Stone: Improving Labor Relations Through Corporate Social Responsibility
COMMENT

IMPROVING LABOR RELATIONS THROUGH CORPORATE SOCIAL RESPONSIBILITY – LESSONS FROM GERMANY AND FRANCE

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I. INTRODUCTION

The gap between the minimum wage and the living wage in many areas is growing.1 This gap can be attributed to increasing costs of necessities,2 coupled with a minimum wage that is nearly the same (adjusted for inflation) as it was over thirty years ago.3 Because of this rising gap, the battle over the minimum wage has become a central labor issue. This issue has been highlighted by recent campaigns to increase fast food workers’ minimum wage to fifteen dollars per hour4 and has gained traction among organizations fighting to increase the minimum wage across the board.5 It has also become a central issue for one of the major political parties, with the Democratic National Committee approving the pursuit of a fifteen-dollar per hour minimum wage as a facet of their 2016 platform.6

In the United States, several companies have been criticized for the inability of their workers to survive without social programs or some other form of aid. For example, Wal-Mart has become notorious for its poor treatment of its employees,7 resulting in many of its employees requiring government welfare in the form of food stamps,


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Medicaid, and housing assistance to survive. Similarly, McDonald’s demonstrated the lack of adequate compensation for its employees when it released a sample budget to its workers. In order to come up with a reasonable budget, McDonald’s had to assume each employee was working two jobs, did not have food or gas expenses, and had health insurance costs that were less than one-tenth of the national average. The total cost to taxpayers in welfare programs from McDonald’s and Wal-Mart’s employees was approximately $7.4 billion in 2014 alone.

Throughout the United States, low wages cost taxpayers approximately $152.8 billion annually.

The inadequacy of corporations in addressing the needs and issues related to labor is all too common in the United States. Due to the heavy focus on the interests of capital holders, it is difficult to address these pervasive labor issues.

Corporate social responsibility ("CSR") is defined as "actions that appear to further some social good, beyond the interests of the firm..."
and that which is required by law." 14 Although CSR is a voluntary commitment by a company to greater serve stakeholders, 15 it is becoming increasingly important for companies to participate in order to remain competitive. 16 Employees are key stakeholders, and their compensation is an important CSR issue. 17 By refocusing CSR, companies can improve their labor relations, especially in the area of employee compensation. 18 Although providing adequate compensation to employees is not as popular a CSR campaign as environmental programs, for example, it can have a very large effect on a company. 19 Addressing employee needs is not as much of an attention-grabbing, marketing-friendly campaign as environmental or philanthropic campaigns. 20 This likely explains its less prominent focus, especially when looking at the CSR programs that are widely advertised by companies. 21 However, as discussed further in this article, a focus on integrating and serving labor issues can be greatly beneficial to companies, as well as employees. 22


17. Global Corporate Governance, supra note 13, at 53.


19. Id.; see also, Global Corporate Governance, supra note 13, at 86.


21. See id.

22. Global Corporate Governance, supra note 13, at 77.
Boards of directors play a large role in determining CSR programs, as they are meant to be strategic guides for companies.\textsuperscript{23} Therefore, the composition of the board and representation of interests can greatly impact CSR adoption and effectiveness.\textsuperscript{24} The United States’ method of choosing directors and the expectations for those directors varies greatly from the methods used in other parts of the world.\textsuperscript{25} Germany and France, in particular, have very different systems, which integrate stakeholders directly into board activities.\textsuperscript{26} The United States should mandate labor representation on its boards, similar to the German and French corporate models.

This article will argue that by integrating aspects of the CSR systems in companies that balance the interests of shareholders and stakeholders, the United States may improve these labor relations. To help achieve an improvement in labor relations, companies should focus their CSR efforts on providing a living wage to its employees.\textsuperscript{27} The German and French systems for CSR provide useful insights for different approaches that may improve the labor relationships and address issues present in United States CSR. In Section II, this article will discuss the current state of CSR in the United States. It will look at the legal structure of boards of directors along with cultural aspects of the United States, which have contributed to the way CSR has developed. Section III will discuss criticisms of the United States’ legal framework for structuring boards of directors. Section IV will examine the state of CSR in Germany and France, focusing on the differences in board structure, composition, and labor representation requirements, and how those features impacts CSR. Finally, Section V will argue that the United States CSR can be improved by applying some aspects of German and French CSR, with a focus on the minimum wage issues that the United States is currently facing. This Article will demonstrate that, by adopting certain aspects of the


\textsuperscript{25} See infra section III.

\textsuperscript{26} See infra section IV.

\textsuperscript{27} Using Corporate Social Responsibility to Win, supra note 13, at 39.
German and French systems for CSR, the United States may be able to ease the conflict and debate over the issue of the living wage between management and labor interests.

II. CSR IN THE UNITED STATES

Because of the United States’ laws, there is not a clear single set of guidelines for board composition. 28 Rather, each state gets to choose its own corporate codes. 29 However, the different state systems do share many similarities, and the New York Stock Exchange provides a set of standards that must be met for a company to be publically listed. 30

As for the commonalities between the different state guidelines in the United States, boards of directors have only one tier – where the same board performs both the supervisory and management roles. 31 No employee representation is mandated on boards within the United States. 32 Instead, United States boards have requirements focused on things like independence of directors and committee composition. 33

Due to internationally notorious issues with companies such as Enron, the United States passed the Sarbanes-Oxley Act of 2002 (“the Act”). 34 The Act added provisions to make directors, chief financial officers, and chief executive officers face personal criminal and civil responsibility for the items on which they sign off regarding the company. 35 The overarching goals of the Act are: (1) to create the

29. Id.
32. See generally DEL. CODE ANN. tit. 8, § 141 (West 2015). Delaware is used as an example because almost all public corporations are incorporated there.
33. PUB. CO. ADVISORY GRP., supra note 30, at 28.
Public Company Accounting Oversight Board to oversee audits of public companies; (2) to make public company auditors more independent; (3) to add regulations to corporate governance and CSR; (4) to require greater financial disclosures; (5) to regulate conflicts of interests for securities analysts; and (6) to add new crimes and penalties for violation of the securities and other laws. Much of the similarity present in board requirements across the United States can be traced back to these goals. In particular, these goals show that CSR and corporate governance are an important aspect of the responsibilities of boards of directors in the United States.

Due to increased regulations from legislation such as the Sarbanes-Oxley Act, the requirements to be publically listed on the New York Stock Exchange changed. For example, boards of directors are required to have an audit committee, corporate governance committee, and compensation committee. Each committee must be comprised of at least three members, all of whom are independent directors. An independent director is defined as a person who does not have a material relationship "either directly or as a partner, shareholder or officer of an organization that has a relationship with the company." These increased board requirements are an attempt to achieve the goals of Sarbanes-Oxley, which include a greater focus on corporate governance and CSR.

Under the Act, the board of directors of a company is required to oversee the management. The board plays a role in setting overall

37. See PUB. CO. ADVISORY GRP, supra note 30.
40. NYSE Listed Co. Manual Section 303A.02(a)(i), supra note 38.
41. See Johnson & Sides, supra note 36, at 1154.
42. Adams, supra note 23, at 729.
strategy and ensuring management follows that strategy.\textsuperscript{43} A major function of a board of directors is to choose members of the company management.\textsuperscript{44} The main goal for the board is considered to be serving the interests of shareholders.\textsuperscript{45} This is generally considered to be synonymous with maximizing shareholder value, measured by share price.\textsuperscript{46} Due to its place in the strategic planning of organizations, boards shape the CSR pursued by companies.\textsuperscript{47}

As demonstrated by the expected function and how success is measured for boards, the United States is a heavily shareholder focused system. Consequently, stakeholders'\textsuperscript{48} interests can often be ignored or inefficiently served by the United States' system.\textsuperscript{49}

Although many boards in the United States have adopted CSR programs, they are often considered to be a form of marketing strategy.\textsuperscript{50} The main motivation behind this strategy is to increase overall shareholder value, rather than to address issues facing stakeholders.\textsuperscript{51} Additionally, CSR is frequently used as a tool to combat already negative perceptions.\textsuperscript{52}

\begin{itemize}
\item 43. Id. at 737.
\item 44. Id. at 730.
\item 46. See id. at 737.
\item 47. See id. at 855.
\item 48. A stakeholder includes “shareholders, employees, customers, suppliers...and a wide variety of interest groups in the community,” or, in essence, anyone materially impacted by a company’s activities. Salacuse, \textit{supra} note 28, at 47.
\item 49. See generally Katherine V. Jackson, \textit{Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis}, 7 HASTINGS BUS. L.J. 309, 341 (2011) [hereinafter \textit{Towards a Stakeholder-Shareholder Theory of Corporate Governance}].
\item 51. Id.
\item 52. “Case evidence shows that companies communicate about their corporate social responsibility as a means to defend their reputation.” Joëlle Vanhamme & Bas Grobben, \textit{The Effectiveness of Corporate Social Responsibility in Countering

The culture and incentive structures in the United States have also contributed to the current state of CSR. A significant cultural difference lies in what is perceived as “success” for a company in the United States versus a company in Germany or France. In the United States, large funds such as the California Public Employees’ Retirement System (“CalPERS”) are well known for pressuring “underperforming companies” into increasing their returns, as well as using shareholder activism to get companies to improve. CalPERS defines “underperforming” as a return on invested capital of less than ten percent annually. However, in Germany and France, where stakeholder focus is more common, annual returns of less than ten percent are common. This substantial focus on return on investment over any other measure of performance contributes to the current structure of CSR within the United States. In the United States, managers are hired with expectations that they will generate the greatest profit, and fear losing their jobs for putting the “greater good” ahead of that expectation. Due to these incentives presented to boards, it is even more difficult for CSR to be effective.

These differences are further demonstrated by the view of managers in the United States as to whether competition or cooperation is more beneficial for society. When asked, the majority of U.S. managers said that greater competition would create more value for society. In contrast, French and German managers believed...

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53. See generally Brad M. Barber, Monitoring the Monitor: Evaluating CalPERS’ Shareholder Activism, UC DAVIS JOURNAL OF INVESTING (Dec. 1, 2007), http://gsm.ucdavis.edu/research/monitoring-monitor-evaluating-calpers-shareholder-activism. (Discussing the expected returns and actions taken by CalPERS (a United States fund) in response to what is perceived as inadequate performance.)

54. Barber, supra note 53; see also Cynthia A. Williams, Corporate Social Responsibility in an Era of Economic Globalization, 35 U.C. DAVIS L. REV. 705, 742 (2002).

55. See Williams, supra note 54, n.121.

56. Id.

57. Id.


59. Salacuse, supra note 28, at 47.
that society would benefit more from cooperation than competition.\footnote{Id. at 48.} This difference can be attributed, at least partially, to the disparities in incentives provided to management in the United States and in European countries, like France and Germany.\footnote{See id. at 38.} Valuing competition over cooperation may also explain why France, Germany, and the United States have dissimilar CSR.\footnote{Id.} In aggregate, the legal structure and cultural values of the United States have lead U.S.-based companies to establish a CSR system that is widely criticized for not only its lack of effectiveness, but also its inability to address major stakeholder interests.\footnote{Infra Section III.} These criticisms are expanded upon in the next section.

**III. CRITICISM OF CSR IN THE UNITED STATES**

Some critics argue CSR in itself is a harmful practice, regardless of the country. These critics argue that CSR creates an agency problem, whereby the values of the company’s executives and board are arbitrarily promoted over those of the shareholders'.\footnote{“[T]he major problem with current corporate governance arrangements are that they provide excessive power to executive managers who may abuse this power in pursuit of their own interests’...[T]hese arguments are predicated on the view that firms’ CSR are due to agency problems between owners and firms’ managers.” John Manuel Barrios Jr. et al., Is Corporate Social Responsibility an Agency Problem? Evidence from CEO Turnovers, SOCIAL SCIENCE RESEARCH NETWORK (May 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id =2540753; see also John Armour et al., Agency Problems, Legal Strategies And Enforcement 2, HARVARD (2009), http://www.law.harvard.edu/programs/olincenter/papers/pdf/Kraakman_644.pdf. (“[An agency problem] arises whenever the welfare of one party, termed the ‘principal’, depends upon actions taken by another party, termed the ‘agent.’ The problem lies in motivating the agent to act in the principal’s interest rather than simply in the agent’s own interest.”).} Those critics who believe there is an agency problem, however, fail to consider that managers traditionally have the authority and certain tools at their disposal that do not maximize profits, but rather
that benefit the company in other ways, even without CSR. 65 Without the ability to take certain actions that may in fact cause a slight decrease in profits, managers are prevented from using their discretion to benefit the company and society. 66 Many times, companies can address public issues more efficiently because of their resources and visibility. 67 Although shareholders could hypothetically exercise their own judgment on which public issues to pursue to the same effect as companies, in practice this is not the case. 68 For these reasons, the potential agency problem should not prevent companies from continuing to pursue CSR.

CSR has also been criticized as something that costs companies profit without providing adequate benefit, as all stakeholder interests cannot be served. 69 However, the more important stakeholders can at least have their interests represented and, based upon weighing of those interests, the company can decide which interests make the most sense to pursue. 70 Additionally, companies can use their overall strategy as a means to identify CSR opportunities which would support that strategy, allowing companies to achieve lower costs and more significant benefits. 71 By strategically choosing a CSR approach, companies can accomplish a great amount of benefit for stakeholders, which may in turn also benefit the companies’ profit or mission. 72 The criticisms of CSR being too expensive are often targeted at CSR that is chosen without taking into consideration these strategic implications.

65. See, e.g., Einer Elhauge, Sacrificing Corporate Profits in The Public Interest, 80 N.Y.U.L. Rev. 733, 743 (2005) (discussing companies sacrificing profit to make donations.).
66. Id.
67. Id. at 740.
68. Id. at 743.
69. See Andrew C. Coors & Wayne Winegarden, Corporate Social Responsibility—Or Good Advertising?, 10 Regulation 874n1-noted.pdf.
71. Id.
72. Id.
There is also a significant amount of criticism of CSR in the United States claiming that the purpose of CSR is not effectively met. Because of the method by which CSR programs are chosen in the United States, CSR is also considered unsuccessful in many respects for the company.

Corporate governance in the United States has a heavy focus on benefitting shareholders over all other stakeholders. For this reason, another common criticism of CSR efforts within the United States is that they are viewed as disingenuous. One prominent example of this is “greenwashing,” where companies try to reap the benefits of eco-friendly initiatives, while failing to actually better the environment, or in some cases, harming the environment greatly. These types of programs are largely viewed as mere marketing ploys.

A more specific issue with CSR in the United States is that it does not adequately represent central labor interests, such as the minimum wage issue. “[The American system] captures only two of the juridical pillars of corporate governance: corporate (or company) law and capital market regulation. Labor relations constitute a third pillar of corporate governance that cannot be ignored.” The methods by

73. See, e.g., Towards a Stakeholder-Shareholder Theory of Corporate Governance, supra note 49, at 341; Corporate Social Responsibility: It’s All About Marketing, supra note 50; Cherry, supra note 20, at 282.
74. See infra section V.A.
76. See, e.g., Corporate Social Responsibility: It’s All About Marketing, supra note 50.
78. Corporate Social Responsibility: It’s All About Marketing, supra note 50.
79. Global Corporate Governance, supra note 13, at 35.
which boards of directors are chosen and the metrics they are expected to meet do not account for these important interests.\footnote{Karnani, supra note 58.} With the limited requirements for board members in the United States, not only is it unclear if shareholder values are properly represented, but stakeholder values are often largely disregarded.\footnote{Towards a Stakeholder-Shareholder Theory of Corporate Governance, supra note 49, at 341.}

The heavy shareholder focus occurs even though employees tend to have greater investments in companies than shareholders. They cannot diversify their “investment” of their time working for a company.\footnote{Id.} Employees are with a company on average about nine times longer than shareholders in the United States.\footnote{David, Duration of Stock Holding Periods Continue to Fall Globally, TOPFOREIGNSTOCKS.COM (Sept. 6, 2010) http://topforeignstocks.com/2010/09/06/duration-of-stock-holding-period-continues-to-fall-globally/ (The average holding time for a stock was around six months in 2015. U.S. DEP’T OF LAB. EMPLOYEE TENURE SUMMARY (Sept. 18, 2014) http://www.bls.gov/news.release/tenure.nr0.htm (In 2014, the average tenure for an employee was 4.6 years).} Employees are also important because “... employees are at least as good monitors of firm performance as shareholders.”\footnote{Towards a Stakeholder-Shareholder Theory of Corporate Governance, supra note 49, at 341.} And yet, despite the demonstrated importance of labor, and labor’s higher levels of dedication to companies, the United States system remains almost exclusively focused upon shareholder value, choosing directors and managers with that primary goal in mind.\footnote{Karnani, supra note 58.}

These criticisms are not to say that the United States does not have some successful aspects of its board composition. For example, meeting frequently and having a clear flow of information have been shown to benefit companies, both of which are important aspects of the American system.\footnote{Mark J. Roe, Corporate Governance: German Codetermination and German Securities Markets, 5 COLUM. J. EUR. L. 199, 200 (1999).} However, the heavy shareholder focus can also lead companies in the United States to view CSR as a mere “add-on” to its strategy, and not something that is genuine and embedded in
its corporate culture.\textsuperscript{88} This artificiality limits the effectiveness and purpose of CSR.\textsuperscript{89}

When companies fail to integrate CSR within their strategies, companies not only limit how well CSR functions, but also lose out on the potential for economic, social, community, and other benefits.\textsuperscript{90} Because boards are integral to the strategy of companies, by integrating the insight of those who are the target of CSR programs as members of boards, companies can create strategically beneficial programs that are also more successful.\textsuperscript{91} The current culture and climate in the United States leads to choosing CSR programs that fail to address legitimate and important concerns, especially those of the labor pool, which causes companies to waste the potential that CSR offers.\textsuperscript{92}

IV. CSR IN GERMANY AND FRANCE

A. Germany

The German CSR model emphasizes the importance of stakeholders, not just shareholders.\textsuperscript{93} In Germany, as in many European countries, the United States' intense and primary focus on shareholder value is viewed as misguided.\textsuperscript{94}

In Germany, co-determination is used to manage companies.\textsuperscript{95} Co-determination means that employees play a role in company management, most often by being included on boards.\textsuperscript{96} German use

\begin{flushleft}

\textsuperscript{89} Id.

\textsuperscript{90} Porter \& Kramer, \textit{supra} note 70, at 89.

\textsuperscript{91} Id.

\textsuperscript{92} Id.

\textsuperscript{93} See Salacuse, \textit{supra} note 28, at 47 ("Germany, with its system of co-determination granting employees a formal role in governance, is often cited as the prime example of the 'stakeholder model'.")

\textsuperscript{94} Id.


\textsuperscript{96} Id.
\end{flushleft}
of co-determination has been viewed as a method of improving the relationship between capital and labor, leading to more cooperation and benefit to the economy as a whole.97

Germany, in contrast with the United States’ one-tiered system, often uses a two-tiered model for its boards.98 A two-tiered model has a separate supervisory board and management board.99

In Germany, under the Mitbestimmungsgesetz of 1976 ("Co-determination Act"), companies with over 2,000 employees must have labor representatives comprise at least half of the supervisory board.100 The Co-Determination Act applies to any corporation with over 2,000 employees, regardless of whether it is a stock (public) or limited liability (private) corporation.101 The majority of limited liability corporations that do not fall under this act have a single board.102 However, when the Co-Determination Act applies, companies are required to use the two-tiered model.103 For companies with at least 500 employees, at least a third of the supervisory board must be labor representatives.104

Even if companies do not fall under the Co-Determination Act, they may be subject to either the Coal and Steel Co-determination Act105 or the Industrial Co-Determination Act.106 Coal, steel, and  

99. Id. at 20.
100. BVerfG, supra note 95.
102. See Gesetz betreffend die Gesellschaften mit beschränkter Haftung [GmbHG] [Limited Liability Company Act], Apr. 20, 1892, BGBL I at 2586, § 52, last amended by BGBL I at 2586, art. 27 (Ger.).
103. See Baums, supra note 101, at 11.
104. DrittelbG [Act on the Third Participation of Employees in the Supervisory Board], May 18, 2004, (BGBL I at 974, last amended by BGBL I, at 642, art. 8 (Ger.) 974 (translated).
mining companies with more than 1,000 employees are required to have a supervisory board of at least eleven members: five shareholder representatives, five employee representatives, and one "neutral" member.\textsuperscript{107} The two boards are composed of different members and have different responsibilities, as expanded upon below.

1. \textit{Supervisory Board}

The Co-Determination Act determines the composition of the supervisory board (or "Aufsichtsrat"). The supervisory board must be comprised of between three and twenty-one members, depending upon the amount of capital the company has in shares.\textsuperscript{108} The number of supervisory board members must be divisible by three.\textsuperscript{109} On average, supervisory boards are comprised of thirteen members.\textsuperscript{110} The supervisory board members are either appointed by shareholders or chosen by employees as representatives.\textsuperscript{111} Members are not permitted to serve on both the supervisory and management boards.\textsuperscript{112}

The supervisory board oversees and maintains the management board, and also monitors the performance of the company as a whole.\textsuperscript{113} The supervisory board has another crucial duty – it must make adjustments to a poorly performing management board.\textsuperscript{114} As an example, the supervisory board may appoint or dismiss members of the management board.\textsuperscript{115} The supervisory board, however, may only

\begin{thebibliography}{9}
\bibitem{108} \textit{AktG} § 95 (translated) Aktiengesetz [AktG] [German Stock Corporation Act], Sep. 6, 1965, BGBl I at 1089, § 95, last amended by BGBl I at 2586, art. 26 (Ger.) (translated).
\bibitem{109} \textit{Id.}
\bibitem{110} Baums, \textit{supra} note 101, at 9.
\bibitem{111} \textit{AktG} § 101(1) Aktiengesetz [AktG] [German Stock Corporation Act], Sep. 6, 1965, BGBl I at 1089, § 101(1), last amended by BGBl I at 2586, art. 26 (Ger.).
\bibitem{112} \textit{Id.} § 105(1).
\bibitem{113} \textit{Id.} § 111.
\bibitem{114} Baums, \textit{supra} note 101, at 13.
\bibitem{115} \textit{Id.} at 9.
\end{thebibliography}
The supervisory board also oversees those employees chosen by the management board to run various parts of the company.\(^\text{117}\)

The supervisory board determines the compensation for the members of the management board and must ensure that these amounts remain reasonable in light of the duties and performance of each member.\(^\text{118}\) The supervisory board may appoint members of the management board for up to a five-year term.\(^\text{119}\) The supervisory board must appoint a chairman if there are more than two members of the management board.\(^\text{120}\)

2. The Management Board

The management board (or “Vorstand”) must be a minimum of one person for companies with share capital less than three million euros, or a minimum of two if share capital is greater.\(^\text{121}\) There are no labor requirements for the management board, but as mentioned, the supervisory board, which does require labor representation, appoints the members of the management board.\(^\text{122}\)

The management board is directly responsible for managing the company.\(^\text{123}\) The management board is the general representative of the company inside and outside of court.\(^\text{124}\) In contrast, the supervisory board represents the company in actions against the management board.\(^\text{125}\)

The management board must provide reports to the supervisory on: (1) the board’s intended business policy and other fundamental matters such as financing, investments, personnel, and discrepancies

116. Examples of just cause for revocation of membership are a breach of duties to the company, failure to manage the company properly, or a vote of no confidence by the shareholders. AktG § 84(3).
117. \textit{Id.} at 111.
118. AktG § 87(1).
120. AktG § 84(2).
121. \textit{Id.} § 76(2).
122. See AktG § 111(1).
123. \textit{Id.} § 76(1).
124. \textit{Id.} § 78(1).
125. \textit{Id.} § 112.
with prior targets; (2) the company’s profitability, especially return on equity; (3) the state of the company, especially revenues; and (4) important transactions which may change the profitability or liquidity of the company.\textsuperscript{126} The reports, respectively, must be provided: (1) at least once annually; (2) at the supervisory board meeting regarding approval of the annual financial statement of the company; (3) at least once quarterly; and (4) if feasible, early enough that the board can give its opinion on the transaction before the company enters into it.\textsuperscript{127} The management board is also required to provide a report on the state of the company whenever requested by the supervisory board.\textsuperscript{128}

3. Consequences of the German System

By splitting the responsibilities of boards of directors into two, the German system is able to respond quickly to pressing issues, such as labor conflicts.\textsuperscript{129} This leads to increased overhead, as it requires more directors and more effort to communicate across the boards.\textsuperscript{130} However, one-tiered boards tend to be quicker to respond because they are composed of fewer members that can meet independently.

The system also creates a built-in check for the management board, and makes it easier to address underperforming members.\textsuperscript{131} This can be lacking in one-tiered systems due to personal relationships and inability to self-evaluate.\textsuperscript{132} Additionally, by including employees on the supervisory board, the German system gives labor a voice by involving employees in the overall strategy of the company, while not requiring as much of a time commitment as serving as a member of a

\begin{itemize}
\item \textsuperscript{126} Id. § 90(1).
\item \textsuperscript{127} Id § 90(2).
\item \textsuperscript{128} Id. § 90(3).
\item \textsuperscript{129} Felix R. FitzRoy & Kornelius Kraft, Co-Determination, Efficiency, and Productivity, IZA DP No. 1442, 7 (2004).
\item \textsuperscript{130} See Lauren J. Aste, Reforming French Corporate Governance: A Return To The Two-Tier Board?, 32 GW J. INT’L L. & ECON. 1, 36 (1999).
\item \textsuperscript{132} See generally id.
\end{itemize}
one-tiered board. This minimizes the loss of working time for employees while maintaining their representation.

Co-determination, like any system, is not perfect. However, many of the perceived cons of co-determination hold true for boards in general, such as lack of effective strategic planning and monitoring. The benefits, however, are unique and tend to create a resilient and effective model of governance. By legitimizing and integrating labor interests at such a high strategic level, Germany has been able to foster cooperation. Cooperation is highly valued within German culture, which can partially explain the success and acceptance of co-determination in German companies. In Germany, co-determination has also been credited for leading to better working conditions.

Germany has established state institutions that determine and regulate CSR policies. It has done so to promote company participation in fighting the issues the government is most interested in, such as environmental impact and sustainability. The federal government has also launched campaigns to increase participation in CSR as well as adding visibility and credibility to CSR movements. Additionally, the government has implemented these programs to bolster other national strategy programs in effect.

133. See Aste, supra note 130, at 48-49.
134. Less annual meetings means less time that is required of employees to serve board interests. Id.
136. Id. at 521-22.
137. See Sadowski et al., supra note 107, at 38.
138. See generally Salacuse, supra note 28, at 48.
139. Id. at 39.
142. Id. at 7.
143. Id. at 8.
144. Id. at 8.
B. France

France is also considered a stakeholder-focused system. In France, the system is slightly different from Germany. French companies can choose between a one and two-tiered system for their boards. When companies do adopt a two-tiered system, it is similarly split into a supervisory and management board, called a Conseil de surveillance and Directoire respectively. Also, although there is still an increased focus on labor, the French code only requires non-voting membership on the board for employee representatives; the representatives may vote if elected by shareholders.

1. One-Tiered System

If the company chooses a one-tiered system, the board must have between three and eighteen members. Directors are appointed at shareholders meetings for a term that cannot exceed six years, but directors can be re-appointed. Employees appointed as board members must have contracts regarding actual employment; employees cannot be hired only to serve as directors. If an employee who is elected as a director violates their employment contract, the directorship is terminated. The company's articles of association determine the amount of shares. Employees may elect a maximum of one third of

147. CODE DE COMMERCE [C. COM] art. L225-79-2 (Fr.).
148. C.COM art. L225-17 (Fr.).
149. C.COM art. L225-18 (Fr.).
150. C.COM art. L225-22, 28 (Fr.).
151. C.COM art. L225-32 (Fr.).
152. C.COM art. L225-25 (Fr.).
153. C.COM art. L225-25 (Fr.)
the board, and the directors elected by employees are not counted as part of the three to eighteen director requirement.\textsuperscript{154} The company decides the actual number of labor representatives that will serve in a board.\textsuperscript{155} Similarly, the minimum number of representatives is also decided by the company.\textsuperscript{156}

The board has the broad responsibility of determining what policies the company will adopt.\textsuperscript{157} It also monitors implementation of company policies via review and inspection of pertinent documents and records provided by management.\textsuperscript{158} The board itself is responsible for electing and dismissing the chairman.\textsuperscript{159} The chairman must oversee the work of the board, organize its tasks, and ensure communication between the board and management.\textsuperscript{160} The board may appoint and dismiss a general director (equivalent to a Chief Executive Officer within the United States) and assistants to the general director of the company.\textsuperscript{161}

2. Two-Tiered System

If a company chooses a two-tiered system, it will have a separate management and supervisory board. The supervisory boards must have at least three members, but not more than eighteen.\textsuperscript{162} Further, board members must own a minimum amount of shares, as determined by the company, unless they are elected by the employees.\textsuperscript{163} No person may be a member of both the supervisory and management boards.\textsuperscript{164} The company may choose to have up to a third of the supervisory board be elected by the employees, and, as in

\begin{itemize}
\item \textsuperscript{154} C.COM art. L225-27 (Fr.).
\item \textsuperscript{155} See id.
\item \textsuperscript{156} See id.
\item \textsuperscript{157} C.COM art. L225-35 (Fr.).
\item \textsuperscript{158} Id.
\item \textsuperscript{159} C.COM art. L225-47 (Fr.).
\item \textsuperscript{160} C.COM art. L225-51 (Fr.).
\item \textsuperscript{161} C.COM art. L225-55 (Fr.).
\item \textsuperscript{162} C.COM art. L225-69 (Fr.).
\item \textsuperscript{163} C.COM art. L225-74 (Fr.).
\item \textsuperscript{164} C.COM art. L225-7472 (Fr.).
\end{itemize}
the single tiered model, those members are not part of the limitation on the number of members.165

The supervisory board must choose a chairman from amongst its members.166 In addition, the supervisory board appoints the members of the management board, and appoints one member as president.167 The supervisory board only has the power to dismiss members of the management board if that power is included in the company’s founding documents.168 Otherwise, only a decision made at a general meeting can determine dismissals.169

The supervisory board’s main responsibility is to oversee the management of the company, which must report to the supervisory board at least once per quarter.170 Information about the way the supervisory board operates, and how it monitors and audits the management board is available to the public.171 Certain deals that the company makes are subject to approval by the supervisory board.172

The members of the management board are broadly responsible for management of the company, and represent the company when it is dealing with third parties.173 The management board may be composed of a maximum of five members.174 The management board may be a single member only if the company has share capital of less than €150,000.175

165. C.COM art. L225-79 (Fr.).
166. C.COM art. L225-81 (Fr.).
167. C.COM art. L225-59 (Fr.).
168. C.COM art. L225-61 (Fr.).
169. Id.
170. See C.COM art. L225-68 (Fr.).
171. Id.
172. C.COM art. L225-86 (“Any agreement entered into directly or indirectly between the company and one of the members of the management or supervisory board, a shareholder holding a fraction of the voting rights greater than 10% or, in the case of a corporate shareholder, the company controlling the meaning of Article L. 233-3 should be subject to the prior approval of the Supervisory Board.”).
173. C.COM art. L225-64, 66 (Fr.).
174. C.COM. art L225-58 (Fr.).
175. Id.
3. Consequences of the French System

The French system has many of the same consequences of the German system, except French companies are given more freedom of choice.176 Where board structure and labor representation is legally mandated in Germany,177 in France, it is largely up to the discretion of the company.178 The ability to use broader discretion allowed in France can be beneficial, as some critics of the German system argue that its inflexibility and failure to allow the free market to regulate business decisions leads to inefficiencies.179 The French system also demonstrates that even without the explicit requirement for labor representation, the choice and ability for labor interests to be represented can lead to better labor relations.180

France’s corporate governance policies place a high level of importance on stakeholders.181 France has also adopted quotas to represent interests other than labor, such as requiring a certain number of women on boards.182 Furthermore, France has higher reporting requirements, which require companies to disclose the environmental and social impact of its activities annually.183

CSR movements in France have had a large impact upon the regulation of companies.184 Following the first CSR movement in the 1970s, the impact upon France and the United States was very different due to the cultural differences.185 For example, the United

176. See C.COM art. L225-27 (Fr.) (discussing the company’s ability to choose the number of labor-elected directors on its board).
177. See supra Section IV(a)
178. See id.; AktG § 101(1).
179. See Sadowski et al., supra note 107, at 66.
182. Id.
185. Id. at 875.
States recently adopted many more governmental regulations of companies, while a high level of governmental company regulation had always been prevalent within France. In France, the CSR policies encourage the environmental responsibility of businesses, as well as responsibility to the communities in which the businesses operate.

V. THE ADOPTION OF ASPECTS OF GERMANY AND FRANCE CSR SYSTEMS BY COMPANIES IN THE UNITED STATES COULD ALLEVIATE LABOR ISSUES AND THE LIMITED EFFECTIVENESS OF CSR

The United States should mandate labor representation onto its boards by changing the Federal Law. By doing so, all public companies would be required to integrate labor representatives onto its boards. This could lead to many benefits for employees, companies, and the economy of the United States, as a whole.

A. Benefits to Companies and Labor Interests from Effective CSR

Effective CSR can provide mutual benefits to employees and companies. Increased employee attraction and retention, economic benefits, and strategic benefits have been demonstrated with the adoption of effective CSR programs. By integrating the perspective of labor, especially for CSR, companies in the United States could build their credibility, while also better serving stakeholder interests. Labor is an incredibly important asset of each company. Companies must work to recruit and

186. Id. at 875-76.
187. Id. at 877.
189. See Meister, supra note 16.
191. See Porter & Kramer, supra note 70.
192. See Using Corporate Social Responsibility to Win, supra note 18, at 38.
retain the best talent to make their operations more successful. They must also work to keep employees happy or else employees may walk away, causing economic loss to the company.193 By addressing labor interests and using CSR effectively, companies can become more attractive to potential employees, and current employees will be more likely to remain associated with the company.194 Research has shown that using CSR properly and strategically can help attract and retain top talent, but an important facet of that is incorporating employees in the CSR choices.195 Research has also suggested that this kind of CSR can give companies a competitive advantage.196

The United States has already demonstrated the benefits of integrating labor into more aspects of a business. For example, when airlines integrated employee stock ownership plans—which allowed employees to gain ownership interests in the company—it lead to increased cooperation and peace between management and labor.197 This method, however, is not ideal. Critics have noted that it can create high levels of risk for the financial well-being of employees while allowing the company owners to take advantage of tax breaks not available to the employees.198

Good CSR that addresses stakeholder interests can present other benefits as well. For example, a recent study revealed that eighteen percent of American consumers said they would switch from one brand to another if one brand is associated with a "good cause."199 Since 1993, the amount that this impacts the choice of brands has

193. Sadowski et al., supra note 107, at 41.
194. Meister, supra note 16.
increased over twenty percent. Negative associations can also lead to consumers switching away from, or even boycotting, a company. Meaningful CSR has also been shown to allow businesses to charge a significant price premium for their products, demonstrating some of the important economic benefits that can be realized from effective CSR.

Concerns that adopting the French or German models would lead to severe economic issues are not supported, as the German and French systems have not created struggling economies. In fact, Germany is the most powerful economy within Europe, with steady growth. It has also maintained a lower unemployment rate than the United States. Additionally, Germany and France both have greater income equality than the United States.

B. How the German and French Systems Lead to More Effective CSR, Especially Regarding Labor Issues

Involving stakeholders tends to lead to more effective CSR. In both the German and French systems, certain stakeholders are automatically included in the process due to the labor and diversity

200. Id.
201. Id.
202. Luan & Kusum, supra note 190.
206. According to the World Bank's GINI index (a measure of income equality), out of the three countries, Germany, with the most mandated labor representation, has the most equal income distribution. France is next, and the United States has the highest amount of income inequality. See THE WORLD BANK, GINI INDEX (WORLD BANK ESTIMATE), http://data.worldbank.org/indicator/SI.POV.GINI.
207. See generally Shuili et al., supra note 199, at 17.
representation requirements.\textsuperscript{208} In addition, placing greater importance upon stakeholders generally leads to more effective CSR because companies are striving for more than simply achieving the greatest profits.\textsuperscript{209}

Furthermore, the focus on labor in particular creates a better environment for employees. Employees have been shown to be very invested in the positive perception of where they work or are considering working.\textsuperscript{210} An important aspect of that perception is CSR, and including labor within CSR decisions is an important aspect of how effective CSR is and how it is viewed.\textsuperscript{211} Thus, by giving labor a more effective voice and opening the focus of the company to more than just shareholders, the French and German systems provide an avenue for genuine CSR that is effective at improving labor relations.

These systems also legitimize and provide a method of expressing more of the labor representatives’ concerns.\textsuperscript{212} Employees have an outlet to discuss issues with the company under a system which integrates labor, making it more likely that employees will express their dissatisfaction rather than simply leaving the company.\textsuperscript{213} This leads to economic benefits for both employees and companies.\textsuperscript{214} As a result, the company can avoid efficiency losses and training costs for new employees while the employees can avoid transaction costs associated with switching companies.\textsuperscript{215}

Conflicts between labor and other interests can be more quickly and fully addressed in these types of systems.\textsuperscript{216} Due to the composition of the boards, there is an avenue to directly manage

\begin{footnotesize}
\textsuperscript{208} See DrittelbG [Act on the Third Participation of Employees in the Supervisory Board], May 18, 2004, BGBL I at 974, last amended by BGBL I. at 642, art.8 (Ger.) (translated); BVerfG, 1 BvR 532, 533/77, Dec. 1, 1978, http://www.servat.unibe.ch/dfr/bv050290.html#Opinion (translated); C.COM art. L225-79-2 (Fr.).
\textsuperscript{209} Shuili et al., supra note 199, at 17.
\textsuperscript{210} Using Corporate Social Responsibility to Win, supra note 18.
\textsuperscript{211} Id.
\textsuperscript{212} See Davies & Hopt, supra note 97, at 339.
\textsuperscript{213} Sadowski et al, supra note 107, at 41.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Davies & Hopt, supra note 97, at 339.
\end{footnotesize}
conflicts that arise between labor and shareholders. These boards allow for the dissemination of information, open discussion, and compromise between these two groups. This opportunity to balance the interests of capital within the United States is especially important because of the limitations that have been put on the collective bargaining power of labor, considered a side effect of privatization and deregulation.

Compensation, a major issue in the United States, is also addressed more effectively by this system. Germany and France are both within the top ten countries with the highest take-home pay to their employees. Germany just adopted its first minimum wage in 2015, and is near the highest in the world. This measure was adopted in part to fight rising poverty in Germany. The minimum and living wage is an important interest of labor that Germany was able to take action to address relatively quickly. This may, in part, be explained by the increased representation of labor in its society. Additionally, the use of co-determination has been credited with an increase in hourly wages for employees.

Another interesting aspect of German and French board composition is the use of quotas in order to ensure more diverse
representation of genders on their boards.\textsuperscript{225} This increased diversity has led to measurable positive results, especially in regards to CSR.\textsuperscript{226} In further contrast to the European CSR models, the United States courts have held that quotas to address discrimination are unconstitutional.\textsuperscript{227} However, this ban on quotas does not apply to labor or employment, but rather protected groups, such as gender, race, and ethnicity.\textsuperscript{228} Therefore, although gender quotas would not likely be successful, the United States could consider mandatory representation without legal issues.

VI. CONCLUSION

The United States should consider a less capital focused approach and integrate a more diverse perspective, especially including stakeholders into their boards of directors. There is potential for companies in the United States to achieve even greater success by adopting certain aspects of both the German and French policies, while maintaining other proven aspects of the current system. The United States could work towards these goals by changing the Federal Laws regarding boards of directors and mandating labor representation on boards.

By marrying the most beneficial parts of both systems, an even more effective—and representative—system could arise. By further integrating the insight of labor into CSR, the United States can make it more effective in both perception and actual effect. This could lead to important advantages when it comes to issues of great importance to the labor force, such as the issue of employee wages.

France and Germany have successfully recognized economic and other benefits from increasing cooperation and including stakeholders into more aspects of CSR. By taking some lessons from these systems, the United States could likely not only improve labor relations, but

\textsuperscript{226} \textit{Id.} at 3.
\textsuperscript{228} \textit{Id.} at 301-02.
also have other positive effects such as improved environmental protections, community relations, and philanthropic pursuits.

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