

BACKGROUND

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Why the U.S. Should Oppose International Corporate Social Responsibility (CSR) Mandates

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Abstract

Like a vitamin regimen that exceeds recommended daily amounts, corporate social responsibility (CSR)—once seen as a healthy thing in small doses—now poses a toxic threat to American business. CSR is an attractive-looking concoction that appears to be a tonic for corporate public relations strategies, with no risk. However, if the latest and most radical wave of supposedly “voluntary” CSR standards, principles, and strategies is fully embraced by the corporate world, it will unleash additional efforts by CSR proponents (special-interest NGOs and intrusive government bureaucrats) to redefine the very purpose of business and lash private companies to ever greater burdens and constraints. Unless the new CSR is stopped, these anti-free market and statist proponents may push CSR beyond the point of no return—from voluntary to mandatory.

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Until recently, proponents of corporate social responsibility (CSR) promoted it as a set of voluntary standards that, if adopted, would allow private companies to boast of their good stewardship of communities’ resources. Many companies were all too happy to sign on to this movement as a public relations strategy to offset the ever-growing demands by government on the private sector. Sensing opportunity, CSR activists (whose ultimate goal is generally to tax private capital to increase the size and scope of government) have upped the ante and are ramping up their CSR demands.

This new CSR push is an attempt to redefine the very purpose of business by asserting so-called triple-bottom-line obligations of companies to deliver (1) economic, (2) social, and (3) environmental “returns” to justify a theoretical “license to operate” granted to them by society. Moreover, advocates of the new CSR are pushing to impose mandated standards instead of voluntary initiatives, assert comprehensive obligations in place of targeted projects, and require highly structured reporting in place of flexible communications.

In 2010, for example, the International Organization for Standardization (ISO)—a

TALKING POINTS

- A new wave of radical corporate social responsibility (CSR) standards poses a toxic threat to American business. The new CSR imposes “triple-bottom-line” obligations on companies to deliver (1) economic, (2) social, and (3) environmental “returns” in exchange for a “license to operate” from society.
- CSR advocates want these standards to be mandatory, not voluntary. In 2010, the International Organization for Standardization (ISO) adopted “ISO 26000” standards, demanding compliance with “international norms of behaviour” in the social, economic, and environmental spheres.
- Special-interest “green” NGOs, intrusive government bureaucrats, and other CSR proponents want to redefine the very purpose of business.
- The Obama Administration is establishing an entire government bureaucracy to encourage and oversee the adoption of the new CSR agenda.
- Private companies and U.S. taxpayers should be very wary. Unless the new CSR mandates are stopped, these anti-free-market and statist proponents may push CSR beyond the point of no return.

nongovernmental organization founded in 1947 and based in Geneva, Switzerland, which sets international standards for doing business—adopted new CSR standards called “ISO 26000.” Advertised as “voluntary” guidelines, the 100-page ISO 26000 is one of the most comprehensive expressions of the new CSR philosophy to date. It defines social responsibility in terms of complying with “international norms of behavior”¹ in the social, economic, and environmental spheres.

This is a case of “buyers beware” for private companies. It is rare in CSR materials that its advocates stipulate which rights or status business owners have in this new bargain. Though words such as “stakeholder” appear frequently in CSR literature, “shareholder” and “owner” do not.

Governments that understand the benefits of the free market, as well as the business community, should resist this new radical CSR agenda. Regrettably, the Obama Administration is setting up an entire government bureaucracy to encourage and oversee the adoption of the CSR agenda.

The Administration has recently established the Stakeholder Advisory Board on the U.S. National Contact Point for the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, and a new office for the U.S. National Contact Point in the State Department’s Bureau of Economic and Business Affairs.² President Barack Obama should reverse those recent actions and Congress should block the use of any U.S. contributions to the OECD that fund programs that will institutionalize CSR activities in member state governments.

The New CSR Agenda: Redefining the Purpose of Business

Demands for corporate social responsibility have become louder over the past 20 years. During that time, a rich literature of advice for “doing well by doing good” has developed in the corporate world.³ Impatient CSR advocates, finding the corporate world too slow in adopting their agenda, found willing allies in international organizations that

allegedly promote human rights and economic development within the United Nations bureaucracy. One early CSR effort was called the U.N. Global Compact, a statement introduced in 1999 that prescribed 10 “voluntary” principles that businesses could sign on to in exchange for the right to use the U.N.’s “We Support the Global Compact” logo in their advertising.⁴ The principles promote long-standing U.N. human rights, labor, environment, and anti-corruption standards. The first principle states: “Businesses should support and respect the protection of internationally proclaimed human rights.” The second principle states that businesses should “make sure that they are not complicit in human rights abuses.”⁵

However, progressives and other CSR advocates are now pushing a new generation of radical and aggressive standards, principles, and strategies. The new CSR mentality seeks, at its core, to redefine the very purpose of business. The definition of CSR has increasingly cast aside the traditional focus of corporate management’s responsibility to the firm’s

1. International Organization for Standardization, “ISO 26000 Final Draft International Standard, Guidance on Social Responsibility,” Sub-clause 2.11 (Geneva, Switzerland: ISO, 2010). For more on the history of ISO 26000, see James M. Roberts, “How Corporate Social Responsibility (ISO 26000) Mandates Undermine Free Markets,” Heritage Foundation *Background* No. 2409, May 3, 2010, <http://www.heritage.org/research/reports/2010/05/corporate-social-responsibility-standards-iso-26000-bad-for-business>.
2. U.S. Department of State, “U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises,” <http://www.state.gov/e/eb/oeed/usncp/> (accessed March 12, 2012).
3. See, for example, Philip Kotler and Nancy Lee, *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause* (Hoboken, NJ: Wiley, 2005). Kotler and Lee assert, “Corporate Social Responsibility is a commitment to improve community well-being through discretionary business practices and contributions of corporate resources,” p. 3. However, as detailed in this *Background*, CSR proponents are now pushing a vastly expanded definition and a much more intrusive CSR. Kotler and Lee’s description would no longer be acceptable in this more radical version of CSR.
4. United Nations, “Global Compact,” http://www.unglobalcompact.org/AboutTheGC/Global_Compact_Logo/index.html (accessed March 23, 2012).
5. An overview of the U.N. Global Compact launched by Secretary-General Kofi Annan in 1999 can be found at United Nations, “Global Compact: The Ten Principles,” <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed March 13, 2012). As a number of scholars have noted, the 10 principles share many of the core elements of the earlier “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.” These norms stress labor and environmental themes that involve heavy state control or regulation, and share an anti-private-sector, pro-big-government bias. Economist Daniel Drezner calls the Global Compact another one of the U.N.’s “grandiose initiatives that never quite live up to their billing.” Wagaki Mwangi and Hans Peter Schmitz, “Global Compact, Little Impact? Explaining Variation in Corporate Attitudes Towards Global Norms,” paper presented at the Annual Convention of the International Studies Association, February 28–March 4, 2007, http://faculty.maxwell.syr.edu/hpschmitz/Human_Rights_2009/Mwangi_Schmitz_GlobalCompact.pdf (accessed March 13, 2012).

owners and investors and, instead, coalesces around what proponents assert is a triple-bottom-line obligation of companies to deliver not only economic, but social and environmental “returns” to their communities in order to justify a license to operate. In addition, the new concept of CSR seeks to change the focus from voluntary initiatives to mandated standards, from targeted projects to comprehensive obligations, and from flexible communications to highly structured reporting.⁶

Advocates of this new CSR agenda believe that society is facing unprecedented challenges, and that, thus, the very definition of business must change to meet these challenges. Long-time CSR advocate and writer John Elkington asserts that the world is approaching an “environmental precipice” in which the very existence of life on planet Earth is threatened by global warming and ozone depletion.⁷ Harvard professors Michael Porter and Mark Kramer claim that, “[t]he capitalist system is under siege. In recent years business has increasingly been viewed as a major cause of social, environmental,

and economic problems.” They claim that this means nothing less than “creating a new conception of capitalism.”⁸ Make no mistake, mere philanthropy or engaging in selective projects to benefit local communities will not satisfy the requirements of the new CSR agenda.

Not only are these new CSR concepts fundamentally flawed, but in their rush to promote, expand, and institutionalize statist policies, CSR advocates have routinely failed to acknowledge the massive and growing thicket of regulations that already form part of the modern regulatory state. As *The Economist* explained in 2005, CSR proponents assert, “It will no longer do for a company to go quietly about its business, telling no lies and breaking no laws, selling things that people want, and making money. That is so passé.” However, legal compliance is no simple matter in the modern regulatory state. In this description, both the volume and complexity of regulatory laws—from environmental to employment, labor union, consumer protection, and antitrust—are completely ignored.⁹

In his excellent 2008 book *Capitalism with Chinese Characteristics*,¹⁰ Yasheng Huang demonstrates the crucial role of private enterprise in rural China in the 1980s that spurred the tremendous economic growth that lifted hundreds of millions out of poverty. These “peasant entrepreneurs”—not Maoist revolutionaries—were the true authors of China’s “Great Leap Forward.” Huang also makes a compelling analytical case that the reactionary crackdown in China in the 1990s after Tiananmen Square—wherein the Communist Party, its 46 million government bureaucrats, state-owned enterprises, and the People’s Liberation Army reasserted state capitalism from their power bases in China’s coastal cities—has all but crushed the rural sector.

Of particular relevance is Huang’s illustration of the statist’s de facto mandatory, “Chinese-style” CSR imposed by the regime only on the truly *private* Chinese companies. These companies could become “glorious” in the eyes of the state only by making social contributions “in the form of charity and

6. The new CSR draws particular support from four major sources, each of which embraces the new CSR’s efforts to redefine the social and environmental obligations of companies. (1) The modern environmental movement has increasingly emphasized that environmental challenges cannot be resolved in isolation: social issues and economic development must also be taken into account. See, for example, Article I of the “Plan of Implementation of the World Summit on Sustainable Development,” Johannesburg, South Africa, 2002, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (accessed April 9, 2012). (2) The modern self-proclaimed human rights movement seeks to expand the definition of “human rights” to include an array of economic, environmental, and social measures. See, for example, the U.N. *Declaration on the Right to Development*, G.A. Res. 41/128, December 4, 1986. (3) The field of business ethics has developed a particular focus on the treatment of “stakeholders,” including those representing various environmental, social, and economic interests. See, for example, R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman Publishing, 1984). (4) The new CSR is also embraced by those who more generally advocate expanded government powers, particularly on environmental and social measures. See, for example, Robert Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (New York: Alfred A. Knopf, 2007). In each case, the new CSR’s attempts to redefine business to include a fundamental obligation to serve environmental and social objectives are enthusiastically embraced by its supporters.
7. John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Oxford: Capstone, 1997), p. 20. The term “triple bottom line” is attributed to John Elkington.
8. Michael E. Porter and Mark R. Kramer, “Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth,” *Harvard Business Review* (January–February 2011), pp. 64 and 77. While Porter and Kramer advocate a concept they call “shared value,” it seems to reflect a number of the features of triple-bottom-line CSR. For example, they assert, “The purpose of business must be redefined as creating shared value, not just profit per se.” They further describe shared value as “creating economic value in a way that *also* creates value for society by addressing its needs and challenges.”
9. “The Good Company,” *The Economist*, January 22, 2005, p. 11.
10. Yasheng Huang, *Capitalism with Chinese Characteristics: Entrepreneurship and the State* (New York: Cambridge University Press, 2008).

donations to poverty alleviation and reforestation.”¹¹

Though CSR advocates routinely blame the Reagan–Thatcher era of deregulation for any number of consequences that now require CSR-style solutions, regulation continues to grow worldwide. In the United States, regulation has grown dramatically in recent decades, as evidenced by the expanding number of pages in the Code of Federal Regulations (CFR): In 2009, the CFR expanded by about 25 percent—from 132,228 pages in 1993 to 163,333 pages.¹² In addition, the Obama Administration’s regulatory wave, especially in the areas of health care, energy, and finance, provides further evidence that the regulatory state is alive and well.¹³

Evidence of this more radical version of CSR can be found in many international documents laying out its principles and policies over the past two years:

- December 2010: ISO 26000 International Standard: Guidance on Social Responsibility;¹⁴

Does ISO 26000 Represent a “Consensus” on Social Responsibility?

The ISO proclaims ISO 26000 as a consensus standard for social responsibility.

However, can ISO truly claim a consensus when:

- National standards bodies—the most representative standards-setting organization within each country—which were participating members in the ISO 26000 process and which voted in favor of ISO 26000, represented just 53 percent of the world population?
- Major organizations representing large, medium, and small businesses rejected the final draft of the ISO 26000 document?
- Participating member national standards bodies representing a number of major ISO member countries did *not* vote in favor of ISO 26000, including the national standards bodies from Australia, Austria, Germany, India, and the United States?

- January 2011: U.N. Global Compact, Blueprint for Corporate Sustainability Leadership;¹⁵
- March 2011: Global Reporting Initiative, Sustainability Reporting Guidelines, Version G3.1;¹⁶
- May 2011: OECD Guidelines for Multinational Enterprises,

Amendments Relating to National Contact Points;¹⁷

- June 2011: United Nations Guiding Principles for Business and Human Rights;¹⁸ and
- October 2011: European Union Commission’s Renewed Strategy 2011–14 for Corporate Social Responsibility.¹⁹

11. Ibid., p. 165.

12. The Heritage Foundation, “Solutions for America: The Rising Tide of Red Tape,” August 17, 2010, <http://www.heritage.org/research/reports/2010/08/the-rising-tide-of-red-tape>.

13. See, for example, James L. Gattuso and Diane Katz, “Red Tape Rising: Obama-Era Regulation at the Three-Year Mark,” Heritage Foundation *Background* No. 2663, March 13, 2012, <http://www.heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-the-three-year-mark>.

14. International Organization for Standardization, “ISO 26000 Final Draft International Standard, Guidance on Social Responsibility,” Sub-clause 2.18, 2010. For more on the history of ISO 26000, see James Roberts, “How Corporate Social Responsibility (ISO 26000) Mandates Undermine Free Markets.”

15. U.N. Global Compact, “Blueprint for Corporate Sustainability Leadership,” http://www.unglobalcompact.org/docs/news_events/8.1/Blueprint.pdf (accessed April 10, 2012).

16. Global Reporting Initiative, “Sustainability Reporting Guidelines G3.1,” 2011.

17. OECD, “OECD Guidelines for Multinational Enterprises,” 2011, <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (accessed April 10, 2012).

18. U.N. Human Rights Council, “United Nations Guiding Principles for Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (accessed April 10, 2012).

19. European Commission, “A Renewed EU Strategy 2011–14 for Corporate Social Responsibility,” October 25, 2011, http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=7010 (accessed April 10, 2012).

Indeed, ISO 26000 is one of the most comprehensive expressions of the new CSR agenda to date. It claims to have achieved “international consensus” on the topic.²⁰

International Organization for Standardization

The International Organization for Standardization in Geneva is made up of national standards organizations from each of its member countries. The ISO currently has 111 national “member bodies” with full rights to participate and vote in technical and policy committee work, as well as 52 “correspondent” or “subscriber” members with more limited rights.²¹

The national standards body acting as the ISO member body for the United States is the American National Standards Institute (ANSI). ANSI was founded in 1918 and has been funded by its private industry members in a (generally successful) effort to achieve product quality through self-regulation, thereby avoiding intrusive and costly government regulation. Among hundreds of ANSI standards are those covering such industries as “nuclear energy, information

technology, material handling and electronics.”²² ANSI’s website notes that it “empowers its members and constituents to strengthen the U.S. marketplace position in the global economy while helping to assure the safety and health of consumers and the protection of the environment.”²³

ISO industrial and commercial standards are often adopted as national law by country governments or integrated into treaties that govern commerce, investment, and other economic activities. In 2003, the ISO established a working group to develop a global standard of social responsibility.²⁴ ANSI tapped the American Society for Quality to lead U.S. participation in the development of the ISO 26000 standard.²⁵

The U.S. government is represented in all U.S. delegations to ISO conferences; and it participated in all meetings having to do with the formulation of the new ISO 26000 standard on CSR. The lead U.S. agency on ISO 26000 is the Environmental Protection Agency, one of the most activist regulatory agencies in the federal government.²⁶ Several ISO 26000-related “products” are

already available on the ANSI website: “Guidance on ISO 26000 standards” (priced at \$235); and ISO “site licenses.”²⁷

How ISO 26000 Redefines Business: The Bottomless Triple Bottom Line

Among the core principles of the *Index of Economic Freedom*,²⁸ published annually by The Heritage Foundation and *The Wall Street Journal*, are limited government, decentralization of power, and the protection of private property. Viewed through the lens of the *Index*, then, it becomes obvious that the fundamental benefit to society from private companies operating in economically free countries is that they supply high-quality goods and services at competitive prices, creating jobs and fostering prosperity in the process. The new CSR agenda, however, redefines the purpose of business by imposing a triple-bottom-line standard: Companies must justify their existence by generating social, environmental, and economic “returns” from business operations. Those returns are defined not by the marketplace but by the CSR activists themselves.

20. “Social Responsibility: Dawn of a New Era,” ISO Focus+, March 2011, p. 1.

21. For a complete listing of current ISO members by type, see International Organization for Standardization, “ISO Members,” http://www.iso.org/iso/about/iso_members.htm (accessed April 19, 2012).

22. American National Standards Institute, “ANSI: Historical Overview,” http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (accessed April 10, 2012).

23. American National Standards Institute, “About ANSI Overview,” http://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1 (April 19, 2012).

24. “Social Responsibility: Dawn of a New Era,” ISO Focus+.

25. American Society for Quality, “Common Grounds: Quality and Social Responsibility,” American Society for Quality *White Paper*, August 23, 2007.

26. The ISO working group on social responsibility also included representatives of “industry”—defined to include companies that would be subject to ISO 26000 standards, as well as consulting companies that would benefit from advising companies on compliance. For example, the Canadian expert “industry” group representative was B.R.I. International Inc., a sustainability consultancy. B.R.I. International, “Welcome to B.R.I. International Inc.,” <http://www.bri.ca/index.html> (accessed April 10, 2012). Austria’s expert industry group representative was CSR Company International. CSR Company International, <http://www.csr-company.com/> (accessed April 10, 2012).

27. American National Standards Institute, “eStandards Store,” <http://webstore.ansi.org/SdolInfo.aspx?sdoid=39> (accessed April 10, 2012).

28. Terry Miller, Kim R. Holmes, Edwin J. Feulner, 2012 *Index of Economic Freedom* (Washington, DC: The Heritage Foundation and Dow Jones & Company, Inc., 2012), <http://www.heritage.org/index/>.

In fact, ISO 26000's definition of social responsibility is troubling; it introduces the triple-bottom-line standard using not just one approach, but three.

First, social responsibility is defined as contributing to sustainable development, which itself is described as the goal of integrating the three goals of economic development, social justice, and environmental responsibility.²⁹

Second, "socially responsible" companies must take into account the expectations of stakeholders, which include individuals or groups with social, environmental, or economic interests arising out of the firm's activities.

Third, ISO 26000 defines social responsibility in terms of complying with "international norms of behavior,"³⁰ which is defined to include a broad array of social, economic development, and environmental principles.

Thus, ISO 26000 operates as a "super triple-bottom-line" standard. The ISO has elsewhere summarized the triple bottom line as "social equity, ecological prudence and economic efficiency."³¹

This triple-bottom-line objective of the new CSR agenda is not unique to ISO 26000. The EU's new CSR strategy, released on October 25, 2011, proclaims a "Modern

Understanding of Corporate Social Responsibility," describing the aim of CSR as "maximizing the creation of shared value for their owners/shareholders and for their other stakeholders and society at large."³² The introduction to the latest Global Reporting Initiative's³³ guidelines (version G3.1) defines sustainability reporting as "a broad term considered synonymous with others used to describe reporting on economic, environmental, and social impacts (e.g., triple bottom line, corporate responsibility reporting, etc.)."³⁴ The triple-bottom line version of CSR has gained significant ground over the past several years.

The adoption of the triple-bottom-line concept as the defining feature for business is flawed for several reasons. Missing is any reference to the central purpose of private business: the right to try to earn a profit in general or to generate returns for the firm's owners in particular. Even former British Prime Minister Tony Blair noted this basic starting point when asked about the social responsibility of business. At the 2005 World Economic Forum in Davos, Switzerland, Blair stated: "The first responsibility of business is to run a good business."³⁵

ISO 26000 fails to identify what, if any, particular status or rights the owners of a business might have. The

word "shareholder" never appears in the 100 pages of text that make up ISO 26000, and the word "owner" appears only rarely in those many pages.

The triple-bottom-line orientation of corporate social responsibility also raises questions of conflicts between the interests represented by its three orientations. However, ISO 26000 does not explain how to resolve conflicts between the interests of shareholders and stakeholders, such as employees, or between the interests of shareholders and environmental activists. The text does recognize the conflict, noting that while both owners and employees are stakeholders, "[t]his does not mean, however, that their interests regarding the organization will be the same."³⁶ But, the text offers no solution. In fact, ISO 26000 contains comprehensive delineations of human rights, environmental, employee and consumer standards,³⁷ but no indication of company and shareholder rights.

The British Petroleum Case: CSR Run Amok

A recent event vividly demonstrated the dangers that can arise when the attention of top corporate management is distracted by the responsibilities imposed by CSR's triple-bottom-line categories. In this

29. ISO 26000: 2010, Sub-clause 2.23.

30. *Ibid.*, Sub-clause 2.11.

31. "Social Responsibility: Dawn of a New Era," ISO Focus+, p. 1.

32. European Commission, "A Renewed EU Strategy 2011-14 for Corporate Social Responsibility."

33. According to its website, the "Global Reporting Initiative (GRI) is a non-profit organization that promotes economic, environmental and social sustainability. GRI provides all companies and organizations with a comprehensive sustainability reporting framework that is widely used around the world." Global Reporting Initiative, "About GRI," <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> (accessed April 10, 2012).

34. Global Reporting Initiative, "Sustainability Reporting Guidelines G3.1," p. 3.

35. Alan Murray, *The Wall Street Journal Essential Guide to Management: Lasting Lessons from the Best Leadership Minds of Our Time* (New York, NY: HarperBusiness, 2010), p. 163.

36. ISO 26000: 2010, Sub-clause 5.3.2.

37. *Ibid.*, Sub-clause 6.

case it was the management of global oil giant British Petroleum (BP) in the years running up to the disastrous accident in the Gulf of Mexico in 2010. It serves as a cautionary tale.

Under the leadership of John Browne, BP's CEO from 1995 until a scandal forced him to resign in 2007, the company ventured into the world of CSR—initially perhaps as a strategy to deflect attention from the traditional PR problems oil companies generally confront as well as to avoid antitrust problems attendant to their takeover of U.S. refiners Amoco and Arco. CSR activism also opened doors for BP—to potentially lucrative U.S. government contracts and grants for alternative energy.

Browne launched an advertising campaign—"Beyond Petroleum"—that indirectly supported a key objective of CSR activists (cap-and-trade-style taxes on carbon) by promoting the hypothesis of imminent danger from anthropogenic global warming (AGW). BP contributed heavily to political candidates who advocated government solutions to AGW, including President Obama, and BP helped establish the U.S. Climate Action Partnership³⁸ to push for passage of the cap-and-trade bill by Congress. As recently as days before the Gulf spill in 2010, Senator John Kerry (D-MA) was boasting to reporters that BP would

ISO 26000: Ownership and Property Rights vs. Environmental and Labor Rights

ISO 26000 contains comprehensive delineations of human rights, environmental, employee, and consumer standards, but no indication of company and shareholder rights.

1. Analysis by number of words of text devoted to the topic
 - a. Rights of shareholders/owners: 0 (does not exist)
 - b. Property rights: 176 words (section 6.6.7)
 - c. Environmental: 3,486 words (section 6.5)
 - d. Labor/Employment: 3,760 words (section 6.4)
2. Analysis by number of sources of international authority cited by ISO 26000 (agreements, treaties, reports, standards)
 - a. Shareholder/owner rights: 0 (does not address)
 - b. Property rights: 1
 - c. Environmental principles: 19
 - d. Labor/employment principles: 72

lend heavyweight corporate support to passage of that job-killing legislation.³⁹

Although such efforts garnered praise from CSR activists, the preoccupation with CSR may have distracted Browne and his BP management team from their primary responsibilities to manage properly the sacred trust given to them by BP's shareholders, customers, and the American public. In any case,

tragedies ensued: In 2005, dozens of BP employees were killed or injured by a terrible explosion and fire at a refinery in Texas that an investigation concluded was caused in part by corporate negligence.⁴⁰ Management lapses were also cited in connection with a 200,000-barrel oil leak from a BP pipeline in Alaska the following year.⁴¹ Critics alleged the blunders were inevitable after Browne fired long-time and knowledgeable Amoco

38. Stephen Power and Ben Casselman, "Defections Shake Up Climate Coalition," *The Wall Street Journal*, February 17, 2010, <http://online.wsj.com/article/SB10001424052748704804204575069440096420212.html> (accessed April 10, 2012).

39. Timothy P. Carney, "Once a Government Pet, BP Now a Capitalist Tool," *The Washington Examiner*, June 9, 2010, <http://washingtonexaminer.com/news/nation/once-government-pet-bp-now-capitalist-tool> (accessed February 3, 2012).

40. Steven Greenhouse, "BP Faces Record Fine for '05 Refinery Explosion," *The New York Times*, October 30, 2009, <http://www.nytimes.com/2009/10/30/business/30labor.html> (accessed April 10, 2012).

41. Peter Elkind, David Whitford, and Doris Burke, "BP: 'An Accident Waiting to Happen,'" CNN, January 24, 2011, <http://features.blogs.fortune.cnn.com/2011/01/24/bp-an-accident-waiting-to-happen/> (accessed April 10, 2012).

42. Joe Nocera, "BP Ignored the Omens of Disaster," *The New York Times*, June 18, 2010, http://www.nytimes.com/2010/06/19/business/19nocera.html?_r=2 (accessed April 11, 2012).

and Arco managers.⁴²

In the aftermath of the two accidents, BP claimed it had reformed and was now “focusing like a laser” on safety, all the while attempting to shield itself from critics by boasting of its CSR-endowed rectitude.⁴³ Then came the worst oil spill in world history in the Gulf of Mexico in 2010, which killed many oil rig workers and for which BP was forced to establish a \$20 billion compensation fund to handle the tens of thousands of claims caused by the accident.⁴⁴

BP’s fixation with CSR and its green drive to get “Beyond Petroleum” appeared to have led it to give short shrift to crucial management responsibilities, and to forget why BP was in business. Tragically for everyone, at the end of the day it was the petroleum in the Gulf of Mexico that flowed out of control, beyond the reach of BP.

Hostile Takeover by CSR “Stakeholders” and “Sustainable Development” Advocates

A final note on the triple bottom

line: Advocates of the new CSR come to the discussion ready to challenge the position of owners of the firm as sole claimants to even one of the “bottom lines.” While the social role and responsibility of business has been the subject of open debate at various times in history,⁴⁵ the specific expression of CSR in the triple-bottom-line formula is a recent one⁴⁶ and is a product of two movements of very recent decades: the “sustainable development” concept coming out of the modern environmental movement⁴⁷ and the stakeholder model of the firm arising out of the quest to build a model of business ethics and strategy that would promote CSR.⁴⁸ In the sustainable development approach to CSR, the three bottom lines are expressed as environmental, social, and economic development—and this “third” bottom line has a broad economic development mandate, not a protection-of-owner-interest focus.

Proponents of the new CSR coming from the perspective of the “stakeholder” model also question the position of shareholders as

the sole representative of economic interests in the triple bottom-line. Stakeholder advocates assert that, since bondholders and lenders have also contributed financial resources to the firm, the firm’s owners should not be the sole representatives of economic interests in the firm. When R. Edward Freeman, to whom the stakeholder model concept is attributed, lists the “primary stakeholders” of the firm by category, the term “shareholders” is notably absent. Instead, he chooses to identify the category as “financiers,” grouping shareholders with bankers and bondholders.⁴⁹

In the new CSR, the right of owners to a special place in even one of the bottom-lines is not secure. ISO 26000 strongly reflects both the stakeholder perspective and the sustainable development perspective: Anyone affected by the firm becomes a “stakeholder,” and the rights of stakeholders are comprehensively defined. Likewise, sustainable development permeates ISO 26000, and, ultimately, sustainable development is described as expressing the

43. Guy Chazan, Benoit Faucon, and Ben Casselman, “As CEO Hayward Remade BP, Safety, Cost Drives Clashed,” *The Wall Street Journal*, June 29, 2010, <http://online.wsj.com/article/SB10001424052748703964104575335154126721876.html> (accessed April, 2012).

44. “Kenneth Feinberg,” *The New York Times*, March 5, 2012, http://topics.nytimes.com/topics/reference/timestopics/people/f/kenneth_r_feinberg/index.html (accessed April 11, 2012).

45. In U.S. history, the debate over the social impact of companies can be seen in the debate over monopoly powers granted to state-chartered transportation companies in the early 1800s, the controversy over the power of “trusts” in the 1880s, and the focus on managerial responsibility in publicly traded companies in the 1930s. The issue was also very much in focus in the post-WWII era, as featured in works by Harold Bowen, Theodore Levitt, and Milton Friedman. Discussion of the role of business in society has been a recurring theme in American history. See, for example, John W. Cadman Jr., *The Corporation in New Jersey: Business and Politics, 1791-1875* (Cambridge, MA: Harvard University Press, 1949); Harold Bowen, *Social Responsibilities of the Businessman* (New York: Harper and Brothers, 1953); Theodore Levitt, “The Dangers of Corporate Social Responsibility,” *Harvard Business Review* (September–October 1958), p. 41; and Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962).

46. Elkington, *Cannibals with Forks*.

47. See Principles 4 and 8 of the 1972 Declaration of the United Nations Conference on the Human Environment, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> (accessed April 11, 2012), and Principle 5 of the 1992 Rio Declaration on Environment and Development, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> (accessed April 11, 2012).

48. Alexei Marcoux, “The Concept of Business in Business Ethics,” *Journal of Private Enterprise*, Vol. 21, No. 2 (Spring 2006), p. 52.

49. R. Edward Freeman, “The Possibility of Stakeholder Capitalism,” in Laszlo Zsolani, ed., *Ethics and the Future of Capitalism* (New Brunswick, NJ: Transaction Publishers, 2002). Freeman’s 1984 book, *Strategic Management: A Stakeholder Approach*, is cited as the foundational work in stakeholder theory.

50. ISO 26000: 2010, Sub-clause 2.23.

expectations of society, and therefore the ultimate focus on CSR.⁵⁰

The Fallacy of the License to Operate Argument

Proponents of CSR justify the re-orientation of business to the triple bottom line by arguing that companies must serve society and the public interest in order to fulfill their license to operate. CSR advocates assert that this license to operate arises out of corporate registration with the government as well as from a broader “social license to operate” mandate. However, the argument that business must serve a public purpose or societal expectations is fundamentally flawed.

CSR proponents like to argue that a public purpose can be imposed on businesses because many types of business organizations, such as corporations, are “chartered” by the government, and the government can impose public service conditions upon that chartering.

However, for well over 100 years the system for forming a business corporation has been one of registration—with no accompanying government conditions for public service. As noted by Robert Hessen, “The state does *not* give life or birth to a corporation. Just as a registrar of deeds records every sale of land, and a county clerk records the birth of every baby, a commissioner of corporations records the formation of every corporation—*nothing more*.”⁵¹ The system is a registration system—no further conditions are imposed.

There is no inherent reason to impose public service requirements. Registrations also are required for marriage and to obtain a driver’s license, but no public service requirements are imposed for those types of registrations. In fact, Hessen notes that government plays more of a role in the creation of a marriage than a corporation: “Yet who, for that reason, would describe a marriage as a creature of the state, and claim that a marriage certificate contains a promise to serve the public interest?”⁵²

The government registration system for business entities is well established in the 21st century, and in fact extends beyond the corporation to include many other entities now available for the conduct of business—all without “public service” requirements. Limited partnerships, limited liability partnerships, and limited liability companies all require registration, but without any public service requirements.⁵³

CSR advocates argue for a return to the practice of earlier periods of history when corporations were chartered with an explicit public purpose. Chartering does have its place in history: In England, it was first used in the Middle Ages for boroughs and guilds, and then starting in the late 16th century, for English companies with plans to trade abroad. James Hurst notes, however, that in England the chartering of companies to develop foreign trade was mainly motivated by political purposes.⁵⁴ According to Hurst,

A royal charter was essential to such ventures. In times of political uncertainty merchants who combined for a foreign venture without explicit royal sanction risked prosecution for criminal conspiracy against the national interest. Moreover, the royal charter legitimized a range of public functions performed by such trading companies in organizing terms of trade, setting up local government, controlling customers, and, in effect, making foreign policy in their areas of operation.⁵⁵

Chartering was consistent with the strong central political control asserted by the English crown, and later parliament, and the dominant economic doctrine of mercantilism of the time: Chartered companies served the interests of the English government. Today there are many divergent views on political and economic matters; the model of special chartering would not address them well in the 21st century.

It is true that special chartering continued into the 19th century even as the new economic doctrine of capitalism took hold and, in the case of the American colonies, with the new political system for the independent United States: It took some decades for the old chartering model to die out. This period of transition away from special chartering is not surprising for several reasons. First, dramatic changes

51. Robert Hessen, *In Defense of the Corporation* (Stanford: Hoover Institution Press, 1979), p. 26.

52. *Ibid.*

53. See, for example, the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. §17-101 et seq. and the Pennsylvania Limited Liability Company Law of 1994, 15 Pa.C.S. §8901 et seq.

54. James Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville, VA: University Press of Virginia, 1970), p. 3.

55. *Ibid.*, p. 4.

are not characteristic of the “common law” system—gradual change is one of the hallmarks of this legal tradition. Moreover, the chartering system had some temporary appeal to newly independent state governments, which found themselves short of funds and other resources: Chartered companies were a convenient mechanism for government officials to employ to achieve the improvements to infrastructure and transportation systems demanded by a growing population.⁵⁶ Finally, it is not surprising to find a remnant of mercantilist practice at a time when the more complete transition from mercantilism to capitalism had yet to take place. However, by the 1870s, special chartering was very much a thing of the past, replaced both by a dynamic and growing private sector led by modern corporate “persons” as well as the rise in the West of Bismarck’s administrative state (which has been a mixed blessing, to say the least!).⁵⁷

In fact, even in earlier periods of history when chartering was the rule, significant practical problems accompanied the chartering system that would make it equally unappealing today. The system of requiring special charters encouraged corruption on the part of government

officials involved in the awarding of special charters: Cases of government officials accepting bribes were not uncommon, since these officials could use the vague “public purpose” standard to justify awarding a charter to any one of the applicant companies. The corporate chartering system was further clouded by the temptation for government to award monopolies, which are hardly favored in most modern legal systems. And government officials were all too eager to invest public monies in some of the newly chartered companies which were “sure to be profitable”—often with disastrous results, as the hoped-for returns did not materialize. As in other cases where politicians spend public money recklessly, taxpayers ended up footing the bill.⁵⁸ They were no better at picking winners and losers in the 18th century than the Obama Administration has been at picking “green” companies worthy of receiving taxpayer subsidies in the 21st.

Looking back historically, one observes that global CSR pressure comes mainly from Europe. Many have commented on how the behavior of the European Commission in this regard is similar to old continental monarchies. Even Woodrow

Wilson noted that the development of the French and German administrative states with their emphasis on central planning and control owed much to their monarchical pedigrees.⁵⁹

In addition to the corporate “chartering” argument, CSR proponents assert that companies must engage in CSR in order to earn a social license to operate, which is said to arise from the fact that companies interact with and depend on society in a number of ways, and therefore have an obligation to meet societal needs and expectations. ISO 26000 states that one of the principal benefits of social responsibility is support for the social license to operate.⁶⁰ The ISO’s Roger Frost asserts that, to continue to operate effectively, companies must both respond to increasing stakeholder scrutiny and address environmental issues since, “[i]n the long run, all organizations’ activities depend on the health of the world’s ecosystems.”⁶¹ Professor Neil Gunningham of the Australian National University in Canberra writes of the social license to operate, identifying “social licensors” as members of the local community, activist organizations and the voting public, each of which “can bestow or

56. Ibid., pp. 22-23.

57. Richard Lowry and Ramesh Ponnuru, “An Exceptional Debate: The Obama Administration’s Assault on American Identity,” March 8, 2010, *National Review Online*, <http://www.nationalreview.com/nrd/article/?q=M2FhMTg4Njk0NTQwMmFIMmYzZDg2YzgyYjdmYjhhMzU=> (accessed April 11, 2012).

58. Between 1832 and 1871, New Jersey gave the Camden and Amboy Rail Road and Transportation Company a monopoly on the movement of goods and people by rail between New York City and Philadelphia. See Cadman, *The Corporation in New Jersey: Business and Politics, 1791-1875*, p. 56. Bribery in issuing special charters was also a recurrent issue. Ibid., pp. 139 and 163. In the 1830s, New York incurred significant indebtedness by backing private canal and railroad companies, which then turned into major liabilities for New York taxpayers as the promised company revenue vanished in the face of difficult economic times and the eclipse of the canal as a transportation mode. In response, New York’s constitutional conventions between 1842 and 1855 insisted on an end to state guarantees for private company debt. See Ronald E. Seavoy, *The Origins of the American Business Corporation, 1784-1855* (Westport, CT: Greenwood Press, 1982), p. 179.

59. Woodrow Wilson, “The Study of Administration,” 1887. Reprinted in *Political Science Quarterly* Vol. 56 (1941), pp. 481-506.

60. ISO 26000: 2010, Box 5, p. 21.

61. Roger Frost, “ISO 26000 Social Responsibility: The Essentials,” ISO Focus+, p. 10.

62. Neil Gunningham, “Corporate Environmental Responsibility: Law and the Limits of Voluntarism,” chap. 16 in Doreen McBarnet, Aurora Voiculescu, and Tom Campbell, eds., *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007), p. 481.

withdraw privileges from a company.”⁶² Harvard professors Michael Porter and Mark Kramer assert:

At a very basic level, the competitiveness of a company and the health of the communities around it are closely intertwined. A business needs a successful community, not only to create demand for its product but also to provide critical public assets and a supportive environment.⁶³

The social licensing argument is objectionable on several grounds. First, it is nothing less than an assertion of a new “social contract” between business and society under the terms of which business must do more than observe traditional ethical principles, pay taxes, and meet existing legal obligations. The fundamental shift involved in the new social contract should not be underestimated. The *Oxford Handbook of Corporate Social Responsibility* notes: “What is clear then is that defining CSR is not just a technical exercise in describing what corporations do in society. Definitional work in CSR is also a normative exercise in setting

out what corporations should be responsible for in society, or even an ideological exercise in describing how the political economy of society should be organized to restrain corporate power.”⁶⁴ University of Kansas Professor Richard T. De George, writing of “the new moral mandate” for business, asserts that it “embodies a view of business that, when taken as a whole, is clearly different from the view found in the writings of John Locke or in the U.S. Constitution.”⁶⁵ The social licensing argument is nothing more than an attempt to impose a new social contract.

Second, as University of Leeds Professor Elaine Sternberg points out, the essence of the social contract demanded by the license to operate is that “businesses must submit to society’s requirements, lest society prevent them from operating.” As Sternberg contends, this version of the social contract is built on the proposition that government has authoritarian power and results in an arrangement that “looks very much like extortion: agreeing not to inflict harm in exchange for compliance is not entering into a social contract, but running a protection racket.”⁶⁶

Sternberg’s characterization of the social license as a form of extortion takes on more specific shape in the context of nongovernmental or other civil society organization campaigns directed against particular companies in the form of specific threats to corporate reputation.⁶⁷ U.N. special representative John Ruggie recounts the example of Coca-Cola being targeted by AIDS activists at the 2002 Barcelona AIDS conference “not because Coke caused HIV/AIDS, but because the company has a universally recognized brand and one of the largest distribution networks in Africa.”⁶⁸ More recently, Greenpeace was accused of targeting U.S. canned tuna producers not because of concerns over particular sustainable fishing practices, but rather as a fundraising ploy. According to the authors of a recent *Wall Street Journal* article, Greenpeace’s strategy is to “[t]arget something that’s easily recognizable (like tuna), make some scary claims in the media, parade around in funny costumes—and start raking in the donations.”⁶⁹ Even one of the founders of Greenpeace, Patrick Moore, has recently denounced these tactics

63. Porter and Kramer, “Creating Shared Value,” p. 66. While Porter and Kramer argue that “shared value” moves beyond CSR, their concept of shared value can also be described as another version of CSR.

64. Andrew Crane et al., “The Corporate Social Responsibility Agenda,” chap. 1 in Andrew Crane et al., eds., *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008), p. 6, citing Richard Maren, “Wobbling on a One-Legged Stool: The Decline of American Pluralism and the Academic Treatment of Corporate Social Responsibility,” *Journal of Academic Ethics*, Vol. 2 (2004), pp. 63–87.

65. Richard T. De George, *Business Ethics*, 7th Ed. (Boston: Prentice Hall, 2010), pp. 511–512.

66. Elaine Sternberg, “Ethical Capitalism and Classical Liberalism,” in Michael James, ed., *Classical Liberalism in the 21st Century: Essays in Honour of Norman P. Barry* (Buckingham: University of Buckingham Press, 2009), p. 50. Sternberg attributes the phrase “license to operate” to a 1995 Royal Society for the Encouragement of the Arts report entitled “Tomorrow’s Company—Inquiry into the Role of Business in a Changing World.”

67. Indeed, some of the extreme cases of NGO activity would seem to approach violations of the Hobbs Act, 18 USC §1951, which prohibits “Interference with Commerce by Threats or Violence” including robbery or extortion, and defines extortion as “the obtaining of property of another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear.” Federal courts have ruled that fear includes not only fear of physical safety but also fear of economic loss. See *U.S. v. Rangel*, 396 F.3d 476 (1st Cir. 2005).

68. John Gerard Ruggie, “American Exceptionalism, Exemptionalism, and Global Governance,” chap. 11 in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005), p. 317.

69. Chris Lischewski, Shue Wing Chan, and In-Soo Cho, “Greenpeace vs. the Tuna Sandwich,” *The Wall Street Journal*, November 8, 2011, p. A19.

and called the approach “wrong-headed” and “damaging.”⁷⁰ The social license to operate argument is also flawed in application because CSR advocates define “societal expectations” in ways which furthers their vision of CSR, but which very well may not reflect the view of most members of society. Indeed, CSR advocates curiously omit any reference to the standard lawmaking process which, at least in democratic countries, presumably has a strong correlation to representing the expectations and interests of society. In fact, an earlier draft of ISO 26000 had explicitly recognized this connection. “Working Draft 2” provided that: “It should be recognized that, more often than not, standards in the social area involve questions that can only be legitimately answered through democratic or representative political processes.”⁷¹ However, later drafts, as well as the ISO 26000 final standard, omit any reference to the political process and, as outlined in the next section, seek to substitute ISO 26000’s own “wish list” of societal expectations for what might come about through the political process. Indeed, ISO 26000 attempts to dispense with any debate over the basis for the social license to operate by simply asserting that “sustainable development can be treated as a way of expressing the broader expectations of society as a whole.”⁷²

The European Commission’s new strategy on CSR for 2011 to 2014 has

another approach to determining “societal expectations”: It announces its intention to “carry out periodic surveys of citizen trust in business and attitudes towards CSR.”⁷³ Since public opinion surveys are traditionally not strongly favorable to business,⁷⁴ and would be conducted in the current era of continuing economic malaise, the EU strategy seems predisposed to reaching the conclusion that the expectations of society are not being met, and to serving as the basis for the EU commission’s call for more restrictions on business.

CSR advocates also emphasize the role of NGOs as stakeholders with a particularly important role in defining “societal expectations.” Both ISO 26000 and the new European Commission Strategy on CSR invoke NGO participation as an important basis for determining societal expectations. For example, in ISO 26000, not only is the term stakeholder so broadly defined that it includes any individual or group that has one or more “interests” in any decision or activity of an organization, but NGOs in particular become stakeholders if the company’s decisions and activities have a “relevant and significant impact” *on the cause* for which the NGO is established. As a result, stakeholder status is immediately conferred on any NGO, regardless of the nature of the group, if the group represents any “cause” impacted by the company.⁷⁵ Imagine the chaos that would ensue if the U.S. legal system were to

grant “standing” in cases based on such flimsy and far-fetched grounds.

Taken together, the approaches to defining the “expectations of society” said to give rise to the social license to operate utilized by supporters of the new CSR are attempts at what might be called “demo-washing.” While companies are accused of “eco-washing” by dressing up their “green” claims to hide “business as usual,” CSR advocates both inside and outside government seem eager to dress up their “societal expectations” claims to hide the absence of the normal (“democratic”) legislative processes and to engage in demands that come close to extortion.

Comprehensive CSR Rights and Duties

ISO 26000 is the first CSR standard to attempt a comprehensive delineation of CSR principles, and it does so in more than 100 pages of text. The key to understanding the comprehensive nature of ISO 26000 principles is the term “international norms of behavior,” which is defined by ISO 26000 as “expectations of socially responsible behaviour derived from customary international law, generally accepted principles of international law, or intergovernmental agreements that are universally or nearly universally recognized.” The expansive scope of the definition of “international norms of behaviour” is fully revealed

70. Patrick Moore, “Monopoly for Forest Certification Is Wrong,” *The Vancouver Sun*, November 18, 2011, <http://www2.canada.com/vancouversun/news/archives/story.html?id=99698dfb-76df-4942-8617-1043afc808ba> (accessed April 19, 2012).

71. International Organization for Standardization, ISO/WD 26000: Working Draft 2, October 2006, Sub-clause 4.2.3.

72. ISO 26000: 2010, Sub-clause 2.23.

73. European Commission, “A Renewed EU Strategy 2011-14 for Corporate Social Responsibility,” p. 9.

74. According to the 2011 Edelman Trust Barometer data, 56 percent of respondents trust businesses “to do what is right”; 52 percent of respondents trust government to do what is right. See “2011 Edelman Trust Barometer Findings,” <http://www.edelman.com/trust/2011/uploads/Edelman%20Trust%20Barometer%20Global%20Deck.pdf> (accessed April 11, 2012).

75. ISO 26000: 2010, Sub-clause 5.3.2.

only when companies understand that this term:

- takes principles which are only directly applicable to governments and extends them to business;
- encompasses not just international law, but an array of other “intergovernmental” agreements;
- extends the application of all norms to all countries; even if a country has not signed a treaty or other “intergovernmental agreement,” as long as “nearly” all countries have, then the norm becomes applicable in all countries;
- is further expanded by the opening phrase “expectations of socially responsible behavior derived from”—international norms of behavior are not actually found in the designated sources, but are “derived from” those sources; and
- is applied not only to a company’s operations and activities but also to any other organization within the company’s “sphere of influence.”⁷⁶

Earlier drafts of ISO 26000 had a narrower definition of “international norms of behaviour.” Working Draft 4.2, for instance, defined International Norms of Behaviour as “norms that are universally, or nearly universally recognized, and based on customary international law, generally accepted principles of international law, or authoritative intergovernmental instruments.”⁷⁷ Section 4.7 of that Working Draft reinforced this definition by emphasizing that international norms are principles “that are based on or derived from customary international law, generally accepted principles of international law, or from sources of public international law such as treaties.” However, in the latter stages of the ISO 26000 drafting process, a much broader range of sources was accepted to transform ISO 26000’s definition of norms into an “NGO wish list” of environmental and social obligations in the name of societal demand.

In fact, ISO 26000 cites over 60 of the United Nation’s International Labour Organization (ILO) conventions, recommendations, codes, and guidelines as well as over 40 other U.N. treaties, reports, and declarations, all apparently constituting ISO 26000’s sources of “international norms of behavior.” Among them

is an array of treaties and conventions which the U.S. has not ratified, including:

- The U.N. Convention on Biological Diversity;⁷⁸
- The Kyoto Protocol to the U.N. Framework Convention on Climate Change;⁷⁹
- The U.N. International Covenant on Economic, Social, and Cultural Rights;⁸⁰
- The Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the abolition of the death penalty;⁸¹
- The ILO Termination of Employment Convention, 1982;⁸²
- The ILO Part-Time Work Convention, 1994;⁸³
- The ILO Paid Educational Leave Convention, 1974;⁸⁴ and
- The ILO Workers with Family Responsibilities Convention, 1981.⁸⁵

Moreover, ISO 26000 freely employs aspirational principles in its effort to manufacture a foundation

76. ISO 26000: 2010, Sub-clause 2.19.

77. International Organization for Standardization, Draft ISO 26000 WD 4.2, June 2008, Sub-clause 2.8.

78. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, 1992.

79. Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 10, 1997, U.N. abd Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22, 1998.

80. International Covenant on Economic, Social and Cultural Rights, December 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360, 1967.

81. Second Optional Protocol to the International Covenant on Civil and Political Rights, GA res. 44/128, annex, 44 UN GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989).

82. International Labour Organization, Termination of Employment Convention, 1982.

83. International Labour Organization, Part-Time Work Convention, 1994.

84. International Labour Organization, Paid Educational Leave Convention, 1974.

85. International Labour Organization, Workers with Family Responsibilities Convention, 1981.

for corporate social responsibility, including references to the Rio Declaration on Environment and Development,⁸⁶ the U.N. Millennium Declaration,⁸⁷ and the ILO Declaration on Social Justice for a Fair Globalization.⁸⁸

The breadth and depth of the resulting “wish list” is truly astonishing. While Clause 4 of ISO 26000 summarizes the “Principles of Social Responsibility” in a relatively modest four pages, Clause 6 details the criteria for these principles of social responsibility—in 50 pages of text. These 50 pages subject businesses to comprehensive standards relating to

- employment practices,
- the environment,
- fair operating principles,
- human rights,
- consumer issues, and
- community involvement and development.

This comprehensive statement of international norms of behavior

includes a number of controversial standards:

- The precautionary approach to environmental issues;⁸⁹
- The preparation of an environmental impact statement before engaging in new product development or any action affecting the environment;⁹⁰
- Recognition of human-induced climate change and a commitment to actions to remedy that change;⁹¹
- In employment law, adoption of comparable worth pay standards and rejection of the employment-at-will doctrine;⁹²
- Disclosure of political contributions;⁹³ and
- Achieving gender parity in the company’s “governing structure and management.”⁹⁴

Not only is the description of norms comprehensive, but the obligation of companies is weighted towards conformity with the entire standard: The ability of companies

to choose particular areas of “doing good” is limited by the fact that the final text of ISO 26000 *eliminated* the only criteria in its section on “Determining Significance” that would have specifically recognized that firms could weigh the costs of taking action on principles of social responsibility. Earlier drafts of the ISO 26000 standard, up to and including the “Draft International Standard” text released in June 2009, specifically recognized that firms could consider at least in part the “potential effect of the related action compared to the resources required for implementation.”⁹⁵ However, the Final Draft International Standard, which became the official text of ISO 26000 in December 2010, eliminated the phrase “compared to the resources required for implementation.” The final wording of the clause states only that companies should consider the “potential effect of taking action or failing to take action on the issue.”⁹⁶ Companies will clearly be at a disadvantage under that standard, as the potential effect of failing to take action on education, health, environment, or any other topic could be said to outweigh the company’s own concerns.

86. United Nations Rio Declaration on Environment and Development, June 13, 1992.

87. United Nations Millennium Declaration, GA res.55/2, U.N. Doc. A/RES/55/2, September 8, 2000.

88. International Labour Organization, Declaration on Social Justice for a Fair Globalization, June 10, 2008.

89. ISO 26000: 2010, Sub-clause 6.5.2.1. ISO uses the term “precautionary approach,” which is perhaps more commonly referred to as the “precautionary principle.”

90. *Ibid.*, Sub-clause 6.5.2.2. ISO 26000 extends the environmental impact statement (EIS) requirement far beyond that found in U.S. law. The National Environmental Policy Act sets forth the requirement of an EIS for “any major federal action significantly affecting the quality of the human environment.” 42 U.S.C. §4332(C). Under ISO 26000, the triggering mechanism is any company action, not a major federal action.

91. *Ibid.*, Sub-clause 6.5.5.

92. *Ibid.*, Sub-clause 6.4.

93. *Ibid.*, Sub-clause 6.6.4.2.

94. *Ibid.*, “Box 2-Gender Equality and Social Responsibility,” p. 7

95. International Organization for Standardization Working Group on Social Responsibility, ISO 26000 Draft International Standard, Guidance on Social Responsibility, Sub-clause 7.3.1.2, 2009.

96. ISO 26000 Draft International Standard, Sub-clause 7.3.2.2.

ISO 26000's definition of norms of behavior is also troubling because it ties the concept of norms to undefined "expectations," and therefore to no definitive standard at all. The definition begins with the phrase "expectations of socially responsible conduct derived from" and then recites the wide array of designated norms identified above. It is unclear how the "expectations" are to be "derived," but, ultimately, ISO 26000 ties "expectations" back to the concept of sustainable development as a whole: "Because sustainable development is about the economic, social and environmental goals common to all people, it can be used as a way of summing up the broader expectations of society that need to be taken into account by organizations seeking to act responsibly."⁹⁷ Thus, it would appear that a norm can exist if it is deemed important for sustainable development, even if the norm is not found in any existing document.

Finally, the new CSR seeks to extend obligations beyond the individual company to countries where it does business and other companies with which it does business. Companies have both a "sphere of influence" on others, and must avoid "complicity" in violations of the standards by others. The sphere of influence can extend to any supplier or customer with which a company does business.⁹⁸ Complicity means that a company may also have an obligation to make sure that any country in

which it does business meets all standards—including on education, health care, and environment—or shut down its business in that country.⁹⁹

ISO 26000 also provides no indication of how small and medium-size companies are to meet these obligations. ISO 26000 does specifically assure small and medium-sized companies that 100 pages of standards can mean that "[i]ntegrating social responsibility throughout the SMO can be undertaken through practical, simple and cost efficient actions, and does not need to be complex or expensive."¹⁰⁰ ISO 26000 contains only one reference to company size: When the company studies how it should integrate social responsibility "throughout its organization," ISO 26000 states that the review should include "the organization's type, purpose, nature of operations and size."¹⁰¹ However, even that one reference is seemingly negated by sub-clause 7.3.2.1 on "determining relevance" of issues to be addressed by the company, as that section does not allow companies to take into account cost or company size.

The "NORMAPME User Guide for European SMEs on ISO 26000" developed by the EU-funded European Office of Crafts, Trades and Small and Medium sized Enterprises for Standardisation (NORMAPME)¹⁰² states that the guide "intends to lend support to the efficient use of ISO 26000 by European small and medium-sized

enterprises."¹⁰³ However, the User Guide cites no specific language from ISO 26000 as the basis for such "efficient use." Indeed, it could not cite that language because it is not there. Is the User Guide consistent with ISO 26000? It is a possible interpretation—but by no means clearly reflected in the text of ISO 26000.

Coming Soon to a Market Near You: Mandatory CSR

Private companies still tend to define CSR in much narrower terms—"of course, we exist to make a profit and we also wish to do some good." But they are in danger of losing the battle, as the starting point and focus on profits is not what is reflected in the CSR definitions being drafted via the current processes and procedures. These new definitions are being influenced by governments' acceptance of CSR activists' broader definition, those NGOs that accept it, as well as by the myriad consultants who prosper by it, and some large companies who believe that perhaps they have the resources to deal with CSR and use it to their competitive advantage over smaller organizations. In a very real sense, the global private sector is like the proverbial frog being slowly boiled to death by a kitchen full of CSR activist cooks.

Standards such as ISO 26000 will be used by governments and NGOs to impose CSR standards and an overall public-purpose vision of private enterprise on the world's privately

97. Ibid., Sub-clause 3.3.5.

98. Ibid., Sub-clause 7.3.3.

99. Ibid., Sub-clause 4.7.

100. Ibid., "Box 3-ISO 26000 and Small and Medium-Sized Organizations (SMOs)," p. 8.

101. Ibid., Sub-clause 7.2.

102. NORMAPME, "What is NORMAPME," <http://www.normapme.eu/en/page/22/what-is-normapme> (accessed April 11, 2012).

103. NORMAPME, "NORMAPME User Guide for European SMEs on ISO 26000: Guidance on Social Responsibility," July 2011, p. 4, http://www.normapme.eu/public/uploads/files/csr%20user%20guide/User%20guide%20ISO26000_version%20EN_final_18072011.pdf (accessed April 11, 2012).

owned companies. A recent OECD report unabashedly declares:

The problem with corporate social responsibility, as promoted in the OECD Guidelines for Multinational Enterprises, is that it is *voluntary*. In some cases, corporations are out in front of governments in terms of addressing climate change and other problems. But the time is coming when companies will be required by governments to fulfill their environmental and social obligations both at home and abroad in the interest of sustainable development.¹⁰⁴

European Union: The “Home” of Heavy-Handed Regulation

True to their origins as the creators of the modern administrative state, EU bureaucrats in Brussels and elsewhere have largely welcomed the new CSR as a basis for achieving greater government control of business and markets. As Lee Casey pointed out several years ago in a lecture at The Heritage Foundation, the European Union “has adopted, and is promoting, a vision of how human society should be governed, and how the international community should be organized, that is antithetical to American traditions of independence and self-government.”¹⁰⁵

Bruce S. Thornton, a National

Fellow at the Hoover Institution and the author of *Decline and Fall: Europe’s Slow-Motion Suicide* explains that central to the EU project are radical and completely secularist Enlightenment notions and utopian ideals based on the belief that “a universal, essentially rational human nature is progressing away from the irrational superstitions and traditions such as religion that in the past defined and disordered human life and society,” and which “are different from those upon which the American order was founded.”¹⁰⁶ Thornton calls this vision “Eutopian” and notes that it creates what French political philosopher Chantal Delsol calls “techno-politics”—top-down government by technical elites who craft policies that intervene in society and the economy in order to mitigate the alleged harsh inequalities of free-market capitalism through government regulations and welfare entitlements. The goal will be to lessen and eventually eliminate what are claimed to be irrational nationalist or religious prejudices and intolerance that foment social disorder and injustice. Hence the intrusive and extensive economic regulations of the EU; the generous social welfare benefits now redefined as “rights” by the EU’s Charter of Fundamental Rights; the legally codified and enforced demands for tolerance, respect, and inclusion; and the animus against Christianity notoriously

evident in the refusal to acknowledge Europe’s Christian roots in the EU Constitution.¹⁰⁷

European Parliament member and rising U.K. Conservative Party star Daniel Hannan has noted how the agenda of the EU elites is reflected by the 78,000-word EU constitution (versus the 7,200-word U.S. Constitution). According to Hannan, the major difference “is the necessary dispersal of power to individuals and local governments for a more federalist, democratically representative body of diverse states” in the United States “rather than consolidation leading to less pluralism, diversity, and competition and overall a less prosperous model of government” in the EU.¹⁰⁸ Hannan expands upon this thesis in his recent book *The New Road to Serfdom: A Letter of Warning to America*.

Hannan warns that if the United States (pushed by CSR activists and others on the left) continues toward Europeanization and social democracy, it will “become less ‘American’—i.e., less prosperous and less unique” in a way that would be “devastating not just to the U.S. but to Western civilization.”¹⁰⁹

The “Transformation” from General Principles to Legal Requirements Is Well Underway

In fact, there is already significant movement in the direction of greater

104. Organization for Economic Cooperation and Development, “OECD Insights: Sustainable Development—Linking Economy, Society, Environment,” 2008, p. 86, http://www.oecd.org/document/11/0,3343,en_21571361_37705603_41530635_1_1_1_1,00.html (accessed April 19, 2012).

105. Lee A. Casey, “The EU Constitution and Europe’s Democratic Deficit,” Heritage Foundation *Lecture* No. 887, June 22, 2005, <http://www.heritage.org/research/lecture/the-eu-constitution-and-europes-democratic-deficit>.

106. Bruce Thornton, “America the Delusional? Overcoming Our European Temptation,” Heritage Foundation *First Principles Series Report* No. 37, March 7, 2011, http://www.heritage.org/research/reports/2011/03/america-the-delusional-overcoming-our-european-temptation#_ftn1.

107. *Ibid.*

108. Aaron Buchhop, “Daniel Hannan to America: Get Off the Road to Serfdom and Actualize the American Ideal!” Heritage Foundation *The Foundry* blog, October 5, 2010, <http://blog.heritage.org/2010/10/05/daniel-hannan-to-america-get-off-the-road-to-serfdom-and-actualize-the-american-ideal/>.

109. *Ibid.*

governmental control. First, ISO 26000 can be used as a template for national governments to enact CSR. ISO 26000 states that governmental organizations “may wish to use this International Standard to inform their policies, decisions and activities related to aspects of social responsibility”¹¹⁰ and that it “can be used as part of public policy activities.”¹¹¹ Denmark has already adopted its own national standard known as DS 26001, which is based on ISO 26000 and offers a “Socially Responsible Management System” certification.¹¹²

Second, ISO 26000 encourages governments and companies to implement its standards as contractual terms. While ISO 26000 states that the standard itself is only guidance for private companies, ISO 26000 states that companies should demonstrate not only their own CSR, but that of others in their “sphere of influence.” One of the principal methods for exercising influence is then identified as “setting contractual provisions.”¹¹³ Likewise, the new EU CSR strategy openly calls for EU governments to use social responsibility principles as a condition for government procurement.

Legal enforcement of CSR principles will also come through other mechanisms. For companies adopting ISO 26000 or other principles, failure to observe their commitment can bring liability for “misrepresentation.” At the same time, activists allege that public discussion and

action on CSR topics are crucial to the betterment of human society, and indeed the continued existence of the earth itself, and they have successfully advocated for regulation of company statements on these same CSR topics as “commercial speech.” In *Kasky v. Nike*, the California Supreme Court ruled that Nike’s response to attacks on its labor and human rights record should be judged as “commercial speech” rather than as “speech on public issues” and should not be accorded the greater First Amendment protections for public issues speech.¹¹⁴ CSR proponents cite the *Kasky* case as one of the possible keys to furthering the legal enforceability of CSR standards.¹¹⁵

Government and company recognition of CSR standards, such as ISO 26000, also encourages the development of customary international law, which of course finds its grounding in practice rather than in written treaties. Writing on the international law of human rights, Curtis Bradley and Jack Goldsmith note various claims to customary international law status including the right to free choice of employment, the right to form and join trade unions, and some right to free primary education. Bradley and Goldsmith go on to warn that “as a leading authority on international human rights has observed, ‘given the rapid continued development of international human rights, the list as now constituted should be regarded as essentially open-ended. ...

Many other rights will be added in the course of time.”¹¹⁶ The push for customary international law recognition of CSR principles is openly encouraged by CSR advocates.

What Washington and the U.S. Private Sector Should Do

The new CSR is driven by a convergence of factors:

- Environmental activism—now supercharged with the so-called settled scientific truth of imminent and catastrophic global warming;
- Reactions to recent corporate scandals and the financial crisis;
- Ongoing serious struggles with poverty and health issues in the developing world (often aggravated by statist policies, poor property rights protections, and rampant corruption); and
- Distrust of markets and companies, especially with increasing economic globalization.

In the CSR world, private companies that operate in these markets may only be deemed “responsible” by meeting codes such as ISO 26000. In the process of meeting the codes, the companies are perforce thrust into a quasi-governmental role in order to address challenges facing modern society. However, not only

110. ISO 26000: 2010, Sub-clause 3.4.

111. *Ibid.*, Clause 1.

112. Eugene Tay, “Introducing ISO 26000—Guidance on Social Responsibility,” March 16, 2011, <http://www.greenbusinesstimes.com/2011/03/16/introducing-iso-26000-guidance-on-social-responsibility/> (accessed January 19, 2012).

113. ISO 26000: 2010, Sub-clause 7.3.3.2.

114. *Kasky v. Nike*, 119 Cal.Rptr.2d 296 (2002), cert. granted, 123 S.Ct. 817, and cert. dismissed, 123 S.Ct. 2254 (2003).

115. Michael Kerr, Richard Janda, and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Canada: LexisNexis Canada, 2009), pp. 275–276.

116. Curtis A. Bradley and Jack L. Goldsmith, “Customary International Law as Federal Common Law,” *Harvard Law Review*, Vol. 110 (February 1997), p. 841.

do companies provide many valuable benefits to peoples and societies around the world, but the challenges facing modern society will only be met by effective and responsible government, a vibrant civil society, and a dynamic economy. Further hobbling individual (or in the case of the EU, regional) markets with CSR will deter economic growth in those countries and regions and thereby negatively impact overall growth.

The private business communities in the U.S. and Europe should unite against compulsory CSR standards that would undermine the core mission of business: increasing opportunities to make profits and provide value to shareholders. In particular, American business should actively participate in the public debate promised by the EU Commission as it rolls out its new strategy on “the role and potential of business in the 21st century.”¹¹⁷ U.S. companies should plan on participating in this debate as the commission’s strategy is already moving in a direction that would fundamentally redefine the role of business in society. They should also monitor the implementation of EU government procurement requirements based on ISO 26000 or other CSR standards and urge the U.S. government to oppose efforts on the part of the EU to enforce the extraterritorial application of EU-recognized CSR standards.

To support the vitality of America’s businesses to compete globally and ensure future prosperity for Americans, the Obama Administration and Congress should push back against these new and costly burdens on U.S. companies and American consumers by:

■ **Rejecting the definition of CSR as embodied in ISO 26000 as the basis for any U.S. government regulatory or policy initiative.**

The radical expansion of CSR’s intrusiveness through the triple-bottom-line concept of “responsibility” and redefinition of property rights could open the door to an even greater government burden on the private sector. Even without CSR and ISO 26000 mandates, U.S. government regulation has grown dramatically in recent decades, as evidenced by the 25 percent increase in the number of pages in the Code of Federal Regulations between 1993 and 2009.

■ **Immediately abolishing the recently established advisory board and contact point office at the State Department.**

President Obama recently appointed a Stakeholder Advisory Board on the U.S. National Contact Point for the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises and Secretary of State Clinton established an Office of the U.S. National Contact Point in the Bureau of Economic and Business Affairs at the U.S. Department of State. These efforts could further institutionalize CSR and ISO 26000 mandates within the U.S. government.

■ **Blocking the use of any American taxpayer funds at the OECD that support programs that further institutionalize OECD member**

government involvement in CSR activities. CSR standards have been codified in the “OECD Guidelines” that were formally endorsed by the OECD’s business and trade union advisory bodies.¹¹⁸ OECD work on these guidelines should be immediately suspended pending a comprehensive review of the impact of CSR in the context of the dangers examined in this paper.

■ **Urging the EU, its member states, and other authorities to reject the ISO 26000 “guidance standard” as the basis for contractual or regulatory requirements.** Denmark has already adopted its own national standard known as DS 26001, which is based on ISO 26000 and offers a “Socially Responsible Management System” certification.

■ **Monitoring the development and implementation of EU government procurement requirements based on ISO 26000 or other CSR standards to ensure compliance with applicable treaties and intergovernmental agreements.** The Obama Administration and Congress should consider launching official complaints about anti-business CSR standards in appropriate fora, such as at the World Trade Organization.

Conclusion

Activists for statist intervention in private free enterprise have been steadily ramping up their push for more corporate social responsibility

117. European Commission, “A Renewed EU Strategy 2011-14 for Corporate Social Responsibility.”

118. OECD, “Guidelines for Multinational Enterprises,” http://www.oecd.org/department/0,3355,en_2649_34889_1_1_1_1,00.html (accessed April 12, 2012).

(CSR) both in the U.S. and globally. Deploying their “doing well by doing good” mantra they have succeeded in enshrining CSR principles not only through the International Organization for Standardization’s “ISO 26000 International Standard: Guidance on Social Responsibility,” but also with such vehicles as the Organization for Economic Cooperation and Development’s Stakeholder Advisory Board for the OECD Guidelines for Multinational Enterprises¹¹⁹ and the U.N. Global Compact.¹²⁰

While the language sounds innocuous enough—to “promote awareness ... work with governments, foreign businesses, international labor and civil society organizations ... and offer a forum for confidential discussion between business and stakeholders,”¹²¹ this latest and more radical phase of CSR is more intrusive and changes the focus from voluntary initiatives to mandated standards, from targeted projects to comprehensive obligations, from

flexible communications to highly structured reporting.

As Jim Kelly of the Federalist Society and Global Governance Watch points out, these groups are seeking to use a

matrix of human rights governance networks to bypass national courts, democracy, and the rule of law to develop “soft law” human rights norms, with which multinational business enterprises will have to comply from the early stages of project research, design, and planning through project completion and beyond.¹²²

The definition of CSR has increasingly cast aside the traditional responsibility of company management to the firm’s owners and has instead coalesced around the claim of a triple-bottom-line obligation of companies to deliver economic, social, and environmental “returns” to justify what the left calls the

license to operate. In the CSR world, private companies that operate in these markets become “responsible” only by meeting codes such as ISO 26000. This completely ignores the fundamental benefits that companies provide to society through the goods and services they supply, the jobs they generate, and the economic freedom that results.¹²³

If the governments and business communities of developed countries fail to resist and block this wave of more radical CSR now, there is a real danger that its proponents will push the new CSR beyond the point of no return.

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119. Ibid.

120. United Nations, “Global Compact.”

121. Media note, “Advisory Board on Implementation of OECD Corporate Social Responsibility Guidelines,” U.S. Department of State, January 31, 2012, <http://www.state.gov/r/pa/prs/ps/2012/01/182844.htm> (accessed April 12, 2012).

122. James P. Kelly III, “International & National Security Law: Multinational Businesses and the Matrix of Human Rights Governance,” *Engage*, Vol. 12, No. 3 (November 2011), p. 51, http://www.fed-soc.org/doclib/20111122_KellyEngage12.3.pdf (accessed April 12, 2012).

123. Miller, Holmes, and Feulner, *2012 Index of Economic Freedom*.