

Impact Investment: Sovereign Wealth Funds, Corporate Governance and Stock Markets*

1 Abstract

In the light of the ever-dwindling resources that will be addressed by our future generation, impact investors invest in accordance with ethical and environmental principles going beyond financial performance. In particular, Sovereign Wealth Funds invest in assets worldwide in accordance with ethical and environmental principles and significantly influence the investment sphere and how enterprises are managed. In the last decades, corporate governance and stock market rules require information beyond financial performance and have changed the information requirement of how listed enterprises have to inform. Although this had an impact towards a more transparent market, the law has to establish obligations broadly reflecting the needs of impact investors and thereby taking the chance of contributing more significantly to development.

Inspired by the success of the Norwegian Governmental Pension Funds addressing environmental, social and economic policies in their investment strategies, this paper elaborates responses to impact investors referring to disclosure obligation under corporate governance and stock market rules in the USA, the EU (UK and Germany) and Switzerland.

2 Corporate Governance a response to Engagement of Impact Investors in the Global Market

2.1 Impact Invest in Multi-National Enterprises

Sovereign Wealth Funds have an impact on the actors in and on the financial market. Achieving its goals, an SWF has at least two avenues through which to exert influence; firstly, company engagement, and secondly, the dialogue with standard setting bodies, i.e. regulators and stock exchange.¹

Sovereign Wealth Funds, respectively governments, are major investors worldwide. In March 2013 the top 3 managed USD 1,910 billion of assets, whereas the Government Pension Fund of Norway alone managed USD 715.9 billion.² To give the figure a value, Cyprus's bail-out cost creditor states

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¹ See Krohn, Gjessing and Syse. *Norwegian Petroleum Wealth and Universal Ownership*, pp.432-37.

² See SWF Institute. Largest Sovereign Wealth Fund Ranking, March 2013, <http://www.swfinstitute.org/fund-rankings/>.

USD 10 billion in March 2013.³ The fact that the public owns a large amount of assets through SWFs requires greater transparency and accountability to the public.⁴

Sovereign Wealth Funds affect the global financial system. Under this aspect, it is necessary that they are transparent and accountable.⁵ The International Working Group of Sovereign Wealth Funds in the Framework of the IMF regularly meet to identify the General Accepted Practices and Principles of Sovereign Wealth Funds. The group recalled the impact of Sovereign Wealth Funds in the market. This fund should clearly define and publicly disclose their underlying policy.⁶ On the assumption that Sovereign Wealth Funds invest in accordance with financial and economic consideration, decisions subject to factors other than economic consideration should be clearly set out and disclosed publicly.⁷ Funds are allowed to exclude certain markets from the scope of their field due to factors other than economics. Some address social, ethical or religious reasons in their investment policy.⁸ The establishment of an investment strategy and its disclosure guide the management and help the public to understand how a Sovereign Wealth Fund operates.⁹

The OECD mentioned Sovereign Wealth Funds' contribution to stabilising the markets at critical times when risk-taking capital was hard to find.¹⁰ Sovereign Wealth Funds hereby operate under the international framework of foreign direct investment. The OECD report recalled principles applying to the protection of foreign direct investments.¹¹ The OECD highlights that transparency and accountability forms part of OECD's best practice and is entailed in various existing instruments.¹²

Generally, domestic law determines the obligations of enterprises. However, an enterprise acting under various domestic laws has discretion to determine the place appropriate for their conduct, some scholar refer to it as forum shopping. In this regard an impact investor may influence the decision of the enterprise. Here, investors require enterprises to act and not the state. This narrows opportunities of enterprise's while aligning its economic policy with the guidelines of the impact investor. The alignment of an enterprises policy is addressed as Corporate Responsibility and implemented in the enterprise in form of Corporate Governance. Responsibility in form of Corporate Governance is the response to the impact investors' need for information while controlling the acts of a enterprise.

³ See *The Economist*, 2013. Unfair, Short-Sighted and Self-Defeating.

⁴ See Edwin M. Truman 2007. Sovereign Wealth Funds: The Need for Greater Transparency and Accountability, Policy Brief, Number Pb07-6, August 2007. [online] Available at: www.fashionjun.iie.com/publications/pb/pb07-6.pdf.

⁵ See Terrence Guay, Jonathan P. Doh, and Graham Sinclair, 2004. Non-Governmental Organizations, Shareholder Activism, and Socially Responsible Investments: Ethical, Strategic, and Governance Implications. *Journal of Business Ethics* 52, p.358.

⁶ See *Sovereign Wealth Funds, Generally Accepted Principles and Practices "Santiago Principles"*, International Working Group of Sovereign Wealth Funds, October 2008, Principle 2.

⁷ See *ibid.*, Principle 19.1.

⁸ See explanation and comment to *ibid.*, Principle 19.1.

⁹ See explanation and comment to *ibid.*, Principle 2.

¹⁰ See OECD, 2008. Sovereign Wealth Funds and Recipient Country Policies, Investment Committee Report, 4 April 2008. [online] Available at: www.oecd.org/daf/inv/investment-policy/40408735.pdf.

¹¹ See *ibid.*, Box 1.

¹² See *ibid.*, 6.

2.2 Global Citizenship for Multi-National Enterprises

Three main groups of theories exist that reflect the responsibilities of business in society: economics, politics, social integration and ethics. Firstly, shareholder value or economic responsibility reflects the economical need of shareholders. Traditionally, investors required the increase of the shareholder value of the enterprise. This may include compliance with other rules, such as care for the environment or defeat of corruption if domestic laws require the participation of the enterprise and the enterprise phases sanction otherwise.¹³ The consideration of reputational damage or legal risk may form part of this theory.

Secondly, stakeholder theory points to a normative perspective of the enterprise based in ethical perspectives. However, it merely addresses the need of its stakeholders. Various groups had proposed principles of stakeholder management. These principles propose a normative approach of the managers. An enterprise is accountable for all the stakeholders and not just the shareholders. Stakeholders are groups with a claim on the enterprise. Stakeholders contribute to the success or failure of an enterprise. However, a success and a failure of the enterprise has a direct impact on a stakeholder. Thus, the interference creates a responsibility between the actors but the interest may be conflicting among the stakeholders. An enterprise following stakeholder value is more difficult to manage and may be less efficient.¹⁴

Finally the corporate citizenship approach has its roots in political studies.¹⁵ In a minimalistic view a citizen has only limited responsibilities opposed to the state responsibilities. A citizen may have more responsibilities considering its social context and environment. The citizens share the rules, traditions, and culture of the communities. Thus, a certain responsibility occurs. Following, the universal approach, citizens base their duties on a general recognition of human dignity.¹⁶ With regard to corporate citizens, especially in countries in which the government fails to recognise the rights of the citizens, the enterprise steps in the position of the government to a certain extent as a provider of social rights, as an enabler of civil rights, and as an enterprise channel for political rights. This proposal is descriptive.¹⁷ The concept of global citizen overcomes the narrow functionalist vision of business and sets the enterprise as citizen in the global society. Some Sovereign Wealth Funds and other impact investors maybe qualified under the global citizen approach. Investors and enterprises are seen as an integrated part of society. They comply with what reflects global society's expectation.¹⁸ Both, Impact Investors and the enterprises invested in by these investors are understood to be citizens of a larger society with duties towards the society.

The Norway Pension Fund, the number one of Pensions Funds n March 2013 and a major equity investor i, invests its capital into the world market in accordance with this approach, e.g. weapon production or serious human rights violation lead to the exclusion of the Fund.¹⁹ The Norwegian

¹³ See Milton Friedman, 1970. The Social Responsibility of Business Is to Increase Its Profits, 13 September 1970. *The New York Times Magazine*.

¹⁴ See Crane, The Oxford Handbook of Corporate Social Responsibility, pp.66-67.

¹⁵ See Andrew Crane, 2009. The Oxford Handbook of Corporate Social Responsibility. Oxford: Oxford University Press, p.49.

¹⁶ See Ibid., pp.71-73.

¹⁷ See Ibid., p.73.

¹⁸ See Ibid., pp.69-71.

¹⁹ See Ministry of Finance, 2010. *Guidelines for the Observation and Exclusion of Companies from the Government Pension Fund's Global Investment Universe*, sec 2.

Pension Fund follows a strategy of corporate governance of universal ownership. This concept takes external costs into account, requires no exploitation of market failures, encourages investees to take an interest in solutions, sees solutions as a business case, and requires transparency as disclosure of information helps to understand the problem and find solutions. The overall goal cannot be achieved without addressing ethical, social and environmental sustainability.²⁰ The role of government in the financial environment is criticised, in particular, if government set goals beyond financial performance.²¹

NGOs and IGOs argue that multinational enterprises and investors need to follow the approach of the global citizen. “The configuration in the business organization of principles of social responsibilities, processes of response to social requirements, and policies, programs and tangible results that reflect the company’s relation with society”.²² Business shall create less harm and more beneficial outcome to society and its people.²³ The corporate social performance responds to the various stakeholders, i.e. immediate stakeholders, NGOs, and activists. Its principles focus on institutional, organizational, and individual levels; on the process of corporate social responsiveness; and on the outcome of corporate behaviour. In particular, they have to step into the duties of an enterprise if an enterprise lacks the capacity to address sustainable development in their society.

2.3 Information Obligations under Corporate Governance

Generally, multinational enterprises do not have an obligation to follow other rules than those expected under the jurisdiction they are operating in. It is the domestic law that determines the rules that apply to them. However, as some jurisdictions fail to address issues of global importance, the question arises if beyond domestic law multinational enterprise have an obligation by themselves to address international law, guidelines and standards.

The OECD proposed the 2004 Principles of Corporate Governance. The basis of the framework should be to “promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities”.²⁴ It hereto points to the overall impact that corporate governance serves; that is to say, an “[...] overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets”.²⁵ Furthermore, the framework should be in accordance with the law and serve the public interest.²⁶ Recalling the theory above, the rules mirror a theory of stakeholder value.²⁷ The disclosure should address the financial

²⁰ See Ola Peter, Krohn Gjessing and Henrik Syse, 2007. Norwegian Petroleum Wealth and Universal Ownership. *Corporate Governance* 15, no. 3, p.429; Gordon L. Clark and Ashby Monk, 2010. Norwegian Government Investment Fund: Ethics over Efficiency. *Rotman International Journal of Pension Management* 13, no. 1, p.14.

²¹ See Norwegian Government Investment Fund: Ethics over Efficiency; Ronald J. Gilson and Curtis J. Milhaupt, 2008. Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism. *Stanford Law Review* 60, pp.1368.

²² D. J. Wood, 1991. Corporate Social Performance Revisted. *Academy of Management Review*, 16: 691-718, 693.

²³ See D. J. Wood, 1991. Toward Improving Corporate Social Performance. *Business Horizons*, 34(4): pp. 66-73, 68.

²⁴ .*OECD Principles of Corporate Governance*, I.

²⁵ Ibid., principle I A.

²⁶ See ibid., principle I A-D.

²⁷ See ibid., principles II&IV.

situation, the performance of the corporation and its policy..²⁸ The commentary outlines that transparency is a central feature for the monitoring of the enterprise and the shareholders to execute their rights. With regard to large and active equity markets the commentary points out that “disclosure can also be a powerful tool for influencing the behaviour of companies and investors” and “[b]y contrast, weak disclosure and non-transparent practices can contribute to unethical behaviour and to a loss of market integrity at great cost, not just to the company and its shareholders but also to the economy as a whole. [...] Insufficient or unclear information may hamper the ability of the markets to function, increase the cost of capital and result in a poor allocation of resources”.²⁹ For a better understanding the principle points to the application of the OECD Guidelines for Multinational Enterprises.³⁰

The OECD Guidelines for Multinational Enterprises list, besides stakeholder interest, also “economic, environmental and social progress with a view to achieving sustainable development” and to “[r]espect the internationally recognised human rights of those affected by their activities”.³¹ The activities of the multinational enterprises should be in line with sustainable development.³² Moreover, in these guidelines, the Declaration on International Investment and Multinational Enterprises recalls the important role of these players in the world of foreign direct investment and their ability to positively contribute to economic, social and environmental progress. They recognise the need to create incentives and disincentives in the market of foreign direct investment.³³ Recalling the theory, these guidelines follow an approach of the global citizen for multinational enterprises.

These guidelines require timely disclosure of information in relation to the multinational enterprise. Whereas the guidelines restated the list mentioned in the Principles of Corporate Governance, they point to the application of a high standard with regard to disclosure of financial and non-financial information.³⁴

Under the umbrella of the UN, the Council for Human Rights endorsed *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* as proposed by the Special Representative, Professor Ruggie.³⁵ These principles require companies to better engage in responsible business in respect of human rights, and also require a degree of transparency. The requirements of host states are set out in Principle 1: “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such

²⁸ See *ibid.*, principle V.

²⁹ *Ibid.*, at comment to principle V.

³⁰ See *ibid.*, comment to principle V.

³¹ *Oecd Guidelines for Multinational Enterprises*, Principle II General Policies. See also *ibid.*, Principles IV and VI.

³² See comment to *ibid.*, Principle II General Policies.

³³ See Declaration on International Investment and Multinational Enterprises, Adhering Governments, 25 May 2011 in *ibid.*

³⁴ See *ibid.*, Principle III.

³⁵ See Business & Human Rights Resource Centre. UN’s ‘Protect, Respect and Remedy’ Framework: Guiding Principles. [online] Available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>.

abuse through effective policies, legislation, regulations and adjudication”.³⁶ Furthermore, the commentary provides that “[...] States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency”³⁷. The states have to conduct arbitral proceedings in a manner that does not violate third persons. It is the primary duty of states to engage in a manner as a party to a treaty and as a disputing party, whereby it allows access to the proceedings.

Businesses have an obligation to assess their effects while doing business. “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.”³⁸ The results have to be disclosed and the civil society should participate in this process.³⁹ “In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should: (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences; (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved; (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.”⁴⁰ The requirements of the Ruggie principles are far-going and entail information having an impact on the environment including civil participation subject to risk of stakeholder, personal or legitimate requirements of commercial confidentiality. The report does not provide any definition of the exception. Thus, a multinational company is allowed to conduct any dispute resolution proceedings as long as it informs and allows for participation as required under the paragraphs above.

Thus, corporate governance requirements lead to disclosure of information in some large projects involving the World Bank. BP and other oil and gas enterprises plan to build a pipeline from the Caspian Sea, through Azerbaijan, Georgia and Turkey. The pipeline shall operate for at least 40 years from 2003 and could be extended another 60 years. The project had major implications on environmental, social and economic effects during construction and later.⁴¹ The project is established under a contract framework. The consortium concluded Host Government Agreements (HGA) with Turkey, Georgia and Azerbaijan. The project is accessible to the public. Thanks to the policy of BP, Amnesty International has resolved irregularities of the state with regard to human rights violation.⁴² However, this is only one example of a large-scale project; there is still plenty of room for projects following the favourable approach of BP.

³⁶ See Human Rights Council and John Ruggie, 2011. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. ed. Human Rights Council, principle 1.

³⁷ See *ibid*, at comment on principle 1.

³⁸ *Ibid.*, principle 17.

³⁹ *Ibid.*, principles 18 & 19.

⁴⁰ *Ibid.*, principle 21.

⁴¹ See Amnesty International, 2003. Human Rights on the Line - the Baku-Tbilisi-Ceyhan (Btc) Pipeline Project. [online] Available at: <http://www.amnesty.org.uk/content.asp?CategoryID=11587>.

⁴² See *ibid*.

Therefore, on an international level are guidelines that require information beyond the financial performance. If enterprises comply with these guidelines, some will be eligible for impact investment, like the Norwegian Fund that invests due to ethical and environmental standards.

3 Regulators and Obligations under Stock Market Authorities

3.1 Continuing disclosure of information adversely affects the Stock Market Price

Publicly traded enterprises are required to disclose information that considerably influences the share price. Impact investors that invest due to different policies other than just financial performance have other needs with regard to the information. Sovereign Wealth Funds investing in accordance with ethical and environmental standards need information that justifies the investment. The rules significantly changed in the last year and in particular market abuse regulations require continuing disclosure of information in addition to regular disclosure. In particular, disputes involving enterprises in relation to environmental emissions or human rights violation should be disclosed.

3.2 Continuing disclosure of information under European Law

EU law requires publicly traded enterprises to disclose information of arbitration if the information qualifies as inside information. Beyond the requirement of periodical information, an additional disclosure requirement exists with regard to inside information.⁴³

The market abuse regulation defines “inside information” as “information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments”.⁴⁴ After consulting with the CESR, the EU proposed, in regulation 2004/124/EC, clarification of the term “precise nature”. “[I]nformation shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.”⁴⁵ Thereto, the CESR provides a list of events that directly affect the issuer and mentions inter-legal disputes and liabilities. It also mentions that the information shall be published as soon as possible, that a reasonable person means someone holding a position as a market trader is the objective interpretation standard, that there is no general rule to decide disclosure, and the decision has to be taken on a case-by-case basis.⁴⁶

⁴³ See Yyonne Ching Ling Lee, 2004. The Elusive Concept of ‘Materiality’ under U.S. Federal Securities Laws. *Willamette L. Rev.* 40, pp.670-89.

⁴⁴ *Directive 2003/6/Ec of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Manipulation (Market Abuse)*, art 1.

⁴⁵ See *Commission Directive 2003/124/Ec of 22 December 2003 Implementing Directive 2003/6/Ec of the European Parliament and of the Council as Regards the Definition and Public Disclosure of inside Information and the Definition of Market Manipulation*, art 1(1).

⁴⁶ See *ibid.*, art 1(2).

However, the disclosure may be delayed. “An issuer may under his own responsibility delay the public disclosure of inside information, [...] such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information. [...]”⁴⁷ Holding the information secret is allowed as long as none of the information holders trade, the issuer may guarantee its secrecy and omission is not likely to mislead the public. Legitimate interest is needed to justify the delay, e.g. ongoing negotiations.⁴⁸ The EU establishes regulations that need to be implemented by enterprises. Such implementation falls under the term, corporate governance. It is not uncommon that corporate governance guidelines are considered during arbitration. In *Euroka v Poland*, the tribunal considered these rights in a different context and delineated compensation only to the economic value of rights granted to Euroko beyond the corporate governance right under the domestic law.⁴⁹ Thus, disclosure obligation owed under domestic law may have an influence on the interpretation of the dispute.

Despite the fact that the EU needs investments in order to sustain growth it is not clear to what extent foreign direct investment will be transparent under EU law.

3.3 Continuing disclosure of information under German Law

Publicly listed enterprises have a duty to disclose information in public. EU law requires Germany to implement the directives concerning market abuse that require publication of the information as aforementioned. In Germany, the *Wertpapierhandelsgesetz, WpHG* (Statute for Securities Exchange) establishes the conditions for a public market of securities exchange.⁵⁰ It hereby sets the rules for publicly traded enterprises. In this regard, the enterprise needs to inform the public concerning information and does so via the ad-hoc *Publizität*. This requirement shall supplement the obligation of regular quarterly disclosure.⁵¹ A person with knowledge of inside information is not allowed to trade.⁵²

The information to publish qualifies as information concerning the issuer or their securities. An issuer has to provide information about inside information concerning their enterprise regardless of whether or not it is traded on the German stock market.⁵³ Information to be published qualifies as information concerning the issuer or their securities. It furthermore has the potential, in cases of disclosure, to considerably influence the stock market price. The standard of interpretation is a

⁴⁷ See *Directive 2003/6/Ec of the European Parliament and of the Council of 28 January 2003 on Insider Dealing and Market Manipulation (Market Abuse)*, art 6(2).

⁴⁸ See *Commission Directive 2003/124/Ec of 22 December 2003 Implementing Directive 2003/6/Ec of the European Parliament and of the Council as Regards the Definition and Public Disclosure of inside Information and the Definition of Market Manipulation*, art 3(1).

⁴⁹ See *Eureko V Poland, Partial Award*, *Eureko B.V. v. Republic of Poland, Ad Hoc, Partial Award*, 19 August 2005, para 145 (2005).

⁵⁰ See *Wertpapierhandelsgesetz in Der Fassung Der Bekanntmachung Vom 9. September 1998 (BgbI. I S. 2708), Das Zuletzt Durch Artikel 10 Absatz 1 Des Gesetzes Vom 13. Februar 2013 (BgbI. I S. 174) Geändert Worden Ist*, §1.

⁵¹ See *Henrik-Michael Ringleb and v Werder Ringleb Kremer Lutter, Kommentar Zum Deutschen Corporate Governance Kodex : Kodex-Kommentar*, 4. Aufl. ed. (München: Beck, 2010), Rn 1204-05.

⁵² See *Wertpapierhandelsgesetz in Der Fassung Der Bekanntmachung Vom 9. September 1998 (BgbI. I S. 2708), Das Zuletzt Durch Artikel 10 Absatz 1 Des Gesetzes Vom 13. Februar 2013 (BgbI. I S. 174) Geändert Worden Ist*, §14.

⁵³ See *ibid.*, §§12&15.

reasonable person that trades on the stock market. Information includes events that are reasonably likely to occur in future.⁵⁴ If information has to be published, it needs to be evaluated case by case.⁵⁵ The start of insolvency proceedings against the issuer requires publication. In the event that insolvency may occur, this is required to be published if the capitalisation of the company is reduced by 50 per cent.⁵⁶

Court and administrative proceedings, in which the issuer participates, generally qualify as inside information to be published. The information has to be published immediately after its establishment.⁵⁷ The mere fact that a verdict will be published may not justify non-disclosure.⁵⁸ Similarly, the German Code of Corporate Governance states that “[t]he Management Board must disclose insider information directly relating to the company without delay unless it is exempted from the disclosure requirement in an individual case”.⁵⁹

An issuer may withhold information as long as a legitimate interest in secrecy exists, omission of information will not mislead the market, and the issuer guarantees the confidentiality.⁶⁰ The public officials in charge of the stock exchange are under a requirement to maintain secrecy. Information shall also be published if the information is transferred from one person to another unless a duty of confidentiality exists for the receiver.⁶¹

Unless reasons for exemption exist under the Statute for Securities Exchange and under corporate governance guidelines, publicly listed enterprises are required to disclose risk of litigation if the information disclosed is likely to have a considerable influence on the value of the enterprise. Similarly, as under EU law, it is not clear how far the disclosure requirements exist.

⁵⁴ See *ibid.*, §13. („(1) Eine Insiderinformation ist eine konkrete Information über nicht öffentlich bekannte Umstände, die sich auf einen oder mehrere Emittenten von Insiderpapieren oder auf die Insiderpapiere selbst beziehen und die geeignet sind, im Falle ihres öffentlichen Bekanntwerdens den Börsen- oder Marktpreis der Insiderpapiere erheblich zu beeinflussen. Eine solche Eignung ist gegeben, wenn ein verständiger Anleger die Information bei seiner Anlageentscheidung berücksichtigen würde. Als Umstände im Sinne des Satzes 1 gelten auch solche, bei denen mit hinreichender Wahrscheinlichkeit davon ausgegangen werden kann, dass sie in Zukunft eintreten werden. Eine Insiderinformation ist insbesondere auch eine Information über nicht öffentlich bekannte Umstände im Sinne des Satzes 1, die sich 1. auf Aufträge von anderen Personen über den Kauf oder Verkauf von Finanzinstrumenten bezieht oder 2. auf Derivate nach § 2 Abs. 2 Nr. 2 mit Bezug auf Waren bezieht und bei der Marktteilnehmer erwarten würden, dass sie diese Information in Übereinstimmung mit der zulässigen Praxis an den betreffenden Märkten erhalten würden.

(2) Eine Bewertung, die ausschließlich auf Grund öffentlich bekannter Umstände erstellt wird, ist keine Insiderinformation, selbst wenn sie den Kurs von Insiderpapieren erheblich beeinflussen kann.“).

⁵⁵ See Heinz-Dieter Assmann, Uwe H. Schneider, and Schneider Assmann, *Wertpapierhandelsgesetz : Kommentar*, 6., neu bearb. und erw. Aufl. ed. (Köln: Schmidt, 2012), §13 Rn 23 ff; BaFin, "Emittentenleitfaden Der Bundesanstalt Für Finanzdienstleistungsaufsicht," (2009), 30-35.

⁵⁶ See *e.g.* Assmann, Schneider, and Assmann, *Wertpapierhandelsgesetz : Kommentar*, §15 Rn 139.

⁵⁷ See BaFin, "Emittentenleitfaden Der Bundesanstalt Für Finanzdienstleistungsaufsicht," IV 2.1.12.

⁵⁸ See *ibid.* („Die Gerichtsöffentlichkeit ist nicht mit der Bereichsöffentlichkeit i.S.d. Wertpapierhandelsgesetzes gleichzusetzen.“).

⁵⁹ See Government Commission, "German Corporate Governance Code (as Amended on May 15, 2012)," (2012), Art 6(1).

⁶⁰ See *Wertpapierhandelsgesetz in Der Fassung Der Bekanntmachung Vom 9. September 1998 (BgbI. I S. 2708), Das Zuletzt Durch Artikel 10 Absatz 1 Des Gesetzes Vom 13. Februar 2013 (BgbI. I S. 174) Geändert Worden Ist*, §15a(3).

⁶¹ See *ibid.*, §8.

3.4 Continuing disclosure of information under England's Law

Publicly listed enterprises are under a duty to inform the public about litigation risks and disputes if the information disclosed has a considerable effect on the value of the enterprise. In the Financial Market⁶² and Securities Act and the Financial Services Authorities Disclosure Rule,⁶³ both set a requirement with regard to publicly traded enterprises and the London Stock Exchange. This Market Abuse Regime has also been extended to AIM companies.⁶⁴ Generally, the FSA honours the principle of good governance in managing affairs.⁶⁵

The FSA prohibits market abuse behaviour and sets conditions to qualify abusive behaviour. One such condition is inside information. "[T]he behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected."⁶⁶

Inside information has to meet the aforementioned criteria of the European Union.⁶⁷ The standard of interpretation is a reasonable person in the position of a trader.⁶⁸ Due consideration has to be given to the information in accordance with the circumstances. "[...] [T]he significance of the information in question will vary widely from issuer to issuer, depending on a variety of factors such as the issuer's size, recent developments and the market sentiment about the issuer and the sector in which it operates."⁶⁹

An issuer may, on their own responsibility, delay the proceedings of disclosure: firstly, if such an omission would not be likely to mislead the public; secondly, if any person receiving the information owes the issuer a duty of confidentiality, regardless of whether such duty is based on law, regulations, articles of association or contract; and, thirdly, if the issuer is able to ensure the confidentiality of that information.⁷⁰

The FSA transparency rules point to the purpose and definition of information in the market abuse directive of the European Union. Moreover, the FSA has the authority to require an issuer at any time to disclose information, which seems appropriate to protect investors or to ensure the smooth operation of the market.⁷¹ An issuer must take all reasonable steps to prevent the issue of misleading information.⁷²

Despite the fact the law requires disclosure of listed enterprises, the underlying policy of corporate law is almost shareholder interest. Directors have to promote the success of the company for the

⁶² See *Financial Services and Markets Act 2000*, 2000 C. 8.

⁶³ See *Disclosure Rules and Transparency Rules*, FSA Handbook, Release 1.35, March 2013.

⁶⁴ See *Financial Services and Markets Act 2000*, 2000 C. 8, sec 118(5).; See also Carol Shutkever, "Inside Information," in *Corporate Governance for Main Market and Aim Companies*, Published in Association with London Stock Exchange Plc, ed. Pdraig Cronin, et al., 119.

⁶⁵ See *Financial Services and Markets Act 2000*, 2000 C. 8, sec 7.

⁶⁶ *Ibid.*, sec 118(2)(a).

⁶⁷ See *Disclosure Rules and Transparency Rules*, Fsa Handbook, Release 1.35, March 2013, R 2.2.3-2.2.4.

⁶⁸ See *ibid.*, R 2.2.5(2).

⁶⁹ See *ibid.*, R 2.2.5(1).

⁷⁰ See *ibid.*, R 2.5.1.

⁷¹ See *ibid.*, R 1A.3.1; *Financial Services Act 2010*, 2010 C. 28, Sec 8 131E.

⁷² See *Disclosure Rules and Transparency Rules*, Fsa Handbook, Release 1.35, March 2013, R 1A.3.2.

benefit of all its stakeholders.⁷³ In the light of this interest, the corporations will have to disclose information.

3.5 Continuing disclosure of information under US Law

Publicly traded enterprises are under a duty to disclose litigation. The federal securities and exchange law require disclosure of certain types of information in respect of publicly traded enterprises. Corporate law is under the competence of states and thus, states set the policy based on the primacy of directors, shareholders or stakeholders. The majority of states set their policy on the basis of shareholder value.⁷⁴

An issuer has to disclose information within the public interest for the protection of investors at registration.⁷⁵ The Securities Exchange Act provides the following obligation:⁷⁶ “Every issuer of a security registered [under the law of this title] shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security”. Furthermore, the commission in charge requires various financial and non-financial information⁷⁷ and in particular, information of pending legal proceedings:⁷⁸ “Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.” The information has to be disclosed as early as possible.⁷⁹

In cases of disclosure, all information that has a material effect on the value of the enterprise has to be disclosed. The disclosure requirement also extends to disclosure of non-financial information that has an indirect impact on the shareholder value. Some scholars directly apply the requirements in accordance with environmental law.⁸⁰ The concept of materiality refers firstly to what a reasonable

⁷³ See *Companies Act 2006*, 2006 C. 46, sec 172(1). (“A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
(a) the likely consequences of any decision in the long term,
(b) the interests of the company’s employees,
(c) the need to foster the company’s business relationships with suppliers, customers and others,
(d) the impact of the company’s operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company”).

⁷⁴ See David Millon, 2012. Enlightened Shareholder Value, Social Responsibility and the Redefinition of Corporate Purpose without Law. In *Corporate Governance after the Financial Crisis*, ed. P. M. Vasudev and Susan Watson. Cheltenham: Edward Elgar, pp.71-74.

⁷⁵ See 15 Usc Chapter 2a - Securities and Trust Indentures, §§77g&77n.

⁷⁶ Title 15 - Commerce and Trade Chapter 2b—Securities Exchanges, §78m(a).

⁷⁷ See e.g. Title 17: Commodity and Securities Exchanges, Subpart 229.1—General - Standard Instructions for Filing Forms under Securities Act of 1933, Securities Exchange Act of 1934 and Energy Policy and Conservation Act of 1975 Regulations S-K, §229.303&§229.503.

⁷⁸ Ibid., §229.103.

⁷⁹ See Ling Lee, The Elusive Concept of ‘Materiality’ under U.S. Federal Securities Laws. 673.

⁸⁰ See Richard Painter, 1961. Disclosure of Environmental Legal Proceedings under the Securities Laws: A Potential Step Backward, *J. Envtl. L. & Litig.* 91 11(1961): 91; Elizabeth E. Hancock, 2004. Red Dawn, Blue

investor will decide. Specific facts in the light of policy will be determined.⁸¹ Materiality is scrutinised in the light of policy objectives that underlie the legislative, judicial, and regulatory interpretation and application.⁸² The underlying policy of corporate law in the US sets the goal of the enterprise to create shareholder value.⁸³ No materiality justifies no disclosure.⁸⁴ As long as the enterprise disclosed the information in accordance with the underlying policy, a shareholder interest in differing objectives, opposed to the "shareholder interest" is less likely to have an influence in the absence of additional facts.

In the turmoil of financial crisis, scholars questioned the primacy of shareholders under corporate law, since the directors in some enterprises acted with due process in accordance with the law but not in the best shareholder interest.⁸⁵ However, this debate is an old one. For example, under Delaware law, stakeholders have only limited means to challenge management decisions. Thus, the law of Delaware provides more of a management primacy than a shareholder primacy.⁸⁶

The disclosure requirements under US law are very far-reaching but the interest of the corporations is defined in most states as very narrow based on the shareholder value. Therefore, in case of doubts as to whether information has to be disclosed, the corporations may consider the law in the light of the interest of the corporation.

3.6 Continuing disclosure of information under Swiss Law

Publicly listed enterprises may have a duty to disclose information in public. The statute of the stock exchange applies established rules for the trade of any security. It hereby sets a requirement for publication.⁸⁷ The statute states that the issuer has a duty to inform its client,⁸⁸ in particular, periodically, and in most cases quarterly, data concerning the monetary success of the enterprise.⁸⁹ Moreover, it contains no rules concerning immediate publication of inside information.⁹⁰ The Swiss statute for stock exchanges recalls the development of the European Union.⁹¹

Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the Sec Disclosure Dilemma," *Geo. Int'l Envtl. L. Rev.* 17, p.236; Robert J. Lewis, 1993-1994. 'Shh! Maybe in My Backyard!' An Equity and Efficiency-Based Critique of Sec Environmental Disclosure Rules and Extraterritorial Environmental Matters. *Minn. L. Rev.* 78 , pp.1046.

⁸¹ See Ling Lee, The Elusive Concept of 'Materiality' under U.S. Federal Securities Laws. 665.

⁸² See *ibid.*, 662.

⁸³ See Milton Friedman, 1970. The Social Responsibility of Business Is to Increase Its Profits, 13 September 1970. *The New York Times Magazine* .

⁸⁴ See Painter, Disclosure of Environmental Legal Proceedings under the Securities Laws: A Potential Step Backward, p.114; Ling Lee, The Elusive Concept of 'Materiality' under U.S. Federal Securities Laws. 662.

⁸⁵ See e.g. Lynn A Stout, 2012. New Thinking on 'Shareholder Primacy'. In *Corporate Governance after the Financial Crisis*, ed. P. M. Vasudev and Susan Watson, Cheltenham: Edward Elgar, pp.28-36.

⁸⁶ See David Millon, Enlightened Shareholder Value, Social Responsibility and the Redefinition of Corporate Purpose without Law. *ibid.*, 72.

⁸⁷ See *Loi Fédérale Sur Les Bourses Et Le Commerce Des Valeurs Mobilières (Loi Sur Les Bourses, Lbvm) Du 24 Mars 1995 (Etat Le 1er Janvier 2013) (Rs 954.1)*, sec 1.

⁸⁸ See *ibid.*, sec 11(1)(a).

⁸⁹ See *Loi Fédérale Complétant Le Code Civil Suisse (Livre Cinquième: Droit Des Obligations) Du 30 Mars 1911 (Etat Le 1er Janvier 2013) (Rs 220)*, sec 663b et seqq.

⁹⁰ See Daniel Daeniker and Stefan Waller, "Kapitalmarktbezogene Informationspflichten Und Haftung," http://www.homburger.ch/fileadmin/publications/3_Daeniker_Waller.pdf.

⁹¹ See Federal Council, 2011. Botschaft Zur Änderung Des Börsengesetzes (Börsendelikte Und Marktmissbrauch) Vom 31. August 2011, Bbl 11.050, 6895.

The stock market in Switzerland is self-regulated. It is not clear if these rules have the quality of law. The law gives discretion to the stock exchange to establish its own rules that will be confirmed by the public authority.⁹² These listing rules contain additional requirements with regard to the publication of inside information on a continuing basis (*ad-hoc Publizität*). The stock exchange establishes an obligation to disclose potentially price-sensitive facts in art 53:⁹³

“1 The issuer must inform the market of any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts which are capable of triggering a significant change in market prices.

2 The issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact.

3 Disclosure must be made so as to ensure the equal treatment of all market participants”.

No additional guidance states that the information regarding major disputes qualifies as inside information. However, such obligation may be conveyed based on the purpose of these rules. The purpose of informing the public with such information is to ensure that the public has true, clear and complete information about significant events arising in the course of their business.⁹⁴ This obligation applies to all enterprises listed on the stock market.⁹⁵ Information about an event has to be disclosed if the disclosure has a significant impact on the price of the security. The standard of interpretation is an average stock market trader.⁹⁶ The information qualifies as significant if, in case of disclosure, it has a considerably greater impact on the price compared with the usual price fluctuation. The evaluation has to be done on a case-by-case basis.⁹⁷ Time of disclosure is as soon as possible.⁹⁸

The disclosure requirement is subject to limitation. The disclosure may be delayed based on a plan or decision of the issuer and in case of legitimate interest in confidentiality. The issuer must ensure that the relevant information remains confidential.⁹⁹

4 Conclusion

Impact investment goes beyond the sphere of Norway. Investing on the basis of long-term strategy requires enterprises to create a financial, ethical and environmental impact. The assessment of the strategy requires information. At least, the impact investors may require their enterprises to comply with Corporate Governance rules entailing the enterprises responsibility as a global citizen and impact investors may lobby for regulations, e.g. under the stock market.

⁹² See *Loi Fédérale Sur Les Bourses Et Le Commerce Des Valeurs Mobilières (Loi Sur Les Bourses, Lbvm) Du 24 Mars 1995 (Etat Le 1er Janvier 2013) (Rs 954.1)*, sec 4.

⁹³ See SIX and SWX, "Listing Rules, Exchange Regulation Swx," art 53.

⁹⁴ See "Directive on Ad Hoc Publicity (Directive Ad Hoc Publicity, Dah), Basis 53 Lr, Dated 29 October 2008," (2008), art 1.

⁹⁵ See *ibid.*

⁹⁶ See *ibid.*, art 3.

⁹⁷ See *ibid.*, art 4.

⁹⁸ See *ibid.*, art 5.

⁹⁹ See "Lr," art 54.

Currently, the corporate governance rules under the OECD and of the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* establish far-reaching requirements to address stakeholders and to some extent following the corporate social responsibility principles of a global citizen. If enterprises fulfil these requirements, they provide information that allows impact investors to assess the impact of potential enterprises.

Moreover, existing Stock Market rules require disclosure obligations that oblige an enterprise to disclose information positively or negatively impacting their investment. However, not all stock markets have similar rules; EU law, in particular for Germany's and England's stock markets, requires some information but allows a delay of the information if non-disclosure may be justified and no risk of disclosure exists; US law requires immediate disclosure of information. The Swiss stock market rules work on a self-regulatory basis and require disclosure of information, but not by law. Moreover, most of these rules apply on the assumption of a shareholder interest with some consideration of stockholder interest but definitely not a concept of global citizen. It will be favourable to allow enterprises to decide their corporate governance but have a framework to hold them accountable under the stock market rules if they fail to disclose information in accordance with their corporate governance rules.

Sovereign Wealth Funds engage and contribute to the development by investing in accordance with ethical and environmental principles. Although corporate governance and stock market rules establish obligations to disclose information, room for more transparency exists in order to disincentivise these enterprises that hide information from the public due to bad practice, and to improve the situation of the others. Thus, corporate governance rules and the stock market have the potential to better contribute to an environment suitable for impact investors like major Sovereign Wealth Funds

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