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Mission Critical: How Fiduciary Duties of Oversight Can Aid Corporations in Managing Stakeholder Interests

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Abstract

After several public tragedies, corporate missteps, and catastrophes; politicians, certain investors, and other stakeholders have called for accountability in capitalism, proactive action to alleviate climate change, and performance of social obligations from corporations. The Business Roundtable and World Economic Forum have come out with proposals that signify a paradigm shift to the stakeholder approach to capitalism. Delaware, a haven for shareholder primacy, has permissive standards that allow a corporation to engage in any lawful business activity. However, concerns about fiduciary duties, especially the implied duties of good faith, legal compliance, and oversight, have created obligations for directors to engage in oversight and accountability mechanisms at the board level. These mechanisms are promising for stakeholders; by enhancing compliance and awareness about federal regulation, corporations can better equip directors to aid corporate stakeholders. This form of consideration of the stakeholder is consistent with the duty of care and the duty of loyalty, especially where they overlap with "mission critical" operations. This comment argues that corporate managers' use of enhanced oversight of stakeholder and mission critical functions would be beneficial for both the stockholder and the non-stockholder stakeholder alike.

Table of Contents

I. Introduction

Recently, influential members of the business community including the Business Roundtable, the World Economic Forum, and Larry Fink, have pushed for a shift in the stakeholder approach, departing from years of shareholder primacy.[1] These announcements come from influential organizations and leaders in the business community and signify a paradigm shift in the business community.[2] Over the last thirty years, corporate law

[1] Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans',* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans; World Economic Forum, *The Universal Purpose of a Company in the Fourth Industrial Revolution*, (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/; Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter, (last visited Apr. 12, 2020).

[2] *See* Erik Gordon, *Companies Don't Need Permission from the Business Roundtable to be Better Corporate Citizens*, PBS NEWSHOUR (Aug. 27, 2019), https://www.pbs.org/newshour/economy/column-

has slowly shifted toward considering social obligations to the stakeholder through the states' promulgation of constituency statutes and benefit corporation statutes.[3] Stakeholders are groups that are impacted by business, including employees, customers, suppliers, communities, and the environment.[4] At the same time, institutional investors increased pressure on corporations to act upon societal obligations through corporate social responsibility and investors moved to consider

companies-dont-need-permission-from-the-business-roundtable-to-be-better-corporate-citizens (referring to the Business Roundtable's statement as a "symbolic change in tune").

[3] *See* Dina Dalessandro, *The Development of Social Enterprise and Rise of Benefit Corporations: A Global Solution?*, 15 HASTINGS BUS. L.J. 294, 298-299 (2019) (explaining past social and legal developments leading to the existence of the benefit corporation).

[4] *See* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 651 (2004) ("[C]orporate officers must give weight to the interests of other corporate and societal constituencies.").

Environment, Social, and Governance ("ESG") factors in their decisions.[5]

The Delaware General Corporation Law ("DGCL"), the nation's most influential corporate law, remains dedicated to shareholder primacy, the prioritization of shareholder profit maximization over other interests.[6] Nevertheless, the business judgment rule and case law regarding oversight and accountability permit corporations to consider stakeholder interests.[7] Under Delaware

[5] *See* Fink, *supra* note 1 (stating that BlackRock will increasingly vote against boards that do not make sufficient sustainability disclosures and the underlying business practices).

[6] *See* Leo E. Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 766 (2015) (arguing that the structure of the DGCL and case law that ground Delaware in shareholder primacy).

[7] *See* Betty M. Huber, Joseph A. Hall, and Louis Goldberg, *Legal Implications of the Business Roundtable Statement on Corporate Purpose*, HARV. L. SCHOOL FORUM ON CORP. GOVERNANCE, (Aug. 21, 2019), https://www.pbs.org/newshour/economy/column-companies-dont-need-permission-from-the-business-roundtable-to-be-better-corporate-

law, directors have fiduciary duties of care and loyalty, as well as implied duties of oversight and good faith.[8] These duties require corporate directors to act with reasonable care to implement and monitor essential or "mission critical" functions of the corporation through oversight systems, including ensuring compliance with federal and local regulations.[9] Since the Business Roundtable identifies stakeholders as fundamental to business, fiduciary duties of oversight, good faith, and legal obedience extend to stakeholder interests. Through monitoring and reporting systems, corporations can ensure regulatory compliance while shedding

citizens, (claiming the business judgment rule should protect directors when they engage in good faith actions).

8 *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 367 (Del. 2006) (discussing the duty to act in good faith); In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) (establishing the duty of oversight).

9 *See* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) (discussing the need for board level oversight of "mission critical" functions of a corporation).

light on stakeholder interests by increasing transparency and information sharing.[10]

This comment argues that enhanced oversight of mission critical functions, including stakeholder interests, would better serve the stakeholder and stockholder alike. Section II of this comment explains the basics of Delaware fiduciary law and the different movements that led to a shift to considering stakeholders. Section III analyzes Delaware fiduciary law, including recent oversight cases, that mandate legal compliance and oversight from the board of directors regarding "mission critical" operations. Section IV recommends certain routes corporations and governments can take to better accommodate stakeholder interests into their corporate structures, while following Delaware law.

II. Shareholder Primacy vs. Stakeholder Approach: A False Dichotomy

A. Delaware's Stockholder-Centric Law

Delaware, the corporate capital of the United States, is the state of incorporation for sixty-six percent of all Fortune

10 *See* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021 (2014).

500 companies.[11] Consequently, much of corporate governance is based on Delaware's preference for shareholder primacy.[12] Delaware is known for its specialized business Court of Chancery, which resolves corporate disputes before a judge.[13] Additionally, Delaware's business friendly government and tax code is appealing for corporations.[14]

Although the DGCL states that a corporation can serve any lawful purpose,[15] corporate fiduciary law prioritizes stockholder welfare, giving no other stakeholder any legal corporate power or avenue for oversight, leaving stakeholders to "vote with

11 Why Business Choose Delaware, DELAWARE DIVISION ON CORPORATIONS, https://corplaw.delaware.gov/why-businesses-choose-delaware/(last visited Sep. 2, 2020).

12 *Id.* Cf. David Million, *Frontiers of Legal Thought I: Theories of the Corporation,* 1990 Duke L. J. 201, 236(explaining how many scholars favor different theories of corporation, such as nexus of contracts, which essentially means a corporation is a nexus of contracts among private individuals).

13 *Id.* (discussing the benefits of Delaware courts).

14 *Id.*

15 DEL. CODE ANN. tit.8, § 101 (West 2020) ("A corporation may be incorporated...to conduct or promote any lawful business or purposes").

their feet."[16] Champions of shareholder primacy often refer to foundational cases to show that any fiduciary who admits that she is prioritizing any interest above stockholder wealth breaches fiduciary duty.[17]

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,[18] a cornerstone of Delaware fiduciary law, establishes that stockholders must prioritize maximizing stock price in a takeover situation.[19] The board engaged in defensive strategies when faced with a hostile takeover offer, including accepting a

[16] *See* Strine, *supra* note 6 (arguing that Delaware law allocates legal rights to only stockholders)*; see also* Vote Every Day. Vote B Corp, Certified B Corporation, https://bcorporation.net/vote (last visited Feb. 15, 2020) (discussing the concept of "voting with your feet" to express approval of a corporation's practices through patronage).

[17] *See* Strine, *supra* note 6 at 776-77; *see also Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173, 182 (Del. 1986) (holding that directors must vote to maximize stock price in takeover situations); *Dodge v. Ford Motor Co*., 170 N.W. 668, 682 (Mich. 1919) (stating that a business corporation is organized for the profit of stockholders).

[18] 506 A.2d 173, 182 (Del. 1986).

[19] *Revlon*, 506 A.2d at 182.

bid with unfavorable conditions such as a $25 million cancellation fee, rather than a competing offer that would maximize stockholder value.[20] Revlon's shareholders prevailed in a derivative suit for a breach of fiduciary duties.[21] The Delaware Supreme Court ultimately held that in the case of a competing takeover offers, a corporation's board of directors must prioritize the maximization of share price over other long term considerations.[22]

In *Dodge v. Ford Motor Co.*, a Michigan case that exemplifies shareholder primacy, the court found that a corporation is organized primarily for the profit of the stockholder, and directors must exercise discretion to best maximize profit without considering other interests.[23] A director violates her fiduciary duties if she acts in her self-interest, rather than the interest of the corporation and its

20 *Id.* at 178 (explaining the options Revlon's board faced).

21 *Id.* at 185 (holding that Revlon directors breached their duty of care when considering non-stockholder benefits).

22 *Id.* (prioritizing shareholders over other considerations).

23 *See Dodge*, 170 N.W. at 682 (discussing the directors' decision to divide up dividends among shareholders); *see also* Strine, *supra* note 6 at 774 (discussing *Dodge's* significance to corporate theory).

stockholders.[24] While the corporation is primarily managed by directors and employees, stockholders have special rights under corporate law.[25] Stockholders, as owners of a corporation, are entitled to transfer ownership of stock, meet annually with directors, inspect the corporation's books and records, change bylaws, and sue the corporation for wrongful acts through derivative suits.[26] Nevertheless, no fiduciary duties are owed to stakeholders directly, and stakeholders have no enumerated rights at the corporate level.[27]

[24] *See id.* at 682; *see also* DEL CODE ANN. tit. 8, § 102 (West 2019).

[25] *See* DEL. CODE ANN. tit.8. §141 (West 2019) (describing directors role in governing the corporation); Strine, *supra* note 6 at 784 (discussing stockholders rights under Delaware law).

[26] *See* DEL CODE ANN. tit. 8 § 212 (West (explaining the voting rights of stockholders and annual meeting requirements); DEL CODE ANN. tit.8 § 327 (West 1998) (explaining the rights of stockholders to institute derivative suits).

[27] *See* Strine, *supra* note 6 at 784 ("[U]nder Delaware corporation law, no constituency other than stockholders is given any power).

B. The Paradigm Shift toward the Stakeholder Approach

Since *Revlon*, many jurisdictions have moved away from shareholder primacy by promulgating constituency statutes.[28] As activism and calls for action on social issues, labor rights, and climate change have risen, corporations and investors have increasingly moved to incorporate considerations of sustainability and long term growth.[29] Corporate groups such as the Business Roundtable, the World Economic Forum, and influential firms like BlackRock have ushered in a new period for capitalism, focused on corporate purpose and impact.[30]

[28] *See generally* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992) (discussing the promulgation of constituency statutes over the late 1980s and 1990s).

[28] *See id.*; 15 PA. CONS. STAT. ANN. §1715 (1983).

[29] *See* The Climate Pledge, AMAZON BLOG DAY ONE, (Sept. 19, 2019), https://blog.aboutamazon.com/sustainability/the-climate-pledge (pledging to meet the Paris Climate Agreement through innovation and use of renewable energy).

[30] *See* Fink, *supra* note 1(discussing a fundamental reshaping of finance and consideration of ESG factors).

i. Constituency Statutes

In the 1980s and 1990s, jurisdictions enacted statutes aimed at allowing directors more discretion when making corporate decisions.[31] Over thirty states enacted similar statutes, the notable exception being Delaware.[32] Constituency statutes allow directors to consider specific stakeholders, such as employees, in their decisions.[33] Pennsylvania took the lead when it enacted the first constituency statute in 1938.[34] The statute allows directors to consider "the effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located".[35]

Although litigation regarding the appropriate balance of interests in jurisdictions that have constituency statutes and benefit corporation statutes is rare, courts have upheld board

31 *See* 15 PA. CON. STAT. ANN., §47-33-4 (1991).

32 *See* CONN. GEN. STAT § 33-756 (1988); N.Y. BUS. CORP. LAW § 717(b) (McKinney Supp. 1994); NEB. REV. STAT. §21-2035(1) (1991).

33 *See* Orts, *supra* note 28 (discussing the promulgation of constituency statutes).

34 *See id.*; 15 PA. CONS. STAT. ANN. §1715 (1983).

35 15 PA. CONS. STAT. ANN. §1715 (1983).

decisions that consider stakeholders under these statutes.[36] For example, when an Iowa corporation rejected a takeover offer due to community interest considerations, aimed at protecting the corporation from bankruptcy, plaintiff stockholders failed to advance their claim that the board of directors breached their fiduciary duty.[37] Further, when a Pennsylvania corporation's board adopted a stock reclassification as a defensive measure against a hostile tender offer, a court considered the action proper because the company considered the interests of the employees, customers, and community over short term shareholder

[36] *See* Kentucky State Dist. Council of Carpenters Pension Tr. Fund v. Myers, No. 4:10-CV-00332, 2010 WL 11483954, at *1 (S.D. Iowa Sept. 9, 2010; Georgia-Pacific Corp., v. Great N. Nekoosa Corp., 727 F. Supp. 31, 33 (D. Maine, 1989) (holding that a shareholder rights plan that allowed a referendum only after 90 to 120 days was reasonable).

[37] *Kentucky State Dist. Council of Carpenters Pension Tr. Fund,* 2010 WL 11483954, at *1 (involving a takeover situation where the corporation considered stakeholder interests under the Iowa Constituency Statute).

profit.[38] Moreover, the District Court of Maine held that Maine law suggests that while directors consider what is beneficial for the shareholders and the corporation, they should consider stakeholder interest, including employees, customers, suppliers, and the communities where offices are located.[39]

ii. The Rise of Benefit Corporations

More recently, a majority of states enacted benefit corporation statutes, creating a new for-profit corporation that operates to advance a specific public benefit.[40] These corporations often specify a public good in their articles of incorporation, and create fiduciary duties for directors that involve both stockholder and stakeholder interests.[41] Delaware's Public Benefit Corporation statute requires that corporate

38 *See generally* Baron v. Strawbridge & Clothier, 646 F. Supp, 690 (E.D. Pa. 1986) (holding that a corporation could consider the impact of a tender offer on employees).

39 *See Georgia-Pacific Corp.,* 727 F. Supp. at 33 (citing Me. Rev. Stat. Ann. tit. 13, §716 (*repealed* 2003)).

40 *See* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345,350 (2014) (explaining the structure and use of Public Benefit Corporations to advance Social Enterprise Law).

41 *See id.*

boards balance the pecuniary interests of stockholders, the interests of those impacted by the corporation, and the specified public benefit.[42] Many states have benefit corporation statutes that include provisions requiring mandatory disclosure or public posting of an annual benefit report, mandatory consideration of certain stakeholders, and use of independent and accurate methods of evaluating social and environmental performance.[43]

Benefit Corporations can also pursue "B Corp" status through a certification from B Labs.[44] B Labs, a nonprofit, holds certified corporations to high standards of social and environmental performance, transparency, and legal compliance.[45] B Corps are required to undergo a Business Impact Assessment, which is conducted every three years to ensure transparency and compliance with certification requirements.[46]

42 *See* DEL. CODE ANN. tit. 8, § 362 (West 2015).

43 *See* MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a)-(b) (2013).

44 *See* About B Corporations, B LAB, https://bcorporation.net/about-b-corps (last visited on Sep. 2, 2020).

45 *Id.* (explaining the requirements for certification).

46 *Id.*

iii. An Era of Accountable Capitalism and Sustainable Business

Aside from legal changes toward sustainability and social responsibility, businesses increasingly consider Corporate Social Responsibility and the impact of Socially Responsible Investment on firms.[47] Acting on perceived societal obligations, corporations may act to, among other things, reduce emissions, commit to enhancing workers' rights, benefit charities, and engage in awareness campaigns.[48] Investors also look at ESG factors when making decisions.[49] Institutional investors, including firms like Vanguard, BlackRock, and State Street, have begun to implement consideration of ESG factors into investment

[47] Marcia Narine Weldon, *Corporate Governance, Compliance, Social Responsibility, and Enterprise Risk Management in the Trump/Pence Era*, 19 TRANSACTIONS: TENN. J. BUS. L. 275,299 (2017) (noting that companies consider corporate social enterprise commitments and public perception).

[48] *Id.* at 284 (noting that ESG matters are often the subject of shareholder proposals regarding the company's annual reports).

[49] *See* Max Matthew Schanzenback & Robert H. Sitkoff, Reconciling Fiduciary Duty and Social Conscience (April 16, 2019) (unpublished manuscript) (on file with author) (discussing the transition from Socially Responsible Investing to ESG).

decisions.[50] Additionally, some investors demanded that the SEC require disclosure of ESG factors along with the requisite pecuniary disclosures.[51]

Influential leaders in the business community have also pushed for the stakeholder approach.[52] The Business Roundtable is a group composed of the nation's leading Chief Executive Officers, including JPMorgan Chase CEO, Jamie Dimon; Apple CEO, Tim Cook; BlackRock CEO, Larry Fink; and Amazon CEO, Jeff Bezos.[53] The Business Roundtable previously used its power and

[50] James Mackintosh, *Replacing the Wisdom of Crowds with the Wisdom of Fink*, WALL ST. J. (Jan. 19, 2020), https://www.wsj.com/articles/replacing-the-wisdom-of-crowds-with-the-wisdom-of-fink-11579429800 (discussing BlackRock's CEO Larry Fink's comments on a push toward ESG investing).

[51] Preston Brewer, *ANALYSIS: Tracking SEC's Evolving Approach to ESG Disclosures*, BLOOMBERG L., (Nov. 4, 2019), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-tracking-secs-evolving-approach-to-esg-disclosures (discussing the SEC's gradual acceptance of ESG disclosures in public company filings).

[52] *See* Business Roundtable, *supra* note 1; World Economic Forum, *supra* note 1, Fink, *supra* note 1.

[53] *See* Business Roundtable, *supra* note 1.

influence to advocate for specific policy interests, including the consideration of stakeholders through corporate Constituency Statutes.[54] On August 19, 2019, the Business Roundtable released the Statement on the Purpose of the Corporation (the "Statement").[55] The Statement includes commitments to five specific types of stakeholders: customers, suppliers, employees, the community, and finally, stockholders.[56] The Statement left many questions unanswered regarding the implementation of the factors into corporate governance and the law.[57] However, it indicates a larger paradigm shift in the business community toward management considering non-stockholder stakeholders in business operations, especially to advance

54 *See generally* SEC v. Business Roundtable, 647 F.3d 1141 (2011) (suing and prevailing against the SEC for changes to the Exchange Act for shareholder disclosures).

55 *See* Business Roundtable, *supra* note 1.

56 *Id.*

57 *See* Matt Thompson, *Failure to Mention Tax in Stakeholder Model Raises Eyebrows*, LAW360 (Aug. 22, 2019), https://www.law360.com/articles/1190944/failure-to-mention-tax-in-stakeholder-model-raises-eyebrows; (noting that the Business Roundtable Statement does not mention the impact on taxes).

social enterprise.[58] States have responded to market demands by considering stakeholder interests such as employee welfare and the environment before the Business Roundtable's Statement.[59]

In January of 2020, Larry Fink, the CEO of BlackRock, released his annual letter, stating that BlackRock would vote against companies that did not make adequate disclosures on sustainability or lacked sustainable practices and programs.[60] Fink linked environmental action with long term growth, reasoning that "climate risk is investment risk."[61] Given the influential authority of leaders in industry, investment, and business, corporations have already begun to respond to the "fundamental reshaping of finance."[62]

58 *See* Business Roundtable, *supra* note 1**Error! Bookmark not defined.**; *see also* Sammy Criscitello, *Investors Struggling to Win Fund Firms' Support on ESG Proposals*, BLOOMBERG L., (Jul. 29, 2019), https://news.bloomberglaw.com/corporate-law/investors-struggling-to-win-fund-firms-support-on-esg-proposals.

59 *See* Dalessandro, *supra* note 3 (discussing the rise of constituent statutes and benefit corporation statutes).

60 *See* Fink, *supra* note 1.

61 *Id.*

62 *See Delta commits $1 billion to Become First Carbon Neutral Airline Globally,* DELTA NEWS HUB (Feb. 14, 2020),

C. The Corporation and its Stockholders: Board Duties

Delaware corporations are governed by a board of directors, charged with the business and day-to-day operations of the corporation.[63] Members of the board of directors owe the corporation and its stockholders two main fiduciary duties under Delaware law: the duty of loyalty and the duty of care.[64] Other implied duties, such as duties of oversight, good faith, and legal obedience arise from these duties.[65]

Courts presume that directors act in good faith, are sufficiently informed, and are acting in the best interests of

https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030/ (committing $1 billion to becoming the first carbon neutral airline over the next ten years); Brad Smith, *Microsoft Will be Carbon Negative by 2030*, MICROSOFT, (Jan. 16, 2020),https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030/ (announcing plans to go Carbon Negative by 2030).

63 DEL. CODE ANN. tit.8. §141 (West 2019).

64 *See* DEL. CODE ANN. tit.8, § 102 (West 2019); In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

65 *See* Pollman, *supra* note 10 at 2024 (exploring the evolution of fiduciary duties to included implied duties of oversight, good faith, and legal obedience).

the corporation.[66] The presumption of the business judgement rule is rebutted if an action violates a fiduciary duty, does not satisfy a rational business purpose, is grossly negligent, or was otherwise carried out in bad faith.[67] Courts give deference to corporate boards under this rule.[68] For example, when Time, Inc. entered a transaction with Warner Brothers, it forewent an offer from Paramount Communications in order to preserve company culture.[69] The court found that Time had a rational business purpose in choosing Warner Brothers: preserving the company's culture and its long-term growth.[70]

66 *See* In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) (stating that the law presumes that directors are sufficiently informed and acting in the best interest of the corporation while making business decisions).

67 *Id.*

68 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010) ("[T]he Court "will not substitute its judgment for that of the board if the [board's] decision can be 'attributed to any rational business purpose.'").

69 Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1153 (Del. 1989).

70 *Id.* at 1153 (discussing how courts do not try to evaluate the merits of the long-term versus short-term investment goals).

i. Duties of Loyalty and Care

The duty of loyalty requires that directors make decisions in the best interests of the corporation and its stockholders.[71] The duty of loyalty goes beyond an affirmative duty to protect the corporation's interests, but also an obligation to refrain from activities that would harm the corporation.[72]

Under the duty of care, directors are obligated to use the same amount of care that an ordinarily careful and prudent person uses in similar circumstances.[73] This usually encompasses a duty to be fully and sufficiently informed and act with care when making decisions for the corporation.[74] Corporate boards

71 DEL. CODE ANN. tit. 8, § 102 (West 2019).

72 *See* Barnali Choudhary, *Serving Two Masters Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 657 (2009).

73 *See* DEL. CODE ANN. tit. 8, § 102 (West 2019); *see* also In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959,967 (Del. Ch. 1996) ("[C]ompliance with a director's duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss").

74 *Caremark*, 698 A.2d at 970 (stating that corporate boards may not fulfill their obligations without being assured that

should make reasonable inquiries before making decisions and act in good faith.[75]

ii. Duty of Oversight

Directors must implement and oversee essential operations of a corporation under the duty of oversight.[76] In *Caremark*, a health services company violated laws that prohibited companies from paying doctors to refer patients to their services.[77] After Caremark officers were indicted and Caremark paid around $250 million in penalties, shareholders sued alleging a breach of fiduciary duty of care.[78] The Court of Chancery held that the directors had a duty to make an effort to ensure monitoring and reporting systems existed.[79] A breach of the duty of oversight occurs when directors fail to implement any reporting or

reporting and monitoring systems accurately report information allowing the board to make informed decisions).

75 *See* Choudhary, *supra* note 72 at 660.

76 *See Stone v. Ritter,* 911 A.2d 362, 370 (citing *Caremark*'s articulation of necessary conditions for director oversight liability).

77 *See Caremark*, 689 A.2d at 960.

78 *See id.* at 961.

79 *See id.* at 970 (discussing the obligation to be informed).

information systems, or directors consciously failed to monitor or oversee systems, rendering themselves uninformed of risk.[80]

Recently, Delaware courts applied the duty of oversight, regarding health and safety operations.[81] In *Marchand v. Barnhill*, the Delaware Supreme Court noted that a Blue Bell director should have been appointed to be responsible for overseeing health and safety regulation compliance after a Listeria outbreak.[82] Blue Bell, an ice cream company, had failed to implement any systems to monitor compliance with federal and state food and drug regulations.[83] However, Blue Bell did not have board level oversight and directors ignored signals before

[80] *See id.* at 971 (explaining the duty of oversight).

[81] *See e.g.,* Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); In re Clovis Oncology, Inc. Derivative Litig., No. CV 2017-0222-JRS, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019).

[82] *See Marchand*, 212 A.3d at 824 (holding that directors who did not implement board level oversight of the "mission critical" operation of food safety breached their duty of loyalty); *see also Clovis Oncology*, 2019 WL 4850188, at *13 (holding that directors who ignored misleading information from managers of failed clinical trials had breached their fiduciary duty).

[83] *Marchand*, 212 A.3d at 811 (detailing the red flags the CEO allegedly ignored).

the Listeria outbreak which resulted in the deaths of three people, as well as significant losses for stockholders.[84] The court claimed that the board had an obligation to monitor such "mission critical" and essential functions of Blue Bell.[85] The Delaware Supreme Court found that a director should have been charged with overseeing compliance with federal regulation to avoid such regulatory disasters.[86]

Further, in the case of *Wells Fargo*, stockholders filed a derivative action claiming that officers and directors were aware of or consciously disregarded that Wells Fargo employees were illicitly creating millions of deposit and credit card accounts for their customers without consent.[87] Employees motivated by increasing pressure to meet company quotas for the incentive compensation plans created accounts for customers

[84] *Id.* at 814 (explaining that stockholders suffered losses after a liquidity crisis caused by the Listeria scandal).
[85] *See id.* at 824 ("[*Caremark*] does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks.").
[86] *Id.* at 823 (discussing the role of a board in oversight).
[87] In re Wells Fargo & Co. S'holder Derivative Litig., 282 F. Supp. 3d 1074, 1109 (N.D. Cal. 2017).

without consent.[88] The board's Audit and Examination Committee and the CEO ignored letters from employees regarding the rise of illegal activity and pressure on employees.[89] The court acknowledged that the "conscious ignorance" of red flags and the companies tacit endorsement of illegal practices to increase stock price.[90] The Northern District of California, applying Delaware law after consolidating several suits on federal and state claims, found that the stockholders had a valid claim for a breach of the fiduciary duty of oversight.[91]

In *Clovis Oncology*, the corporation's clinical trials for a new drug failed, losing the corporation an opportunity for

[88] *Id.* at 1085 (discussing the sales targets and employee incentive plans that lead to fraudulent activity).

[89] *See id.* at 1082-3 (detailing the signs of fraudulent activity and scandal at Wells Fargo including complaints regarding gaming and sales incentives, lawsuits from employees, government investigations, and a news article).

[90] *See id.* at 1100 (N.D. Cal. 2017) (discussing how directors condoned illegal behavior to meet sales targets).

[91] *See id.* at 1108 (noting that directors had access to relevant data and should have known of the illegal activity).

approval from the Food and Drug Administration.[92] Managers of the clinical study misled directors and managers about the success of the clinical trials, leading to an investigation by the Securities and Exchange Commission ("SEC").[93] Although Clovis set up reporting standards and success criteria, through the clinical trial protocol, "RECIST", the court found that the directors should have detected warning signs of the misinformation and intervened to stop it.[94] Clovis Oncology failed to follow the standards of RECIST protocol and the board received reports that success criteria were being calculated improperly.[95] The court found that directors in highly regulated industries should understand regulatory problems and intervene to avoid pecuniary and reputational harm.[96]

92 In re Clovis Oncology, Inc. Derivative Litig., No. CV 2017-0222-JRS, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019).

93 *See id.* at *6.

94 *See id.* at *13 ("[T]he careful observer is one whose gaze is fixed on the company's mission critical regulatory issues").

95 *Id.* at *5-*6 (explaining that success criteria were being calculated based on unconfirmed responses, rather than confirmed responses per RECIST protocol).

96 *See id.* at *15 ("[T]he Board consciously ignored red flags that revealed a mission critical failure...this failure of

Stockholders of Boeing filed suit after a series of safety issues involving the 737 MAX planes which resulted in two plane crashes and the deaths of over 300 passengers.[97] The stockholders allege that Boeing's directors ignored red flags regarding regulatory compliance, inadequate testing, and a lack of pilot training.[98] While litigation is still pending, Boeing's missteps demonstrates the importance of oversight to both the stakeholder and stockholder.[99]

Caremark claims for a failure to conduct oversight or monitor systems illustrate several instances where corporations did not detect or did not act when compliance issues arose. While the business judgment rule allows directors some

oversight caused monetary and reputational harm to the Company").

97 Jef Feely, Boeing Directors Sued Over Missed Warning Signs on 737 MAX 8, Bloomberg (Nov. 18, 2019), https://www.bloomberg.com/news/articles/2019-11-18/boeing-directors-sued-over-missed-warning-signs-on-737-max-8.

98 *See id.*

99 *See id.*

discretion about business decisions, they must engage in oversight under the duty of care.[100]

III. Oversight and the Stakeholder

While Delaware's permissive standards allow corporations to consider the stakeholder in certain decisions, the purpose of most Delaware corporations remains to ensure stockholder profits.[101] Meanwhile, jurisdictions like Pennsylvania, have provisions in place that allow directors to consider the impact of decisions on stakeholders.[102] At the same time, directors in Delaware have an affirmative duty of oversight and monitoring

100 *See* Pollman, *supra* note 10 at 2019 (explaining the foundation of corporate accountability in the duty of care and duty of good faith).

101 *See* DEL. CODE ANN. tit. 8, § 101 (West 2020) (stating a corporation can exist for any lawful business purpose in Delaware).

102 *Compare* Strine, *supra* note 6 at 776-777 (discussing how Delaware law prioritizes stockholder interests) *with* 15 PA. CONS. STAT. ANN. §1715 (1983) (empowering directors to consider the interests of employees, suppliers, customers, and creditors impacted by the corporation).

risks the corporation faces.[103] Acting on the duty of oversight, directors could act for the benefit of the stakeholder by engaging in monitoring of stakeholder-facing functions, which could be classified as mission critical.[104]

A. Business Judgment and Long-Term Growth

Proponents of shareholder primacy argue that Delaware law establishes that the corporate purpose in Delaware is to maximize stockholder profits.[105] The DGCL explicitly empowers stockholders, giving them the right to bring derivative actions, to vote during director elections or when considering important transactions, and amend bylaws.[106] Meanwhile, stakeholders do

103 *See* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959,967 (Del. Ch. 1996).

104 *See* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) (discussing the importance of monitoring mission critical operations at the board level).

105 *See Strine*, *supra* note 6 at 776 (referencing Former Chancellor Allen's readings of *Dodge v. Ford*).

106 *See* Strine, *supra* note 6 at 786 (discussing stockholder's rights).

not have any explicit corporate rights outlined within Delaware law.[107]

Nevertheless, Delaware's extremely permissive legal standard, the business judgment rule, only requires directors to act for a rational business purpose.[108] The business judgment rule is a presumption that is only rebutted if directors are grossly negligent, act in bad faith, or breach fiduciary duties.[109] Consequently, directors may still consider the impacts of business decisions on stakeholders, except for a *Revlon* takeover situation, where stockholders must be the priority.[110] Just as the board in *Paramount Communications*

[107] *See id.* at 792 ("If we believe that other constituencies should be given more protection within corporation law itself, then statutes should be adopted giving them enforceable rights that they can wield.").

[108] *See* In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) (describing presumptions of good faith, sufficient information, and best interest applied to directors' decisions).

[109] *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010).

[110] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173,182 (Del. 1986) (establishing shareholder primacy in the case of corporate takeovers).

considered long-term growth and company culture when deciding between tender offers, corporations can take proactive measures to accomplish goals that serve stakeholders and stockholders in the long-term.[111]

B. Duty of Oversight and Risk Management

Under Delaware law, corporate directors must engage in risk management to serve the stockholder's interest in profit maximization and satisfy their fiduciary duty of oversight.[112] While, regulations and internal company policy often serve as defenses for stakeholder interests, they are also essential to the corporation's long-term growth.[113] When directors have

[111] Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1152 (Del. 1989) (discussing Time's rational business purpose in choosing to merge with Warner Brothers).

[112] Martin Lipton et al, *Risk Management and the Board of Directors*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE, (Mar. 20, 2018) https://corpgov.law.harvard.edu/2018/03/20/risk-management-and-the-board-of-directors-5/ (discussing the evolution of risk management).

[113] *See* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) (discussing the necessity for compliance with food safety regulations at an ice cream company); *see also In re Walt Disney*

knowingly ignored compliance issues or failed to conduct oversight, companies have faced pecuniary and reputational harm, ultimately leading to stockholders bringing derivative suits for breach of fiduciary duty.[114] While *Caremark* claims are difficult to allege and most do not survive motion to dismiss due to the permissiveness of the business judgment rule, recent cases demonstrate the importance of the duty of oversight.[115]

Wells Fargo fostered a culture of noncompliance by imposing quotas on employees to increase stockholder value, prompting illegal activity through the creation of fraudulent accounts.[116]

Co. Derivative Litig., 906 A.2d at 67 (clarifying that legal obedience is implied in fiduciary duties).

114 *See* e.g., *Marchand,* 212 A.3d at 805 (regarding FDA violations that ultimately led to a listeria outbreak); In re Clovis Oncology, Inc. Derivative Litig., No. CV 2017-0222-JRS, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019) (regarding misreporting of FDA compliance, resulting in SEC investigation).

115 *See* Pollman, *supra* note 10 at 2017 (explaining that the few cases that have succeeded on *Caremark* claims have had "particularized allegations of a complete lack of board oversight or egregious disobedience").

116 In re Wells Fargo & Co. S'holder Derivative Litig., 282 F. Supp. 3d 1074, 1082 (N.D. Cal. 2017) (referring to the

The Audit and Examination Committee and the CEO ignored letters from employees, several lawsuits, and several other warning signs before the investigations from the Office of the Comptroller and the Consumer Financial Protection Bureau.[117] Had directors recognized the fraudulent activity and the culture that incentivized it, they could have intervened to mitigate the harm to consumers and stockholders alike.[118]

Blue Bell's failure to comply with essential food safety regulations and failure to conduct oversight at the board level led to a Listeria outbreak.[119] Blue Bell's board did not discuss essential health and safety operations, and there were no protocols in place to update directors of food safety compliance.[120] The court held that directors breached their duty

competitive cross-selling strategies aimed to inflate share price and executive compensation).

117 *Id.* at 1082 (citing to the many red flags Wells Fargo directors ignored).

118 *Id.* at 1109 (discussing the Chief Risk Officer's knowledge of the inadequacy of internal feedback and reporting systems).

119 *See Marchand v. Barnhill*, 212 A.3d at 822 (discussing the deaths resulting from a Listeria outbreak).

120 *See id.* at 822 (discussing the Board's breach of duty of oversight).

to conduct oversight of "mission critical" operations of food safety.[121] Had the board implemented monitoring systems for food safety, the stockholder and stakeholder would have benefitted as it could have prevented the Listeria outbreak.[122]

The Clovis Oncology Board misled stockholders about the success of their clinical trials for a new drug, leading to an SEC investigation.[123] In a fact-intensive inquiry, the court acknowledged the existence of oversight and reporting procedures, but found that directors actively ignored warning signs that management was inaccurately reporting on the success of the clinical trials.[124] Had directors taken action to stop

121 *See id.* at 824 (referring to food safety as essential and mission critical).

122 *See id.* at 805 ("Three people died as a result of the listeria outbreak. Less consequentially, but nonetheless important for this litigation, stockholders also suffered losses because, after the operational shutdown, Blue Bell suffered a liquidity crisis that forced it to accept a dilutive private equity investment.").

123 In re Clovis Oncology, Inc. Derivative Litig., No. CV 2017-0222-JRS, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019).

124 *Id.* at *10 ("Plaintiffs have well-pled that the Board ignored red flags that the Company was violating—perhaps consciously

illegal activity and catch the red flags, stakeholders and stockholders would have greatly benefited.[125]

More recently, critics of Boeing’s 737 MAX and it’s safety issues have argued that the aviation company’s cost-cutting culture and lack of Federal Aviation Administration compliance resulted in the deaths of 346 passengers.[126] The eventual grounding of the 737 MAX resulted in a drop in stock price and a

violating—the RECIST protocol and then misleading the market and regulators regarding Roci's progress through the TIGER-X trial”).

125 *See id.* at 824 (emphasizing that the Blue Bell directors’ failure to set up oversight protocols regarding the most central health and safety issue would constitute a breach).

126 *See* Joe Nocera, *News Analysis: Boeing Sacrificed Quality on the Altar of Shareholder Value*, L.A. TIMES, (Jan. 17, 2020), https://www.latimes.com/business/story/2020-01-17/nocera-boeing (arguing that Boeing’s focus on stockholders ultimately harmed the corporation and its stakeholders); *see also* In re Boeing 737 MAX Pilots Litig., No. 1:19-CV-5008, 2020 WL 247404, at *3 (N.D. Ill. Jan. 16, 2020) (regarding the status of pilots as members of a class for further litigation).

halt in business operations.[127] While Boeing and Clovis Oncology await derivative litigation, it is clear that missteps regarding compliance with regulation ultimately impact both stockholders and stakeholders by reducing stock price and harming consumers.[128]

While Blue Bell, Clovis Oncology, and Boeing exist in highly regulated industries and complied with some regulatory requirements, they did not implement systems at the board level to regulate safety.[129] Although Wells Fargo's fraudulent operations did not directly impact safety, prioritization of

127 Tom Hals & Tracy Rucinski, *Lawsuit Against Boeing Seeks to Hold Board Liable for 737 MAX Problems*, REUTERS, (Nov. 18, 2019) https://www.reuters.com/article/us-boeing-737max-lawsuit-board/lawsuit-against-boeing-seeks-to-hold-board-liable-for-737-max-problems-idUSKBN1XS2I3 (citing a twelve percent drop in stock price at the time of publishing).

128 *See e.g.,* Marchand v. Barnhill, 212 A.3d 805, 823 (Del. 2019); In re Wells Fargo & Co. S'holder Derivative Litig., 282 F. Supp. 3d 1074 (N.D. Cal. 2017).

129 *See Marchand*, 212 A.3d at 823 ("But the fact that Blue Bell nominally complied with FDA regulations does not imply that the board implemented a system to monitor food safety at the board level").

stock price and incentive-based compensation ultimately hurt customers, employees, and stockholders.[130] When a corporation's missteps are tied to compliance issues, the mere existence of an oversight and compliance program is often insufficient to avoid liability, especially in heavily regulated industries.[131]

C. Corporate Purpose and Mission Critical

To avoid compliance issues with regulators and stockholders, directors that engage in oversight of essential operations will more easily avoid liability.[132] Where directors

130 *See Wells Fargo*, 282 F. Supp. 3d at 1082 (citing to the Defendant's complaint) ("The goal of Wells Fargo's high pressure cross-selling strategy was to show leadership in cross-selling, and, most importantly drive up the Bank's share price ... result[ing] in enormous compensation for the Bank's executives").

131 *See Marchand*, 212 A.3d at 823 (explaining that nominal FDA compliance was not sufficient to avoid liability for the board's failure to conduct oversight).

132 *See* William Savitt, Ryan A. McLeod, & Anitha Reddy, *Delaware Courts of Chancery Again Sustains Oversight Claims*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE, (Oct. 5, 2019), https://corpgov.law.harvard.edu/2019/10/05/delaware-court-of-

have made good faith efforts to implement board oversight of regulatory compliance and safety, Delaware courts defer to boards of directors, "even when illegal or harmful company activities escaped detection".[133] However, directors have a duty to conduct oversight over compliance risks.[134]

While the Delaware Supreme Court did not define "mission critical" in *Marchand v. Barnhill*, it used to term in reference to the food safety of ice cream production.[135] *Clovis Oncology* takes this language a step further, noting directors should carefully observe regulatory compliance issues.[136] The Clovis

chancery-again-sustains-oversight-claims/ (discussing the implications of the *Clovis Oncology* opinion).

133 *Marchand*, 212 A.3d at 821 (explaining how the business judgment rule works in the oversight context).

134 *See id.* (discussing the director's discretion in designing industry-specific approaches to oversight).

135 *Id.* at 824 (stating that *Caremark* does require that directors make a good faith effort to establish a system of monitoring compliance risk).

136 In re Clovis Oncology, Inc. Derivative Litig., No. CV 2017-0222-JRS, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019) ("[T]he careful observer is one whose gaze is fixed on the company's mission critical regulatory issues").

Oncology Board failed to intervene after observing obvious warning signs regarding its mission critical operations.[137] While Delaware courts may choose to expand on its definition of "mission critical" in the future, this language only reinforces that directors must be aware of compliance risks, especially in relation to essential operations.[138]

As fiduciaries, directors should make best efforts to be familiar with the pertinent regulatory environments relevant to their business operations and to oversee the compliance with such regulatory environments.[139] The Court of Chancery stated that a corporation is more likely to face oversight liability for failure to monitor compliance with law, than with liability based on failure to monitor and avoid risk from day to day business operations.[140] Directors should be familiar with

137 *Id.* at *13 (identifying clinical trial protocols and FDA regulations as mission critical).

138 *See id.*

139 *Id.* at *12 (Del. Ch. Oct. 1, 2019) ("[A]s fiduciaries, corporate managers must be informed of, and oversee compliance with, the regulatory environments in which their businesses operate.")

140 In re Facebook, Inc. Sec. 220 Litig., 2019 WL 2320842, at *14 (Del. Ch. May 31, 2019) (discussing the Cambridge Analytica data

mission critical legal compliance issues, and the regulatory frameworks that govern them.[141] While courts may defer to a board's business judgment, the duty of oversight indicates that legal compliance remains a priority for courts under fiduciary law.[142] *Wells Fargo*, *Marchand v. Barnhill*, and *Clovis Oncology* are the few cases where *Caremark* claims have been successful, likely because the risks impacted both legal compliance and business goals.[143] These cases, along with the rise of advocacy for stakeholder interests and oversight operations, could lead

breach which led to approximately $ 120 billion in losses of shareholder wealth.)

141 *Clovis Oncology*, 2019 WL 4850188, at *13 (describing the importance of monitoring mission critical operations).

142 *See* Pollman, *supra* note 10 at 2019; *see also In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) ("[E]xplaining that a failure to act in good faith can be shown when a fiduciary acts with intent to break the law, advances interests other than the best interest of the corporation, or intentionally fails to act).

143 *See* Pollman, *supra* note 10 at 2036 (referring to the cases as "[t]he small handful of *Caremark* cases that have survived this nearly insuperable standard").

to increased accountability and transparency for mission critical operations.[144]

Identifying stakeholders or ESG metrics as "mission critical," either through a change in law or a corporation's governing documents would require enhanced oversight from directors.[145] When environmental impact, for example, is subject to increased oversight from the board of directors, a corporation can better ensure compliance with the Environmental Protection Act.[146] Directors can advance the dual intentions of increased regulatory compliance and increased awareness about

[144] *See* Lipton, *supra* note 112 (discussing how investors increasingly consider risk oversight matters*)*; *see also*, John Armour, et al, *Board Compliance*, 104 MINN. L. REV. 1191, 1220 (2020) (describing the importance of audit committees and compliance committees in opening up bandwidth for engagement).

[145] *Clovis Oncology*, 2019 WL 4850188, at *12 ("[W]hen a company operates in an environment where externally imposed regulations govern its "mission critical" operations, the board's oversight function must be more rigorously exercised").

[146] *See* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) (discussing the importance of monitoring mission critical and legal compliance issues for ice cream production).

stakeholder needs by monitoring risk areas at the board level.[147] Through enhanced oversight, directors may act on their fiduciary duties of loyalty and care, while providing stakeholders the protections afforded to them through regulation.[148]

In fact, corporations and investors have demanded increased disclosure of risk, especially related to climate change.[149] Many stockholders are advocating for increased reporting on ESG factors and consider ESG in investing decisions.[150] The United

[147] *See* Miriam F. Weismann, *The Missing Metrics of Sustainability: Just How Beneficial are Benefit Corporations*?, 42 DEL. J. CORP. L. 1, 13 (2017) (discussing the tension of benefit corporations in advancing a "dual mission of wealth maximization and corporate social responsibility).

[148] *See* Pollman, *supra* note 10 ("[E]volving statutory law and fiduciary duty jurisprudence have recognized that [fiduciary] obligations cannot be eliminated because they preserve a safety valve for protecting public policy, which springs from the same source as corporate charters—the state").

[149] *See* Fink, *supra* note 1 (stating that climate risk is an investment risk).

[150] *See* Brewer, *supra* note 51 (discussing how investors have been pushing for increased ESG disclosure to better inform investment); Dawn Lim & Julie Steinberg, *BlackRock to Hold*

Nations, the corporate elites at the World Economic Forum, and institutional investors such as BlackRock have pushed for consideration of ESG factors in investment and board level decision-making.[151] Some firms go as far as demanding action from the SEC regarding increased reporting and disclosure on the environment and other statistics for stockholders of publicly

Companies and Itself to Higher Standards on Climate Risk, WALL ST. J. (Jan. 14, 2020), https://www.wsj.com/articles/blackrock-shakes-up-sustainable-investing-business-following-criticism-11579000873?shareToken=stba8857d997624910bc53df77e1dd78c3 (announcing that BlackRock would be taking a tougher stance on corporations that do not disclose environmental risk and discussing BlackRock and other institutional investors influence upon markets); Rick Wartzman and Kelly Tan, *The Business Roundtable's Model of Capitalism Does Pay Off,* WALL ST. J. (Oct. 27, 2019), https://www.wsj.com/articles/the-business-roundtables-model-of-capitalism-does-pay-off-11572228120 (evaluating how social responsibility and other stakeholder considerations impact corporations).

[151] *See* World Economic Forum, *supra* note 1; Brewer, *supra* note 51.

traded companies.[152] Consumers and employees, as well as investors, are increasingly looking at the social impact of organizations when considering patronage or employment opportunities.[153]

By moving away from reliance on the “safety valve” of regulation to protect employees, consumers, the community, and the environment, directors can use oversight and monitoring mechanisms to be more attentive to stakeholder interests, going above the minimum requirements of regulatory compliance.[154] Operationalizing efficient and accurate monitoring mechanisms could prevent large commercial mishaps, as Boeing, Blue Bell, Clovis Oncology, and Wells Fargo faced, and satisfy investor demands of considering stakeholder impact.

152 *See* Brewer, *supra* note 68 (regarding the push from institutional investors to include ESG in SEC mandated disclosures).

153 Dieter Holder, *What Generation Is Leading the Way in ESG Investing? You’ll Be Surprised*, WALL ST. J. (Sept. 10, 2019), https://www.wsj.com/articles/what-generation-is-leading-the-way-in-esg-investing-youll-be-surprised-11568167440 (discussing how Millennials and Gen X have a growing interest in ESG factors).

154 *See* Choudhary, *supra* note 72 (discussing the use of fiduciary duties to advance social responsibility).

D. Oversight and Reporting in the Stakeholder Context

While other jurisdictions allow directors to consider stakeholders through Constituency Statutes and Benefit Corporation Statutes, there are few constraints on how directors should balance between different stakeholder interests.[155] Stockholders are the only stakeholders, except for creditors, with any legal power to influence corporate decision, while other stakeholders are not generally represented at the board level, and do not have enumerated corporate rights.[156] Because stockholders control director elections and have the power and means to pursue litigation, directors are incentivized to value stockholder concerns.[157] Therefore, even when corporations are

155 *See* Lawrence Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 589 (1992) ("As these and most other commentators *See* it, constituency statutes threaten to undermine the balance of power in corporations, granting "standardless discretion" to the board and leading to poor decisions on behalf of the corporation"); *see also* Orts, *supra* note 28 (discussing the permissive nature of Constituency statutes).

156 *See* Strine, *supra* note 6.

157 *See* Mitchell, *supra* note 155 at 606 (discussing how directors can protect themselves from litigation or replacement).

legally permitted to consider the impact of a decision on stakeholders, stockholders remain their top priority.[158]

Although there have been few derivative suits from stockholders regarding the balancing of interests under constituency statutes, stakeholders do not have a right of action or a designated corporate power to advocate for their interests.[159] Stakeholders are left to "vote with their feet," through activism including protests and boycotts, and in drastic

[158] *See* Mitchell, *supra* note 155 at 594 (discussing how directors are beholden to stockholders through their agent-principal relationship); Gary von Strange, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie*, 11 HOFSTRA LAB. L.J. 461, 483 (1994) ("[T]hese statutes, as they currently exist, do not force a corporation to conduct itself in a socially responsible manner...Nor will these statutes significantly transfer wealth from shareholder to [sic] nonshareholder.").

[159] *See* Strine, *supra* note 6; *see also* Kentucky State Dist. Council of Carpenters Pension Tr. Fund v. Myers, No. 4:10-CV-00332, 2010 WL 11483954, at *1 (S.D. Iowa Sept. 9, 2010); Georgia-Pacific Corp., v. Great N. Nekoosa Corp., 727 F. Supp. 31, 33 (D. Maine, 1989); Baron v. Strawbridge & Clothier, 646 F. Supp, 690 (E.D. Pa. 1986).

situations, through individual suits which can jeopardize their relationships with the corporation.[160]

In benefit corporations, directors must still fulfill fiduciary duties to the stockholders and balance pecuniary interest with the stated purpose of the corporation.[161] While the benefit corporation structure provides directors more room to consider the impact of business operations on each impacted group, it does not provide the stakeholder-constituents a legal route to enforcement or oversight, beyond annual reporting and non-corporate mechanisms.[162] Even in benefit corporations, stockholders have the exclusive right to pursue derivative

160 *See e.g.,* Josh Dzieza, "*Beat the Machine": Amazon Warehouse Workers Strike to Protest Inhumane Conditions*, THE VERGE, (Jul. 16, 2019), https://www.theverge.com/2019/7/16/20696154/amazon-prime-day-2019-strike-warehouse-workers-inhumane-conditions-the-rate-productivity; Sammy Nickalls, *Here's Why All Your Friends Are Deleting Their Uber Accounts,* ESQUIRE (Jan. 29, 2017), https://www.esquire.com/news-politics/news/a52652/heres-why-uber/.

161 *See* Murray, *supra* note 40 (discussing the structure of benefit corporation statutes).

162 *See* DEL. CODE ANN. tit. 8, § 362 (West 2015).

litigation on behalf of the corporation.[163] Nevertheless, the requirement of an annual benefit report requires increased reporting and monitoring of the benefit generated along with risk management mechanisms.[164] Benefit corporations, much like regular corporations, only give stockholders the right to file derivative suits against the corporation; however, no suits have been filed regarding the balancing of stakeholder and stockholder interest.[165]

B Corps, certified by B Lab, are corporations that undergo strict vetting and reevaluation to ensure that they maintain sustainable policies.[166] B Corps have the same regulatory

[163] *See* Dalessandro*, supra* note 3 (discussing the rights of stockholders in benefit corporations).

[164] *See* Murray, *supra* note 51 (discussing the annual benefit report requirement).

[165] *See* DEL. CODE ANN. tit. 8, § 367 (West 2019) ("Stockholders of a public benefit corporation owning individually or collectively... as of the date of instituting such derivative suit...may maintain a derivative lawsuit to enforce the requirements set forth in § 365(a) of this title".)

[166] *See* B Labs, *supra* note 44 (describing the Benefit Impact Assessment and verification process conducted by B Lab before certification and every three years after).

compliance duties as all corporations, but also have requirements for transparency, with the added potential for a site visits from B Labs.[167] B Corps are required to consider stakeholders, requiring B Corps to embody a legal corporate form that allows such consideration, such as benefit corporations.[168] Even when the stakeholder approach is implemented in the law, corporations are required to assess risk (and benefits, in the case of Benefit Corporations) and report them to stockholders.[169] Benefit Corporations have built-in reporting systems, since stakeholder considerations are mandated.[170]

167 *See* Certification Requirements, B Lab, https://bcorporation.net/certification/meet-the-requirements (describing that ten percent of certified corporations are subject to site reviews every year).

168 *See id.* (defining legal requirements for potential certified corporations and providing a jurisdiction-based tool on which types of corporations qualify).

169 *See* Lipton, *supra* note 112 (discussing risk disclosure to investors, including ESG factors).

170 *See* DEL. CODE ANN. tit. 8, § 362 (West 2015) (mandating a balance between stakeholder and shareholder interests); *see* also 15 PA. CONS. STAT. ANN. §1715 (1983) (allowing corporations to consider shareholder interests).

Oversight, whether from outside monitoring, disclosure requirements, or board functions would shed light on stakeholder interests, in addition to emphasizing and enhancing corporate compliance with regulations.[171] The obligation of oversight is entirely consistent with fiduciary duties and risk management doctrines and serve a rational business purpose.[172] Therefore, considering stakeholders through the lens of risk and oversight should satisfy corporate fiduciary duties, while satisfying the stockholder in the long term.[173]

IV. Risk Oversight and Board Level Engagement

To address the challenges some corporations face in meeting the demands of some influential actors in the business community, corporations should consider engaging with stakeholders at the board level through representation and oversight.[174] At the same time, the government can mandate

171 *See* Pollman, *supra* note 10 at 2015 ("[T]he duty of good faith remained a potential mechanism for accountability.").

172 *See id.* (discussing risk oversight and management).

173 *See* Lipton, *supra* note 112 (explaining the overlap of risk management and oversight of stakeholder concerns).

174 *See J.* Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L. J. 61, 85 (2017) (discussing the increased representation of stakeholders at the board level).

specific stakeholder disclosure and encourage corporations to consider stakeholder interests.[175] As corporations adapt corporate governance structures to encourage engagement with stakeholders, they can proactively minimize risk and go beyond their obligations of regulatory compliance.[176]

A. Proactive Boards and Corporate Oversight

While the adoption of a stakeholder approach leaves many unanswered questions about the law and the future of corporate governance, the paradigm shift in the business community will require reform and robust corporate policies.[177] Apart from a *Revlon* takeover situation or instances of gross negligence, Delaware law is permissive regarding what a corporation can do, so long as it satisfies a cognizable business interest.[178] While

175 Emily Barreca, *Accountable Compensation*, 37 YALE J. REG. 338, 370 (202) (discussing the Accountable Capitalism Act's proposals of mandating stakeholder considerations and increased disclosure).

176 *See* Lipton, *supra* note 112 (discussing the importance of risk oversight).

177 *See* Thompson, *supra* note 57 (calling for more information on the implementation of the stakeholder approach).

178 DEL. CODE ANN. tit. 8, § 101 (West 2020) (stating a corporation can exist for any lawful business purpose).

Delaware has yet to see robust derivative litigation about stakeholder accountability, it seems that considering stakeholders will be embraced as good faith efforts to advance a business purpose.[179] As corporations increasingly consider the environment and employee conditions, supplier relations, and other factors that touch on regulatory schemes, corporations should implement robust oversight and reporting policies for corporate compliance.[180]

i. Extending Oversight and Risk Management to Stakeholders

Every corporation, especially those in highly regulated industries, should implement permanent oversight and accountability committees that oversee both business risk and legal compliance with positive law.[181] Additionally,

179 *See* Huber, *supra* note 7 (discussing the application of the business judgment rule to stakeholder considerations).

180 *See* Lipton, *supra* note 112 (discussing tips for corporations on adopting oversight mechanisms such as reviewing risk tolerance and assessing whether the strategy is consistent with the agreed-upon risk levels).

181 *See* Lewis Kamb, *Boeing's Board Calls for Better Internal Safety Oversight in Wake Of 737 MAX Crashes*, SEATTLE TIMES (Sept. 25, 2019) https://www.seattletimes.com/business/boeing-

corporations that chose not to opt into benefit corporation structures should still implement annual reports beyond what is usually required for an annual stockholders meeting or SEC disclosure.[182] Publicizing information such as ESG metrics will aid corporations in enhancing their compliance culture.[183] Emphasizing transparency from the "top" of the corporate structure will also aid in establishing a corporate culture of compliance.[184]

ii. Board Level Representation

The existence of board level involvement in oversight will allow for enhanced accountability from the top of the corporate structure, and will work its way down to those directly

aerospace/boeings-board-calls-for-revamping-company-structure-in-wake-of-737-max-crashes/ (stating that Boeing's Board recommended Aerospace Safety Committee after 737 Max Crashes).

182 *See* Brewer, *supra* note 51 (charting the gradual shift toward incorporating ESG disclosures into SEC disclosures).

183 *See* Leo E. Strine, *Toward Fair and Sustainable Capitalism*, PENN. L. LEGAL SCHOLARSHIP REPOSITORY, (Oct. 3, 2019), (recommending "socially important companies" issue annual impact reports).

184 *See* Lipton, *supra* note 112 (suggesting that setting the "tone from the top" should reflect company values and emphasize integrity and escalation of non-compliance).

responsible for identifying risk and ensuring compliance.[185] Additionally, stakeholders should be invited to the annual stockholders meeting, and be provided a route to board level representation, whether that takes the form of nonbinding recommendations from stakeholders, or an actual path to election to the board of directors.[186] In Germany, companies have employee-elected supervisory boards, which approve decisions of the management boards and participate in the election of the management board.[187] The supervisory boards allow companies to consider stakeholders, particularly employees, while having a separate management body.[188]

185 *See id.* (arguing that an enhanced accountability structure will aid corporations in being more socially responsible).
186 *See* An Update on Our Work to Serve All Stakeholders, AIRBNB (Jan. 17, 2020) https://news.airbnb.com/serving-all-stakeholders/ (announcing Stakeholder Day to report progress and company updates)
187 *See* Murray, *supra* note 174 *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L. J. 61, 85 (2017) (suggesting the implementation of stakeholder advisory boards).
188 *Id.* (explaining the relationship between advisory boards and directors).

Corporations should also consider creating a stakeholder advisory board that would be responsible for communicating with the board of directors regarding "mission critical" or essential operations of the corporation.[189] The stakeholder advisory board would include elected representatives' subcommittees dedicated to each stakeholder interest.[190] For example, representatives of employees, and those who work closely with the community, suppliers, and consumers, would be able to meet and have input on corporate activities.[191]

Although maximizing stock price is a compelling motivator for boards, short term growth without consideration of the stakeholder can lead to larger structural problems of a public nature, such as widespread fraud at Wells Fargo and the Boeing 737 MAX crash.[192] By increasing oversight and stakeholder input,

[189] *See* Murray, *supra* note 174 at 94_ (discussing the rationale behind the stakeholder board movement).

[190] *See* Strine, *supra* note 183 at 5 (recommending workforce committees to address labor issues at the board level).

[191] *See* Murray, *supra* note 174 at 98 (suggesting the ideal composition of Stakeholder Advisory Board).

[192] *See* Nocera, *supra* note 126 (theorizing that Boeing's cost-cutting strategies ultimately lead to its downfall).

corporations can be proactive in avoiding public crises while increasing long term growth and stakeholder satisfaction.[193]

B. Increasing the Standards for Socially Responsible Corporations through Government Action

i. Incentivizing sustainable business

Jurisdictions should work to encourage adopting benefit corporation status through incentives to corporations.[194] The City of Philadelphia provides a Sustainable Business Tax Credit to "companies whose business practices support environmental and human well-being."[195] Corporations that show certification from B Lab, and submit evidence that the business conducts itself as a sustainable business, giving "substantial consideration to employee, community, and environmental interests in its

193 *See* Murray, *supra* note 174 at 106 (explaining stakeholder advisory boards would achieve social enterprise aims).

194 *See* Anne Kim, *The Rise of Do-Gooder Corporations*, GOVERNING (Jan. 2019), https://www.governing.com/columns/public-money/gov-philadelphia-good-philanthropy-corporation.html (discussing the benefits of the Philadelphia Tax credit).

195 Sustainable Business Tax Credit, CITY OF PHILADELPHIA, https://www.phila.gov/services/payments-assistance-taxes/tax-credits/sustainable-business-tax-credit/ (last visited on Sep. 2, 2020).

practices, products, and services" qualify for the tax credit.[196] Such incentives will aid mid-size and small corporations to make the shift to benefit corporations and advance specified benefits for their communities.[197] The existence of benefit corporations will increase the advancement of public good, and create more pressure for other corporations to become socially responsible.[198]

ii. Increasing Disclosure and Reporting

Additionally, the SEC should move to require ESG metrics in its required disclosures.[199] Such disclosure would better inform corporations and allow investors and consumers to apply pressure to corporations to meet a higher standard when it comes to

[196] *Id.* (limiting the number of businesses eligible to receive a tax credit against their Philadelphia Business Income and Receipts Tax Liability to seventy-five)

[197] *See* Kim, *supra* note 194 (encouraging a shift to benefit corporations to advance worker and community goals).

[198] *See* Murray, *supra* note 40 (elaborating on the benefits of Benefit Corporations as mechanisms to advance social enterprise).

[199] *See* Brewer, *supra* note 51 (discussing the SEC's gradual shift toward considering ESG factors in disclosures).

factors such as carbon emissions.[200] Additionally, increasing transparency will allow corporations to better implement oversight and reporting guidelines.[201]

iii. Stakeholder Commitments at the Federal Level

Progressive politicians have also been pushing for increased accountability and stakeholder incorporation into corporate governance.[202] Massachusetts Senator Elizabeth Warren proposed the Accountable Capitalism Act that would codify the stakeholder approach into law and mandate forty percent of directors be elected by employees.[203] Senator Warren's plan to require big corporations to charter at the federal level and would require corporations to meet certain stakeholder commitments.[204] These potential requirements could fundamentally

200 *See* Lipton, *supra* note 112 (discussing the importance of ESG metrics to institutional investors).

201 *See id.* (emphasizing the importance of risk oversight and disclosure).

202 *See* Barreca, *supra* note 175 at 370 (discussing the Accountable Capitalism Act).

203 *See* Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

204 *See id.*

change Delaware law to push corporations to be more proactive at the federal level.[205]

V. Conclusion

The Business Roundtable's Statement on the Purpose of a Corporation is the culmination of a gradual paradigm shift toward social responsibility and the stakeholder approach.[206] Since the 1980s, corporate law has seen a shift toward considering stakeholders that are impacted by corporations.[207] While it is unlikely that Delaware law will change to shift to a stakeholder approach, cases like *Marchand v. Barnhill* and *Clovis Oncology* show some promise for increased standards for oversight and legal compliance.[208] Federal and local regulation and legal

205 *See* Barreca, *supra* note 175 at 375 (discussing the challenges of the Accountable Capitalism Act).

206 Mireia Giné & Silvio Dulinsky, *Business Leaders: The Shift to Stakeholder Capitalism Is Up to Us*, World Economic Forum (Jan. 9, 2020) https://www.weforum.org/agenda/2020/01/shift-to-stakeholder-capitalism-is-up-to-us/.

207 *See* Dalessandro, *supra* note 3 (detailing the proliferation of constituency statutes and benefit corporations).

208 *See* Marchand v. Barnhill*,* 212 A.3d 805 (Del. 2019) (noting corporations should have board level oversight over essential business functions and risks).

compliance systems have long stood as a minimum protection for stakeholders.[209] The director role in oversight and accountability prioritizes and ensures that stakeholders are considered seriously by the board, especially when their operations are identified as mission critical.[210] Accordingly, corporations should enhance the opportunity for stakeholder representation and consideration at the board level, given many corporations have identified stakeholders as "fundamental" to operations.[211] Whether corporations opt to become benefit corporations, or create committees for employees, supplier relations, consumers, the community, and the environment, they can better facilitate stakeholder input at the board level.[212]

[209] *See* Pollman, *supra* note 10 (referring to the "safety valve" of public policy).

[210] *See* Savitt, *supra* note 132 (referring to the requirement of regulatory compliance, and recognizing red flags from management).

[211] *See* Strine, *supra* note 183 (recommending stakeholder committees serve in an advisory position on the board of directors).

[212] *Id.* at 7; *see* Murray, *supra* note 174 (discussing stakeholder advisory boards).

Delaware corporations may be waiting a long time before the legislature or courts implement the stakeholder approach into law. In the meantime, Corporate actors can pursue proactive measures within their corporate structures to ensure that they value stakeholders and consider them an opportunity for long term growth. Corporations should not wait until they face public crises to consider interests affecting stakeholders but should be proactive in cultivating growth through oversight and a balance of interests at the board level.[213]

[213] *See* Barreca, *supra* note 175 *at* 374 (discussing the need for stakeholder oriented boards that reallocate resources to serve employees, communities and consumers).