POLITICAL RISK MANAGEMENT

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ABSTRACT

The COVID-19 pandemic and social unrest have focused considerable corporate attention on political risk. The disruptions to company operations are voluminous and diverse: entertainment and hospitality industry closures, airline industry cancellations, eviction moratoriums in residential real estate, international trade interruptions, manufacturing supply shortages, employee vaccination mandates, and ride-hailing service restrictions. Enterprise risk management (ERM) is the mechanism through which boards and their respective firms can manage complex political risks. In the current business climate, more companies should emphasize and integrate political risk oversight in their ERM programs. Although neglecting political risk may not trigger legal liability from regulators or courts, it can cause significant financial and reputational loss to the company. Contemporary corporate boards should not operate with political blinders; they must remain politically sensitive. Politics should not be avoided but managed in a nuanced way pursuant to effective board oversight of ERM. Companies must contend with courts of law and the court of public opinion, each with its own distinct rules. Missteps in the latter may injure the corporation more seriously than unfavorable judgments in the former. The failure to manage political risk is not in the best interests of the corporation. This article adds to the legal literature in three important areas. First, it situates political risk within the contemporary ERM discussion. Second, it re-examines how corporations engage with politics in the contemporary context. Finally, it contributes to theories that posit the large modern corporation as a quasi-public institution and argues, with some caveats, that it functions as a quasi-political institution, mandating more robust board oversight of political risks.

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INTRODUCTION

The concept of an apolitical corporation is utopian. Boards of directors cannot serve the best interests of the corporation through political blindness. In the contemporary environment, companies proactively influence the shape of regulation through an array of mechanisms to benefit their interests. They also react to political and regulatory developments, selectively taking public stances on voting restrictions, racial justice, gender equity, human rights, climate change, reproductive rights, and other politically charged issues.[1] The COVID-19 pandemic and societal unrest in the wake of broad social justice

[1] *E.g.*, David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, N.Y. TIMES, https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html (May 27, 2021) ("Amazon, BlackRock, Google, Warren Buffett and hundreds of other companies and executives signed on to a new statement . . . opposing 'any discriminatory legislation' that would make it harder for people to vote."); David Hessekiel, *Companies Taking a Public Stand in the Wake of George Floyd's Death*, FORBES (Jun 4, 2020, 11:24 AM), https://www.forbes.com/sites/davidhessekiel/2020/06/04/companies-taking-a-public-stand-in-t he-wake-of-george-floyds-death/?sh=17ef5b267214 (listing numerous companies that pledged donations to groups

demands illustrate the political minefields companies must navigate.[2] The confluence of investor concern, stakeholder demands, and the recent emphasis on environmental, social, and governance (ESG) factors is pressuring companies to become more sensitive to political risk.[3] However, most large public companies find the effective management of political risk elusive.[4]

Although we have no consensus definition of political risks, they are as palpable as cybersecurity, climate, human capital, and financial risks.[5] Investors, portfolio managers, insurers, lenders, and ratings agencies regularly incorporate data related to political risk into their decision-making processes.[6] Political risk exposures raise the cost of capital and

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working on racial justice); *Verizon brings together major Fortune 500 companies to launch Women's CoLab*, VERIZON NEWS CENTER (Oct. 11, 2021), https://www.verizon.com/about/news/verizon-brings-together-major-fortune-500-companies-launch-womens-colab ("Verizon and its partners[, including Accenture, Walmart, and MasterCard,] launched Women's CoLab, an initiative providing women with essential resources to help them achieve success in an increasingly digital economy."); Dina Bass, *Microsoft Agrees to Human Rights Review in Deals With Law Enforcement, Government*, BLOOMBERG, https://www.bloomberg.com/news/articles/2021-10-13/microsoft-agrees-to-investor-push-f or-human-rights-review-of-government-deals (Oct. 13, 2021, 12:49 PM) ("Microsoft Corp., which has faced pressure from employees and shareholders over contracts with governments and law enforcement agencies, agreed to commission an independent human rights review of some of those deals . . . [in response to] a shareholder proposal asking the company to evaluate how well it sticks to its human rights statement and related policies."). There are a growing number of successful shareholder proposals related to climate change. CONFERENCE BOARD, *In 2020, Companies Will Continue to Face Pressure to Diversify Their Boards, Address Pay Gaps, and Expand Political Contribution Disclosure* (Dec. 17, 2019), https://www.prnewswire.com/news-releases/in-2020-companies-will-continue-to-face-pressure-to-diversify-their-boards-address-pay-gaps-and-expand-political-contribution-disclosure-300976064.html; Catherine Thorbecke, O*ver 200 Companies Pledge Net-zero Emissions by 2040 as Pressure on Private Sector Mounts*, ABC NEWS (Sep. 20, 2021, 12:17 PM), https://abcnews.go.com/Business/200-companies- pledge-net-emissions-2040-pressure-private/story?id=80124841 ("Nearly 90 new companies—including multinational corporate giant Procter & Gamble, tech behemoth HP and cloud-computing titan Salesforce—have signed onto the Climate Pledge, an Amazon-backed initiative that asks firms to commit to achieving net-zero carbon emissions by 2040."); Emma Hinchliffe, *Business Finally Speaks Out in Support of Abortion Rights in Texas*, FORTUNE (Sep. 22, 2021, 9:14 AM), https://fortune.com/2021/09/22/business-finally-speaks-out-in-support-of-abortion-rights-in-texas/ ("More than 50 companies signed an updated version of the 'Don't Ban Equality' letter that argues that abortion restrictions are bad for business."); Marc Treviño, *2019 Proxy Season Review: Part 1—Rule 14a-8 Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 26, 2019), https://corpgov.law.harvard.edu/2019/07/26/2019-proxy-season-review-part-1-rule-14a-8-shareholder-prop.

[2] *E.g.*, Te-Ping Chen and Sara Randazzo, *Companies Tiptoeing Back to the Office Encounter Legal Minefield*, WALL ST. J. (Nov. 16, 2020, 7:26 AM), https://www.wsj.com/articles/companies-tiptoeing-back-to-the-office- encounter-legal-minefield-11605529593 ("The list of rules and guidelines employers must consult when reopening offices is varied, including guidance from the Occupational Safety and Health Administration and the Centers for Disease Control and Prevention. It also includes regulations at the local and state levels.").

[3] *See* Lisa M. Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129, 1142 (2019); Mary K. Cline et al., *Political risk and corporate performance: Mapping impact*, EY at 1 (Draft as of May 6, 2019), https://riskcenter.wharton.upenn.edu/wp-content/uploads/2019/09/EY-Geostrategic-Business-Group_Impact-of-Political-Risk_Academic_Draft.pdf [hereinafter Cline, *Political Risk and Corporate Performance*].

[4] *Id.* at 2 ("More than 80% of companies in Asia-Pacific and Europe say they have someone tasked with political risk management, but only 51% of companies in the Americas say the same. The global C-suite has not yet reached consensus on where primary responsibility for political risk management sits.").

[5] Brett H. McDonnell et al., *Green Boardrooms?*, 53 CONN. L. REV. 335, 346 (forthcoming 2021); George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TULANE L. REV. 639 (2021).

[6] Failing to address political risks, like other financial and social risks, can have a sweeping impact on investors. *See* McDonnell *supra* note 5, at 346 ("Many institutional investors, the owners of most shares of public companies, are highly diversified in their share ownership. They thus care about the effect that the behavior of one company may have on the long-term profits of their other portfolio companies.").

premiums for corporations perceived as riskier.[7] Historically, political risks focused on "[t]ransnational risks, including terrorism, military conflict and trade wars," in developing or emerging markets that could impact a corporate investment and market valuation.[8] Recently, domestic political risks related to COVID-19, populism, and a potential new era of enhanced state intervention have grabbed the attention of boards, investors, and other stakeholders. Whereas mainstream investors are more likely to evaluate political risk data associated with their portfolio investments, company approaches at the enterprise level are generally reactive, less sophisticated, and more ad hoc.[9]

Corporate political engagement intersects with the longstanding corporate purpose debate. A leading critique of the stakeholder governance, or argument in favor of shareholder primacy, is the concern that it provides managers cover to pursue their own political and other self-interested prerogatives in their decision-making, thereby making companies plutocracies in disguise.[10] Not surprisingly, there is a reluctance from some observers to mix business and politics. Despite important democratic legitimacy concerns beyond the scope of this article, modern corporations, specifically corporate boards, must inevitably engage with and manage political risk in their strategic oversight role.[11] Contrary to some contemporary observers, political demands on the corporation are not new nor likely to disappear.[12] Board failure to adequately oversee political risk, even when it evades legal liability, can have serious negative implications for corporate strategy and value. A company's response to political risk depends on context and designing political risk management capabilities at the enterprise level demands a coordinated, proactive, strategic approach.[13] ERM is a dynamic internal governance mechanism through which firms can address political risk among other key business risks. Effective board oversight of ERM has the potential to help firms navigate complex political minefields and capture business opportunities. As part of the corporate immune system, ERM complements external corporate governance mechanisms: shareholder empowerment, markets, litigation, gatekeepers, insurance, public sentiment, and top-down public regulation.[14] It also performs an internal regulatory function that lowers monitoring costs for government regulators.[15]

This article adds to the legal literature in three areas. First, it situates political risk within the contemporary ERM discussion.[16] Second, it re-examines how corporations

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[7] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 19.

[8] *Id.*

[9] *See* Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. 106, 109–10 (May–June 2019) ("Mainstream investors now look for evidence that their portfolio companies are focused on the material ESG issues that matter to financial performance.").

[10] ROBERT CHARLES CLARK, CORPORATE LAW § 16.2 (1986).

[11] *See generally* Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POLICY, 203-225 (Summer 2006).

[12] Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1499 (2005) ("[C]orporate demand for political activity is a natural response to the effect of legal rules on business operations. As a result, regulatory restrictions are more likely to restructure corporate political activity than to eliminate it.").

[13] Cline, *Political Risk and Corporate Performance*, *supra* note 3 at 2.

[14] *See generally* Omari Scott Simmons, *The Corporate Immune System: Governance From The Inside Out*, 2013 ILL. L. REV. 1131 (2013).

[15] *Id.*

[16] *E.g.*, Betty Simkins & Steven A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 LOY. U. CHI. L.J. 571 (2008); Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967 (2009) (comparing and contrasting ERM with traditional compliance monitoring and analyzing ERM under *Caremark* and its progeny). Michelle M. Harner, *Ignoring the Writing on the Wall: The Role of Enterprise Risk Management in the Economic Crisis*, 5 J. BUS. & TECH. L. 45, 50–58 (2010) [hereinafter Harner, *Ignoring the Writing on the Wall*]; Eric J. Pan, *Rethinking the Board's Duty*

engage with politics in the contemporary context.[17] Finally, it contributes to theories that posit the large modern corporation as a quasi-public institution and argues, with some caveats, that it functions as a quasi-political institution, mandating more robust board oversight of political risks.

Part I explores past and present corporate political engagement. Part II examines political risk as an element of ERM. Part III establishes the link between corporate legal doctrine, oversight, risk management, and political risk. Part IV analyzes proactive political engagement and reactive responses to political pressures. Part V discusses the connection between politicization, political risk, and corporate purpose. Part VI concludes with the implications of political risk management for contemporary boards.

I. CORPORATE POLITICAL ENGAGEMENT, PAST AND PRESENT

A. Corporate Political History

Since the beginning of the United States, corporations have been embroiled in politics, controversy, and public mistrust.[18] The impetus behind the enactment of general corporation statutes, at least in part, was the concern that corporate chartering by special acts of state legislatures was a tainted process involving cronyism and lobbying.[19] State general corporation acts were considered an innovation that democratized the chartering process and removed unnecessary political influence by powerful interests.[20] Since the

to Monitor: A Critical Assessment of the Delaware Doctrine, 38 FLA. ST. U. L. Rev. 209, 218 (2011); Betty Simkins & Steven A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 LOY. U. CHI. L.J. 571, 591–94 (2008).

[17] Fisch, *supra* note 12; Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017) (describing companies—like Uber and Tesla, among others—that make changing the law a material part of their business plan); Timothy P. Duane, *Regulation's Rationale: Learning from the California Energy Crisis*, 19 YALE. J. ON REG. 471, 473–74 (2002) (describing how Enron developed its political capital—making large political donations and developing relationships with government officials––to obtain favorable regulatory changes enabling it to build its energy-trading market).

[18] Consumer boycotts—that is, economic boycotts—predate the American Revolution and remain a salient contemporary tool to directly pressure corporations. David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. & SOC'Y 1, 4–5 (2010). The 1933 and 1934 securities acts were passed on the heels of the Great Recession of 1929 and sought to correct perceived market abuses of the prior decade by creating new disclosure regulations. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-7811 (2000); *see* Elisabeth Keller & Gregory A. Gehlmann, *A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 342–47 (1988).

[19] S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DE. J. CORP. L. 1, 7 (1976). Presidents Theodore Roosevelt, Howard Taft, and Woodrow Wilson all voiced support for a federal corporate chartering scheme in their annual State of the Union addresses. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV., 588, 598 (2003) For a broader discussion of presidential endorsements of federal chartering, *see* Joel F. Henning, *Federal Corporate Chartering for Big Business: An Idea Whose Time Has Come?*, 21 DEPAUL L. REV. 915, 919 (1972); Comment, *A Federal System of Licenses and Charters*, 25 GEO. L.J. 700, 704 (1937) (exploring Theodore Roosevelt's strong support of federal incorporation and Woodrow Wilson's endorsement of federal licensing); *see also* Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933*, at 26–29 (1990) (discussing the appeal of federal incorporation as a response to the argument that "the rise of big business was national in character, and thus required a national government response").

[20] In the early 1800s, most corporate charters required special acts of state legislatures, and thus corporations were, in a very immediate sense, creatures of the states—and legislatures—that brought them into existence. In his 1819 *Dartmouth College* opinion, Justice Marshall defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." Dartmouth College v. Woodward, 17 U.S. 518 (1819) at 636. Justice Taney shared Marshall's view. *Dartmouth College* did not constrain the states' powers to create corporations with special privileges or regulate corporations' actions so long as both the privileges and the regulatory authority were laid out in the corporate charters. *Dartmouth College*, among other cases, focused political attention squarely on state legislatures and the policies they pursued in chartering corporations. By the

beginning of the twentieth century, corporate political activity has been subject to federal regulation, especially restrictions on campaign contributions.[21]

Historically, corporations have experienced periods of public hostility. Non-shareholder interest groups have generally followed two approaches to influence corporate behavior: (1) working indirectly through federal and state governments; and (2) directly pressuring corporations.[22] The direct approach became prominent with the civil rights and anti-war movements.[23] The 1970s witnessed Ralph Nader and other consumer advocates employing shareholder resolutions as one means, among others, to directly influence corporate policies.[24] In a watershed moment in corporate history, the Project on Corporate Responsibility, a group of young lawyers backed by Nader, campaigned through a range of shareholder proposals to make General Motors more socially responsive to environment, health, safety, and other concerns.[25] A contemporary academic observer stated:

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mid-nineteenth century, such heightened attention would bring about changes that stripped legislatures of their power to enact specialized corporate charters. John W. Cadman, Jr., *The Corporation in New Jersey: Business and Politics, 1791-1875* (Cambridge, Mass: Harvard University Press, 1949). The shift from special corporate charters to general incorporation shepherded in a profound change in the relationship between corporations and American democracy.

[21] Fisch, *supra* note 12, at 1496.

[22] Vogel, *supra* note 16, at 15–45.

[23] Harwell Wells describes the direct pressure citizens applied to corporations during the American Civil Rights Movement:

> In October 1950, well in advance of Greyhound's 1951 shareholders' meeting, Peck and Rustin again submitted their proposal to the company. Greyhound responded as expected, notifying Peck and Rustin, as well as the SEC, that it planned to exclude the proposal, relying on the earlier SEC pronouncement allowing omission of proposals of a "general political, social, or economic nature." . . . If the proposal should be adopted it is apparent it could and would be used by Mr. Peck and his organization as propaganda to bear to force the management to act on the recommendation . . . and institute a social reform. . . . If the proposal should be voted down, Mr. Peck could use that fact as propaganda to discredit Greyhound. . . . We feel that to permit Mr. Peck to submit this proposal to our stockholders would be likely to cause irreparable damage to our business, because whatever action is taken would place Mr. Peck and the Congress of Racial Equality in a position to charge that Greyhound is opposed to the abolition of segregation.

Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of Peck v. Greyhound* (Temple University Legal Studies Research Paper No. 2021-29) at 23, https://ssrn.com/abstract=3873430; Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535 (2018); Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 WASH. & LEE L. REV. 1259 (2019).

[24] Phillip I. Blumberg, *The Politicization of the Corporation*, 51 B.U. L. REV. 425, 431 (1971); The 1970 Project on Corporate Responsibility—a group of Washington lawyers sponsored by Ralph Nader—was an effort to obtain shareholder approval of several resolutions through the solicitation of proxies. Among the numerous resolutions submitted, one would have expanded the Board to include three directors nominated by constituent groups of employees and consumers; another would have required General Motors to publish information on its policies concerning auto safety, pollution control, and minority hiring. *See, e.g.*, Herbert Mitgang, *G.M. Challenged on 'Responsibility'*, N.Y. TIMES (May 17, 1970), https://www.nytimes.com/1970/05/17/archives/gm-challenged-on-responsibility-gm-meeting-to-vote on.html. Today, utilizing the shareholder proxy machinery continues to be an avenue for raising social and political questions. For historical development, see e.g., David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"*, 56 CORNELL L. REV. 1 (1970); Melvon Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489 (1970); Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on campaign GM*, 69 MICH. L. REV. 421, 520–29 (1971).

[25] Richard Halloran, *Nader to Press for G.M. Reform*, N.Y. TIMES (Feb. 8, 1970), https://www.nytimes.com/1970/02/08/archives/nader-to-press-for-gm-reform-opens-a-campaign-to-make-company.html; Mitgang, *supra* note 22. During this same era, General Motors, in response to shareholder and domestic political pressures, inter alia, elected the first African-American director on a Fortune 100

"[Increasingly,] as the result of the search for a more vulnerable target, the corporation, rather than the political structure, has become the recipient of the political goals and pressures of various youth, anti-war, anti-pollution, anti-racist and consumer-oriented organizations."[26] Activists sought to use major corporations as a forum; as Nader said, "G.M. may be the host for a great public debate on the role of this giant corporation in American society rather than a wooden recital of aggregate financial data."[27]

B. The Contemporary Moment

In contemporary society, stakeholder and political demands upon corporations are multifaceted, direct, indirect, and fast moving due to social media and technological innovation.[28] All of society's institutions have come under increased scrutiny, especially corporations' role in, and accountability for, economic and social outcomes.[29] Dissatisfaction with political gridlock and failures, in part, make corporate engagement a pragmatic tool among a range of mechanisms available to activists.[30] Are we experiencing a new, defining contemporary moment? History suggests not, yet the COVID-19 pandemic has elevated the importance of political risk for corporate boards and arguably changed the way companies operate.

Contemporary observers are resurrecting and repackaging previous reform efforts as well as engaging in novel approaches. Meanwhile, public values are shifting, and a socially oriented investor base has become a formidable source of support for movements targeting changes in corporate objectives, such as impact investing and ESG.[31] The mainstream investment community is becoming receptive, recognizing the business and financial implications. The recent small shareholders' Engine No. 1 campaign at Exxon garnered the support of mainstream institutional investors BlackRock, Vanguard, and State Street.[32] It also reflects a perceived convergence of climate risk concerns, financial returns, and long-

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company board. A PRINCIPLED MAN: REV. LEON SULLIVAN (MotionMasters July 12, 2020); It also adopted the Sullivan principles to challenge South African Apartheid workplace practices. The Sullivan Principles originated from a single member of the General Motors board in conjunction with external legislative and interest group pressures. *Id.*

[26] Blumberg, *supra* note 22, at 431.

[27] Halloran, *supra* note 23.

[28] Lin, *supra* note 21, at 1535.

[29] *See, e.g.*, Tracy Jan et al., *Corporate America's $50 Billion Promise*, WASH. POST (Aug. 23, 2021), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/; Paul Roberts, *Costco and Boeing, Commit Tens of Millions to Social Justice Programs*, SEATTLE TIMES (Aug. 28, 2020), https://www.seattletimes.com/business/local-business/two-of-washingtons-biggest-companies-costco-and-boeing-commit-tens-of-millions-to-social-justice-programs/; Jeffrey Sonnenfeld, *CEOs Lead America's New Great Awakening*, WALL. ST. J. (Apr. 15, 2021), https://www.wsj.com/articles/ceos-lead-americas-new-great-awak ening-11618505076.

[30] Blumberg, *supra* note 22, at 431; Lucy Colback, *The Role of the Corporation in Society*, FIN. TIMES (July 10, 2020), https://www.ft.com/content/482a8435-c04c-4be8- 9856-941e7ecf128a.

[31] *See, e.g.*, Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (2020), https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter ("[BlackRock's] investment conviction is that sustainability-and climate-integrated portfolios can provide better risk-adjusted returns to investors"); Michal Barzuza, Quinn Curtis, & David H. Weber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020) (arguing that index fund managers' interest in ESG is motivated by a desire to court investment by socially conscious millennials rather than a concern for shareholder value); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by A Trustee*, 72 STAN. L. REV. 381, 392-99 (2020) (discussing the evolution of ESG investing).

[32] *E.g.*, Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html ("[Engine No. 1] successfully waged a battle to install three directors on the board of Exxon with the goal of pushing the energy giant to reduce its carbon footprint. . . . BlackRock, Vanguard and State Street voted against Exxon's leadership and gave Engine No. 1 powerful support.").

term value.[33] Managing political risk in the contemporary context connects with ESG-related initiatives and disclosures, particularly the social aspects, which are the least quantified, most fluid, and, arguably, the most political.

According to some observers, the European and US movements toward stakeholder capitalism are occurring at a different pace, but both are headed in the same direction.[34] Divergent approaches or differences in pace reveal that corporate governance systems are themselves, in part, politically determined. Pace differences may be related to differences in the overarching regulatory systems. EU regulators with various codes often reference and recognize the rights of stakeholders and push asset managers harder on environmental issues than their US counterparts. By contrast, the US corporate regulatory regime, including Delaware and the federal government, generally takes a more cautious approach. Facing more limited interest-group considerations and a plaintiff-driven system of common-law adjudication, Delaware is moving slowly toward stakeholder capitalism,[35] while the federal government has stepped into corporate internal affairs incrementally to fill regulatory gaps.[36] Currently, the Securities and Exchange Commission (SEC) is moving toward enhanced ESG and political disclosures. The reaction from the investment community, however, is mixed. Although large asset manager BlackRock has been a vocal proponent of stakeholder capitalism, other large asset managers take a more measured approach. The pace of a US transition may also depend upon the political party in power and the development of more uniform standards that would make it easier for regulators, investors, and other stakeholders to monitor corporate ESG performance.[37]

The modern corporation both proactively wields political power and reacts to external pressures from a range of constituencies.[38] Accountability still remains the threshold governance issue. In *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means address its two dimensions: (1) the minimization of internal costs resulting from the separation of ownership and control among diffuse shareholders and managers and (2) the external abuse of corporate power at the expense of society at large.[39] The status

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[33] *Id.* ("[Engine No. 1] convinced the mighty BlackRock. 'We believe more needs to be done in Exxon's long-term strategy' on reducing climate risk, which threatens shareholder value, [BlackRock] said in a statement explaining why it had sided with Engine No. 1.").

[34] Nations can be located on a corporate governance continuum ranging from "shareholder-centric" systems (US) to "stakeholder-centric" systems (much of Europe). Europe and the UK have recently been moving toward increasing the rights of, and duties owed to, stakeholders. John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* at 14–16 (2020) https://ssrn.com/abstract=3678197); *see* Jennifer G. Hill, *Good Activist, Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018) [hereinafter *Good Activist*]; Jennifer G. Hill, *Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance*, 5 U.C. IRVINE J. OF INT'L, TRANSNAT'L & COMP. L. 163 (2020) [hereinafter *Shifting Contours*]; Katherine Jackson, *Toward a Stakeholder-Shareholder Theory of Corporate Governance: Comparative Analysis*, 7 HASTINGS BUS. L. J. 309 (2018).

[35] *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997). In 2013, however, Delaware adopted a public benefit corporation statute, in part, to address stakeholder concerns and impact investor appetites. *See* DGCL §§ 361–68.

[36] For example, SOX federalizes rules for the composition of a corporation's audit committee, the separation of accounting and auditing services, forfeiture of executive pay, and prohibitions on loans to corporate executives. Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 323 (2009). *See generally* Sarbanes-Oxley Act of 2002, Pub. L. No.107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7, 17, 15, 18, 22, 31, and 42 U.S.C.).

[37] Coffee, Jr., *supra* note 32, at 14–16 (2020); *see* Hill, *Good Activist, supra* note 34; Hill, *Shifting Contours, supra* note 34; Jackson, *supra* note 34.

[38] Blumberg, *supra* note 22, at 425 (1971). ("The increasing politicization of the large American corporation, illustrated by numerous current developments, is primarily the product of changing concepts of the role of business in the society, set against a background of profound unresolved problems in the society itself.").

[39] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY 11–13, 17–

quo of the modern corporation is not rigidly rooted in one extreme or the other but vacillates in the tension between a narrow shareholder primacy view and a broader stakeholder approach. A fair reading of history, legal doctrine, and modern corporate practice reflects this tension and a trend toward hybridization or flexibility to address evolving challenges and preferences.

C. The New Wave of Populism

Since the 2007-2009 global financial crisis, populism has made inroads.[40] While particular manifestations have been analyzed before, devising strategies that adequately address populism in the context of multinational enterprises (MNE) in developed countries is a new challenge confounding firms and researchers.[41] Institutional volatility and political events abroad and at home may close markets and threaten supply chains and other operational concerns.[42] This extreme uncertainty is hard to characterize and distinct from more planned institutional reform, which tends toward a direction or endpoint.[43]

The economic and business literature captures the effects of political and economic policy risk in "normal" times—for example, elections may lead to a rollback in investment[44]—but populism can magnify uncertainty and vitiate marketplace information, making firm "assessments, investments, and valuations more difficult."[45] Populism is often associated with weakening economic conditions and stagnation as well as institutional volatility and transition.[46]

D. The COVID-19 Pandemic

The COVID-19 pandemic has tested companies' risk management capabilities. Numerous governments—foreign, domestic, and local—shifted policies in response to waxing and waning infection rates and death tolls. Political risks include lockdowns and travel restrictions affecting human capital; export controls affecting supply chains and access to strategic products (e.g., microchips); industrial policies to increase "self-sufficiency" in "critical products"; as well as vaccine mandates, diplomacy, and nationalism.[47] A recent survey indicates that while some "[e]xecutives may be discounting the likelihood of some political risks," nearly "half of global executives expect political risk to be higher in the coming year, with geopolitics being the highest area of concern," and "more than 90% of global executives say that their company has been affected by unexpected political risks in the past 12 months."[48]

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18 (1932).

[40] Christopher A. Hartwell & Timothy Devinney, *Populism, political risk, and pandemics: The Challenges of Political Leadership for Business in a Post-COVID World*, 56 J. WORLD BUS. 1, 18 (2021).

[41] *Id.*

[42] *See, e.g.*, *Container Shipping Rates Between U.S. and China Exceed $20,000, Hitting a Record*, CNBC (Aug. 25, 2021), https://www.cnbc.com/2021/08/05/china-us-container-shipping-rates-sail-past-20000-to-a-record. html.

[43] *Id.*

[44] Bryan Borzykowski, *Why Markets Tend to Fall During a Presidential Election Year*, CNBC (Jan 13, 2016, 9:30 AM) ("[M]arkets tend to fall in the last year of a president's second term."); Candace E. Jens, *Political Uncertainty and Investment: Causal Evidence from US Gubernatorial Elections*, 124 J. Fin. Econ. 563 (2017); B. Julio and Y. Yook, *Political Uncertainty and Corporate Investment Cycles*, 67 J. of Finance, 45 (2012).

[45] Hartwell & Devinney, *supra* note 38, at 8–9.

[46] *Id.*; Jens, *supra* note 41, at 563; Julio and Yook, *supra* note 44; Ľuboš Pástor & Pietro Veronesi, *Political Uncertainty and Risk Premia*, 110 J. FIN. ECON. 520 (Dec. 2013).

[47] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 5.

[48] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 4–5 ("More than 90% of executives in the EY Geostrategy in Practice 2021 survey say that their company has been impacted by unexpected political risks in the past 12 months.")

Despite this heightened awareness, most companies' approach to political risk is reactive. In the current business environment, investors, regulators, and other stakeholders are nudging them to demonstrate a more integrated and strategic approach to managing political risks and opportunities.[49]

II. Political Risk as an Element of Enterprise Risk Management

A. Enterprise Risk Management (ERM)

Oversight responsibilities for risk management are a salient part of the contemporary director role.[50] Risk brings benefits and detriments, upsides and downsides, minefields and opportunities. There is an inherent tension between profit maximization and risk management.[51] As two former Delaware jurists opine: "[r]isk management is not simply a business and operational responsibility of a company's management team—it is a governance issue that is squarely within the oversight responsibility of the board."[52] The ABA Corporate Director's Guidebook adopts the following definition of risk management:

> Risk management is a multifaceted process that includes identifying and assessing risks, considering mitigating factors, implementing risk controls and monitoring. The board's responsibility with respect to risk management encompasses both direct decisions about matters such as strategy and risk tolerance and oversight and monitoring implementation of those decisions and the effectiveness of the corporation's compliance programs.[53]

ERM is a holistic approach to managing a company's risk profile, that is, a composite view of a company's most important risks.[54] The Committee of Sponsoring Organizations of the Treadway Commission defines it as "a process, [a]ffected by an entity's board of directors, management and other personnel, applied in strategy-setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within

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[49] Dominic Waughray & Jon Williams, *How to Set Up Effective Climate Governance on Corporate Boards Guiding Principles and Questions*, WORLD ECON. FORUM at 10–18 (2018), https://www3.weforum.org/docs/WEF_Creati ng_ effective_climate_governance_on_corporate_boards.pdf.

[50] Betty Simkins & Steven A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 LOY. U. CHI. L.J. 571 (2008); Bainbridge, *supra* note 14, at 967 (comparing and contrasting ERM with traditional compliance monitoring and analyzing ERM under *Caremark* and its progeny); Harner, *Ignoring the Writing on the Wall*, *supra* note 16, at 50–58. E. Norman Veasey and Randy J. Holland, *Caremark at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors' Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen's 1996 Caremark Landmark*, 76 BUS. LAWYER 29, 34 (Winter 2020).

[51] Michelle Harner, *Corporate Culture and ERM*, CONF. BOARD (June 2013), https://www.conference-board.org /publications/publicationdetail.cfm?publicationid=2527 [hereinafter Harner, *Corporate Culture and ERM*].

[52] *Risk Management and the Board of Directors*, WACHTELL LIPTON ROSEN & KATZ at 1 (June 4, 2020); AM. LAW INST. § 3.08.

[53] ABA BUS. LAW SECTION, CORPORATE DIRECTOR'S GUIDEBOOK 37 (7th ed. 2020).

[54] Harner, *Corporate Culture and ERM, supra* note 51. Risk profile can be defined as a composite view of a company's most important risks. *See* COMMITTEE OF SPONSORING ORGANIZATIONS OF THE TREADWAY COMMISSION, ENTERPRISE RISK MANAGEMENT--INTEGRATED FRAMEWORK 2 (2004), http://www.coso.org/Publications/ERM/COSO_ERM _Executive Summary.pdf. The Casualty Actuarial Society (CAS) defines enterprise-wide risk management as "the process by which organizations in all industries assess, control, exploit, finance, and monitor risks from all sources for the purpose of increasing the organization's short- and long-term value to its stakeholders." *See* CASUALTY ACTUARIAL SOCIETY, ENTERPRISE RISK MANAGEMENT COMMITTEE, OVERVIEW OF ENTERPRISE RISK MANAGEMENT 8 (2003), available at http://www.casact.org/research/erm/overview.pdf.

its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives."[55]

ERM empowers corporate actors at many levels across the organization to identify, assess, and communicate about risk exposure. This practice, in turn, allows boards to work more effectively with their management teams to monitor and mitigate risks and encourages them to embrace a risk-aware culture supporting firmwide communication.[56] ERM's objective is not to eliminate all risks but to maintain a level of risk that aligns with the company's risk appetite, or the type and amount of risk the company is willing to take on.[57] From a strategy perspective, "the board is expected to make informed judgments on risk tolerance and the management of risks, including financial, legal, reputational risks, and enterprise risks."[58] Notably, "[c]ontemporary board oversight responsibilities include establishing and monitoring a range of programs relating to ESG, data-privacy, cybersecurity, and COVID-19 often under the ERM umbrella."[59]

In the ERM context, board oversight must be distinguished from *operational management* and *micromanagement*. For example the "board hires the management team, makes strategic decisions on risk, and oversees management's execution of that strategy, including compliance with legal and financial norms. But the board does not go down to the engine room to run the operations or crunch the numbers, at least in the first instance."[60] While "[t]he management of risk in today's often-extended enterprise is complex, with executive teams typically feeling the need to transfer ownership of risks to specialist risk, compliance, and security functions inside the organization or to outsource them to external advisors," the "examination of recent risk disasters reveals that diffused accountability for risk management is a major problem."[61] Some delegation to a standing committee (e.g., risk or audit), a chief risk officer (CRO), or outside experts is necessary, but risk management remains the responsibility of the entire board. By reinforcing the legal oversight framework with its emphasis on information flow and internal control systems, ERM encourages boards of directors to foster and embrace a risk-aware culture that supports firmwide communication and, hence, better governance practices.[62]

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[55] *Enterprise Risk Management—Integrated Framework: Executive Summary*, COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM'N (2004), http://www.coso.org/publications/erm/coso_erm_executivesummary.pdf. COSO introduced one of the most widely adopted ERM approaches. COSO's proposed framework also assigns responsibility for risk management oversight to everyone who works for the business. *See also* Kristen N. Johnson, *Addressing Gaps in the Dodd-Frank Act: Directors' Risk Management Oversight Obligations,* 45 U. MICH. J. L. REFORM 55 (2011) ("COSO's ERM framework involves several elements, including careful evaluation of a firm's risk culture; articulation of a clear statement of the firm's risk objectives and risk management policy; development of responses to risks ex ante; and improvement of the flow of communication, information, and monitoring of risk across the enterprise" and "[t]he framework requires everyone engaged in accomplishing an enterprise's business goals to act in a manner reasonably consistent with the company's risk management objectives.").

[56] Harner, *Corporate Culture and ERM*, *supra* note 51.

[57] *Id.*

[58] Veasey & Holland, *supra* note 50, at 34.

[59] *Id.*; Leo E. Strine, Kirby M. Smith, & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy* (2020) (unpublished manuscript), available at http://scholarship.law.upenn.edu/faculty_scholarship/ 2196.

[60] Veasey & Holland, *supra* note 50, at 34.

[61] *2019–2020 NACD Public Company Governance Survey*, NACD at 18 (2020).

[62] *See* COMMITTEE OF SPONSORING ORGANIZATIONS OF THE TREADWAY COMMISSION, ENTERPRISE RISK MANAGEMENT--INTEGRATED FRAMEWORK at 11 (2004), http://www.coso.org/Publications/ERM/ COSO_ERM_ ExecutiveSummary.pdf.

B. Aspirational ERM Design Considerations

The design of company-wide ERM programs is crucial to their efficacy. Aspirational ERM design features include: (1) a clear, concise risk-appetite statement to guide strategy and set management expectations internally and externally; (2) a firm grasp of the company risk profile;[63] (3) transparent reporting (e.g., heat maps and dashboards); (4) understanding the severity, velocity, and duration of identified risks beyond mere enumeration (e.g., prioritizing top risks and intermediate risks); (5) establishing authority and accountability for risk, where people and processes are identified and evaluated; (6) interactive decision-making versus box-ticking and massive data dumps; (7) a multidirectional view of risk from the vantagepoint of key stakeholders: investors, customers, suppliers, employees, regulators, and others;[64] (8) understanding the links among various types of risk (e.g., financial, operational, reputational, and political); (9) board understanding of the top risks, or mission-critical strategic assets that must be protected; (10) board engaging in forward thinking on risk (i.e., discerning whether the company's risk profile accounts for future risks); (11) board consideration of whether the company risk profile adequately accounts for emerging risks, such as political events; (12) board understanding of how the company's risk profile aligns with key value drivers; (13) board understanding of how management measures the likelihood and severity of risks; and (14) board understanding of how the company compares to peers (e.g., benchmarking). A firmwide ERM system reflecting the above features is more likely to be dynamic and proactive and to increase the effectiveness of board oversight.

C. Political Risk Management

1. Status of Academic Political Risk Research

The academic literature on political risk is fragmented and interdisciplinary.[65] Since the 1960s, political risk has been an active topic of research in the international business literature.[66] It evolved largely in reaction to the conditions MNE faced in emerging markets, focusing on the risks of appropriation, nationalization, and decolonization and taking a qualitative, case-based approach.[67] More recent research has shifted to a large-scale, quantitative, empirical approach.[68] The earlier tendency focused narrowly on discrete risks and their impact rather than embracing a holistic approach encompassing the entire

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[63] *2019–2020 NACD Public Company Governance Survey*, NACD at 2–14 (2020). Michelle Harner, *The Potential Cost and Value of ERM*, 5 DIRECTOR NOTES 1 (March 2013) ("The concept of enterprise risk management (ERM) as a holistic approach to managing a company's risk profile has tremendous appeal.").

[64] *Id.* at 18.

[65] For a detailed review of the political risk literature, see Hartwell & Devinney, *supra* note 38, at 8–9; Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 2 ("Political risk is a complex concept, incorporating risks on the transnational level . . . to the local level . . . , which can materially impact a range of corporate activities. Scholars tend to focus on discrete risks and discrete impact, rather than approach the risk environment, and potential management of those risks, holistically.").

[66] John Dunning, *The Eclectic Paradigm of International Production: A Restatement and Some Possible Extensions*, 19 J. INT'L BUS. STUDIES 1, 12–30, (Spring 1988); Jean J. Boddewyn, *Political Aspects of MNE Theory*, 19 J. INT'L BUS. STUDIES 341, 343–60 (1988); RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES at 3–40 (1971).

[67] Hartwell & Devinney, *supra* note 38, at 8–9; Dunning, *supra* note 66, at 12–30; Boddewyn, *supra* note 66, at 343–60; VERNON, *supra* note 66, at 3–40.

[68] Historically, academic research relied primarily on qualitative case studies or relatively crude proxies for political risk; however, recent research increasingly draws on quantitative methodologies and more strategically useful data sets. A potential benefit of these research efforts is the ability to better predict and compare company political risk exposure over time. Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 4.

risk environment.[69] Political scientists and sociologists traditionally focused on the strength and power of corporations rather than their vulnerabilities.[70] The political risk literature eventually evolved to recognize corporate firms as actors in the political context, not merely passive observers. It examined the ways in which companies proactively and preemptively addressed political uncertainty and captured opportunities.[71] Another strand of research emerged to explore how political institutions contribute to the risk environment, but the legal literature concerning political risk management remains underdeveloped.[72]

2. Defining Political Risk

Political risk has no consensus definition. Broadly, it means "the probability that political decisions, events or conditions at the geopolitical, country, regulatory or societal level will impact the performance of a company, market or economy."[73] It is difficult to define because it affects and overlaps with other key risk areas, and ERM processes do not necessarily untangle them. For example, items characterized as operational risks may actually result from government actions, such as closures, that reverberate across the entire corporate enterprise. Political risk management is "the governance and processes that adapt risk management practices to overcome challenges and seize opportunities associated with political risks."[74] Although fraught with complexity, it is integral to enhanced governance under the ERM umbrella. Understanding the nature of political risk relative to other contingencies is important. As one contemporary observer notes:

> No one can perfectly predict the future. In many situations, however, we can make good predictions, because we can extrapolate from sufficiently similar, or homogeneous, past events. We can predict possible outcomes and their payoffs, as well as their associated probabilities, with an appreciable degree of confidence and precision. By contrast, in other situations our predictions require extrapolation from dissimilar (heterogeneous) events; these predictions will not be nearly as good.[75]

Frank Knight in his book *Risk, Uncertainty, and Profit* described the former category as risk and the latter as uncertainty.[76] A contemporary observer further explains the implications of this distinction as it pertains to political risk:

> Risk can be adequately quantified; the more homogeneous the events, the more we know about the distribution of possible outcomes. By contrast, quantification of "uncertainty" is far more difficult; indeed, the more heterogeneous the events, the less we know about the distribution of possible outcomes. Political risk is quite heterogeneous. Each event differs

[69] *Id.* at 2.
[70] Hartwell & Devinney, *supra* note 38, at 8–9; Ralph C. Hybels, *On Legitimacy, Legitimation and Organizations: A Critical Review and Integrative Theoretical Model*, ACADEMY MGMT. 241, 241–45 (1995).
[71] *Id.*; Jean J. Boddewyn, *supra* note 66, at 343–60; VERNON, *supra* note 66, at 3–40.
[72] Fisch, *supra* note 12, at 1504–07 (describing relationships between FedEx, its CEO and founder, and Washington insiders); Lin, *supra* note 21, at 1546; Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 217 (1998) [hereinafter, Roe, *Backlash*]; Pollman & Barry, *supra* note 15, at 2032; Blumberg, *supra* note 24, at 427.
[73] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 5. Earlier definitions of political risk: "Political risk is fundamentally a statistical stationary concept that posits unknowns which can be characterized (and hence managed and financially hedged)."; Hartwell & Devinney, *supra* note 38, at 8–9.
[74] *Id.* at 30.
[75] Claire A. Hill, *How Investors React To Political Risk*, 8 DUKE J. COMP. & INT'L L. 283, 287 (1998).
[76] FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921).

markedly. Moreover, as the world changes, the profile of political risk changes.[77]

With new information and events, companies are constantly revising their assessments for all types of risk. Yet, the heterogeneity of political risks make their discrete classification and assessment more challenging compared to other types of risk (e.g., supply chain, human capital, and cybersecurity).[78] For example, events and new information within more homogenous risk categories "should prompt far less revision: even a dramatic event within a homogeneous class [or category] can readily be incorporated into the previously established probability distribution."[79] But "a new event within the class [or category] of political risk can revise the definition of political risk itself."[80]

Another complicating factor to managing and defining political risk is that there is a lack of agreement concerning what constitutes a "political" issue. In today's environment, a simply contested or disputed issue is often labeled as "political." This labelling can be used strategically to discredit a range of seemingly innocuous initiatives.

3. A Taxonomy of Political Risks

To elucidate the scope and impact of political risk at the enterprise, functional, and business-unit levels, defining its subcategories is helpful. However, this attempt at categorization is inevitably imprecise, incomplete, and evolving. In practice, companies may be effective at addressing one subcategory while deficient at others. Political risk affects an array of business areas: operations and supply chains; human capital; revenue; growth and investment; finance and taxes; data and intellectual property; and compliance and reputation.[81] Moreover, it can be viewed from several perspectives: (a) geopolitical, (b) domestic, and (c) societal.[82] Geopolitical risk arises when countries' foreign policies, regulatory environment, or international relations more broadly affect markets and companies.[83] Examples include "[p]olitical conflict, trade wars, sanctions, retreat from multilateral accords, social movements, military conflict, [and] terrorism."[84] Country/domestic risk arises when the national political environment, the stability of the government and institutions, or the legislation and its implementation affects companies.[85] Examples include "[p]olitical (regime) transitions, policy shifts, lack of law enforcement, civil conflict, buy-national policies, [and] corruption."[86] Societal risk springs from tensions between groups or public actions launched by groups ranging from trade unions to consumers that affect markets and companies.[87] Examples include "[b]oycotts, protests,

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77 Claire A. Hill, *supra* note 75.

78 *Id.* at 287–89.

79 *Id.*

80 *Id.*

81 *Id.* at 11.

82 Companies sometimes treat regulatory risk as separate from political risk. Regulatory risk arises when governments at the international, national, or local level change environmental, health and safety, financial, and other regulations or their implementation.

83 Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 13 ("Transnational or geopolitical risks, in the broadest sense, emerge when the interests of countries in defined policy arenas collide, or when the international system at large is undergoing a transformation.").

84 *Id.*

85 *Id.* ("National or country risks emerge when the national political environment, the stability of the government and institutions, legislation, or the regulatory environment has measurable economic consequences for domestic markets and corporations acting in those markets.").

86 *Id.*

87 *Id.* ("Societal risks emerge when groups such as nongovernmental organizations (NGOs), trade unions and consumer groups develop a collective political identity and interests that subsequently drive their public

disruptions of production or supply chains, corporate espionage, [social media campaigns], [and] local violence."[88]

Generally, a company might place political risks into two separate boxes: (i) internal firm specific risks impacting operations and strategy, and (ii) external non-firm specific or systemic risks. Managing the former clearly falls within the purview of the board. But responsibility for latter is contested and likely distributed between state actors and private firms. Notwithstanding, the classification of internal firm specific risks versus external systemic risks presents some challenges. For example, the origins of important reputational risks are sometimes seemingly remote. In practice, companies can define their own firm specific political risks and ideally manage them through an ERM framework. Given the breadth of political risks, it may be helpful for companies to further divide them into workable discrete categories based upon their nexus to the business: operational, reputational, financial, and legal liability. Additionally, firms should further prioritize these risks based upon their level of severity and probability to the extent determinable.

4. Integrating Political Risk Management with ERM

Understanding the probability of risks, damages as well as potential costs and opportunities is a fundamental feature of managerial decision-making. ERM is a dynamic internal governance mechanism through which firms can address political risk among other key business risks. Rather than disjointed approaches, effective board oversight of ERM has the potential to help firms navigate complex political minefields and capture business opportunities. As part of the corporate immune system, ERM complements external corporate governance mechanisms: shareholder empowerment, markets, litigation, gatekeepers, insurance, public sentiment, and top-down public regulation.[89] It also performs an internal regulatory function that lowers monitoring costs for government regulators.[90]

In theory, assessments of the upsides and downsides of political risks should inform decision-making at the board and management levels, but their disruptive or emergent nature is often not adequately captured by traditional ERM or compliance processes. According to recent surveys, only one out of five global executives (23%) says their company integrates political risk management into broader ERM on a regular basis, and only about "one-third of companies globally conduct political risk management activities at multiple levels."[91] This neglect likely undermines their ability to mitigate downside risks and seize upside opportunities related to political considerations.[92] In any case, companies

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activism and, in turn, have consequences for markets and companies operating globally. These risks typically occur at a local level but can transcend local boundaries and take on national and transnational characteristics.").

[88] *See, e.g.*, Lin, *supra* note 21, at 1546; Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 3.

[89] *See generally Omari Scott Simmons*, supra note 17.

[90] *Id.*

[91] Oliver Jones & Courtney Rickert McCaffrey, *The CEO Imperative: Are you making political risk a strategic priority?*, EY (May 13, 2021), https://www.ey.com/en_us/geostrategy/the-ceo-imperative-are-you-making-politic al-risk-a-strategic-priority ("Such integration can be particularly impactful if it leverages quantitative political risk identification outputs and tangible estimations of political risk impact.").

[92] *Id.* ("The ERM team responsible for political risk should seek to target financial and operational hedging and other risk strategies that foster resilience, minimizing the impact of downside political risk events while also proactively identifying strategic opportunities the company could pursue related to upside political risk events."); *Id.* at 24 ("Only about half of executives globally (52%) say their company invests enough in political risk management. The other half of executives assess that their company is not investing enough at either the enterprise (9%) or the functional or business unit level (39%). This lack of funding may explain why so few companies have political risk capabilities at the functional or business level and may contribute to more ad hoc risk management.").

should move away from siloed ERM approaches to integrate discussions of disruptive political risks into strategic planning, market entry and exit, and transactional decisions.[93] According to recent surveys, boards pay most attention to the impact on existing strategy and miss future implications.[94]

Political risk is hard to predict and hard to measure. According to a recent survey, one-half of investors believe most companies do not fully appreciate or acknowledge the potential impact of political risk.[95] Their doubts are well-founded: only about 16 percent of boards receive routine geopolitical briefings from external subject matter experts,[96] and less than 25 percent participate in scenario planning related to political risks and the macro environment.[97] Moreover, "[o]nly 18% of companies have a board member with government or political experience."[98]

5. *Proactive Versus Reactive Political Risk Management*

Given the impact of political risk on corporate strategy and reputations, effective management requires boards to take a more proactive, adaptive, and forward-looking approach, including: (a) integrating political risk into ERM and strategic planning; (b) staying informed about industry and societal trends; (c) building their understanding of cultural, social, political, and broader reputational risks and rewards associated with corporate actions; (d) considering a wider feedback loop that involves employees and outsiders, such as customers, suppliers, and other stakeholders, to reveal potential political risks that do not manifest in internal strategic planning and other initiatives; (e) developing stakeholder relationships at the enterprise, business unit, and functional levels; (f) coordinating a cross-functional team or committee to manage political risk;[99] (g) recruiting individuals with political expertise to serve on the board and senior leadership team; (h) coordinating activities at the enterprise, functional, and business-unit levels to balance exposure to high-risk geographies and parts of the business via diversification and other mitigation strategies;[100] and (i) collecting qualitative and quantitative data and developing capabilities to assess the impact of political risk on the business.[101] Adoption of the above features is likely to improve the execution of corporate strategies, political risk oversight, and ERM overall.

D. Governance Structure and Political Risk Management

A company's governance structure determines its ability to manage political risk. In too many companies, it is siloed and overly centralized.[102] A more proactive approach would include collaboration among a diverse set of executives engaging with a variety of corporate functions.

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[93] Courtney Rickert McCaffrey, Jon Shames & Oliver Jones, *EY Geostrategy in Practice 2021 Survey*, 17–18 (2021) ("[O]nly 2% of executives saying that their company does not incorporate political risk analysis into market entry and exit or transactions decisions.").

[94] *Id.* at 22.

[95] *Edelman Trust Barometer Special Report: Institutional Investors Executive Summary*, EDELMAN at 5 (New York, NY: Edelman Inc., 2017).

[96] McCaffrey, Shames & Jones, *supra* note 93, at 9.

[97] *Id.* at 22.

[98] *Id.* at 9 ("Only 18% of companies have a board member with government or political experience, suggesting a lack of leadership experience or acumen to understand and design an effective political risk strategy.").

[99] *Id.* at 20.

[100] *Id.* at 16.

[101] *Id.* at 4.

[102] *Id.* at 20.

1. Corporate Functions

Strategic integration of the external stakeholder-facing functions, including government affairs, stakeholder relations, sustainability, community relations, and corporate communications, helps protect stakeholders and creates shareholder value.[103] This integration can help to reduce uncertainty and costs as well as capture opportunities related to the intersection of business and politics.[104]

2. C-Suite

In the C-Suite, the CRO is the senior executive commonly involved with political risk management.[105] Others include the chief financial officer, chief strategy officer, and chief compliance officer. Note that two important roles are often absent: the chief operating officer (COO) or supply-chain officer and the head of public policy and government affairs. Risk management teams should include both to capture political expertise. Greater involvement from a broader set of senior executives is needed to implement a less-siloed enterprise approach to the various dimensions of political risk, such as strategic planning, financial hedging, and compliance, as well as corporate operations and the supply chain.[106] Exclusion of the COO and head of public policy and government affairs may suggest a reactive approach to political risk at many companies.[107]

3. The Board

Political risk is the full board's responsibility. It should be integrated into firmwide ERM processes and monitored by a designated board committee (e.g., risk and audit). In the present volatile political climate, boards are dedicating more time to it; in a recent survey, "58% of executives said their boards were increasing time spent on political risk"[108] However, their approaches remain largely reactive. While 40% assess the impact of political risk on the company's existing strategy, 32% have a board committee responsible for political risk management oversight, 26% receive regular geopolitical briefings from company functions, and 25% regularly consider political risk as part of business decision-making, only 18% have at least one member with government or political experience, and only 16% receive regular geopolitical briefings from an external subject-matter expert.[109] These findings underscore opportunities for boards to improve their political risk management oversight, but recent surveys indicate that it is not a high priority for executives.[110]

4. Board Political Independence and Awareness

Board members should be politically aware but remain independent when exercising their fiduciary duties on behalf of the corporation and its shareholders. Board members who invariably vote along political lines are not objectively evaluating matters before them to serve the best interests of the corporation. Instead, they are prioritizing personal preferences. A major critique of stakeholder governance is that it may allow politics to invade corporate decision-making by providing cover for managers pursuing political self-

[103] WITOLD J HENISZ, CORPORATE DIPLOMACY: BUILDING REPUTATIONS AND RELATIONSHIPS WITH EXTERNAL STAKEHOLDERS X (2014).
[104] *Id.*
[105] McCaffrey, Shames & Jones, *supra* note 93, at 21.
[106] *Id.* at 22.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 23 ("[F]ewer than one-quarter regularly receive political risk briefings from external experts or engage in scenario analysis on political risks and the macro environment.").

interest. To an extent, the director role requires suppressing individual or political affinities in the service of the corporation. Doing otherwise is often viewed as an inappropriate use of shareholders' money.[111] Boards may inevitably engage in spirited, politically charged discussions unlikely to reach a public audience. Whenever possible, they seek consensus, trying to get everyone on the company bus. The board chair can be instrumental in reminding directors of their fiduciary duties to the corporation and guide or facilitate the discussion, ensuring that many voices are heard, and the ideological commitments of certain members do not dominate it. Individual board member evaluations and director removal are other ways to mitigate political outbursts and partisanship in the boardroom.

5. Political Risk and the Court of Public Opinion

Political risk that plays out in the court of public opinion should not be treated differently from other emerging risks, such as a major data breach, an airline crash, or a health scare associated with a food or pharmaceutical product. Companies must develop plans, processes, and checklists to address risks that emerge from political issues, actors (e.g., politicians and candidates), and stakeholders (e.g., shareholders, customers, and employees). Gender-neutral bathrooms, voting restrictions, and a range of politically charged questions are not on the radar for many board members, yet they are asked to carefully and quickly review statements and press releases drafted by their public relations departments. Company responses are often nuanced, nonpartisan, general, and careful. Sales and marketing teams, especially in consumer-facing companies, should also have input. The coordinated company response must be quick. On the one hand, no response or a slow one may generate criticism and require follow-up action. On the other hand, a multinational company may make a calculated decision not to opine on an issue in a region or area where it has a limited presence for fear of backlash. Ideally, before making a political statement (or a statement that could be construed as political), a CEO will consult with the board, other corporate actors, and experts. Whenever possible, boards do not want to be caught "flatfooted" and respond reactively to forestall stakeholder backlash.

6. The Challenge of Quantifying the Impact of Political Risk

Ideally, political risk assessment should measure, *inter alia*, business exposure and the potential effect on current business strategy and finances.[112] However, political risk derives from many sources at many levels—geopolitical, national, and societal[113]—and affects a wide range of corporate activities—sales, production and operations,[114] research and

[111] Miller v. American Telephone & Telegraph Co., 507 F.2d 759 (3d Cir. 1974) (holding that a corporate board cannot claim protection of the business judgment rule in a derivative suit if the decision at issue was a knowing violation of public law).

[112] McCaffrey, Shames & Jones, *supra* note 93, at 13.

[113] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 3.

[114] High political risk is related to company strategies employing low-level commitment mechanisms, such as joint ventures.

development,[115] security,[116] finance,[117] regulatory compliance,[118] human capital,[119] governance,[120] and reputation.[121] Its impacts are both varied and interdependent, with disadvantages and advantages. They might include shifts in operations, supply-chain disruptions, market-access restrictions, intellectual property theft, higher cost of capital, higher regulatory compliance costs, increased security costs, reputational damage, and internal governance lapses.[122] Moreover, companies' contextual environments and specific features, including their "ex ante strategies to protect themselves against political risk," differentiate their exposure.[123]

Given the complexity of political risk, its impact must be quantified using mixed methods. Geopolitical risk is often measured using: (a) the periods or dates of armed conflict and the number of fatalities reported; (b) bilateral trade and investment barriers; and (c) media content analysis of the "verbal and material interactions between national

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[115] *See* Srividya Jandhyala, *International and Domestic Dynamics of Intellectual Property Protection*, 50 J. WORLD BUS. 2, 284–93 (2015) (describing how a country's accession to WTO membership resulted in a mere 2% improvement in de facto IP protection); Minyuan Zhao, *Conducting R&D in Countries with Weak Intellectual Property Rights Protection*, 52 MGT. SCIENCE 8, 1185–99 (2006) (explaining that companies mitigate R&D risk by collaborating with investors in countries with strong intellectual property rights).

[116] *See* Jain C. Subhash & Robert Groose, *Impact of Terrorism and Security Measures on Global Business Transactions: Some International Business Guidelines*, 14 J. TRANSNAT'L MGT. 1, 42–73 (2009) (describing an understudied material threat to companies: increasing violence by non-state international actors targeting global companies); Erwann Michel-Kerjan et al., *Corporate Demand for Insurance: New Evidence From the U.S. Terrorism and Property Markets*, 82 J. RISK & INSURANCE 3, 505–30 (2014) (explaining how violence targeted towards global companies deters foreign direct investment).

[117] Levels of political risk can raise the cost of capital. *See* Yi Huang et al., *Trade Networks and Firm Value: Evidence from the US-China Trade War* at 1–49 (Aug. 20, 2020), https://ssrn.com/abstract=3227972 (explaining how markets priced-in the probability of a US-Chinese trade war during the Trump administration).

[118] Vogel, *supra* note 16, at 68–87 (describing how transitional societal networks form international norms when formal treaties or agreements are missing); David Antony Detomasi, *The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks* 71 J. BUS. ETHICS 3, 321–34 (2007) (explaining how international norms are effective forms of private self-regulation); Timothy Werner, *Gaining Access by Doing Good: The Effect of Sociopolitical Reputation on Firm Participation in Public Policy Making*, 61 MGMT. SCIENCE 8, 1989–2011 (2015) (explaining how firms with strong societal reputations on social issues have more standing in national policymaking); Shon R. Hiatt. & Park Sangchan, *Lords of the Harvest: Third-Party Influence and Regulatory Approval of Genetically Modified Organisms*, 56 ACAD. MGMT. J. 4, 923–44 (2013) (explaining how corporations form broad coalitions to influence regulatory outcomes while avoiding perceptions of favoritism or insider-dealing).

[119] *See* W. Maloney, *Missed Opportunities, Innovation and Resource-based Growth in Latin America*, 3 ECONOMÍA 111, 114–67 (arguing that endemic political instability may be a major reason why Latin American countries have low human capital levels). *But see* Jeroen Klomp & Jakob de Haan, *Political Regime and Human Capital: A Cross-Country Analysis*, 111 SOC. INDIC. RES. 45, 45–73 (2013) (explaining how companies may focus or increase their investments in human capital during unstable political situations because human capital is a less specific asset and easier to transfer).

[120] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 4 ("Corporations facing political risk are associated with weaker corporate governance, in which some primary stakeholders are more able to benefit themselves at the expense of others or of secondary stakeholders."). There are various reasons why political risk is associated with weaker corporate governance. S. Chen et al., *Government Intervention and Investment Efficiency: Evidence from China*, 17 J. CORP. 259, 259–71 (2011) (inefficient resource allocation); J.D. Piotroski et al., *Political Incentives to Suppress Negative Information: Evidence from Chinese Listed Firms*, 53 J. ACCT. RSCH. 405, 405–59 (2015) (self-censorship); A.C. Eggers & J Hainmueller, *MPs for Sale? Returns to Office in Postwar British Politics*, 103 AM. POL. SCI. REV. 513, 513–33 (2009) (politically motivated hiring); J. Zhang, *Public Governance and Corporate Fraud: Evidence from the Recent Anti-corruption Campaign in China*, 148 J. BUS. ETHICS 375, 375–96 (2018) (greater legal fines or judgments).

[121] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 4.

[122] *Id.* at 2.

[123] *Id.* at 9.

governmental and opposition representatives."[124] Country or national risk is measured using metrics such as the World Bank Worldwide Governance Indicators (WGI),[125] the International Country Risk Guide (ICRG), and measures of trust, such as the Edelman Trust Barometer.[126] Societal risk is often measured by the incidence of strikes, social unrest, and/or terrorist attacks and media content analysis.[127] Still, despite the availability of political risk data, many companies are not using it. A recent survey indicates that a significant number of companies do not collect quantitative data to identify risk at the enterprise, functional, and business unit levels.[128] Such data would inform assessments and better integrate political risk into ERM systems.[129]

The challenge of ex-ante quantification and the heterogeneity of political risk leads to a reluctance to actively address it. Traditional financial metrics are not sophisticated enough to capture its impact, yet political risks are palpable.[130] Consider the geopolitical risks related to Brexit,[131] the business risks associated with national, state, and local government mandates and restrictions related to the COVID-19 pandemic, and fallout from the storming of the United States Capitol on January 6, 2021. These contemporary examples underscore the need for companies to actively engage with and manage the potential impact on the current corporate strategy.

Most companies, including their boards, do assess the impact of political risk on corporate strategy,[132] yet many take an ad hoc approach at the enterprise level without exploring particular effects and interrelationships at all levels of the organization.[133] Only

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[124] The Global Database of Events, Language, and Tone (GDELT) has tracked print, broadcast, and web news reports in over 100 languages across every country since 1979. Other means of measuring political risk include the Transparency International Corruption Perceptions Index; the Political Constraint Index; CHECKS, established by the Database of Political Institutions; executive constraints or state fragility and state failure as measured by the Polity Database and Systemic Peace Project; various measures of constraints on government power within the V-Dem database; and the International Country Risk Guide.

[125] The WGI index has been the recent subject of scandal. *See* Ronald C. Machen et al., *Investigation of Data Irregularities in Doing Business 2018 and Doing Business 2020*, WilmerHale (Sep. 15, 2021); Josh Zunbrum, *World Bank Cancels Flagship 'Doing Business' Report After Investigation*, WALL ST. J. (Sept. 16, 2021, 4:58 PM), https://www.wsj.com/amp/articles/world-bank-cancels-flagship-doing-business-report-after- investigation-11631811663. However, the WGI captures six dimensions of governance: political stability, government effectiveness, voice and accountability, regulatory quality, rule of law, and control of corruption. Aart Kraay et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues*, 3 Hague J Rule Law 220, 220–21 ("The aggregate indicators are based on several hundred individual underlying variables, taken from a wide variety of existing data sources. The data reflect the views on governance of survey respondents and public, private, and NGO sector experts worldwide.").

[126] Edelman Trust Barometer 2021, https://www.edelman.com/trust/2021-trust-barometer. Several organizations provide proprietary political risk data. International Country Risk Guide (ICRG) https://www.prsgroup.com/explore-our-products/international-country-risk-guide/.

[127] *See* "Data Page," CENTER FOR SYSTEMIC PEACE, http://www.systemicpeace.org/inscrdata.html (Apr. 2019) (showing a decline in cooperation with foreign business beginning a few years before the financial crisis of 2009 and continuing through 2019); Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 8.

[128] McCaffrey, Shames & Jones, *supra* note 93, at 7.

[129] *Id.* at 9.

[130] *See* Claire A. Hill, *supra* note 75.

[131] Nicholas Bloom et al., *Brexit Is Already Affecting UK Businesses—Here's How*, HARV. BUS. REV. (March 13, 2019), https://hbr.org/2019/03/brexit-is-already-affecting-uk-businesses-heres-how ("Brexit was also essentially a political shock versus an economic one, and one that was largely unexpected.").

[132] McCaffrey, Shames & Jones, *supra* note 93, at 13 ("Two-thirds of companies already do this on a proactive or regular basis, and 40% conduct these assessments at both the enterprise level and the functional or business unit level. The board is also more engaged in this activity, with 40% of executives saying their company's board regularly assesses the impact of political risk on strategy.").

[133] *Id.* at 20 ("Geopolitical risks are expected to overwhelmingly hit companies on the topline strategic areas of growth and investment and revenue, which helps to explain why executives are so concerned about

a small proportion of companies model the financial impact of political risk at the business-unit and functional levels. Different categories of political risk—geopolitical, country or national, and societal—may affect specific areas of the business differently and to different degrees. For example, societal risks may have a greater impact on reputation than on finance and taxes, whereas country-related risks (e.g., regulatory developments) may have a stronger impact on operations and supply chains.[134] These dynamics call for more nuanced risk-aware approaches across the enterprise.

III. CORPORATE LAW, CAREMARK, AND POLITICAL RISK OVERSIGHT

Historically, companies were unlikely to incur legal liability for lapses related to ERM. The law affords significant discretion in the design of risk-management systems as well as legal compliance systems. However, emerging jurisprudence signals rising expectations.[135] This section addresses several important questions. What are directors' responsibilities concerning ERM oversight? Does corporate law have anything to say about managing political risk? Even in the absence of clear legal guidance, directors inevitably must respond to broader forces that affect their corporation's reputational assets. According to the ABA Corporate Director's Guidebook:

> Risk management and legal compliance are critical components of the board's responsibility for oversight of the corporation's business and affairs. As businesses and the legal requirements under which they operate become ever more complex, the pace of business change continues to accelerate, and reliance on technology increases, the stakes involved in effectively managing risk and ensuring legal compliance only increase. Well-publicized financial, operational, legal, and security failures in recent years have led to a heightened focus on the role of the board in oversight of risk management and legal compliance.[136]

ERM is an integral tool enabling modern directors to meet their oversight responsibilities. It supports firmwide communications, reinforces a "risk-aware" culture, empowers people throughout the corporate organization to identify, monitor, assess, and report risk exposures as well as to mitigate and manage risks.[137]

A. State and Federal Statutory Support for ERM

Boards of directors have two important functions: strategy and oversight. The statutory power and duty to manage corporations is vested in a board of directors that delegates tasks and functions to senior executives and board committees.[138] Pursuant to DGCL 141(e), the board can rely on internal and external experts.[139] A large portion of corporate governance is outsourced to third parties, often professional service providers: consultants, external

this risk type. In contrast, business operations and supply chains will be most affected by country and regulatory risks . . . .").

[134] *Id.* at 12.

[135] *See* Marchand v. Barnhill, 212 A.3d 805, 820–21 (Del. 2019).

[136] ABA BUS. LAW SECTION, CORPORATE DIRECTOR'S GUIDEBOOK 35–37 (7th ed. 2020).

[137] Harner, *Corporate Culture and ERM*, *supra* note 51.

[138] *See, e.g.*, DEL. CODE ANN. 8, § 141(c), (e) (2019); Robert E. Lamm, *Board Structure and Processes*, in 2 CORPORATE GOVERNANCE: LAW AND PRACTICE § 7.01[1] (Amy L. Goodman & Steven M. Haas eds. 2017); DEL. CODE ANN. 8, § 141(a) (2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.").

[139] Robert E. Lamm, *Board Structure and Processes*, in 2 CORPORATE GOVERNANCE: LAW AND PRACTICE § 7.01[1] (Amy L. Goodman & Steven M. Haas eds. 2017).

auditors, bankers, and executive search firms.[140] The board must still exercise judgment and not abnegate its role and accountability, but third parties, including standard-setting bodies, provide a significant amount of the content and design of external controls to address risk, particularly in the ESG context, without a universal set of standards.[141]

The federal regulatory framework supports the establishment of ERM systems, particularly for financial companies, and certain bodies have developed standardized approaches to ERM that many companies have adopted.[142] Notably, against the backdrop of the federal sentencing guidelines, the seminal *Caremark* decision provided amnesty for companies with compliance programs. Arguably, then, to the extent that compliance programs are required for large, publicly traded companies, ERM systems should also be required, especially for top company risks.

B. State Corporate Law

1. Business Judgment Rule

Millions of routine corporate decisions have significant and far-reaching public impact but are often anonymous and largely insulated from external second-guessing.[143] The business judgment rule, the touchstone of Delaware corporate law, presumes that directors act independently, on an informed basis, in good faith, with an honest belief that their decisions are in the best interests of the corporation. It can be rebutted if the process, independence, or good faith of directors is compromised, or the decision cannot be attributed to a rational business purpose.[144] It is pragmatic because it allows for shifting

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[140] *See* DGCL 141(e); STEPHEN M. BAINBRIDGE & M. TODD. HENDERSON, OUTSOURCING THE BOARD: HOW SERVICE PROVIDERS CAN IMPROVE CORPORATE GOVERNANCE 1–15 (2018) (advocating fundamental change to modern board)

[141] Recommendations for ESG, SEC ASSET MGMT. ADVISORY COMM. (July 7, 2021), https://www.sec.gov/files/spotlight/amac/recommendations-esg.pdf; *see* BLACKROCK, TOWARDS A COMMON LANGUAGE FOR SUSTAINABLE INVESTING 8 (2020); Cyrus Taraporevala, *CEO's Letter on Our 2020 Proxy Voting Agenda*, STATE ST. (Jan. 28, 2020), https://www.ssga.com/us/en/institutional/ic/insights/informing-better-decisions-with-esg; *State Street Joins Global Leaders to Address Climate Change Risk at Vatican Gathering*, STATE ST. (June 4, 2019), https://investors.statestreet.com/investor-news-events/press-releases/news-details/2019/State-Street-Joins-Global-Leaders-to-Address-Climate-Change-Risk-at-Vatican-Gathering/default.aspx; VANGUARD, INVESTMENT STEWARDSHIP 2019 ANNUAL REPORT, 23 (2019).

[142] For example, the MD&A section of Form 10-K, which board members must sign off on, describes key risk factors that might negatively impact the company. Moreover, Dodd-Frank provisions address risk management for financial companies, including the establishment of risk committees with independent directors. Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. ILL. L. REV. 859, 868 (2013) ("Do other areas of law today create a similar argument for more generalized board monitoring? We think so. For all public companies there are the SOX audit committee and internal control rules and the new disclosure rules on risk management discussed above. For financial companies, there are a variety of stricter risk management requirements scattered throughout the rules of different areas of financial regulation. For all companies, but particularly financial companies, a clear imperative exists to engage in a serious risk management program, or face a variety of possible sources of legal liability.") (citations and footnotes omitted). SOX mandates certain internal controls for public companies and federal disclosure rules require boards to discuss the board's role in risk management and the relationship between compensation practices and risk.

[143] Donald E. Schwarz, *A Case for Federal Chartering of Corporations*, 31 Bus. Lawyer 1125, 1128–29 (1976); *see also* Bayless Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U. L. REV. 38, 46 (1960).

[144] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Robert Clark describes the business judgment rule as follows: The rule is simply that the business judgment of the directors will not be challenged or overturned by courts or shareholders, and the directors will not be held liable for the consequences of their exercise of business judgment even for judgments that appear to have been clear mistakes, unless certain exceptions apply. ROBERT CHARLES CLARK, CORPORATE LAW § 3.4 (1986); *See also* FRANKLIN A. GEVURTZ, CORPORATION LAW 278–79 (2000) ("The idea underlying the rule is that courts should exercise restraint in holding directors liable for (or otherwise second guessing) business decisions which produce poor results or

business and political environments and intertemporal planning (i.e., short, intermediate, and long term), whereby profit-enhancing decisions in the near term may spark or lead to more socially responsible choices. It can accommodate failing corporate strategies, risk-management decisions, extensive philanthropic endeavors, political contributions, and lobbying efforts.[145] It largely prevents courts from second-guessing strategic business decisions that prove unsuccessful. A heightened standard would likely subject directors and officers to liability for poor results and arguably have a chilling effect on risk-taking that might enhance the firm's value.

Business judgment rule protection across a spectrum of decisions accommodates mixed motives, mixed objectives, diverse rationales, and political and other risk calculations.[146] Its penumbra of protection could, in part, explain why some observers and companies see little reason to change their internal documents (e.g., charter) to specifically address stakeholder concerns or expand statements of corporate purpose.[147] The status quo may provide sufficient flexibility for them to straddle and juggle stakeholder, shareholder, political, and other concerns.[148] Perhaps the most salient question related to risk should focus, not on a particular business decision, but rather on director oversight responsibilities for risks beyond legal compliance.[149]

2. Common Law Jurisprudence

Delaware courts resolve cases across a range of factual contexts and are not constrained by bright-line rules.[150] Delaware fiduciary duty law generally addresses three types of decisions: enterprise, ownership, and oversight.[151] Management makes enterprise decisions about what products to manufacture or whether to build a foreign plant.[152] Ownership decisions concern mergers, acquisitions, and corporate takeovers.[153] Oversight decisions concern managers' monitoring role, such as ensuring that employees execute their responsibilities in compliance with law and other business risks.[154]

Firm legal compliance and risk-management decisions, unlike other types of board decisions, have a strong operational component and involve countless decisions made by employees throughout an organization. Arguably, director oversight cannot be evaluated effectively through a rigid formula or mandatory approach. Delaware's contextualized

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with which reasonable minds might disagree. This seems to be a sensible notion. After all, business decisions typically involve taking calculated risks.").

[145] *See generally* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (arguing corporate social responsibility initiatives are permitted pursuant to the broad discretion under Delaware law); Einer Elhauge, *The Causal Mechanisms of Horizontal Shareholding*, 82 OHIO STATE L.J. 1 (2021).

[146] *See generally* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018).

[147] Bebchuk and Tallarita claim that failure to change purpose is an automatic reflection of a firm's lack of commitment to stakeholder issues. *See* Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?,* 75 VAND. L. REV. X, X (Forthcoming May 2022).

[148] *Id.* (assuming that companies must make broad changes—like updating their statement of corporate purpose—as a prerequisite to addressing stakeholders' concerns).

[149] Stephen Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, BUS. LAW. at 2 (UCLA School of Law, Law-Econ Research Paper No. 21-10, September 2021), https://ssrn.com/abstract=3899528.

[150] *See* E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAWYER 393, 393-94 (discussing the types of decisions Delaware courts review, such as enterprise, ownership, and oversight).

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

standards-based lens provides flexibility in the compliance and risk-management contexts.[155]

3. Evolving Oversight Jurisprudence and Caremark

Caremark was a watershed decision establishing directors' good-faith responsibility for oversight "as a first principle of corporate governance."[156] Its legacy and recent decisions by the Delaware Supreme Court and the Court of Chancery reinforce "that directors [must] be actively engaged in establishing both the initial oversight and subsequent monitoring procedures" and "the necessity of carefully documenting (e.g., through proper minutes) [of] the directors' active engagement in oversight and monitoring."[157]

In *Caremark*, the court made the following assertion on the scope of oversight duties:

> In light of these developments, it would, in my opinion, be a mistake to conclude that our Supreme Court's statement in Graham concerning "espionage" means that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.[158]

This statement effectively made compliance programs a *de jure* requirement. It also raised a question: did *Caremark* extend beyond compliance with law to other types of business risk (e.g., ERM)? The court rationalized a high liability standard in the oversight context,[159] yet "a demanding test of liability in the oversight context is probably beneficial to corporate stockholders . . . as it is in the board context, since it makes board service by qualified persons more likely, while continuing to act as a stimulus to good faith performance of duty by such directors."[160] Affirming *Caremark*, the Delaware Supreme Court in *Stone* reinforced the contours of oversight liability to the conscious disregard of known red flags and an utter failure to implement a system of controls.[161] It also pragmatically acknowledged that, even assuming the best intentions, "directors' good faith exercise of

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[155] *See generally* 15 U.S.C. § 7262 (Supp. V 2000). The prescriptive bright-line rules under SOX have been criticized for failing to differentiate between larger and smaller firms. *See* E. Norman Veasey, Shawn Pompian, & Christine Di Guglielmo, *Federalism vs. Federalization: Preserving the Division of Responsibility in Corporation Law*, 2005 ABA SEC. BUS. L. COMM. ON FED. REGULATION 77, 94–95 (Dec. 15, 2021) (highlighting the one-size-fits-all shortcoming of SOX reforms).

[156] Independent directors violate their oversight duties only if they breach their duty of loyalty by failing to discharge their oversight responsibilities in good faith. Veasey & Holland, *supra* note 58, at 45 ("The full scope of the directors' oversight duty is not only that they must conceive and design an adequate information system in good faith, but also they must monitor the system that they have established to acquire the information and act on it.").

[157] Veasey & Holland, *supra* note 58, at 47.

[158] In re Caremark, 698 A.2d at 970 (emphasis added); *see* Bainbridge, *supra* note 14, at 980. *But see* Robert T. Miller, *Oversight Liability for Risk-Management Failures at Financial Firms*, 84 S. CAL. L. REV. 47, 100 (2010).

[159] *Id.* at 971 ("[Such] a test of liability—lack of good faith as evidenced by a sustained or systematic failure of a director to exercise reasonable oversight—is quite high.").

[160] *Id.*

[161] Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006).

oversight responsibility may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability."[162]

Caremark and *Stone* were seemingly confined to situations involving violations of law and regulation. In *Citigroup*, the Court of Chancery expressed some reluctance in recognizing a requirement to monitor general business risk versus a compliance program aimed at preventing violations of law and regulations.[163] The court noted, "a purported Caremark claim cannot become a vehicle for a sneak attack on the business judgment rule."[164] In other words, the court tried to distinguish strategic risk-based decisions, protected pursuant to the business judgment rule, from internal controls to capture violations of law and conscious disregard of known "red flags" related to such violations.

4. Marchand and the New Directions in Oversight

Historically, the Delaware Court of Chancery and Supreme Court distinguished a company's management of risk inherent in the business plan from board oversight of company compliance with law or regulation, with liability attached to the latter.[165] Despite judicial attempts to confine *Caremark's* application, questions remained.[166] One observer contends that there is "no doctrinal reason that Caremark claims should not lie in cases in which the corporation suffered losses, not due to a failure to comply with applicable laws, but rather due to lax risk management."[167] A new line of *Caremark* cases and evolving jurisprudence reflect this tension. The *Marchand* decision and its progeny signal greater attention to risk oversight; they mark a departure from previous oversight cases and expand the potential for director liability resulting from failure to address risks.

In *Marchand*, the complaint addressed listeria outbreaks at an ice cream company, alleging multiple oversight failures at the board level: "(1) there was no committee charged with monitoring food safety; (2) the board did not have a process for a board-level discussion devoted to food safety compliance; and (3) there was no board protocol requiring management to deliver reports on food safety compliance."[168] The court summarized: "the complaint supports an inference that no system of board-level compliance monitoring and reporting existed at Blue Bell. Although Caremark is a tough standard for plaintiffs to meet, the plaintiff has met it here."[169] *Marchand* concerned an egregious example: a monoline food company in a highly regulated industry. The court explained the heightened plaintiff's burden when making *Caremark* claims and cautioned that "plaintiffs usually lose because they must concede the existence of board-level systems of monitoring and oversight such as a relevant committee, a regular protocol requiring board-level reports about the relevant risks, or the board's use of third-party monitors, auditors or consultants."[170]

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[162] *Id.* at 373 (Del. 2006).

[163] In Re Citigroup Inc. Shareholder Derivative Litigation, February 24, 2009 Opinion at 42, Civil Action No. 3338-CC (Del. Ch. 2009) ("Instead of alleging facts that could demonstrate bad faith on the part of the directors, by presenting the Court with the so-called 'red flags,' plaintiffs are inviting the Court to engage in the exact kind of judicial second guessing that is proscribed by the business judgment rule. In any business decision that turns out poorly there will likely be signs that one could point to and argue are evidence that the decision was wrong.").

[164] Veasey & Holland, *supra* note 50, at 40.

[165] Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2032 (2019).

[166] For cases illustrating the possibility of oversight liability for business risk, *see, e.g.*, Wayne County Employees' Ret. System v. Dimon, 629 Fed. Appx. 14, 15 (2d Cir. 2015) (unpublished); In re Think3, Inc., 529 B.R. 147, 180 (Bankr. W.D. Tex. 2015); In re Goldman Sachs Grp., Inc. S'holder Litig., 2011 WL 4826104 at *22 n. 217 (Del.Ch. Oct. 12, 2011).

[167] *See* Bainbridge, *supra* note 14, at 968.

[168] Veasey & Holland, *supra* note 58, at 40.

[169] Marchand v. Barnhill, 212 A.3d 805, 820–21 (Del. 2019).

[170] *Id.* at 823.

Despite this statement, Delaware courts are allowing more risk-oversight cases to proceed.[171] *Marchand* and its progeny have expanded the range of circumstances where directors may incur liability for oversight lapses.[172] Shareholder plaintiffs are recognizing more opportunities to hold directors accountable. Claims alleging directors did not act in good faith, breaching their duty of loyalty claims under *Caremark*, are strategically advantageous.[173]

Cases emerging in the wake of *Marchand* dive further into ERM. However, in emphasizing mission-critical risks, which often overlap with regulatory or legal requirements,[174] they may not constitute a massive departure from previous compliance-with-law oversight cases. Under *Marchand*, oversight claims, in the absence of red flags, expanded to include situations involving mission-critical risks that are also the subject of regulation and potentially mission-critical risks that *are not* the subject of overlapping regulation or legal requirements. In the first case, liability makes sense because directors cannot say they are exercising their oversight in good faith while ignoring an obvious mission-critical risk, the importance of which is reinforced by regulation. In the second case, liability is a gray area ripe for exploration and testing by shareholder plaintiffs. We can postulate mission-critical or high risks without overlapping regulation;[175] for example, the cybersecurity or data privacy risk of an online retailer like Amazon.[176]

Although most public companies have an ERM system, *Marchand* begs the question of whether ERM should be a requirement for large public companies enmeshed in corporate law just like legal compliance programs under *Caremark*. From this author's and others' perspective, the answer is in the affirmative.[177] Beyond ignoring red flags, emerging

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[171] *See* Stephen Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, BUS. LAW. At 18 (UCLA School of Law, Law-Econ Research Paper No. 21-10, September 2021), https://ssrn.com/abstract=3899528; *See, e.g.*, Roger A. Cooper et al., *Caremark Claims on the Rise Fueled by Section 220 Demands* (Jan. 11, 2021) https://www.clearygottlieb.com/news-andinsights/publication-listing/caremark-claims -on-the-rise-fueled-by-section-220-demands ("A notable rise in the number of cases in which Delaware courts are allowing Caremark claims against company directors to survive motions to dismiss.").

[172] In *Clovis*, the Court of Chancery emphasized the importance of a board's oversight function when a company is operating in the midst of a mission-critical regulatory compliance risk, suggesting it may be subject to greater scrutiny than the same board's oversight of less critical business risks. In re Clovis Oncology Derivative Litigation, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019). In *Marchand*, the Delaware Supreme Court's decision emphasized the importance for corporations operating in heavily regulated industries to implement a system that ensures that mission-critical risks and compliance issues are brought to the attention of the board, whether through a board-level compliance committee or a direct reporting line between the corporation's top compliance officer and the board. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

[173] DEL. CODE ANN. tit. 8, § 102(b)(7) (2020); Malpiede v. Townson, 780 A.2d 1075, 1095 (Del. 2001) ("Our jurisprudence since the adoption of the statute has consistently stood for the proposition that a Section 102(b)(7) charter provision bars a claim that is found to state only a due care violation."); In re The Boeing Company Deriv. Litig., 2021 WL 4059934, at *1–2 (Del. Ch. Sept. 7, 2021) ("The Delaware Court of Chancery allowed a derivative stockholder lawsuit to proceed against The Boeing Company (Boeing), alleging that Boeing's board of directors breached their fiduciary duties by failing to implement proper oversight and monitoring procedures over 'mission critical' airplane safety risks.").

[174] *Marchand* highlights the importance of director oversight when a company operates in an environment subject to external regulations that govern its "mission critical" operations, noting that in such circumstances, director oversight "must be more rigorously exercised." *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

[175] *See, e.g.*, Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 685–87 (2018)

[176] Kevin LaCroix, *Recent Delaware Caremark Duty Decision Underscores Board Cyber and Privacy Liability Risks*, D&O DIARY (Aug. 5, 2019), https://www.dandodiary.com/2019/08/articles/director-and-officer-liability/rece ntdelaware-caremark-duty-decision-underscores-board-cyber-and-privacy-liabilityrisks/.

[177] Hill & McDonnell, *supra* note 130, at 877 ("The risk committee requirement will be of a piece with our broader concern that boards focus more on risk, not just because of the steps firms will take to meet the requirement, but also because law will be thereby expressing its views as to, and making more salient, the board's and the firm's role in risk inquiries.").

cases reflect the need for internal controls to address mission-critical risks to meet modern director-oversight obligations.

ERM covers a range of risks, but at present, only those deemed mission critical warrant liability. This carve-out by the courts raises two important questions: What exactly are mission-critical risks, and why should they trigger liability? First, mission-critical risks can potentially have catastrophic impacts on a company. They would almost certainly be included in the company's risk profile and monitored and prioritized by the board's ERM system. They may shift, depending upon company context and environment; for example, a car manufacturer must monitor ignition switches that could cause fatalities;[178] an ice-cream company must monitor safety risks to assure its "monoline" product is suitable for human consumption;[179] and airplane safety must be monitored to assure planes will not explode in the air.[180] The carve-out of mission-critical risks may allay concerns that expanding liability to general business risks would undermine director protections and strategic risk taking and experimentation.[181] Reserving liability for a narrow category of risks that business processes should already address still places a high burden on plaintiffs and, at the same time, incentivizes companies to put systems in place to monitor mission-critical risks and does not dilute the pool of directors willing to serve. Mission-critical risks are the "easiest [risks] for the board to anticipate" and "where the potential harm is greatest."[182]

C. *Predictions for Risk Oversight*

Cases like *Marchand* reveal that directors who, in the absence of red flags, fail to set up a monitoring system for mission-critical risks and/or fail to monitor such risks on an ongoing basis may be subject to liability. Recent cases like *Boeing*, alleging directors breached their fiduciary duties by failing to implement oversight and monitoring

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[178] In re General Motors LLC Ignition Switch Litigation, No. 1:2014mc02543 (S.D.N.Y. 2020).

[179] Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

[180] The Delaware Court of Chancery recently allowed a derivative stockholder lawsuit to proceed against the Boeing Company, alleging that Boeing's board of directors breached their fiduciary duties by failing to implement proper oversight and monitoring procedures over "mission critical" airplane safety risks. In re The Boeing Company Derivative Litigation, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

[181] In Citigroup, Chancellor Chandler presented a nuanced understanding of the business judgment rule:

> Instead of alleging facts that could demonstrate bad faith on the part of the directors, by presenting the Court with the so called "red flags," plaintiffs are inviting the Court to engage in the exact kind of judicial second guessing that is proscribed by the business judgment rule. In any business decision that turns out poorly there will likely be signs that one could point to and argue are evidence that the decision was wrong. Indeed, it is tempting in a case with such staggering losses for one to think that they could have made the "right" decision if they had been in the directors' position. This temptation, however, is one of the reasons for the presumption against an objective review of business decisions by judges, a presumption that is no less applicable when the losses to the Company are large. . . .
>
> In this case, plaintiffs allege that the defendants are liable for failing to properly monitor the risk that Citigroup faced from subprime securities. While it may be possible for a plaintiff to meet the burden under some set of facts, plaintiffs in this case have failed to state a Caremark claim sufficient to excuse demand based on a theory that the directors did not fulfill their oversight obligations by failing to monitor the business risk of the company.

In re Citigroup Inc Shareholder Derivative Litigation, 964 A 2d 106 (Del Ch 2009).

[182] Hill & McDonnell, *supra* note 130, at 872 ("In particular, we are mindful of the courts' appropriate reluctance to micromanage business, embolden meritless litigation, and discourage people from joining boards because of the potential scope of liability. We thus think that the duty should be strongest where the potential harm is greatest and is easiest for the board to anticipate.").

mechanisms concerning mission-critical airplane safety risks, underscore the need for contemporary directors to be more risk-aware. From the perspectives of shareholder and stakeholder protection, directors should put in place systems that address and subsequently monitor mission-critical risks,[183] but as in the legal-compliance context, it seems premature to invite courts to deeply evaluate the adequacy of ERM program functioning *ex post* in the absence of state or federal regulations establishing uniform standards or requirements. Mission-critical risks are arguably a compromise allowing a small subset of the most obvious company risks to potentially trigger liability.[184] Delaware courts will remain reluctant to second-guess managerial risk oversight, and the threshold for establishing liability will remain extremely high. The distinction between compliance with law and risk management-based liability, which has been observed in previous court decisions, will diminish, but other questions will require answering: What if directors approve a risk appetite that is too high? What if directors fail to understand a company's risk profile (e.g., top or mission-critical risks)?

D. Political Risk and Oversight Liability

As emergent, disruptive, and uncertain, political risks are most likely to fall outside the ambit of mission-critical risks subject to liability under *Marchand* and other cases. Creating a liability shield, however, is not the only or most compelling reason for companies to manage political risk. Stakeholders including investors may desire a more credible commitment in the political sphere. Directors who ignore political risk and the potential for far-reaching and varied impacts on business value are shortsighted and careless. Moreover, political risks often depend on, are subsumed by, or are components of other risk types.

In the present socio-political climate, companies will become more stakeholder sensitive but not stakeholder driven. Courts may be drawn into stakeholder issues, but shareholders, with legal standing, will continue to drive the corporate car with stakeholders in the passenger seat. The overwhelming majority of courts will be reluctant to aggressively retreat from the assumption that the residual or primary purpose of the corporation is to make profit for shareholders. Federal regulators will heighten their emphasis on risk management, particularly with respect to climate and other ESG-related risks, yet a change of presidential administration can always slow the process. Some observers contend that Delaware case law vacillates in response to various interest groups, scandals, and market shocks.[185] They suggest Delaware judges are influenced by political developments.[186] An alternative explanation is that director expectations and duties, from *Graham* to *Marchand*, are evolving.[187] In any case, Delaware courts are likely to take a measured approach, as

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[183] Box-ticking and overly mechanical approaches to ERM are insufficient because organizational behaviors and cultures matter. Within the US corporate-law context (i.e., *Caremark* and *Stone*), directors and officers are unlikely to face liability for breaching their oversight duties; due to flawed corporate cultures, they ostensibly set a cultural and ethical tone for the entire organization. Flawed corporate cultures may impede effective management of legal compliance, risk, and corporate malfeasance. The failure to account for them, irrespective of legal liability, risks damage to company and societal bottom lines.

[184] *See* Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967 (2009).

[185] *See, e.g.*, Douglas M. Branson, Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 111–12 (1990); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 58–68 (2005).

[186] *Id.*

[187] Former Chief Justice E. Norman Veasey provides the following alternative explanation for movements in Delaware law:

> Our courts do not have a political agenda that vacillates from time to time to favor one litigant over the other. Delaware courts today are not any more "pro-stockholder" and less

reflected in recent *Caremark* cases addressing risk management.[188] Some observers wonder whether *Caremark* liability will extend to ESG-related risks.[189] In the absence of uniform standards, legal requirements, or regulations, *Caremark* liability is unlikely to attach in the ESG context unless the particular ESG-related risk is deemed mission critical. Otherwise, a failure to set up systems to monitor ESG factors under existing jurisprudence remains aspirational.[190]

In the absence of firmer legal and regulatory requirements and uniform standards, centering legal liability on aspirational standards of political risk or ESG oversight seems risky in itself because companies' responses may be scattered and inconsistent. Doing so might place corporate managers under considerable pressure and, in some cases, make them potentially liable for best practices or aspirational social norms.

IV. Proactive and Reactive Responses to Political Pressures

The modern corporation is not a neutral political actor. Corporations proactively engage with politics through lobbying and contributions and influence regulation through a range of practices.[191] These actions arguably advance business objectives and help to secure better outcomes for shareholders and other stakeholders. Companies also react to powerful external market forces, including political actors using the bully pulpit to publicly critique firm actions or threaten regulation and customer backlash stemming from business practices and perceived or actual company positions on socio-political issues.

A. Proactive Manifestations of Corporate Political Power

Corporations are not merely passive victims of demands from political constituencies; they proactively wield significant political power. They subtly, and sometimes not so subtly, deploy a range of tactics to influence politics for business gain.[192]

> "pro-director" than they were in the past, or vice versa. The expectations of director conduct have evolved over the years, including in the post-Enron era, but that does not mean the courts have begun to take on a political agenda to favor stockholders over directors. That evolution in director expectations is a function of the development of the common law reflecting changing business mores and sharper pleading in corporate litigation, focusing more precisely on process. Delaware courts are balanced and objective, and the business judgment rule is alive and well.

E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 Del. L. Rev. 163, 169 (2004).

[188] *See, e.g*., Marchand v. Barnhill, 212 A.3d 805, 823 (Del. 2019); *see also* E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 Del. L. Rev. 163, 169 (2004).

[189] Leo E. Strine, Jr. et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and ESG Strategy*, 106 Iowa L. Rev. 1885, 1905-06 (2021) ("[G]rowing focus on climate change and other negative effects of intensive economic activity on the environment has manifested itself in litigation under Caremark."); William Savitt, *Wachtell Lipton Discusses Tectonic Forces to Watch in Corporate Litigation*, CLS Blue Sky Blog (Jan 30, 2020), https://clsbluesky.law.columbia.edu/2020/01/30/wachtell- lipton-discusses-tectonicforces-to-watch-in-corporate-litigation/.

[190] Stephen Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, Bus. Law. at 2 (UCLA School of Law, Law-Econ Research Paper No. 21-10, September 2021), https://ssrn.com/abstract=3899528.; *see also* Edward D. Herlihy & William Savitt, *Boeing's MAX Woes Reach the Boardroom*, Harv. L. F. on Corp. Governance (Sep. 13, 2021), https://corpgov.law.harvard.edu/2021/09/13/boeings-max-woes-reach-the-boardroom/ (discussing In re Boeing Co. Derivative Litig., No. CV 2019-0907-MTZ, 2021 WL 4059934, *1 (Del. Ch. Sept. 7, 2021)).

[191] Pollman & Barry, *supra* note 15, at 383.

[192] Fisch, *supra* note 12, at 1500.

1. Lobbying

Defined broadly, lobbying means "to conduct activities aimed at influencing public officials and especially members of a legislative body on legislation."[193] Most large corporations have an internal apparatus that identifies, monitors, and works to influence laws and regulations to achieve optimal business outcomes. Companies may also employ K-Street lobbyists and political insiders to achieve desired political and legislative aims.[194] Beyond traditional lobbying, companies can leverage their favorable reputations to serve as credible authorities on issues that affect their business and industry.[195] They can shape draft legislation and provide research and expertise to government actors.[196] They can also build coalitions with other industry participants in support of legislation.[197] Traditional lobbying "relies on gaining quiet access to officials, then leveraging that access to exert influence behind the scenes."[198] Yet companies also employ more aggressive tactics beyond traditional lobbying. Rather than engaging with government actors, companies may engage in regulatory arbitrage which involves circumvention and exploiting loopholes.[199] They may also engage in regulatory entrepreneurship, which is a blunter, more offensive lobbying tactic leveraged by such well-known companies as Uber, Tesla, Airbnb, UFC, FanDuel, and Draft Kings.[200] They "make an issue as publicly salient as possible, rally the public to their cause, then use their popular support as leverage to win the change they want from resistant officials."[201] Companies engaging in regulatory arbitrage and regulatory entrepreneurship find it easier to seek forgiveness than permission from government actors.

2. Corporate Political Spending

Corporate political spending reflects attempts to influence legislative outcomes.[202] According to the 2020 CPA-Zicklin Index of Corporate Political Disclosure and Accountability, "[p]rivate firms spent nearly $2.2 billion lobbying Congress – more than half of all lobbying expenditures – and millions more on contributions directly, by their political action committees and through third party groups to particular candidates."[203] The overwhelming majority of public companies have Political Action Committees (PACs)

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193 *Lobbying*, MERRIAM WEBSTER (11th ed. 2003).

194 Fisch, *supra* note 12, at 1506 (discussing FedEx's government affairs office staffed with Washington, D.C. insiders).

195 *Id.* ("FedEx has a reputation for going beyond mere advocacy in its political efforts.").

196 *Id.* at 1508–09. For example, hospitality and sports and entertainment companies have worked closely with local and state governments to develop COVID-19 protocols.

197 Working through trade associations allows companies to influence politics without the backlash that may accompany high visibility. *Id.* ("By participating in politics through trade groups, FedEx has been able to play a leadership role while reducing the visibility of its participation.").

198 Pollman & Barry, *supra* note 15, at 387.

199 Elizabeth Pollman, *Tech, Regulatory Arbitrage, and Limits*, 20 EURO. BUS. ORG. J. 567, 567–80 ("[R]egulatory arbitrage can affect stakeholders and impose costs on communities. Particularly when a company aggressively maneuvers around a law in a way that creates perceptible social costs, the public can react negatively and ultimately affect whether, and the extent to which, such a strategy is a valuable course of action. Because regulatory arbitrage can be viewed as circumventing obligations to society or unfairly taking advantage of loopholes, its propensity to provoke social pushback may be greater than other forms of business decisions more generally.").

200 Elizabeth & Barry, *supra* note 15, at 385–89, 395, 402–03.

201 *Id.* at 387.

202 *See* Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1508–09 (2005); Marianne Bertrand et al., *Tax-Exempt Lobbying: Corporate Philanthropy as a Tool for Political Influence*, 110 AM. ECON. REV. 2065, 2065–102 (2020).

203 *2020 CPA-Zicklin Index of Corporate Political Disclosure and Accountability*, Center for Political Accountability at 8 (Oct. 13, 2021), https://politicalaccountability.net/hifi/files/2020-CPA-Zicklin-Index.pdf.

organized for the purpose of raising and spending money to elect or defeat candidates.[204] A general rationale for political spending is to have a voice on issues influencing the company's business.[205] Corporate political activities including expenditures for political speech are quite controversial because many observers view them as falling outside of the standard business process, a misuse of shareholder funds, and prone to abuses of managerial power in pursuit of their own individual preferences.[206] Although many companies are under no obligation to disclose their giving, some do so voluntarily, and elected officials may disclose their donors.[207] Strategically, the better time to make political contributions is not when the company is in crisis but to establish a relationship, show support, and make political allies during periods of relative stability. One, two, or three years later, companies can re-engage, seek support, and attempt to influence favorable legislative outcomes. In the 2020 federal election, corporations spent over $100 million of which at least $33 million came from public companies.[208] These amounts pale in comparison to the estimated $1 billion in dark money funneled into elections. The Supreme Court's *Citizens United* decision contributed to, or set the stage for, the current political giving environment and it also endorsed political giving disclosures.[209] In response, investors are taking a proactive stance on political spending disclosures and transparency, pressuring management through shareholder proposals.[210] Specifically, "these resolutions call for regular reports on decision-making processes for donations and a comprehensive account of all political spending on candidates, lobbyists, parties, trade groups and any other organizations that may use the money for political ends."[211] According to the *New York Times*, "[i]n 2019, there were 51 political spending proposals at S&P 500 companies; none passed, and they received an average of 28 percent support. Last year [2020], of 55 similar proposals, six passed and average support rose to about 35 percent. … So far this year [2021] … five of the seven [so-called political transparency proposals] that have been put to a vote won majority support."[212]

Notwithstanding its benefits to business objectives, political spending can pose a reputational risk to companies and requires director oversight. In theory, it may make sense

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[204] Recent societal trends suggest fewer companies may begin utilizing PACs. *See* Samantha Subin, *Capitol riot reaction: Corporations and the future of political donations*, CNBC (Jan. 13, 2021, 10:48 AM), https://www.cnbc.com/2021/01/13/capitol-riot-reaction-corporations-and-political-donations.html.

[205] *See generally* John C. Coates, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?*, HARV. L. & ECON. (Discussion Paper No. 684, September 21, 2010), https://ssrn.com/abstract=1680861.

[206] C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech* 130 U. PA. L. REV. 646 (1982); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L. J. 235 (1981); First National Bank of Boston v. Bellotti, 435 US 765 (1978).

[207] *See* Cydney Posner, *Shareholder Proposals for Political Spending Disclosure Make Headway this Proxy Season*, PUBCO AT COOLEY (June 22, 2021), https://www.jdsupra.com/legalnews/blog-shareholder-proposals-for-7444726/.

[208] Ciara Torres-Spelliscy, *More Shareholders Seek Transparency on Corporate Political Spending and Climate Change*, BRENNAN CENTER (June 16, 2021), https://www.brennancenter.org/our-work/analysis-opinion/more- shareholders-seek-transparency-corporate-political-spending-and.

[209] Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009). The Supreme Court in *Citizens United* also endorsed political spending disclosures. Citizens United v. FEC, 558 U.S. 310, 352 (2010) ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interests in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests.").

[210] Torres-Spelliscy, *supra* note 194.

[211] *On Voting Rights, It Can Cost Companies to Take Both Sides*, N.Y. TIMES DEALBOOK (June 5, 2021), https://www.nytimes.com/2021/06/05/business/dealbook/voting-rights-companies.html.

[212] *Id.*

to spend equally among candidates irrespective of party to appear unbiased. In practice, however, equitable giving may prove to be a challenge where, for example, a particular political party dominates a legislature. In the wake of the US Capitol insurrection, companies withheld donations to politicians who supported it or challenged the 2020 presidential election results to protect their reputations.[213] For example, the investment management company Charles Schwab permanently shut down its PAC and donated the remaining funds to the Boys and Girls Club of America and historically black colleges. It issued a press release: "[i]n light of a divided political climate and an increase in attacks on those participating in the political process, we believe a clear and apolitical position is in the best interest of our clients, employees, stockholders and the communities in which we operate. . . ."[214]

Recent trends indicate a movement toward greater transparency for corporate political expenditures and more board oversight. For example, [t]he number of [S&P 500] companies that fully or partially disclosed their political spending in 2020 or that prohibited at least one type of spending was 332, up from 304 in 2016."[215] Notably, in 2016, 111 S&P 500 companies "had policies for general board oversight of political spending and for board committee review of company policy, political expenditures and trade association payments."[216] Four years later, in 2020, that number had "risen to 162 [S&P 500] companies, an increase of 46 percent."[217] Moreover, "[t]he number of companies adopting general board oversight or more granular committee review of political spending has increased between 13 and 35 percent depending on the type of spending."[218]

3. Corporate Charitable Donations

Corporate charitable donations provide direct and indirect benefits for companies. They are permitted under both common law and statutory schemes,[219] and the United States Internal Revenue Code incentivizes corporate giving, recognizing a desire for companies to contribute to public causes.[220] Historical and legal frameworks recognize and encourage corporate engagement with public causes.[221]

However, according to one study, "7% of corporate foundation giving is politically motivated, a sum that is nearly four times as much as corporate contributions to political action committees (PACs)."[222] Another study found that when a congressional representative joins a certain committee that has policy implications for a firm, its "foundation is more likely to give grants to charities within the representative's district."[223]

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[213] *See* Subin, *supra* note 191.

[214] *Schwab to Discontinue its Political Action Committee*, CHARLES SCHWAB (2021), https://www.aboutschwab.c om/schwab-to-discontinue-its-PAC.

[215] *2020 CPA-Zicklin Index of Corporate Political Disclosure and Accountability*, *supra* note 192, at 13.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *See, e.g.*, DEL. CODE ANN. tit. 8, § 122(9) (2001); *cf.* 26 U.S.C. § 170(b)(2) (2000) (permitting deduction of corporate charitable contributions up to 10 percent of taxable income); *see also* Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (Del.Ch.1969) (opining that corporate social responsibility is a desirable goal).

[220] *See* IRC § 170(a)–(e).

[221] Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (Del.Ch.1969) ("Furthermore, contemporary courts recognize that unless corporations carry an increasing share of the burden of supporting charitable and educational causes that the business advantages now reposed in corporations by law may well prove to be unacceptable to the representatives of an aroused public. The recognized obligation of corporations towards philanthropic, educational and artistic causes is reflected in the statutory law of all of the states, other than the states of Arizona and Idaho.").

[222] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 21.

[223] *Id.*; Bertrand, *supra* note 190, at 2065–102.

Another area of concern is managerial accountability to shareholders; that is, using shareholders' money for non-business-related purposes. Managers might choose their own pet projects, which are only tangentially related to the business, or pursue other self-interested aims.

In any case, challenges to corporate donations are likely to fail as long as defendants can show reasonableness and some nexus between the donation and benefit to long-term business interests. Courts are reluctant to speculate on the equivalence of the charitable expenditure to company benefit.[224] Reasonableness, in the corporate giving context, is construed permissively.

4. Government's Revolving Door

Corporate executives frequently enter and exit government posts, while former government officials function as lobbyists and directors, and senior executives of public companies, securing lucrative financial opportunities following their government service.[225] One study suggests that "[f]irms with political connections financially outperform their peers in the presence of political risk."[226] To capitalize on their political insights, companies—for example, Boeing, FedEx, Bristol-Myers Squibb, and Lyft—hire former senior-level government officials to serve on their boards of directors and in other capacities.[227] This revolving door flows in the other direction as well. A significant number of administration officials now come from the management consulting and financial services sectors. For example, current Secretary of Transportation Pete Buttegieg is a former McKinsey associate and SEC chair Gary Gensler was a Goldman Sachs partner.[228] In addition to financial capital, corporations wield social or relationship capital; that is, value derived from formal and informal networks.[229] The revolving door builds valuable relationship capital; for both government and business, it assures friends in high places.[230]

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[224] *See, e.g.*, Memorial Hospital Ass'n v. Pacific Grape Products Co., 290 P.2d 481 (Cal.1955); Kahn v. Sullivan, 594 A.2d 48 (Del.1991); Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969); Union Pac. R. Co. v. Trustees, Inc., 329 P.2d 398 (Utah 1958).

[225] *See Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1428–39 & n.60 (1981) ("The term 'revolving door' refers to the phenomenon of individuals who move between government and the private sector and who are often regulators one day, regulated the next, and regulators again the day after."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684–87 (1975) (describing how administrative agencies are captured by the interests they are charged to regulate); Steven Davidoff Solomon, *The Government's Elite and Regulatory Capture*, N.Y. TIMES (June 11, 2010), http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/ (suggesting that regulatory capture could result from the interaction between regulators and the people they regulate).

[226] Cline, *Political Risk and Corporate Performance*, *supra* note 3, at 21; Bertrand, *supra* note 190, at 2065–102; Simon Luechinger & Christoph Moser, *The Value of the Revolving Door: Political Appointees and the Stock Market*, 119 J. PUB. ECON. 93, 93–107 (2014).

[227] Boeing hired the following political officials to serve on its board in the past decade: Howard Baker, former senator; Charles Mannatt, Washington lawyer and former Democratic Party national chairman; George Mitchell, former Senate Majority Leader; and Shirley Jackson, RPI President and former member of the Nuclear Regulatory Commission. Fisch, *supra* note 12, at 1507. Former FBI Director Louis J. Freeh served on the board of Bristol Myers Squibb. He was also hired by credit card issuer MBNA, ultimately serving as board director and general counsel and ethics officer. Anthony Foxx, former US Secretary of Transportation, was hired as an executive by Lyft. *Id.*

[228] Jeff Gerth, *Being Intimate with Power, Vernon Jordan Can Wield It*, N.Y. TIMES (July 14, 1996), https://www.nytimes.com/1996/07/14/us/first-friend-special-report-being-intimate-with-power-vernon-jordan-can-wield-it.html?searchResultPosition=1.

[229] Fisch, *supra* note 12, at 1504–07 (2005) (describing relationships among FedEx, its CEO and founder, and Washington insiders).

[230] Vernon Jordan was, in essence, a shadow cabinet member under the Clinton administration while serving on the boards of America's most powerful companies. Gerth, *supra* note 217.

5. Public/Private Collaboration

Contrary to public rhetoric, corporations and government are engaged in a collaborative and symbiotic relationship.[231] Out of necessity, state, local, and federal governments render make-versus-buy decisions.[232] Some observers overemphasize the adversarial aspects of the private and public sector relationship and warn against oversized government, but these criticisms do not grasp the reality of their co-dependency. Public/private partnerships offer opportunities for meeting social needs. The traditional public/private partnership is grounded in government procurement. Federal and state governments constitute a major customer channel for large, publicly traded corporations. While the uninitiated might consider national defense a government function managed by several military branches, it relies heavily on a civilian private sector.[233] Simply put, defense industry growth promotes private job creation. Some political actors encourage outsourcing to private employers who might build facilities in their states and hire their constituents. Recent examples of collaboration in other areas include COVID-19 vaccine development and manufacturing, space exploration, infrastructure improvement, and commercial airline airlifts out of Afghanistan.[234] These collaborations inform a more holistic view of public-private exchange and collaboration: extensive, nuanced, and emblematic of the powerful position publicly traded companies occupy in society.

6. Expertise, Capacity, and Informational Advantages

The size and impact of modern corporations makes collaborative engagement necessary. The private sector wields significant expertise advantages over the public sector across a range of domains, particularly technology. Thus, the government's make-versus-buy calculus extends beyond cost to expertise and capacity, inter alia. In the context of national security, leveraging private-sector expertise to support military and intelligence operations around the world is necessary.[235] For example, the Department of Justice and other federal agencies leverage the surveillance and data analysis capabilities of companies like Facebook, Google, Amazon, and Palantir to detect, investigate, and prevent criminal and other types of activity.[236]

In the modern economy, data is the new gold, and private companies often have access superior to certain governments. Corporate concentrations and their interaction with data are an ongoing concern for regulators. Corporations wield significant power through advertising, using the press and social media to promote products and services and to shape consumer preferences.[237] Facebook, Amazon, and Google have come under fire for their use and potential misuse of customer data.[238] At the same time, governments, although

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231 *Id.*

232 *See generally* Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537 (1981) (arguing that the modern corporation evolved in part from a desire to reduce transaction costs and other economic factors); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971) (analyzing the benefits of internalization versus external procurement).

233 ROBERT CHARLES CLARK, CORPORATE LAW § 16.3, at 697 (1986).

234 *Id.*

235 John D. McKinnon, *Pentagon Scraps JEDI in Win for Amazon at Microsoft's Expense*, WALL ST. J., https://www.wsj.com/articles/pentagon-plans-reboot-of-jedi-cloud-contract-11625589039 (July 6, 2021, 3:49 PM).

236 *See id.*

237 MURRAY EDELMAN, THE POLITICS OF MISINFORMATION X (2001); TIMOTHY E. COOK, GOVERNING WITH THE NEWS (1997).

238 *E.g.*, *Amazon, TikTok, Facebook, Others Ordered To Explain What They Do With User Data*, NPR (Dec. 15, 2020, 3:36 AM), https://www.npr.org/2020/12/15/946583479/amazon-tiktok-facebook-others-ordered-to-explain -what-they-do-with-user-data.

critical of these companies, once again, seek to leverage their data to advance their own capabilities and objectives.

7. *The Corporate Bully Pulpit and the Power of Persuasion*

The quasi-governmental position companies occupy in contemporary society requires a degree of public acceptance. Accordingly, companies must speak up for themselves to maintain good stakeholder relations and irreproachable reputations.[239] In the age of social media and broad misinformation campaigns, silence may signal a company's indifference or make it vulnerable to outside observers who claim to define its positions. In response, companies may use the corporate "the bully pulpit" to make political statements and take positions.[240] When using the corporate bully pulpit, companies must remain sensitive to a diverse audience including various shareholders, customers, employees, regulators, and other stakeholders. In recent years, "[n]umerous public corporations began to take positions on the varied societal issues of our time from gay marriage to global equity and, most notably, climate change, going far astray from their traditionally narrow involvement." This observer further notes, "[w]ith the recent rebirth of the 'stakeholder' movement, it has been forcefully argued that businesses should not be narrowly concerned with shareholder value, but instead become active participants in a broader campaign for social justice."[241] Notably, business leaders, not simply fringe activists, are speaking out on these issues.[242] Activists for social change seek corporate participation or to shift corporate objectives.[243] Thus, a company's response to social activism can threaten or enhance its reputation. More specifically, failure to account for complex reputational risks may destroy the long-term value of a company.[244] A company under a cloud of litigation, investigations, and even social media outrage may suffer reputational damage with serious financial

[239] Blumberg, *supra* note 22, at 431.

[240] Todd C. Frankel, *How Two Black CEOs Got Corporate America to Pay Attention to Voting Rights*, WASH. POST (May 4, 2021, 4:52 AM), https://www.washingtonpost.com/business/2021/05/04/corporate-america-voting-rights/.

[241] Charles Elson, *Reimagining the Board*, DIRECTORS & BOARDS (2021 Third Quarter).

[242] Recently, in response to an onslaught of restrictive voting bills pursued by Republicans in 43 states, particularly Georgia, former American Express CEO, Kenneth Chenault, Kenneth Frazier, CEO of Merck, and other corporate executives issued general statements against such voting restrictions. Andrew Ross Sorkin & David Gelles, *Black Executives Call on Corporations to Fight Restrictive Voting Laws*, N.Y. TIMES, https://www.directorsandboards.com/articles/singletaking-stand-how-and-when-should-companies-speak-out-political-issues (Apr. 3, 2021). Prior to restrictive voting legislation passing in Georgia, "almost no major companies spoke out against the legislation, which introduced stricter voter identification requirements for absentee balloting, limited drop boxes and expanded the legislature's power over elections." *Id.* Atlanta-based corporations, "including Delta Air Lines, Coca-Cola and Home Depot, offered general statements of support for voting rights, but none took a specific stance on the bills. The same was true for most of the executives who signed the new letter, including Mr. Frazier and Mr. Chenault." *Id.* But compare the following approach taken with respect to reproductive rights: "When Texas lawmakers advanced a restrictive voting rights bill this year, American Airlines and Dell Technologies, two of the state's biggest employers, were early and vocal critics of the effort. But this week, as a law that prohibits most abortions after about six weeks took effect in Texas, both companies declined to comment on the measure. American Airlines and Dell were representative of the business community at large. While many corporations are taking stands on voting rights, climate change, immigration and other important matters, few companies would comment on the abortion law." David Gelles, *Companies Stay Quiet on Texas' New Abortion Law*, N.Y. TIMES (Sept. 3, 2021), https://www.nytimes.com/2021/09/03/business/companies-texas-sb8-abortion-law.html (a few corporations have begun to speak up in opposition to the law and to offer support to those affected by its passage).

[243] Lin, *supra* note 21, at 1546. ("The broad reach and deep impact of social activism powered by new information technology means that businesses are frequently engaged in social issues whether they want to be or not. . . . [C]hanges in social expectations about corporate behavior have also altered corporate social activism. Many in society and within corporations now expect businesses and executives, particularly those at large public companies, to engage with the critical social issues of today.").

[244] *Id.* at 1579–81.

ramifications.[245]

Company stances may also have serious consumer implications. For example, according to one survey, "77% of respondents agreed that CEOs are obligated to speak out when their company's values are violated or threatened, and nearly half (48%) agreed that companies should take positions on social issues they consider important to their workforce and to society, even if not directly related to their business."[246] The survey also found that when consumers share the views espoused, CEO activism may positively influence purchase decisions; nearly half of respondents (46%) said they were more likely to buy from a company led by a CEO who speaks out on an issue they support. On the other hand, consumers who disagree with the CEO's position may forsake the company and its products or services.[247] The recent experiences of Nike and Under Armour illustrate these tensions. Whereas, Nike embraced the activism of Colin Kaepernick's NFL protests and incorporated him into an extensive ad campaign associating the Nike brand with youthful social activism, Under Armour, through its CEO's statements espousing support for President Donald Trump, alienated key stakeholders including its celebrity brand ambassadors and a younger customer base.[248] In the former instance, Nike made a calculated risky business decision to align with Kaepernick's social justice stances to build consumer affinity for its brand.[249] Under Armour's statements were not calculated, poorly timed, and risky, especially for an upstart company seeking to build market share against larger competitors with legacy brands. These divergent approaches reveal the upsides and downsides of political risk management.

Company responses to political issues demand a nuanced, contextually driven approach. In some situations, a company might opine on an issue to prevent backlash; in others, a statement could alienate certain stakeholders or create an unintended controversy, so no action is warranted.[250] Companies' political statements may require strategic follow up, including changing course, an apology, a retraction, or doubling down.[251] In response to a board survey following the recent enactment of voting restrictions in Georgia, 54 percent of board members felt that companies doing business in Georgia should take a position; 72 percent of that group said companies should overtly oppose the law, and 23 percent said companies should issue a general statement supporting the protection of voting

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[245] *See* Omari Scott Simmons, *The Federal Option: Delaware as a De Facto Agency*, 96 WASH. L. REV. 935 (2021).

[246] Weber Shandwick and KRC Research, *CEO Activism in 2018: The Purposeful CEO* (July 2018), available at webershandwick.com.

[247] For more information, *see* Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. REV (Jan.–Feb. 2018) ("In 2017, Under Armor's CEO, Kevin Plank, was criticized by some of his company's celebrity endorsers [and brand ambassadors], including Stephen Curry and Dwayne Johnson, when he said in an interview that President Trump's business background made him 'a real asset' to the country."). Katie Robertson & Julie Creswell, *Under Armour Founder Kevin Plank to Step Down as C.E.O.*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/business/under-armour-kevin-plank.html ("The Wall Street Journal reported [in 2018] that the company had a culture of inappropriate behavior toward women, including visits to strip clubs that often included Mr. Plank and were charged to corporate cards. In response, Mr. Plank said, 'We can and will do better.'").

[248] *See, e.g.*, Paul R. La Monica, *Under Armour has a Big Trump problem*, CNN BUSINESS (Feb. 15, 2017, 11:41 AM).

[249] *See, e.g.*, Julie Creswell, Kevin Draper & Sapna Maheshwari, *Nike Nearly Dropped Colin Kaepernick Before Embracing Him*, N.Y. TIMES (Sep. 26, 2021), https://www.nytimes.com/2018/09/26/sports/nike-colin-kaepernick.html.

[250] Margaret Steen, *Taking a Stand: How and When Should Companies Speak Out on Political Issues?*, DIRECTORS & BOARDS (Apr. 13, 2021), https://www.directorsandboards.com/articles/singletaking -stand-how-and-when-should-companies-speak-out-political-issues.

[251] *Id.*

rights.[252] Irrespective of the particular tactic employed, companies should have teams and processes in place to quickly address the question of public statements *ex ante* and *ex post*.

B. External Political Pressures Prompting a Reactive Corporate Response

1. Investors and ESG

Pressure from parts of the investment community to incorporate ESG factors and frameworks into business practice is growing. With potential regulation of ESG-related SEC disclosures and political activity on the horizon, the public and shareholders have become increasingly active, pressuring companies to address their proposals on climate change, political spending, and diversity.[253] In a sign of things to come, proxy advisory firm ISS recently rebuffed Uber for its lack of disclosure of political activity.[254] Some scholars argue that demographic shifts in the shareholder base—Generations Y and Z—may affect future increases of corporate activism.[255]

If many social proposals are likely to have little economic impact on the corporation, "a limited number of funds deliberately appealing to socially conscious investors through well publicized plans to invest with social considerations as one of the major elements influencing investment decision" may accrue value.[256] Company attentiveness may yield benefits: "[t]he company that displays social responsibility may thus attract future professional investor support because of anticipated performance in the basic economic aspects of the business arising from the broader horizons demonstrated in the social area."[257]

2. Consumer Sentiment

Consumer backlash, or economic boycotts, have a tradition reaching back to the founding of the United States.[258] Contemporary consumers may be swayed by a company's position and actions, or lack thereof, on a range of social issues. Consumer surveys illustrate the connection between demand preferences and social activism.[259] In some instances, the product brand may be inextricably tied to a social issue. In others, the connection may be tenuous. Thus, consumer sentiments cannot be ignored as a strategic imperative that poses risk to a firm's bottom line and reputation.

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[252] Leslie Norton, *CEOs Should Seek Board Approval Before Taking Stances on Social Justice, Survey Says*, BARRON'S, https://www.barrons.com/articles/ceos-should-seek-board-approval-before-taking-stances-on-social-justice-survey-says-51618671599 (April 27, 2021).

[253] *See* Stephen Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, BUS. LAW. At 2 (UCLA School of Law, Law-Econ Research Paper No. 21-10, September 2021), https://ssrn.com/abstract=3899528; Fairfax, *supra* note 2, at 1142; Todd Sirras et al., *2021 Say on Pay & Proxy Results*, HARV. L. SCH. F. CORP. GOV. (May 26, 2021), https://corpgov.law.harvard.edu/2021/05/26/2021-sayon- pay-proxy-results/. ("A preliminary analysis of the 2021 proxy season found that shareholders had already voted on six proposals relating to environmental issues and 44 relating to social concerns, which was an increase of 33% over the prior year.")

[254] *Id.*

[255] David Webber, et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 SO. CAL. L. REV. 1243 (2020); Michal Barzuza et al., *The Millennial Corporation* (September 6, 2021), available at SSRN: https://ssrn.com/abstract=3918443.

[256] Blumberg, *supra* note 22, at 452.

[257] *Id.* at 454.

[258] *Id.*; *see* Vogel, *supra* note 16, at 15–45.

[259] *See generally* Kees Jacobs et al., *How Sustainability is Fundamentally Changing Consumer Preferences*, CAPGEMINI, at 2 (June 2020), https://www.capgemini.com/wp-content/uploads/2020/07/20-06_9880_Sustainability-in-CPR_Final_Web-1.pdf ("A significant majority of consumers (79%) are changing their purchase preferences based on sustainability. This contrasts sharply with the 36% of organizations who believe consumers are willing to make this change in their choices/preferences based on social or environmental impact.").

3. *Political Actor Maneuvering*

Political actors contribute to the politicization of modern corporations.[260] They can use their bully pulpit to denounce corporations and strategically shift their own accountability to a large, recognizable target. For corporations, political capital is an "intangible asset that provides . . . long term value extending beyond an isolated policy issue [or dispute]."[261] For lawmakers incentivized to maximize political capital by generating broad political support, policy choices may indicate "what is 'in it'" for them "when they move" in a particular direction.[262] The present political moment is ripe for policy entrepreneurs. On the surface, it seems rational for lawmakers to target the most powerful interest group—managers and institutional investors.[263] The most pragmatic outcome is often "a compromise among various interests, albeit slanted to preserve a broad coalition of support, thereby maximizing lawmaker utility."[264] Sometimes, purely efficient or fair regulation may lack political appeal, and merely symbolic, inefficient, and hybridized policies have more political utility.[265] Strategic inefficiency, on balance, may be a net positive because it limits the backlash generated by economic shocks, scandals, and social unrest.[266] The value of political capital is not diminished by the fact that any backlash averted cannot be precisely measured.[267] Lawmakers' pursuit of self-interest and maximization of political utility may actually benefit shareholder and stakeholder constituencies. From this perspective, reform outcomes are not simply zero-sum scenarios for various stakeholders. Another popular critique of lawmaker maneuvering or opportunism is the aggrandizement of government bureaucracies and their power perhaps beyond the optimal point, which may discount the value of nongovernmental institutions.[268]

The impact of public opinion must also be considered. Even though the concept is ambiguous, ascertaining general public sentiment is an informative exercise for boards, executives, and lawmakers alike, providing a crude measure of legitimacy for corporate governance.[269] While it tends to be cyclical and intense,[270] it does not "automatically [spring] into people's minds"; it may be partially manufactured.[271] In and of themselves,

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[260] *Id.* at 453.

[261] Fisch, *supra* note 12, at 1498 (2005) (describing a case study of FedEx to illustrate the various ways corporations buy and use political power); *see* Simmons, *Taking the Blue Pill*, *supra* note 36, at 329.

[262] *See* Sam Peltzman, *George Stigler's Contribution to the Economic Analysis of Regulation*, 101 J. POL. ECON. 818, 824 (1993); Simmons, *Taking the Blue Pill*, *supra* note 36, at 329.

[263] *See id.*

[264] Simmons, *Taking the Blue Pill*, *supra* note 36, at 322.

[265] *Id.* at 323.

[266] Roe, *Backlash*, *supra* note 70, at 217 ("The prospect of backlash—or of strategically tempering otherwise efficient rules and institutions to finesse away a more destructive backlash—complicates a law and economics inquiry.").

[267] *Id.* at 240.

[268] ROBERT CHARLES CLARK, CORPORATE LAW § 16.3 (1986).

[269] As Adolf Berle asserts:

> [A] modern American corporation understands well enough that it has a "constituency" to deal with. If its constituents—notably its buyers—are unsatisfied, they will go to the political state for solution. Hardly any present day board of directors or corporation management would take the position that it could afford to disregard public opinion—or would last very long if it did.

ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 56–57 (1954).

[270] *Id.* at 57 ("A disadvantage (not peculiar perhaps to a political as contrasted with an economic balancing force) is the fact that movements of public opinion tend to be sluggish in commencing, and extreme once they start. A situation has to be really out of hand before public pressure begins to assert itself, and when it does passions run high.").

[271] MURRAY EDELMAN, THE POLITICS OF MISINFORMATION 53 (2001).

citizen demands may not have a significant impact on corporate conduct; they are more likely to be successful when coupled with investor and lawmaker intervention or the threat thereof.[272]

Politics can disrupt markets, but it can also mediate economic turmoil. Corporate scandals, social unrest, and severe "economic disruptions often change the distribution of political power and create opportunities for public policy entrepreneurs to rearrange things to their advantage."[273] Despite a lack of organization, diffuse constituencies may participate in the political process when they are provided with "free (and easy to digest, perhaps entertaining) information" and "political saliency, a major national issue that commands attention and motivates action."[274] The influence of social media has amplified this effect.

V. POLITICAL RISK, POLITICIZATION, AND CORPORATE PURPOSE

A. The Debate

Shareholder and stakeholder governance approaches reflect a tension between two visions of corporate governance: a tight focus on investor return and a panorama that encompasses all constituencies affected by the corporate entity. Support for either approach can be found in case law, the regulatory architecture, and the academic literature.[275] Specifically, politics connects with the corporate purpose debate in the following ways. A key justification for the stakeholder approach is that "many types of corporate activities that appear to be profit-reducing expenditures for the public are really conducive to profit maximization in the long run."[276] Proponents also make a big picture argument that companies engaging in socially responsible activities will lead to an overall better business

[272] Mark Roe's description of "backlash" acknowledges the importance of broader public sentiment beyond the manager-shareholder constituency. *See* Roe, *Backlash*, *supra* note 70, at 217; Simmons, *Taking the Blue Pill*, *supra* note 36, at 331.

[273] Sam Peltzman, *The Economic Theory of Regulation After a Decade of Deregulation*, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 58 (William C. Brainard & George L. Perry eds., 1989).

[274] *Id.* at 51–52.

[275] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("Although such considerations [of other corporate constituencies] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, . . . directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 20 (Del. Ch. 2013) ("Directors of a Delaware corporation owe fiduciary duties to the corporation and its stockholders which require that they strive prudently and in good faith to maximize the value of the corporation for the benefit of its residual claimants."). *But see* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985) (Directors can consider the "impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)"); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 112 (Del. Ch. 2011) (quoting *Paramount Commc'ns*, 571 A.2d at 1150) (outside a change of control, "a board of directors 'is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover.'"); TW Servs., Inc. v. SWT Acquisition Corp., Nos. CIV. A. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) ("[D]irectors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other 'corporate constituencies.' . . . There is a time, however, when the board's duty becomes more targeted and specific and its range of options becomes narrower.").

[276] This statement is consistent with what Robert Clark labelled the limited monism approach. ROBERT CHARLES CLARK, CORPORATE LAW § 16.2, at 680–81 (1986).

climate.[277] Thus, a concern regarding strict shareholder profit maximization is that, to a certain degree, it is self-defeating, leading to a society that is suspicious of corporations.[278]

A leading critique of the stakeholder approach (or argument in favor of shareholder primacy) is the concern that it provides managers cover to pursue their own political and other self-interested prerogatives in their decision-making.[279] In addition, "[c]orporations [already] owe many contractual, common law, and statutory duties to their [non-shareholders] customers, suppliers, creditors, employees, and to the environment, the general public, and numerous government entities."[280] At the extreme, critics contend a stakeholder approach may function as a plutocracy in disguise, where managers deploy their power toward non-business goals to serve their own preferences.[281] A second but weaker critique contends that publicly-spirited activities do not create a better business climate after all, but instead reduce incentives for governments to adopt needed regulatory measures.[282] A third, but very important critique is that not all publicly-spirited activities, including political activities, are conducive to long term profitability. From this third critique emerges a tension: not all political activity minimizes shareholder value; some activities may help the bottom line and others may not. The challenge for corporate managers, academics, and policymakers is perhaps drawing a line between political activities maximizing profits in the long term versus those that do not. The integration of political risk into existing ERM frameworks may, in part, advance this process making the debate operationally relevant to corporate practice.

B. Blurred Lines, Non-State Actors, and Hybridization

Academic debate often ignores the fact that companies will inevitably act and react in response to politics. Modern corporations are immersed in a matrix of political activity that extends well beyond political spending. The growing impact of non-state actors and the blurring of the lines between government and private enterprise have brought corporations into a broader conversation on public accountability.[283] Large corporations "[a]s a major factor in the society . . . cannot escape involvement in the urgent problems of the country."[284] They function as quasi-public institutions, and their power or "bigness" is an ongoing public concern.[285] Historically and today, the driving force behind many types of business regulation is concern about corporate power and making large corporations, particularly management, more accountable to shareholder and stakeholder interests.[286]

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[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] Lin, *supra* note 21, at 1535–46.

[284] Blumberg, *supra* note 22, at 427.

[285] Ronald Alsop, *Corporate Scandals Hit Home*, WALL ST. J. (Feb. 19, 2004, 10:39 AM), https://www.wsj.com/articles/SB107715182807433462 (discussing the public's distrust of corporations following waves of accounting scandals starting in the early 2000s); Philip Augar, *Corporate Scandals Demand a Shake-Up in the Boardroom*, FIN. TIMES (Apr. 14, 2017), https://www.ft.com/content/570b60b2-1e ce-11e7-b7d3-163f5a7f229c ("In the past few years, scandal has affected many businesses in the FTSE 100, such as BP, BAE Systems, GlaxoSmithKline, HSBC, Tesco and Rolls-Royce, and elsewhere such as Toshiba, Volkswagen and Wells Fargo."); Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/business/ wells-fargo-settlement.html (discussing a recent $3 billion settlement by Wells Fargo following discovery of fraudulent employee activity from 2002 to 2016).

[286] *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933). The checks on a corporation's economic power include, inter alia, competition, profits, political intervention, and public consensus or sentiment. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 52–59 (1954).

Some proponents of policy change view the abuse of corporate power as a meta-problem, requiring a deep structural remedy.[287] Corporations overtly crossing into the political sphere sparks controversy and entails risk.

Acknowledging corporate power and influence against a backdrop of political gridlock, stakeholders are lobbying companies directly to address a range of social issues. In a sense, "[t]he state [is regarded] as the corporate state, and the corporation as a prime target."[288] Corporations are not necessarily a nemesis but another vehicle to achieve activist goals.[289]

Politics are divisive; they are also a mechanism to mediate conflict as well as preserve and enhance value. As quasi-governmental entities, modern companies cannot ignore politics and related risks and arguably still effectively serve the best interests of shareholders and other stakeholders. Although this characterization may draw criticism, it has greater descriptive and explanatory power than prevailing rigid theoretical constructs set at extremes or sometimes zealous demands for purity or neutrality.[290] Even when managers have mixed motives, mixed objectives, and divided loyalties, their actions do not necessarily harm stakeholder or shareholder interests.[291] The converse may also be true. Similarly, neutrality on issues may not be beneficial; it can be complicit with a suboptimal status quo and cause reputational damage in a volatile political environment.[292] At the same time, politically driven decisions that overreach and ignore tenets of shareholder ownership may devalue and denigrate shareholder rights and disincentivize investment. Directors are caught at a dangerous intersection, where they must artfully avoid collisions.

However, "if business ignored the public acceptance-expectation-demand process and refused to involve itself in the solution of social problems," we cannot assume "that the pressures for politicization would disappear."[293] Management may actually contribute to greater politicization.[294] Contemporary accounts supporting shareholder primacy must acknowledge that "[t]he slowness of business to respond and its own role . . . has contributed to business' painful position of being a prime target in the movement for social

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[287] Senators Elizabeth Warren and Bernie Sanders each proposed corporate federal chartering plans. *See* Accountable Capitalism Act of 2018, S. 3348, 115th Cong. (2018); *Corporate Accountability and Democracy*, BERNIE SANDERS, https://berniesanders.com/issues/corporate-accountability-and-democracy/; *see also* Simmons, *supra* note 245, at. 935.

[288] Blumberg, *supra* note 22, at 428.

[289] *See* Alan R. Palmiter, *Capitalism, Heal Thyself* (October 25, 2021), https://ssrn.com/abstract=3940395.

[290] Debate over corporations' purpose can be similarly divisive. One view maintains the corporation is merely an economic institution, responsive only to shareholder concerns. Another maintains that the corporation is a political institution subject and accountable to societal group control. *See, e.g.*, Bebchuk & Tallarita, *supra* note 135. Meanwhile, some observers straddle stakeholder and shareholder perspectives. Fisher and Shapiro succinctly explain how polarization can plague a debate. *See* Elizabeth Fisher & Sidney Shapiro, *Disagreement About Chevon: Is Administrative Law the "Law of Public Administration"?*, 70 DUKE L.J. 111, 112 (2021) ("These disagreements amount to two different groups, who imagine administrative law in two completely different ways, talking past each other. Their disagreement cannot even be called a debate since each group employs a different vocabulary and preoccupation. Nor is it a political disagreement either.").

[291] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 10-40 (1991); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES at 32 (Sep. 13, 1970) (Magazine).

[292] *But see* Aaron K. Chatterji & Michael W. Toffel, *The Power of C.E.O. Activism*, N.Y. TIMES, Apr. 3, 2016, at SR10 ("[I]n an era of political polarization, in which we are increasingly cloistered in neighborhoods, social networks and workplaces that serve as echo chambers for our ideological beliefs, corporate neutrality may be outdated.")

[293] Blumberg, *supra* note 22, at 429.

[294] *Id.* ("[W]hereby management does not participate or resists efforts to do so is any factor that is contributing strength to the position of management in resisting efforts to politicize the corporation, it is the ability to point to a record—albeit limited—of social participation.").

and environmental reform."[295] Moreover, "[t]he intensity of these problems, the extent to which corporations have caused them, the limited response of corporations to their solution—in brief, the failure of business leadership— have accelerated the forces for politicization."[296]

Nearly fifty years ago, Philip Blumberg's article "Politicization of the Corporation" identified how "society's view of business has changed to encompass social and moral good, along with, and at times ahead of, economic good."[297] As "one of the major power centers in society, " business is a focal point of change.[298] He acknowledged eight factors that contributed to greater public demands on corporations, and they remain relevant today: (1) the failure of business leadership; (2) changing concepts about the role of business in society; (3) lack of management accountability; (4) the concentration of corporate economic power; (5) the communications revolution; (6); lack of responsiveness of the political system; (7) changing values; and (8) development of a socially oriented shareholder power base.[299]

The more effective company response to diffuse politicization in the contemporary context involves sensitivity and responsiveness to both investor concerns and political and social problems.[300] Businesses "should be able to articulate their profit-seeking purposes in a comprehensive manner that better accounts for the social interests and norms expected . . . which in turn may actually lead to superior financial performance" and enhance their value for employees, consumers, and society at large.[301] A broad, hybrid approach to corporate governance is demanded, one not limited to shareholder concerns but incorporating input from a range of stakeholder constituencies. Yet managers cannot ignore the often residual goal of maximizing shareholder wealth.

CONCLUSION

Corporate political engagement is complex. It extends well beyond political spending and raises profound democratic legitimacy concerns. But, in the absence of prescriptive regulation, curtailing corporate political influence, disclosure of political activity along with a reliance on market monitoring and enforcement will likely prevail. The COVID-19 pandemic and social unrest have focused considerable attention on political risk and engagement. The disruptions to company operations are voluminous and diverse: entertainment and hospitality industry closures, airline industry cancellations, eviction

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[295] *Id.*
[296] *Id.* at 428.
[297] *Id.* at 425. In the same article, Blumberg concludes:

> Business can only prosper by being a part of healthy society and can only preserve its present degree of independence from public control by participation in the solution of social and environmental problems in accordance with public expectations and demands, by joining in the battle for social justice: the struggle against poverty, race and sex discrimination, environmental abuse, urban blight, and by having a significant number of independent directors reflecting public attitudes on its boards.

Id. at 441.
[298] *Id.* at 425.
[299] *Id.* at 425–32.
[300] *Id.* at 429. As one observer acknowledges, "the current—and likely future—terrain of business and social activism suggests that a singular narrative centered exclusively on amoral profit-seeking would be unsatisfactory for many corporate stakeholders, social activists, and policymakers." Lin, *supra* note 21, at 1597–98.
[301] Lin, *supra* note 21, at 1579 ("Being socially responsible does not mean being financially irresponsible.").

moratoriums in residential real estate, international trade interruptions, manufacturing supply shortages, employee vaccination mandates, and ride-hailing service restrictions.

ERM is the mechanism through which boards and their respective firms can manage complex political risks. In the current climate, more companies should emphasize and integrate political risk oversight in their ERM programs. Although its neglect may not trigger legal liability from regulators or courts, it can cause significant financial and reputational losses to the company. Politics should not be avoided but managed in a nuanced way pursuant to effective board oversight of ERM. It is negligent for corporate managers to operate with political blinders. Companies must contend with courts of law and the court of public opinion, each with its own distinct rules. Missteps in the latter may injure the corporation more seriously than unfavorable judgments in the former. The failure to manage political risk is not in the best interests of the corporation.