Audits—Why Do Them? (unpublished memorandum 1974). *See also* Address by Dr. Clark Abt, Social Audits for Federal Audits, Annual Seminar, Boston Section of the Federal Gov't Accountants Ass'n, Apr. 30, 1974.

368. And to relieve investors, the public, and corporate executives from the public relations drivel many of those executives' competitors attempt to make do as a substitute for meaningful social responsibility efforts. *See* notes 380-84 *infra* and accompanying text.

369. D. McCLELLAND, THE ACHIEVING SOCIETY 238 (1961). Hetherington elaborates:

> Psychological studies show that business executives rate high in need achievement; that is, they have a drive to do well and evaluate their performance in relation to a standard of excellence. *See generally* D. McCLELLAND . . . 259-300 . . . . Further indications are that business executives . . . work harder "when there is a chance that personal efforts will make a difference in the outcome." *Id.* at 226. A business executive is oriented toward "concrete feedback in how well he is doing . . . ." *Id.* at 233. Finally, the studies suggest that money rewards (beyond certain levels . . .) do not have much influence on the performance of high need achievers: "they are interested in achievement." *Id.* at 235.

Hetherington, *supra* note 120, at 266 n.71. *Cf.* Henry Manne's assumption that, given the discretionary cash available in the large corporation, but for potential adverse publicity most executives would use that cash to compensate themselves, note 187 *supra.*

bility, or it may cause them to contemplate how they might do it more efficiently.

Again, disclosure will force accounting. Accounting will force application of traditional management tools to social responsibility. Corporate social preference will no longer be "an afterthought, like a quarter in a blind man's cup."[370] Gone also will be the blanket and shotgun approaches to social responsibility that some companies have adopted in response to the demands placed upon them. Managers will select programs and priorities on the basis of the feedback accounting and disclosure give them. No longer will companies tilt at windmills. Social accounting and disclosure will cause corporate social programs to be better considered, more efficient, and more apt to achieve their goals. Indeed, they will be more apt to have goals in the first place.

(3) Relief of Corporate Social Performances from Misguided Attacks

Relief from misguided attacks on corporations' social preferences is a benefit some public social accounting seemingly would bestow and a benefit many corporate managers would welcome. Required social responsibility disclosures will reveal which corporations are, on a relative basis, the more responsible ones. Year-to-year comparisons of a particular company's disclosure will also reveal whether or not a particular company is making progress. By the same token, some required disclosure will, in part at least, reveal which corporations are less concerned about or are expending little effort on some responsibility issues. Many managements are socially responsible and do considerable good.[371] Some of those managements do disclose, others do not. One reason some responsible managements do not disclose is that when their responsible brethren have disclosed the good that they have accomplished or attempted, many of those disclosing companies have become targets upon which corporate gadflies and watchdog groups have focused. Not knowing how little other companies are doing, critics have denigrated socially responsible companies' actions as paltry or of poor

370. Schwartz, *Proxy Power and Social Goals: How Campaign GM Succeeded*, 45 ST. JOHN'S L. REV. 764, 770 (1971), so characterizes many current corporate efforts.

371. Agreement on that point ranges from those who are skeptical of more corporate social responsibility, *e.g.*, Hetherington, *supra* note 120, at 286, to even idealistic student scholarship strongly in favor of using governmental resources to bring about more social responsibility from "unaccountable, irresponsible power centers," Note, 59 GEO. L.J., *supra* note 257, at 118-20 & nn.6-15.

quality.[372] The phenomenon is not fair to those companies who do disclose, only to become victims of misguided attacks. Fairly exacting required disclosure, however, perhaps when buttressed by rules against puffing or misrepresentation in such disclosure, could relieve relatively good companies from the corporate critics' fire. A correlative benefit of required disclosure may be that the fire it generates will shed more light; that is, disclosure will enable activists and gadflies to aim their barbs at those companies or industries that really need or deserve prodding.

Disclosure and the accounting data that leads to disclosure also will enable corporate managers to more ably defend their companies' track records against both critics of "too little" and detractors of "too much" social responsibility. To defend themselves, managers need a more overall picture of the social responsibility records of their own company, their industry, and the entire corporate sector. For that reason alone, one well-known corporate manager "heartily endorses" social accounting and disclosure for "both the public and private sectors."[373]

Preparation for required disclosure also may have the effect of highlighting those social responsibility situations upon which the company can easily mount an effective assault. Knowledge that one will have to disclose what action has been taken or what one has failed to do causes a certain amount of "putting one's house in order" before the time arrives when management has to begin compiling final data for periodic disclosures.[374] The honest window

372. Eli Goldston, while president of Eastern Fuel and Gas Associates, Inc., for its industry a socially responsible firm and one which had regularly been making disclosures, made the point:

> About three years ago some students at Harvard Law School blocked recruiting efforts by a law firm which represents my company in many matters. The law firm had absolutely nothing to do with the particular matter in controversy and, even more aggravating, my company was actually on the same side of the issue as the militant but carelessly confused students . . . .
>
> A little earlier we had a problem at an old plant of ours in New Haven. Already scheduled for demolition in two years and with careful personnel planning targeted to this date, the plant was cited as an air polluter and ordered to close at once. The union showed city hall that the pollution for which their jobs were being threatened was about one-quarter of that caused by the automobiles owned by Yale freshmen. After some controversy the plant was permitted to operate until the scheduled demolition. No one ever considered doing anything about the Yale automobiles.

Goldston, *supra* note 257, at 30. *See also* Henning, *supra* note 126, attacking those companies that have been disclosed as being involved in nothing more than a "shell game."

373. Rockefeller, *supra* note 158, at 55-56.

374. This is the housekeeping and planning feature of disclosure, discussed note 272 *supra* and accompanying text. Cary observes that a good manager has "wisdom in being

dressing that disclosure would bring about is thought to be justifiable and, moreover, a benefit that required disclosure bestows in financial and other areas. The same would be true for disclosure requirements in the social responsibility area. Corporations would avoid attacks for social irresponsibility in those areas where they could easily be avoided.

In the above ways, then, social accounting and required disclosure will lead to far fewer headaches for those many corporate managers who do want to ascertain and then do the "right thing." Perhaps perversely, another benefit disclosure may bring is that corporate critics' resources will be more efficiently allocated.

(4) Relief from Some Shareholder Proxy Proposals and the Waste of Corporate and Governmental Resources They Entail

Concrete examples of misguided attacks on corporations and the waste involved therein come from the public interest proxy proposal area. The SEC recently has refined its shareholder proxy proposal rule.[375] The rule now permits incumbent management to exclude from the proxy statement proposals involving "any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer."[376] By reverse implication, however, management must include in the proxy statement and present at the annual meeting some shareholder proposals relating to "general economic, political, racial, religious, social, or similar" causes. The only required nexus is that the general matter relate to the company's business or be within its control. The standard seemingly paves the way for a possible increase in the number of shareholder proxy proposals submitted on a great variety of issues.

In the past, many shareholder proposals called merely for disclosure about a company's action or nonaction in certain areas.[377] Perhaps because managements tend to view any shareholder proposal as an attack on management's stewardship, they invariably

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sensitive to, and anticipating, public reactions that may crystallize." As a regulatory force, disclosure may be most valuable to management in leading it to such sensitivity and awareness and to the ability to solve matters before they do become problems. Cary, *supra* note 13, at 408-09.

375. SEC Exchange Act Release No. 9784 (Sept. 22, 1972), amending Rule 14a-8, 17 C.F.R. § 240.14a-8 (1972).

376. Rule 14a-8(c)(2), 17 C.F.R. ¶ 240.14a-8(c)(2) (1975).

377. *See* notes 122-28 *supra* and accompanying text.

resist such proposals. Many corporations either try to exclude the proposal from the proxy statement, and wage a fight at the SEC level to do so, or lobby heavily to obtain an overwhelming vote against a proposal once it has found its way into the proxy statement. This can result in significant waste of corporate assets—in legal fees, public relations costs, and lobbying efforts.[378] Other shareholder proposals evoke management opposition on more specific grounds. Many proposals are poorly worded, are fishing expeditions, or are just thrown at a variety of companies, regardless of their relatively good or bad records.[379] In these cases, too, corporations and the government may needlessly expend resources in dealing with shareholder proposals.

Required social responsibility disclosure could reduce the number of shareholder proposals for disclosure by making available some of the information shareholders typically seek. This would enable other shareholder proposals to be better reasoned and more specific. Then, hopefully, many managements' categorical opposition to public interest proxy proposals might diminish. As a result, corporations might expend fewer resources defending against shareholder proposals and sometimes simply volunteer to undertake disclosure or other actions shareholders seek. Likewise, those shareholder proposals that remain for consideration at annual meetings might be better considered in that they will be properly aimed toward those companies where questioning or reform is needed. Thus, in the shareholder proxy proposal area, some required accounting and disclosure might well lead to more efficient use of both SEC and corporate resources, including the resource of management capacity for

378. Schwartz, *supra* note 35, at 47-48 explains why the process is often costly:

> Management could probably defeat any proposal for social action merely by arguing that it would be bad for business. But it does not do so. . . . [I]t will not do so . . . since what is said to the shareholders will also be overheard by nonshareholders. Therefore, management must justify its opposition to the proposal in public interest terms lest the nonshareholder public react adversely to the corporation.

379. *The Ethical Investor* views some of the activity as part of "an endless stream of mindless or frivolous or harassing complaints, moved more by narcissism than social concern." THE ETHICAL INVESTOR, *supra* note 1, at 59. One mutual fund officer, charged with voting his fund's shares finds that:

> Most of the public questions . . . that I have seen on proxy statements displayed an amazing lack of knowledge concerning the company, the management's . . . effort to be a good citizen and the characteristics of the industry. It seems to me that companies that have tried very hard to do the right thing are often more subject to pressure and are more likely to have public interest proxy questions . . . than some companies that have clearly neglected their social responsibility.

LONGSTRETH & ROSENBLOOM, *supra* note 1, at 70.

mental and emotional strain that public interest proxy proposals sometimes cause.

(5) Relief from Public Relations Drivel Now Substituting for Controlled Disclosures

Public utilities spend so much on image advertising that "one might think they were in the business of wilderness preservation."

> The classic abuse of social responsibility advertising was recently perpetrated by [a major forest products company]. Its ad depicted an idyllic river scene with the caption "It cost us a bundle, but the Clearwater River still runs clear." Indeed, it does, where the photo was taken, *upstream* of [tbe company's] pulp plant.[380]

There is much truth in the view that "many companies limit their concern to press releases, empty speeches, or less."[381] And the cost is staggering. Advertising sources estimate that billings for company image advertising, as opposed to product advertising, run between $500 million and $1 billion annually. One oil company alone spends $10 million a year for a multi-media image advertising blitz.[382]

Social accounting and disclosure will not stop image advertising altogether. Indeed, freedom of speech considerations proscribe that.[383] Yet, if all companies' track records are a matter of public record, companies might feel less constrained to state or overstate their cases in advertising. Disclosure might slow or stem the tide of wasteful and self-serving advertising. Even if social responsibility disclosures do not slow the volume of image advertising, disclosure might stop the extreme puffing and outright misrepresentations many advertisements contain. Disclosure would produce accurate records against which interested parties might compare media-based social responsibility claims. The corporate embarassment caused by the revelation of the truth, as required disclosures reveal it to be, would reduce the exaggeration and outright fabrication found in today's image advertising.[384]

380. Henning, *supra* note 126, at 154.

381. Wall Street J., Apr. 29, 1971, at 1, col. 1 (statement of Whitney Young, Executive Director, Urban League).

382. Wall Street J., May 14, 1975, at 1, col. 6.

383. *See* the Federal Trade Commission's refusal of six congressmen's petition that the agency require major oil companies to substantiate image advertising claims, principally on first amendment grounds. BNA ANTITRUST & TRADE REG. REP. No. 712, at A-3 to -5 (May 6, 1975).

384. SEC-promulgated disclosure rules might include a rule that all social responsibility data be accompanied by a statement of any assumptions the company has made and reflected in the company's disclosures, along with a strongly worded proviso against exaggera-

Few corporate executives would disagree with the proposition that some image advertising is economically wasteful. Other executives might join in labeling some image advertising as bordering on the dishonest. Still other executives would agree that dishonest advertising places at a disadvantage those companies who regularly and accurately disclose. Required social responsibility disclosures could materially aid in reducing both the economic waste and the shading of truth that much company advertising involves.

(6) Social Accounting and Disclosure as the Most Efficient Use of Governmental Resources

With each year the litany of reforms proposed to induce corporate accountability grows longer. Proposals range from tinkering reforms, such as the installation of public interest directors on major companies' boards of directors, to pervasive reforms, such as complete federal regulation for larger corporations or nationalization of key industries. Social accounting and disclosure are near the middle of that spectrum. Furthermore, accounting and disclosure may have the most promise—of all the proposed reforms they seem the most politically feasible and economically sound. Because disclosure would utilize an existing agency—the SEC—an existing reporting system under the Securities Exchange Act of 1934, and a functioning dissemination network through which present financial disclosures are digested,[385] disclosure seems destined to provide the most social responsibility and traditional returns for the regulatory dollars spent. Even the most persistent critics of federal agencies award good marks to the SEC, which would administer the disclosure system.[386] Relatively speaking, the SEC is one of the smallest federal

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tion or omission of material facts. From the beginning the Commission's various proposed rules on sales and profit projections have contained such rules. *See, e.g.*, SEC Exchange Act Release No. 9984 (Feb. 2, 1973). Also, the traditional antifraud rules applicable to disclosures companies file with the Commission would strengthen social responsibility disclosure requirements' quest for accuracy.

385. No one has ever posited that all interested investors do or should peruse disclosure documents that companies file with the SEC. Rather, brokerage house research departments, investment advisors, authors of market letters, and the like read those documents, cull out pertinent information, and along with other information, use the information as the basis for investment monitoring and recommendations. Through this established filtration system, "[i]nformation communicated to and absorbed by professionals filters out to and benefits a wider public." WHEAT REPORT, *supra* note 112, at 10.

386. *See* Lazarus, in *Halfway up From Liberalism: Regulation and Corporate Power*, in CORPORATE POWER IN AMERICA 215, 216-24 (R. Nader-M. Green eds. 1973), rates the SEC as the most effective of the eleven principal agencies the New Deal has spawned.

agencies,[387] but it is a very efficient agency.

On the other hand, both pervasive and tinkering reforms are demonstrably inefficient. Many pervasive corporate reforms that have been proposed probably would result in yet another new and untried bureaucracy. These reforms include a radical and abrupt restructuring of the way in which major corporations operate, which would entail losses in the private sector. Further, the amount of social responsiveness or traditional accountability to shareholders and investors such reforms would produce for each tax dollar invested is problematical. By contrast, the tinkering reforms involve very little in the way of governmental expenditure. The costs might be even less than those under a social accounting and disclosure proposal, for under the latter the SEC would have to hire some new personnel and develop expertise in relatively uncharted waters. The tinkering reforms' inefficiencies arise because, for any amount of money and human resources the government expends in implementing them, most commentators now agree that the social responsibility or other return would be nil. Thus, if one examines each corporate law reform proposal, whether it calls for pervasive or tinkering reform, it becomes evident that social accounting and disclosure involve the most efficient use of both governmental and corporate resources.

(a) Federal Chartering

Ralph Nader and the Corporate Accountability Research Group are the principal architects of the federal chartering movement.[388] The reform measure they propose would dictate that corporations above a certain size, as measured by assets, sales, employees and similar indicia, would have to drop their state charters. These large corporations would then reincorporate under a federal statute. Under the federal scheme, the corporations would become subject to more stringent antitrust and anticoncentration rules. Federally chartered corporations would have to make much more pervasive financial and social responsibility disclosures than those the law and the SEC now require. Federal law would reverse the liberalizing

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387. SEC manpower is about the same as in 1940, when the SEC staff numbered 1,670. 6 SEC Ann. Rep. 189 (1940). At the end of fiscal 1973, SEC personnel totaled 1,556. 39 SEC Ann. Rep. 134 (1974).

388. *See generally* Henning, *supra* note 344; R. Nader, *The Case for Federal Chartering*, in CORPORATE POWER IN AMERICA 67 (R. Nader-M. Green eds. 1973); D. Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 GEO. L.J. 71 (1972); Note, *Federal Chartering of Corporations: A Proposal*, 61 GEO. L.J. 89 (1972).

trend in state corporate law by beefing up the standard of care and the duty of loyalty corporate managers owe the company. The federal statute would further reverse state-law permissiveness through increased shareholder rights of inspection for corporate books and records, expanded shareholder access to the proxy machinery, the outlawing of staggered boards of directors, and a requirement for mandatory cumulative voting.[389]

A new regulatory unit, the Federal Chartering Agency, would administer the scheme. The agency's sway over regulated corporations would be greater than that of many agencies, for much like broadcasters, federally chartered corporations periodically would have to apply for renewal of their charters. The Federal Chartering Agency would have the power to condition charter renewals upon compliance with federal laws in any area, upon spin-off of a subsidiary or division if the company has grown too large, and upon other conditions when similar corporate failures to meet established standards have occurred.[390]

Proponents of federal chartering go to some lengths to demonstrate that it is politically feasible and that it involves efficient, limited use of governmental resources. As to political feasibility, they point to some twenty-five occasions in this century when legislators have introduced bills to create a federal incorporation scheme for large industrial companies.[391] Based on that historical fact, federal chartering is "[a]n idea whose time has come and come and come. Our present economic and social ills—in the midst of corporate abuses and unbridled power—make it topic again."[392] Just as plausible an explanation, however, is that federal chartering's past failures indicate that politically it is a bankrupt idea. In fact, federal chartering had its greatest support in the Theodore Roosevelt and Taft administrations. Thereafter, federal chartering has gathered less support each time it has been proposed.[393] Perhaps federal

389. Nader, *supra* note 388, at 86-87.

390. *Id.* at 80-82; Henning, *supra* note 344, at 922.

391. Twenty bills for federal chartering were introduced between 1903 and 1914. The pace slowed to eight bills over the 1915-32 time span. Apparently, the last attempt at federal chartering was the 1938 O'Mahoney-Borah bill. Nader, *supra* note 388, at 76-77. *See also* Reuschlein, *Federalization—Design for Corporate Reform in a National Economy*, 91 U. PA. L. REV. 91, 106-07 (1942).

392. Nader, *supra* note 388, at 78.

393. The periodicity with which bills have been introduced, note 391 *supra*, supports that conclusion. Lazarus observes that "Federal chartering received its most sustained and serious political attention during the Republican Administrations" shortly after 1900. "[I]t was then the pet project of Wall Street forces who believed that it would cement a cooperative

chartering represents a broad-based governmental incursion into the private sector so far beyond what the country has ever experienced that solons fear that not only public apathy but public antipathy would greet its implementation.[394]

On the efficiency side supporters of federal chartering go to great lengths to assure inquirers that chartering portends only a slight bureaucratic extension to an otherwise overgrown federal government:

> The bureaucracy created [the Federal Cbartering Agency] would be as trim and nondiscretionary as possible. Only the top one thousand interstate corporations . . . would be chartered . . . . The kind of charter provisions being enforced would be as objective as possible.[395]

Aside from the impossibility of predicting how trim the bureaucracy created will be or will remain, one learns that even before adoption, some of its proponents are expanding federal chartering's reach. Beyond a certain number of the largest corporations, it becomes necessary to require "a national franchise"

> [o]f a smaller corporation if it wishes to do a significant amount of business with the federal government, to operate . . . facilities in foreign countries, or to engage in certain industries where there is an existing, overriding federal interest, such as energy or interstate transportation.[396]

Federal chartering would thus bring into being not only a new, untried federal agency, but one that undoubtedly will be hungry to extend the application of the new concepts it administers. The new agency would be likely to surpass quickly in size the present SEC, if not larger federal agencies.[397] Of necessity, a Federal Chartering

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relationship between the federal government and big business." Lazarus, *supra* note 386, at 227-28.

The only other near achievement of something akin to federal chartering was the National Recovery Administration (NRA). Much of the impetus for the NRA also came from husiness, not from reform interests. For a description of the NRA, of course, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), is quite good.

394. Nevertheless, an Ohio Congressman has announced an intention to introduce a Corporate Citizenship and Competition Act for federal chartering of the nation's 100 largest companies. BNA SEC. REG. & L. REP. No. 298, A-15, at A-17 (April 16, 1975). *See also* Bleiberg, *Whither the Corporation*, BARRONS, July 7, 1975, at 8-9.

395. Nader, *supra* note 388, at 83.

396. Henning, *supra* note 344, at 922.

397. In both the legislative and executive branches of government, a persistent failure to make inroads in solving problems, despite continuing budgetary deficits, seems to be leading to bipartisan awareness that the New Deal is dead. A new federal agency cannot come into existence each time a new social problem is perceived to exist. *See, e.g.*, Miller, The Uneasy Liberals, Wall Street J., Aug. 6, 1975, at 8, cols. 3-5. Hence, federal chartering may not be politically feasible merely because federal chartering requires a new agency.

Moreover, in the movements to not only refrain from creation of new bureaucracies but

Agency would have an activist role. It would need a large staff to make complex determinations about how corporations and their charters should be restructured upon initial incorporation and to make controversial decisions on charter renewals.

Social accounting and disclosure would utilize the proven concept of required disclosure and an existing, effective agency that is not out to prove itself. By and large a passive regulatory device, disclosure would necessitate only supplementing those personnel who receive and screen documents now filed with the SEC and those who bring enforcement actions. In all, with a promise of efficiently producing some furthering of the SEC's traditional goals of investor guidance and protection, social accounting and disclosure seem a good and modest use of federal power, funds, and bureaucracy. Accounting and disclosure, therefore, seem to be a measure the government should try before launching federal chartering and the vast new bureaucracy and far-reaching power that scheme entails.

(b) Federal Corporate Uniformity Statutes

The reform most often juxtaposed to federal chartering is minimum legal standards for large corporations. Indeed, minimum standards and federal chartering dominate most of the ever-growing discussion of corporate law reform.[398] Federal minimum standards is a relatively new proposal in the reform area—the idea springs from a 1974 article by Professor William Cary.[399] Because federal chartering has so many times failed to pass Congress and because it has "no public appeal," Professor Cary rejects federal chartering

to cut present government's size, agencies that have an activist role, like that proponents contemplate for the Federal Chartering Agency, are increasingly under attack. *See, e.g.*, Lazarus, *supra* note 386, at 232:

> [T]here seems to he two kinds of regulatory institutions . . . : those with defensive or policing tasks . . . and those witb "offensive" or managerial responsibilities . . . . Agencies in the latter category represent far more ambitious undertakings. Their task [not unlike that of a Federal Chartering Agency] is to structure all or part of an industry's operations and thereafter direct the industry's course in the public interest. In contrast, policing agencies [like the SEC in a social disclosure program] are designed not to pre-empt the free market but to enable consumers to make better use of its processes by thwarting anticompetitive or deceptive . . . practices . . . . In general, experience seems to teach that regulation of the "offensive" or managerial genre should never be instituted . . . .

398. Indeed, those were the only two alternatives discussed when the American Bar Association's Federal Regulation of Securities Committee hosted a recent symposium. BNA SEC. REG. & L. REP. No. 307, at A-1 (June 18, 1975).

399. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

as "politically unrealistic."[400] Instead, he proposes a Federal Corporate Uniformity Act. The minimum standards contained in such an act would aim at reversing state laws' "race for the bottom." The standards would not pretend to break new ground, to induce social responsibility, or to satisfy investors' needs or wants. Rather the motive is to reinstate the traditional corporate law model of accountability to shareholders.[401] To that end, a new federal statute would impose upon corporations of a certain size or larger:

> (1) fiduciary standards with respect to directors and officers . . . ; (2) an "interested directors" provision prescribing fairness as a prerequisite to any transaction; (3) a requirement of certain uniform [charter] provisions . . . for example, authority to amend by-laws, initiate corporate action, or draw up the agenda of shareholders' meetings shall not be vested exclusively in management; (4) a more frequent requirement of shareholder approval of corporate transactions . . . ; (5) abolition of nonvoting shares; (6) the scope of indemnification of directors specifically prescribed . . . ; (7) adoption of a long arm provision comparable to § 27 of the Securities Exchange Act . . . .[402]

Like federal chartering, the federal minimum standards proposal tries to anticipate criticism that such standards will expand the federal bureaucracy. For that reason, the "participation of a government agency such as the Securities and Exchange Commission is not contemplated."[403] The proposal does raise a kindred problem involving government expenditure, however, namely that perhaps "the proposed amendments would flood the federal judiciary with litigation."[404] Certainly, the Uniformity Act would represent a vast new extension of federal power. For corporations of any size the federal standards would displace lax state laws. The new act would apply:

> [t]o corporations having more than $1 million of assets and 300 shareholders . . . . To prevent disparity in the law, however, it might be preferable to make such an act apply to all public companies engaged in or affecting

400. *Id.* at 700. Professor Cary adds that "American business would unanimously reject such a convenient vehicle of government control . . . ." *Id.* (footnote omitted).

401. And "to escape from the present predicament in which a pygmy [Delaware] among the 50 states prescribes, interprets, and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders . . . ." *Id.* at 701.

402. *Id.* at 702.

403. *Id.* at 701.

404. *Id.* at 704. For that reason, Professor Cary suggests state court jurisdiction "with some form of certiorari jurisdiction on the part of the [federal] courts of appeal." *Id.* at 705. Abruptly usurped of their traditional role in regulating intra-corporate affairs, one wonders how sympathetic state courts might be to Federal Uniformity Act claims; one also can question how sympathetic federal courts would be to any significant expansion of their jurisdiction. *See, e.g.*, Blue Chip Stamps Co. v. Manor Drug Stores, 421 U.S. 723 (1975).

> interstate commerce. A line might be drawn arbitrarily . . . at $250,000 of assets and 50 shareholders . . . .[405]

With such a scope, organic federal corporate law would reach into the offices and plants of many surprisingly small companies. Given the notorious laxity and lack of formality with which most small corporations operate, a flood of Uniformity Act litigation surely would be forthcoming.

On a theoretical level, federal minimum standards would represent a reversion to the old corporate model, an anachronism. Without more, minimum standards represent a return to accountability to shareholders and, perhaps, profit maximization as the corporate goal. A federal uniformity act is not an attempt to develop gradually a model encompassing accountability to shareholders and other constituencies or a search for a formula that includes some quantum of social problem-solving along with long-run profitability.[406] Therefore, disclosure seems better suited to answer the basic questions of "where to go" and "how to get there," for social accounting and disclosure seem to shade in forward-looking directions without complete abandonment of the old corporate model before a new paradigm evolves.

(c) Installation of Public Interest Directors

Many persons have viewed mandatory installation of directors who are responsible to the public rather than to fellow board members or to shareholders as the way to reform corporate laws and to induce more corporate social awareness.[407] Variations suggest the use of well-known public figures or of trained full-time professionals as the public interest directors, of independent directors' staffs to supplement the directors' own efforts, or of two-tiered boards of directors with one tier representing groups other than shareholders.[408] By now, however, most commentators have abandoned hope

405. Cary, *supra* note 399, at 701-02.

406. Professor Cary does recognize that ideally "We might go even further and ask what representation the modern constituencies of the corporation—employees, consumers, and the public, as well as shareholders—should have on the governance of the corporation." *Id.* at 701. As an empirical study, of course, social accounting and required disclosure would be a first step in that direction.

407. Mr. Justice Douglas advocates full time professionals to serve as public directors. W. DOUGLAS, DEMOCRACY AND FINANCE 52-53 (1940).

408. *See, e.g.*, Long, *The Corporation, Its Satellites, and the Local Community*, in THE CORPORATION IN MODERN SOCIETY 202 (E. Mason ed. 1960) (in addition to the board of directors, a company is required to have locally selected boards in each community where the company has extensive operations); Vagts, *Reforming the "Modern" Corporation: Perspec-*

for this device as a means of achieving reform, at least when its use is suggested without accompanying structural reforms.[409] This abandonment has been on efficiency grounds. The inefficiency does not lie in use of governmental resources; the device contemplates neither a federal agency nor expanded federal jurisdiction. Rather, the inefficiency lies in the belief, based upon some experience with the idea, that public interest directors do not achieve enough even to expend the resources required to have them installed.

Significantly, a principal difficulty with public interest directors has been the impossibility of their obtaining from companies the information the directors feel they need to represent the public.[410] Too little traditional corporate disclosure, much less social accounting and disclosure, is made to outside directors to enable them confidently to go about their tasks. The same paucity of information, perhaps in exaggerated form, surely would greet one who is not only an outside director, but an outside director who represents the public rather than shareholder or corporate interests. Even if they could obtain needed information, public interest directors would vary widely in their effectiveness. Each such director might have his or her own notion of where the public interest lies, resulting in efforts that cancel each other out or are splintered and fragmented. For these and many other reasons,[411] proposals for public

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tives From the German, 80 HARV. L. REV. 23, 50-53 (1966) (German two-tiered boards have not worked well; the supervisory board chosen by shareholders and labor under codetermination rules often "rubberstamps management decisions."); *Goldberg Resigns from TWA*, NEWSWEEK, Oct. 30, 1972, at 47 (Mr. Justice Goldberg recommends independent staffs for outside directors and liberal access to corporate information for those staffs).

409. Schwartz examines public interest directors' use on the Union Pacific Railway (1862) and in the Communications Satellite Corporation (1962). His unequivocal conclusion: such directors "cannot effectively protect the public interest . . . ." H. Schwartz, *supra* note 4, at 363. Interestingly enough, one of the roles government intended a Union Pacific or Commsat director to play was as a surrogate for disclosure. Public interest directors were to serve as "two way windows" for tbe President and for federal agencies, keeping them informed of the corporation's activities. *Id.* at 354. The Union Pacific and Commsat directors failed in that as well as in their other roles.

410. The Union Pacific directors complained that they were given little information and that they were treated as "spies and antagonists, and were kept in the dark about many things." *Id.* at 422. More recently, a mere outside and not public interest director made a similar complaint. *Goldberg Resigns from TWA*, NEWSWEEK, Oct. 30, 1972, at 427. On the inability of outside directors to obtain information or to function generally, *see* M. MACE, DIRECTORS: MYTH AND REALITY (1971). *But see* Calame, *Gulf Officer's Ouster Was Boldly Engineered by Mellon Interests*, Wall Street J., Jan. 15, 1976, at 1, col. 6.

411. Under any scheme, the number of public interest directors would probably still be a minority on the board of directors. The simple human phenomenon, that such directors would soon discontinue representing the public interest and overidentify with the company on whose board they serve, also would often intervene to lessen their effectiveness. *See, e.g.*,

interest directorships no longer seem to surface very often.

By comparison, social accounting and disclosure seem much sounder reform devices. Unlike public interest directorships, accounting and disclosure do not call for strangers to be thrust into corporate officers' midst.[412] Whatever results accounting achieves will be uniform to a point, as each company will have to disclose roughly the same amount of information in comparable format. That information will be taken up and utilized through a reporting system that has already become a central part of corporate regulation. In any case, past history shows that, at a minimum, some forced intra-firm social accounting and disclosure are prerequisites to even a limited chance of success for public interest directorships.

(d) A Liberalized Shareholder Proxy Proposal Rule

The spate of shareholder social responsibility proxy proposals in the early 1970's has produced suggestions to liberalize the proxy proposal rules as a means of achieving corporate social responsiveness.[413] Liberalization would begin with a more restrictive definition of what activity constitutes a solicitation and thereby triggers the proxy rules' applicability.[414] Both incumbent management and proponents of public interest measures would thus be able to speak to the issues without first being required to file a proxy statement or other participants' materials.[415] Supporters of resolutions would be allowed to have longer supporting statements printed in management's proxy statement, and some grounds upon which management can now rely to exclude shareholder proposals would be eliminated.[416]

Conard, *supra* note 4, at 207; Henning, *supra* note 126, at 167 (one of 23 directors on the $20 billion dollar General Motors board, which meets only twelve times a year, cannot be effective); Schwartz, *supra* note 4, at 354-56 (3 of 15 at Commsat) & at 358-61 (5 of 25 on the Union Pacific).

412. Despite the public interest director device's demonstrated benign nature and despite the threats of one or the other more drastic reforms being thrust upon them soon (*see, e.g.*, the sentiment for federal chartering growing in some quarters, *supra* note 394), corporate executives demonstrate "little interest in opening the board to constituency representatives." Burgen, *The Scenario for Tomorrow's Executive*, BUS. WEEK, May 4, 1974, at 85, 86. There is a feeling that it is worth some cost to keep the corporate inner circle unbroken.

413. Schwartz, *supra* note 33, at 523 *passim*.

414. *Id.* at 524. Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1969), the controlling decision, includes activity, however slight, within the term solicitation. In *Studebaker*, merely requesting other shareholders to join in seeking a shareholder list was held a solicitation.

415. Schwartz, *supra* note 33, at 524-26.

416. *Id.* at 523-24.

To be sure, the shareholder proxy proposal should continue as a valuable forum for management-shareholder exchange, but liberalization of the public interest proposal rules and reliance upon them to induce more corporate social responsibility is another matter. Public interest proposals often are poorly worded. Activists indiscriminately fire them at many companies with both good and bad records on the issue involved. Government resources go into policing the proxy proposal rules. More time and money go into corporate efforts to deal with them.[417] Moreover, since many such proposals simply seek information, primary reliance on shareholder proposals as a means to force disclosure, or as a means to induce social responsibility generally, is inefficient because it forces shareholders and investors to do in an indirect and costly fashion what they should be able to do directly, through simple disclosure.

(e) One-Person-One-Vote Restructuring

The one-person-one-vote concept involves graduation of voting rights so that with each marginal share purchased the investor obtains less voting power.[418] The proposal never reaches complete egalitarianism; rather it merely shades toward one-shareholder-one-vote, as opposed to one-share-one-vote (the present system). The proposal's rationale is to restore shareholders with widely scattered and smaller shareholdings to the role they would enjoyed before the separation of ownership and control. Management could no longer dominate with fifteen to twenty percent of the vote because the widely scattered small holdings would, on a relative basis, have more power.[419]

This proposal would require few governmental resources. Litigation probably would not increase, and no new agency, much less new bureaucracy, would be necessary. Despite those advantages, however, since a respected author first made the suggestion, the proposal has received virtually no play in the literature. Like federal minimum standards, the difficulty may be that, standing alone, the one-person-one-vote device is geared only to a return to the old corporate model, accountability to shareholders. Serious reform efforts have moved beyond that, seeking to evolve a new, nonradical

417. *See* notes 377-79 *supra* and accompanying text.

418. Ratner, *supra* note 114. Professor Ratner points out that several civil law countries have such a pattern or model.

419. *See* the discussion of Berle and Means' thesis of the separation of ownership and control, text accompanying note 330 *supra*.

corporate model that provides a well-defined role for groups other than shareholders and a corporate goal other than pure profit maximization.

(f) Nationalization

As a drastic remedy for the perceived dearth of social accountability, nationalization still raises its head. Admitting first the failure to take hold of countervailing power and then of an enlightened technostructure, Professor John Galbraith's latest prescription combines with other measures the nationalization of key economic sectors.[420] With due respect to Mr. Galbraith, experience shows that nationalization is the most inefficient corporate reform of all. The British nationalizations demonstrate that society's benefit from the resources available drops precipitously under nationalization. Observers swear that managers of nationalized industries pay more attention to financial results than do managers in privately owned firms.[421] Moreover, from governmental efficiency viewpoints, nationalization represents an increase in red tape and bureaucracy of infinite proportions. Even to Galbraith, this latter point is a stumbling block for his proposals.[422]

(7) Accounting and Disclosure as the Most Politically Feasible of Reforms

Simply because accounting and reform are the "lesser of evils," corporate managers might object less to them than to other proposed reforms. Disclosure represents a reporting out, rather than the more tangible incursion of governmental presence into executive offices and boardrooms that federal chartering or other reforms represent. Additionally, among academicians and reformers, disclosure is a common denominator. Every proposal for corporate law reform, no matter how disparate, contains a proposal for corporate social responsibility disclosure as an integral part of the reform. That is true for one-shareholder-one-vote proposals, for expanded use of shareholder proxy proposals, and for federal chartering proposals.[423]

420. J. K. GALBRAITH, ECONOMICS AND PUBLIC PURPOSE (1973). One other current call for nationalization is Shepherd, *Public Enterprise*, in CORPORATE POWER IN AMERICA 235 (R. Nader-M. Green eds. 1973).

421. Crossman, *Socialism and the New Despotism*, Fabian Tract No. 208, at 5-6 (Feb. 1956).

422. Nossiter, *supra* note 178, at 10.

423. Ratner, *supra* note 114, at 18-19 (one-shareholder-one-vote plus disclosure); Schwartz, *supra* note 35, at 94 (liberalized public interest proxy proposal plus disclosure);

Although all reformers strongly advocate disclosure, they do so only in passing. None give consideration to methodology—for example, social auditing—nor do they examine what disclosure's purposes are or can be and what disclosure can accomplish in reaching sometimes conflicting goals.[424] Perhaps if these critics of the modern corporation did examine disclosure more closely, and regarded it as *the* reform instead of as ancillary to some other reform measure, they might argue for disclosure as a first reform, a moderate reform, and the most attainable reform on the horizon.

(8) Disclosure as a Means of Forcing Social Accounting's Development

Another benefit required disclosure would produce is to regularize and speed social accounting's heretofore fit-and-start development. Under required disclosure, companies would have to conjure up methods to determine the impact the firm's activities have in certain areas.[425] The imposition of a disclosure doomsday date would foster more intense discussion and rapid development of accounting tools.[426] An interchange of ideas between companies, accountants, and academicians would take place. Once disclosures began to flow, firms could see how other firms go about the social accounting task.

Nader, *supra* note 388, at 86 and Henning, *supra* note 344, at 915 (federal chartering includes added disclosure). Even a skeptic of all New Deal reform, Lazarus finds worth in disclosure:

> Information access . . . can be useful . . . . The SEC and the securities laws . . . show that . . . disclosure can transform the climate in which an industry operates—if there is an active constituency (in this case securities firms, lawyers, and investors) . . . .

Lazarus, *supra* note 398, at 225-26. Even Shepherd, *supra* note 420, at 245-46, as a believer in nationalization, calls for social responsibility disclosure as the "first legislative priority."

424. Conflicting goals include those such as utility to investors, protection against loss, and equality of access to information, text accompanying notes 120-272 *supra*, versus enforcement and publicity effects, *supra* text accompanying notes 345-51. For instance, Schwartz considers none of that. His total consideration of the accounting that necessarily must precede disclosure is that it is "doubtless a very complex subject" and "is not an area in which the SEC has developed any particular competence over the years." Schwartz, *supra* note 33, at 528.

425. As has been pointed out, notes 103 *supra* and accompanying text, social auditing has advanced beyond the point casual observers think it may have reached. In contrast, though, social accounting suffers because demands have been made for social accounting or social disclosure to do much more than the financial accounting or financial disclosure have even attempted to do. Development, although proceeding, is on again, off again due to that phenomenon and perhaps also because there is no sense of urgency to social accounting's refinement.

426. Setting such a date would be similar to SEC imposition of a time certain for phasing in negotiated brokerage commission rates which was necessary to bring innovation and reform to the broker-dealer community. *See, e.g.*, Kaplan, *Merrill Lynch Prepares for Mayday*, INSTITUTIONAL INVESTOR 47 (Apr. 1975).

Further refinement in executives' ability to see precisely how their firms' operations impinge on their surroundings would occur.

(9) Disclosure Will Make Further Reform Less Abrupt and Better Considered

Disclosure might convince ersatz reformers that certain industries or certain companies are doing more than critics have given them credit for in some areas of concern and thus render some reforms unnecessary. On the other hand, corporations' impacts in certain areas, although deleterious, might be altogether different from what critics now think they are. In those cases, with proper disclosure, reform can be redirected. An additional pragmatic argument for disclosure is that unless it is implemented, some other type of reform, probably more drastic, could be near.[427] A benefit of disclosure's acceptance might be merely to delay that reform. Whether disclosure postpones reform or makes some or all of it unnecessary, however, the probabilities are that the knowledge disclosure brings and the accounting techniques disclosure develops will benefit those contemplating further corporate law reform. Disclosure can provide the data that is needed to gain confidence in any new arrangement and, in the meanwhile, have a healthy effect on the way in which many enterprises operate. Such a double result would be a certain benefit to companies, to academicians, and to government.

C. Costs Social Accounting and Disclosure Might Impose

(1) The Information Social Accounting Could Provide Would Be of a Soft, Speculative Variety

The cost of social accounting for corporations would be that much of the social responsibility information they would disclose would not be in quantified, much less monetized, form.[428] Time, effort, and hence cost, would be required to develop techniques and to convert the information into something resembling hard data. In

427. Federal chartering advocates believe that with recent revelations ahout corporate bribery and political contributions, the "political possihilities" for federally legislated corporate law reform have "changed drastically . . . anything [is] possible." BNA SEC. REG. & L. REP. No. 307, A-1, at A-4 (June 18, 1975).

428. This was a concern of the SEC in the Natural Resources Defense Council Proceeding, notes 301-20 *supra* and accompanying text. *See, e.g.*, [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,717. In the better considered social audits, however, quantification, monetization, and relationships to profit are not matters of overriding concern or urgency. *See* text accompanying notes 103-07 *supra*.

the meanwhile, the soft social responsibility information disclosed would be subject to puffing and to multiple interpretations by investors. Those concerns who took a conservative accounting approach would be seen in a bad light; those who took advantage of the latitude soft information permits could paint a picture of social performance better than reality would warrant. The more honest corporation would incur a penalty, a public relations cost.

An obvious answer to this problem is that presently required disclosure contains much more soft data and narrative information than many observers realize or care to admit.[429] Another answer is that hard financial accounting, with its complete reduction of information to dollars and its relation of all information to a bottom line profit figure, can disguise the true situation as readily as can words and quantified, but nonmonetized data. Because of that reality, the trend in financial accounting is toward more narrative and so-called soft information. There is a growing realization that perhaps prior regulation has erred in giving accounting results too much certitude and in fostering an impression among investors that numbers and financial statements are unassailable.[430]

Certainly, with increasing frequency plaintiffs' lawyers are finding that traditional accounting results do not reveal, or indeed can hide, the true state of corporate affairs.[431] Lists grow longer of fiascos in which financial accounting has misled or disguised actual results. Such lists include the National Student Marketing, Equity Funding, Penn Central, Westec, and Four Seasons Nursing Homes affairs, to name a few.[432] As a result, courts are close to holding that adherence to generally accepted financial accounting principles may not be enough to paint a sufficient picture of a com-

429. *See, e.g.*, note 94 *supra* and accompanying text.

430. Fiflis finds that one of the most difficult problems with the current financial "accounting model" is that, without fraud or intent to mislead, it is "likely to mislead the layman, unaware of its qualifications, into believing it depicts the facts of the real world . . . ." Fiflis, *Current Problems of Accountants' Responsibilities to Third Parties*, 28 VAND. L. REV. 31, 44 (1975).

431. In 1973 more than 500 lawsuits were pending against accountants. Arthur Anderson & Co. 1973 Ann. Rep. 4. As of September 1974, the estimate was as high as 1000 lawsuits pending and 200 decisions rendered for a total of 1200. Fiflis, *supra* note 430 at 33; Liggio, *Expanding Concepts of Accountants' Liability*, CALIF. CPA Q. 18, 19 (Sept. 1974).

432. Professor Briloff lists celebrated recent cases, including his "A to Y Roll of Dishonor," in which financial accounting has failed to tell the truth. Briloff, *"We Often Paint Fakes,"* 28 VAND. L. REV. 165, 185, 191, 197 (1975). Professor Fiflis, *supra* note 420, at 33, compiles a similar list. Although the flood of litigation may be recent, the underlying unreliability of accounting in certain situations is not. *See* Katz, *Accounting Problems in Corporate Distributions*, 89 U. PA. L. REV. 764, 776-77 (1941).

pany's affairs. The trend is for courts to hold that accountants must go beyond traditional accounting, if need be, and paint a "fair" corporate portrait through footnotes to financial statements and the like.[433] The further inference is that to achieve a realistic representation, in many cases full and fair disclosure may require accountants to go beyond financial statements altogether.[434]

Social accounting may produce soft and speculative information, but not much softer nor more speculative than does financial accounting. In fact, there may be a benefit rather than a cost: a partly narrative, partly quantified (but not forcibly quantified) social audit may point to how financial accounting can cure the false impressions of certitude it increasingly seems to create.

(2) Social Responsibility is a Moving Target, and Costs Will Be Incurred in Hitting a New Target Each Year

Disclosure will saddle corporations with a duty to account. As the emphasis of social responsibility critics shifts from minority hiring to environmental matters to whatever is the greatest current concern of vocal activist groups, companies will incur accounting costs. Firms will expend time and effort in constantly developing new reservoirs of information and the accounting and disclosure techniques needed to live up to their duty to disclose.[435] Again, however, this problem is no more severe for social accounting and disclosure than for financial accounting and disclosure. In financial accounting technique, recent emphasis has skipped from purchase-pooling accounting to contingent liabilities and thence to last-in-first-out versus first-in-first-out inventory valuation.[436] The underlying substantive matters to which the various accounting techniques attach have risen to the fore and then, after a few years' publicity, have faded away. The late 1960's conglomerate boom, lawyers' and

433. *See* the discussion of *United States v. Simon* in note 190 *supra*.

434. Hawes, *supra* note 200, at 10-11, demonstrates that such is the import of recent decisions such as Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973), and Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

435. The SEC attempts to demonstrate that such a prohlem exists by listing 100 areas in which those interested in corporate social responsibility ostensibly want disclosure. [Current] CCH FED. SEC. L. REP. ¶ 80,310, at 85,724 n.72. The SEC's list, however, is strikingly redundant and makes no attempt to discern between the ridiculous, the vague, and the frivolous. *See* notes 318-20 *supra* and accompanying text.

436. *See* Briloff, *Dirty Pooling*, 42 ACCOUNTING REV. 489 (1967); Briloff, *supra* note 103, on the purchase-pooling controversy; note 67 *supra* on lawyers' attempts to reconcile their professional responsibilities with those of accountants; Hawes, *supra* note 200, at 12-15 with reference to inflation accounting and the LIFO-FIFO controversy.

accountants' professional responsibilities, and inflation in turn have been *causes celebre*. Each has given rise to data gathering and accounting problems—and to costs for corporations.

Another answer to the charge that social responsibility is a moving target is that the number of matters of concern to those persons seriously interested in corporate social responsibility seems to have lessened and that number's rate of change lessened and stabilized. Further, a consensus seems to have developed as to what those matters of central concern are. Peripheral concerns, such as Department of Defense contracting on the one hand and trade with Communist countries on the other, have altogether disappeared from most laundry lists. A small number of items now appear at the top of every list of what constitutes social responsibility or of what social accounting and disclosure should treat—environmental pollution, minority and female hiring and promotion, product safety, employee plant safety and welfare, corporate philanthropy, and perhaps corporate involvement in the local community.[437] No doubt that list will change over the coming years, but assuredly more gradually than it has in the past. Social accounting changes and the shifts in emphasis that engender them will still entail costs but not those of each year bringing to the corporate and SEC doorsteps myriad new questions to which disclosure must respond. More corporate and SEC time in which to anticipate gradually evolving concerns will mean a more dispassionate, relaxed atmosphere in which to develop programs and accounting and disclosure techniques. A more dispassionate, relaxed atmosphere translates into lower social responsibility costs for businesses and for government.

(3) Compiling Data on Corporate Social Performance Will Be Costly

Had large corporations never attempted to do so in the past, they might incur significant costs in ascertaining the impact their operations have on employee safety or on the environment, in structuring programs to ameliorate those effects that are deemed harm-

437. *See* the authorities cited in note 107 *supra*. That also seems to be the consensus at which Congress and federal agencies other than the SEC have arrived, believing that in those areas private business corporations do have responsibilities, agreeing in what direction those responsibilities lie, and requiring them to make one sort of account or another. *See* notes 217-20 *supra* and accompanying text. Gearing a social audit to such areas will reduce businesses' accounting and disclosure costs. The same consensus seems to emerge from institutional and other investors' desires for information. *See, e.g.*, the quotation accompanying note 145, 152 *supra*; the Investment Company Institute's suggestions, *supra* note 134.

ful, in monitoring those programs and gathering data, and in disclosing information about the programs and the results they believe those programs achieve. Many large companies, however, already have begun these tasks. Many corporate managers have voluntarily embarked on a bit of social auditing.[438] The enlightened manager wants to know all he can about his business, including the impacts it has on various matters. To that end, he may have undertaken some social accounting to see if matters of social concern affect the financial bottom line, the company image, or share prices. Many managers have assembled program descriptions and results into disclosable formats, and some actually are doing the disclosing. Many corporations' added costs in meeting SEC disclosure requirements, therefore, might not be as large as some individuals imagine or claim.

Governmental regulations already require most large companies to compile statistics on a variety of matters with which social responsibility advocates are concerned. Furthermore, companies must report those statistics to various government agencies. Required social accounting and disclosure could keep corporate costs down by being largely confined to those areas in which federal filings of one sort or another already are required.[439] The only added corporate cost would lie in preparing a summary of the programs and resources the company has devoted to achieving the statistical results required to be reported to other federal agencies. Thus, most large American corporations are or should be only a step or two away from a reportable social audit that would satiate the desires of most individuals who call for social responsibility disclosures. If the SEC confines the required disclosure to a simple audit format, along the lines many current process audits utilize, corporate costs involved in meeting disclosure requirements would be relatively low.

(4) Image Costs to Corporations Will Arise When Disclosure Forces Revelation of Negative Items or Lack of Progress on Certain Social Fronts

The maturity that recently has come to the corporate social responsibility area answers the problem of image costs. The shrill ultimatums of the late 1960's on a wide variety of issues have been

438. By one tabulation, 76 percent of a sample of large companies have undertaken social accounting of one sort or another. *See* note 254 *supra*.

439. That is precisely the proposal made herein, notes 451-52 *infra* and accompanying text.

displaced by a handful of more serious and responsible, yet more sustained demands for corporations to relate to society. Also, there is an ever-growing realization among investors that corporate social responsibility is a relative concept. Thus, social responsibility no longer means a search for a clean company in which to invest or for a company blackened by social irresponsibility which investors should shun. There are many shades and gradations of social performance, and more and more people interested in social responsibility have come to realize that fact.[440] Further evidence of interested persons' relative approach to social responsibility is their willingness to compare a particular company's disclosures over time to determine if the company is making progress. Hence, relative approaches will aid in preventing corporations' initial social disclosures from becoming the basis upon which a company is castigated, if over time a company's own and other companies' disclosures show that a corporation is earnestly moving in the right direction. Thus, most investors, at whom social responsibility and financial disclosures primarily are aimed, realize that "[o]ne must learn over time what inferences are warranted from the numbers which any measurement system generates."[441]

In fashioning a social responsibility disclosure program, the SEC also can minimize the embarrassment or breast-beating through which companies would have to sojurn in disclosing. Disclosure should not concentrate on past sins; rather, it should have a prospective, positive focus. In the disclosure program's beginning years, disclosure could center on a description of the problem as the disclosing company perceives it, on a description of the program the company has fashioned to attack the problem, and on a quantification of the resources the company is devoting to that program. Hence, initially, disclosure merely would force some companies to think about and refine programs a bit. Then, gradually, disclosures' emphasis could widen to include results that the described programs achieve and year-to-year statistical comparisons. In this way, interested persons would have relative information while companies developed their social programs.

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440. *See, e.g.*, notes 41 & 154-60 *supra* and accompanying text.

441. *Commentary on Let's Get on With the Social Audit*, BUS. & SOC'Y REV. 42-44 (Winter 1972-73) (remarks of Raymond A. Bauer).

(5) An Excursion into the Socioeconomic Arena Will Cause Loss of the SEC's Non-Controversial Status and, Therefore, Its Effectiveness

Over the years, industry, academia, and investors have given the SEC high ratings.[442] With the respect of the regulated as well as the critics, the Commission has been able to extend its track record as an effective regulator. On a number of matters, ranging from integration of the '33 and '34 Acts disclosure systems to implementation of negotiated brokerage commission rates and creation of the central market system, the Commission has moved slowly but surely toward meaningful reform. The danger is that a sudden turnabout in its opposition to corporate social responsibility disclosure would thrust the SEC into the center of controversy. Business executives would lose respect for the Commission's edicts, whereas heretofore businesses by and large have tried to conform to SEC policy. These results, the scenario goes, would flow from corporate resentment for the Commission's having made companies reveal all the skeletons in the corporate closet.

There is some credibility to the belief that SEC social responsibility disclosure requirements might impair the Commission's effectiveness. A large portion of the SEC's good reputation derives from its limited role, a role it has not sought to expand. Hence, the Commission does not "make economic determinations . . . as to the merits of any particular security or investment recommendation."[443] The Commission requires full and fair disclosure. Once an issuer makes that disclosure, the issuer can sell its securities, whatever the enterprise's investment merits. By requiring companies to disclose social performance information, the SEC would not be passing on securities' investment merits, but the Commission nevertheless would be expanding its role. Moreover, the Commission would be moving toward forcing the issuers themselves to make a statement about the moral worth or social merit of an enterprise.

Several observations can be made about this scenario. First, at most firms social audit results would not be odious. In fact, many large corporations do not know themselves the good things they do. Hence, SEC-required social accounting and disclosure would not create a wave of investor and public revulsion, coupled with corpo-

442. *See, e.g.*, Lazarus, *supra* note 386, at 216-24; Nader, *supra* note 388, at 89; Ratner, *The SEC: Portrait of the Agency as a Thirty Seven Year Old*, 45 St. John's L. Rev. 583 (1971).

443. Ratner, *supra* note 442, at 584. *Cf.* some states' Blue Sky law philosophy, *supra* notes 113 & 272.

rate resentment, as companies are forced to spew forth reams of incriminating evidence.[444]

Secondly, although the SEC does not pass on a security's financial merits, in reality the Commission already comes close to forcing issuers to do so themselves. As administered by the Commission, full and fair disclosure requires a company to disclose and disclose, until an investor's conclusion may be well-nigh irresistible. A company may not have to state flatly that it has little merit, but the SEC will require such complete and straightforward disclosure that in their entirety disclosure documents virtually say "there is really very little merit here."[445] Even if corporate social responsibility disclosures were aimed at flushing out *mea culpa* statements and issuer conclusions as to their moral or social posture, the resultant disclosure would not be significantly different from much financial disclosure the SEC now requires.

Thirdly, the Commission's reputation derives not only from its abstention from investment merit determination, but also from its passive role in requiring disclosure by all companies and industries, across the board and without selectivity, rather than in having to deal with a narrow and captive economic sector.[446] The Commission has not had a life-and-death power over all companies in a given field. It has not had "the difficult and politically dangerous task of choosing between competing applicants for a limited number of franchises,"[447] as does the Federal Communications Commission and the Civil Aeronautics Board, or as a Federal Chartering Agency in effect would have.[448] The Commission need not "undertake the

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444. The relative approach to judging the social responsibility of investments, notes 154-60 *supra* and accompanying text, also answer the question.

445. For example, the SEC requires prominently displayed chart and hydrograph disclosure to show prospective investors the percentage of ownership and control promoters will receive, note 263 *supra*. Registration of the securities of newly founded companies or of speculative enterprises of any type requires a blunt, no-nonsense listing of all the factors which make the securities risky or speculative. Moreover, the registrant must insert the list in a prominent place at the beginning of the prospectus. *See, e.g., In re* Woodland Oil & Gas Co., 38 S.E.C. 485 (1958). On requirements for full, plain speaking disclosure generally, see *In re* Universal Camera Corp. 19 S.E.C. 648 (1954); *In re* Franchard Corp., SEC Securities Act Release No. 4710 (July 31, 1964).

446. By dealing with all industries rather than just one (railroads or airlines or the broadcast media), there is less chance of being co-opted by a singularly organized counterattack. To an extent this explains a difference between the SEC and the ICC. Nader, *supra* note 388, at 87.

447. Ratner, *supra* note 442, at 583, explaining the Commission's success as a regulatory agency.

448. Taking cognizance of the rising tide of opinion against creation of any more New Deal type agencies, and the sentiment for deregulation of some industries, *e.g.*, note 397

imbroglios of rate determination," which result in heavy "industry lobbying and a dependence on self-serving data,"[449] together with frequent ruination of the original intent to regulate in the public interest.

In requiring corporate social accounting and disclosure, the Commission would not take on such activist regulatory tasks. To be sure, were the Commission to adopt disclosure requirements, some executives would attempt to brand the Commission the activists' sycophant. But closer analysis reveals that in requiring such disclosure the Commission would not be changing one element in its success formula. The Commission would still play the passive role it has played in the past: requiring full and fair disclosure by every publicly held company of a certain size or larger, to enable each investor to make his or her own determination about the relative worth of various enterprises.

VIII. A Modest Proposal—Required Disclosure of Process Audit Results

By rule, the Commission should require a simple process audit and disclosure of audit results. The required accounting and disclosure should be kept simple, remembering that "the biggest mistake of this juncture is to try to design," or to demand "techniques which fully satisfy all dimensions."[450] Disclosure rules should require a description of the social problem an issuer of securities believes it is facing, with a statistical description when available. Following the problem description would be a narrative describing the program the company has designed to alleviate the conditions it believes to exist, together with a short narrative about the rationale behind the program. Tabulation of the human and economic re-

supra, Ralph Nader and the Corporate Accountability Research Group have hinted at revision of their federal chartering proposal. Instead of a new Federal Chartering agency to administer the proposed statute, they now propose that the regulatory functions the federal chartering statute creates be parceled out to existing agencies, principally the SEC and the Department of Justice's Antitrust Division. R. Nader, M. Green & J. Seligman, Constitutionalizing the Corporation: The Case for Federal Chartering of Giant Corporations (1976); Jones, *Nader Calls for Federal Charter of Business*, Wash. Post, Jan. 25, 1976, at C-10. This seems to be a singularly bad idea. By foisting upon the SEC the duty to pass upon corporations' initial federal charter and upon charter renewals, the proposal would thrust upon the SEC an active rather than passive role of the very type Nader, *see supra* note 446, and others, *e.g.*, Lazarus, *supra* note 397, have criticized. The further danger is that the imbroglios and controversy so created might also infect the SEC in the other, more passive missions it has carried out so well.

449. Nader, *supra* note 388, at 87.

450. Linowes, *supra* note 11, at 4.

sources the company devotes to the program would be required. The last item in the required process audit would be a list of the goals the company hopes the program would achieve.

Monetization should not be required, much less any attempt to demonstrate the programs' contributions to long-run profits. When reasonably available and after a few years of beginning disclosures, however, the SEC should begin requiring more quantification of results, such as number of minority persons hired, number of employee accidents, number of product safety complaints, or effluent level in parts per million. The SEC also should undertake a continuing review of various quantification methods with a view towards promulgating guidelines on how best to quantify a given item—for example, excluding from a count of product safety complaints those complaints not evidenced by a writing, or including work-related injuries even though the particular employee has not lost work days.

The next question is what areas of social concern, or processes, disclosure should treat. Again, the coverage should be modest. No area should be included unless a near consensus exists that private entities do have responsibilities in the area and that those responsibilities lie in a certain direction and extend to certain lengths. Perhaps a better standard would be that a formally stated executive or legislative pronouncement must have imposed upon corporations a duty in the area. Narrowing still further, required disclosure could be limited to those areas in which a governmentally imposed duty exists and a federal filing with some agency or arm of the federal government is required.[451]

The limitation to areas in which a federal filing is required would not reduce SEC-required disclosure to a mere replication of various federal filings. As has been pointed out, the disclosures should place emphasis on the programs, strategies, and resources companies have devoted to achieving the results that the filings with other agencies are designed to monitor. Disclosure also could go beyond other filings; filing with another agency would key SEC-required disclosure over the entire spectrum of a company's activity in the generic category involved. Hence, since indirectly the National Environmental Policy Act (as to air pollution) and directly the Clean Water Act (as to other effluents) require federal filings, a

451. *See* the discussion of the filings currently made, notes 217-31 *supra* and accompanying text. The only filing not therein discussed is the corporate tax return. And, of course, the Internal Revenue Code embodies both a policy in favor of corporate philanthropy and a requirement of disclosure to the IRS. INT. REV. CODE OF 1954 §§ 170(b)(2) & 545(b)(2).

national policy exists in favor of some corporate abeyance of adverse environmental effects. SEC-required disclosure, then, might pertain to the entire generic category—the environment. Thus, disclosure also would briefly describe programs devoted to solid waste reduction and recycling and noise level reduction as well as to air and water pollution.[452]

Social responsibility disclosure should be required no more often than annually. Whether this disclosure should be in the annual 10K report companies file with the SEC or in the annual shareholder report companies mail to stockholders, is becoming a moot question. For years, beyond certain de minimus requirements, the SEC had a hands-off policy with respect to the shareholder report, preserving it as a vehicle for management to communicate with its shareholders in the manner management deemed best.[453] Thus, the shareholder report tended to be a "discursive, chatty document," while the 10K the SEC received tended to be a thick and gray liability-avoiding document.[454] The SEC, however, has modified, if not discarded, that annual report philosophy and has moved much more toward required disclosure in the glossy-paged shareholders' report.[455] That being so, corporate social responsibility information might go in the shareholders' report, since that document is most likely to receive wide circulation.

The last question is what companies should have to prepare a process audit. The cutoff that first comes to mind is 12(g) status under the Securities Exchange Act of 1934.[456] Companies with a class of equity securities held by 500 or more persons and having a million dollars or more in assets must file periodic reports with the SEC. Companies of 12(g) size, however, to the lay person's eye, can be quite small. There is neither significant nor widespread investor interest, let alone social responsibility interest, in many such companies. Further, the limitation of resources under which many smaller 12(g) companies operate may make fashioning a social audit an undue burden on them. An already existing classification that might limit social responsibility disclosures to larger companies,

452. The areas in which filings are now required and where disclosure would be required are environment, corporate philanthropy, product safety, occupational health and safety, minority hiring and promotion, and energy conservation and development. *See* notes 107, 134, 145 & 217-31 *supra*.

453. *See* Sommer, *supra* note 111, at 1100; *supra* note 214.

454. Sommer, *supra* note 111, at 1100.

455. *See* note 214 *supra*.

456. 15 U.S.C. § 781(g) (1970).

able to carry the burden, would be having a class of securities listed on a national stock exchange.[457] Such a disclosure cutoff, however, would exclude from social responsibility reporting some companies that are quite large, but have chosen to have their securities traded in the over-the-counter market.

A good "in-between" classification upon which to base corporate social responsibility disclosure might include all those companies that have securities traded on a national stock exchange plus those larger companies whose securities are traded over-the-counter and are on the margin list promulgated by the Federal Reserve.[458] Such a classification is not unknown to securities regulation or, indeed, to disclosure requirements—the SEC has used that classification to describe those companies to which expanded quarterly reporting requirements will apply. The SEC has reasoned that such a break-point includes within the reporting requirement companies of sufficient size to be able to comply with expanded disclosure requirements without undue hardship and in which investors have sufficient interest to justify more quarterly disclosure.[459] The same seems true in the social responsibility area. Similarly, the Commission should require social accounting and disclosure of listed companies and those over-the-counter companies on the Federal Reserve Board margin list.

The disclosure proposal then, is a modest and circumscribed one: two pages or so of social responsibility disclosures in most very large corporations' annual reports. The accounting results companies must report would be carefully limited to five or six areas in which general agreement exists that corporations do have a duty, including agreement of corporate executives themselves, and in a particular direction and to a certain extent. Production of hard data on results would be required only as the data becomes available to reporting companies. Narrative descriptions, subject to limitations on puffing and on the omission of material facts, would fill in the interstices of the audit. Such a disclosure program seems eminently reasonable. It can be required on the same bases upon which financial disclosure always has been required. Indeed, it seems the best alternative available for gradually moving toward a new, modern

457. 15 U.S.C. § 781(b) (1970).

458. Such a classification would include 300 or so of the largest and best known of the some 14,000 or more stocks traded in the over-the-counter market, Wall Street J., Sept. 12, 1975, at 5, col. 2.

459. SEC Accounting Series Release No. 177 (Sept. 10, 1975); Wall Street J., Sept. 12, 1975, at 5, col. 2. *See also* note 192 *supra*.

model for the corporation without the severe dislocations, monumental governmental intervention, or corporate resentment other alternatives would produce.

IX. Conclusion

Adolf Berle once described what he called "inchoate" law:

> [It] relates to the duties of corporations . . . arising from the impact on social and economic situations forseeably resulting from a corporate course of action. When the impact point is reached, it is predictable that hitherto undetermined . . . responsibility will suddenly emerge as explicit law. This result might come about through sudden demand for and passage of legislation . . . or through court decision . . . . It is the business [of corporations and their counselors] to be aware of these fields of inchoate law and to guide corporate policy so that results will accord, rather than conflict, with these inchoate rules. In the truest sense this is corporate statesmenship . . . .[460]

It is submitted that regulatory agencies, too, have a similar, albeit muted, duty of statesmanship akin to that which Professor Berle describes. At the SEC, for instance, commission statesmanship has manifested itself in anticipation of Congressional and brokerage community reaction. The Commission has implemented negotiated brokerage commission rates and a central market plan before legislation has crystalized those reforms. In other areas, the Commission in the exercise of statesmanship and enlightened self-interest, regularly seeks congressional action before legislation in ill-considered form is forced upon it.[461] In this troublesome area of corporate social responsibility, judging from the number, increasing frequency, and intensity of reform proposals, Berle's impact point seems to be approaching for both the regulators and the regulated. Yet the SEC has done little. Instead of resisting, the Securities and Exchange Commission should take cognizance of some "inchoate" law's existence, and exercise some leadership.

Perhaps in conjunction with its recently announced and forthcoming disclosure study,[462] the Commission should seriously exam-

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460. Berle, *Corporate Decision-Making and Social Control,* 24 Bus. Law. 149 (1968).

461. For example, recent SEC requests for legislation have included requests for expanded authority to deal with so-called pyramid sales plans, expanded authority to deal with securities issues by common carriers, and authority to regulate investment companies' sales to foreign investors. In addition, the SEC has recently made a number of suggestions as to what authority Congress should give the Commission to regulate banks in the automatic investment plan and other areas. *See generally* BNA Sec. Reg. & L. Rep. No. 317, at A-9 to A-10 (Aug. 27, 1975).

462. On Jan. 7, 1976, SEC Chairperson Roderick Hills told the American Institute of Certified Public Accountants that the SEC is soon to announce a 12-18 month study on "the objectives of our disclosure policy and our means of implementing those objectives." In part,

ine social accounting and disclosure. Perhaps, in the meanwhile, the Commission could require some modest social accounting by corporations.[463] If the Commission feels insecure in the area, perhaps it should explore congressional feeling about disclosure and other reform proposals and consider the possibility of explicit legislative disclosure requirements. Should the Securities and Exchange Commission not begin a study of this area of "inchoate" law and should it not exercise some statesmanship and leadership, the prospects are that the Commission, publicly held corporations, and investors will meet with an abrupt imposition of some heavy-handed, wasteful, and theoretically unsound or uncertain corporate law reform and new corporate law model. At a minimum, the Commission, corporations, and investors will continue to face uncertainty in this troublesome social responsibility area for a long, long time to come. Companies, investors, and others need a Cheshire Cat to tell them "where to go" and "how to get there." Some social accounting has begun; let it proceed and progress, and let some disclosure of accounting results begin under the considered mandate of the SEC.

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though, the study will go off on a new track, attempting "to face up to the criticisms of economists and accountants and lawyers that our disclosure policies overall are not as relevant as they could be." The study will not confine itself to an investigation based on disclosure's traditional premises, as the Wheat Report had done. BNA SEC. REG. & L. REP. No. 335, E-1, at E-3 (Jan. 14, 1976). On Feb. 2, 1976, the SEC announced the appointment of various experts to the new study group. SEC Securities Act Release No. 5673. Such a study presents an opportunity for a thorough, open-minded consideration of social accounting and disclosure matters, in contradistinction to the adversary setting. *See, e.g.*, the discussion of *Natural Resources Def. Council, Inc. v. SEC*, notes 274-321 *supra* and accompanying text, that heretofore has clouded the issues involved.

463. The Commission has not denied that it has the authority to require some social responsibility disclosures. In the Natural Resources Defense Council proceeding the SEC characterized its authority as enabling it to require disclosure on matters that are not only primarily economic in nature but of matters "of economic significance" or having an impact on economic matters. CCH FED. SEC. L. REP. ¶ 80,310, at 85,710. In fact, the Commission noted that its "broad discretion to require disclosure provides necessary latitude to expand or contract disclosure rules in light of changes in the relative context in which securities issuers conduct their businesses." *Id.* at 85,712.