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BOARDS IN INFORMATION GOVERNANCE

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ABSTRACT

This Article focuses on the evolving role of boards of directors. It charts the decline of the two leading, twentieth-century conceptual frameworks shaping corporate boards' roles: agency cost theory, which produced the limited "monitoring board," and "separate realms" theory,[1] which ceded board responsibility for matters other than profit maximization to government regulation. Hedge fund activism and wild stock market swings have exposed the limits of the board's role in agency cost theory. The 2020 pandemic, economic crises, investors' demands for socially responsible stewardship, and corporations' own political activism have rendered separate realms thinking untenable.

Although much theorizing in corporate law remains constrained by these two conceptual frameworks, technology, necessity, and law reform are moving boards beyond them, as we demonstrate. For example, by spring 2020, the economic shocks of the COVID-19 pandemic had sent many public company boards into high gear, forcing them to look beyond stock prices to engage their firm's full capacity for information gathering, knowledge synthesis and communication. Yet, even before the global pandemic placed heightened demands on boards, a two-decade trend toward "information governance" was well underway. It has been catalyzed by new technology, legal requirements, industry best practices, committee charters, fiduciary duties, and investor demands. The trend is observable in the overhaul of frameworks compelling audit committees' increased participation in financial reporting. It is evident in legal requirements compelling greater board participation in risk management, legal compliance, and ESG oversight. These changes foster boards' capacities to collaborate in informed strategy formation—a prerequisite to their responding adeptly to activists' interventions and stock price gyrations.

We name this new model of board governance "information governance" to capture the board's agency in knowledge synthesis, reporting

1. The nomenclature "separate realms" is our own, but the concept is foundational, dating back to the classical economic tradition of David Ricardo and Adam Smith.

oversight, and institutional deliberation constitutive of the firm's identity. Information governance highlights a leadership role for boards in driving communicative action in firms—the active framing, synthesis, and deployment of the firm's self-knowledge. In this respect, we discern and emphasize an affirmative, value-creating role for boards that has been suppressed by agency theory's monitoring board conceit. We analyze areas of ongoing legal flux supporting the new, technologically enhanced, information-rich paradigm we identify.

INTRODUCTION

The COVID-19 pandemic and stock market turmoil of 2020 have heightened the urgency of national debate about corporate governance and increased the demands placed on boards of directors.[2] Amidst this tumult, boards are seeking fresh guidance regarding their roles, but existing governance paradigms are proving threadbare. In these uncharted waters, agency cost board governance provides little guidance to directors. With stock prices dependent on day traders, Federal Reserve activism, or other exogenous factors, it is plainly insufficient for boards to rely on stock prices as benchmarks of corporate success. In a pandemic and climate-stressed world demanding greater corporate diversity and inclusion, boards are more hard-pressed to rationalize fending off social welfare concerns to a separate realm of state action. In sum, both the agency cost and separate realms paradigms for board governance are outdated. Companies and boards are facing unprecedented challenges within a framework of rising expectations and heightened legal standards—standards which presume directors capable of leveraging state of the art information and communication technologies. Old governance dogmas warrant reconsideration.

This Article argues that we are witnessing a shift away from the monitoring board and separate realms models, which masked the true scope of board discretion and authority in corporate affairs. We propose "information governance" to describe this new paradigm for board governance in the Information Age. Information governance highlights the board's authoritative deployment of the firm's knowledge and communication systems to ground corporate collective action responsive to

2. For an account of the "seismic" changes creating an "urgent imperative" for board leadership, see NAT'L ASS'N OF CORP. DIRS., REPORT OF THE NACD BLUE RIBBON COMMISSION, FIT FOR THE FUTURE: AN URGENT IMPERATIVE FOR BOARD LEADERSHIP 8 (2019) [hereinafter NACD, URGENT IMPERATIVE]. An open question presented is whether boards will demand and obtain the information and leadership stature they rightly should have, which is an imperative of our writing.

the competitive environment. This corporate self-knowledge, emerging under the board's leadership, is the basis for building the firm's strategic, organizational, and ethical identity.

In this Article, we present information governance both as a normative theory about the role of boards in governance—an answer to the question: "What should boards do in governing the twenty-first-century firm?"—and as a descriptive framework for understanding professional and legal changes already underway. That is, information governance offers a new and better theory about what boards *should be doing*, and therefore how corporate governance law should evolve, while describing more accurately what boards *are increasingly doing now*, and how law has helped get us to this place. For decades, the agency cost paradigm offered an economic framework upon which corporate governance was built, producing the "monitoring board."[3] Information governance offers a new, superior framework for building corporate governance, one made possible–made *necessary*—by advances in information technology, heightened business challenges, and enhanced legal and stakeholder demands. Hence, information governance offers a better framework for understanding corporate law *as it presently evolves*.

In the agency cost theory of board governance, the board served as the actor at the top or center of the organizational chart—the "nexus" in a nexus of contracts or "mediating hierarch" in a team production model.[4] Its principal job was to ensure that neither management nor shareholders extracted private benefits at the expense of the other.[5] Monitoring was

3. *See, e.g.*, Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1326 (2013) (describing agency cost analysis as "the dominant framework of analysis for corporate law and corporate governance today"); Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 14 (2014) (describing a "fixation on agency costs [having] taken root and flourished within the corporate law academy"); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism*, 113 COLUM. L. REV. 863, 870 (2013) (discussing the "laser-like focus of corporate governance reformers on minimizing agency costs").

4. For more information regarding the nexus of contracts, see Stephen M. Bainbridge, *The Board of Directors as a Nexus of Contracts*, 88 IOWA L. REV. 1 (2003); William W. Bratton, *The Nexus of Contracts Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 453–56 (1989) (discussing the role of the board in the nexus-of-contracts firm). For background about team production, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

5. *See* Thomas Clarke, *The Impact of Financialization on International Corporate Governance: The Role of Agency Theory and Maximizing Shareholder Value*, 8 L. & FIN. MKT. REV. 39, 42 (2014) ("In classical agency theory the central role of the board of directors is to monitor managers (the agents) to ensure their interests do not diverge substantially from those of the principals (the shareholders), and to devote the company to maximizing principals return.").

accomplished through a finite set of board tasks: reviewing CEO performance and pay, umpiring extraordinary transactions, and scrutinizing any self-dealing. In order to be "efficient" (a key to agency cost reduction), the mandates of board governance were trimmed to the bone. Limiting the mandate and workload enabled individual directors to serve on multiple big-company boards. It also perpetuated an inner circle of directors constituted principally from the ranks of current and recently retired CEOs.[6] The influence of agency cost thinking on corporate governance theory, law, and practice is difficult to overstate. Even today, academic governance reform proposals stay safely within the agency cost box, offering little more than tweaks to a framework in which boards are presumed informationally captured and largely passive.

Information governance recognizes that the political-economic mandate for public company boards has moved beyond the reduction-of-agency costs model. It re-conceptualizes board governance for twenty-first-century firms as communicative action. As contemporary social science elucidates, deciding what the firm will measure, value and communicate, internally and publicly, catalyzes coordinated action in public companies and other complex organizations.[7] Board judgment about what will or will not be measured, valued, and closely observed echoes throughout the organizational life of the firm. The stakes are especially high in a world where ESG concerns are compounding. Departing from recent polemics, information governance doesn't dictate an endgame for directors about stakeholder versus shareholder governance, or any other endpoint of

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6. On the persistence of corporate inner circles, see James Fanto, *Whistleblowing and the Public Director: Creating Corporate Inner Circles,* 83 OR. L. REV. 435 (2004). For a sociological, behavioral and statistical analysis, see Bang Dang Nguyen, *Does the Rolodex Matter? Corporate Elite's Small World and the Effects of Board of Directors*, 58 MGMT. SCI. 236 (2012).

7. For discussion of the field of "communication constitutes organization," see *infra* notes 219 and 220. For discussion of firm knowledge from the perspective of the "resource-based view of the firm," see *infra* note 309. Our information governance concept draws on the literature of organizational identity formation in management science and organizational behavior. For the foundational text, see Stuart Albert & David A. Whetten, *Organizational Identity*, 7 RES. ORGANIZATIONAL BEHAV. 263, 265 (1985) ("When discussion of goals and values become heated, when there is deep and enduring disagreement or confusion, someone may well ask an identity question: 'Who are we?' 'What kind of business are we in?' or 'What do we want to be?'"). *See also* Joep P. Cornelissen, S. Alexander Haslam & John M. T. Balmer, *Social Identity, Organizational Identity and Corporate Identity: Towards an Integrated Understanding of Processes, Patternings and Products*, 18 BRITISH J. MGMT. 1, 3 (2007) (defining organizational as "relating to the identity of the organization as a whole"); Dennis A. Gioia et al., *Organizational Identity Formation and Change*, 7 ACAD. MGMT. ANNALS 123, 124–25 (2013) (reviewing the literature on organizational identity).

corporate identity.[8] Alternatively, it posits that boards create value by marshaling the firm's information and communication systems to foster coherence and direction regarding the organizational, competitive and strategic possibilities defining the enterprise.[9]

The meta-insight of our information governance theory is that board investment in knowledge gathering and synthesis, deliberation and reporting—followed by informed delegation of authority to act—generates value for the firm. *The board is not merely monitoring the value-creating work of others* to diminish agency costs. *Rather, it is itself creating value* by participating in identifying the firm's key sources of competitive advantage, including its ESG capabilities.[10] In documenting the foundations of our information governance model, we validate the need for boards to shift to an expansive value-creation mindset, rather than an *ad hoc*, passive, compliance-based one.

Consistent with their *Caremark* duties,[11] boards engage in information governance in the deliberative construction of the firm's internal data gathering, reporting, and communications architecture—harnessing that architecture to board level action.[12] In this mode, we analyze four facets of information governance at the board level. First, information governance is

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8. There is considerable irony in corporate governance law's fervent embrace of corporate self-regulation and "enabling" law, on the one hand, while taking a monolithic approach to profit maximization for shareholders being the (legal and economic) purpose of business corporations.

9. For perhaps the most influential early treatment of organizational identity as it shapes the choices of an enterprise's leadership team, see Dennis A. Gioia et al., *Organizational Identity, Image and Adaptive Instability*, 25 ACAD. MGMT. REV. 63 (2000). For information regarding the importance of disclosure in relation to theories of building corporate identity, see, for example, Andrea J. S. Stanaland, May O. Lwin & Patrick E. Murphy, *Consumer Perceptions of the Antecedents and Consequences of Corporate Social Responsibility*, 102 J. BUS. ETHICS 47 (2011).

10. For information on the link between competitive strategy and corporate social responsibility, see, for example, Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78 (2006). See *infra* Part II.G for a discussion of Edith Penrose's "resource-based" view of the firm.

11. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

12. The empirical literature attesting to the link between effective internal auditing, robust internal controls, and corporate performance is growing. *See, e.g.*, Yahel Ma'ayan & Abraham Carmeli, *Internal Audits as a Source of Ethical Behavior, Efficiency and Effectiveness in Work Units*, 137 J. BUS. ETHICS 347 (2016) (presenting evidence that internal audits are conducive to efficiency and effectiveness in organizations). Likewise, there is evidence of link between ESG (environmental, social and governance) investing and positive returns. *See, e.g.*, Paul Sullivan, *Investing in Social Good Is Finally Becoming Profitable*, N.Y. TIMES, Aug. 29, 2020, at B5 (presenting data demonstrating that during the coronavirus crisis impact investing is outperforming traditional investing).

graphically illustrated by heightened legal and professional standards for audit committees' leadership in financial reporting. Second, we highlight enhanced expectations for boards effectuating better risk management and legal compliance governance. Third, boards' financial accounting and risk and legal compliance oversight lay a basis for informed board decisions regarding organizational culture, including the firm's responses to ESG shareholder proposals. (Indeed, the SEC has proposed that boards' stated opinions on them should be disclosed.[13]) Coherent corporate cultures, including ESG policies, reinforce productive collective action and stakeholder loyalty, both being potential sources of value for firms.

Finally, the financial, legal, operating, and ESG information garnered through board and committee service furnish a basis for boards to understand and advise upon strategy formation, evaluate the CEO, and set executive compensation. The agency cost monitoring model failed to empower boards to assume a robust role in vetting and advising on strategy–a serious deficiency in our view.[14] We argue that there is potential value, even, in boards' expecting the CEO to present—for discussion—a coherent, fact-intensive vision and plan for maximizing the firm's competitive advantage. We anticipate that our information governance nomenclature will be useful to directors and commentators in its clarity. However, "information governance" offers more than just a new piece of jargon. It represents a new theory about how boards leverage information, communications and knowledge to create value for their firms.

13. A common response is for the firm to "settle" the proposal before it comes to a vote. *See* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 293–94 (2016) ("In a climate of rising shareholder empowerment, managers may simply agree to accommodate shareholders' desire for more transparency if they can do so at a minimal cost to the firm."). The evolving mandate for boards to take a public position on shareholder proposals is discussed *infra* Part II.F.

14. The monitoring paradigm of board service has been so pervasive that empirical analysis of boards' contribution to strategic advising and strategic outcomes is still emerging. For recent examples of empirical studies examining boards' strategic advisory role, see, for example, Felix von Meyernick, David Oesch & Markus Schmid, *Is Board Industry Experience Valuable?* 45 FIN. MGMT. 207, 208 (2016) (citations omitted) (finding that surveys conducted among directors suggest they consider the advisory role, including their duty to review the firm's major plans and actions, to be of greater importance than the monitoring role); Chamu Sundaramurthy, Kuntara Pukthuanthong & Yasemin Kor, *Positive and Negative Synergies Between the CEO's and the Board's Human and Social Capital*, 35 STRATEGIC MGMT. J. 845, 849 (2014) (showing how the interaction between the human and social capital of the CEO and the board has positive effects on IPO success). Analysis of the friction between monitoring and advising exists in both the legal academic and finance research literature. *See* e.g. Chamu Sundaramurthy & Marianne Lewis, *Control and Collaboration: Paradoxes of Governanc*e, 28 ACAD. MGMT. REV. 397 (analyzing tradeoffs between the control and collaboration approaches to board leadership).

Moreover, as legal academics, we validate the need for corporate governance *law* to provide a supportive scaffolding for boards' investment in information governance. In this regard, we build on existing legal and quasi-contractual requirements—for example committee charter requirements imposed by stock exchanges— in elaborating the board's role in overseeing the firm's informational infrastructure and communications functions. The board's treatment of the full range of mandatory and discretionary corporate communications—for example, the chosen methods of financial reporting, the release (or not) of ESG reports and reports on the firm's philanthropic and political activities[15]—shapes the firm's organizational identity and culture, hence its prospects.[16]

This Article is organized into two parts. Part I describes the demise of the twin paradigms of twentieth-century corporate governance. It argues that agency cost governance has fallen short on its own profit-maximization terms, and that separate realms thinking has become an ideological iron cage.

Part II presents the core of the information governance thesis, expanding on the brief sketch presented above. The impetus for this Article is the shared instinct that exceptional events since the 2000s have given rise to a new corporate governance reality (though others have not described it as breakdown of agency cost and separate realms paradigms).[17] This new

15. To this day, no body of U.S. law or regulation requires public disclosure of corporate donations to politically active nonprofits, including think tanks. *See* Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579 (1997) (exploring practices and substantive rules). Disclosure laws have not altered despite the rise of nonprofits like the Olin Foundation and the Federalist Society, which have proven extraordinarily influential in altering policy and the political complexion of the U.S. judiciary—which can receive unlimited corporate funds without transparency.

16. There is an expansive empirical literature exploring the practical effect of organizational identity. *See, e.g.*, Susanne Scott & Vicki Lane, *A Stakeholder Approach to Organizational Identity*, 25 ACAD. MGMT. REV. 43, 47 (2000) ("Managers choose organizational images for presentation to stakeholders for strategic reasons. Corporate reputation building is principally concerned with promoting attractive organizational images for purposes of goal attainment, and it is the primary job of leadership to manage organizational identity toward that end.").

17. *See, e.g.*, Lynne L. Dallas, *Is There Hope for Change? The Evolution of Conceptions of "Good" Corporate Governance*, 54 SAN DIEGO L. REV. 491, 552 (2017) (concluding that there is "considerable support for the emergence of a new conception of corporate governance"); THE BRITISH ACAD., REFORMING BUSINESS FOR THE 21ST CENTURY: A FRAMEWORK FOR THE FUTURE OF THE CORPORATION 9 (2018) (describing how the weakening of the bond between a corporation and its public purpose due to socio-economic and geopolitical shifts calls for the redefinition of the corporation); MARTIN LIPTON, INT'L BUS. COUNCIL OF THE WORLD ECON. F., THE NEW PARADIGM, A ROADMAP FOR AN IMPLICIT CORPORATE GOVERNANCE PARTNERSHIP BETWEEN CORPORATIONS AND INVESTORS TO ACHIEVE SUSTAINABLE LONG-TERM INVESTMENT AND GROWTH 1 (2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf

phase in corporate governance more candidly acknowledges the power and discretion of corporate boards, and the power and discretion of global corporations, rather than portraying them as narrowly reactive and hemmed in by markets. The concept of information governance, and board leadership as communicative action, emphasize the freedom and also new responsibilities that corporations possess in the Information Age.

I. THE FALL OF THE TWIN PARADIGMS OF TWENTIETH-CENTURY CORPORATE GOVERNANCE

A. Agency Theory's Market-Based Governance

Though Berle and Means raised alarm about efficiency losses in widely-held firms back in the 1930s,[18] it was only in the late 1970s and '80s that agency cost corporate governance began its hegemonic reign in corporate theory, law, and governance practice.[19] Although agency cost theory formatively influenced corporate governance, the focus shifted away from *governance* in the usual sense of human judgment and behavior in organizations. It emphasized modalities for enabling market forces to accomplish most of the "governance" work. Most pertinently, market forces were intended to incentivize and discipline chief executives who might otherwise appropriate or squander corporate and shareholder wealth.[20] Incentive compensation and hostile takeovers were accepted as the crucial tonics, with boards being tasked principally with unleashing them.[21]

The doctrines of fiduciary care and loyalty remained formally intact.

[https://perma.cc/2MP6-HAVS] (explaining the need for changes in corporate governance in response to short-term financial activists impeding long-term economic prosperity).

18. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119–25 (1932) (empirically documenting and examining the repercussions of "the divergence of interest between ownership and control") [hereinafter BERLE & MEANS, MODERN CORPORATION].

19. For information about the hegemonic embrace of agency cost governance, see Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1279 (1999) ("Today, the monitoring model of the board has been almost universally accepted and adopted in large publicly held corporations."). To understand this use of "hegemony," see Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 32 (1982) ("Hegemony is very close to our concept of ideology. It is the notion of the exercise of domination through political legitimacy, rather than through force.").

20. *See generally* MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION (1976) (describing the roles of boards and shareholders in the governance of a corporation).

21. *See* Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002) (reviewing large body of empirical work on executive compensation and finding labor market failures in the design of executive incentive compensation plans).

But apart from M&A, the operation of the demand requirement largely curtailed derivative litigation alleging fiduciary breach.[22] Even when concern for proper information stewardship emerged in inchoate form in corporate fiduciary law, it remained largely toothless. With state law's oversight role in abeyance, federal legal requirements and quasi-contractual governance standards saw an uptick after the 2000s, catalyzed by more frequent and virulent boom-and-bust stock market cycles. The busts yielded the Sarbanes Oxley and Dodd Frank Acts, the Public Company Accounting Oversight Board ("PCAOB"), and a sea of regulatory and stock exchange governance reforms. Yet, agency cost theory prevailed—the new requirements were mostly derided as dead-weight make-work, rather than board governance for value.[23]

As we show, boards who absorbed the agency cost, monitoring board paradigm were disincentivized to become deeply informed about their firms. Nor could they presume support from their CEOs, other board professionals, or even their firms' support staff to this end. In the most recent, extreme version of shareholder value contestation, board under-investment in rich informedness is in play where activist hedge funds present strategic alternatives to the corporate status quo. In this limelight, since board assent to fundamental transactions and restructurings remains legally mandatory, boards are finding that agency cost theory has ill-prepared them to execute the strategic judgments requisite to their office. Reliance on stock prices is not sufficient. Activists' interventions nearly always drive a concurrent uptick in price (sometimes reflecting a liquidation of greater long-term value), and Main Street and Wall Street valuations are increasingly unhinged. A new theory of board value creation is needed—in our view, one that leverages the board's role in stewarding the firm's enterprise-salient information and communications.

22. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133 (documenting the paucity of duty of care and loyalty derivative suits outside of the M&A context).

23. Ironically, a more theoretically eclectic approach survived in management science, where an enormous stream of empirical research, under the rubric of "in-put/out-put studies," sought to discern linkages between board composition (gender, age, educational background) governance for value, and firm characteristics (diversification, size, structure, levels of monitoring, etc.). *See, e.g.*, James D. Westphal & Ithai Stern, *Flattery Will Get You Everywhere (Especially If You Are A Male Caucasian): How Ingratiation, Boardroom Behavior, And Demographic Minority Status Affect Additional Board Appointments at U.S. Companies*, 50 ACAD. MGMT. J. 267 (2007) (studying the factors influencing the likelihood that directors of U.S. corporations will get other board appointments).

1. The Agency Cost Paradigm of Board Monitoring

From the publication of the *Modern Corporation and Private Property* in 1932, American academic corporate law focused on the implications for firms and shareholders of the "separation of ownership and control."[24] Adolph Berle, Jr., a Columbia Law professor, and Gardiner Means, an economist, observed the growing remoteness of shareholding from hands-on management in large, U.S. industrial corporations. Reflecting this orientation, for four generations, corporations continued to be conceived of in such shareholder-property terms. This perspective jibed with the orientation of law professors in the law-and-economics tradition—critical influencers in building the late twentieth-century field of corporate governance.[25]

Before the late 1970s, the gulf separating dispersed shareholders from managerial decision-making was conceived of as a fundamental harm—an economic vulnerability arising from the "explosion of the atom of [shareholder] property."[26] The defining concern, in simplified form, has been that shareholders' property value would succumb to the agency costs of managers' self-dealing or indolence. Nevertheless, in what some regarded as a "race to the bottom," corporate law allowed directors to remain in a mostly clubby relationship with CEOs, who retained almost complete influence in their selection.[27]

From the 1980s onward, the writings of financial economists Fama and Jensen[28] and Jensen and Meckling[29] proved formative in reshaping the

24. *See* BERLE & MEANS, MODERN CORPORATION, *supra* note 18 (discussing the political-economic consequences of separating ownership from control); Brian R. Cheffins, *The Rise and Fall (?) of the Berle-Means Corporation*, 42 SEATTLE U. L. REV. 445, 445–46 (2019) (discussing the tenacity and legacy of the concept).

25. For a brief history of the law and economics movement's influence on legal thought, see GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

26. *See* BERLE & MEANS, MODERN CORPORATION, *supra* note 18, at 9 (arguing that stockholders are not motivated to a more efficient use of corporate property due to the separation of ownership).

27. For the classic objection, see generally William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (suggesting a reconsideration favoring a federal role in corporate law).

28. *See* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301–02 (1983) (rebutting Berle and Means' analysis by arguing that organizations where ownership and control are separated survive because they benefit from specialization of these roles and are able to control agency problems by separating "the ratification and monitoring of decisions from initiation and implementation of the decisions").

29. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976)

orientation of modern corporate law. The separation between the financing function and the managerial/control function was reconceived as an "*efficient,*" positive specialization.[30] Monitoring by independent directors became the tip of the corporate-accountability-to-shareholders spear. Boards engaged in "ratification and monitoring of [corporate] decisions" to promote shareholder value.[31] The C-Suite acquired the hands-on, executive function—the "initiation and implementation of [corporate] decisions" to promote shareholder value.[32] Courts declined to review corporate transactions approved by even nominally independent boards, *a fortiori* to apply legal sanctions after the fact if their good faith decisions resulted in losses. Market forces and incentives, rather than legal rules and judicial enforcement, were conceived of as exerting the optimal, efficient form of discipline on corporate managers.

Reliance on stock prices, as well as consultation with outside bankers and lawyers, shielded directors from having to do "too much" work.[33] It also thinned the baseline standard of what directors were expected to learn about their firms—hence what "monitoring" meant. Lost was the value that might have accrued if experienced directors had commanded robust systems of information-gathering and reporting within the firm, and then invested themselves in deliberating over, discussing, and following up on the information that was produced.

Curiously, the agency cost paradigm was not a natural fit for corporate law and governance. Under U.S. law, neither directors nor officers are agents of shareholder-owners. Boards' authority is statutory and plenary, and officers' authority is delegated from the board.[34] Nor can shareholders

(developing a theory of ownership structure based on the theory of property rights, agency and finance).

30. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harvard Univ. Press 1996) (explaining the rules and practices of corporate law as efficient mechanisms for governing relations between multiples stakeholders); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 918 (1982) (analyzing the separation of ownership and control as a praiseworthy form of economic organization).

31. FAMA & JENSEN, *supra* note 28, at 302.

32. *Id.*

33. As just one example, before the agency cost paradigm took hold, the typical public company board met much more frequently than has become the norm. A transcript of Standard Oil Company of New Jersey's 1945 annual meeting reveals that the company's board met "every week" with "committee meetings practically every day." STANDARD OIL CO. OF NEW JERSEY, STENOGRAPHIC REPORT OF THE ANNUAL MEETING 8 (1945). Mainstream commentators have claimed there are insufficient numbers of talented and experienced outside director candidates who would devote such meaningful time to board service, but they lack evidence for this long-standing supposition.

34. *See* DEL. CODE ANN. tit. 8, §§ 141–42 (listing the powers and duties of directors and

rightly be conceived of as legal owners of corporate property, as opposed to residual risk bearers, since the corporation itself owns its property.[35] Nevertheless, consistent with the conceit of directors being their agents, profit maximization for shareholders became the nearly exclusive focus of directors' and officers' duties in modern corporate governance.[36]

Influenced by the law-and-economics focus, corporate legal academics validated officers' and boards' laser-focused attentiveness to stock prices as the principal signal of corporate performance.[37] Their research mirrored this orientation. Focusing on event studies, commentators attempted to resolve what "worked" in corporate governance through recourse to stock price changes.[38] With stock prices serving as surrogates for deeper investments in

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officers); LYNN STOUT, THE SHAREHOLDER VALUE MYTH 16 (2012) (discussing the legal and economic fallacies embedded in the shareholder profit maximization framework); Faith Stevelman, *Myths about Shareholder Value*, 3 ACCT. ECON. & LAW 1, 7 (2013) (extending the political-economic analysis of corporate power established by the profit maximization framework of contemporary corporate governance).

35. *See* STOUT, *supra* note 34, at 29–30 (exploring the mistaken assumption that shareholders own the corporation). For a recent treatment of the reformulated shareholder ownership concept, proposing the establishment of a "shareholder trustee," see Kelli A. Alces, *Revisiting Berle and Rethinking the Corporate Structure*, 33 SEATTLE U. L. REV. 787 (2010).

36. There were exceptions to the law and economics focus in corporate law scholarship. Many of the exemplary avenues of critique are represented in LAWRENCE E. MITCHELL, PROGRESSIVE CORPORATE LAW (1995) (reflecting on the nature of modern corporation law and its limits). *See also* Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure,* 22 COMP. LABOR L. & POL'Y J. 97 (2000) (exploring the lack of corporate governance rights for American workers); David Millon, *New Directions In Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993) (discussing the friction between shareholder primacy and broader, stakeholder-regarding views of corporate purpose). For forty years, moreover, shareholder profit maximization was conflated with broad economic social welfare. *See, e.g.*, William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489 (2013) (addressing the intellectual evolution of conflating shareholder wealth maximization with the enhancement of social welfare); William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767 (2017) (analyzing the intellectual evolution of thinking about corporations' role in society over six decades).

37. *See generally* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007) (tracking outside directors' growing preeminence on boards and describing the trend as being enabled by reliance on increasing transparency and reliance on stock prices).

38. As stated in a review essay by Jill Fisch, "Event studies use sophisticated econometric techniques to factor out general market and industry-specific price fluctuations in an attempt to determine if a particular event has a statistically significant impact on stock price." Jill E. Fisch, *Picking a Winner*, 20 J. CORP. L. 451, 452 (2015). *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993) (examining the evidence and concluding that the market for corporate charters works to promote regulatory structures which enhance firm value). *But see* Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV 1049 (2015) (using empirical analysis to demonstrate that Delaware corporate law neither

firm knowledge, a nearly universal presumption arose that outside directors would come to know and understand relatively little about their firms.[39] Favoring directors who could impartially judge conflicted transactions (even if they possessed thin knowledge of the firm's internal affairs) remained a plausible accommodation, especially because directors were largely shielded from liability for errors in judgment.[40]

Armed with solid faith in markets as the determinants of corporate survival and success, the deregulation of state corporate law continued for decades.[41] Calls for federal incorporation to ensure minimum fiduciary standards had been beaten back already in the 1970s, criticized as rigid and ill-conceived.[42] A 1989 symposium edition of the *Columbia Law Review* questioned, even, whether *any* corporate law rules should be mandatory, rather than optional ("enabling").[43]

Portfolio diversification was vaunted as another market-based governance proxy, a principal mode of shareholder self-protection. Leveraged buyouts and restructurings were lauded as efficient solutions to eliminating excess free cash flow otherwise subject to managerial waste. The legal favor shown stock-based, incentive compensation, and the emphasis on boards having discretion in crafting executive incentive-

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adds nor subtracts substantial economic value for firms). A recent empirical study demonstrates the weak or nonexistent link between choice of Delaware incorporation and corporate advantage. *See* Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657 (2018) (suggesting that the strongest factors in incorporation choice are unrelated to the quality of the state law).

39. *See, e.g.*, Jill E. Fisch, *Corporate Governance: Taking Boards Seriously*, 19 CARDOZO L. REV. 265 (1997) (concluding that the monitoring versus advising tradeoff is real and mandates against mandatory board composition rules).

40. The statutory validation of good faith reliance on experts helped enormously in this regard, too. See DEL. CODE ANN. tit. 8, § 141(e) (allowing directors to rely in good faith on expert opinion).

41. Former Stanford Law School dean Bayless Manning described corporate law as having "nothing left but our great empty corporation statutes–towering skyscrapers of rusted girders, internally welded together and containing nothing but wind." Bayless Manning, *The Shareholders' Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962). For a historical account of the early development of corporate law, see Harwell Wells, *The Modernization of Corporation Law, 1920-1940*, 11 U. PA. J. BUS. L. 573 (2009).

42. For discussion of such a potential federal initiative, see, for example, Richard W. Jennings, *Federalization of Corporation Law: Part Way or All the Way*, 31 BUS. LAW. 991 (1976) (arguing that the reform of corporations can only be accomplished at the federal level); Donald E. Schwartz, *Symposium-Federal Chartering of Corporations, An Introduction*, 61 GEO. L.J. 71 (1972) (proposing a federal corporation statute).

43. *See* Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989) (presenting the volume's conclusions for and against allowing corporations to opt out of all mandatory corporate law terms through their charter provisions).

compensation packages, illustrates how directors were validated in deploying market forces, rather than being organizational leaders.[44] As mentioned above, thanks to the legal validation and liberal use of independent director ratification, self-dealing transactions ran aground the duty of loyalty almost exclusively in the context of high stakes mergers and acquisitions, where personal director liability is almost never in play.[45] Outside of M&A deals, few shareholder derivative lawsuits against executives or directors survived motions to dismiss.[46] Duty of care lawsuits against directors had disappeared after the rise of charter exculpation clauses in the mid-1980s.[47] Beginning in 2000, Delaware even validated charter waivers of the fiduciary corporate opportunity doctrine.[48] In short, the field of corporate governance stubbornly avoided looking inside the "black box" of corporate affairs where actual governance occurred.[49] The path through the fiduciary maze had been cleared by faith in market forces.

Deference to the market did not mean simplicity in deal practice, however. Agency theory's market orientation fostered lucrative work for investment bankers and transactional lawyers advising boards, thus enabling thinly informed boards to avoid governance disasters. M&A deals involve intensive board advising about alternative structures, debt and equity financing options, comparative bid values, auction modalities, poison pill

44. For a review of the phenomenon and extant literature, see Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. PA. J. LAB. & EMP. L. 227 (1999) (surveying the social science literature and the legal framework of performance-based executive compensation, and arriving at skepticism about the accepted link with executive motivation).

45. The apex of this validation of private ordering was reached when the Delaware Supreme Court allowed for deferential business judgment rule review of controlling shareholders' going private transactions (so long as they're conditioned on preapproval by a majority of disinterested directors and shareholders). *See* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014). For opposition to this degree of judicial laissez-faire based on faith in parties' capacity for beneficial and fair self-ordering, see Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, 62 BUS. LAW. 775 (2007). *But see* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2 (2005) (validating the move to deferential business judgment review).

46. *See supra* note 22 and accompanying text.

47. For a rare proposal favoring using fiduciary care to elevate board informedness, see Geoffrey P. Miller, *A Modest Proposal for Fixing Delaware's Broken Duty of Care*, 2010 COLUM. BUS. L. REV. 319 (2010).

48. *But see* Siegman v. Tri-Star Pictures, Inc., CIV. A. NO. 9477, 1989 WL 48746, at *7–*9 (Del. Ch. May 5, 1989) (finding a conflict between the fiduciary, corporate opportunity doctrine and the scope of charter waivers under Section 102(b)(7)).

49. *See* Thomas Clarke, *The Impact of Financialization on International Corporate Governance: The Role of Agency Theory and Maximizing Shareholder Value*, 8 L. & FIN. MKT. REV. 39, 42 (2014) (agency theory "does not dare to enter the 'black box' of the firm itself").

mechanics, and so forth. Executive stock option compensation plans and corporate stock buybacks, similarly, involve extraordinary transactional complexity subject to board authority, upon reliance on bankers', lawyers' and consultants' expert advice. Thus, the industry of board advising remained vital, even if the theory and law surrounding boards' roles and discretion remained oversimplified.[50] In sum, beyond the mandate to leverage and attend to market signals, agency cost governance had little to offer individual boards making choices in governing individual firms.

2. Expanded Board Informational Tasks under Federal Law

In contrast to the laissez-faire focus in state corporate law and corporate legal theory, federal legal reforms and so-called "soft law" standards sought to raise the level of board oversight in the wake of large and too common corporate frauds and attendant stock price losses. Beginning in the late 1990s, stock exchange listing requirements and various industry compendia of best board practices demanded that public companies establish audit, compensation, and nominating committees composed predominantly of independent directors.[51] The committee reformulations mandated some stepped-up mastery of firm-specific information by directors.[52] Increased director attentiveness was galvanized further by the enactment of the Sarbanes Oxley Act in 2002.[53] Unfortunately, again, many professional advisers and legal commentators derided the new board oversight requirements, viewing them as supernumerary compliance tasks, rather than as a predicate for value creation by boards.[54] Indeed, the changes were often

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50. We are not the first scholars to suggest that the agency cost paradigm has lost its luster. *See, e.g.*, GERALD DAVIS, THE VANISHING AMERICAN CORPORATION: NAVIGATING THE HAZARDS OF A NEW ECONOMY (Berrett-Koehler Publishers 2016) (tracking the decline of the large American corporation).

51. For a comprehensive treatment of the New York Stock Exchange amendments and new standards, see Simpson, Thacher & Bartlett, *NYSE Board of Directors Approves New Corporate Governance and Disclosure Standards*, 9 LAW & BUS. REV. AMS. 63 (2003) (enumerating all the new requirements for listing on the NYSE, including the requirement for a majority of independent directors to be on the board).

52. *See* discussion *infra* Part II.D (discussing the significance of stock exchange listing requirements for committee charters).

53. Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, § 107(c), 116 Stat. 745, 766 (2002) (codified at 15 U.S.C. § 7217(c) (2012)). For a detailed treatment of Sarbanes Oxley's codification of enhanced director oversight in areas relevant to accurate reporting and fraud prevention, see J. Robert Brown, *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317, 359 (2004) ("In the area of disclosure, Sarbanes-Oxley . . . mandated a more systematic and enhanced review of corporate filings by the SEC.").

54. For a striking example, see Roberta Romano, *The Sarbanes-Oxley Act and the*

condemned as rigid drags on efficiency.[55] The monitoring board model simply did not require functional board committees. Preferring loose, equitable standards to rules and requirements, most academic thought leaders condemned the new law reforms.

The changes were indeed substantial. Until 2002, the Securities and Exchange Commission's (SEC) hands were mostly tied, its mandate confined essentially to enhancing transparency.[56] Thereafter, with the series of large-scale accounting scandals which emerged in 2001-02, the importance of board stewardship of critical corporate information rose. These accounting scandals lead to the enactment of Sarbanes Oxley, followed by SEC regulations compelling greater board attentiveness to and stewardship of sound corporate accounting, auditing, and financial reporting practices, especially by board audit committees. Notably however, even with Sarbanes Oxley and the ensuing SEC regulations and listing standard requirements, the emphasis remained on *particular tasks* directors performed for the benefit of *capital markets investors*—not on committees' immersion in firm-specific knowledge, or management of the firm's knowledge and communications to benefit the enterprise in a broad sense. In this respect, the new securities laws, including the new audit committee provisions, reinforced the constraints and conventions of *agency cost governance to support market forces*.

The same orientation and limitations are manifest in Congress' enactment of the Dodd-Frank Act of 2010.[57] The Act's governance provisions emphasize the role of independent directors in reducing managerial conflicts, excessive executive compensation, and incipient

Making of Quack Corporate Governance, 114 YALE L.J. 1521 (2005) (concluding that Sarbanes Oxley's governance provisions are ill-conceived and likely to accomplish little good). *But see* Lawrence Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Might Just Work)*, 36 U. CONN. L. REV. 915, 919 (2003) ("Despite its weaknesses, the Sarbanes Oxley Act is not trivial. Though mostly patchwork and codifying, there are a couple of provisions amounting to legislative silver bullets-still not sweeping reform, but potentially profound.").

55. *See, e.g.*, Larry E. Ribstein, *Sarbanes-Oxley After Three Years*, 3 N.Z. L. REV. 365, 376 (2005) (arguing that the empirical literature does not support SOX); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251, 259 (2005) (noting the deficiencies in the Act's governance provisions).

56. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005) ("The federal regime had until then consisted primarily of disclosure requirements rather than substantive corporate governance mandates . . .").

57. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

corruption (e.g., by prohibiting retaliation against whistle-blowers).[58] In an era where fiduciary enforcement had become tissue-thin, in essence, they codify features of state corporate law's proscription against self-dealing, the paradigmatic agency cost.

In sum, soft law, SEC requirements, and even federal legislation after 2000 expanded the agency cost paradigm by using board committees to foster market transparency and reign in corruption. Unfortunately, myopia about board committees' potential to elevate broad governance objectives, and governance elites' disdain for federal rulemaking meant another lost opportunity. Nowhere in these soft law mandates or federal securities laws and regulations is there anything approaching recognition of the possibilities inherent in information governance—that is, a role for boards in curating their firms' knowledge and communications to define what the enterprise is and how it might thrive.

3. New Information Technologies and Emergent Fiduciary Duties

Two developments in the final years of the twentieth century—one technological, the other legal—brought pressure to bear on agency cost governance. First, vastly enhanced computing power and communications technology expanded boards' practical ability to learn about corporate affairs.[59] Second, the law of fiduciary duty began to reappraise the importance of board stewardship of corporate information, though it did so tentatively, and without expanding the scope of director personal liability.

In 1985, in *Smith v. Van Gorkom*, the Delaware Supreme Court admonished boards to "inform[] themselves . . . of all material information reasonably available to them."[60] But the import of the decision was limited by the practical limitations of the information and communications technology of the day. Cumbersome centralized computing had only recently given way to user-friendly personal computers. As relevant to

58. *See* Nizan Geslevich Packin & Benjamin P. Edwards, *Regulating Culture: Improving Corporate Governance with Anti-Arbitration Provisions For Whistleblowers*, 58 WM. & MARY L. REV. ONLINE 41, 46 (2016-2017) (arguing that Dodd-Frank created a distinct, heightened basis for exempting corporate and financial whistleblowers from mandatory arbitration that courts should respect despite lack of total clarity in the statutory language).

59. *See, e.g.*, TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2011) (surveying the invention and development of the internet); Rani Molla, *How Apple's iPhone Changed the World: 10 Years in 10 Charts*, VOX (June 26, 2017, 11:24 AM), https://www.vox.com/2017/6/26/15821652/iphone-apple-10-year-anniversary-launch-mobile-stats-smart-phone-steve-jobs [https://perma.cc/YJ8L-M8HQ] (highlighting how the information available on an iPhone changed the business world, *inter alia*).

60. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

directors' knowledge about their firms, the average standard of executives' computer literacy was (understandably) low. A decade later, by the mid-1990s, the internet had had a revolutionary impact on corporate affairs. The new technological development enabled near-instant communication via electronic mail, instant messaging, voice phone calls over Internet Protocol (VoIP), and two-way interactive video calls. Moreover, the communications of that era, as made possible by 1990s "flip phones" and early laptops, look primitive compared to the smartphones and tablets which became pervasive a decade later. At the company-side, the new technologies massively spurred companies' investments in improved operational software and internal controls. Virtually every facet of large companies' affairs became automated, monitored, and remotely visible via software. State of the art corporate web pages displaying detailed data and narrative disclosures became ubiquitous. Corporate governance practices were evolving to reflect the Information Age.

Beginning in the mid-1990s, electronic filing of corporate quarterly, annual and transactional reports (rather than in hard copy) was at first optional, and then was made mandatory by the SEC. These data-rich corporate autobiographies soon became easily accessible to the public, including investors, both on the internet and via corporate webpages. As instantaneous communication of sophisticated data became normalized, the on-the-ground practice of boards' fiduciary duty of care (i.e., to become apprised of "all material information reasonably available") also evolved upward.[61] With vast amounts of information about their firm readily available to them, directors were challenged to up their game. Surely, they would be expected to know their company better than outside investors and analysts could from publicly available reports? If they did not, the problem was not "executive capture," i.e. a lack of practical ability or legal authority to obtain any material corporate information they desired.

Ironically however, after the watershed of *Smith v. Van Gorkom*, the legal evolution of the fiduciary duty of care stalled. After the mid-1980s, the nearly universal adoption of charter exculpation provisions by public companies precluded most judicial inquiry into the duty of care, stunting the judicial development of the duty's informational governance mandate vis a vis boards. Moreover, an artificial legal convention walled off directors' fiduciary care obligation to be well informed about corporate affairs, from their obligation to become fluent in the substance of the SEC reports the firm published to shareholders. The former was recognized as "corporate governance," the latter as an *ad hoc* facet of "market regulation." It was only

61. *Id.* at 893.

in 1998, in *Malone v. Brincat*, that the Delaware Supreme Court reversed this supposition (and the Court of Chancery's decision), holding that directors owed a fiduciary duty of care and loyalty in overseeing disclosures to investors.[62] Nevertheless, a host of predicates and qualifications in the Delaware Supreme Court's opinion, once again, thwarted the expansion of board informational governance, as recognized in *Malone*. In corporate law, board oversight over public disclosures remained a priority nearly exclusively in the M&A context.[63]

Boards' information-based fiduciary duties took a tentative step forward in *In re Caremark*, in 1996. The Delaware Court of Chancery veered away from the established, narrow confines of the duty of care and loyalty doctrines to recognize a new duty for boards to oversee the establishment of efficacious corporate internal controls (i.e., internal corporate information gathering and reporting systems).[64] Once again, however, the new doctrinal development was stunted. For two decades, *Caremark's* take-away for boards' informational duties remained ambiguous. First, its precedential authority was uncertain because it was merely a review of a settlement of shareholder derivative claims. Even more unpropitious was the opinion's uncertain jurisprudential foundation. *Caremark* grounded its new, systematic, board internal control oversight duties in *fiduciary care* doctrine.

62. Malone v. Brincat, 722 A.2d 10 (Del. 1998). For discussion of the place of truthfulness and candor in the framework of boards' basic duties of fiduciary care and loyalty, see Faith Stevelman Kahn, *Transparency and Accountability: Rethinking Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505 (2000) (arguing that directors' candor and truthfulness in dealings with shareholders is of the essence in state corporate fiduciary duty law, apart from its relevance to federal disclosure mandates).

63. The state fiduciary (corporate) law focus on disclosure in M&A settings remains vivid to the present. *See, e.g.*, Gordon v. Verizon Commc'ns, Inc., 148 A.D.3d 146 (N.Y. App. Div. 2017) (reversing the New York Supreme Court's rejection of a disclosure-based settlement of litigation challenging Verizon's purchase of Vodafone Group PLC assets at an allegedly excessive price). *But see In re* Trulia, Inc. S'holder Litig., C.A. No. 10020-CB 898 (Del. Ch. Jan. 22, 2016) (announcing a new rule for evaluating disclosure-based settlements in deal litigation—the "plainly material" standard—and expressing a preference for disclosure claims either to be litigated or mooted, rather than settled).

64. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996) (holding that the duty of care extended beyond directors merely informing themselves in an *ad hoc* manner, and expanding it to requiring boards to be proactive, and install and oversee the general effectiveness of their firms' internal controls—controls capable of fostering information germane to accurate public reporting and internal reporting relevant to the assessment of legal compliance and risk-management). The court observed, too, that efficacious internal controls yield the information requisite to a board's fulfilling its basic, state statutory monitoring and managing responsibilities. *Id.* The decision was a provisional bridge to a new way of seeing board governance, consistent with our information governance proposal, and yet the path forward remained.

But it called for directors to make *a good faith* effort to promote efficacious internal controls at their firms. As stated therein, only "an utter failure to attempt to assure a reasonable information and reporting system exists—— will establish *the lack of good faith* that is a necessary condition to [director] liability."[65] Which would furnish the basis of *Caremark's* new board oversight obligation: the fiduciary duty of care or duty of good faith? Immensely high stakes lay in the distinction. Duty of good faith jurisprudence was opaque, providing little guidance for directors *ex ante*.[66] Moreover, unlike duty of care shortfalls, shortfalls in the duty of good faith (i.e., bad faith), were not (and are not) susceptible to statutory charter exculpation.[67]

The scope and application of *Caremark* duties created ongoing concern within the legal and governance fields, especially given the ambiguous application of charter exculpation. Only in 2006, a decade after the Court of Chancery's decision, did the Delaware Supreme Court affirm the existence of *Caremark* internal control oversight duties for boards, rooting them in the duty of loyalty. By that time, improved information technology and elevated best practices—reflecting the intervening federal securities and stock exchange rules—had substantially elevated the norms of board stewardship of corporate information and communications, as discussed in Part II.[68]

4. Passive Institutional Investors

Agency cost governance follows two conceptual master tracks, both aimed at maximizing shareholder wealth. Above, we described the principle of *board primacy*, where boards operate as surveilling surrogates for vulnerable, dispersed shareholders. Its counterpoint is the school of *shareholder primacy*, where shareholders seek to intervene more directly in corporate affairs in their own interest. From a capital market perspective, the forty-year arc described herein saw a radical shift to concentrated institutional equity ownership:[69] mutual funds, public and private pension

65. *Id.* at 971.

66. For a review of the development of the case law on good faith, emphasizing the stakes of the scope of director liability, see Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010) (detailing the doctrinal development of the good faith obligation as a core fiduciary duty of directors).

67. DEL. CODE ANN. tit. 8, § 102(b)(7) (allowing exculpation of directors, but not for bad faith, self-dealing or approval of wrongful shareholder distributions).

68. *See infra* Part II.B (discussing the role of advancements in technology in board governance).

69. For a quantitative profile of the types of institutional owners and assets under

funds, trusts and endowments, insurance firms, and most salient recently, hedge funds. Legal commentators had wondered aloud whether institutional investors might take up an active role in corporate affairs, especially via the proxy process. Perhaps institutions would marshal their collective clout to overcome the agency cost problems arising from the separation of ownership from control?[70]

By the mid-1990s, however, legal scholars concluded that free-rider problems and other incentive-conflicts limited institutional asset managers' propensity to use the proxy process (*a fortiori* expensive hostile tender offer bids) to replace directors and wrest control from incumbent managers.[71] Activist institutional investors almost entirely failed to materialize, at least prior to the 2000s. Many factors drove this: the chilling structure of proxy regulation (including non-reimbursement of expenses), the *in terrorem* effect of SEC Rule 13D, costs of collective action (i.e., sharing gains while bearing all costs), fund managers' compensation structure, and asset managers' incentives not to alienate incumbent managers. The agency costs of agency

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management (including projections of future trends), see PRICEWATERHOUSECOOPERS, ASSET MANAGEMENT 2020: A BRAVE NEW WORLD 13 (2020), https://www.pwc.com/gx/en/asset-management/publications/pdfs/pwc-asset-management-2020-a-brave-new-world-final.pdf [https://perma.cc/S99M-PE22] (charting trends in institutions and volume of investable assets pre-COVID-19). For analysis of the U.S. legal and regulatory framework accompanying intensive capital market concentration, see Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1268 (2016) (observing that the largest institutional investors collectively own eighty percent of all stock in S&P 500 corporations, and arguing that such concentration reduces competition, causes higher prices, and should be illegal).

70. *See, e.g.*, Bernard S. Black, *The Value of Institutional Investor Monitoring: The Empirical Evidence*, 39 UCLA L. REV. 895, 899 (1992) (arguing that although not conclusive, empirical data suggests that institutional oversight can add significant value); Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 814–15 (1992) (concluding that changes in the legal rules would have allowed large institutions better to monitor the actions of corporate managers, were political preferences different in the U.S.); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 449–51 (1991) (analyzing the intersection of collective action problems with agency cost analysis to predict that institutional investor voice would not prove robust). *See also* John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor,* 91 COLUM. L. REV. 1277, 1281 (1991) ("Put simply, the agents controlling institutional investors have considerable reason to remain 'rationally apathetic' about corporate governance, and little reason to become active participants").

71. For discussion of the factors influencing passivity, see, for example, John C. Coffee, Jr. *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*., 91 COLUM. L. REV. 1277, 1283 ("[T]he primary explanation for institutional passivity is not overregulation, but the insufficiency of existing incentives to motivate institutional money managers to monitor."); ROCK, *supra* note 70, at 472 (noting that institutional investors replicate the agency cost problem at their own managerial level, and that dispersed shareholders lack sufficient incentives to discipline fund managers).

capitalism produced inertia in this period.[72]

This pattern of passive institutional ownership began to change in the mid-2000s and accelerated after the 2008 financial crisis. With increased calls for greater corporate accountability, shareholder primacy was ascendant. The SEC initiated a project of shareholder proxy access in the years after Sarbanes Oxley.[73] The basic concept was to enable certain holders of large blocks of stock to propose short slates of director nominees in a unitary, company proxy statement.[74] But intense controversies and roadblocks ensued from the SEC's proxy access proposals, and shareholder nominees in the company proxy did not become a meaningful possibility until quite recently, and via a different regulatory route.[75] Prior to activist hedge funds' leveraging proxy access and otherwise mobilizing the proxy process, institutional owners remained mostly passive actors in governance.

5. The Mobilization of Activist Hedge Funds

Back in the 1980s, hostile takeovers raised bedrock corporate governance issues about board primacy.[76] Would boards remain free, under

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72. In the Private Securities Litigation Act, Congress sought to leverage the clout of the largest institutional investors to monitor the agency costs implicit in private securities lawsuits. Nevertheless, the institution did not welcome vigorous participation as lead plaintiffs. *See, e.g.*, Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1529 (2006) ("question[ing] whether the lead plaintiff provision really encourages greater monitoring of plaintiff law firms.").

73. Congress did not specifically mandate proxy access, but rather authorized the SEC to adopt a proxy access rule. Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024 (proposed June 18, 2009) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249, and 274). Nevertheless, the Court of Appeals for the District of Columbia vacated SEC Rule 14a-11 as arbitrary and capricious, finding that the SEC had inadequately documented the tradeoff of costs and benefits. The SEC subsequently resolved not to appeal the ruling. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

74. *See* Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1352 (2011) ("[A]rgu[ing] that, contrary to the views expressed by the commentators, [the chamber of commerce, the Corporate Board Member magazine, and many others] proxy access would have little impact on corporate governance.").

75. Instead of following the path of Rule 14a-11 (which was invalidated), the SEC's amended Rule 14a-8 provisions enable shareholders to submit for inclusion in a corporation's proxy materials a proposal to amend the company's governance documents to provide for proxy access or request the board of directors of the company implement proxy access. The proxy access rules were adopted by the SEC at the same time. Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024 (proposed June 18, 2009) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249, and 274).

76. John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 439 (1988) (arguing for

the business judgment rule, to fend off in-the-money tender offers for control—just to continue pursuing the strategy they had set *ex ante*? Regulation (especially control share acquisition statutes) and private ordering (especially poison pills and staggered boards) evolved quickly to dampen the then-immediate threat of shareholder primacy via hostile tender offers.[77] Agency cost governance did not evolve to undermine board primacy in this period.

By the mid-2000s, however, capital market conditions and legal and institutional arrangements had once again changed to favor an insurgent shareholder primacy movement, with so-called "activist," hedge funds in the vanguard. Eschewing the costs and risks of tender offers, activist hedge funds typically mount a proxy-based threat that compels management to consider their demands. Again, the proxy access movement and 2008 financial crisis destabilized the governance status quo, escalating the platforms for shareholders to voice their demands, and placing boards under enormous pressure to be responsive. In their attempts to alter corporate financial or operating affairs in order to capture a greater, immediate surplus, activist hedge funds represent a trenchant, destabilizing force in contemporary governance.[78] As was true with hostile bids, even the mere

consideration of stakeholder interests when boards evaluate takeover proposals). For the bedrock governance issues raised by takeovers see, BRATTON & WACHTER, *supra* note 36 (providing intellectual history of the issues in play amidst the market and institutional changes of the time).

77. For discussion of the market and regulatory milieu, see Jeffrey N. Gordon, *Corporations, Markets and Courts*, 91 COLUM. L. REV. 1931 (1991) (noting that the high level of deference to management's business judgment in the face of a hostile takeover bid "reduce[s] not only the number of hostile bids (and successful bids), but also the number of corporate restructurings . . . in fear of a hostile bid."). *See generally* David Millon, *New Directions In Corporate Law Communitarians, Contractarians, And The Crisis In Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1375 (1993) (demonstrating that the perceived problems arising from hostile takeovers indicate a growing sensibility that shareholder primacy is on shaky ground).

78. There is less opposition to activist hedge funds' interventions than, say, was targeted at 1980s-style corporate "raiders" and leveraged buyouts, but the commentary is mixed on their impact on firms' long-term welfare. For discussion of the likely deleterious effects of activist campaigns, see John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: the Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 550 (2016) (arguing that an impact of this activism is "shortening investment horizons and discouraging investment in [research and development.]"); Leo E. Strine Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1939 (2017) ("For human investors, the overall trends as to the factors relevant to the question of if activism harms or helps them are, at the least, worrying. American public corporations seem to be spending much more of their free cash flow on stock buybacks, increasing dividends, and other tactics to guarantee immediate payoffs than on research and development and other forms of long-term investment."). *But*

threat of an activist campaign stands to influence, to constrain the strategies and operating plans firms can aspire to undertake.

As was true in the heyday of hostile bids, the academic camps favoring board primacy and shareholder primacy are clashing loudly.[79] A vocal shareholder rights project at Harvard Law School succeeded in pressing the case against board primacy, and facilitated widespread gains for shareholder primacy.[80] In the past decade, many public companies repealed their poison

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see Bernard S. Scharfman, *Activist Hedge Funds in a World of Board Independence: Creators or Destroyers of Long-Term Value?* 2015 COLUM. BUS. L. REV. 813 (2015) (arguing activist hedge funds generate long-term value by encouraging efficiencies and contributing positively to the decision-making process).

79. While there are powerful dissents, there is a burgeoning literature attesting to positive shareholder wealth effects from activist campaigns. *See* Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1100 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291577 [https://perma.cc/NT28-AQWA] (finding that evidence does not substantiate the claim that activists are focused on short-term growth at the expense of long-term growth); Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1730 (2008) (revealing that unlike other forms of activism, such as that of mutual funds and pension funds, hedge fund activism leads to shareholder gain because hedge funds are in a better position to serve as informed monitors); Nicole M. Boyson & Robert M. Mooradian, *Corporate Governance and Hedge Fund Activism,* 14 REV. DERIVATIVES RES. 169, 170 (2011) (showing that in the time period from 1994 to 2005, hedge funds successfully made valuable changes to corporate governance which benefit both the hedge fund and the shareholders); Christopher P. Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 J. CORP. FIN. 323, 323–24 (2008) (finding that firms targeted by activist hedge funds tend to see an increase in operating efficiency, tend to be well positioned to "mitigate liquidity constraints in their investment portfolio," and tend to "earn larger holding period returns on their active blocks than their passive blocks."); Robin M. Greenwood & Michael Schor, *Investor Activism and Takeovers*, 92 J. FIN. ECON. 362 (2009) (concluding that because activist hedge funds can force a takeover, they can yield "large positive abnormal returns"); C. N. V. Krishnan, Frank Partnoy & Randall S. Thomas, *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise*, 40 J. CORP. FIN. 296 (2016) (establishing that hedge funds with previous large dollar investments tended to generate positive returns in subsequent interventions); April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187, 213 (2009) (finding that in the period surrounding the initial Schedule 13D and for the subsequent one year period, hedge funds create positive abnormal stock returns); *see also* Shane Goodwin, *Myopic Investor Myth Debunked: The Long-term Efficacy of Shareholder Advocacy in the Boardroom* 11–12 (June 24, 2014) (working paper), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2450214 [https://perma.cc/TG23-UNSB] (finding "statistically meaningful empirical evidence to reject the anecdotal conventional wisdom that hedge fund activism is detrimental to the long term interests of companies and their long term shareholders").

80. Although it was highly successful, the program was a lightning rod for governance controversy. *See, e.g.*, Andrew Ross Sorkin, *An Unusual Boardroom Battle, in Academia*, N.Y. TIMES (Jan. 5, 2015) (noting the impact of the Shareholder Rights Project, along with the questionable value of the staggered board); Lucian A. Bebchuk, *The Myth that Insulating*

pill and staggered board defenses.[81] Proxy advisory firms are helping to catalyze shareholder voting in public companies, so that it is a far more meaningful force in governance, even apart from hedge fund activism.[82] As stated above, the 2008 financial crisis increased investors' mistrust in the corporate governance status quo's beneficial effects on the economy,[83] creating support for law reforms promoting greater shareholder influence on corporate decisions.[84] In this milieu, hedge fund activists have been exceptionally well positioned to press their claims, making headway, especially, in groups (so-called "wolf packs"), and even with support from traditional, institutional investors, at times.[85]

Boards Serves Long-Term Value, 113 COLUM. L. REV. 1637, 1638–42 (2013) (discussing his work, the success of his program (the Shareholder Rights Project) in its representation of institutional investors, and opposition to his work).

81. Steven Davidoff Solomon, *The Case Against Staggered Boards*, N.Y. TIMES (Mar. 20, 2012), https://dealbook.nytimes.com/2012/03/20/the-case-against-staggered-boards/ [https://perma.cc/6RFL-6B5E]; Taub Stephen, *More Companies Going Off The (Poison) Pill*, COMPLIANCE WEEK (Feb. 6, 2006), https://www.complianceweek.com/more-companies-going-off-the-poison-pill/6733.article [https://perma.cc/FRN5-S5EW]. With the effect of COVID-19 on the economy, many firms are evaluating reinstalling shareholder rights plans. Mark D. Gerstein, Tiffany F. Campion & Joshua C. Resiman, *Proactively Adopting a Poison Pill in Response to the COVID-19 Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 8, 2020), https://corpgov.law.harvard.edu/2020/04/08/proactively-adopting-a-poison-pill-in-response-to-the-covid-19-crisis/ [https://perma.cc/7S3X-QBSV].

82. Because they are roiling the governance status quo, the advisory firms are encountering strong criticism. The SEC has recently unveiled rules that would burden the advisory firms' operation, with mixed reviews. Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 34-89372, at 46 (July 22, 2020) (codified as amended 17 C.F.R. pt. 240 (2020)).

83. For a candid scholarly treatment facing the fundamental macro-level economic questions, see Jeffrey N. Gordon, *Is Corporate Governance a First-Order Cause of the Current Malaise?*, 6 J. BRIT. ACAD. 405 (2018) (noting corporate governance's complicity with excessive executive compensation, but focusing on the role of the state, not corporate governance, in supporting the development of human capital).

84. Elisse B. Walter, Commissioner, Sec. & Exch. Comm'n, Speech at the Master Class on Corporate Governance: "Restoring Investor Trust through Corporate Governance" — Remarks Before the Practicing Law Institute (Feb. 18, 2009), https://www.sec.gov/news/speech/2009/spch021809ebw.htm [https://perma.cc/NF6T-ENYJ]. For a comprehensive treatment, see generally STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 202 (Oxford Univ. Press 2008) (analyzing the conceptual and economic tradeoffs in corporate governance and advocating "that director primacy—not shareholder primacy—ought to be the future of corporate governance").

85. Bernard S. Sharfman, *What Theory and the Empirical Evidence Tells Us About Proxy Access*, 13 J.L. ECON. & POL'Y 1 (2017). In most circumstances, to succeed via the proxy route (rather than through informal pressure and board capitulation), the activists require traditional institutional owners' support for their proposals. For a treatment of activists' synergy with traditionally more passive institutional investors, see Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation*

6. Facing Activists, Boards Cannot Defer to Stock Prices

Activists cannot go around boards, because corporate law prevents shareholders—even activist hedge funds—from forcing fundamental corporate change without their assent. Thus, activists' rising influence in corporate affairs has set the stage for confrontation. How will boards know when to assent to activists presenting an alternative, purportedly a more profitable business plan? Even accepting the embrace of shareholder wealth maximization as the goal, reliance on stock market signals cannot resolve the directors' dilemma. The common uptick in stock price attendant to the arrival of activists may reflect a costly sacrifice of otherwise realizable, if later, larger wealth gains.[86] Given the potential presence of confidential strategic information (nontransparent to stock trading), the price uptick might be less than the gains which would materialize if the board stayed the course. The price uptick might reflect merely a liquidation and discount to greater long-term corporate wealth creation. Moreover, shareholders differ in their preferences for risk and investment time horizons, ones which might not align with the activists'.[87] Further, even believers in efficient market pricing concede that certain kinds of information (perhaps information crucial to understanding the likely payoff from the firm's longer-term strategy) confound "efficient" stock pricing.[88] Activists' restructuring or payout demands are likely to be harder to evaluate than would be an all-cash acquisition offer, because the latter at least presents an objective number for comparison to the firm's own projections. In sum, activists' demands require

of Governance Rights, 113 COLUM. L. REV. 863, 895–98 (2013) (arguing that institutional investors have undervalued governance rights, so that activist hedge funds provide salutary balance in questioning the corporate status quo when they launch campaigns).

86. The proposition has been squarely rejected by Harvard Law School's Lucian Bebchuck and his co-authors, yet it remains plausible. *See* Lucian A. Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1087 (2015) (concluding that no evidence supports claims of activists driving short-term gains relative to a five-year baseline of corporate performance). For citation to the conflicting academic literature, *see supra* notes 78 and 79.

87. For an early treatment intra-shareholder conflicts, see Iman Anabtawi, *Some Skepticism about Increasing Shareholder Power,* 53 UCLA L. REV. 561, 563 (2006) (documenting the likely conflicting priorities among different classes and types of shareholders).

88. Brad Jones, *Asset Bubbles: Re-thinking Policy for the Age of Asset Management* 7 (Int'l Monetary Fund, Working Paper No. 15/27, 2015) (concluding that the financial incentives of asset managers contribute to "bubble-riding" and investor herding); Ferhat Akbas, Will J. Armstrong, Sorin M. Sorescu & Avanidhar Subrahmanyam, *Capital Market Efficiency and Arbitrage Efficacy*, 51 J. FIN. & QUANTITATIVE ANALYSIS 387, 387 (2016) (concluding that availability of arbitrage capital influences the degree of stock market price reactivity).

boards to evaluate the merits of their proposal, to make choices between alternative futures for the firm, with all the concomitant uncertainties implied therein.

Most germane to this Article, given the problems associated with boards deferring to stock prices in formulating responses to activists, *will boards have the strategic information necessary to make a wise choice at the crucial juncture?* Agency cost governance has not supported boards in obtaining, analyzing and deliberating over the kind of thick, strategy-related corporate information they would be required to know. No reliable market-based measure or other handy heuristic exists to short cut boards' need to bring in-depth knowledge of the firm to bear on this judgment. Nor do the extant research studies resolve the issue of whether activists' campaigns are commonly "opportunistic". Alongside a sophisticated empirical literature attesting to genuine wealth creation from embracing activists' plans, exists an equally sophisticated literature demonstrating value destruction therefrom.[89]

89. For legal commentary and analysis skeptical of activists' value-creation claims, see, for example, Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 268–69 (2012) (discussing incentives for short-termism and how law could respond to mitigate activists' harmful impacts); Martijn Cremers, Saura Masconale & Simone M. Sepe, *Activist Hedge Funds and the Corporation*, 94 WASH. U. L. REV. 261, 264 (2016) (presenting analysis and empirical evidence that the substantial private gains activists realize come at the expense of long term value, as opposed to being salutary disciplining forces on managerial waste); John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 IOWA J. CORP. L. 545, 548–50 (2016) (surveying the relevant institutional and regulatory developments and concluding that the rise of hedge fund activism is driving a serious, concerning cut back in corporations' investment in long-term capital investments, including in research and development."); Leo E. Strine, Jr. *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1968–70 (2017) (surveying the legal and financial features of hedge fund activism to conclude that the system isn't advantageous to most natural persons, even those who own equity); YVAN ALLAIRE, INST. FOR GOVERNANCE PRIV. & PUB. ORGS., HEDGE FUND ACTIVISM: PRELIMINARY RESULTS AND SOME NEW EMPIRICAL EVIDENCE (2015) (finding investors in activist hedge funds would achieve equal gains from investment in a diversified public stock portfolio once fees are taken into account). For scholarship embracing the net-value creation version of activists' interventions, and rejecting the expropriation or short-termism thesis, see Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1155 (2015) (citing evidence contrary to the theory that initial positive gains from activism are tied to longer-term corporate underperformance); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1027 (2007) (advising against further regulation on grounds that "it is unclear whether and to what extent hedge fund activism is driven by excessive short-termism"); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights*, 113 COLUM. L. REV. 863, 893 (2013) (concluding that activists provide positive value

If a board is under-informed about the firm's resources, competitive position and strategic plans, it may too easily capitulate to the activist's proposal, not wanting to appear unresponsive or risk averse. Alternatively, an unprepared board may too readily succumb to status quo bias, rejecting the activist's proposal out of false confidence in the existing plans, or on account of groupthink. *Being thinly informed, boards will lack ballast to make a collective, informed judgment—which is precisely their job.* This is the crucible that boards face when confronting activist hedge funds bearing glossy proposals. Easy reliance on stock prices is untenable, and the stakes for firms, shareholders and other constituencies are high.[90]

In 2020, a huge rift has emerged between the real, pandemic economy (showing signs of tremendous losses and disarray) and stock prices (setting new highs after cratering months before).[91] This is deepening the challenges facing boards. Many firms have encountered serious financial hardships, and most are facing financial reforms, and/or serious operational and staffing changes necessary to adjust to the disruptions.[92] Comparisons to the economic woes of the Great Recession are rife.[93] Companies are adjusting to supply chain disruptions, a sudden migration to remote work, vastly altered consumer behavior, employees testing positive for COVID-19 or juggling child care, the cessation of most recreational dining, travel, and in-store shopping, and a burgeoning, nation-wide civil rights movement. For

by complementing institutional investors' shortcomings, since activists engage in intensive evaluation of portfolio companies' strategies, thus selecting for possible underperformers). *See also* Bernard S. Sharfman, *Activist Hedge Funds in a World of Board Independence: Creators or Destroyers of Long-Term Value?*, 2015 COLUM. BUS. L. REV. 813, 821–22 (2015) (supporting this paper's thesis that if boards can act as informed, impartial arbiters, then activists' proposals will be adopted when they are most likely to generate long-term value).

90. Ronald J. Gilson & Jeffrey N. Gordon, *Boards 3.0: An Introduction*, 74 BUS. L. 351 (2019) (conceding the problem of agency cost boards' relative ignorance about strategy and calling for the establishment of board strategy committees).

91. Matt Phillips, '*This Market Is Nuts': S&P 500 Hits Record, Defying Economic Devastation*, N.Y. TIMES (Aug. 18, 2020); Eric Morath, Theo Francis & Justin Baer, *The Covid Economy Carves Deep Divide Between Haves and Have-Nots*, WALL ST. J. (Oct. 5, 2020), https://www.wsj.com/articles/the-covid-economy-carves-deep-divide-between-haves-and-have-nots-11601910595 [https://perma.cc/KU8H-CGAD].

92. *See, e.g.*, Christopher M. Matthews, *Big Oil Companies Lose Billions, Prepare for Prolonged Pandemic*, WALL ST. J. (July 31, 2020) (explaining that corporate leaders of the largest oil and gas companies do not have clear expectations for economic or energy market recovery because of the uncertainties inherent in the pandemic, as well as the uncertain policy environment).

93. Sifan Liu & Joseph Parilla, *What the Great Recession Can Tell Us About the COVID-19 Small Business Crisis,* BROOKINGS (Mar. 25, 2020), https://www.brookings.edu/blog/the-avenue/2020/03/25/what-the-great-recession-can-tell-us-about-the-covid-19-small-business-crisis/ [https://perma.cc/NBK4-KH3Z].

many established technology firms and large enterprises especially, stock prices in the summer and fall of 2020 reached new records, after suffering a thirty-plus percent drop in early spring. The stock price volatility itself is a challenge for boards and CEOs. While bullish stock prices appear to portend the widespread and relatively rapid dissemination of an efficacious vaccine, most scientists remain cautious about the timing of a return to normal.[94] Companies' stock prices may be elevated due to factors unrelated to their performance. The empirical case for aberrancies and inefficiencies in stock market prices—"short-termism" and "bubbles," for example—has become more compelling after the 2008 financial crisis.[95] The shocking drop and then stunning climb of stock market prices after the spring of 2020 has not enhanced faith in stock market efficiency.[96] With the market's buoyancy attributed variously to day traders' enthusiasm, an activist Federal Reserve and Treasury, and low interest rates (driving investors to equity), stock prices—the lodestar of agency cost governance—are increasingly suspect as benchmarks for board decision-making. Old fashioned agency cost boards that are confidently relying on current high stock prices are likely under-investing in governance.

This is the Achilles' heel of the agency cost monitoring board. If directors cannot securely rely on stock prices to evaluate corporate performance, the monitoring board fails on its own profit-maximization terms. Agency cost theory's narrow mandate for boards (to rely on stock prices as signals and limit managerial waste) makes it too limited a medium, even, for optimally fostering profit maximization for shareholders. The monitoring model has under-prepared boards to invest in the high-level, firm-specific information requisite to engaging in strategic analysis.

Change in this direction is occurring, as we document in Part II, but it has not cohered into a new board governance paradigm.[97] Even if they serve on the audit committee, it's most likely that directors have not been

94. Ayoub Ammy-Driss & Matthieu Garcin, *Efficiency of the Financial Markets during the Covid-19 Crisis: Time-Varying Parameters of Fractional Stable Dynamics* 14-15 (July 22, 2020) (unpublished manuscript), ResearchGate.net/publication/343124591 [https://perma.cc/8LWQ-TBJX].

95. William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 705 (2010). *See, e.g.*, *id.*

96. Researchers are only beginning to come to terms with the ways stock prices were impacted by the pandemic. *See, e.g.*, HaiYue Liu et al., *The COVID-19 Outbreak and Affected Countries Stock Markets Response*, 17 INT'L J. ENVTL. RESEARCH & PUB. HEALTH 1, 16 (2020) (evaluating the "short-term impact of the coronavirus outbreak on 21 leading stock market indices in major affected countries including Japan, Korea, Singapore, the USA, Germany, Italy, and the UK etc.").

97. *See infra* Part II.B.

encouraged to leverage the financial, risk, and legal compliance information they would have garnered thereby, in order to analyze the firm's strategic prospects. It's likely that boards influenced by decades of agency theory would avoid raising cutting-edge, possible controversial questions, such as whether the firm's resources, culture, and reputation are being cultivated to create employee and customer loyalty. Stock price surges can vanish suddenly, leaving monitoring boards unmoored. The monitoring board model insufficiently counsels boards to demand a three-dimensional informational inventory of the firm in order to build long-term value. Our information governance model is intended to help boards identify and capitalize on their firm's resources, capabilities, and comparative advantages.

B. The End of Separate Realms Thinking

For decades most corporations downplayed their impact on the environment, the wellbeing of their employees and communities, and other matters that traditionally escape quarterly financial statements. Alternatively, this section of the Article documents the extraordinary, growing salience of investors' demand for corporate governance of social, environmental, and political risks, and the challenges it poses for boards. Because these areas are increasingly influential to firms' success, they merit serious board attention. Agency theory pushed boards and CEOs to ignore all matters other than shareholder wealth, to leave such matters to action by the state—an approach we denominate as "separate realms" thinking.

Separate realms and agency cost governance are distinct but intertwined concepts, recapitulating the public/private dichotomy in classical liberal thought. From this perspective, markets (the private sphere) are salutary, natural domains of self-interest, but states (the public sphere) are belated, unnatural, and tinged with coercion.[98] Twentieth century agency cost and separate realms governance told business leaders they could create value by ignoring everything that did not immediately and materially influence revenue and profit figures. Instead, they should focus on maximizing shareholder wealth as measured by stock prices.[99] Unsurprisingly, this

98. For a discussion of the crucial legal authorities in this tradition, as relevant to modern law, see, for example, Derek McKee, *The Public/Private Distinction in Roncarelli v. Duplessis*, 55 MCGILL L.J. 461, 472 n.47–97 and accompanying text (2010) (explaining how the public/private distinction maintains relevant in modern legal thought).

99. For a treatment of the intellectual substructures of separate realms concepts as they influenced law in this period, see generally, Ronald Chen & Jon Hanson, *The Illusion Of Law: The Legitimating Schemas Of Modern Policy And Corporate Law*, 103 MICH. L. REV. 1, 3

outlook better suited a simpler, older, more manufacturing-based economy, where unions attended to labor rights, and concerns about environmental damage remained marginalized. That economy and consciousness no longer predominates.[100] The concerns which were then deferred are now aired loudly through the internet, and especially social media, to widespread, attentive audiences. Even more so in the pandemic (while we are tethered to our smart devices), and with the repercussions of the November 2020 election looming—the social, environmental and political dimensions of corporate action are in the limelight. The outdated nature of the separate realms construct is dramatically apparent. Information governance offers boards a new model to capture the emerging challenges.

The foundational text of modern, academic corporate governance—*The Modern Corporation and Private Property*—itself mused over the fallacy of separate realms thinking, suggesting that corporate law could be construed as a form of constitutional law in the economic sphere.[101] But this facet of the opus was overshadowed; it fit uneasily with the rise of neoliberalism in the later twentieth century, the period in which corporate law and governance matured as modern fields.[102] Nevertheless, more recently—especially since the 2008 financial crisis and even more so amidst the pandemic (which has necessitated more Treasury and Federal Reserve bailouts),—separate realms thinking has come under vocal criticism, both from shareholders and the public.[103] Growing, extreme income and wealth inequality have exposed the

(2004) (describing the ideas that influence our lives, thinking, public policies and the law); Linda Weiss, *The State in the Economy: Neoliberal or Neoactivist?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS 183 (Glenn Morgan, John L. Campbell, Colin Crouch, Ove Kaj Pedersen & Richard Whitley eds., Oxford Univ. Press 2010) (drawing on the literature of comparative capitalism and international political economy to analyze key approaches to the state's role in the contemporary economy).

100. Greg Ip, *Pandemic Hastens Shift to Asset-Light Economy*, WALL ST. J. (Oct. 7, 2020), https://www.wsj.com/articles/pandemic-hastens-shift-to-asset-light-economy-11602087201 [https://perma.cc/5AMS-73QA].

101. BERLE & MEANS, MODERN CORPORATION, *supra* note 18, at 124–25.

102. In the years after the financial crisis several excellent accounts of the conceptual structure and influence of neoliberalism have emerged. *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (Oxford Univ. Press 2005) (surveying the values neoliberalism attaches to market exchange and its influence on international policy, globally); COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM vii (2011) (encapsulating neoliberalism as having "one dominant theme: that free markets in which individuals maximize their material interests provide the best means for satisfying human aspirations, and that markets are in particular to be preferred over states and politics, which are at best inefficient and at worst threats to freedom.").

103. Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 160 (2019). For a recent overview of cutting-edge heterodox economic research, see generally HEATHER BOUSHEY, UNBOUND: HOW INEQUALITY CONSTRICTS OUR ECONOMY AND

fallacy of a shared nirvana built on growth,[104] as have the radically accelerated effects of industry-led climate change and natural resource devastation.[105]

Significantly for our theory of expanded board governance, it has become clear that investors, and other constituencies companies depend upon, care immensely about firms' ESG performance and risks, and are unwilling to buy into separate realms beliefs.[106] At the same time, the *Citizens United* decision and greater media attention to corporate political action have made more salient corporations' own adventuring beyond the commercial sphere.[107] Corporate political and philanthropic action is both more controversial and less avoidable amidst the pandemic's social and public health effects, the Black Lives Matter movement, and rising economic insecurity; these have radically unsettled the business landscape, exposing a range of polarizing divisions. There is an upsurge in demands for boards better to understand and manage ESG risks, to supervise reliable ESG disclosures, and to take responsibility for fostering ethical firm cultures encompassing ESG concerns.[108] Firms and boards cannot credibly or profitably persist in separate realms thinking.

Many commentators, and the Business Roundtable itself, are resorting to preexisting conceptual frameworks of "stakeholder governance," or "corporate social responsibility." In contrast, we believe "information governance" is a superior conceptual framework. It emphasizes the freedom

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WHAT WE CAN DO ABOUT IT (2019) (surveying the institutional, statistical and conceptual shifts demonstrating inequality's threat to the U.S. economy).

104. For discussion of the widespread, heightened awareness of the effects of income and wealth inequality, as spurred by the writing of pathbreaking French economist Thomas Piketty, see Idrees Kahloom, *Thomas Piketty Goes Global in "Capital and Ideology*", THE NEW YORKER (Mar. 2, 2020) ("His book perfectly fit the post-Occupy Wall Street ethos, providing empirical rigor for the upswell in anger.").

105. Thomas M. Lenton et al., *Climate Tipping Points—Too Risky to Bet Against*, 575 NATURE 592 (2019) ("The growing threat of abrupt and irreversible climate changes must compel political and economic action on emissions.").

106. *See infra* notes 120–122 and accompanying text.

107. For an unabashed treatment of firms' strategic imperative to engage the legal and regulatory process proactively, see Constance E. Bagley, *What's Law Got to do with It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587, 639 (2010) (arguing that firms can benefit financially from "legal astuteness" when the law is properly integrated into their overall framework).

108. For example, in July 2020, the Government Accountability Office published a 62-page report. (U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM (2020), https://www.gao.gov/products/gao-20-530 [https://perma.cc/368U-374E]. *See also*, Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and Privateness on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 386 (2020).

well-informed boards possess to direct enterprise resources—and, hence, the stakes of directors being well-informed about their firms. It also captures the fact that information (intra-firm knowledge and know-how) is often a twenty-first-century corporation's most valuable resource.[109] "Information governance" captures the medium through which boards themselves can create value (stewarding knowledge management) and highlights the modality through which they will evaluate their executive team's success (on the basis of corporate information and communications). Consistent with the enabling nature of corporate law, "information governance" affirms that boards in individual companies should (in a condition of robust transparency) determine where along the "shareholders versus stakeholders" spectrum their firm will live.

1. The Rise and Demise of Technocratic Governance

Separate realms thought, as applied to modern U.S. business, dates from the 1970s. It arose, first, from fears catalyzed by President Johnson's progressive, Great Society political reforms, and against a backdrop of lingering anxieties from America's mid-century "red scare."[110] Social unrest, too, stirred corporate elites, who became aghast at vocal anti-war and civil rights protests in the U.S.[111] Milton Friedman's 1970 essay in *The New York Times* famously stated what became the separate realms thesis and guiding principle of corporate governance for forty years: "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits. . . ."[112] The admonition was thrilling, an easy sell, on account of the permission it gave businesses to ignore worrisome complexities. Technocratic governance won the day.

Around the same time, business schools in the U.S. became enmeshed with university economic departments, where experts in neoclassical

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109. *See infra* Part II.G for a discussion of the resource-based view of the firm.

110. *See generally* ZACHARY D. CARTER, THE PRICE OF PEACE: MONEY, DEMOCRACY, AND THE LIFE OF JOHN MAYNARD KEYNES (Random House 2020).

111. For an account of the social and political clashes in this period, see generally Sarah C. Haan, *Civil Rights and Shareholder Activism:* SEC v. Medical Committee for Human Rights, 76 WASH. & LEE L. REV. 1167 (2019) (describing a civil society organization's nearly successful attempt to expand the limits of corporate democracy).

112. Milton Friedman, *A Friedman Doctrine - The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 33. Friedman's essay was so notorious that the New York Times published a special Dealbook section, fifty years later, to revisit its influence. Andrew Ross Sorkin & Jason Karaian, *Greed is Good. Except When It's Bad.*, N.Y. TIMES (Sept. 13, 2020), https://www.nytimes.com/2020/09/13/business/dealbook/milton-friedman-essay-anniversary.html [https://perma.cc/N9LJ-GQME].

economics pursued abstruse, quantitative modelling untethered to "social" consequences.[113] The collaboration, and co-constitutive focus on economic theory, helped foster the legitimacy of focusing businesses and business leaders exclusively on profit maximization.[114] Falling in line, legal academics pilloried commentators working outside the agency cost paradigm—especially those concerned with businesses' "social responsibilities."[115] Silos in university research and education—especially those separating business and economics departments from history, international relations, and programs in public policy—thwarted deeper awareness on the part of future business leaders of the social and environmental impacts of corporate-based globalization (at least beyond the reductionist concept of "externalities").

Analogously, the SEC's shareholder proposal rules reflected the view that business affairs are inherently apolitical, and rightly should remain so. The SEC's staff rationalized issuing no action letters permitting corporations to exclude most pro-social shareholder proposals in order to limit exogenous, "political" incursions by corporate "gadflies."[116] Despite its increased financial sophistication, corporate law clung stubbornly to the anachronistic, property-based view of the corporation.[117] Moreover, the narrowly

113. For the historical development of this academic enmeshment see Marion Fourcade & Rakesh Khurana, *From Social Control to Financial Economics: The Linked Ecologies of Economics and Business in Twentieth Century America*, 42 THEORY & SOC'Y 121 (2013) (providing historical detail and analytical insight into the connections between neoclassical economic thought in economic departments and business schools' faculty, research and curricula).

114. The shareholder profit maximization focus was buoyed, in large measure, by the publication of Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). For a recent history of the extraordinary influence of economists, including Milton Friedman and Michael Jensen, on MBA programs and public policy, see BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY (2019) (tracing four decades of economists' outsized influence shaping public policy).

115. Corporate law professor Henry Manne was among the earliest academics to write condescendingly of corporate social responsibility. *See, e.g.*, Henry G. Manne, *The Social Responsibility of Regulated Utilities*, 1972 WIS. L. REV. 995, 995 (1972) ("The concept of corporate social responsibility, for all of its popularity today, has not had a distinguished intellectual career.").

116. This view was predominant as far back as 1952, when the SEC amended the shareholder proposal rule to clarify that companies could exclude shareholder proposals "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes." Amendment of Proxy Rules, SEC Securities Exchange Act of 1934, Release No. 4775 (Dec. 11, 1952), 1952 SEC LEXIS 121, at *2.

117. For the classic early judicial enunciation of the property view of the corporation, *see, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders."). For a contemporary

commercial range of Regulation S-K corporate disclosures (hence the narrow range of mandated corporate transparency), in combination with the business judgment rule, kept courts and most commentators from focusing on firms' specific handling of their "social responsibilities." What wasn't before them largely fell out of view.

Nothing in statutory or judge-made corporate law, however, narrowly limited the broad scope of discretion boards possessed to pursue long-term business goals, including investing in employees, communities, or technologies that would limit environmental damage. But such lawful board discretion was downplayed. For example, shortly after the Delaware Supreme Court affirmed boards' discretion to take account of multi-stakeholder interests in sales of corporate control, in *Unocal Corp. v. Mesa Petroleum Co.*, it downplayed that discretion in *Revlon v. McAndrews and Forbes Holding*.[118] Similarly, when many states (excluding New York and Delaware) enacted so-called "constituency statutes" (following the *Unocal* view), the laws were derided as political sops.[119] Nevertheless, outside the narrow context of sales of corporate control, the management of employees' concerns, treatment of the environment, fair commercial practices, enhanced product safety, supply chain management issues, and even shareholders' actual preferences other than immediate profit maximization—these all fell well within boards' lawful business discretion. Again, the discretion remained largely out of sight—courts were saved from having to weigh in on the propriety of particular board judgment calls by virtue of the business judgment rule's deferential posture. Separate realms thinking made boards' jobs easier, because the mandate was simpler, but this facile simplicity has been shattered.

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defense of shareholders as owners, see, for example, Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897 (2010) (dismissing critiques of the shareholders-as-owners principle). *But cf.* Katherine Pratt, *The Debt-Equity Distinction in a Second-Best World*, 53 VAND. L. REV. 1055, 1116 (2000) ("This view of shareholders as owners of the corporation and bondholders as outside the corporation is, however, based in part on an individualistic view of debtor-creditor relations that was in vogue at the turn of the century but is outmoded today.").

118. *Compare* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (validating boards' discretion to consider many variables, while upholding the board's decision to self-tender, in response to a hostile tender offer, as within the board's fiduciary duties), *with* Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173 (Del. 1986) (holding that the board breached its fiduciary duties when it failed to obtain the best price for shareholders upon approving the sale of the company).

119. For a recent research paper declaring the failure of such statutes, see Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, (Aug. 19, 2020) (working draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155 [https://perma.cc/3SVL-BCNB].

As pressing macro-social problems are becoming highly visible in firms' operating choices, a critical transformation is occurring in corporate affairs. Gone is the neutral trope of technocratic business management as a bulwark of corporate capitalism and social prospering.[120] Ironically, the business-led push to deregulate has itself put greater pressure on individual companies, and hence their boards, to decide where they will draw the line on exploiting their bargaining power, informational advantages, and capacity for regulatory arbitrage. Simultaneously, vastly enhanced sharing of information about corporate abuses, via social media, has created immense reputational risks for firms, boards, and CEOs. For example, publicity over gruesome conditions in supply chains has reached back to tarnish the reputations of even *legally distinct* corporate parents and vendors.[121]

As investors and other stakeholders become more informed, especially thanks to social media, contemporary thinking about corporate governance is increasingly exposing the fallacy of rigid "financial" versus "non-financial" risk categories for business management and investor concern.[122] Media outlets, investors and other corporate stakeholders are rightly indifferent to ascribing reputation-destroying conduct to one formalistic category or the other.

CEOs and boards are taking note. A new global governance regime is emerging in which corporate stakeholders and broader publics expect

120. Even leaders in mainstream governance are reckoning with the obvious shortcomings of the traditional model. *See, e.g.*, Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future*, (Univ. of Pa. Inst. for Law & Econ., Research Paper No. 39, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924 [https://perma.cc/8TBN-EGHT] (outlining proposals to restore fairness and sustainability in corporate investing).

121. See *id*. Consulting firms have geared up to help companies and boards prepare for such reputational disasters. *See, e.g.*, DELOITTE, A CRISIS OF CONFIDENCE (2016), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-global-cm-survey-report.pdf [https://perma.cc/ZH45-QYQH] (surveying 300 board members regarding their preparedness).

122. *See, e.g.*, Mathew Nelson, *The Importance of Nonfinancial Performance to Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 25, 2017), https://corpgov.law.harvard.edu/2017/04/25/the-importance-of-nonfinancial-performance-to-investors/ [https://perma.cc/PDX4-T84E] ("a dwindling percentage of investors believe that it is unclear whether nonfinancial disclosures are material, down substantially from surveys in 2015 and 2013"); Amir Amel-Zadeh & George Serafeim, *Why and How Investors Use ESG Information: Evidence from a Global Survey* (Harv. Bus. Sch. Working Paper, Paper No. 17-079, 2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:30838135 [https://perma.cc/AXW8-63CN] (concluding that investors use ESG metrics to analyze risk).

businesses to cultivate and observe ethical values and standards as part of their social license to operate. These expectations are taking hold irrespective of whether they are mandatory under traditional, hard law regimes.[123] In regard to substance, these values and standards include diversity and inclusion, honesty and transparency, respect for human rights, dedication to product safety, and consideration of environmental sustainability. In regard to process, the "G" in ESG (governance) presumes that some established, reliable and responsive office in the firm, operating under the board's authority, will be exercising conscientious and coherent leadership in these areas. Accordingly, the discourse has shifted from "ensuring (minimal) legal compliance,"[124] to firms' engaging proactively in *managing the corporation's reputation as a resource vital to its future*.[125] In response to these pressures, the role of boards continues to expand, their informational and leadership responsibilities deepen.[126]

2. Stakeholders Care About ESG

The global ESG movement now firmly encompasses the U.S. investment scene. An avalanche of evidence suggests that both institutional and retail investors, along with other stakeholders, care greatly about environmental, social, and governance policies at U.S. firms. Moreover, especially with the support of proxy advisory firms,[127] investors are

123. For a rigorous examination of governance issues pertaining to firms' networks of supply chains, see Virginia Harper Ho, *Team Production and the Multinational Enterprise*, 38 SEATTLE U. L. REV. 499 (2015). *See also* Larry Cata Backer, *Unpacking Accountability in Business and Human Rights: The Multinational Enterprise, the State, and the International Community*, in –ACCOUNTABILITY, INTERNATIONAL BUSINESS OPERATIONS AND THE LAW: PROVIDING JUSTICE FOR CORPORATE HUMAN RIGHTS VIOLATIONS IN GLOBAL VALUE CHAINS 60–85 (Liesbeth Enneking et al. eds., Routledge, 2019) (detailing the concept of accountability as deployed in business governance).

124. *See, e.g.*, Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998) (analyzing the legal context surrounding cost-benefit analysis of whether to conform to legal requirements, without regard for social welfare).

125. *See* Mohammed Benlemlih, Amama Shaukat, Yan Qiu & Grzegorz Trojanowski, *Environmental and Social Disclosures and Firm Risk,* 152 J. BUS. ETHICS 613, 613 (2018) ("[C]onsistent with the predictions of stakeholder theory and the resource-based view of the firm, . . . firms which make extensive and objective E and S disclosures promote corporate transparency that can help them build a positive reputation and trust with their stakeholders.").

126. For a scholarly treatment of corporate boards' responsibilities and opportunities in promoting diversity, from the perspective of Canadian corporate governance, see Aaron A. Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 QUEEN'S L.J. 569 (2010) (considering the intersection of race and gender with corporate law and governance).

127. GLASS LEWIS, 2018 PROXY PAPER GUIDELINES: AN OVERVIEW OF THE GLASS LEWIS

becoming increasingly adept at bringing their interest in ESG to the attention of boards and corporate executives.[128] This rise in ESG investor-activism is well-documented. Once dismissed as eccentrics, ESG investors presently hold trillions of dollars of invested capital, while a growing proportion of new investor funds are also being directed toward ESG investments.[129] In 2016, roughly a quarter of assets under management in Asia, Australia, New Zealand, Canada, Europe, and the U.S. were ESG investments.[130] In the first five months of 2018, sustainable investment funds averaged $924 million in monthly inflows, nearly double the monthly average in 2017.[131]

Even though the numbers reveal enormous investor interest in sustainable investment funds, they tell only part of the story. Again, ESG concerns are influencing not only equity,[132] but also debt investment.[133] Since 2017, Moody's has been increasing the incorporation of ESG metrics

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APPROACH TO PROXY ADVICE: UNITED STATES (2018), https://www.glasslewis.com/wp-content/uploads/2017/11/US_Guidelines_2018.pdf [https://perma.cc/HP29-QR4R].

128. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM (2020), https://www.gao.gov/products/gao-20-530 [https://perma.cc/HG3N-HNZ5] ("Investors are increasingly asking public companies to disclose information on [ESG] factors to help them understand risks to the company's financial performance or other issues, such as the impact of the company's business on communities.")

129. *See* Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#2791d7021695 [https://perma.cc/9DWY-B3GM] (discussing the steady growth of ESG investing).

130. Sara Bernow, *From 'Why' to 'Why Not': Sustainable Investing as the New Normal*, MCKINSEY & CO. (Oct. 25, 2017), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/from-why-to-why-not-sustainable-investing-as-the-new-normal [https://perma.cc/5JNK-7UT8] (labeling integrating the ESG factors as the key to effective investing). The percentage in the U.S. was slightly lower, at 21.6%. *See id*. Even Goldman Sachs has put its professional capital behind ESG investing as a form of longer-term value investing. *See, e.g.*, STEVE STRONGIN & DEBORAH MIRABAL, GOLDMAN SACHS, SUSTAINABLE ESG INVESTING, TURNING PROMISES INTO PERFORMANCE 3 (2020), https://www.goldmansachs.com/insights/pages/gs-research/sustainable-esg-investing-f/report.pdf [https://perma.cc/3DAS-APLP].

131. *See* Jon Hale, *5 Things About Sustainable Investing in the First Half of 2018*, MEDIUM (July 6, 2018), https://medium.com/the-esg-advisor/5-things-about-sustainable-investing-in-the-first-half-of-2018-4f8230709a58 [https://perma.cc/CL7H-VNR2] (discussing Larry Fink's letter to CEOs and how social purpose is an investment in long-term profitability).

132. Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV., May-June 2019, https://hbr.org/2019/05/the-investor-revolution [https://perma.cc/GD2J-JBVU].

133. *See, e.g.*, Stephen Kim Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, 54 STAN. J. INT'L L. 1, 4 (2018) (noting that the green bond market "has grown dramatically since 2013); Matt Wirz, Social Investing Has New Message: Bond Managers See It As a Crucial Ingredient of Risk, WALL ST. J. (June 19, 2018) (describing a "frenzy to adopt ESG" in the bond markets).

into its credit ratings, as are its competitors.[134] In the last few years, even traditional, seemingly conventional institutional investors have stepped up their focus on ESG. As just one example, BlackRock, the largest U.S.-based asset manager, has created new index products allowing ESG tailoring of index investments.[135] Also, as particularly relevant to this Article, it is demanding more ESG engagement by boards.[136] As proxy advisory services are becoming ESG advocates, they too are increasing the voting power and visibility of ESG investor activism.[137] Institutional Shareholder Services now includes environmental and social scores alongside governance scores in the company-specific reports it sends to subscribers.[138] The major business consulting firm Glass Lewis, and even the Business Roundtable itself, are becoming similarly committed to enhanced ESG stewardship.[139]

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134. *See, e.g.*, Press Release, Moody's Investors Service, Moody's Hires Carbon and Corporate Governance Experts to Join its ESG Team (Feb. 28, 2018) (hiring researchers to assess ESG factors); Press Release, Moody's Investors Service, Moody's Appoints Rahul Ghosh to Deepen Work on Impact of ESG Factors in Credit Ratings (Nov. 1, 2017) (detailing how Moody's is "seeking to deepen its commitment to assessing the impact of Environmental, Social and Governance (ESG) considerations in its credit ratings"); Press Release, Moody's Investors Service, Moody's Ratings Incorporate ESG Considerations with Material Credit Implications (Oct. 25, 2017) ("Moody's Investors Service continues to strengthen its commitment to its assessment of [ESG] considerations and how they impact different sectors and debt issuers").

135. *See, e.g.*, Rob Cox, Why BlackRock's Move to Disarm Some Funds Is Good Business, N.Y. TIMES (Apr. 6, 2018), https://www.nytimes.com/2018/04/05/business/dealbook/blackrock-guns.html [https://perma.cc/AK67-RBJA] (describing how BlackRock has created new index funds that exclude firearms manufacturers and sellers).

136. Letter from Larry Fink, Chairman & CEO, BlackRock, to CEOs (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/4BLH-27MX] (requesting that "directors assume deeper involvement with a firm's long-term strategy"). *See also* OFF. OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, "BEST PRACTICES" IN BOARD MATRICES (Aug. 2018), https://comptroller.nyc.gov/wp-content/uploads/2018/08/NYC-Comptrollers-Office-Matrices-Compendium-8-2018-FINAL.pdf [https://perma.cc/4YVJ-5ACB] (advocating on behalf of N.Y.C. pension funds' Boardroom Accountability Project that corporations publish board matrices with information about directors' race, gender, and sexual orientation).

137. For example, Glass Lewis has announced that, beginning in 2019, it will recommend voting against the chair of a company's nominating committee if the company's board has no female members. GLASS LEWIS, *supra* note 127, at 22–3.

138. *See* INSTITUTIONAL SHAREHOLDER SERVICES, ISS QUALITYSCORE: ENVIRONMENTAL & SOCIAL DISCLOSURE QUALITYSCORE FAQ 4 (2018), https://www.issgovernance.com/file/faq/Environmental-Social-QualityScore-FAQ.pdf [https://perma.cc/A83L-Z2NH] (listing three "Environmental Pillar" categories: Management of Environmental Risks and Opportunities—Carbon & Climate; Waste & Toxicity; and Natural Resources; and four "Social Pillar" categories: Product Safety, Quality & Brand; Stakeholders & Society; Labor Health & Safety; and Human Rights).

139. On August 19, 2019, the Business Roundtable announced a new statement of corporate purpose (rejecting the old shareholder primacy view of corporate purpose) signed

In response, a small but growing ESG *ratings industry* has emerged to measure companies' success in managing the pressing moral, social, and operational challenges scrutinized by shareholders, employees,[140] and consumers[141] under the ESG rubric. Increased interest in ESG is being expressed through activists' public relations campaigns, stakeholders' contacts with companies' Investor Relations departments, shareholder proposals, industry surveys, institutional investor mission statements and reports, and companies' own websites and publications. With commentators pressing the SEC to embrace mandatory corporate ESG disclosures, it is likely that the ESG ratings industry will continue to grow, which itself will feed additional investor interest.[142] The phenomenon is well past the stage where it can reasonably be ignored by corporate leaders.

As investors track the ESG conduct of firms, they are tracking risks that may, perhaps instantaneously, become pressing financial problems. Missteps in these domains influence investors', employees', and consumers' choices, and in real time.[143] From this vantage, ESG metrics provide a lens

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by 180 CEOs of major corporations. The signatories committed to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders. Although the statement is merely aspirational (and has been criticized *ex post* amidst the pandemic), it essentially represents an embrace of using ESG as an important metric for longer-term value creation. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUSINESS ROUNDTABLE (Aug. 19, 2019).

140. There is an increasing body of sociological data documenting the connection between worker morale, productivity, and firm value—and morale's relation to ethical and mission-driven cultures. Marion G. Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1184 (2010) ("By managing employees' identities and aligning them with the firm's brand, employers can nurture an emotional attachment to the firm that yields a significant payoff in employee loyalty and productivity, and, ultimately, in customer satisfaction and loyalty.").

141. For an overview of the many CSR/ESG rating outfits, see Client Memorandum, Davis Polk, *ESG Reports and Ratings: What they Are, Why they Matter?* 1 (July 12, 2017), https://www.davispolk.com/files/2017-07-12_esg_reports_ratings_what_they_are_why_the y_matter_0.pdf [https://perma.cc/J2HB-XJBY] ("Most international and domestic public (and many private) companies are being evaluated and rated on their environmental, social and governance (ESG) performance by various third-party providers of reports and ratings."). For commentary on improving the ratings system, see, for example, Thuy-Nga T. Vo, *Rating Management Behavior and Ethics: A Proposal to Upgrade the Corporate Governance Rating Criteria*, 34 J. CORP. L. 1, 1 (2008) (arguing that periodic assessments of managerial behavior and ethics would provide insight into whether the company's directors and officers are performing their responsibilities to advance shareholder interests).

142. See Letter from Cynthia Williams and Jill Fisch to Brent J. Fields, Sec'y of Sec. and Exch. Comm'n (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https ://perma.cc/KQD6-6FT9].

143. *See, e.g.*, Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647 (2016) (showing that accounting for both

through which to assess the quality of a board's leadership in creating the informational and institutional infrastructure of long-term corporate value creation.[144] For boards, attending to the ESG risks investors care about has become an increasingly salient part of the job.

In this vein, the scope of material risks facing companies and boards has broadened significantly in just the last decade. Recent examples of expanded and intensified risk categories include employee exposures to COVID-19, fallout from claims of racial bias (especially damaging in light of Black Lives Matter protests), cybersecurity risks,[145] the opioid crisis,[146] lawsuits and negative publicity from alleged workplace sexual harassment (especially in light of the #MeToo movement),[147] and stakeholders' calls for

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financial and nonfinancial risk can drive firm and portfolio performance, while advancing market transparency and stability); *Why Companies Must Manage Environmental, Social and Governance Risks*, KNOWLEDGE@WHARTON (Oct. 17, 2018), http://knowledge.wharton.upenn.edu/article/companies-need-manage-environmental-social-governance-risks/ [https://perma.cc/92UW-ZQ9X] (using the term "non-traditional risks" to describe risks that emanate from the social sector and from the external stakeholders).

144. For a review of the fiduciary (i.e., legal) underpinning of such board duties, see, for example, Eric J. Pan, *A Board's Duty to Monitor*, 54 N.Y.L. SCH. L. REV. 717 (2009).

145. *See* MAYER BROWN, 2019 PROXY AND ANNUAL REPORTING SEASON: LET THE PREPARATIONS BEGIN 12 (2018), https://www.mayerbrown.com/files/Publication/e6cedd0b-c795-49ab-bd0b-4bdb7930d157/Presentation/PublicationAttachment/9175842f-d8c1-4046-a23e-5fb8c1d62c82/proxy-reporting.pdf [https://perma.cc/KT7M-J2JP] ("cybersecurity is recognized as a pervasive issue that impacts companies of all types, generating risks from both an economic and security perspective"); Commission Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8166 (Feb. 26, 2018) (codified as amended at 17 C.F.R. pts. 229 and 249) (providing guidance to public companies about disclosing risks associated with cybersecurity), https://www.sec.gov/rules/interp/2018/33-10459.pdf [https://perma.cc/3U4X-79K4].

146. Several institutional investors banded together in 2017 to create *Investors for Opioid Accountability*, which has focused on activism at opioid manufacturers and distributors, and at companies that manufacture treatments for opioid abuse. *See* AS YOU SOW, PROXY PREVIEW 48–49 (2018) [hereinafter PROXY PREVIEW 2018]. During the 2018 proxy season, AmerisourceBergen published two shareholder proposals related to its opioid crisis risk in its Proxy Statement; both major proxy advisory firms, ISS and Glass Lewis, supported the proposals. *See* Press Release, Investors for Opioid Accountability, ISS, Glass Lewis Support Investors for Three Opioid Accountability Shareholder Proposals at AmerisourceBergen, (Feb. 14, 2018), https://iccr.org/sites/default/files/blog_attachments/ioa_statement_on_iss_and_glass_lewis_support_for_amerisourcebergen_shareholder_proposals_final_2-14-18.pdf [https://perma.cc/D5MR-BEUF]. Both proposals won a majority of independent shareholder votes, though neither met the threshold for shareholder approval. *See* AmerisourceBergen Corp., Proxy Statement (Schedule 14A) 71-77 (Jan. 19, 2018) (reciting Proposals 7 and 8 related to opioid distribution); AmerisourceBergen Corp., Quarterly Report (Form 8-K) (Mar. 1, 2018) (reporting voting results).

147. *See, e.g.,* David A. Katz & Laura A. McIntosh, *Shareholder Activism Is the Next Phase of #MeToo*, N.Y.L.J. (Sept. 26, 2018) (describing the role shareholders have played in companies adopting socially progressive policies). The Council of Institutional Investors has

or complaints about firms' and CEOs' political activities. In addition, some ESG matters which once were regarded as "social"—climate change being the most salient—now squarely present ongoing material financial risks to companies' strategic direction and operational performance. The separate realms concept is being debunked by the erasure of a clear demarcation of social and financial risks for firms. A remarkable set of events in 2020—a global pandemic, a nationwide racial justice crisis, operational turmoil in most major U.S. industries, and an extraordinarily polarizing Presidential election—has forced corporate America to confront ESG risks on a new scale. Even just one of these events would have demanded heightened board engagement at big companies across the economy. The coincidence of all them simultaneously has likely permanently elevated expectations for corporate leadership, hence improved board governance. Empirical evidence is emerging to attest to the shift. In one survey of corporate directors, from summer 2020, thirty percent reported that the time they spent on board service had at least doubled.[148]

Many companies have responded to the escalated 2020 Black Lives Matter protests with urgency, for example, producing value statements, social media communications, pledges, corporate donations, and political mobilization.[149] Yum! Brands, which owns chain restaurants KFC, Pizza Hut, and Taco Bell, issued a "call for unity" in May 2020,[150] and pledged

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sought to communicate to boards the necessity of tone at the top and having a board level plan to deal with serious claims of sexual harassment in the work environment. *See* ROSEMARY LALLY & BRANDON WHITEHILL, COUNCIL OF INSTITUTIONAL INVS., HOW CORPORATE BOARDS CAN COMBAT SEXUAL HARASSMENT 3 (2018), https://www.cii.org/files/publications/misc/03_01_18_corporate_boards_sexual_harassment.pdf [https://perma.cc/5AGR-DYPH].

148. Paula Loop, *Facing the COVID-19 Challenge in Corporate Boardrooms*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 11, 2020), https://corpgov.law.harvard.edu/2020/08/11/facing-the-covid-19-challenge-in-corporate-boardrooms/ [https://perma.cc/ZC4P-RN3B] (reporting that 76% of directors spent more time on their director duties according to a PricewaterhouseCoopers director survey).

149. *See Corporate America Agrees Black Lives Matter. What Comes Next?*, N.Y. TIMES (Aug. 23, 2020), https://www.nytimes.com/2020/08/23/insider/business-racism.html?action=click&module=Well&pgtype=Homepage&section=Reader%20Center [https://perma.cc/5Q8Q-7PCZ]; Shan Li, *Major Companies Commit to Hiring 100,000 Low-Income New Yorkers by 2030*, WALL ST. J. (Aug. 11, 2020), https://www.wsj.com/articles/major-companies-commit-to-hiring-100-000-low-income-new-yorkers-by-2030-11597158094 [https://perma.cc/E736-4N66]; Tiffany Hsu, *Corporate Voices Get Behind 'Black Lives Matter' Cause*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html [https://perma.cc/5Z3W-EWXX].

150. *A call for unity*, YUM! (May 31, 2020), https://www.yum.com/wps/portal/yumbrands/Yumbrands/news/company-stories-article/A+call+for+unity [https://perma.cc/V3U8-KKBZ].

$100 million to "fight inequality" in June.[151] In August, it created the role of Chief Equity Officer at Pizza Hut, and launched an initiative to bring anti-racist education resources to schools.[152] Presumably with the assent of their boards, scores of corporate CEOs spoke out in favor of racial equality and pledged their firms would take concrete actions to improve their record.[153] Institutional Shareholder Services has put out for comment a proposal that, beginning in February 2022, it would recommend a vote against a nominating committee chair where no ethnic or racially-diverse board candidate has been put forward.[154]

Consistent with the separate realms paradigm, corporate social responsibility (an antecedent to ESG) operated largely as a form of marketing. Accordingly, corporations commonly made social commitments mostly in their communications to consumers.[155] But companies are presently going further, making social commitments responsive to the interests and activism of their investors and employees, as well as consumers and other publics.[156] Given the salience of these commitments, and the stakes

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151. *See Yum! Invests $200 Million to Fight Inequality by Unlocking Opportunity for Employees and Communities*, YUM! (June 25, 2020), https://www.yum.com/wps/portal/yumbrands/Yumbrands/news/company-stories-article/Yum+invests+100+million+to+fight+inequality+by+unlocking+opportunity+for+employees+and+communities [https://perma.cc/8ZCF-LM2W]; *Yum! Brands pledges $3 million to advance equality and social justice*, YUM! (June 5, 2020), https://www.yum.com/wps/portal/yumbrands/Yumbrands/news/company-stories-article/Yum%21+Brands+pledges+3+million+to+advance+equality+and+social+justice [https://perma.cc/B26F-VKNL].

152. PIZZA HUT, *Pizza Hut and First Book Launch Collection Of Antiracism Resources For Educators*, PR NEWSWIRE (Aug. 19, 2020), https://www.prnewswire.com/news-releases/pizza-hut-and-first-book-launch-collection-of-antiracism-resources-for-educators-301114559.html [https://perma.cc/N8MH-LZTZ].

153. Sherrell Dorsey, *Twilio, Box, Spotify, and Other Tech CEOs Speak Out Against Racism and Police Brutality; Others Stay Silent*, THE PLUG (May 31, 2020), https://tpinsights.com/2020/05/31/twilio-box-spotify-and-other-tech-ceos-speak-out-against-racism-and-police-brutality-others-stay-silent/ [https://perma.cc/8ZAY-VVVA].

154. INSTITUTIONAL SHAREHOLDER SERVICES, PROPOSED ISS BENCHMARK POLICY CHANGES FOR 2021 6–7 (2020), https://www.issgovernance.com/file/policy/proposed-benchmark-policy-changes-2021.pdf [https://perma.cc/TBT2-39XH].

155. For a recent, critical appraisal of consumer-facing corporate commitments to social justice, see Marcia Narine Weldon, *Wokewashing and the Board*, BUS. L. PROF BLOG (AUG. 14, 2020), https://lawprofessors.typepad.com/business_law/consulting/ [https://perma.cc/B9J4-TLFQ].

156. *See, e.g.*, Loren Appin, *Majority of Tech Workers Expect Company Solidarity With Black Lives Matter*, TECHCRUNCH (Aug. 6, 2020), https://techcrunch.com/2020/08/06/79-of-tech-workers-expect-company-solidarity-with-black-lives-matter/ [https://perma.cc/9769-PLT4]; Kimberly Chin, *Twitter, Square to make Juneteenth a Company Holiday*, WALL ST. J. (June 9, 2020), https://www.wsj.com/articles/twitter-square-to-make-juneteenth-a-corporate-holiday-11591745358 [https://perma.cc/NUG9-AXX3].

if things go wrong, or if the statements are unheeded by corporate actors, there will be increasing pressure for boards routinely to review and approve them—not doing so will be regarded as irresponsible.

A seemingly amorphous matter like the cultivation of an ethical corporate culture (conventionally described as "tone at the top"), might have seemed exogeneous to the essential commercial work to be done by the board and senior management. But disasters of the kind that have occurred at and damaged too many name-brand firms demonstrate otherwise—including the corporate frauds at Enron, WorldCom, and AIG,[157] the emissions scandal at Volkswagen, failed safety protocols at Boeing and BP (formerly British Petroleum), and sexual harassment allegations at CBS.[158] These corporate disasters attest to the challenges and urgency of establishing ethical infrastructures and superstructures atop sprawling, decentralized business enterprises.[159] As discussed further in Part II, this is not a responsibility which can be managed appropriately at a level below the upper echelons of an enterprise. In this regard, ESG can be seen, in part, as a kind of "soft law" modality for addressing the trenchant risks inherent in international business firms and globalized supply chains.[160] The magnitude of these problems, and their impact on companies, perforce enlists boards—as, by law, the most senior authorities in corporations—in creating new ESG policies and

157. Am. Int'l Group, Inc. v. Greenberg, 965 A.2d 763 (Del. Ch. 2009) (describing AIG as a "criminal organization").

158. Rachel Abrams, *CBS Inquiry Into What Went Wrong in Les Moonves Era Hits Snags as It Advance*s, N.Y. TIMES (Oct. 26, 2018) ("The #MeToo movement may have affected CBS Corporation more than any other media company over the past year."). For discussion of the board's role in establishing and implementing an ethical culture in business firms, see Lynne L. Dallas, *Enron and Ethical Corporate Climates*, in ENRON CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

159. David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J. L. & BUS. 317 (2016) (employing recent research in behavioral and organizational ethics to present a model of organizations' ethical infrastructures that integrates the ideas of compliance and the fostering of ethical corporate cultures).

160. The pandemic has emphasized the operational risks attendant to firm's reliance on far-flung supply chains. But before the pandemic, new risks associated with business models deeply reliant on distant supply chains—including those highlighted under ESG metrics—were becoming more salient, and hence the subject of consulting firms' advisory practices. *See, e.g.*, Susan Lund et al., *Risk, Resilience, and Rebalancing in Global Value Chains*, MCKINSEY GLOBAL INSTITUTE (Aug. 6, 2020), https://www.mckinsey.com/business-functions/operations/our-insights/risk-resilience-and-rebalancing-in-global-value-chains# [https://perma.cc/Q6QP-MM4G] ("New research from the McKinsey Global Institute explores the rebalancing act facing many companies in goods-producing value chains as they seek to get a handle on risk—not ongoing business challenges but more profound shocks such as financial crises, terrorism, extreme weather, and, yes, pandemics.").

vehicles for leadership.

At the time of this Article's publication, special criticism is being directed at technology companies, both in regard to their overall power,[161] social and political impacts,[162] and failures to safeguard customers' private personal information.[163] These failures are materially affecting tech giants' stock prices and commanding board-level concern.[164] As an example, after the 2016 election, the audit committee at Facebook was belatedly informed by the company's head of security about Russian-linked activity on the social media company's network. The tardy revelation "prompted a humiliating boardroom interrogation" of the company's CEO and controlling shareholder, Mark Zuckerberg, and its COO, Sheryl Sandberg, along the lines of 'what do you know and when did you know it?'[165] The Facebook

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161. Ryan Tracy, *Big Tech's Power Comes Under Fire at Congressional Antitrust Hearing*, WALL ST. J. (July 29, 2020), https://www.wsj.com/articles/tech-ceos-defend-operations-ahead-of-congressional-hearing-11596027626 [https://perma.cc/M9HS-YNGZ].

162. Micah Maidenberg, *Facebook Sees Growing Ad Boycott in Protest Against Handling of Speech*, WALL ST. J. (June 30, 2020), https://www.wsj.com/articles/clorox-to-halt-facebook-ads-through-year-end-joining-advertiser-push-on-content-11593459934 [https://perma.cc/Q8GU-WNTE].

163. Sam Schechner, *Twitter Data Case Sparks Dispute, Delay Among EU Privacy Regulators*, WALL ST. J. (Aug. 20, 2020), https://www.wsj.com/articles/twitter-data-case-sparks-dispute-delay-among-eu-privacy-regulators-11597921201 [https://perma.cc/BUP4-JX7L].

164. Nevertheless, pandemic-driven isolation is boosting many technology companies' value. For a summary of data privacy scandals that affected Facebook's stock price in 2018, including a $36 billion loss of market capitalization after the Cambridge Analytica scandal became public in March, see Salvador Rodriguez, *Here Are the Scandals and Other Incidents That Have Sent Facebook's Share Price Tanking in 2018*, CNBC (Nov. 20, 2018), https://www.cnbc.com/2018/11/20/facebooks-scandals-in-2018-effect-on-stock.html [https://perma.cc/ACZ9-6AJF]. Giant fines levied by European authorities under the GDPR have also caught boards' attention. *See, e.g.*, Adam Satariano, *After a Data Breach, British Airways Faces a Record Fine*, N.Y. TIMES (July 8, 2019) (discussing the context behind British Airways' $230 million fine); Adam Satariano, *Google Is Fined $57 Million Under Europe's Data Privacy Law*, N.Y. TIMES (Jan. 21, 2019). *See generally* James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137 (2009) (explaining how Facebook users socialize on the site, why they misunderstood the risks involved, and how their privacy suffers as a result).

165. According to an investigation by the *New York Times*, the disclosures "set off [Erskine] Bowles," the Committee's chair, who "pelted questions" at Zuckerberg and Sandberg at a full board meeting later in the same day. *See* Sheera Frenkel, Nicholas Confessore, Cecilia Kang, Matthew Rosenberg & Jack Nicas, *Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis*, N.Y. TIMES (Nov. 14, 2018). According to the N.Y. Times' investigation, Alex Stamos, Facebook's head of security, "acting on his own," led an investigation to uncover the scope of Russian activity on Facebook, then met with top officers of the company, including COO Sheryl Sandberg and Zuckerberg to report his findings. Publicly, company officials played down the role of Russian-linked groups before the 2016 election. "By August 2017, Facebook executives concluded that the situation had become what one called a 'five-alarm fire.'" *Id.*

story underscores that boards increasingly expect to be pro-actively informed about threats to corporate reputation—to the point of challenging the company's controlling shareholder in the above instance. Put simply, boards cannot afford to be and should not accept being blindsided by reputational risks and scandals. Instead of passive monitors surveilling managerial agency costs, boards are commanding upgrades in internal control systems and elevated standards of candor in reporting up the chain of leadership, even if they make for difficult conversations in the boardroom.

3. Demands for ESG Information

The SEC is presently enabling certain social matters to enter the public domain and investor consciousness via the shareholder proposal system and traditional securities calendar reporting (e.g., Form 10-K, Form 10-Q, and the Annual Report to shareholders).[166] As mentioned above, ESG shareholder proposals were excludable from the corporate proxy if they covered matters not within the scope of shareholder power, or matters touching on the firm's ordinary business affairs.[167] In the 1970s, furthermore, the SEC changed the rules to exclude proposals not "significantly related" to a company's business.[168] These mind-numbingly opaque provisions shut down many shareholder-initiated proposals relevant to ESG, since they could neither be too central to nor too extraneous to a company's business. The disfavor shown ESG shareholder proposals also helped keep them at the margins of boards' awareness,[169] unlike today

166. In August 2020, the SEC announced amendments to several provisions of Regulation S-K, including amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor disclosures (Item 105). *See* Modernization of Regulation S—K Items 101, 103, and 105, 84 Fed. Reg. 44,358 (proposed Aug. 23, 2019) (to be codified at 17 C.F.R. pts. 229, 239, and 240. Significantly, the amendments accomplished so little in raising the standard of mandatory, comparable ESG disclosure that two of the five SEC Commissioners published a dissent to the final rule. *See* Public Statement, Caroline Crenshaw, Comm'r, Sec. and Exch. Comm'n, Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105 (Aug. 26, 2020), https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k [https://perma.cc/8WAC-Q7YA].

167. The ordinary business exclusion was codified by the SEC in January 1954. *See* Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4979 (Jan. 6, 1954), 19 Fed. Reg. 246, 247 (1954).

168. Adoption of Amendments to Proxy Rules, Exchange Act Release No. 9784, 1972 SEC LEXIS 155 (Sept. 22, 1972).

169. For an example of the older, intensive condemnation of there being a legitimate, existing legal basis for, or proper use of shareholder proposals to influence corporate governance, see George W. Dent, *Proxy Regulation in Search of a Purpose*, 23 GA. L. REV. 815 (1989).

(especially with the SEC's having flagged the propriety of boards' properly attending to them).

The annual number of ESG shareholder proposals submitted to U.S. public companies has been on a slow upward climb.[170] Each proxy season in the U.S., shareholders now ordinarily submit more ESG proposals than traditional agency cost governance proposals.[171] Moreover, total shares voted in support of ESG proposals have increased steadily for two decades. In 2000, ESG proposals that reached a vote averaged 7.6% shareholder support,[172] whereas in 2018, the shareholder support averaged as high as 32.8%.[173] In a record high, in 2018, ten ESG shareholder proposals won a majority of independent shareholder support.[174]

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170. Though reliable numbers are hard to come by, *Proxy Preview*, published annually by As You Sow, The Sustainable Investments Institute, and Proxy Impact, provides an annual count of ESG shareholder proposals submitted to U.S. public companies by February of proxy season. It counted 429 shareholder resolutions for the 2018 proxy season. *See* PROXY PREVIEW 2018, *supra* note 146, at 13 (noting that "a dozen or so more [proposals] are likely to be filed for meetings that occur after June"). Compare this to 2006, when *Proxy Preview* counted 357 ESG shareholder proposals. *See* AS YOU SOW, PROXY PREVIEW 11 (2015). The Gibson Dunn law firm has also published ESG proposal numbers: for 2018, it counted 202 "social" proposals, 139 environmental proposals, and 92 proposals related to corporate political engagement, totaling 433. *See* GIBSON DUNN, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2018 PROXY SEASON 3–4 (2018), https://www.gibsondunn.com/wp-content/uploads/2018/07/shareholder-proposal-developments-during-the-2018-proxy-season.pdf [https://perma.cc/2H7J-9DYL]. Gibson Dunn also identified 20 proposals that requested using social or environmental performance metrics to set executive compensation. *Id*. Including these in the count would bring the total to 453 for 2018. In its 2020 study, the GAO estimated that 5% of the S&P Composite 1500 received ESG-related proposals in the 2020 proxy season. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-530, DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 14 (2020). Of these, 28% received shareholder support and no ESG proposal won more than 50% of the vote. *Id.* The GAO's data likely relates to proposals published in companies' proxy statements, not proposals "received" by companies.

171. *See* GIBSON DUNN, *supra* note 170, at 3 (showing that in 2018, ESG proposals were the "most frequently submitted" type of proposal); *see also* HAAN, *supra* note 13, at 301 (noting the submission of more ESG than governance proposals in 2014 and 2015).

172. For a discussion of the evolution of shareholder support for ESG proposals, see HAAN, *supra* note 13, at 294.

173. *See* GIBSON DUNN, *supra* note 170 (providing an overview of shareholder proposals submitted to public companies during the 2018 proxy season). *But see* ISS ANALYTICS, A PRELIMINARY REVIEW OF THE 2018 US PROXY SEASON 6 (2018) (presenting evidence that overall shareholder support for ESG proposals was 24% in the 2018 proxy season).

174. *See* INTERFAITH CTR. ON CORP. RESPONSIBILITY, CATALYZING CORPORATE CHANGE 1 (2018), https://www.iccr.org/sites/default/files/iccr_-_catalyzing_corporate_change_2018_073018.pdf [https://perma.cc/KWC7-8F4Z] (showing that successful shareholder proposals included the following: Sturm Ruger (gun violence), AmerisourceBergen (two proposals related to opioids) (majority of independent votes), Tyson (water) (majority of independent votes), Kinder Morgan (climate change), Genessee & Wyoming (climate change), Middleby

ESG awareness is being pressed not only from within the investor and stakeholder community but also from the top of government. In the Dodd-Frank Act, Congress pushed the SEC to require enhanced socially-relevant disclosures, particularly in relation to U.S. companies' use of conflict minerals,[175] and regarding recordkeeping payments by U.S. companies to foreign governments for natural resources.[176] More generally, the SEC seems no longer wedded to the view that socially significant matters are discretely separable from traditional business ones. In 2013, the Commission published its "Disclosure Effectiveness" initiative, which sought to evaluate and potentially reform corporate disclosures.[177] When in 2016 the SEC issued the *Concept Release on Business and Financial Disclosure Required by Regulation S-K*, it sought public comment regarding

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(climate change), Anadarko Petroleum (climate change), Ameren (water/coal ash), and Range Resources (methane)). *See also* ISS ANALYTICS, *supra* note 173, at 6 ("The number of majority-supported E&S resolutions rose over 2017 levels, from six to 10, tying the 2016 season for most majority-supported E&S proposals."); EY CENTER FOR BOARD MATTERS, 2018 PROXY SEASON REVIEW 4 (2018) (showing that 6% of ESG shareholder proposals that went to a vote won a majority of the vote).

175. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (codified as amended at 15 U.S.C. §§ 78m(p), 78m note (Conflict Minerals). For the SEC's overview of the (ill-fated) conflict minerals disclosure rule, *see* Nat'l Ass'n of Mfrs. v. Sec. and Exch. Comm'n, No. 13-CF-000635 (D.D.C. 2017) (explaining, *inter alia*, how the rule ran into first amendment problems).

176. The SEC's codification of the U.S. legislative counterpart to the international Extractive Industries Transparency Initiative was quashed by the Trump Administration through executive action. The international initiative, however, remains in force. *See, e.g.*, Kelsey Landau & Victoria Bassetti, *The Evolution of The EITI And Next Steps For Tackling Extractive Industries Corruption*, BROOKINGS (July 30, 2020), https://www.brookings.edu/blog/up-front/2020/07/30/the-evolution-of-the-eiti-and-next-steps-for-tackling-extractive-industries-corruption/ [https://perma.cc/YS85-S9YN] (analyzing the effectiveness of EITI and ways in which it can further improve). One of the authors of this Article testified before the House Financial Services Committee in favor of the Rule's adoption. *See* Faith Stevelman, Professor, New York Law School, Prepared Testimony before the United States House of Representatives Committee on Financial Services (June 26, 2008), http://archives-financialservices.house.gov/hearing110/stevelman.pdf [https://perma.cc/3H37-KUSQ].

177. *See* SEC. & EXCH. COMM'N STAFF, REPORT ON REVIEW OF DISCLOSURE REQUIREMENTS IN REGULATION S-K (2013), https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf [https://perma.cc/2WCV-FMEH] (describing the proposed amendments that would change the disclosure requirements in Regulation S-K). In fall 2020 the SEC issued its revisions to S-K, altering only human capital disclosure—and in small measure—to expand ESG disclosure. The conservative tack produced a dissent from two of the three commissioners. *See* Public Statement, Allison Herren Lee, Comm'r, Sec. and Exch. Comm'n, Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020), https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26 [https://perma.cc/YQZ9-RMDB].

expanded ESG reporting.[178] In the face of an outpouring of comment letters received by the SEC, on October 1, 2018, law professors Cynthia Williams and Jill Fisch submitted a rulemaking petition to the SEC in favor of expanded ESG disclosure.[179] Their petition was signed by investors and associated organizations representing more than five trillion dollars in assets under management—capital that many boards would like their firms to attract. In late 2017, the SEC issued guidance that encouraged a company seeking to exclude an ESG shareholder proposal to include in its request for permission to do so, the board's analysis of the substance and significance of the ESG policy issues raised.[180] Although a second staff bulletin in 2018 noted that the board's analysis is voluntary in this setting,[181] the clear implication is that board review of corporate ESG exclusionary efforts is an important feature of governance.[182]

4. Corporations in the Political Sphere

On the ground, large corporations themselves did not respect the separate realms notion. Milton Friedman's 1970 essay conceded that business had to observe "the rules of the game," but corporations were mobilizing, behind the scenes, to alter laws, regulations, and judicial standards of review in favor of unrestrained capital acquisition.[183] This tactical mobilization was captured in Louis F. Powell, Jr.'s 1971 memorandum, which asserted that an "attack" on the American economic system required businesses to mobilize for political combat.[184] This

178. SEC. & EXCH. COMM'N, CONCEPT RELEASE ON BUSINESS AND FINANCIAL DISCLOSURE REQUIRED BY REGULATION S-K (2016).

179. Letter from Cynthia Williams and Jill Fisch to Brent J. Fields, Sec'y of Sec. and Exch. Comm'n (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https://perma.cc/JZ4E-D544].

180. SEC. AND EXCH. COMM'N STAFF, LEGAL BULLETIN NO. 141 (CF) (2017), https://www.sec.gov/interps/legal/cfslb14i.htm [https://perma.cc/4GVS-2JDT] (listing that for exemptions under the "ordinary business" exception, Rule 14a-8(i)(7), "going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance"; for exemptions under the "economic relevance" exception, Rule 14a-8(i)(5), "we would expect a company's Rule 14a-8(i)(5) no-action request to include a discussion that reflects the board's analysis of the proposal's significance to the company," and the "explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned").

181. SEC. AND EXCH. COMM'N STAFF, LEGAL BULLETIN NO. 14J (CF) (2018), https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals [https://perma.cc/N46L-86JJ].

182. For further discussion, see discussion *infra* Part II.F.

183. FRIEDMAN, *supra* note 112.

184. LEWIS F. POWELL, JR., CONFIDENTIAL MEMORANDUM: ATTACK ON AMERICAN FREE

mobilization occurs, then and now, not only through corporate-funded PACs, but also corporate-funded think tanks and politically-active foundations (the Federalist Society being a salient example).[185] National lobbying efforts by businesses also radically expanded in this period.[186] The American Legislative Exchange Council (ALEC), one of the most adept, pro-business lobbyists, soon went on the offense, rather than remaining reactive in responding to law and regulations. Most pertinent here, commentators rarely, if ever, asked who within firms was charged with overseeing these political initiatives, or whether shareholders supported them.

Corporate political mobilization has become increasingly controversial in the public sphere as it has grown in visibility. Corporate political spending and CEOs' public political statements have therefore become serious reputational concerns, attracting attention not only from politicians but also from journalists, watchdog organizations, investors, customers, and employees.[187] Concern about corporate political activity is now so salient

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ENTERPRISE SYSTEM 25–6 (1971), https://scholarlycommons.law.wlu.edu/powellmemo/1/ [https://perma.cc/3YRH-PENF] ("Business must learn the lesson . . . that political power is necessary; that such power must be assiduously cultivated; and that when necessary, it must be used aggressively and with determination—without embarrassment and without the reluctance which has been so characteristic of American business."). The history of such mobilization is still being written. *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (Ira Katznelson, Martin Shefter & Theda Skocpol eds., 2008) (describing the conservative legal movement's tremendous organizational strength, endurance, and success in influencing policy).

185. A notable recent example is the Global Antitrust Institute which receives (but doesn't disclose) substantial funding from Google, Amazon and Qualcomm. *See* Daisuke Wakabayashi, *Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech*, N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html [https://perma.cc/2QEM-3A2M]. *See also* Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 653–57 (1997) (describing the legal basis for think tanks, foundations, and other politicized nonprofit organizations to receive corporate funds without the corporations having to make any disclosures).

186. The pharmaceutical industry spent more than $280 million on lobbying in 2018, more than any other industry. In every year since 2000, the U.S. Chamber of Commerce was the top spender, laying out $95 million in 2018. *See* Karl Evers-Haillstrom, *Lobbying Spending Reaches $3.4 Billion in 2018, Highest in Eight Years*, OPENSECRETS (Jan. 25, 2019), https://www.opensecrets.org/news/2019/01/lobbying-spending-reaches-3-4-billion-in-18/ [https://perma.cc/6ECS-3SU9]. For an in-depth look at the inefficiencies if not corrupting effects of lobbying, see Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012).

187. *See* Letter from Committee on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Aug. 3, 2011); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?* 124 HARV. L. REV. 83 (2010); John C. Coates, IV, *Corporate Speech & the First Amendment: History, Data,*

that, in one recent example, major companies rushed to claw back donations they had made to an incumbent U.S. Senate candidate from Mississippi after she was accused of making racist remarks.[188]

This Article's embrace of information governance does not condemn or support corporate political activity, but rather affirms its inherent materiality and hence *relevance to governance at the board level.* Especially after the *Citizens United v. FEC* decision in 2010, there has been increasing recognition that corporate political activity requires oversight at the highest level of governance. Investor groups have waged successful campaigns demanding that boards of directors increase their supervision of political spending.[189] In 2016, the Business Roundtable formally endorsed board oversight of political spending.[190] Last year, forty-seven percent of S&P 500 companies were on record as employing some form of board oversight of political spending, with thirty-five percent assigning the review of trade association expenditures to a board-level committee.[191] *Citizens United* helped catalyze this change by significantly raising interest in corporate political spending—a development that made political spending qualitatively material and therefore "worthy of the board's attention."[192] Investor activism on corporate political spending is among the strongest categories of ESG

and Implications, 30 CONST. COMM. 223 (2015). For a basic explanation of how businesses spend money to influence elections, illustrated with data from the 2012 federal election, see Sarah C. Haan, *Opaque Transparency: Outside Spending and Disclosure by Privately-Held Business Entities in 2012 and Beyond*, 82 U. CIN. L. REV. 1149, 1158–71 (2014).

188. *See, e.g.*, Rachel Siegel, *Walmart Wants Campaign Donation Back from Sen. Hyde-Smith After Her Support of Public Hangings*, WASH. POST (Nov. 20, 2018), https://www.washingtonpost.com/business/2018/11/20/walmart-wants-campaign-donation-back-sen-hyde-smith-after-her-support-public-hangings/ [https://perma.cc/K39H-YDYV] (expanding on Walmart, Boston Scientific, and Union Pacific demanding the return of their donations).

189. For example, the nonprofit Center for Political Accountability ("CPA") made board oversight a core principle of a campaign it launched shortly after *Citizens United* came down. *SEE* CTR. FOR POLITICAL ACCOUNTABILITY, THE CPA INDEX OF CORPORATE POLITICAL ACCOUNTABILITY AND DISCLOSURE: HOW LEADING COMPANIES NAVIGATE POLITICAL SPENDING IN THE WAKE OF CITIZENS UNITED 7–9 (2011) (describing the increased need for board oversight in regard to political spending and duties to shareholders); *see also* Haan, *supra* note 13, at 275–76 (2016) (describing the CPA's campaign of shareholder activism).

190. BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 28 (2016) ("To the extent that the company engages in political activities, the board should have oversight responsibility. . . .").

191. CTR. FOR POLITICAL ACCOUNTABILITY, THE 2019 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY 19, 27 (2019).

192. THE CONFERENCE BOARD, CORPORATE POLITICAL SPENDING 14 (2d ed. 2015) ("Many make the case that the level of investor interest and reputational risk make the issue material, elevating the matter to the board level."). For discussion of the strange governance dimensions of "corporate" political speech, see Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451 (2019).

activism—receiving attention not only from shareholders, but also proxy advisory firms, commentators, and the media, thus further focusing boards' attention on their company's spending and oversight systems.[193] Concern over excess, misdirected, or polarizing corporate political spending is vivid even from the agency cost perspective. [194]

Despite worries about adverse publicity, agency costs, and political corruption, there is strong public support for companies to be vocal on "political" issues raising fundamental ethical concerns. In the summer of 2019, 206 major corporations signed a U.S. Supreme Court amicus brief in a trio of cases contesting the relevance of LGBTQ rights to civil rights and anti-discrimination laws.[195] In another salient example, many CEOs who served on President Trump's business advisory council felt compelled to resign from their positions after the President refused to denounce the Charlottesville white supremacist protesters in a timely, forceful fashion.[196] In October 2018, several CEOs who had planned to attend a conference in Saudi Arabia had to make rushed, newsworthy choices about whether to cancel after the murder of journalist Jamal Khashoggi was credibly linked to Saudi Crown Prince Mohammed bin Salman.[197] According to Andrew Ross Sorkin in the *New York Times*, "businesses have faced perhaps their thorniest conundrum, caught between a global outcry, a vacuum of leadership from Washington and a country [Saudi Arabia] with a long memory."[198] These examples illuminate the high stakes surrounding firms' and CEOs' political actions. This is activity which clearly exceeds the "ordinary business" scope

193. *See* HAAN, *supra* note 13, at 265 n.7 (stating that proposals on corporate political spending constituted the largest category of ESG shareholder proposals in the 2016 proxy season); AS YOU SOW, PROXY PREVIEW 5 (2019) (stating the same for 2019).

194. *See* John Coates, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657 (2012) (analyzing the effect of political activity on value for shareholders and firms in general); *see also* Marina A.B. Gama, Gisele W. Galilea, Rodrigo Bandeira-de-Mello & Rosilene Marcon, *With Other People's Money: Campaign Finance as an Agency Problem*, 45 J. GEN. MGMT. 40 (2019) (validating concerns that political campaign donations confer substantial benefits on corporate insiders).

195. Bostock v. Clayton Co., 140 S. Ct. 1731, 1760 n.12 (2020) (Alito, J., dissenting).

196. *See, e.g.*, James B. Stewart, *C.E.O.s Long Avoided Politics. Trump is Changing the Calculus*, N.Y. TIMES (Aug. 16, 2017), https://www.nytimes.com/2017/08/16/business/trump-chief-executives-companies.html [https://perma.cc/2MEP-Y6C8] (quoting Jeffrey A. Sonnenfeld) (noting that "boards were hastily meeting to map strategy," and "having ad hoc conference calls.").

197. *See* Rory Jones & Summer Said, *Wall Street Returns to Saudi Summit, but Khashoggi Murder Deters Some Executives*, WALL ST. J. (Oct. 28, 2019) (describing cancellations in both 2018 and 2019).

198. Andrew Ross Sorkin, *When Business Executives Become Reluctant Statesmen*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/business/dealbook/saudi-arabia-journalist-business-executives.html [https://perma.cc/P73A-TRAY].

of discretion possessed by executive officers without board discussion and resolution.

The success that corporations have had in shaping public opinion through political spending has made it impossible to ignore the influence of corporations on public policy, law, and government. In the wake of *Citizens United*, there is a palpable resurgence of interest in observing the ways that corporate interests dominate political discourse and, possibly, outcomes.[199] If nothing else, corporate political activity since the 2010 Supreme Court decision in *Citizens United v. FEC* has made clear that firms have difficult choices to make about how they will cultivate political influence and power, choices which cannot legitimately be delegated by the board.

In the immediate aftermath of the 2020 presidential election, the U.S. is facing an employment and small business crisis of a level rivaling the Great Recession—hence widespread, national attention to the nature and influence of corporate political activity is certain to be high.[200] Because directors can easily hold an impromptu meeting remotely, it is legally and tactically difficult to justify why CEOs would make these salient choices, on their own or on the firm's behalf, without obtaining the advice and consent of their boards.

Corporate law and governance did not traditionally attend to political action by firms or CEOs. Corporate law presumed that managers spent corporate funds in politics and philanthropy in the shareholders' interest. Hence, from the perspective of agency theory it was masked as noncontroversial.[201] There were few relevant corporate law standards or cases governing firms', CEOs', or boards' political speech. With corporate law preoccupied by agency cost concerns, inquiry into corporate politicking fell to other domains—election law, administrative law, or constitutional law. Shaped by over-arching concerns about liberty and democracy, these other bodies of authority gave little focus to the particularistic shape of corporate-based political activity.[202] Legal scholars are still playing catch-up to understand the ways in which businesses shape and influence law,

199. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

200. *See* Philipp Carlsson-Szlezak, Paul Swartz & Martin Reeves, *Taking Stock of the Covid-19 Recession*, HAR. BUS. REV. (Aug. 14, 2020), https://hbr.org/2020/08/taking-stock-of-the-covid-19-recession [https://perma.cc/NJ24-7GPC] ("Business leaders have to navigate shattered expectations, widely disparate outcomes, and continued uncertainty.").

201. *See, e.g.,* A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145 (1953) (approving corporate charitable donation to Princeton University.)

202. Here again, separate realms thinking encouraged an artificial intellectual divide, which is still mirrored in the concept of "public law" (e.g., constitutional law, election law, anti-discrimination law) and "private law" (e.g., property, torts and corporate law).

politics, and the democratic process.[203] As they do so, here again, business executives are positioned in the crosshairs of emerging awareness and opinion. The populist, anti-corporate backlash is universally felt, but newly emergent as a phenomenon that boards and officers are being asked more openly to address. What this means is that CEO and corporate political action are just now coming into fuller view as subjects of board governance.

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The above discussion of corporate ESG and political conduct adds up to the conclusion that boards' duties are growing in scope and complexity as the role of corporations in society grows in scope and complexity. Monitoring executive activity to limit agency costs is a simplistic version of directors' duties in the governance of twenty-first-century firms. It fails even to capture their full fiduciary or statutory duties. The straw man has been that executives make purely commercial decisions, constrained by competitive markets, in order to drive growth—but the straw man is dead. Business, society, and politics are inextricably linked, as is now universally apparent.

II. BEYOND THE MONITORING BOARD: INFORMATION GOVERNANCE

Against the above backdrop of twentieth-century corporate governance, we turn to the substance of our information governance model. Information governance intends the active mobilization of the firm's data reporting, analysis, and communication under the board's stewardship.[204] It regards newly active board committees as a prerequisite to board leadership as communicative action. The broadest objective of the model is to spur more mindful value creation and leadership in large corporations, as arising from more active, informed board deliberation, in collaboration with the C-Suite. The new paradigm is being driven by expanded shareholders' and stakeholders' demands, new technologies, and newly vigorous board engagement itself, especially at the committee level.

The practice of board leadership in information governance should

203. For an important account at the international level, see Melissa J. Durkee, *International Lobbying Law,* 127 YALE L.J. 1742 (2018).

204. Who will be governing data versus who will be governed by it is emerging at the cutting edge of law and policy. *See, e.g.*, Katharina Pistor, *Rule by Data: The End of Markets?*, 83 L. & CONTEMP. PROBS. 101 (2020) (exploring the role massive data purveyors play in constructing "markets").

yield more robust answers to firms' most vital questions: What is the firm's source of competitive advantage? Is the corporate culture and reputation creating or destroying value? Is the company excelling in consistently reporting accurate financial results, managing risk, and legal compliance? Is there preparation for escalating ESG demands? Is the board obtaining the candid and complete information necessary to answer these questions? Is the board free to reach throughout the organization to obtain information it seeks? We posit that by enabling this dialogue at the top of the organization and following through to get answers, board leadership constitutes communicative action.

We commence by focusing on how advanced information technologies have created the predicate for this new model, and exploring briefly how large businesses, in the twenty-first century, are increasingly dependent upon rich networks of data and communications in order to succeed. We note the expanded domains of messaging through which communicative action occurs (many being new but also taken for granted). Turning to committees, the audit committee's work in leading and participating in financial reporting exemplifies the new hard and soft legal requirements driving intensive committee practice. Post-Sarbanes Oxley audit committees are expected to be active leaders in the financial reporting process. Board committee participation in financial reporting, legal compliance, risk management, and ESG leadership efforts yields a board properly prepared to vet and contribute to the CEO's strategies (and then review and compensate the CEO accordingly). The final section of Part II traces recent expansions of informational fiduciary duties, especially *Caremark* "informational infrastructure/oversight" duties.[205] We conclude by examining some recent judicial decisions which hint at where an informational orientation to board governance may take the law.

A. Why the Board?

A trend has emerged favoring a more robust *governance* of firms. We believe the heightened expectations for board *committees* have changed practice, and hence also raised expectations for boards generally being more active and informed. But confusion remains.[206] The notion that directors must know their companies very well is at once self-evident and iconoclastic! Realistically, are public company directors required to expend

205. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). *See also* discussion *infra* Part II.0.

206. *See* Faith Stevelman and Sarah C. Haan, *Board Governance for the Twenty-First Century*, 74 BUS. LAW. 329 (2019).

substantial time reviewing the firm's critical reports, SEC filings, and board materials, attending all (or almost all) board and assigned committee meetings, and asking probing questions to participate in leading the firm? Despite the power, status, legal duties, and directors' substantial compensation (commonly $300,000 per year), many commentators suggest that directors cannot realistically be expected to do this.

To the contrary, we believe that there are plenty of highly-qualified individuals who would gladly accept a position as a public company director and—especially given the convenience of modern information and communications technology—rise to the challenge of such an opportunity. The norm would likely shift to serving on only one public company board at a time, but this is an easily practicable change. The more ticklish issue is whether nominating committees will venture out of closed, inner circles, if necessary, to nominate such candidates for election. The discussion immediately below further explains why boards (and nominating committees) should shoulder this responsibility in governance.

Rather than scrutinizing stock price signals to assess the CEO, we believe the crucial role of the board is to survey, develop, and promulgate compelling and shared understandings of what the firm is, has been, and will be, as the predicate for rational collective action. If the CEO's strategy departs from the board's panoramic views, the board must make a distinct choice whether to take a risk and retain the CEO or seek another. Among legal commentators, there is unanimity regarding this dimension of the board's role: evaluating—and hence properly compensating—the CEO. But once one accepts that stock prices are insufficient and unstable benchmarks for evaluating CEOs, how will boards evaluate their CEOs if they are not deeply and widely informed about their firms? For this reason, we envision the board as a nexus of communicative action where the best, most relevant corporate information meets searching, careful discussion, direction, and decision-making about the firm's status, prospects, leadership, and potential. When the board engages in this process of corporate identity formation, its analysis and decision-making is recapitulated through the many levels of leadership and action which constitute the firm.[207] An active board's investment in data gathering, deliberation, and reporting processes as constitutive of the firm's status—its "identity"— portends significant value for the firm.[208]

207. *Accord* NACD, URGENT IMPERATIVE, *supra* note 2, at 12 (writing that the board-management relationship should take the form of "an iterative collective-learning process").

208. For a consideration of corporate identity in relation to "norms," see generally Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001); Edward B. Rock, *Saints and*

If one discards the idea of firms as being fundamentally reactive and hemmed in by competitive markets and instead embraces a view of firms as strategic, innovative enterprises (reliant especially on human capital), the shift to this more participatory, information-enriched view of board service appears right and necessary.[209] As the economy increasingly shifts away from manufacturing, price signals about commodities grow less critical. More sophisticated communicative action and coordination become central to leadership in governance. This work is done by natural persons inside the firm, not by invisible market forces.[210] Even in a nexus of contracts world, someone needed to be coordinating the parts (i.e., contracts) to avoid duplication and incoherence. Governance is not the responsibility of the firm's bankers, lawyers, or other advisers, each of whom approaches corporate problems and tasks with local priorities and incentives. The CEO's resources are best targeted at strategy initiation and execution, as Fama and Jensen theorized.[211] As such, the monitoring-versus-managing apportionment of responsibility (the board being in the former position) wasn't so much wrong as incomplete; "monitoring" requires thicker, firm-specific knowledge. With the focus on external markets, the monitoring function left out the necessity of boards demanding coordinated, intelligent, information gathering and reporting—and becoming invested in the results of this reporting—as a basis for fostering the firm's competitive advantage.

B. The Role of New Information Technology

New information and communications technology have radically expanded the scope and ease of board participation in governance. As late as the early 1990s, the CEO's office, or office of the Corporate Secretary, released board reports on paper, to be delivered by Federal Express.[212] It is nearly inconceivable that the first iPhone was released only in 2007. Professional practice in law and business has radically accelerated in speed

Sinners: How Does Delaware Corporate Law Work? 44 UCLA L. REV. 1009 (1997).

209. The SEC is attempting to reform disclosure practices to highlight human capital value. Modernization of Regulation S—K Items 101, 103, and 105, 84 Fed. Reg. 44,358 (proposed Aug. 23, 2019) (to be codified at 17 C.F.R. pts. 229, 239, and 240).

210. *See generally* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937) (describing market forces).

211. *See, e.g.*, FAMA & JENSEN, *supra* note 28, at 313 (with regard to strategy, boards retain only rights to "ratify and monitor major policy initiatives").

212. *See generally* Farhad Manjoo, *Jurassic Web*, SLATE (Feb. 24, 2009), https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html [https://perma.cc/U76R-AT9R] (describing Americans' use of email and the internet in the early 1990s, and noting that "[i]n 1996, just 20 million American adults had access to the Internet").

and broadened in focus almost entirely in this relatively brief period.[213] Best board practice looks nothing like "the show up at the boardroom having read the paper report" world of the past; and post-pandemic remote board and committee meeting attendance will surely remain common. Leaving aside quarterly and special board meetings, governance now occurs through a near-constant stream of emails, including some with complex attached documents, or posts to a board "dashboard," supplemented by text messages, phone calls, and video chats. The revolution in governance depends on new technologies: smart phones, laptops or tablets, personal computers, and the software they run.

These technologies have had a revolutionary effect on the costs and speed—hence possibilities—of board governance. Senior professionals (i.e., the cohort of public company directors) have become accustomed to receiving critical information anytime and anywhere. There is nothing resembling the old, ordinary working day (even before the COVID-19 pandemic!). As stated above, patterns of governance are accommodating to new complexities in business enterprise, which has become more virtual and information-based and less dependent on hard assets and central physical locations. Problems arising in the pandemic from businesses' adaption to "just in time" inventory illustrate this fallout.[214] The old construct of corporate hierarchies is dematerializing. The boundaries of firms, once essential to Coasean thought, have become diffuse, reshaped into networks, affiliates, and supply chains.[215] Contemporary board governance is not factory floor meta-oversight, but information governance, literally. Official corporate reports are complemented—and at times superseded—by employee or watchdog reporting, which can instantly go viral on social media. Both fellow employees' attitudes (which influence recruitment, productivity and retention, and hence impacts costs) and customers' attitudes (which influence profits or losses, of course) can be altered fundamentally by these informal reporting channels and social media technologies. Board

213. Until around 1990, in order to determine the precedential validity of a case (i.e., Shepardize a case), a lawyer needed to visit a library and peruse several hard volumes, including a "pocket part supplement." Also, professionals relied on administrative staff to type their work product.

214. Lizzie O'Leary, *The Modern Supply Chain is Snapping*, THE ATLANTIC (Mar. 19, 2020), https://www.theatlantic.com/ideas/archive/2020/03/supply-chains-and-coronavirus/608329/ [https://perma.cc/U76R-AT9R].

215. As an extreme example, the construction of Boeing's commercial jets depends on a supply chain of 5,400 global entities. NAT'L INST. OF STANDARDS & TECH., U.S. DEP'T COM., BOEING AND EXOSTAR: CYBER SUPPLY CHAIN RISK MGMT., at 2, https://www.nist.gov/system/files/documents/itl/csd/NIST_USRP-Boeing-Exostar-Case-Study.pdf [https://perma.cc/Y3XQ-9QZ9].

governance must, and is, adapting accordingly.

C. Governing Corporate Identity and Reputation for Value

Boards are facing extraordinary challenges in stewarding the communicative resources of their firms. Extemporaneous, potentially damaging public statements by executives and employees, the media, and watchdog groups add pressure to boards' management of the formal, intentional, and mandatory facets of corporate reporting. The monitoring board model implied a high degree of reactivity in board action—directors being *responsive* to managerial action in shareholders' defense. But such a reactive board posture is no longer tenable. Boards will increasingly have to adapt to governing corporate identity and reputation for value or alternatively expose their firms to the negative consequences.

This is already evident in boards' participation in investor relations, and their responsiveness to activist investors in particular, as described in Part I.[216] Passive boards simply leave firms too vulnerable. The process of reputational development is inevitable whether boards embrace it or not, which is why, consistent with their legal authority and fiduciary duties, they must act. This is why "corporate identity formation" accurately describes an important part of the board's information governance.

Management science research confirms that "corporate identity" is a robust concept.[217] Virtually all large corporations have an identity. In some

216. *See supra* Part I.A.6.

217. Our concept of board participation and oversight of information governance is relevant to the well-established, strategically significant concept of corporate (or organizational) identity, and the board's role in shaping it. The concept is under-analyzed in academic corporate law, but well developed in management research. For salient treatments in management research, see, for example, Russell Abratt & Michela Mingione, *Corporate Identity, Strategy and Change*, 24 J. BRAND MGMT. 129, 137 (2017) (using "Punctuated Equilibrium Theory" as a model for managing internal corporate identity change and exploring its strategic value); Suzana Rodrigues & John Child, *The Development of Corporate Identity: A Political Perspective*, 45 J. MGMT. STUD. 885, 885 (2008) (exploring corporate identity—a "key to understanding modern organizations"—as a system subject to internal power dynamics among competing managerial elites); Eva Parum, *Corporate Governance and Corporate Identity*, 14 CORP. GOVERNANCE: INT'L REV. 558 (2006) (analyzing the role of the corporate board in linking external disclosures and the development of corporate identity in small and medium size listed firms); T.C. Melewar, *Determinants of the Corporate Identity Construct: a Review of the Literature*, 9 J. MKTG. COMMC'NS 195 (2003) (reviewing of twenty-five years of research on the corporate identity construct and presenting academic and managerial implications); John M.T. Balmer & Stephen A. Greyser, *Managing the Multiple Identities of the Corporation*, 44 CAL. MGMT. REV. 72 (2002); Helen Stuart, *Employee Identification with the Corporate Identity*, 32 INT'L STUD. MGMT. & ORG. 28, (2002) (analyzing corporate identity as a modality of employee solidarity and productivity for the

firms, it's clear, stable, and a motivating source of collective action. In others, it's a drag on value. As we have stated above, boards have agency in coordinating, framing, and prioritizing the flows of information and communications within their firms—actions which may influence corporate identity.[218] Identity formation is a governance function that is instrumental to maximizing competitive advantage.

Where does the macro-level identity of the corporation show up in the messaging that becomes part of the experience of the firm's participants? As we have noted, older models of corporate governance looked to bottom-line financial metrics and stock prices as the principal signifiers of the firm's status. Alternatively, decades ago, it was more plausible to focus on hard assets like manufacturing facilities or principal offices or headquarters as expressions and anchors of corporate identity and status. Modern firms, which are more likely to be global, asset-light, and highly dependent on subcontracting, elude these older, abbreviated signifiers for what the firm "is." As evident from the SEC's recent reset to basic business description in S-K regulations, it's no longer a simple exercise to define what the firm is, or what its principal assets and forms of value are, or how they align with a strategic plan and risk metrics. Conveying this appropriately to internal and external stakeholders is a challenge that must be governed by the board, not delegated to lawyers or others. As stock market prices are increasingly buffeted by macro-economic factors, they are far too limited to serve as signals of the firm's status. If corporate boards previously relied on lawyers, investment bankers, or their senior executives to make judgments, in defining the firm and its condition, such board-level deference would be increasingly risky, and irresponsible.

Traditional corporate governance has paid little attention to the sourcing, curating, and shepherding of information and communications

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benefit of the firm); Judy Motion & Shirley Leitch, *The Technologies of Corporate Identity*, 32 INT'L STUD. MGMT. & ORG. 45 (2002) (providing a novel framework for managing the pragmatic development of corporate identity and assessing its congruence with organizational goals). Within the legal literature, see Virginia Harper Ho*, Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879 (2012) (analyzing corporate identity in terms of legal structures, including parents, subsidiaries, and affiliated ventures); Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REGUL. 1 (2019) (leveraging the concept of corporate identity to explore the liability boundaries of firms, especially subsequent to transformational enterprise transactions, including M&A deals). For a recent discussion of corporate culture as an analog to corporate 'identity,' see Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and Privateness on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 386 (2020) (stating that in public firms there is an "increasing acknowledgement that bolstering a healthy corporate culture is part of officers' and directors' business judgment responsibilities.").

218. *See supra* Part II.0.

(beyond stock prices) as a critical modality of enterprise and source of firm value. But an emerging field of organizational behavior focuses precisely on this subject and these processes in businesses and enterprises of all kinds.[219] This relatively new academic field (which grew out of Media Studies research) is now firmly incorporated into Organizational Studies, under the heading of "Communication Constitutes Organization" ("CCO").[220]

Having emerged in North American universities in the 1990s, CCO research synthesizes insights from transaction-cost economics, management theory, behavioral science, semiotics, and sociology.[221] CCO builds on "the narrative turn" in modern social science research.[222] The core CCO insight

219. For a contemporary analysis of new directions in the field, see François Cooren & David Seidl, *Niklas Luhmann's Radical Communication Approach and Its Implications for Research on Organizational Communication*, 45 ACAD. MGMT. REV. 479 (2020). CCO research has generated novel understanding of many fundamental features of organizational life, including agency (individual action versus path dependence), technology, routines, strategy formation, and internal organizational conflicts. On CCO and agency, see, for example, BORRIS H.J.M. BRUMMANS, THE AGENCY OF ORGANIZING: PERSPECTIVES AND CASE STUDIES (Rutledge ed., 2018) (amassing new research from CCO scholars analyzing how collective communications practices within organizations set the stage for their members to claim authority, lead, and effectuate change). On CCO, technology, and computerization, see, for example, JAMES R. TAYLOR, CAROLE GROLEAU, LORNA HEATON & ELIZABETH VAN EVERY-TAYLOR, THE COMPUTERIZATION OF WORK: A COMMUNICATION PERSPECTIVE (Sage 2000) (charting organizational change as a result of evolving technological change). On communications by (embodied) persons establishing organizational routines, see Alex Wright, *Embodied Organizational Routines: Explicating a Practice Understanding*, 28 J. MGMT. INQUIRY 153 (2017) (seeking to ground CCO discourse in the interactions of living persons in organizations). On CCO and strategy-formation, see François Cooren, Nicolas Bencherki, Mathieu Chaput & Consuelo Vasquez, *The Communicative Constitution Of Strategy-Making: Exploring Fleeting Moments Of Strategy*, *in* THE CAMBRIDGE HANDBOOK OF STRATEGY AS PRACTICE 365 (2nd ed., Cambridge Univ. Press 2014). On CCO and intra-organizational conflicts, see Linda L. Putnam, Gail T. Fairhurst & Scott Banghart, *Contradictions, Dialectics, and Paradoxes in Organizations: A Constitutive Approach*, 10 ACAD. MGMT. ANNALS 65 (2017) (documenting the complexity of communications among collegial and competing actors in organizations).

220. An important author in the field is James R. Taylor. *See, e.g.*, James R. Taylor & Elizabeth J. Van Every, THE EMERGENT ORGANIZATION: COMMUNICATION AS ITS SITE AND SURFACE (Lawrence Erlbaum Associates 2000) (reorienting the definition of "organization" from the established legal, institutional perspective to one that highlights communicational practices including dialogue, texts, practical technologies and systems design).

221. For a volume collecting essays written by scholars in these diverse academic disciplines and perspectives, see BUILDING THEORIES OF ORGANIZATION: THE CONSTITUTIVE ROLE OF COMMUNICATION (Linda L Putnam & Anne M. Nicotera eds., Routledge 2009) (restating the accomplishments and challenges of the field and presenting leading new works).

222. This narrative turn is visible in feminist legal theory's deployment of stories as a critical method of law reform, for example. It exists in contradistinction to contemporary, academic economics' quantitative approach and the conventional use of statistics in other

is that any productive enterprise requires human collaboration, which arises from communication—such communication in turn stimulating further coordination of effort and capital. Shifting away from the study of quantitative models of inputs and outputs, CCO theorists focus on information and communication as ideational frameworks which successively and recursively shape and incentivize the selection, prioritization, and application of capital inputs, as well as the evaluation of results.[223] Ideas and communication precede and then reinforce deliberate collective action and judgments about the production of value. In these respects, the framework of CCO scholarship is deeply relevant to the new board paradigm set forth herein.

An extraordinary array of texts, symbols, and other modes of communication shape a company's core commitments, goals, and processes—hence, its identity. Cumulatively, these texts drive the next level of messages circulating inside firms to employees, and then beyond the firm, to shareholders and others. The most obvious formal, substantive external messaging—an autobiography of the firm—is the detailed account of its business, property, principle markets, financial results, trends and risks, material litigation, and regulatory deficits in the firm's SEC reports. These encompass quarterly and annual SEC reports on Forms 10-Q, 10-K, and 8-K; Schedules TO and 14d-9; and annual reports to shareholders. As discussed further below,[224] both corporate fiduciary doctrine and the SEC's pronouncements have increased the level of presumed board oversight and candor in the production of these reports.

Corporations are also purposely, voluntarily expanding their narrativity through their webpages and sustainability (ESG) reports, both online and otherwise. These are all self-initiated representations of the corporation's actions and commitments. The externally directed messaging also impacts employees, executives, suppliers, and independent contractors dealing with the firm. Internal messaging encompasses employee and executive codes of conduct, corporate mission statements, and internal compliance, and risk

social sciences. The "narrative turn" in the social sciences draws on contemporary critical theory and linguistics. For a brief account of the intellectual history and evolution of the "narrative turn" in social science, see Matti Hyvärinen, *Revisiting the Narrative Turns*, 7 LIFE WRITING 69 (2010). For a research handbook compiling multiple approaches and topical areas, see QUALITATIVE RESEARCH IN ACTION (Tim May ed., Sage 2002).

223. For a description of the process, see Daniel Robichaud, Hélène Giroux & James R. Taylor, *The Metaconversation: The Recursive Property of Language as a Key to Organizing*, 29 ACAD. MGMT. REV. 617 (2004) (demonstrating the way that communication reflects existing knowledge and creates the grounds for new insight, as relates to collaboration in organizations).

224. *See infra* note 234 and accompanying text.

management policies. These documents are also critical signifiers of what the corporation is and intends to become. They reflect past corporate conduct and shape future conduct of the firm's constituencies. Where a corporation's actions have departed substantially from its public statements—including disclosures in SEC filings, corporate press releases, or CEO interviews—companies have faced embarrassment, stakeholder blowback, boycotts, and potential securities lawsuits. Where a corporation's self-described status or conduct has departed from its promises in codes of conduct, compliance commitments, and CSR/ESG reports, they have faced employee lawsuits, public shaming, possible boycotts, or loss of goodwill. These feedback loops tie corporate narrativity to business realities. While corporate identity is a valuable resource, one to be stewarded by senior corporate leadership (including boards), it can also backfire if inadequately attended to.

Again, the domains and interactivity of corporate identity and reputation have altered fundamentally in the past two decades. Corporate webpages have become such critical portals of opinion formation and investor relations that is it startling to recall that they have been in wide usage for less than three decades. They are also almost entirely untheorized in the corporate governance literature.

The role of investor relations departments and corporate communications departments has burgeoned in furtherance of shaping opinion and coordinating action regarding what the firm does, is, and will become. Analogously, the law has fundamentally shifted in allowing far greater access for investors to inspect corporate books and records.[225] This means that board meeting minutes, internal memoranda, reports of investigations, and other critical board decisional documents have instrumental weight in influencing shareholder responses. In terms of legal liability, it is sometimes understood that corporate reports and disclosures are synthetic, meaning their authorship cannot be parsed between managers, lawyers, directors, and other experts. But the liability perspective doesn't resolve the governance one. Board leadership is critical not only in evaluating the C-Suite, but also in evaluating other critical advisers who influence the gathering, reporting, and synthesis of formative corporate information.

In sum, board leadership lies considerably in focusing, disciplining, and making critical decisions about the firm's messaging, in all its textual

225. For a recent case about book and records requests, see *Woods v. Sahara Enters., Inc.*, C.A. No. 2020-0153-JTL, 2020 WL 4200131 (Del. Ch. July 22, 2020).

incarnations. To be sure, boards should not themselves manage all of the firm's critical disclosures and communications any more than they manage all of the firm's traditional capital assets and commercial affairs. But hard and soft law and best practices are moving in the direction of enabling and expecting boards to exert constructive energy in this domain. Overseeing the candor, completeness, and coherence of the firm's corporate conduct codes, compliance policies and other reports, and voluntary and mandatory disclosures is a crucial dimension of board value creation and information governance.

D. Audit Committees and Financial Reporting

The audit committee's leadership in the financial reporting process exemplifies active board information governance. Four facets of this are immediately noteworthy. First, the legally mandatory, active oversight by audit committees of the financial reporting process is incompatible with the passive model of the monitoring board. The legally mandated role of audit committee directors is now more formal, proactive, and intensive than monitoring implies, and the audit committee's role has independent significance beyond evaluating the CEO. Second, the quantitative and narrative financial reports produced under the agency of the audit committee are essential to the full board's understanding and evaluation of the firm's capacities, broadly. Thirdly, information produced by the audit committee is synthetic with other committee and full board judgments and functions. For example, financial data and reports illustrating the firm's status are relevant to the board's advisory role in strategy, which informs the board's perspective on the CEO, which influences board compensation decisions and also ESG governance, such as pay ratio disclosure. Fourth, while audit committees' leadership in financial reporting illustrates the apogee of the board's information governance, it is only different in degree from what is becoming the norm for other committees. Outside directors on the compensation and nominating committees, or in risk and legal compliance or ESG oversight, also participate in communicative action vital to shaping their firm's identity.

The foundations of information governance lie in the 2000s. The changes wrought by Sarbanes Oxley substantially elevated the prominence and responsibilities of public company audit committees. Congress intended its legislation to inspire additional rulemaking to promote accurate, complete, and clear corporate financial reporting. Hence, Sarbanes Oxley's provisions (as incorporated in the '34 Act) are only one portion of the new rules mandating directors' active leadership in financial reporting.

Also influential in shaping audit committees' leadership in financial reporting are NYSE and NASDAQ listing requirements, and especially companies' own audit committee charters (which are required to be publicly available).[226] Furthermore, audit committees' leadership role is bolstered by PCAOB rules and Statement of Auditing Standards ("SAS") pronouncements, including requirements for auditors to discuss material auditing and accounting matters directly with the audit committee directors. In sum, there is now a detailed scaffolding of legal rules and regulations, as well as soft law commitments, supporting audit committee leadership in the production of materially complete financial statements and reports.

Fiduciary duties complement these rules and regulations in supporting active audit committee leadership. These include the fiduciary duty of candor (requiring directors to communicate fully and accurately with one another and also investors), the duty of care (requiring directors to be fully informed), and *Caremark* informational-architecture oversight duties. In sum, the audit committee does not have the option to play a passive role in the financial reporting process if it wishes to comply with existing rules and standards. This is the ground floor of information governance.

Confusion notwithstanding, it is not the outside auditors but rather the audit committee that leads the financial reporting process. The rules envision audit committee authority over a reporting team encompassing the external auditor, the CFO, heads of business units, the corporate controller or chief accounting officer, and the internal audit department. Because each of these actors has a distinct function and perspective, the audit committee's coordination role is essential to achieving the reporting goal. Underscoring the audit committee's leadership, SEC rules mandate that the audit committee, and not management, is responsible for hiring, firing, supervising, and structuring the compensation of the outside auditors.[227]

The audit committee is responsible for scrutinizing the independence of the registered public accounting firm conducting the audit and approving any permissible non-audit services.[228] For companies listed on the NYSE, the audit committee must obtain and review a report by the independent auditor describing its internal quality control procedures.[229] An

226. *See* NAT'L ASS'N OF CORP. DIRS., REPORT OF THE NACD BLUE RIBBON COMMISSION ON THE AUDIT COMMITTEE app. A at 30–44 (2010) (outlining audit committee requirements for public companies listed on the NYSE and NASDAQ as set forth in the Dodd-Frank Act and the Sarbanes Oxley Act).

227. 17 C.F.R. § 240.10A-3(b)(2)(F) (2019).

228. Securities Exchange Act of 1934 § 10A, 15 U.S.C. § 78j-1(h)-(i); Qualifications of Accountants, 17 C.F.R. § 210.2-01(c)(7) (2020).

229. *See* NYSE, INC., LISTED COMPANY MANUAL § 303A.07(b)(iii)(A) (2018) [hereinafter NYSE LISTED COMPANY MANUAL].

analogous requirement also exists in the NASDAQ listing rules.[230] As part of supervising the audit, the audit committee

> . . . must be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged . . . for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed issuer, and each such registered public accounting firm must report directly to the audit committee.[231]

Both NYSE and NASDAQ listing standards require that the audit committee enumerate its responsibilities in a publicly-disclosed charter.[232] The charters and these other authorities enumerate a base-line of rigorous leadership by the audit committee that is high.[233] The audit committee is generally expected to meet in executive session, separately, with the outside audit firm, the inside auditors, and management. Based on audit best practices this should occur quarterly, at minimum. These now common practices exemplify audit committees' leadership and participation in the processes that yield the authoritative financial self-portraits of the firm—ones that influence everything else.

Cumulatively, the rules make apparent that such audit committee

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230. For NASDAQ, LISTING RULES, Rule 5605(c)(1)(B) (2019).

231. 17 C.F.R. § 240.10A-3(b)(2) (2019).

232. Order Approving NYSE Proposed Rule Change Amending Audit Committee Requirements, 64 Fed. Reg. 71,529, 71,530 (Dec. 21, 1999) (noting NYSE Listed Company Manual § 303.01(B)(1)(c)); Order Approving NASD Proposed Rule Change Amending Audit Committee Requirements, 64 Fed. Reg. 71,523, 71,523 (Dec. 21, 1999) (noting NASD Rule 4310(c)(26)(A)(ii)).

233. The charter of a NYSE company's audit committee *must* state the audit committee's responsibility to: "meet to review and discuss the listed company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including reviewing the listed company's specific disclosures under 'Management's Discussion and Analysis of Financial Condition and Results of Operations.'" NYSE LISTED COMPANY MANUAL, *supra* note 229, § 303A.07(b)(iii)(B). The NASDAQ rule is slightly more open ended, but essentially the same. NASDAQ, LISTING RULES, Rule 5605. The SEC requires that the audit committee disclose whether it has "reviewed and discussed the audited financial statements with management." 17 C.F.R. § 229.407(d)(3)(i)(A). Thus, the SEC has imposed a disclosure-based analog to the duty of care in this context. The Business Roundtable's *Principles of Corporate Governance* also flesh out the leadership and intensive participation expected of audit committees: "The audit committee should meet privately with each of the internal and outside auditors and management on a regular basis, and in any event at least quarterly, and communicate with them between meetings as necessary." BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE (2010), https://www.businessroundtable.org/archive/resources/2010-principles-of-corporate-governance1 [https://perma.cc/3CZ4-SCZY].

leadership is not administrative, but genuine participation in executive decision-making over financial reporting. The audit committee members are expected to inform themselves of the substantive information in the financial statements and management discussion and analysis ("MD&A"), and why the data is what it is. A general consensus exists that the audit committee's most crucial duties include scrutinizing the numbers, choices of accounting policies, accounting estimates, and textual disclosures in the MD&A.[234] By inference, this encompasses the audit committee's determinations about data which was excludable as being immaterial under Generally Accepted Accounting Principles ("GAAP"), SEC rules, and the securities laws. A number of overlapping rules and pronouncements, including directors' duty of care, formalize the audit committee's obligation to ask these kinds of probing, material questions on an ongoing basis. Auditor rules reinforce the audit committee's duty of inquiry and oversight.[235] SEC and PCAOB rules expressly require the auditor to support the audit committee's scrutiny not only of the financial reports generally, but also other critical matters such as the review of related party transactions.[236]

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234. *See, e.g.,* Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, § 204, 116 Stat. 745, 773 (2002) (codified as amended at 15 U.S.C. § 78j-l (2020)) (adding section 10A(k) to the Securities Act of 1934, which requires audit reports to the audit committee to include the important accounting policies to be used as well as ramifications of alternative treatment and disclosures pertaining to financial information); 17 C.F.R. § 210.2–07 (2005) (requiring the same as in Sarbanes Oxley); NYSE LISTED COMPANY MANUAL, *supra* note 229, § 303A.07 (amended 2013) (explaining that the audit committee's obligations include, among others, assisting in board oversight of financial and compliance standards, reviewing financial statements, and discussing policies related to risk).

235. Accounting industry standards require auditors conducting a review of interim financial information to report to the audit committee any material modifications required to bring the financial information in conformance with GAAP, any frauds involving senior management or resulting in a material misstatement of the financial statements, possible illegal acts (unless inconsequential), and matters that, in their judgment, represent significant deficiencies in the design and operation of internal controls. AUDITING STANDARD OF THE PUB. CO. ACCT. OVERSIGHT BD., AS 4105.29-.36 (2017); CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 100, AU §§ 722.29-.36 (AM. INST. OF CERTIFIED PUB. ACCOUNTANTS 2002), *superseded by* CODIFICATION OF STATEMENTS ON AUDITING STANDARDS, Statement on Auditing Standards No. 122, AU-C §§ 930.24-.29 (AM. INST. OF CERTIFIED PUB. ACCOUNTANTS 2020) [hereinafter SAS No. 100].

236. Congress itself, in Sarbanes Oxley, enacted rules to mandate auditors' support for audit committee leadership. PCAOB rules also document matters that must be discussed between the audit committee and the outside auditor. Under PCAOB Auditing Standard 1301, the auditor has a duty to facilitate audit committee oversight. AUDITING STANDARD OF THE PUB. CO. ACCT. OVERSIGHT BD., AS 1301.03 (2017) [hereinafter AUDITING STANDARD 1301]. The PCAOB also requires the audit firm to discuss any "critical audit matters" it has identified with the audit committee. PUB. CO. ACCT. OVERSIGHT BD., RELEASE NO. 2017-001, THE AUDITOR'S REPORT ON AN AUDIT OF FINANCIAL STATEMENTS WHEN THE AUDITOR EXPRESSES

SEC rules provide that the audit committee must oversee the resolution of substantive disputes over financial reporting methods if they arise, whether between the external and internal auditors or between the outside auditor and management.[237] PCAOB Auditing Standards and the SAS expand on the range of reporting matters to be evaluated and discussed between audit committee directors and the audit firm.[238] The latter requires auditors to present orally or in writing and evaluate critical accounting matters with the audit committee.[239] After mutual discussion, the auditor's report becomes incorporated into the Form 10-K filing with the SEC. The auditor's report is required to contain a review of any sensitive judgments or unusual transactions—matters which the rules, again, mandate would have been discussed with the audit committee.[240] Hence, the report constitutes an enduring, public record of the resolution of matters arrived at in consultation between the audit committee and the rest of the financial reporting team.

True, nowhere in this network of formal requirements does it expressly state that "the audit committee directors must read and understand their firm's financial statements and results of operations, risks, and business trends." But this requirement is presumed everywhere—implicitly in the federal, self-regulatory organization ("SRO") charter, and auditing mandates, including those requiring the audit committee to discuss the quarterly and annual reports with the other members of the audit team (including the outside auditor). It arises, too, from the audit committee directors' duty of care, which operates at all times in directors' decision-making, oversight, and monitoring actions.[241] The express requirements for the outside audit firm to discuss the accounting methods employed in the

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AN UNQUALIFIED OPINION AND RELATED AMENDMENTS TO PCAOB STANDARDS 11–12 (2017).

237. This feature of intensive audit committee involvement must be reflected in the audit committee charter, as per NYSE and NASDAQ requirements. 17 C.F.R. § 240.10A-3(b)(2).

238. Auditing Standard 1301 requires that the auditor provide timely information to the audit committee to permit the audit committee to scrutinize "[a]ll critical accounting policies and practices to be used, including . . . [t]he reasons that certain policies and practices are critical," and deliver that information sufficiently in advance of the final audit report, and filing deadline for the financial statements, that the audit committee would be in position to take appropriate follow up actions. AUDITING STANDARD 1301, *supra* note 236, ¶¶ .12, .26.

239. The normal practice is for the external auditor to produce a written document for the audit committee covering all such required communications, and to discuss at length with the audit committee any issues that merit special attention. SAS NO. 100, *supra* note 235, § 722.21.

240. AUDITING STANDARD 1301, *supra* note 236, ¶¶ .12(c)-(d).

241. *See* Lyman P. Q. Johnson, *The Audit Committee's Ethical and Legal Responsibilities: The State Law Perspective*, 47 S. TEX. L. REV. 27, 35–36 (2005) (discussing directors' duty of care to obtain and act on all material information within the decision-making process and be reasonably informed in properly monitoring and overseeing the business affairs of a corporation).

financial statements, material features of the audit process, and substance of the auditor's report with the audit committee presumes that the committee members understand the financial statements and reports with fluency.

The audit committee's financial reporting responsibilities—which are continual (i.e., without break)—result in the creation and re-creation of a board-led, transparent narrative about the company's financial condition.[242] The committee's leadership encompasses not only the annual report to shareholders, but also the annual reports on Form 10-K (including the MD&A), and the firm's interim, quarterly financial statements (including their MD&As). These reports are searchable online on the SEC's webpage and customarily posted on the firm's webpage as well. Hence, they constitute a very public narrative about the company's financial position and projected status. The unavoidable subjectivity in financial reporting helps explain why audit committee directors' independence from management is mandatory and essential, and why the audit committee's leadership of the financial reporting process is critical to discerning—indeed, *defining*—the firm's financial status. The SEC rule requiring a majority of the directors sign the Form 10-K further emphasizes the board's duty to understand the substance of the firm's financial reports.[243]

Also driving home the idea that the audit committee directors must obtain a full understanding of their firm's financial status and reports is the SEC rule requiring each audit committee to contain a "financial expert," or disclose (embarrassingly) that it does not.[244] Beyond fiduciary rationales and securities liability issues, a substantive requirement for the audit committee to include a financial expert arises from the SRO's standards. A financial expert is defined expressly as someone adept at comprehending the accounting and financial presumptions operating in financial statements and reports subject to GAAP.[245] The financial expert is positioned as a backstop

242. *Accord* NACD, URGENT IMPERATIVE, *supra* note 2, at 12 (describing board engagement as "a continuous process").

243. *See* U.S. SECURITIES AND EXCHANGE COMM'N, FORM 10-K, GENERAL INSTRUCTION D(2)(a) (requiring the Form 10-K report be signed by at least a majority of the board of directors or persons performing similar functions).

244. *See* Disclosure Required by Sections 406 and 407 of the Sarbanes Oxley Act of 2002; Correction, 68 Fed. Reg. 15,353 (Mar. 31, 2003) (amending 17 C.F.R. pts. 228, 229) (clarifying that the disclosure of whether a company has a financial expert on the audit committee must be made only in the annual report). In addition, a series of authorities require that all audit committee members be independent of the company, so they will not be subject to influence from the CFO or CEO.

245. *See* Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules*?, 11 DEPAUL BUS. & COM. L.J. 205, 234 (2013) (listing the attributes of an audit committee financial experts which includes an understanding of GAAP and financial statements).

to raise the level of the full committee's literacy in GAAP and Generally Accepted Auditing Standards (GAAS). But the responsibility to engage and understand the firm's financial and operating status lies not only with the financial expert, but with the full audit committee. That is, notably, the SRO and PCAOB auditor rules prescribing what must be discussed, reviewed, and authorized do not refer to the financial expert, but *to the audit committee in toto*. At the next level, of course, the audit committee has a duty to relay its understanding of the firm's financial status to the board in full.

In sum, federal statutes, SEC regulations, SRO listing mandates, PCAOB standards, and SAS requirements all demand the *active* leadership of the audit committee in the issuance of sound financial reports of the firm's condition and results of operation, principal risks, and trends. The process through which these financial reports—narratives about the company's financial status—are produced is *continual*. Given the quarterly nature of financial reporting, at least the audit committee chair, if not the other members of the committee, would be in *near-constant communication* with the larger financial reporting team about not only the process but also the substance of what will be disclosed.

Finally, the portrait of intensive audit committee participation in the production of the annual and quarterly financial statements and reports specified above assumes normal times. In situations where there was severe financial stress bearing on the firm's status as a going concern, or in a situation where fraud or misstatements were feared, or where other extraordinary risks or transactions were pending, the audit committee's work would expand. The portrait of contemporary audit committee leadership described above illustrates one crucial facet of the board's information governance. The language of "oversight" does not capture this reality, which lies more in "communicative action."

E. Boards in Risk Management and Legal Compliance

More intensive board leadership in risk management and legal compliance is also a new normal. As an outgrowth of the conventional structure of internal control, dating back to COSO's formation in 1985,[246] it

246. COSO is the Committee of Sponsoring Organizations of the Treadway Commission. Usually referred to by reference to its chairman, James C. Treadway, Jr., a former SEC commissioner, its formal name was "The National Commission on Fraudulent Financial Reporting." Treadway was established in June 1985 and funded by five of the largest private U.S. accounting organizations. For the evolution of these bodies and concepts, see generally Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 IOWA J. CORP. L. 267 (2004) (discussing how COSO categorized

is often the audit committee that also leads oversight of risk management and legal compliance. Reflecting this convention, the NYSE corporate governance rules provide that the audit committee should support "board oversight of . . . [a] listed company's compliance with legal and regulatory requirements."[247] Nevertheless, risk oversight governance is not required to be in the audit committee per se—fewer formal rules govern this area, in comparison to financial reporting oversight.[248]

Flexibility in this office also makes sense because of its relevance to the many facets of information governance, including strategy,[249] compensation choices, CEO retention,[250] decisions relevant to tone at the top,[251] and ESG governance.[252] Rather than the audit committee, firms variously assign this

administrative and accounting controls under one heading called internal controls, which, with formal auditing standards, promote achievement of corporate objectives related to operations, financial reporting, and legal compliance).

247. NYSE LISTED COMPANY MANUAL, *supra* note 229, § 303A.07(b)(i)(A).

248. *See* BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 16 (2016) ("Unless the full board or one or more other committees do so, the audit committee should oversee the company's compliance program, including the company's code of conduct. The committee should establish procedures for handling compliance concerns related to potential violations of law or the company's code of conduct, including concerns relating to accounting, internal accounting controls, auditing and securities law issues.").

249. *See* Robert S. Kaplan & Anette Mikes, *Managing Risks: A New Framework*, HARV. BUS. REV., June 2012, at 50 ("We examine the individual and organizational challenges inherent in generating open, constructive discussions about managing the risks related to strategic choices and argue that companies need to anchor these discussions in their strategy formulation and implementation processes.").

250. *See, e.g.*, David Yaffee-Bellany, *McDonald's Fires C.E.O Steve Easterbrook after Relationship with Employee*, N.Y. TIMES (Nov. 3, 2019), https://www.nytimes.com/2019/11/03/business/mcdonalds-ceo-fired-steve-easterbrook.html [https://perma.cc/EU7A-2UZR] (reporting how the board of McDonald's fired the CEO for demonstrating poor judgment in engaging in a consensual relationship with an employee); *After Deadly Crashes of Marquee Aircraft, Boeing CEO is Out*, LONG ISLAND BUS. NEWS (Dec. 23, 2019), https://libn.com/2019/12/23/after-deadly-crashes-of-marquee-aircraft-boeing-ceo-is-out/ [https://perma.cc/Y4B4-N6M7] (discussing how Boeing's company observed a need to change leadership to restore confidence after two deadly crashes).

251. *See* Deloitte, *Building Tone at the Top: The Role of the CEO, Board and CCO*, WALL ST. J. (Mar. 21, 2018), https://deloitte.wsj.com/riskandcompliance/2018/03/21/building-tone-at-the-top-the-role-of-the-ceo-board-and-coo-3/ [https://perma.cc/G42J-J7BN] (explaining how the board plays a critical role in setting the tone of the organization through selection of the CEO, monitoring, oversight, and approvals).

252. For discussion of the merits of a separate risk committee, see, for example, Matteo Tonello, *Should Your Board Have a Separate Risk Committee?*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (Feb. 12, 2012) https://corpgov.law.harvard.edu/2012/02/12/should-your-board-have-a-separate-risk-committee/ [https://perma.cc/ZKU4-E7SP] (discussing the benefits and potential issues of having a separate risk committee and what to consider when deciding to form such committee); PROTIVITI, COMM. OF SPONSORING ORG. OF THE TREADWAY COMM'N, BOARD RISK OVERSIGHT – A PROGRESS REPORT: WHERE BOARDS OF DIRECTORS

role to another principal board committee, a specified compliance and risk management committee, or to the full board in its entirety. Nevertheless, there is public accountability for whatever process is selected. The SEC requires detailed disclosure of a firm's *board-level* risk oversight process.[253] Clearly this is intended to elevate the substance of board governance in this domain. (The SEC, too, practices *communicative* action!)

In Sarbanes Oxley, Congress made express the obligation of corporate attorneys to report material legal non-compliance all the way to the board if necessary to accomplish a satisfactory remedial response.[254] Congress's and the SEC's decision to tie hands-on compliance and risk management officers' duties (and potentially their personal legal exposure) to their responsibility to report up to the board (when material irregularities are uncovered) has eroded directors' resort to pleading ignorance as a defense. This is a critical legal shift, one where the "chain of command" structure has indeed been formalized. Heightening directors' sensitivity to their own potential legal exposure (albeit extraordinarily rare) has had a systemic effect on intensifying board governance practices in this area. From the perspective of securities class action liability exposure, of course, the board's knowledge of undisclosed risk and legal compliance shortfalls, or even reckless failures to report them, is formative—*scienter* is the touchstone.[255] These law

CURRENTLY STAND IN EXECUTING THEIR RISK OVERSIGHT RESPONSIBILITIES 6 (2010), https://www.coso.org/documents/Board-Risk-Oversight-Survey-COSO-Protiviti_000.pdf [https://perma.cc/9GY6-XDJD] (providing commentary that risk committees play substantial risk oversight roles, especially in industries of complex nature that require focused expertise).

253. The SEC considers risk oversight a primary responsibility of the board and requires disclosure of its role in this area. The relevant S-K provisions are Sections 402(c) and 402(n) of Regulation S-K, 17 C.F.R. § 229.402 (2009).

254. *See* Sarbanes Oxley Act of 2002, Pub. L. No. 107–204, § 307, 116 Stat. 745, 784 (2002) (codified as amended at 15 U.S.C. § 7245 (2002)) (listing the rules of professional responsibility for corporate attorneys). Section 307 of the Act requires the SEC to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the SEC, including a rule

> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counselor officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation),) *requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors* comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors. (emphasis added).

255. On the issue of scienter as grounds for board liability, see, for example, *Tellabs, Inc. v. Makor Issues & Rights, Ltd*, 551 U.S. 308, 324 (2007) (discussing how a finding of scienter

reforms have been potent motivators to enhanced board governance of risk management and legal compliance, and a catalyst to board-driven remedial action.

In the case of financial firms, the Dodd-Frank Act requires even more formalized and rigorous financial risk oversight procedures, including, expressly, board-level oversight.[256] Furthermore, outside of financial firms, heightened requirements for board-level risk management and legal compliance oversight are present in recent "upscaled" *Caremark* duty to monitor holdings.[257] Not only legal compliance failures but also, increasingly, business risk management failures are moving into the ambit of *Caremark's* fiduciary schema governing board vigilance, as discussed further below.[258]

The Federal Sentencing Guidelines (the "Guidelines") also function as an incentive to enhanced board oversight of legal compliance, as was observed in 1996 in *Caremark* itself. Under the Guidelines, the executive with operational responsibility for legal compliance oversight must

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need not require a "smoking gun" but must be "cogent and compelling" in light of other explanations).

256. Dodd-Frank's mission was to require a separate risk committee for certain nonbank financial companies and certain bank holding companies. The Board of Governors may require a publicly traded company with total consolidated assets of less than $10 billion to establish a risk committee to promote sound risk management practices. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 165(h), 124 Stat. 1376, 1429-1431 (2010) (stating the mandatory and permissive regulatory authority for the Board of Governors as related to establishing risk committees for publicly traded companies). For a discussion of enhanced risk management responsibilities of boards at financial institutions after Dodd-Frank, see generally Kristin N. Johnson, *Addressing Gaps in the Dodd-Frank Act: Directors' Risk Management Oversight Obligations*, 45 U. MICH. J.L. REFORM 55 (2011) (arguing that the Dodd-Frank Act's measures to address enhanced risk management are weak, therefore requiring reforms that consider the impact of cognitive biases and structural dynamics on risk governance for more effective risk management regulation).

257. For discussion of enhanced duties and potentially liability under recent duty to monitor decisions, see, for example, Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2164-79 (discussing how compliance systems are meant to provide an ongoing framework for monitoring to alert the board of any red flags which may require concrete and effective action by the board in fulfilling its duties); *see also* Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457 (2010/2011) (explaining how the *Caremark* duty which compels directors to create systems for monitoring compliance is a duty of obedience to the law). For further discussion of *Caremark's* expanding influence on board informational duties, see *infra* Part II.F.

258. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805, 820-24 (Del. 2019) (finding existence of management-level compliance program on its own, without good faith effort, not enough for board to avoid liability); *In re* Clovis Oncology, Inc. Derivative Litig., C.A. No. 2017-0222-JRS, at 42 (Del. Ch. Oct. 1, 2019) (finding board of life sciences experts should have been on notice of problems with drug trials and addressed flawed reporting).

expressly have authority to communicate directly with the audit committee (or other appropriate governing body) overseeing legal compliance.[259] Firms which can demonstrate solid board governance targeted at fostering firm-wide legal compliance are likely to obtain lesser penalties if problems do occur.[260] Moreover, the Department of Justice ("DOJ") increasingly requires upgrades to corporate compliance programs, reaching to the boardroom, as part of settlements via deferred prosecution or non-prosecution agreements.[261] In egregious cases, the DOJ insists on the imposition of an outside, board-level monitor to raise the level of firm-wide legal compliance.[262]

Recent updates to the SEC's S-K reporting requirements on risk and legal proceedings disclosures are also drawing increased attention to board governance in this domain.[263] Expanded transparency is, in turn, fostering investors' and other constituencies' enhanced attention to ESG-related risk factors, reinforcing a cycle feeding into upgraded board-led governance efforts.[264] Board level vigilance is reinforced through an iterative and

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259. *See* U.S. SENTENCING GUIDELINES MANUAL, §§ 8B2.1(b)(2)(C) and 8C2.5(f) (U.S SENTENCING COMM'N 2018) (requiring individuals with delegated operational responsibility to report periodically and directly to governing authority on the effectiveness of the compliance program).

260. A Department of Justice guidance document addresses the matter. It suggests that one of the questions prosecutors will ask is what, if any, compliance expertise has been available to the board. In assessing penalties, they may consider whether the board has held executive sessions with compliance leaders within the company and may inquire as to what types of information the board has examined in its exercise of the oversight function. Key questions will be what types of issues have been reported to the board, and how the board and management have addressed them. Documentation as to board discussions and decisions will be necessary to show that the board has been diligent in fulfilling its oversight responsibilities. U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2020), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/LWT2-XVJG].

261. For discussion of the practice of DPAs and NPAs, see, for example, Rachel E. Barkow, *The New Policing of Business Crime*, 37 SEATTLE U.L. REV. 435 (2014) (explaining how the use of DPAs and NPAs allows the government to have a more proactive role in policing and monitoring corporate behavior); Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach To Investigation And Reform*, 66 FLA. L. REV. 1 (2014) (positing the benefits of formalizing and systemizing the use of DPAs in corporate criminal justice administration).

262. *See* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?,* 105 MICH. L. REV. 1713 (2007) (discussing how the government often seeks appointment of monitors who have an expanding scope of power).

263. Modernization of Regulation S—K Items 101, 103, and 105, 84 Fed. Reg. 44,358 (proposed Aug. 23, 2019) (to be codified at 17 C.F.R. pts. 229, 239, 240).

264. *See, e.g.*, ROSEMARY LALLY & BRANDON WHITEHILL, COUNCIL OF INSTITUTIONAL INVESTORS, HOW CORPORATE BOARDS CAN COMBAT SEXUAL HARASSMENT (2018) (providing recommendations and resources for directors and investors looking to combat sexual

recursive process in which enhanced disclosure feeds investor pressure and upscaled standards for board oversight.[265]

Accordingly, since the 2000s, most public companies have overhauled their staffing radically to expand the teams tasked with risk management and legal compliance.[266] This increased hiring to upgrade risk management and legal compliance in U.S. firms is, of course, a redirection of corporate resources occurring under the board's authority, i.e. within its discretion. Most importantly for information governance, there is a regulatory, professional, and industry consensus that risk management and legal compliance are enterprise *capabilities*, not simply functions. They cannot be effectuated by corporate managers in the middle layers of the enterprise on their own. This is where "tone at the top" is board level communicative action.[267] As *Caremark* itself noted, the scope of operational and reputational damage, which can be effectuated by rogue actors inside an organization, mandates instituting rigorous internal controls reaching to the board.[268]

In order for risk management and legal compliance internal controls to achieve effective results, the board should oversee the establishment and effective operation of multiple, direct, independent, but backstopping, channels of reporting, so they cannot be circumvented by executive officers having an incentive to suppress red flags. This is entirely compatible with

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harassment).

265. *See, e.g.*, Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 653 (2016) (arguing that accounting for both financial and nonfinancial risk can drive firm and portfolio performance). For ESG risks' relationship to conventional interpretations of "materiality," see Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645 (2019) (describing the best way to reconceptualize materiality to be in line with society's interest in sustainability).

266. *See* Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2146 ("In the last ten years, the explosive growth of compliance departments has redefined the corporate landscape, demanding extraordinary resources and upending established corporate governance hierarchies.").

267. This emergent reality is inspiring a burgeoning board best practices literature in the area of risk management and compliance. *See, e.g.*, THE NACD BLUE RIBBON COMMISSION, ADAPTIVE GOVERNANCE: BOARD OVERSIGHT OF DISRUPTIVE RISKS (2018) (recommending steps for boards to manage disruptive risks).

268. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996). Despite the emphasis on stock price monitoring by boards, Gordon notes the emergence of a "controls monitoring" duty on the board's part. *See* GORDON, *supra* note 37, at 1540 ("Directors, then, will have a particularized monitoring role, which might be called 'controls monitoring,' in addition to 'performance monitoring.'"). Our treatment of the subject differs substantially from Gordon's by focusing on controls monitoring as a steppingstone for actual board leadership in corporate affairs, to the point of defining the firm's orientation to a broad set of financial, operational, legal, and socially relevant matters.

the progress of and corporate investments in upgraded information technology. Information governance rejects the presumption of the "informationally-captured" board, which had no basis in law, and ignored the relevance and utility of contemporary communications technologies.

From an information governance perspective, an essential insight is that risk management and legal compliance are not finite tasks or "check the box" functions which the firm summarily completes and moves on. This facet of information governance demands reframing as a "capability" of firms—one executed under the board's leadership and linked to value creation arising from the right culture and reputation. Stepping back, it becomes clear that legal noncompliance is a subset of risk, and risk is a subset of strategy—an area of governance executed at the highest level.[269] To emphasize—given the scope and complexity of financial and operational risks facing public companies, and the multiplicity (federal, state, and regulatory) of legal rules governing firms' conduct—risk and legal compliance are features of strategy which, by law and practical necessity, should engage board judgment and discretion. That is, they constitute a facet of board leadership. How much risk should the board shoulder in seeking return? How much legal compliance should the board effectuate before the costs become prohibitive? Or, how little should the board invest without risking large penalties or reputational catastrophe? These issues reveal the synthetic quality of information governance and, relatedly, why it cannot be siloed in functional units below the board's purview.

Expanded transparency and stakeholder scrutiny, in combination with the inherent uncertainty accompanying achieving an optimal equilibrium in a firm's risk management and legal compliance responsibilities, mandate boards' superintendence of these matters, along with the C-Suite. The potential salience generated by social media, in combination with the legal stakes and uncertainties, means there are no shortcuts. Governing risk management and legal compliance becomes a matter of senior level business strategy, since reputation and potential financial penalties bear immediately on corporate wealth.[270] Information governance contemplates that each firm's board will take a unique tack in adapting and prioritizing risk and legal

269. For a story of an epic legal compliance and risk oversight failure at Goldman Sachs, see *Plaut v. Goldman Sachs Group, Inc.*, No. 18-CV-12084, 2019 U.S. Dist. LEXIS 160255 (S.D.N.Y. Sept. 19, 2019) (involving alleged fraud and violations of the Exchange Act); Dennis M. Kelleher, *Goldman Sachs and the 1MDB Scandal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 14, 2019), https://corpgov.law.harvard.edu/2019/05/14/goldman-sachs-and-the-1mdb-scandal/ [https://perma.cc/2JYT-6NJW].

270. For discussion of the strategic dimensions of the governance of legal compliance, see Constance E. Bagley, *What's Law Got to Do with It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587, 600 (2010).

compliance governance. Yet while the intensity and priority will vary firm-by-firm, these *must be priorities for boards' attention in every firm*.[271] Each firm will have an individual signature—an identity achieved through board leadership. The firm's own reporting (both mandatory and discretionary, including on its web page), media reporting, and social media reporting telegraph this signature identity to investors, customers, and employees. This is a crucial facet of the new reality boards face in information governance.

F. ESG as Part of Information Governance

Boards' increasing focus on ESG matters fits the information governance thesis (as we demonstrated in Part I, in regard to the demise of separate realms thinking). In recent years, we have seen increasing board-level attention devoted to sustainability reporting, policies toward ESG shareholder proposals, and ethical corporate culture initiatives.[272] All of these involve enhanced informational commitments. Many times, they result in compelling narratives intended to shape corporate actors' conduct and the firm's identity. Where firms have failed to attend to these, they have not uncommonly paid a reputational price in the stock market, as well as the market of public opinion.[273] At the same time, the invention of the benefit corporation and the proliferation of benefit corporation statutes across the nation, underscore not only the public interest in socially responsible business, but also the increased role in traditional for-profit companies for boards of directors that take such concerns seriously.[274]

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271. Again, information governance takes a synthetic view of board leadership as communicative action. This is why risk and legal compliance are matters which come under the purview of nominating and governance committees, and the full board as well, not just audit committees.

272. *See, e.g.*, NACD, URGENT IMPERATIVE, *supra* note 2, at 16 (86% of the S&P 500 now publishes annual sustainability reports, compared to 20% in 2011); NATALIE COOPER, BOB LAMM & RANDI VAL MORRISON, DELOITTE, BOARD PRACTICES REPORT 7 (2018) (56% of directors surveyed anticipate that their companies will increase disclosure related to CSR, sustainability, and social impact over the next twelve to eighteen months).

273. Edward J. Carberry, Peter-Jan Engelen & Marc Van Essen, *Which Firms Get Punished for Unethical Behavior? Explaining Variation in Stock Market Reactions to Corporate Misconduct*, 28 BUS. ETHICS Q. 119 (2018) (empirically testing the role of the media and corporate disclosures on stock price reactions to unethical corporate conduct).

274. *See* Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 618–25 (2017) (discussing some of the unique attributes of benefit corporations and their relation to board leadership).

1. Board Stewardship of Shareholder Proposal Issues

Beginning in 2017, in a series of Staff Legal Bulletins, the SEC's Division of Corporation Finance (the "Division") began encouraging boards of directors to provide a written, board-level analysis of the excludability of a shareholder proposal when a corporation requests a No-Action Letter from the Division.[275] Asserting that a company's effort to exclude a proposal under the "ordinary business exclusion" can involve "difficult judgment calls that we believe are matters that the board of directors generally is well-situated to analyze," the Division emphasized that a "well-developed discussion of the board's analysis" could assist the corporation in demonstrating to the Division that a proposal is excludable.[276] Although the Division has said that this new, board-level submission is not required to obtain a No-Action Letter, the Division's special emphasis on it has created new obligations for a board considering an exclusion. It shifts oversight of the underlying policy issue from the C-Suite up to the board and ensures that board-level consideration occurs (and is memorialized in writing) even for proposals that the firm seeks to ignore. The Division has stated that it believes that the board is the "appropriate body with fiduciary duties to shareholders" to give "due consideration as to whether the policy issue presented by a proposal is of significance to the company."[277] The Division's decision to ask for board analyses thus makes the corporation's response to issues raised by shareholder proposals (rather than just the corporation's handling of the proposals themselves) a matter of the board's fiduciary obligation.

In addition, because shareholder-proponents often pursue the same reform year after year, the result of the Division's move will be, at many companies, a written chronology of the board's ongoing consideration of the underlying issue, whether social, political, environmental, or governance-related. The net effect is to make the *board* rather than the usual players, the C-Suite officers, the steward of the underlying substantive issue over a potentially long-time horizon, and to create a public paper trail of the board's treatment of the policy issue over a course of years. This record creates an important communication about the firm's commitments. It makes the

275. SEC Staff Legal Bulletin No. 14I (Nov. 1, 2017); SEC Staff Legal Bulletin No. 14J (Oct. 23, 2018); and SEC Staff Legal Bulletin No. 14K (Oct. 16, 2019).

276. SEC Staff Legal Bulletin No. 14K (Oct. 16, 2019) ("If a request where significance is at issue does not include a robust analysis substantiating the board's determination that the policy issue raised by the proposal is not significant to the company, our analysis and ability to state a view regarding exclusion may be impacted.").

277. *Id.*

board's stewardship of the issue not only a fiduciary obligation for the board, but also an expression of the firm's purpose, operation, and intentions—its identity.

2. "Tone at the Top"

The abuses which led to the Great Recession focused the world's attention on corporate culture. As the research of Yale Law professor (and psychologist) Tom Tyler demonstrates, ethical, pro-compliance corporate cultures can flourish only where there is a perception of strong "buy-in" from the board and the firm's senior-most executives.[278] This insight is often described as the "tone at the top." It recognizes that information does not just flow up the reporting chain to a passive board, but also down from an active and engaged board through all the strata of the organization. In this picture, the board is not merely a recipient of information about the firm, but also an author of the firm's ethical identity. Through a significant immersion in corporate data and reporting systems, and by overseeing the creation of ethical, conscientious corporate policies, the directors instantiate the commitment to accountability that can motivate and unify the firm in moving forward.[279]

In "tone at the top," we can see the outlines of the shift from the agency cost model of the board to the information governance model. The agency cost model focused on creating incentives to shape managers' behavior to benefit shareholders. Firms could treat "tone at the top" as a shareholder wealth maximization exercise. Alternatively, boards are increasingly communicating "tone at the top" as part of instilling a broader "ethical culture" irrespective of ties to shareholder value. For example, this is happening through the production and dissemination of a wide range of authoritative corporate texts directed at employees, investors, customers, and regulators. Given the enterprise-wide salience of these texts and the ramifications where such commitments are breached by firms and employees, they should be subject to board review. The creation of an ethical

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278. *See, e.g.*, RODERICK M. KRAMER & TOM R. TYLER, TRUST IN ORGANIZATIONS (1996) (discussing the broad effects of trust on organizational functioning); Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267 (2014) (arguing for the importance of values, particularly legitimacy, in minimizing the likelihood of unlawful corporate behavior).

279. *See* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001) (noting the role of board governance in building productive internal firm culture as a valuable asset); NACD, URGENT IMPERATIVE, *supra* note 2, at 12 ("corporate culture" is one of the items on the board agenda that "really matters").

culture is not primarily about calibrating incentives for agents in a narrowly instrumental sense (although it can demonstrably influence employees' morale and behavior). Rather, more genuine and durable ethical cultures arise from information- and communication-based actions by the firm's leadership: learning about the firm's cultures and sub-cultures, synthesizing an ethical identity across all of the firm's sub-units, and communicating that ethical identity effectively, continually, and with consequence.[280] This phenomenon reflects, in part, the increased power of multinational corporations, and hence their boards. Especially because such firms can now more effectively influence and elude individual nation-states' legal systems,[281] they are more susceptible to populist backlash and attendant organizational disruption when they are seen as bad actors.

G. Boards in Strategy

Our information governance proposal builds on the upsurge in demand for robust, creative strategic management in U.S. corporations. Whereas the monitoring board's contribution to strategy was limiting managerial waste, information governance presumes higher aspirations for the board. While, as they currently do, boards would delegate responsibility for *initiating* and *executing* strategy to their CEOs, information governance contemplates a thicker, more collaborative strategic advisory role for the board.[282] The new paradigm presumes that directors are dedicated to acquiring in-depth, firm-specific knowledge to complement their individual expertise. As described above, committee duties once categorized as administrative are, in fact, domains for corporate expertise-building which position directors to contribute to strategy. Moreover, the current ease of communications technology, and firms' enhanced data reporting systems support this capability.[283] Surveys indicate that directors themselves are enthusiastic

280. *See also* Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 600 (2018) (analyzing a corporation as a system, where each element is interconnected such that the entity operates as a unified whole).

281. For discussion of one modality through which this influence is exerted, internationally, see for example, Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017).

282. For discussion of board strategic advising in the legal literature, see Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265 (1997); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001); Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors,* 40 SAN DIEGO L. REV. 781 (2003).

283. *See* discussion *supra* Part II.B.

about having an expanded role in strategic advising.[284]

It is not up to CEOs, legally or technologically, to permit or prevent boards from engaging robustly in strategic advising. Nominating committees should be well aware, by now, of the enterprise risks associated with imperialistic CEOs. Technology no longer positions CEOs to capture corporate information in order to subvert boards' capacity to play an active, genuine role in strategy. Again, as Melvin Eisenberg wrote in the *Cardozo Law Review* back in 1997, boards should insist on multiple overlapping but independent channels of information reaching them directly without possibility of CEO bias.[285] Boards also have the power to hire independent advisers, including management consultants, to shed impartial light on strategic alternatives.[286]

Hence, information governance envisions directors as truly empowered in the common project of ensuring the firm's prosperity. Indeed, information governance contemplates boards will engage in *defining what it means for the firm to prosper*. Rather than focusing on the *shortcomings* of outside directors, we see this cohort as uniquely and structurally *enabled* to provide CEOs a constructive sounding board in strategy formation. Directors cannot be fired or otherwise sanctioned by the CEO. Nor are directors, as board members, structurally situated to compete for financial or other rewards. Even the structure of shareholder voting, i.e., the tendency to retain board incumbents, enables directors to speak authentically in deliberations with little fear of reprisal.[287] The simple practice of requiring CEOs to present their (hopefully) cogent, fact-based strategic plans to now increasingly well-informed boards stands to make a contribution. It's likely to discourage CEO strategies that are too egoistic, rash, thinly conceived, or ill-fitting with the firm's competitive position and environment. As peers secure in their

284. *See, e.g.*, NACD, URGENT IMPERATIVE, *supra* note 2, at 11 (finding in a May 2019 director poll that 86% of directors "fully expect to deepen their engagement with management on new drivers of growth and risk in the next five years"); VINCENT FIRTH, MAUREEN BUJNO, BENJAMIN FINZI & KATHY LU, DELOITTE, SEVEN STEPS TO A MORE STRATEGIC BOARD 3 (2019) ("directors want to be more involved in strategy" to "contribute more value" and to "use their full range of talents"); Chinta Bhagat, Martin Hirt & Conor Kehoe, *Tapping the Strategic Potential of Boards*, MCKINSEY Q., Feb. 2013, at 2 (two out of three surveyed directors would like to spend more time on strategy).

285. Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237 (1997). *See also* Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REGUL. 313, 334 (2007) (discussing excess managerial freedom in corporate law).

286. Sarbanes Oxley Act of 2002, Pub. L. No. 107–204, § 301, 116 Stat. 745, 776 (2002) (codified at 15 U.S.C. § 78j-1(m) (2020)).

287. These constitute one reason why reference to Habermas in the terminology of "communicative action" appears apt.

positions, board members are free to dig in—to bring both their firm-specific and their individual knowledge to bear—and to deliberate over their firm's future.

Some of the increased demand for board collaboration in strategizing is being fueled by fears of short-termism, as associated with activist hedge funds and otherwise.[288] Despite record-high stock prices, there is palpable economic malaise challenging U.S. firms' stature and prestige.[289] Slow growth, economic insecurity, and rising inequality are creating populist turmoil, including resentment against large companies.[290] Prior to the pandemic, companies commonly used free cash flow (and tax breaks) to buy back shares, raising complaints that they were failing to invest in their firms' longer-term futures, including that of their employees.[291] Once the pandemic hit, the absence of cash reserves triggered bailouts, especially for larger firms—always a source of controversy. No longer is record-high CEO pay receiving unqualified endorsement, even in the presence of high stock prices. The underlying tenets of antitrust policy are also being reconsidered, reflecting worry that record consolidation has enabled oligopoly to undermine wages, sustainability, and innovation.[292] These legal, social, and macro-economic pressures are presenting challenges to business strategy that, at minimum, CEOs *should not resolve on their own without board input and consensus*.

Surveys indicate that directors are themselves seeking a larger role in the strategic planning process. Directors are advocating for a larger role in strategic planning notwithstanding their greater time commitment and responsibility in financial reporting and oversight of risk and legal compliance. Or perhaps directors seek a larger role on account of these things, since being more deeply informed, by virtue of active committee service, gives directors greater depth in strategic planning. For many directors, prestigious strategy work is a "reward" for the heavy lifting of

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288. Mark J. Roe & Roy Shapira, The Power of the Narrative in Corporate Lawmaking (Harv. Pub. L. Working Paper No. 20–21, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703882 [https://perma.cc/P4UQ-VLT3].

289. *See, e.g.*, Jeanna Smialek, T*he Fed Sets Out Many Reasons to Worry About the Economy*, N.Y. TIMES (Sept. 15, 2020), https://www.nytimes.com/2020/07/01/business/economy/federal-reserve-minutes.html [https://perma.cc/LD27-FCBZ].

290. *See, e.g.*, Peter S. Goodman, *Big Business Pledged Gentler Capitalism. It's Not Happening in a Pandemic.*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/13/business/business-roundtable-coronavirus.html [https://perma.cc/QY4R-4FBK].

291. *See, e.g.*, Jerry Useem, *The Stock-Buyback Swindle*, THE ATLANTIC (Aug. 2019), https://www.theatlantic.com/magazine/archive/2019/08/the-stock-buyback-swindle/592774/ [https://perma.cc/U2QP-F58M].

292. *See generally* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2019); Lina M. Khan, *Amazon's Antitrust Paradox*, 76 YALE L.J. 710 (2017).

committee work.[293]

Because this Article is not an encyclopedic account of boards in information governance, we have omitted a treatment of the compensation committee's work. It is apparent, nevertheless, that directors' participation in strategy formation should improve their capacity to assess the CEO's *execution* of the strategy, as relevant to CEO compensation and retention decisions. As expressed earlier, information flows in information governance are synthetic.[294] The monitoring board relied principally on external, stock price signals to assess CEO success. Information governance shifts the focus to illuminate how internal board experience, advising on financial reporting, risk and legal compliance, and strategy (in addition to stock prices), enables better board judgments about compensation and retention.

Business strategy is conventionally associated more with the fields of management and finance than law. But law is crucial to the board's authority in strategy. To review, by statute in every state, boards of directors are granted preeminent discretionary authority over corporate affairs, to manage or direct, as they see fit.[295] The CEO's authority is delegated from the board's statutory authority and documented in board resolutions vis a vis non-ordinary affairs. Sales of substantially all assets, a sale or substantial expansion via a merger, and the declaration of special dividends or share repurchases are all corporate acts that cannot be commenced other than by consent of a majority of directors.[296] The board, of course, chooses the firm's CEO—the primary actor in setting strategy—and may terminate the CEO if the firm's strategy is a failure.

To provide room for reasonable adventurousness in strategy, the law ensures that neither boards nor CEOs are financially liable for business losses from failed strategies, except in extraordinary circumstances. So long as the strategy was chosen in good faith, based on all reasonably available information, the business judgment rule ensures that shareholders cannot hold the board or CEO liable for attendant business losses.[297] This fiduciary

293. *See* STEWART, *supra* note 196. *See also* Rick Hoel, *The Role of the Board of Directors in Strategic Planning,* DILIGENT INSIGHTS (Apr. 12, 2019), https://insights.diligent.com/board-of-directors/role-board-directors-strategic-planning [https://perma.cc/27NM-7CNS] ("Collectively, [directors] rate long-term strategic planning as the top issue demanding their attention.")

294. *See supra* note 271.

295. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a).

296. *See, e.g.*, DEL. CODE ANN. tit. 8, § 271.

297. *See generally* DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW (2018) (tracing the origins and development of the duty of care and business judgment rule in American corporate law).

duty of care requirement provides an additional incentive for boards to ensure they are fully informed in their strategy-oversight role. Financial conflict-of-interest transactions and egregious shortfalls in directors being informed can result in personal liability for directors, but only in truly extraordinary circumstances largely within their control. Liability for corporate "waste" is virtually nonexistent—pertaining to instances of board judgment falling outside *any* creditable strategy.[298] Business judgment deference in litigation is also a pillar of board leadership in information governance. For these reasons, fear of liability should not factor into boards' participation in strategy. In sum, the law provides that board authority and discretion is constitutive of corporate strategy formation, notwithstanding the freedom and respect afforded CEOs in this domain. The monitoring model masked full recognition of board authority and discretion in setting corporate goals and objectives. There was not ambiguity over whether they existed, they just did not comport with broader features of that agency cost paradigm.

Nevertheless, interestingly, there is no *fiduciary* duty mandating boards to govern strategy or to govern "strategically."[299] Broad, nonspecific nostrums in the equitable jurisprudence advise directors (and officers) to act in the best interests of the firm and shareholders, to become informed, and to avoid financial conflicts. One might presume this gap in fiduciary doctrine arises from the law's tendency to attend to the "downside" of affairs—the avoidance or resolution of conflicts. Yet this is not the case here: fiduciary duties have an aspirational, "upside" orientation, as well as one demarcating standards of liability.[300] As for board fiduciary duties touching on "strategy," the case law simply avoids express mention of the subject. Conceptual frameworks for strategy operative in the field of management—through MBA education, consultants, and research—have not infused the vast case law of board duties

Nor do fiduciary duties or other requirements in corporate law (outside the M&A context) locate where along the spectrum of shareholder profit maximization or stakeholder governance a board should set corporate sights. Both shareholder wealth maximization and stakeholder governance—indeed

298. *See, e.g.*, PRINCIPLES OF CORPORATE GOVERNANCE, § 1.41 (AM. LAW INST. 2019).

299. This realization is first noted in the legal literature by Nadelle Grossman. *See* Nadelle Grossman, *The Duty to Think Strategically*, 73 LA. L. REV. 449, 479 (2013) (arguing that legal duties focus only on managing to prevent losses, not on strategically managing to create gains).

300. *See* Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 463–64 (1993) (claiming that the standards of conduct in corporate law are not merely aspirational, but also have "a real bite").

the full spectrum of strategic board discretion—are congruent with existing fiduciary tenets and the board discretion they validate. Irrespective of claims to the contrary, the law remains agnostic on this matter, and information governance supports this agnosticism, and hence expansive discretion in the board. We argue that enhanced transparency is the ideal monitor of this fiduciary and corporate discretion, rather than law or legal commentators dictating some end purpose of business corporations.[301]

More remarkable than fiduciary law's silence is the almost complete failure of legal scholarship to address boards' role in strategy.[302] Most pointedly, as illustrated in Part I, the "monitoring" board—as it was intended to focus the board on limiting managerial agency costs—was not the "strategy" board.[303] Legal corporate governance research acknowledged in passing that boards might fruitfully advise the CEO about strategy, but the discussion went no further, remaining generic, nonspecific. The silence in the legal scholarship perhaps reflects the pervasiveness of the presumption (unsupported by empirical evidence) that non-management directors would not or could not become deeply informed about corporate affairs, and hence could not contribute much to a CEOs' project of strategy formation. The view was that CEOs would resent and prevent it. Second, there was a presumption that non-management directors could not obtain the requisite information to become genuinely useful, a presumption refuted above. Third, there was a presumption that non-management directors lacked an incentive to become deeply informed about their firm—a presumption, we noted, that ignores the prestige from and enjoyment of power in the role, as well as the now substantial compensation. As stated above, relative director ignorance about the inside of their firms was accepted as if it were a necessary tradeoff for independence—an assumption the information governance model rejects. We believe we have demonstrated that new technology, new legal requirements, and new expectations for directors' roles refutes the model of the detached, thinly-informed director.[304] In this

301. Such discretion fits neatly with the enabling nature of American corporate law. On the benefits of such flexibility in law, see, for example, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993) (arguing that a legal structure that allows shareholders and the market to freely monitor management is more efficient than implementing rules that directly regulate management).

302. *See* Ronald J. Gilson & Jeffrey N. Gordon, *Boards 3.0: An Introduction*, 74 BUS. LAW. 351, 353 (2019) (conceptualizing a new board model that would have a more active role in shaping a company's strategy); GROSSMAN, *supra* note 299, at 473–75 (claiming that although directors play an advisory role when determining strategy, managers ultimately choose a company's strategic plan).

303. *See* discussion *supra* Part I.

304. *See, e.g.*, NACD, URGENT IMPERATIVE, *supra* note 2, at 12 (proposing that board

new mindset, the opportunity to influence the identity of a major public company, including its business strategy, its posture towards risk and the law, and its ESG profile are, even alone, powerful draws, encouraging talented professionals to board service.

Indeed, the role of *outside* directors in strategy formation is a functionally vital one. Vetting the CEO's strategic plan, with authentic candor, is not plausibly an option for an insider or affiliated director. Where they could be fired by the CEO, as is true for inside directors and advisers, they cannot afford to bring constructive criticism to bear on the CEO's strategic vision. Inside directors, reasonably, would have to say "yes"—thereby fostering groupthink, as well as greater overconfidence bias in the CEO.[305] Both have been highly destructive for firms. The universally accepted need for independent directors' judgment in evaluating a CEO's performance *ex post* is equally germane to vetting a CEO's strategy *ex ante*. But to make a meaningful contribution, directors' professional independence—security of livelihood and independence of mind—has to be complemented by meaningfully deep firm-specific knowledge, as we have discussed herein.[306]

By 2020, the field of strategic management has already embraced reliance on big data, quantitative analysis, and enhanced reporting-technology software. Big data and information science have ramped up to such a degree that commentators are already foreseeing a role for machine learning in corporate governance.[307] But what is overlooked too often is that *strategy is also a narrative process*.[308] Corporate data does not speak for

leaders "position boards as more proactive in providing direction and shaping future strategy").

305. *See, e.g.*, Marleen O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1243–47 (2003) (finding that CEO-dominated boards may not act in shareholders' best interests because other directors are not sufficiently independent of the CEO and do not have "equal peer status" to her); James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 L. & CONTEMP. PROBS. 83, 91–93 (1985) (arguing that director nominees are often agreeable to and compatible with the current board leading to in-group conformity and a lack of dissent within the board).

306. Once we concede that local stock market prices are incomplete signals about the quality of a CEO's strategy, then directors serving on the Compensation Committee must also be well informed about the terms and parameters of the CEO's chosen strategy.

307. *See, e.g.*, John Armour & Horst Eidenmüeller, *Self-Driving Corporations?* 13 (ECGI Law, Working Paper No. 475/2019, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3442447 [https://perma.cc/QC9N-R6SG].

308. On this score, see, for example, Christopher Fenton & Ann Langley, *Strategy as Practice and the Narrative Turn,* 32 ORG. STUD. 1171 (2011) (drawing on the organizational studies literature on Communication Constitutes Organization to analyze this dimension of strategy).

itself. To become meaningful, data demands inferences about causality, probability, and market competitors' conduct—all projected into the future. Taking a narrative view of strategy illustrates how it fits with the discretionary, conscientious view of the board's information governance. Mindful information gathering, deliberating about the results, and asking probing questions at the board level are part of the narrativity in strategy formation. They are not self-executing functions, nor is the process suitable to be performed by one individual. Accordingly, requiring the CEO to engage the board in a collaborative process of describing, examining, and narratively constructing the firm's strategic plan can be extremely valuable to the firm.

Nor do boards have to reinvent the wheel in developing conceptual frameworks for strategy. As distinct from strategy *execution,* which is inevitably bespoke, strategy *formulation* builds on two predominant schools of thought in management science. While impossible to summarize here, they should be noted because they provide authoritative, widely accepted, rigorous entrée to serious considerations of strategy by boards. Variations on these two academic strategy traditions are employed, commonly, by executives and management consulting firms—hence they should be conceptually accessible for directors.

One is the so-called "resource-based" view of the firm, arising from the seminal research of Edith Penrose.[309] To discern the sources of a firm's competitive advantage in order to capitalize on it, the resource-based view of the firm demands a searching interrogation of which corporate assets or resources (tangible or intangible) are "rare, valuable and relatively inimitable." The resource-based view of the firm is nearly universally taught in business schools.[310] Its basic framework would be familiar to virtually every director with an MBA.

The same is true of the second major school of strategic thought, arising from the research of Harvard Business School's Michael E. Porter.[311]

309. *See generally* EDITH PENROSE, THE THEORY OF THE GROWTH OF THE FIRM (1959) (arguing that a firm's growth is largely dependent on its available resources); Richard L. Priem & John E. Butler, *Is the Resource-Based "View" a Useful Perspective for Strategic Management Research?*, 26 ACAD. MGMT. REV. 20, 23–25 (2001) (summarizing the different takes on the resource-based view of the firm); Birger Wernerfelt, *A Resource-Based View of the Firm*, 5 STRATEGIC MGMT. J. 171 (1984) (finding that a firm's strategic options should be governed by that firm's available resources).

310. *See, e.g.*, Norman T. Sheehan, *Understanding How Resources and Capabilities Affect Performance: Actively Applying the Resource-Based View in the Classroom*, 30 J. MGMT. ED. 421 (2006).

311. *See* MICHAEL E. PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE (1985) (explaining how a firm's "value chain" gives it a competitive

Porter's work is as famous among MBAs as Coase's is among University of Chicago Law School graduates. Porter is still an active teacher and researcher at Harvard and is a sought-after consultant. Porterian strategy adopts a five-part heuristic for analyzing a firm's competitive status within its industry and larger competitive environment—hence, its most likely paths to success. Notably, despite their comprehensive influence on management science, neither the resource-based view, nor Porter's five forces analysis, are particularly quantitative models of strategy (though econometric and other quantitative metrics are used in applying the theories to case studies, of course). The point for directors is that they do not need to conduct regression studies to understand the strategic future of their firms. Nor do they need to proceed *ex nihilo* in developing a framework for analyzing their CEO's strategic plans. These two widely accepted models offer frameworks for boards to discuss their CEO's preferred strategic alternatives.[312]

This discussion of boards in strategy, and in information governance overall, suggests that firms might benefit from selecting board candidates with different backgrounds. Nominating committees might focus less on the pool of retired and current CEOs and more on mid-career executives who intend to grow professionally with their firms. Directors who are employed full-time will serve, ideally, on one board at a time. The greater churn in executive labor markets, as well as the greater representation of women and minorities in elite professional networks, suggests there will be no shortage of highly qualified candidates. Web-based, professional search technology is available, and likely genuinely to up the ante in board recruitment. Beyond the substantial compensation, public company board positions confer power, prestige, and access to elite networks which can later be monetized. Charter exculpation, indemnification, D&O insurance, the business judgment rule, the demand requirement, heightened pleading requirements, forum selection bylaws, and a myriad of other legal and logistical hurdles ensure that directors acting conscientiously face near zero personal liability exposure.[313]

edge over other industry firms); MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS (1980) (finding that a firm's competitive strategy should be determined by industry analysis, competitor analysis, and strategic positioning).

312. Of course, there are CEOs who adopt an instinctive, ineffable approach to strategy, and would avoid board-level discussion of strategy. In such a case, the full board would have to evaluate whether to tolerate that degree of CEO autonomy. Blind luck, too, is at times more influential than is planning, but no one would suggest leaving a company's future up to luck.

313. *See* Rene Otto & Wim Weterings, *D&O Insurance and Corporate Governance: Is D&O Insurance Indicative of the Quality of Corporate Governance in a Company?*, 24 STAN. J. L. BUS. & FIN. 105, 108 (2019) (finding that D&O insurance reduces directors' risk-adverse

Going forward, to the degree boards require support to obtain relevant data in the domains of information governance described above, administrative supports will develop. The Office of the Corporate Secretary is an underdeveloped institutional resource which could be recast to report to the board rather than management. A "board ombudsman" or an "administrative board suite" might also aid in this goal.[314]

In sum, although corporate governance has underemphasized the role of boards in strategy formation, developments in information technology, more intensive director committee requirements, and clear, evolved frameworks for strategic analysis, now position even outside directors to make a valuable contribution in this area. Strategy formation is not a gnostic art; the information governance board is strategically enabled.

H. Boards' Fiduciary Information Duties

Under *Caremark* and its progeny, boards must demonstrate a pattern of genuine inquiry regarding legal compliance and risk management and pay attention to signs of "red flags." In a more modern vein, boards must attend to their firms' architecture of internal data gathering and reporting and produce a considered response to the results.[315] The evolution of *Caremark* duties provides some of the best authority that informational demands on boards are increasing, and that this path leads to better corporate governance. Information governance provides a framework to understand this evolution. It justifies the ongoing legal shift in favor of enhanced *Caremark* duties by recognizing the creation of and attendance to informational architecture as a core role of the board. It connects the board's active participation in informational practices to the board's satisfaction of its fundamental duty of loyalty.

In a closely followed decision in *Marchand v. Barnhill,* the Delaware

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behaviors and fears that they will personally have to pay for a liability claim).

314. Proposing the former, see Lynne L. Dallas, *Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson*, 54 WASH. & LEE L. REV. 91, 93, 130–37 (1997) (arguing that a board ombudsperson would gather information, present it to independent directors, and make recommendations based on the information). Proposing the latter, see Kobi Kastiel & Yaron Nili, *"Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 2017 WIS. L. REV. 19, 52–55 (2017) (claiming that a board suite, consisting of an office of the board and an independent general counsel to the board, would close the board's information gap).

315. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (stating that boards themselves must ensure that reasonable information and reporting systems exist in the organization to satisfy their obligation to be reasonably informed); Stone v. Ritter, 911 A.2d 362 (Del. 2006) (finding that directors fulfilled their obligation to establish an information and reporting system and subsequently monitor its operation).

Supreme Court emphasized that the board could not simply rely on management's compliance efforts or discretionary reporting on operational matters.[316] In *Barnhill*, an ice cream manufacturer failed to remediate an outbreak of deadly bacteria in one of its manufacturing plants, leading to three deaths.[317] The company's board had not been informed about "yellow and red flags" about the bacterial outbreak because it had no informational architecture that required reporting such flags up to the board and because the company's officers had elected to provide the board with limited information about the growing problem.[318] The Delaware Supreme Court held that the company's board could violate its *Caremark* duties by failing to establish the existence of a system to keep itself informed about the company's food safety performance and compliance.[319] To discharge its *Caremark* duties, the court held that the board had to undertake a good-faith effort to establish a food safety risk oversight system *at the board level* and then *participate in* the system.[320] Relying on this two-prong approach endorsed by *Barnhill*, the Delaware Court of Chancery recently rejected a motion to dismiss a complaint that pled a violation of *Caremark* duties where the board of a pharmaceutical company had ignored red flags raised through information processes focused on its regulatory approvals.[321]

Starting in the mid- to late 1990s, then, *Caremark* and its progeny have expressed the board's duty of loyalty, in part, in terms of its good faith execution of informational practices.[322] As the Delaware Supreme Court said in *Barnhill*, "the board must make a good faith effort—i.e., *try*—to put in place a reasonable board-level system of monitoring and reporting."[323] The word *reasonable* suggests that as informational best practices evolve, courts will hold boards responsible for updating and improving those practices at

316. Marchand v. Barnhill, C.A. No. 2017-0586-JRS, slip op. at 34–36 (Del. June 18, 2019).

317. *Id.* at 1.

318. *Id.* at 5 ("the complaint alleges that Blue Bell's board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments" and "the board was not presented with any material information about food safety").

319. *Id.* at 32–33.

320. *Id.* at 30 ("In short, to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it."); *see also In re* Clovis Oncology Derivative Litig., C.A. No. 2017–0222-JRS, slip op. at 2 (Del. Ch. Oct. 1, 2019) (emphasizing the board's obligation to *monitor* an oversight system).

321. *In re* Clovis, slip op. at 36–43.

322. For a recent synthesis of *Caremark* and its progeny, see Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021–25 (2019) (finding that few cases alleging director-oversight failures survive the motion to dismiss stage).

323. Barnhill, slip op. at 30–31 (emphasis added).

each firm. What is reasonable will turn not only on the company's unique business-regulatory and risk profile, but also on the information technology and organizational practices that supported (or failed to support) the board's collection and analysis of information germane to remediating problems. As information technology and organizational practices improve, the expectations for board competency will ratchet up. Exculpation for duty of care violations (and the business judgment rule) will continue to protect directors from personal liability for poor judgment in the *use* of the information, but the board's responsibility for robust informational practices will limit any "blind spot" defense, including in the selection of plainly inadequate informational systems.[324] Boards operating in good faith will increasingly be held liable for ignoring red flags and failing to attempt to learn of them.

Given the growing importance of information flows and communicative action to board governance, we might expect courts to raise the bar for disclosure-related fiduciary duties and cleansing tools in other contexts. This includes directors' disclosure duties to shareholders and their duty of candor *inter se*, as well as disclosure practices upon which the cleansing effect of shareholder votes will turn.[325] This also includes making express the duties of officers to disclose material information to the board. For example, in recognition of the importance of "reporting up" red flags to the board, Jennifer O'Hare has proposed a "duty to inform" bylaw that would require the CEO and CFO to promptly inform the board of information it needs to manage the firm.[326] This is a bylaw which boards could and should adopt at present, without shareholder involvement.[327]

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324. *Accord In re* Clovis, slip op. at 34–35 ("as relates to *Caremark* liability, it is appropriate to distinguish the board's oversight of the company's *management of business risk* that is inherent in its business plan from the board's oversight of the company's *compliance with positive law*—including regulatory mandates"); *see also* Teamsters Local 443 Health Serv. & Ins. Plan v. Chou, C.A. No. 2019-0816-SG, slip op. (Del. Ch. Aug. 24, 2020) (following a relatively cautious path in interpreting board oversight duties in relation AmerisourceBergen's subsidiary's legal violations respecting marketing of a cancer drug).

325. *See* Malone v. Brincat, 722 A.2d 5, 9–12 (Del. 1998) (stating that directors must disclose to shareholders "accurate and complete" information relevant to the transaction at hand); *see also* Shannon German, *What They Don't Know Can Hurt Them: Corporate Officers' Duty of Candor to Directors*, 34 DEL. J. CORP. L. 221, 230 (2009) (describing *Malone* as "t[ying] together" directors' "duty of honesty to shareholders not only in communications seeking shareholder action—whether for approval or ratification—but also '[w]henever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action'").

326. Jennifer O'Hare, *Private Ordering and Improving Information Flow to the Board of Directors: The Duty to Inform Bylaw*, 53 U. RICH. L. REV. 557, 558 (2019).

327. *Id.*

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The role of boards in information governance is expanding, as demonstrated above. New demands placed on audit committees exemplify the board's increasing investment in information and communication practices. Over time, fiduciary duty has become increasingly concerned with the management of information. Federal law, SRO rules, and investor demands have pushed boards and board committees to expand the scope and intensity of their attention. Information governance recognizes that boards play a value-creating role at the command center of firms' information architecture. By investing in the firm's knowledge and communication systems, the board helps turn collectivity into enterprise, rather than chaos.

CONCLUSION

This Article has argued that the agency cost "monitoring board" paradigm and separate realms concepts reflect a dated approach to board governance. Four decades ago, Fama and Jensen divided the governance world into monitoring and managing, creating a conceptual dichotomy that influences corporate law to this day. Boards assumed the monitoring role, while the C-Suite performed the executive function. What got lost in the elegant monitoring-versus-managing trope is the board's role in stewardship, which cannot happen in the absence of a meaningfully credible baseline of knowledge and shared communications. Stock price signals are thin, often tardy substitutes for this thicker knowledge about the firm. The COVID-19 pandemic and recent stock market turbulence have only underscored weaknesses inherent in stock-price-based corporate governance.

Governance changed radically in the 2000s in the aftermath of Sarbanes Oxley and attendant developments reflecting widespread fears of legal compliance and risk management failures. The shared belief that governance failures were also implicated in the 2008 (and beyond) financial crisis also brought pressure to bear on the field and produced the Dodd-Frank Act and ensuing SEC regulations. These changes, along with technological and macroeconomic developments, are still being assimilated by governance actors, regulators, and researchers today.

What is clear is that a new approach to board governance is taking shape. Information governance describes the board's management and authoritative deployment of knowledge and communication as the basis for rational collective action in the firm. It embodies an active, rather than a passive, approach to board governance. It is both a normative improvement on the stale monitoring board and one better reflecting corporate governance law's cutting edge.

Directors' participation in financial reporting and risk management and legal compliance oversight constitute investments in valuable firm-specific knowledge. This knowledge is a capital asset that compounds in value when brought to bear on consideration of the CEO's strategic plans. Recent shocks to our systems of public health and finance have only heightened the importance of these informational assets and firms' systems of information gathering, synthesis, and strategy formation. The future of corporate governance is board-level information governance.