

REVIVING SHAREHOLDER STEWARDSHIP: CRITICALLY EXAMINING THE IMPACT OF CORPORATE TRANSPARENCY REFORMS IN THE UK

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ABSTRACT

This Article examines the UK's corporate transparency reforms designed to motivate enhanced shareholder engagement in publicly-listed companies. Enhanced shareholder engagement is seen as an essential part of healthy corporate governance in companies providing scrutiny and a form of governance for the corporate sector. However, other than niche forms of hedge-fund or focused activism, shareholder engagement, particularly by institutions, with investee companies remains weak in the UK. Corporate transparency reforms in enhanced narrative reporting seek to bolster such shareholder engagement, to support the Stewardship Code, a body of soft law which contains best practices in shareholder engagement designed to motivate and guide such engagement.

This Article doubts that narrative reporting and the exhortation to stewardship—in the absence of structural reforms that change investment management incentives—would change the landscape of shareholder engagement in the UK. This Article explores the U.S. model of private securities litigation as a form of market discipline that expresses shareholders' rights in corporate governance, in order to determine if insights may be relevant to the UK.

However, there are pros and cons in encouraging the development of such disclosure-based market discipline as a form of corporate governance. This exercise of focusing on the limitations of corporate transparency reforms in terms of its impact on shareholder engagement may indeed spur policy-makers to consider the necessity of embarking more resolutely on structural-type reforms to the investment-management and corporate governance landscapes.

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I. INTRODUCTION

Shareholder engagement in investee companies is viewed by leading commentators and policy-makers in the United Kingdom ("UK") and the United States ("U.S.") as an important facet of corporate governance and market discipline that is in need of revival in the wake of the 2008–2009 global financial crisis.¹ Besides the 2010 institution of the UK Stewardship Code, a set of seven principles exemplifying the best practices of shareholder engagement applicable to institutional shareholders,² other reforms are also afoot to support the exercise of shareholder stewardship. The UK government has proposed corporate transparency reforms to enhance the narrative reporting regime for companies in order to facilitate greater shareholder engagement with corporate communications.³ This Article examines the role of corporate

¹See HM TREASURY, DAVID WALKER INDEPENDENT REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES, 2009, § 5.7 (U.K.) [hereinafter Walker Review]; Christopher M. Bruner, Conceptions of Corporate Purpose in Post-Crisis Financial Firms, 36 SEATTLE U. L. REV. 527, 552 (2013); John Kay, The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report, EUR. CORP. GOVERNANCE INST. (July 23, 2012), available at http://www.ecgi.org/conferences/eu_actionplan2013/documents/kay_review_final_report.pdf [hereinafter Kay Review]; Christopher M. Bruner, Corporate Governance Reform in a Time of Crisis, 36 J. CORP. L. 309, 329 (2011).

²*The UK Stewardship Code*, FIN. REPORTING COUNCIL (2012), <http://www.frc.org.uk/getattachment/e2db042e-120b-4e4e-bdc7-d540923533a6/UK-Stewardship-Code-September-2012.aspx>.

³*The Future of Narrative Reporting: the Government Response*, DEP'T FOR BUS., INNOVATION & SKILLS 14 (Mar. 2012) [hereinafter Government Response Report]; Edward Davey, *The Future of Narrative Reporting: Consulting on a New Reporting Framework*, DEP'T

transparency in supporting shareholders' corporate governance role and discusses whether enhanced narrative reporting is the best method of encouraging more informed shareholder engagement.

This Article is comprised of three parts. Part II discusses the role of corporate transparency in supporting the corporate governance role of shareholders.⁴ This Part deals with the theoretical grounding for corporate transparency, and will draw upon a comparative discussion of the mandatory disclosure regime in the U.S., highlighting the divergent corporate governance roles of shareholders in the UK and U.S.⁵ U.S. literature and perspectives on the role of corporate and securities transparency are pertinent to the examination in this paper of how shareholders' role in corporate governance may be framed and offers some useful points for thought. Part III then critically discusses the UK government's proposed reforms to enhance the narrative reporting regime in the UK in order to support increased shareholder engagement.⁶ Part IV examines the implications of the UK government's proposed transparency reforms and critically queries whether these reforms point to an under-explored avenue of reviving shareholders' corporate governance role or indeed point to the ultimate limitations of such a role.⁷

II. THE ROLE OF CORPORATE TRANSPARENCY IN CORPORATE GOVERNANCE AND MARKET DISCIPLINE—A TALE OF TWO DISCLOSURE SYSTEMS

A. *Policy Rationale Behind Corporate Transparency*

1. Public Interest Protection

Professor Charlotte Villiers opines that the earliest rationale for corporate transparency in the UK may be articulated as the price for incorporation and the enjoyment of limited liability.⁸ Corporate transparency is thus grounded in public interest, as an exchange for the public assumption of risk in affording privileges to persons who wish to conduct enterprise through a corporate vehicle.⁹ Increased mandatory

FOR BUS., INNOVATION & SKILLS ¶ 2.2 (Sept. 2011).

⁴See *infra* Part II.

⁵See *id.*

⁶See *infra* Part III.

⁷See *infra* Part IV.

⁸CHARLOTTE VILLIERS, CORPORATE REPORTING AND COMPANY LAW 16 (Barry Rider, ed., Cambridge Univ. Press 2006).

⁹See *id.* at 17.

corporate transparency came via developments in securities regulation, first subject to European legal harmonization in the 1970s and 1980s, then re-boostered in the early 2000s after the Financial Services Action Plan resolved to bring about capital markets integration and maximum harmonization in securities regulation.¹⁰ Mandatory disclosure as part of securities regulation continues in the vein of public interest, as a means to overcome information asymmetry between issuers and capital suppliers, and to ensure adequate investor protection through continuing accountability by publicly-traded corporations.¹¹ The publicly-traded corporation has become the icon of a marketized corporate economy and such an economy is sustained by market trust and confidence in the accountability of corporate-wealth creation through mandatory corporate disclosure.¹² Mandatory corporate disclosure is arguably a constitutive institution of the marketized corporate economy, and is based on the attractive objectives of fraud prevention and investor protection as well as the enhancement of market efficiency and confidence.¹³ These objectives are especially well-discussed in a rich array of American literature since the introduction of mandatory regulation in the 1930s for companies that offer securities to the public.¹⁴

2. Fraud Prevention & Investor Protection

The objective of fraud prevention and investor protection relates mainly to the point in time companies offer their securities directly to investors, and concerns the need to prevent companies from abusing the information asymmetry between them and investors.¹⁵ Mandatory disclosure is also regarded as necessary because of the limitations of

¹⁰See IRIS H.-Y. CHIU, REGULATORY CONVERGENCE IN EU SECURITIES REGULATION 5-6 (Kluwer Law Int'l et al. eds., 2008).

¹¹See Joseph A. Franco, *Why Antifraud Prohibitions Are Not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case for Mandatory Securities Disclosure*, 2002 COLUM. BUS. L. REV. 223, 245-46.

¹²See *id.* at 290.

¹³See *id.* at 265.

¹⁴See *id.* at 233-35 & n.27.

¹⁵See John C. Coffee, Jr., Market Failure and the Economic Case for A Mandatory Disclosure System, 70 VA. L. REV. 717, 742 (1984); Franco, *supra* note 11, at 237; Joel Seligman, The Historical Need for a Mandatory Corporate Disclosure System, 9 J. CORP. L. 1, 12-14 (1983); see also Zohar Goshen & Gideon Parchomovsky, The Essential Role of Securities Regulation, 55 DUKE L.J. 711, 755-56 (2006) (arguing that the key information asymmetries are between the corporations and information traders who serve the market's needs).

voluntary disclosure¹⁶ and the benefits of standardization of disclosure.¹⁷ Economists are also of the view that periodic and continuous mandatory disclosure by firms that have already become quoted or listed in the market serves the public interest purpose of enhancing market price accuracy and efficiency;¹⁸ therefore, improving market liquidity,¹⁹ and generally confidence.²⁰ This Article does not deal with the well-trodden

¹⁶See, e.g., Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 668-69 (1979). But see Coffee, *supra* note 15, at 722-23 (providing a contrary view on the role of voluntary disclosure).

¹⁷The benefits are in the form of standardization and enhancing the comparability of corporate transparency. See, e.g., Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 CARDOZO L. REV. 333, 356-57 (2006).

¹⁸See Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575, 1575 (1991); Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 383, 387-88 (1970); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 637-38 (1984); Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 811-12 (1985); Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 1042 (1992). For empirical evidence on the effect of corporate transparency upon share price responsiveness and accuracy, see Brian J. Bushee & Christian Leuz, *Economic Consequences of SEC Disclosure Regulation: Evidence from the OTC Bulletin Board*, 39 J. ACCT. & ECON. 233, 235-36 (2005); Allen Ferrell, *Mandatory Disclosure and Stock Returns: Evidence from the Over-the-Counter Market*, 36 J. LEGAL STUD. 213, 214-15 (2007); Merritt B. Fox, Randall Morck, Bernard Yeung & Artyom Durnev, *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331, 342-43 (2003). But see George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 62 AM. ECON. REV. 132, 153 (1973) (suggesting that mandatory periodic disclosure does not benefit investors); Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 770-72 (1995) (arguing that accuracy enhancement cannot be achieved because securities laws reduces the amount of information disclosed and the disclosure of information reduces the ability to compete effectively).

¹⁹Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 264 (2009); Khaled Hussainey & Sulaiman Mouselli, *Disclosure Quality and Stock Returns in the UK*, 11 J. APPD. ACCT. RES. 154, 156-159 (2010); Etienne Farvaque, Céline Gainet, Catherine Refait-Alexandre & Dhafer Saïdane, *Is Corporate Disclosure Necessarily Desirable? A Survey*, § 3.1.3 (Oct. 26, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1494238>.

²⁰Professor Edward Rock regards corporate mandatory disclosure as a form of credible commitment to an indefinite obligation to keep the market and public informed and therefore engendering market confidence. See Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 684-86 (2002). Market confidence can be manifested in several forms. It could relate to market confidence to participate in the securities markets and therefore reduce the cost of capital generally. See Lutz Hail & Christian Leuz, *Cost of Capital Effects and Changes in Growth Expectations around U.S. Cross-Listings I* (Eur. Corp. Governance Inst., Working Paper No. 46/2004, 2006), available at <http://ssrn.com/abstract=549922>. Lower cost of capital is seen as a phenomenon of market confidence. See *id.*; Farvaque, *supra* note 19, § 3.1.3. Further, the

issue of the weaknesses in the nature of disclosure as a regulatory tool, such as the outcomes expected to be achieved; whether it actually assists recipients in making *better* investment decisions. There is literature that canvasses both sides of the debate.²¹ This Article focuses on the role of mandatory corporate transparency in underpinning effective corporate governance, as this is the area that is sought to be ratcheted up by policy-makers in the UK after the 2008–2009 global financial crisis.²²

3. Reducing the Agency Gap

The marketized corporate economy is in reality an aggregate conceptualization, a sum of the myriad transactional relations between investors and their investee companies, which are corporate governance relations in nature. Mandatory corporate transparency is therefore relevant to the mediation of such corporate governance relations. Professor Paul G. Mahoney opines that mandatory disclosure is used as the means to remedy the agency problem between management and shareholders, such as mitigating management's informational advantage over shareholders and conflicts-of-interest problems such as management self-dealing.²³ Hence, mandatory disclosure reduces agency costs by reducing costs of shareholder monitoring, and may be seen as a form of structural support for shareholders' corporate governance role.²⁴

Professor Allen Ferrell further argues mandatory corporate disclosure is the fundamental anchor for corporate governance whether dealing with blockholding ownership structures where the corporate governance issue is the agency problem between controlling majority and minority shareholders or in dispersed ownership structures where the corporate governance issue is the agency problem between management and shareholders.²⁵ The role of mandatory disclosure in mediating

reduction of price volatility which is attributed to the effects of mandatory disclosure could also be crucial for and a signal of healthy market confidence. See Jeff Schwartz, *Fairness, Utility, and Market Risk*, 89 OR. L. REV. 175, 178 (2010).

²¹See Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1103, 1115 (2007); Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 603 (2013); Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 147–48 (2006); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011).

²²Walker Review, *supra* note 1, at § 5.7.

²³Paul G. Mahoney, *Mandatory Disclosure As A Solution To Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995).

²⁴See *id.*

²⁵Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around*

corporate governance issues framed in the agency paradigm focuses on the "private benefit" of mandatory disclosure to shareholders.²⁶ However, it may be argued that the enhancement of the corporate governance role of minority shareholders amounts to making market discipline effective and achieves the public interest of an effective and efficient market, lowering the cost of finance generally.²⁷ In other words, corporate transparency, largely through securities regulation, is a regulatory regime that melds the private interest of corporate governance monitoring with the public interest in making such monitoring effective as a form of market discipline.²⁸

4. Private Securities Enforcement

The mandatory disclosure regime in U.S. securities regulation showcases how shareholders' private corporate governance interests are served in the exercise of market discipline.²⁹ Although mandatory disclosure by corporations is couched in public interest accountability, private enforcement undertaken by shareholders is a significant means of calling corporations to account, and may be regarded as a form of market discipline through corporate governance.³⁰

Commentators characterize private securities litigation as an exercise of shareholder rights in relation to corporate transparency, although in aggregate, such exercise of shareholders' rights constitutes a form of market discipline.³¹ Professor Jill E. Fisch is also of the view that private securities litigation provides a mechanism for minority shareholders to enforce rights towards compensation³² as failures in

the World, 2 U. BROOK. J. CORP. FIN. COM. L. 81, 116-17 (2007).

²⁶*See id.* at 112 (explaining that the information in mandatory disclosures can displace private information).

²⁷Ferrell, *supra* note 18, at 216.

²⁸*See id.*

²⁹*See* Ferrell, *supra* note 25, at 112.

³⁰The public interest aspect remains a key rationale for mandatory disclosure as the economic efficiency reasons continue to be based on such public interest, and the social footprint of corporations is also regarded as an important rationale for compelling corporate transparency. *See* Donald C. Langevoort & Robert B. Thompson, "Publicness" in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 338 (2013) (discussing U.S. federal law forcing companies above a certain shareholding threshold to go public, such as Facebook going public).

³¹*See* C.S. Agnes Cheng, Henry He Huang, Yinghua Li & Gerald Lobo, Institutional Monitoring through Shareholder Litigation, 95 J. FIN. ECON. 356, 358 (2010); James D. Cox, The Social Meaning of Shareholder Suits, 65 BROOK. L. REV. 3, 5 (1999); Fox, *supra* note 19, at 307.

³²Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2

disclosure are presumed to cause loss by virtue of the fraud-on-the-market theory.³³ Private securities litigation is also necessary as reliance should not be placed on the public securities regulator to enforce the private governance rights of shareholders.³⁴ Public securities enforcement is shaped and motivated by other concerns.³⁵ Although there may be inefficiencies such as plaintiff attorneys' opportunism and speculative forms of litigation,³⁶ the U.S. has tweaked³⁷ the private securities litigation model, so that it may better serve the purposes of private enforcement as market discipline.³⁸ Research has also provided affirmation for the importance of private securities enforcement as a necessary structural support for the exercise of minority shareholder rights in the U.S.³⁹

The enthusiasm observed in foreign firms seeking cross-listings in the U.S. is also argued to be a response to investor affirmation for the

WIS. L. REV. 333, 342 (2009); *see also* Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2 WIS. L. REV. 243, 291-92 (2009) (arguing that compensation for the suing shareholders does not transfer wealth away from other innocent shareholders not joined in the suit).

³³Basic Inc. v. Levinson, 485 U.S. 224, 246-47 (1988).

³⁴*See* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 179 (2012).

³⁵*Id.*; *see* Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 73 (2008).

³⁶John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implication*, 106 COLUM. L. REV. 1534, 1536 (2006); A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions With Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 983 (1999); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301, 1331 (2008).

³⁷*See generally* Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2006). Most of the focus has been on provisions aimed at eliminating nonmeritorious suits. *See* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1493-94 (2006). The changes included:

[p]roviding a safe harbor for forward-looking statements; [r]aising the bar for what must be pled about a defendant's mental state; [b]arring discovery prior to a motion to dismiss; [r]equiring loss causation; inserting a damage cap; [s]hifting from joint and several liability to proportionate liability; [and] [e]liminating RICO claims for securities.

Id. (footnotes omitted).

³⁸*See* Choi & Thompson, *supra* note 37, at 1493-94 (affirming study of the positive effects of the Private Securities Litigation Reform Act).

³⁹*See* Rafael La Porta et al., *What Works in Securities Laws?* 15 (Tuck Sch. Bus., Working Paper No. 03-22), available at <http://ssrn.com/abstract=425880> (arguing that the view that the availability of private securities enforcement for the exercise of minority shareholder rights is the key reason for more developed securities markets such as in the U.S.). *Contra* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 294-95 (2007) (arguing that less emphasis is placed on enforcement in securities regulation).

regulatory framework in the U.S. that supports market discipline via private securities litigation.⁴⁰ The U.S. system of private enforcement against defective corporate transparency arguably melds the private monitoring role in corporate governance with the public interest in maintaining market discipline.⁴¹ Hence, a key insight from the enforcement of corporate transparency in the U.S. is that effective corporate governance based on corporate transparency can be manifested in the form of market discipline through private securities litigation.⁴² However, one must bear in mind the contextual reasons for this phenomenon, *i.e.*, the relative weaknesses in shareholder power generally under U.S. state corporate law regimes.⁴³ The dominance of private securities litigation against defective corporate disclosure as an exercise of shareholders' corporate governance role would also have the effect of framing such a corporate governance role rather narrowly in relation to the integrity of corporate accountability.⁴⁴

*B. Comparative Discussion of the Mandatory Disclosure Regime:
U.S. v. UK*

1. U.S. Shareholder Power

The role of corporate transparency in facilitating market discipline by shareholders in the U.S. is a particularly important form of corporate governance as the exercise of shareholder power as a matter of corporate law is relatively weak.⁴⁵ The weakness of shareholder power is due to

⁴⁰See Marco Pagano, Ailsa A. Röell & Josef Zechner, *The Geography of Equity Listing: Why Do European Companies List Abroad?* 12 (Cent. Stud. Econ. Fin., Working Paper No. 28), available at <http://ssrn.com/abstract=209313>; John C. Coffee, Jr., *Racing Towards The Top?: The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1780-81 (2002). But see Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 142 (2003).

⁴¹See, e.g., Langevoort & Thompson, *supra* note 30, at 338.

⁴²See *id.* at 338-39 (providing examples as to why Congress put enforcement in the hands of private individuals).

⁴³See *infra* Part II.B.1. (discussing the relative weaknesses in U.S. shareholder power).

⁴⁴See *id.*

⁴⁵Shareholder rights enshrined in the most popular incorporation state of Delaware are relatively weak compared to the UK system. See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 847-48 (2005). Some may argue this is a form of 'race to the bottom' spurred on by the regulatory competition for corporate charters in the U.S. See William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861, 1866-67 (1995).

state corporate law regimes that endow management with enormous powers, severely limiting interferences by shareholders.⁴⁶ One such example is Delaware, arguably the most popular body of state corporate law due to Delaware being the choice incorporation state for various important American corporations.⁴⁷ The limits to which shareholders may exercise their powers⁴⁸ are affected by: the prevalence of opt-outs in Delaware corporate law, which allow opt-outs from directors' obligations to owe a duty of care to shareholders,⁴⁹ and the difficulties in shareholder derivative enforcement against directors due to the operation of the business judgment rule.⁵⁰ Thus, one of the most significant and visible exertions of shareholder rights in the U.S. is wrapped around enforcement against defective corporate disclosure. The market discipline against defective corporate disclosure could be regarded as an expression of shareholders' role in corporate governance, although such a governance role is narrowly framed around monitoring the integrity of corporate reporting. Nevertheless, enhancing shareholder power is a work in progress in the U.S.⁵¹ and shareholders are increasingly taking on

Contra Roberta Romano, *The Genius of American Corporate Law*, 49 BUS. LAW. 1955, 1958 (1994) (arguing that the market aligns management and shareholder interests, which creates a race to the top, not a race to the bottom).

⁴⁶CHRISTOPHER M. BRUNER, *CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER* 36-37 (Cambridge University Press 2013).

⁴⁷*Id.* at 38 ("Whereas management authority in a U.K. corporation ultimately flows from the shareholders themselves, management authority in a U.S. corporation flows from the statute, placing the board in a different position.").

⁴⁸John Armour, Bernard Black, Brian Cheffins & Richard Nolan, *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMPIRICAL LEGAL STUD. 687, 711 (2009) (showing that shareholder enforcement of corporate law is weak and is compensated for by the a friendlier regime for shareholder enforcement in securities law).

⁴⁹See J. Robert Brown, Jr. & Sandeep Gopalan, *Opting Only In: Contractarians, Waiver of Liability Provisions, and the Race to the Bottom*, 42 IND. L. REV. 285, 294 (2009); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 4 (1990); Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1704 (1989).

⁵⁰See Franklin A. Gevurtz, *The Role of Corporate Law in Preventing a Financial Crisis—Some Reflections on In re Citigroup Inc. Shareholder Derivative Action*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 113, 138-40 (2010); Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 457-58 (2005); Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 571-74 (2013).

⁵¹See Facilitating Shareholder Director Nominations, 17 C.F.R. §§ 200, 232, 240, 249 (2010). However, the Securities and Exchange Commission's Rule 14a-11 was successfully challenged and vacated. *Business Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011).

a governance role in forms of engagement such as in proxy access and voting.⁵²

2. UK Shareholder Power

Where the UK is concerned, shareholders have generally greater governance and participatory powers in corporate governance.⁵³ Hence, what role is corporate transparency expected to play in this framework?

Shareholders in UK companies are accorded with more powers of governance and participation than compared to their U.S. counterparts.⁵⁴ Shareholders have certain powers of control in the company such as the exercise of reserve power to direct management if shareholders procure a special resolution to do so.⁵⁵ Company law therefore allows shareholders in exceptional circumstances to override management.⁵⁶ English law has always accorded a special provision to the equity capital suppliers of the firm, and this may be due to the fact that companies evolved out of partnership law, and until 1855, members of a company did not have limited liability.⁵⁷ Equity providers were not seen as a collective mass of anonymous persons, but often as participants in the company.⁵⁸ Mandatory law in the UK treats shareholders as the monitors of the board, and provides for certain decisions to be reserved for the general meeting.⁵⁹ Provisions dealing with the appointment and removal of directors are examples of the former.⁶⁰

⁵²See Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315, 318 (2008); Sunil Wahal, *Pension Fund Activism and Firm Performance*, 31 J. FIN. & QUANTITATIVE ANALYSIS 1, 4 (1996); Jonathan M. Karpoff, *The Impact of Shareholder Activism in Target Companies: A Survey of Empirical Findings*, at 4-5 (Sept. 10, 2001) (unpublished manuscript) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885365.

⁵³BRUNER, *supra* note 46, at 36-37.

⁵⁴*Id.*

⁵⁵Companies Act, 2006, c. 46, §§ 17-38 (U.K.) (codifying the position that shareholders may reserve power to direct management through articles in a company's constitution).

⁵⁶See BRUNER, *supra* note 46, at 36-37.

⁵⁷Ross Grantham, *The Doctrinal Basis of the Rights of Company Shareholders*, 57 CAMBRIDGE L.J. 554, 562 (1998).

⁵⁸See *id.*

⁵⁹See, e.g., Companies Act, 2006, c. 46, §§ 160, 168-69 (U.K.).

⁶⁰Section 188 of the Companies Act 2006 governs directors' long-service contracts exceeding two years with the company. *Id.* § 188. Appointments may however be made just by the Board under the Model Articles, although this may be modified by companies. *Id.*

Further, directors or their connected persons are not allowed to enter into substantial property transactions with the company,⁶¹ or to benefit from a company loan or quasi-loan⁶² or other credit transaction,⁶³ without the approval of shareholders by an ordinary resolution.⁶⁴ These provisions co-opt shareholders into monitoring the prospects of self-dealing by management, and in turn, allow the exercise of a form of proprietary control for shareholders.⁶⁵ Further, directors acting in conflicts of interest and duty may seek shareholder approval for the transactions.⁶⁶ Shareholder approval, hence, takes on a gatekeeping function to ensure that directors are allowed to proceed without running the risk of a breach of fiduciary duties.⁶⁷ Mandatory law has also provided for shareholders to have the right of ratification or otherwise of breaches, negligence, or omissions committed by directors.⁶⁸ The right of shareholder ratification seems particularly based on the perspective of shareholders as residual risk bearers in the agency paradigm and hence the exclusive right to act as assessors of whether or not it is appropriate to accept irregularities committed by management.⁶⁹

Compared to the U.S., the regulatory framework for the exercise of shareholders' corporate governance role in the UK is much more empowering.⁷⁰ However, shareholder derivative or securities litigation for publicly-listed companies are not the norm, whether as an expression in corporate governance or as a form of market discipline.⁷¹ Shareholder monitoring in corporate governance, is predominantly expressed in informal forms of dialogue and engagement with management.⁷² Such

⁶¹*Id.* §§ 190-96.

⁶²*Id.* §§ 197-200, 213-14.

⁶³Companies Act, 2006, c. 46 §§ 201-14 (U.K.).

⁶⁴*Id.* §§ 197-214 (U.K.).

⁶⁵*See id.*

⁶⁶*Id.* §§ 175(4), 180.

⁶⁷Companies Act, 2006, c. 46 §§ 175(4), 180 (U.K.).

⁶⁸*Foss v. Harbottle*, (1843) 2 Hare 461 (Eng.). The rule in *Foss* is now enshrined with modification in the Companies Act 2006. *See* Companies Act, 2006, c. 46, § 239 (U.K.).

⁶⁹*See* Companies Act, 2006, c. 46, § 239 (U.K.).

⁷⁰BRUNER, *supra* note 46, at 36.

⁷¹*See* John Armour et al., *supra* note 48, at 716 (showing that between 2004 and 2006, there were only six suits filed against directors of publicly traded companies and only three of those were private litigation, two of which were then struck out); John Lowry, *The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure*, 68 CAMBRIDGE L.J. 607, 620-21 (2009) (arguing that enhanced disclosure may help with shareholder enforcement).

⁷²Chris Mallin, Andy Mullineux & Clas Wihlborg, *The Financial Sector and Corporate Governance: the UK case*, 13 CORP. GOVERNANCE 532, 532 (2005), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8683.2005.00447.x/pdf>.

has been the norm in the 1980s and 1990s, and the nature of such engagement may be attributed to the shareholder base of the UK corporate sector, which is characterized by high levels of institutional ownership.⁷³ With that said, such engagement revolved around takeover issues, not corporate governance issues as such.⁷⁴ Paradoxically, the more empowering framework of corporate governance rights for shareholders in UK law did not foster contests for participation and control between shareholders and management at publicly-listed companies, and did not give rise to publicly visible market discipline in the form of securities or derivative litigation.⁷⁵ However, the quiet front was not to be taken for granted as the 1990s further exposed weaknesses in the corporate governance of the UK corporate sector.⁷⁶

C. Enhanced Corporate Governance as the Framework for Reliable Financial Reporting

1. UK Corporate Governance Code of 2012 and History

In the 1990s, corporate scandals emerged, such as the collapse of the Bank of Credit and Commerce International ("BCCI") and Polly Peck, due to management fraud and manipulation of financial reporting to shareholders.⁷⁷ The scandals triggered a thorough examination of financial reporting by companies and Sir Adrian Cadbury was asked to lead a committee to look into that issue.⁷⁸ The Cadbury Committee, however, identified that the governance of the company was integral to a sound financial reporting process, and that internal governance and controls had to be in place before integrity in corporate financial reporting could be secured.⁷⁹ Hence, much of the Cadbury Report dealt with a model of good governance for companies, including board

⁷³*Id.* at 533. BRIAN R. CHEFFINS, *CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED* 373 (Oxford: OUP 2009).

⁷⁴Paul Clyde, *Do Institutional Shareholders Police Management?*, 18 *MANAGERIAL & DECISION ECON.* 1, 1-2 (1997).

⁷⁵See Kern Alexander, *UK Corporate Governance and Banking Regulation: The Regulator's Role as Stakeholder*, 33 *STETSON L. REV.* 991, 997 (2004).

⁷⁶*Id.* at 996.

⁷⁷*Id.* at n.21.

⁷⁸See generally Adrian Cadbury, *Report of the Committee on the Fin. Aspects of Corp. Governance*, EUR. CORP. GOVERNANCE INST. (Dec. 1, 1992) [hereinafter Cadbury Report], <http://www.ecgi.org/codes/documents/cadbury.pdf> (noting that the Cadbury Report was written in response to the UK scandals and the controversy over directors' pay).

⁷⁹*Id.* §§ 1.2, 1.6.

effectiveness, board composition including non-executive directors, the formation of independent committees of the board, the appointment of auditors and how audit services should be provided, and the essential monitoring role of shareholders.⁸⁰ The Cadbury Committee proposed a Code of best practices in corporate governance⁸¹ for listed companies, which should be adhered to on a comply-or-explain basis, and it was envisaged that enhanced governance disclosures required of the board in accordance with the Code would improve the rubric of corporate transparency as a basis for shareholders to exercise their corporate governance roles in monitoring their investee companies.⁸² In the words of the Cadbury Report, "[t]he obligation on companies to state how far they comply with the Code provides institutional and individual shareholders with a ready-made agenda for their representations to boards. It is up to them to put it to good use."⁸³

2. Increased Regulatory Oversight

The integrity of financial reporting is also sought to be improved by the institution of regulatory oversight of the development of accounting standards and the discipline of auditors⁸⁴ and European Union ("EU") legislation that sought to harmonize financial reporting standards applicable across the EU⁸⁵ and in narrative reporting.⁸⁶ The Labour government installed in the UK in 1997, which toppled almost two decades of Conservative leadership, was faced with the aftermath of corporate scandals and the rise in social distrust of the corporate sector.⁸⁷

⁸⁰See generally *id.*

⁸¹The proposed code of best practices became the Cadbury Code of Corporate Governance, which subsequently became the Combined Code of Corporate Governance following the Hampel review in 1998 and is now the UK Corporate Governance Code 2012. *The UK Corporate Governance Code*, FIN. REPORTING COUNCIL (2012), <http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.aspx>.

⁸²Cadbury Report, *supra* note 78, § 3.7.

⁸³*Id.* § 6.16 (emphasis added).

⁸⁴See FIN. REPORTING COUNCIL, <http://www.frc.org.uk/About-the-FRC.aspx> (last visited Aug. 12, 2013).

⁸⁵Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards, 2002 O.J. (L243) 1.

⁸⁶Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, 2003 O.J. (L178) 16.

⁸⁷See Cadbury Report, *supra* note 78.

Steady reforms to enhance corporate transparency and accountability included the Directors' Remuneration Report Regulations 2002, which required corporate disclosure of executive-pay packages to shareholders and the taking of a shareholder non-binding advisory vote.⁸⁸

The Labour government also took the initiative to thoroughly review the company law framework in the UK and proposed to institute a more comprehensive regime of mandatory narrative reporting in the form of the Operating and Financial Review ("OFR") than that required under the EU legislation.⁸⁹ The OFR had already been developed as a voluntary reporting practice by the accounting profession.⁹⁰ Although the OFR was subsequently pulled from the mandatory corporate transparency framework in an abrupt u-turn on policy-making, many features of the OFR found its way into the requirement imposed on directors to produce a business review⁹¹ to accompany annual corporate reporting.⁹²

D. Faith in UK Corporate Governance is Shaken

1. Restrictions on Private Securities Litigation Based on Defective Corporate Disclosure

For the last two decades, the shareholders' corporate governance role in the UK may be regarded as adequately empowered in company law, and enhancements to corporate transparency does not serve the same purpose in the U.S. as a substitutive platform for corporate governance in lieu of rights and powers based in company law.⁹³ UK policy-makers frown upon the exercise of the shareholders' role in corporate governance via the mechanism of private securities litigation

⁸⁸Sir Richard Greenbury, *Directors' Remuneration: Report of a Study Group*, EUR. CORP. GOVERNANCE INST. 49-52 (July 17, 1995), available at <http://www.ecgi.org/codes/documents/greenbury.pdf> (evaluating public outcry mounted against excessive executive remuneration in privatized utilities companies).

⁸⁹Accounting Standards Board, *Reporting Statement: Operating and Financial Review*, at 24 (2006), available at <http://www.frc.org.uk/Our-Work/Publications/ASB/UITF-Abstract-24-Accounting-for-start-up-costs/Reporting-Statement-Operating-and-Financial-Review.aspx>.

⁹⁰*Id.*

⁹¹See Companies Act, 2006, c. 46, § 417 (U.K.).

⁹²Tom Burns & John Paterson, Gold Plating, Gold Standard or Base Metal? Making Sense of Narrative Reporting after the Repeal of the Operating and Financial Review Regulations, 18 INT'L COMPANY & COM. L. REV. 247, 257-58 (2007).

⁹³BRUNER, *supra* note 46, at 36-37.

based on defective corporate disclosure.⁹⁴ Hence, when the UK had to implement the EU legislation on enhanced corporate transparency requirements relating to periodic securities reporting,⁹⁵ the UK made a policy decision to restrict the opportunities for civil litigation in respect of defective periodic securities reporting, only allowing investors to sue if the defective securities disclosure was material and was known or deceitfully concealed.⁹⁶ The requirement imposed on investors to prove knowledge or dishonesty is much more onerous than the fraud-on-the-market assumption made in favor of investors in the U.S.⁹⁷

In sum, the corporate governance role of shareholders in the UK is seen as a distinct realm from market discipline in the securities markets.⁹⁸ This allows it to be legitimately viewed as a role to be exercised in the private paradigm of the company's internal relations, and is not narrowly framed around corporate transparency and market discipline for securing integrity in corporate accountability.⁹⁹ Corporate transparency is therefore a servant to corporate governance in the UK, and provides an informed basis for shareholders to decide how to engage—whether informally or through the exercise of corporate powers provided in the Companies Act 2006.¹⁰⁰ In the U.S., however, a significant part of corporate governance is framed around corporate transparency itself, and the nature of such governance may be regarded as narrowly framed.¹⁰¹ But such governance, expressed in private securities litigation, provides a visible and vibrant form of market discipline.¹⁰²

⁹⁴See *id.*

⁹⁵Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, 2004 O.J. (L390) 38, 44, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:390:0038:0038:EN:PDF>.

⁹⁶Financial Services and Markets Act, 2000, c. 8, § 90(A), sch. 10A (U.K.); Paul Davies QC, *Davies Review of Issuer Liability: Final Report*, at 15-16 (2007), available at http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/d/davies_review_finalreport_040607.pdf.

⁹⁷See Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL. J. CORP. L. 455, 458-59 (2006).

⁹⁸See Eilís Ferran, *The Role of the Shareholder in Internal Corporate Governance: Enabling Shareholders to Make Better-Informed Decisions*, 4 EUR. BUS. ORG. L. REV. 491, 497 (2003) (opining that, in the realm of securities disclosure, discipline is regarded as coming chiefly from regulatory enforcement and not "market" enforcement in the form of private securities litigation).

⁹⁹See *id.*

¹⁰⁰See *id.*

¹⁰¹See *supra* note 45 and accompanying text.

¹⁰²See *id.*

2. Lack of Shareholder Monitoring

In the wake of the global financial crisis, faith in the corporate governance role of shareholders in the UK has been shaken.¹⁰³ Policy-makers in the UK have articulated their concern that there is a persistent lack of shareholder monitoring of their investee companies.¹⁰⁴ The empowering legal framework for shareholders' rights and enhanced corporate transparency in corporate governance, directors' remuneration, and narrative reporting in the business review have not sustained a vibrant landscape of shareholder monitoring.¹⁰⁵ First, it may be argued that institutional shareholders, being diversified, do not have a keen interest in exercising governance rights and vote with their feet if they need to.¹⁰⁶ Hence, although there has always been evidence of institutional shareholder engagement in the UK, such levels are not particularly vibrant.¹⁰⁷

Second, the ownership landscape has changed dramatically in the UK in the last decade or so, with institutional ownership falling to approximately 13 percent from over 26 percent in 2008 and over 40 percent in 1998, while foreign ownership has increased to over 40 percent.¹⁰⁸ The decrease in institutional ownership of the corporate sector has weakened the little informal shareholder engagement that has taken place thus far.¹⁰⁹ The change in the dynamics in corporate governance relations has made policy-makers realize the assumption that there is a working regime of informal shareholder engagement led by UK institutions may be increasingly misplaced.¹¹⁰ Further, the last decade is

¹⁰³See Iris H-Y Chiu, *Institutional Shareholders as Stewards: Towards a New Concept of Corporate Governance*, 6 BROOK. J. CORP. FIN. & COM. L. 387, 387 (2012) [hereinafter Chiu, *Institutional Shareholders*].

¹⁰⁴See *id.*

¹⁰⁵See *supra* Part II.B.2.

¹⁰⁶See Ferran, *supra* note 98, at 496.

¹⁰⁷See Emiliós Avgouleas & Jay Cullen, *Market Discipline and EU Corporate Governance Reform in the Banking Sector: Merits, Fallacies, and Cognitive Boundaries* 41 J. OF LAW AND SOCIETY (SPECIAL ISSUE: EUROPEAN CORPORATE GOVERNANCE) 1-3 (forthcoming 2014), available at <http://ssrn.com/abstract=2163118>.

¹⁰⁸See OFFICE FOR NAT'L STATISTICS, *Ownership of UK Quoted Shares, 2010 1, 3* (Feb. 28, 2012), http://www.ons.gov.uk/ons/dcp171778_257476.pdf; see also Andrew Bolger, *UK Share Ownership Moves Overseas*, FIN. TIMES (London), Sept. 25, 2013, <http://www.ft.com/intl/cms/s/0/5dcf0dbc-25f9-11e3-ae88-00144feab7de.html#axzz2ghfcSxEZ>.

¹⁰⁹See *id.*; see also Chiu, *Institutional Shareholders*, *supra* note 103, at 392-93.

¹¹⁰See Chiu, *Institutional Shareholders*, *supra* note 103, at 392-93.

marked by a noted lack of shareholder engagement,¹¹¹ as investors have become much more focused on short-term market gains than on underlying corporate value, in an era characterized by the explosion of financial innovation and development of myriad forms of financial instruments.¹¹² That said, occurrences of intense shareholder activism carried out in the UK have been due to hedge-fund activism, which is an investment strategy that facilitates "value-extraction."¹¹³ Such shareholder activism is questionably beneficial for the long-term stability of the corporation.¹¹⁴

E. Steps Taken to Reform UK Corporate Governance

1. Policy-makers & Commentators Discuss How to Enhance Shareholder Monitoring

Policy-makers have now shone a critical light on the shifting landscape of shareholder monitoring in the UK.¹¹⁵ The current trajectory is to reinvigorate institutional shareholder engagement, although changing realities have shown that the role of institutional shareholder engagement has slipped and waned over the years.¹¹⁶ Institutional shareholders in the UK have been accused of being asleep prior to the onset of the crisis.¹¹⁷ "The critique is that institutional shareholders have

¹¹¹See John Hendry, Paul Sanderson, Richard Barker & John Roberts, *Responsible Ownership, Shareholder Value and the New Shareholder Activism* (ESRC Ctr. for Bus. Research, Univ. of Cambridge, Working Paper No. 297, 2004), available at <http://www.cbr.cam.ac.uk/pdf/wp297.pdf>.

¹¹²See Andrew Jackson, *Towards a "Mutual Understanding of Objectives"? Attitudes of Institutional Investors and Listed Companies to Corporate Governance Reforms*, 9 CORP. GOVERNANCE 196, 203 (2001).

¹¹³See IRIS H-Y CHIU, *THE FOUNDATIONS AND ANATOMY OF SHAREHOLDER ACTIVISM* 141, 145 (Hart Publishing 2010).

¹¹⁴*Id.* at 150.

¹¹⁵See Iris H-Y Chiu, *Turning Institutional Investors into 'Stewards': Exploring the Meaning and Objectives in 'Stewardship'*, 66 C.L.P. 443, 443-44 (2013) [hereinafter Chiu, *Turning Institutional*].

¹¹⁶*See id.*

¹¹⁷See Kate Burgess, Myners Lashes out at Landlord Shareholders, *FIN. TIMES* (London), Apr. 21, 2009, <http://www.ft.com/intl/cms/s/0/c0217c20-2eaf-11de-b7d3-00144feabdc0.html#axzz2byhQtTOq>; Helia Ebrahimi, Institutional Shareholders Admit Oversight Failure on Banks, *TELEGRAPH* (U.K.), Jan. 28, 2009, <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/4363635/Institutional-shareholders-admit-oversight-failure-on-banks.html>; Jennifer Hughes, FSA Chief Lambasts Uncritical Investors, *FIN. TIMES* (London), Mar. 11, 2009, <http://www.ft.com/cms/s/0/9edc7548-0e8d-11de-b099-0000779fd2ac.html#axzz2byhQtTOq>.

been uncritical of risky business practices in their investee banks and should have monitored board risk management" and such monitoring constitutes part of the general governance for wider social good.¹¹⁸ "Although the European Commission Green Paper"¹¹⁹ acknowledges that the lack of critical scrutiny by institutional shareholders in financial institutions may be a 'special case' due to the complexity of banking businesses, the Paper nevertheless points out that shareholder apathy is a chronic problem in listed companies with dispersed ownership."¹²⁰ The argument is that there is a lacuna in effective shareholder monitoring as part of corporate governance, which also entails public-interest effects.¹²¹

It remains speculative, however, to what extent the lack of shareholder monitoring would have helped avert the financial crisis. That said, the Walker Review suggests that shareholder engagement as a form of corporate governance in bank and financial institutions is in the wider interest of risk management and financial stability.¹²² The Walker Review is of the view that shareholder monitoring should take on a character of stewardship in order to contribute to the governance potential of shareholders' role in corporate governance, viz:

The potentially highly influential position of significant holders of stock in listed companies is a major ingredient in the market-based capitalist system which needs to earn and to be accorded an at least implicit social legitimacy. As counterpart to the obligation of the board to the shareholders, this implicit legitimacy can be acquired by at least the larger fund manager through assumption of a reciprocal obligation involving attentiveness to the performance of investee companies over a long as well as a short-term horizon. On this view, those who have significant rights of ownership and enjoy the very material advantage of limited liability should see these as complemented by a duty of stewardship. This is a view that

¹¹⁸Chiu, *Institutional Shareholders*, *supra* note 103, at 387.

¹¹⁹*Green Paper The EU corporate governance framework*, EUROPEAN COMM'N 3, 12-13 (May 4, 2011) http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf.

¹²⁰See Chiu, *Institutional Shareholders*, *supra* note 103, at 394.

¹²¹There are many commentators who doubt that shareholder monitoring is the answer to check excessive risk-taking by management. See Avgouleas & Cullen, *supra* note 107, at 10; Bruner, *supra* note 1, at 321.

¹²²Walker Review, *supra* note 1, at 10.

would be shared by the public, as well as those employees and suppliers who are less well-placed than an institutional shareholder to diversify their exposure to the management and performance risk of a limited liability company.¹²³

2. UK Stewardship Code of 2010

In response to the Walker Review, the UK Stewardship Code of 2010, amended in 2012, has been rolled out as a body of best engagement practices for institutional shareholders to comply with or explain any deviations.¹²⁴ Reviving the role of shareholder engagement is a path-dependent way of coping with the changes in the corporate governance dynamics in the UK corporate sector, and it is perhaps quite a natural response for policy-makers who see the slipping of such engagement as the key problem in corporate governance that needs to be remedied.¹²⁵ Further, there are hopes that such reinvigorated shareholder engagement can amount to a form of credible market discipline.¹²⁶ The Author has elsewhere critically questioned the hopes placed on "shareholder stewardship."¹²⁷ This Article however focuses on the narrower question of whether prospective corporate transparency reforms would have an impact upon shareholder stewardship.

The investment community in the UK to its defense raised a pertinent question that ultimately led to the Sharman Inquiry established in March 2011, *i.e.*, whether the corporate transparency regime adequately provided them with information.¹²⁸ The UK banks that failure in the crisis produced going concern statements in the run-up to the crisis, providing no sign of warning to investors.¹²⁹ Hence, was there a problem with the corporate transparency regime in the UK that ultimately underpinned the lack of shareholder engagement and market discipline? In other words, a post-crisis examination into the role of corporate reporting leading up to the crisis is necessary in order to

¹²³*Id.* at 70.

¹²⁴*See* Chiu, *Turning Institutional*, *supra* note 115, at 456-57 (discussing key Stewardship Code provisions). Stewardship is discussed further in Part IV. *See infra* Part IV.

¹²⁵*See infra* Part IV.

¹²⁶*See generally* Kay Review, *supra* note 1.

¹²⁷*See* Chiu, *Turning Institutional*, *supra* note 115, at 451-56.

¹²⁸*See generally* Colin Sharman, *The Sharman Inquiry: Going Concern and Liquidity Risks: Lessons for Companies and Auditors, Final Report and Recommendations of the Panel of Inquiry*, FIN. REP. COUNCIL (June 2012), <http://www.frc.org.uk/getattachment/591a5e2a-35d7-4470-a46c-30c0d8ca2a14/Sharman-Inquiry-Final-Report.aspx>.

¹²⁹*See id.* ¶ 67.

ascertain what corporate reporting could and should have said about the prospects of certain banks and financial institutions carrying on as "going concerns."

3. Financial Reporting Council: Sharman Inquiry

The Sharman Inquiry, appointed by the Financial Reporting Council in the UK, carried out this review and the final conclusions of the Inquiry obliquely criticized the capital markets for latching onto shorthand financial information such as going concern certifications.¹³⁰ The Sharman Inquiry acknowledged that the going-concern standard needed to be better defined¹³¹ but short-hand financial information such as going concern certifications should be more contextualized so that directors could explain that their conclusion was made in the exercise of their judgment in good faith and skill, and provide more insight for shareholders.¹³² Although the Sharman Inquiry posed there was room for improvements to the financial reporting regime to shareholders, and that such improvements could come from enhancement in narrative reporting requirements, particularly by directors, the Sharman Inquiry made a balanced finding in terms of recommending both corporate transparency to be improved and the governance role of shareholders to be made more meaningful.¹³³ This approach, moreover, arguably deflects the issue of potential directors' liability for the signing-off on going-concern certifications, because acknowledgement of the need to improve the disclosure regime surrounding going concern means that directors should not be held to be at fault for the standard of disclosure they adhered to.¹³⁴ There does not seem to be an appetite for supporting market discipline through shareholder actions against directors on account of corporate disclosure, although there is arguably policy appetite for a form of public agency-led enforcement against certain directors for the management of certain failed banks.¹³⁵

¹³⁰*See id.*

¹³¹*See id.*

¹³²Sharman, *supra* note 128, ¶ 123.

¹³³*Id.* ¶ 53.

¹³⁴*See id.*

¹³⁵*See* PARLIAMENTARY COMMISSION ON BANKING STANDARDS, 'AN ACCIDENT WAITING TO HAPPEN': THE FAILURE OF HBOS, 2012-13, H.L. 144, H.C. 705, ¶ 129 (U.K.), <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcb/144/144.pdf>.

The UK government has proposed corporate transparency reforms in order to support shareholders' stewardship role.¹³⁶ The next Section examines these proposed transparency reforms and critically questions what they really seek to achieve.¹³⁷ Although the Walker Review has framed shareholder stewardship as a matter of private corporate governance and also a matter of public interest, the UK is unlikely to embrace the position of melding corporate governance and market discipline through more visible forms of derivative and securities litigation.¹³⁸ But does the vibrant landscape of market discipline in the U.S. through private securities litigation hold lessons for the UK in light of its attempt to reform shareholder engagement by reforming corporate transparency? The next Section discusses the narrative reporting reforms proposed by the government.

III. NARRATIVE REPORTING REFORMS IN THE UK

It has been recognized for some time that non-financial narrative reporting that complements financial reporting is necessary to provide a fuller picture in corporate disclosure.¹³⁹ Traditional financial reporting is increasingly unable to capture the value of intangible assets such as intellectual property, brand value, customer loyalty, etc.¹⁴⁰ The pioneering effort in the U.S. is Regulation S-K that prescribed a list of financial and non-financial narrative disclosures.¹⁴¹ The U.S. Securities

¹³⁶ See Walker Review, *supra* note 1, at 10.

¹³⁷ See *infra* Part III.

¹³⁸ See *id.*

¹³⁹ See generally Tim Ambler & Andy Neely, Narrative Reporting in Company Annual Accounts, 19 BUS. STRATEGY REV. 28 (2007), <http://ssrn.com/abstract=1030724>; David Campbell & Mara Ridhuan Abdul Rahman, A Longitudinal Examination of Intellectual Capital Reporting in Marks & Spencer Annual Reports, 1978-2008, 42 BRIT. ACCT. REV. 56 (2010); Corporate Reporting—A Time for Reflection: A Survey of the Fortune Global 500 Companies' Narrative Reporting, PRICEWATERHOUSECOOPERS 9 (Apr. 2007) [hereinafter PricewaterhouseCoopers Survey], http://www.pwc.com/en_GX/gx/corporate-reporting-services/pdf/reflection.pdf.

¹⁴⁰ See BARUCH LEV, INTANGIBLES: MANAGEMENT, MEASUREMENT, AND REPORTING 180 (Brookings Institution Press 2001); *Enhanced Business Reporting Consortium Releases Framework to Promote Greater Transparency in Corporate Reporting*, PR NEWSWIRE, Oct. 18, 2005, [http://www.thefreelibrary.com/Enhanced+Business+Reporting+Consortium+Releases+Frame work+to+Promote...-a0137677132](http://www.thefreelibrary.com/Enhanced+Business+Reporting+Consortium+Releases+Framework+to+Promote...-a0137677132).

¹⁴¹ Item 303 of Regulation S-K has been consolidated with Items 303(b) and (c) of Regulation S-B, Item 5 of Form 20-F and Paragraph 11 of General Instruction B of Form 40-F to form the Management's Discussion and Analysis of Financial Condition and Results of Operations, or MD&A, to be filed with the U.S. Securities Exchange Commission. See

Exchange Commission ("SEC") enacted Regulation S-K after the Jenkins Report recommended that non-financial disclosure be prescribed.¹⁴² The relevant financial and non-financial disclosure that companies have to produce are consolidated as the Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"), which has to be filed annually with the SEC.¹⁴³ Such non-financial reports relate to productivity and innovation; management analysis of the relationships between directors, management, and shareholders; forward-looking information; information about management and shareholders; objectives and strategy; description of business and industry structure; and, risks associated with financial instruments and off-balance sheet financing.¹⁴⁴

A. *Companies Act 2006 Requirements Regarding Narrative Reporting*

1. Directors' Business Review

In its overhaul of company law reform culminating in the Companies Act 2006, the UK has expanded the scope of narrative reporting required of directors in publicly-quoted or listed companies in the form of the directors' business review.¹⁴⁵ The business review must include "a fair review of the company's business, and a description of the principal risks and uncertainties facing the company."¹⁴⁶ It must be "a balanced and comprehensive analysis" of the company's financial performance as well as the main trends and factors likely to affect the future development and performance of the company's business.¹⁴⁷ Further, it must contain information about the company's policies on environmental matters, the company's employees, social, and community issues, and information about persons with whom the company has contractual or other arrangements, which are essential to the business of the company.¹⁴⁸ The analysis in the review must be based on both financial and non-financial key performance indicators.¹⁴⁹ The narrative

Regulation S-K, Item 303, 17 C.F.R. § 229.303 (2008).

¹⁴²*Id.*

¹⁴³AM. INST. CERTIFIED PUB. ACCT., Improving Business Reporting: A Customer Focus, §§ 1, 3 (1994), available at <http://www.aicpa.org/interestareas/frc/accountingfinancialreporting/downloadabledocuments/jenkins%20committee%20report.pdf>.

¹⁴⁴*See id.*

¹⁴⁵Companies Act, 2006, c. 46, § 417 (U.K.).

¹⁴⁶*Id.* §§ 417(3)(a)-(b).

¹⁴⁷*Id.* §§ 417(4)-(5).

¹⁴⁸*Id.* § 417(5).

¹⁴⁹Companies Act, 2006, c. 46, § 417(4)-(6) (U.K.). *See, e.g.,* Arad Reisberg & Ian

reporting in the UK's directors' business review arguably goes further than the narrative reporting regime in the U.S. which is still very much focused on financial performance.¹⁵⁰

The UK government is fully supportive of the move towards expanded narrative reporting by directors and has in early 2012 proposed an overhaul of the directors' business review in section 417 of the Companies Act 2006.¹⁵¹ The directors' business review is now replaced with a Strategic Report.¹⁵² The next Section will discuss the UK government's proposals and the final reforms that have been enacted.

2. Reforms in Narrative Reporting in Companies Reform Regulations 2013

a. *Strategic Report*

In its proposal, the government envisions that the board of directors will set out in the Strategic Report the strategy, direction, and challenges facing the company, evidenced by high-level financial and remuneration information.¹⁵³ The Strategic Report would provide clear information about the company's business strategy, the business model and risks of the company, and the rewards for the company's directors.¹⁵⁴ The Strategic Report would include strategy, risk management, and remuneration issues as being integral to risk management.¹⁵⁵ The Strategic Report would be prepared for shareholders, but it would also be relevant to all users of annual reports and accounts.¹⁵⁶ New and

Havercroft, *Directors' Duties Under Companies Act 2006 and the Impact of the Company's Operations on the Environment*, U.C. LONDON CENTRE COM. L. (Dec. 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274567.

¹⁵⁰Iris H-Y Chiu, *The Paradigms of Mandatory Non-Financial Disclosure: A Conceptual Analysis: Part 1*, 27 *COMPANY LAW* 259, 266 (2006); Iris H-Y Chiu, *The Paradigms of Mandatory Non-Financial Disclosure: A Conceptual Analysis: Part 2*, 27 *COMPANY LAW* 291, 295 (2006). Commentators in the U.S. also call for narrative reporting in the U.S. to reflect performance indicators for environmental, social responsibility, and governance issues. See Bryant Cannon, Note, *A Plea for Efficiency: The Voluntary Environmental Obligations of International Corporations and the Benefits of Information Standardization*, 19 *N.Y.U. ENVTL. L.J.* 454, 469-70 (2012); Michael R Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 *WASH. U. L. REV.* 115, 123 (2009).

¹⁵¹See Davey, *supra* note 3, at 3; see also Government Response Report, *supra* note 3, at 3.

¹⁵²See Companies Act, 2006, c. 46, § 414A (U.K.).

¹⁵³Davey, *supra* note 3, at 16 fig.1.

¹⁵⁴See *id.*

¹⁵⁵See *id.*

¹⁵⁶*Id.* ¶ 3.17.

simplified disclosures for executive remuneration in single total figures have also been proposed.¹⁵⁷

b. *Annual Directors' Statement*

The Strategic Report would be supported by detailed information in an Annual Directors' Statement ("ADS") presented in a consistent and coherent format aimed at online publication.¹⁵⁸ The ADS would support the Strategic Report and would include the information that is currently subject to mandatory reporting such as, perhaps, material information under the Listing Rules, corporate governance disclosures including gender diversity on the board, and detailed remuneration information.¹⁵⁹ The ADS could also include voluntary environmental, social responsibility, and governance information such as the company's record on human rights as recommended by the Ruggie Principles commissioned by the United Nations.¹⁶⁰ The ADS proposes to have "a prescribed structure with a set layout and standard headings . . . [that] will facilitate both ease of access to the information and the comparability of the data"¹⁶¹ The Strategic Report, therefore, provides a high-level bird's-eye view in narrative terms for shareholders, and is distinguishable from the ADS, which contains other narrative reporting that is currently mandatory and scope for voluntary disclosures.¹⁶² The de-cluttering in the Strategic Report of other mandatory reporting may distinguish its nature and encourage better engagement by shareholders with such communication.¹⁶³

3. Recently Enacted Transparency Reform Incorporating Strategic Report & ADS

In August 2013, the Companies Reform Regulations 2013 amended the Companies Act 2006, which implements the Strategic Report and the Directors' Report (instead of the ADS) to replace the directors' business review in the now superseded section 417 of the

¹⁵⁷Davey, *supra* note 3, ¶¶ 5.6-5.7.

¹⁵⁸*Id.* ¶ 3.7.

¹⁵⁹*Id.* at 21 fig.2.

¹⁶⁰*Id.* ¶ 4.9.

¹⁶¹Davey, *supra* note 3, ¶ 3.26.

¹⁶²*Id.* ¶¶ 1.4, 1.6.

¹⁶³*Id.* ¶ 4.1.

Companies Act 2006.¹⁶⁴ The Strategic Report now incorporates the former requirements of the superseded directors' business review in section 417 of the Companies Act 2006,¹⁶⁵ as well as a description of the company's strategy, business model, and gender diversity on the board, in senior management and in employees.¹⁶⁶

The Strategic Report in its final shape seems to place less emphasis on risk management as the government's consultation paper has earlier suggested.¹⁶⁷ Further, it is largely similar to the previous directors' business review with an added descriptive component.¹⁶⁸ It remains uncertain how far the renamed Strategic Report would actually become a high-level narrative report useful for providing a key overview to shareholders. The originally envisaged two-level narrative reporting in the Strategic Report and ADS has also become streamlined into one Strategic Report.¹⁶⁹

B. Enhanced Narrative Reporting Impact

Will the enhanced narrative reporting regime proposed by the UK government have a significant impact upon the exercise of shareholders' corporate governance role in monitoring, scrutiny, and engagement? There are three points to consider. One relates to the limitations of narrative reporting, an issue well canvassed in literature.¹⁷⁰ Second, it is important to look into the motivations for shareholder engagement generally and whether enhanced informational empowerment truly relates to increased shareholder engagement.¹⁷¹ Finally, the third point,

¹⁶⁴Companies Act, 2006, c. 46, § 414A (U.K.).

¹⁶⁵*Id.* § 414C(2).

¹⁶⁶*Id.* § 414C(8).

¹⁶⁷Compare Davey, *supra* note 3, ¶ 2.7 (explaining that one of the important aspects commentators to the proposed Strategic Report is "effective disclosure of company risk"), with *Exposure Draft: Guidance on the Strategic Report*, FIN. REPORTING COUNCIL § 4.1 (Aug. 2013) [hereinafter *Exposure Draft*], <http://www.frc.org.uk/News-and-Events/FRC-Press/Press/2013/August/FRC-consults-on-strategic-report-guidance.aspx> (requiring only "principal" risks be disclosed in the narrative reports).

¹⁶⁸Compare Companies Act, 2006, c. 46, § 417(3) (U.K.) ("The business review must contain—(a) a fair review of the company's business, and (b) a description of the principal risks and uncertainties facing the company."), with Companies Act, 2006, c. 46, § 414C(2) (U.K.) ("The strategic report must contain—(a) a fair review of the company's business, and (b) a description of the principal risks and uncertainties facing the company.").

¹⁶⁹Exposure Draft, *supra* note 167, ¶ 4.1 ("The narrative reports comprise the strategic report and the directors' report.").

¹⁷⁰See *infra* Part III.B.1.

¹⁷¹See *infra* Part III.B.2.

discussed in Part IV, relates to whether the reforms would enhance the scope of directors' liability for corporate disclosures under section 463 of the Companies Act 2006, and the implications for the future of shareholder engagement in light of increased potential for litigious market discipline.¹⁷²

1. Limitations of Narrative Reporting

First, narrative reporting may be criticized as being too subjective and qualitative.¹⁷³ Research shows that many narrative corporate reports engage in "impression management," or presenting information in order to be perceived favorably.¹⁷⁴ There are various driving forces for impression management in corporate reporting, such as the desire on the part of corporations to maintain the legitimacy of certain corporate actions or decisions, to manage investor relations, or even to explain away negative information.¹⁷⁵ Corporations engage in various communication formats, selective detail of disclosure, frames of expression, and language manipulation to achieve impression management.¹⁷⁶ The reliability of narrative reporting is thus pitted against management's self-serving bias in impression management that can be carried out in narrative reporting.¹⁷⁷ Further, Choi et al. argue that corporations mimic each other in how they phrase and present disclosures, so that unintended consequences are mitigated.¹⁷⁸ Such behavior may undermine the usefulness of narrative reporting that is

¹⁷²See *infra* Part IV.

¹⁷³See generally Lori Holder-Webb, *The Question of Disclosure: Providing a Tool for Evaluating Managements' Discussion and Analysis*, 10 ADVANCES ACCT BEHAV. RES. 183 (2007) (discussing a more intensive tool for evaluating the qualitative disclosures of narrative analyses).

¹⁷⁴Niamh M. Brennan & Doris M. Merkl-Davies, *Chapter 8: 'Accounting Narratives and Impression Management,'* in THE ROUTLEDGE COMPANION TO COMMUNICATION IN ACCOUNTING 3 (Lisa Jack, Jane Davidson & Russell Craig eds., 2013) available at <http://ssrn.com/abstract=1873188>; Doris M. Merkl-Davies & Niamh M. Brennan, *A Conceptual Framework of Impression Management: New Insights From Psychology, Sociology and Critical Perspectives*, 41 ADVANCES ACCT BEHAV. RES. 415, 415 (2011); Doris M. Merkl-Davies, Niamh M. Brennan & Stuart J. McLeay, *Impression Management and Retrospective Sense-Making in Corporate Narratives*, 24 ACCT., AUDIT & IMPRESSION MGMT. 315, 316 (2011).

¹⁷⁵Brennan & Merkl-Davies, *supra* note 174, at 8.

¹⁷⁶*Id.* at 5.

¹⁷⁷Merkl-Davies, Brennan & McLeay, *supra* note 174, at 316.

¹⁷⁸Stephen J. Choi & G. Mitu Gulati, *An Empirical Study of Securities Disclosure Practice*, 80 TUL. L. REV. 1023, 1025 (2006).

meant to highlight unique features of the business not captured in standardized financial reporting.¹⁷⁹

That said, the standardization of narrative reporting by law could improve both the quantity and quality of disclosure as mandatory standards of reporting could go some way to constrain the scope of cosmetic reporting and "impression management".¹⁸⁰ In 2007, the PricewaterhouseCoopers survey of narrative reporting in the UK showed narrative reporting is taken seriously by companies, forming between 50 and 60 percent of the annual report.¹⁸¹ This trend is observed to have continued in the later survey conducted by Deloitte & Touche in 2010.¹⁸² Both surveys highlight that narrative reporting is a work in progress with several areas of weaknesses.¹⁸³ The earlier survey by PricewaterhouseCoopers reported that strategic views from the top, risk information, and forward-looking information are weak areas of reporting; this is affirmed by the Deloitte survey and independent empirical research carried out by academic commentators.¹⁸⁴ The Strategic Report arguably deals with an expanded scope for reporting of strategic views on business risks and performance and may be able to address these areas of weaknesses.¹⁸⁵ However, commentators have

¹⁷⁹*Id.* at 1024-25.

¹⁸⁰Serene Shi Yun Seah & Ann Tarca, *The Impact of Regulatory Framework on Management Commentary Reports* 22 (Dec. 16, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=962628>.

¹⁸¹PricewaterhouseCoopers Survey, *supra* note 139, at 19.

¹⁸²*Swimming in Words: Surveying Narrative Reporting in Annual Reports*, DELOITTE LLP, 14 fig.4 (2010) [hereinafter Deloitte & Touche Survey], http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Services/Audit/Corporate%20Governance/UK_Audit_Swimming_in_words.pdf.

¹⁸³*See* PricewaterhouseCoopers Survey, *supra* note 139, at 9; Deloitte & Touche Survey, *supra* note 182, at 14.

¹⁸⁴Tim Ambler & Andrew Neely, *Narrating the Real Corporate Story*, 19 BUS. STRATEGY REV. 28, 32 (2008) (arguing that the identification of non-financial key performance indicators remains weak, and forward-looking information is sparse). Although the Deloitte & Touche survey reports improvement in the identification of non-financial key performance indicators, the integration of these indicators into analysis of the performance of the business at a strategic level remains weak. Olajo Aiyegbayo & Charlotte Villiers, *The Enhanced Business Review: Has It Made Corporate Governance More Effective?*, 2011 J. BUS. L., no. 7, 699, 723 (concluding, through a qualitative survey, that the same weaknesses in narrative reporting identified in the PricewaterhouseCoopers Survey have persisted). Further, Peter Yeoh also reported a lack of forward-thinking information in his empirical survey. Peter Yeoh, *Narrative Reporting: The UK Experience*, 52 INT'L J. L. & MGMT. 211, 228 (2010).

¹⁸⁵Although how risk is reported is still left rather open-ended and this may be pertinent to whether shareholders feel adequately informed. *See* ANNTI MIHKINEN, *The Usefulness of Firm Risk Disclosures under Different Firm-Riskiness, Investor-Interest, and Market Conditions: New Evidence from Finland*, in *ESSAYS ON CORPORATE RISK AND*

highlighted the importance of forward-looking information as forming a basis for informed shareholder engagement but such remains not forthcoming in corporate disclosure and not highlighted in either the proposed Strategic Report or ADS.¹⁸⁶

The usefulness of narrative reporting is in little doubt and regulatory, professional, and voluntary bodies such as the Global Reporting Initiative that produce standards for corporate social responsibility reporting are all making progress in enhancing the usefulness of narrative reporting.¹⁸⁷ Hackneyed arguments regarding the limitations of narrative reporting to support shareholder engagement are probably no longer convincing. However, is shareholder engagement likely to be motivated by more narrative reporting?

2. Skepticism in relation to Shareholder Engagement

The reasons for shareholder apathy and lack of engagement are rooted in structural issues such as short-termism¹⁸⁸ and the reliance on capital market gains rather than long-term corporate value for investment management.¹⁸⁹ Many institutional shareholders delegate investment management to asset managers and their relatively short-termist relationships with asset managers contribute to the short-term horizons of investment management.¹⁹⁰ Further, asset managers are often given

TRANSITION DISCLOSURES IN THE IFRS ERA 4 (2013), available at http://epub.lib.aalto.fi/pdf/diss/Aalto_DD_2013_035.pdf; Tom C.W. Lin, A Behavioral Framework for Securities Risk, 34 SEATTLE U. L. REV. 325, 330 (2011).

¹⁸⁶ Annti Miihkinen, *What Drives Quality of Firm Risk Disclosure? The Impact of a National Disclosure Standard and Reporting Incentives Under IFRS*, 47 INT'L J. ACCT. 437, 442 (2012).

¹⁸⁷ GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org> (last visited August 24, 2013).

¹⁸⁸ See Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 268 (2012) (defining short-termism); JOHN C. BOGLE ET AL., *Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management* 2 (2009), available at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/overcome_short_state0909_0.pdf (explaining the problems of short-termism); DEAN KREHMEYER, MATTHEW ORSAGH & KURT N. SCHACHT, CFA CENTRE FOR FINANCIAL MARKET INTEGRITY & BUSINESS ROUNDTABLE INSTITUTE FOR CORPORATE ETHICS, *BREAKING THE SHORT-TERM CYCLE: DISCUSSION AND RECOMMENDATIONS ON HOW CORPORATE LEADERS, ASSET MANAGERS, INVESTORS AND ANALYSTS CAN REFOCUS ON LONG-TERM VALUE* 1 (2006), available at http://www.corporate-ethics.org/pdf/Short-termism_Report.pdf (providing recommendations for overcoming short-termism).

¹⁸⁹ Kay Review, *supra* note 1, at 53.

¹⁹⁰ JOHN C. BOGLE, *THE CLASH OF THE CULTURES: INVESTMENT VS. SPECULATION* ch. 3 (2012); ALFRED RAPPAPORT, *SAVING CAPITALISM FROM SHORT-TERMISM* 71 (2011); Simon CY Wong, *Why Stewardship is Proving Elusive for Institutional Investors*, 2010

mandates that are benchmarked against market gains; preoccupation with market gains changes the character of investment management.¹⁹¹ Dalia Tsuk Mitchell has conceptualized the modern investor as one whose primary right is to sell out if unhappy with the investment, not necessarily to participate in the internal reform of companies.¹⁹² The development of deep, mature, and liquid securities markets allows investment management gains to be made from market gains and holding out for wealth creation by the corporation in the long term is no longer the norm.¹⁹³ Developments in cheaper and speedier trading also make portfolio turnover a relatively easy decision to make in investment management,¹⁹⁴ and empirical research reports that most institutions turn over their portfolios by 72 to 200 percent every year.¹⁹⁵ These structural issues mean that investors use corporate disclosure for trading decisions and not necessarily for engagement.¹⁹⁶

In these cases, would the enhancement of corporate disclosure in narrative reporting seeking to draw investors' attention to strategy, risk, and corporate citizenship really change investor behavior in terms of shareholder engagement?¹⁹⁷ The narrative reports are not mandated to be long-termist in outlook,¹⁹⁸ and neither does the Stewardship Code overtly promote long-termism.¹⁹⁹ However, it could be argued that long-termism underlies current UK company law, just as the Company Law Review that worked on the Companies Act 2006 accepted the ideology of the "enlightened shareholder" as a fundamental tenet in corporate governance.²⁰⁰ The "enlightened shareholder value" model underlies section 172 of the Companies Act 2006 dealing with directors' fiduciary

BUTTERWORTHS J. INT' BANKING & FIN. L. 406, 406 (2010).

¹⁹¹Wong, *supra* note 190, at 407.

¹⁹²Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1564 (2006).

¹⁹³Wong, *supra* note 190, at 407.

¹⁹⁴Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 700 (2013).

¹⁹⁵IIRC INSTITUTE & MERCER, INVESTMENT HORIZONS: DO MANAGERS DO WHAT THEY SAY? 6-7 (2010), available at http://www.iircinstitute.org/pdf/IIRCMercerInvestmentHorizonsReport_Feb2010.pdf.

¹⁹⁶*See id.*

¹⁹⁷Wong, *supra* note 190, at 411 (arguing that absent structural changes to the investment management landscape, the requirements of stewardship do not change the incentives for investment management as it is currently practiced).

¹⁹⁸*See* DEPT FOR BUS., INNOVATION & SKILLS, THE FUTURE OF NARRATIVE REPORTING: A CONSULTATION 10-12 (Aug. 2010) (showing a lack of focus on long-termism).

¹⁹⁹Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1025 (2010).

²⁰⁰Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'*, 29 SYDNEY L. REV. 577, 579 (2007).

duties to promote the long-term success of the company, taking into account of matters relating to stakeholder interests such as employees and the community, and responsibility for the environment.²⁰¹ Although the enlightened shareholder value model pertains to defining the scope of directors' duties, it also paints a picture of what shareholders' interests should be.²⁰² The enlightened shareholder is the benchmark of a hypothetical shareholder who is interested in the long-term well-being and performance of the company and its social and environmental impact.²⁰³ Further, the directors' business review is based on directors' duties under section 172 and therefore frames disclosure according to the needs of the enlightened shareholder.²⁰⁴ However, the ideological underpinning may not serve as a basis for impugning directors' discharge of duties or for shareholders' exercise of stewardship in their corporate governance role.²⁰⁵ Many commentators, including the government-commissioned Kay Review, are of the view that shareholder engagement with investee companies, for the long-term stability of the companies, may only become mainstream if structural changes support such behavior.²⁰⁶ Structural changes include encouraging concentration of ownership instead of diversification of portfolios;²⁰⁷ shortening the investment management intermediary chain;²⁰⁸ tax incentives for long-term shareholding or disincentives for frequent trading;²⁰⁹ enhanced shareholder rights for long-term shareholders, or reduced rights for short-termist shareholders;²¹⁰ and even changing the composition of ownership

²⁰¹*Id.* at 591.

²⁰²See Andrew Keay, *Enlightened Shareholder Value, The Reform of the Duties of Corporation Directors and the Corporate Objective*, [2006] L.M.C.L.Q. 335, 339; Andrew Keay, *Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado About Little*, 22 EUR. BUS. L. REV. 1, 2, 18 (2011).

²⁰³Keay, *supra* note 202, at 40.

²⁰⁴See *id.* at 2; see also Lowry, *supra* note 71, at 616.

²⁰⁵Keay, *supra* note 200, at 609.

²⁰⁶Kay Review, *supra* note 1, § 5.34; Chiu, *Turning Institutional*, *supra* note 115, at 451-56; Leo E. Strine Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 17-18 (2010); GEORGE COX, *OVERCOMING SHORT-TERMISM WITHIN BRITISH BUSINESS: THE KEY TO SUSTAINED ECONOMIC GROWTH* 42 (2013), available at <http://www.mbsportal.bl.uk/taster/subjareas/accfinecon/labour/144083overcomingshorttermism13.pdf>.

²⁰⁷Kay Review, *supra* note 1, § 6.14.

²⁰⁸*Id.*

²⁰⁹*Id.* § 8.32.

²¹⁰*Id.* § 1.

of the corporate sector by rethinking merger and takeover law.²¹¹ In this context, one could argue that reforms to corporate transparency in enhancing narrative reporting are merely small steps not likely to achieve any significant impact upon shareholder engagement by institutional shareholders for the long-term interest of companies.²¹²

IV. EXPANSION OF THE SCOPE OF DIRECTORS' LIABILITY AND THE PROSPECT OF SHAREHOLDER MONITORING AS A FORM OF MARKET DISCIPLINE?

The next Section argues that it is worth exploring whether the impact of corporate transparency reforms upon shareholder engagement could be enhanced if corporate transparency provides the basis for the exercise of shareholders' rights as a form of corporate governance. That is to say, if corporate transparency per se may be actionable by shareholders as a means of calling companies to account, working in a similar way as in the U.S. to facilitate a form of corporate governance through market discipline and private litigation, the narrative reporting reforms proposed by the government could have a more pronounced impact on shareholder engagement behavior, particularly in respect of institutional shareholders. This is of course a controversial suggestion.

A. *Expansion of the Scope of Directors' Responsibility and Liability for Corporate Disclosures*

1. The Strategic Report Expands Section 463

The reforms that overhaul the directors' business review into the Strategic Report will result in an expanded scope of directorial responsibility and possibly liability for corporate disclosures. First, directors can incur criminal liability by knowingly or recklessly allowing the Strategic Report to be non-compliant.²¹³ Nothing is explicitly said about enhancing the civil liability of directors for mis-disclosures, but this Article is of the view that the scope of civil liability has also been expanded. Directors' civil liability for corporate mis-disclosures is governed by the existing section 463 of the Companies Act 2006.²¹⁴

²¹¹See Kay Review, *supra* note 1, § 8.7.

²¹²See *id.* § 6.17.

²¹³Companies Act, 2006, c. 46, § 463 (U.K.).

²¹⁴*Id.*

Section 463 allows the company to claim compensation from a director who knowingly makes an untrue statement or dishonest omission in a director's report, statement, or summary financial statements.²¹⁵ Such an action could also be a derivative action taken by shareholders.²¹⁶ Because the Strategic Report replaces the directors' business review, which is subject to section 463, the Strategic Report falls within the scope of section 463.²¹⁷ As such, it is arguable that the scope of liability for directors has remained unchanged. However, the Strategic Report compels more disclosure of business model and forward-looking analysis, and strategic directions, as well as gender-diversity information so the scope for civil liability for mis-disclosures has correspondingly expanded.²¹⁸ In fact, the Financial Reporting Council's proposed guidelines for narrative reporting in the Strategic Report highlight a notable expansion in the scope of what needs to be reported, and directors should be keenly aware of the greatly enhanced scope of responsibility and liability in corporate reporting in general.²¹⁹

Detailed recommendations are made on how each element in the Strategic Report can be reported in a narrative but meaningful manner.²²⁰ In terms of the objectives of the company, the Strategic Report should explain what the objectives are and why they are established,²²¹ and financial as well as non-financial objectives.²²² The element relating to "description of business model" should explain how the company "generates and preserves" value.²²³ In particular, information should be provided regarding how the company is structured; the market in which it operates; its main products, services, and customers; and its distribution methods, the nature of its relationships and resources, its external environment and future trends and its internal factors and trends

²¹⁵*Id.*

²¹⁶*Id.* See *supra* note 71 and accompanying text (explaining that derivative action taken by shareholders against directors is not the norm).

²¹⁷See generally Exposure Draft, *supra* note 167 (providing a detailed and informative review and "best practice" guide for the new Strategic Report litigation).

²¹⁸Companies Act, 2006, c. 46, § 414A (U.K.).

²¹⁹Exposure Draft, *supra* note 167, at § 2.1.

²²⁰See generally *id.* (providing narrative reporting examples for various items throughout the Strategic Report).

²²¹See *id.* § 4.1 ("The objectives of the narrative reports are: [] to provide information on the entity and insight into its main **objectives** and strategies, and the **principal risks** it faces; and [] to complement, supplement and provide context for the related financial statements.").

²²²See *id.* §§ 4.3-4.4.

²²³Exposure Draft, *supra* note 167, at 35 (explaining that the definition of business model remains ingrained from the Code).

such as research.²²⁴ In terms of principal risks and uncertainties, companies should report on the key risks that may affect future performance or threaten viability, in such a way that the range of risks covered are both comprehensive and specifically explained so that investors may be able to make the connection between the identification of certain risks and their likely impact on the company.²²⁵ The risks that should be discussed comprise the full range of business risks including commercial, operational, and financial risks.²²⁶

Next, the Exposure Draft recommends that the key performance indicators of the company that should be disclosed are the ones that the directors judge to be the most relevant to the objectives and strategy of the company, and narrative reporting should explain what they are and how they are used to calculate and measure performance.²²⁷ The Exposure Draft also provides guidelines on how narrative reporting can be used to meaningfully explain financial statements.²²⁸ The Strategic Report should provide narrative explanations of the cash flow, liquidity positions of the company, and how the company intends to fund its strategies.²²⁹ It should also report on the tangible and intangible assets including brand, intellectual property rights, and human capital.²³⁰ Finally, in relation to stakeholder matters such as the environment, customer, and supplier matters that have been included in the previous directors' business review, the Financial Reporting Council's position is that such matters should be reported in a way that relates them to the performance of the company and the relevance should be explained.²³¹

2. Benefits of Expanding Section 463

The expansion of the scope of section 463 liability for directors could be an attractive prospect for shareholder scrutiny. The expansion of scope for directorial responsibility and liability for corporate reporting may also be argued to be inevitable as regulators and commentators seem to increasingly favor integrated reporting, which would likely consolidate more corporate disclosure in one place and expand

²²⁴ See *id.* § 6.39.

²²⁵ See *id.* §§ 5.4, 6.51.

²²⁶ See *id.* § 6.52.

²²⁷ See Exposure Draft, *supra* note 167, § 6.55.

²²⁸ See *id.* § 6.58.

²²⁹ See *id.* § 6.62.

²³⁰ See *id.* § 6.63.

²³¹ See Exposure Draft, *supra* note 167, §§ 6.64-6.66.

directorial responsibility over it.²³² The integrated report is a form of corporate reporting that integrates financial and contextual environmental and social governance ("ESG") information in order to present a high-level integrated view of the corporation in terms of its long-term vision and "value-creation" (moving away from the hackneyed term of "performance").²³³ Brockett et al. from Ernst & Young argue that investors are demanding reporting along the lines of five areas of multiple bottom-line performance: economic, governance, social, ethics, and environmental.²³⁴ In order to report along multiple bottom lines, corporations need to engage in holistic risk management, and corporate reporting should be based on materiality, stakeholder inclusiveness, the sustainability context, and completeness.²³⁵ The integrated report provides that both financial and non-financial reporting should be put into one place, and the delivery of information should itself be an integrated whole, developed from business strategy, risk considerations, and a holistic consideration of long term value creation.²³⁶ The International Integrated Reporting Committee ("IIRC") is a "global collaboration" that includes the International Federation of Accountants ("IFAC"), the Global Reporting Initiative ("GRI"), and the Prince's Accounting for Sustainability Project in order to develop an international template for integrated reporting.²³⁷ Could the prospect of expanded directorial responsibility and perhaps liability for corporate reporting create incentives to change the behavior of shareholder engagement?

²³²*New Financial Reporting Lab Project: Accounting Policy Disclosures and Integration of Related Financial Information*, FIN. REPORTING COUNCIL (May 8, 2013), <http://www.frc.org.uk/News-and-Events/FRC-Press/Press/2013/May/New-Financial-Reporting-Lab-Project-Accounting-Pol.aspx>.

²³³*Towards Integrated Reporting: Communicating Value in the 21st Century*, INT'L INTEGRATED REPORTING COMM. 8 (Sept. 2011, Discussion Paper and Summary of Responses) (U.K.), http://theiirc.org/wp-content/uploads/2011/09/IR-Discussion-Paper-2011_spreads.pdf.

²³⁴ANN M. BROCKETT & ZABIHOLLAH REZAEI, CORPORATE SUSTAINABILITY: INTEGRATING PERFORMANCE AND REPORTING 5 (2012).

²³⁵*Id.*

²³⁶See ROBERT P. ECCLES & MICHAEL KRZUS, ONE REPORT: INTEGRATED REPORTING FOR A SUSTAINABLE STRATEGY 10 (2010).

²³⁷See KATELJNE VAN WENSEN, WIJNAND BROER, JOHANNA KLEIN & JUTTA KNOPF, THE STATE OF PLAY IN SUSTAINABILITY REPORTING IN THE EUROPEAN UNION 31 (Arne Peter Braaksma ed., 2011); *The IIRC*, International Integrated Reporting Committee (last visited Sept. 5, 2013), <http://www.theiirc.org/the-iirc/>.

B. Benefits To Increasing Shareholders' Corporate Governance Role

Although the UK system has never encouraged the exercise of shareholders' corporate governance role to be framed around corporate disclosure,²³⁸ such as in private securities litigation in the U.S., the beefing up of disclosure to motivate shareholder engagement puts disclosure itself in the spotlight and this could encourage shareholder scrutiny of the integrity and accuracy of disclosure itself. For example, if the Strategic Report contains corporate citizenship disclosures saying that the company is confident of the standards maintained by foreign suppliers in emerging economies in relation to employee rights and health and safety, what would the implications be if a major industrial accident were to happen at one of its suppliers such as the Bangladesh supplier whose factory collapsed in April 2013? Shareholders could engage informally with their investee companies to compel better scrutiny of their suppliers. The outcome of such engagement may remain uncertain and unverifiable. Conversely, a bank that relies significantly on short-term wholesale funding may disclose the risk of its reliance, but may assess the risk of adverse changes in the wholesale funding sector to be low. Such assessment may turn out to be misjudged. Should shareholders then informally engage to compel better risk assessments in the future? Are improvements or otherwise in board engagement with risk matters readily discernible by shareholders? In the alternative, shareholders could impugn the veracity of the corporate disclosure as an indirect means to address behavioral issues in relation to choice of supplier or making judgments about risk.

One may argue that if directors realize that matters in the Strategic Report are subject to section 463 liability, such realization may entail changes in behavior that are positive, such as greater board stewardship in the matters of strategy, risk, and corporate citizenship; greater board attention to seeking verification or critically scrutinizing the matters subject to disclosure; and more engaged oversight of senior management. Moreover, it remains difficult for shareholders to impugn corporate disclosure as courts having the jurisdiction to permit or discontinue derivative actions could decide in any given case that private litigation based on corporate disclosure is not in the best interests of the company, and shareholders would still find it difficult to prove "knowledge" or

²³⁸BRUNER, *supra* note 46, at 36-37.

"dishonesty" in relation to the impugned disclosure.²³⁹ Therefore, the commencement of actions could by itself raise director awareness of the potential exercise of shareholder power to call for accountability, although the lessons from the U.S. regarding large settlements that may excessively benefit lawyers should also be heeded. In other words, market discipline that may be narrowly framed around corporate transparency could exert a wider corporate governance effect upon management decision-making. This could achieve a more compelling effect than shareholder engagement.

C. Drawbacks To Increasing Shareholders' Corporate Governance Role

On the other hand, fear of liability may have a counter-productive effect: cosmetic changes in management behavior in order to produce the desired effects in disclosure²⁴⁰ or chilling disclosure altogether²⁴¹ towards making disclosure increasingly bland, uninformative and less likely to give rise to liability. It may also be argued that shareholder engagement should not be encouraged through increased disclosure-based derivative litigation under section 463. Directors are asked to disclose relatively speculative matters such as subjective risk perceptions or forward-looking business strategies.²⁴² Why should changes in risk profiles, which may not be under the control of the company, or necessary changes in strategic direction made after disclosure give rise to opportunities to impugn such disclosure? It could also be argued that encouraging shareholders' governance role to be expressed via derivative litigation against flawed disclosures is tantamount to encouraging short-termism. Shareholders could turn market losses in stocks affected by bad news into opportunities to seek wealth transfer from those very same corporations on the basis of disclosure irregularities. Such behavior may reinforce myopic investment management behavior that seeks short-term

²³⁹Companies Act, 2006, c. 46, §§ 263(2)(a), (3)(b) (U.K.).

²⁴⁰See Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 479-85 (2007); Benjamin E. Hermalin & Michael S. Weisbach, *Information Disclosure and Corporate Governance* 3 (The Ohio State Univ. Fisher Coll. of Bus. Charles A. Dice Ctr. For Research in Fin. Econ., Dice Ctr. Working Paper No. 2008-17, 2011), available at <http://www.ssrn.com/abstract=1082513>.

²⁴¹Jonathan L. Rogers & Andrew Van Buskirk, *Shareholder Litigation and Changes in Disclosure Behavior*, 47 J. ACCT. & ECON. 136, 136 (2009), available at <http://ssrn.com/abstract=930654>.

²⁴²Exposure Draft, *supra* note 167, at §§ 6.16-6.18.

gains, a phenomenon already lamented in the Kay²⁴³ and Cox reviews in the UK.²⁴⁴ However, one must also bear in mind that the scope of disclosure liability in the U.S. is much broader as private securities disclosure liability is premised on the fraud-on-the-market theory for all continuing disclosure obligations,²⁴⁵ while Section 463 of the UK Companies Act only relates to yearly directors' disclosures.²⁴⁶ The breadth of the scope of disclosure liability in the U.S. arguably affects the incentives giving rise to shareholder litigation.

D. The Road Less Traveled: Market Discipline as a Reform to Shareholders' Corporate Governance Role

This Article acknowledges that encouraging shareholder derivative litigation based on disclosure irregularities as an exercise of shareholders' corporate governance role is highly controversial and there are procedural and funding matters in the UK that this paper does not purport to deal with. However, it is worthwhile pointing out that the effectiveness of corporate transparency in the U.S. is underscored by the flourishing of market discipline in the U.S. Policy-makers should consider if their hopes of reforming corporate transparency in the UK to stimulate shareholder engagement in the private realm of corporate governance are misplaced, as reforms of corporate transparency relate more directly to the purpose of increased public visibility in market discipline through the enhancement of corporate transparency.

This Article suggests it is important to see the alternative perspective of market discipline as a form of corporate governance framed around securities disclosure (as in the U.S.), which could generate insights for the UK. The UK is slow to embark on structural and regulatory reform regarding shareholders' investment management and corporate governance roles,²⁴⁷ preferring to rely on market forces, in which case, should they not consider the potential of market discipline through private disclosure-based litigation as a form of corporate governance? However, shareholder derivative litigation can be subject to perverse incentives²⁴⁸ and it is yet uncertain how ratcheting up this area

²⁴³Kay Review, *supra* note 1, at 9.

²⁴⁴COX, *supra* note 206, at 6.

²⁴⁵See *Basic Inc. v. Levinson*, 485 U.S. 224, 246-47 (1988).

²⁴⁶Companies Act, 2006, c. 46, § 463 (U.K.).

²⁴⁷See Chiu, *Turning Institutional*, *supra* note 115, at 448-51.

²⁴⁸See Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849, 857 (2012) (recognizing the existence of litigious shareholders to

would change the dynamics in investor relations in the UK. In which case, does the perspective from the U.S. highlight the appeal or the pitfalls of market discipline?

Perhaps reflecting upon the relationship between corporate transparency and market discipline as a form of corporate governance can allow policy-makers to consider the limitations of shareholders' corporate governance role in the private realm, perhaps through stewardship, and the limitations of reforming corporate transparency if policy-makers are in fact reluctant to encourage market discipline for corporate transparency. These reflections may also point the way forward: that policy-makers who wish to introduce change to the investment management and corporate governance culture in the UK should perhaps be more resolute in embarking on structural reforms to change the incentives for investment management to be more aligned with engaged and long-termist outlooks in corporate governance.

V. CONCLUSION

This Article examines the UK's corporate transparency reforms designed to motivate enhanced shareholder engagement in publicly-listed companies. Enhanced shareholder engagement is seen as an essential part of healthy corporate governance in companies providing scrutiny and a form of governance for the corporate sector. However, other than niche forms of hedge-fund or focused activism, shareholder engagement, particularly by institutions, with investee companies remains weak in the UK. Corporate transparency reforms in enhanced narrative reporting seek to bolster such shareholder engagement, to support the Stewardship Code, a body of soft law which contains best practices in shareholder engagement designed to motivate and guide such engagement.

This Article doubts that narrative reporting and the exhortation to stewardship—in the absence of structural reforms that change investment management incentives—would change the landscape of shareholder engagement in the UK. However, this Article explores the U.S. model of private securities litigation as a form of market discipline that expresses shareholders' rights in corporate governance, in order to determine if

simply collect fees); Paul Rose, *Common Agency and the Public Corporation*, 63 VAND. L. REV. 1355, 1359 (2010) (acknowledging the powerful influence large shareholders have over other shareholders and directors). *See generally* Brenda Hannigan, Board Failures in the Financial Crisis: Tinkering With Codes and the Need for Wider Corporate Governance Reforms: Part 2, 33 COMPANY LAW. 35 (2012) (proposing administrative remedies for corporate governance reform).

insights may be relevant to the UK. Although such a form of corporate governance is narrowly framed around defective disclosures and could arguably have been developed only because of the relative weakness of shareholder power in the U.S., corporate transparency provides a focal point for engagement and accountability issues could entail further changes in terms of governance.

However, encouraging the development of such disclosure-based market discipline as a form of corporate governance may also have other negative implications. This exercise of focusing on the limitations of corporate transparency reforms in terms of its impact on shareholder engagement may indeed spur policy-makers to consider the necessity of embarking more resolutely on structural-type reforms to the investment-management and corporate governance landscapes.

