CORPORATE GOODWILL

CALEY PETRUCCI

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Abstract: Perhaps the most significant debate in corporate law today is the role of the corporation in society. Do corporations have a responsibility to their employees, local communities, and other non-shareholder constituencies? On one side of the debate, there is a vocal group of critics arguing for a shareholder primacy model of governance focused on maximizing value to shareholders. On the other side, there are corporations embracing stakeholder governance and the consideration of employees, local communities, and other non-shareholder constituencies in the ordinary course of business. Modern corporate governance, however, presents a curious phenomenon: Even the most ardent supporters of stakeholders abandon their longstanding commitments during times of change, such as dealmaking and shifts in governmental power.

Thus, this Article examines the question of why corporations that adopted a stakeholder governance approach in the ordinary course abandon their commitments in times of change. As a baseline matter, it analyzes the increased risks during times of change as well as lack of transparency when reneging on prosocial commitments. Notwithstanding widespread criticism of this conduct, the Article argues that such abandonment is not a complete deterioration of stakeholder governance. Rather, it demonstrates that times of change are periods of rearranging priority among those with a stake in the corporation. Each corporation will have implicitly established a hierarchy among these stakeholders in the ordinary course. During times of change there is an implicit rearranging of stakeholder claims on the corporation's resources, attention, and time. When viewed through the lens of reprioritization of stakeholder claimants, it becomes clear that while there is a decrease overall of stakeholder considerations in times of transition, it is not an eradication entirely.

The Article makes three primary contributions to the literature. First, it uses novel, hand-coded data from filings with the Securities and Exchange Commission (SEC) to examine the conflict between stakeholder treatment in the ordinary course and in times of change. Second, it advances a cohesive theory of the driv-

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ers of corporate abandonment and uncovers the potential harms of such conduct. Lastly, the Article explores the implications of this analysis on the corporate purpose debate and advances a range of doctrinal and policy proposals, such as increased disclosures, durable contractual commitments, and third-party certifications, to promote transparency and increase accountability in corporate governance.

INTRODUCTION

When Etsy went public, the company that had once been hailed as "a beacon of socially responsible business . . . bec[a]me a case study in how the short-term pressures of the stock market can transform even the most idealistic of companies."[1] New corporate leadership laid off employees in record numbers, and perhaps most notably, Etsy lost its coveted third-party certification as a "B Corp," a certification obtained for meeting heightened social and environmental standards.[2] When organic food company Kashi was acquired by Kellogg, Kashi started including GMO and non-organic ingredients in its products and relocated from the community in which it had been operating for years.[3] And when billionaire Elon Musk acquired Twitter, he reversed course on its long-term efforts to promote the "interests of [its] stakeholders" as "a purpose-driven company that does good."[4] In short order, Musk laid off more than 75% of Twitter's employees[5] and reinstated nearly all previously banned accounts.[6] Hate speech flourished on the platform with a surge in certain racist

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[1] David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES (Nov. 25, 2017), https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html [perma.cc/JF3Q-LNGX]; *see* Nikita T. Mitchell, *Etsy Made Mistakes, but Its Commitment to Social Responsibility Wasn't One of Them*, QUARTZ (July 20, 2022), https://qz.com/work/1146365/etsy-made-mistakes-from-which-other-b-corps-can-learn ("Etsy's tumultuous journey serves as a cautionary tale for socially conscious entrepreneurs and corporate leaders . . . . It suggests that socially responsible business models may not be built to withstand the brutal short-termism of the capital markets.").

[2] *See* Gelles, *supra* note 1 (discussing layoffs); Mitchell, *supra* note 1 (same).

[3] *See* David Kesmodel & Annie Gasparro, *Inside Kellogg's Effort to Cash In on the Health-Food Craze*, WALL ST. J. (Aug. 31, 2015), https://www.wsj.com/articles/inside-kelloggs-effort-to-cash-in-on-the-health-food-craze-1441073082 [perma.cc/REM3-5P3P]; *see also* Stephanie Strom, *Kellogg Agrees to Alter Labeling on Kashi Line*, N.Y. TIMES (May 8, 2014), https://www.nytimes.com/2014/05/09/business/kellogg-agrees-to-change-labeling-on-kashi-line.html [perma.cc/9LSP-8ABC] (noting that Kellogg was instrumental in efforts to defeat Proposition 37, a California ballot initiative that would have required labeling certain products containing genetically engineered ingredients).

[4] *See* TWITTER, 2020 GLOBAL IMPACT REPORT 4, 6 (2020), https://about.twitter.com/content/dam/about-twitter/en/company/global-impact-2020.pdf [perma.cc/MW3Z-4FVJ].

[5] *See* Kate Conger, Ryan Mac & Mike Isaac, *In Latest Round of Job Cuts, Twitter Is Said to Lay Off at Least 200 Employees*, N.Y. TIMES (Feb. 26, 2023), https://www.nytimes.com/2023/02/26/technology/twitter-layoffs.html [perma.cc/8M8C-7TKM] (announcing that Twitter had pared its workforce from about 7,500 employees to 1,800).

[6] *See* Nicholas Reimann & Robert Hart, *Elon Musk Says He's Granting 'Amnesty' for Nearly All Banned Twitter Accounts*, FORBES (Nov. 24, 2022), https://www.forbes.com/sites/nicholasreimann/2022/11/24/elon-musk-says-hes-granting-amnesty-for-nearly-all-banned-twitter-accounts/ [perma.cc/HCM3-LJCL].

slurs (202%), antisemitic slurs (60%), transphobic slurs (62%), homophobic slurs (58%), and misogynistic slurs (33%).[7] Engagement with tweets containing these slurs increased by 273%.[8]

Even more recently, Meta Platforms, the parent company of Facebook and Instagram, announced that the company was ending fact-checking on its platforms.[9] JPMorgan Chase, BlackRock, and others began withdrawing from groups focused on addressing climate change risks.[10] Similarly, Meta, along with the nation's leading retailer, Walmart, and fast-food giant McDonald's, among many others, announced cuts to diversity, equity, and inclusion (DEI) programs and policies.[11] While corporate removal of DEI programs first gained momentum following the Supreme Court's landmark decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[12] and was further spurred by the Fifth Circuit's decision in *Alliance for Fair Board Recruitment v. SEC*,[13] a surge of corporations have further scaled back their policies following Donald Trump's re-election to the U.S. presidency.[14] Trump's executive orders, including one that effectively ended affirmative action programs in the federal government and directed federal agencies to take

[7] *The Musk Bump: Quantifying the Rise in Hate Speech Under Elon Musk*, CTR. FOR COUNTERING DIGIT. HATE (Dec. 6, 2022), https://counterhate.com/blog/the-musk-bump-quantifying-the-rise-in-hate-speech-under-elon-musk [perma.cc/277F-CWX9] (discussing the rise in certain racist, homophobic, sexist, and transphobic slurs); *see also* KATE CONGER & RYAN MAC, CHARACTER LIMIT: HOW ELON MUSK DESTROYED TWITTER 392 (2024) (discussing the rise in antisemitic slurs).

[8] CTR. FOR COUNTERING DIGIT. HATE*, supra* note 7.

[9] Natalie Sherman, *Meta and Amazon Scale Back Diversity Initiatives*, BBC NEWS (Jan. 10, 2025), https://www.bbc.com/news/articles/cgmy7xpw3pyo [perma.cc/NSH6-JSC2].

[10] *Id.*; Simon Jessop & Ross Kerber, *JPMorgan, State Street Quit Climate Group, BlackRock Steps Back*, REUTERS (Feb. 15, 2024), https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15/ [perma.cc/98NG-D2WC].

[11] *See Read: Meta's Memo to Employees Rolling Back DEI Programs*, AXIOS (Jan. 10, 2025), https://www.axios.com/2025/01/10/meta-dei-memo-employees-programs [perma.cc/ZP36-7SGX] (publishing a memo announcing changes to DEI efforts and noting that "[t]he Supreme Court of the United States has recently made decisions signaling a shift in how courts will approach DEI"); *see also* Sherman, *supra* note 9.

[12] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that Harvard College's admission process, which considered an applicant's race as one of many factors, violated the Fourteenth Amendment).

[13] *See* All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 166, 180 (5th Cir. 2024) (en banc) (holding that the SEC lacked authority to approve a proposed Nasdaq rule that would require companies listed on the exchange to meet certain diversity standards for their boards, or to explain why they have not done so).

[14] *See Costco Shareholders Reject an Anti-DEI Measure, After Walmart and Others End Diversity Programs*, CBS NEWS (Jan. 24, 2025) [hereinafter *Costco Shareholders Reject an Anti-DEI Measure*], https://www.cbsnews.com/news/costco-dei-policy-board-statement-shareholder-meeting-vote/ [perma.cc/XLJ8-A7DT] ("In recent weeks, companies including Meta, Ford, McDonald's and Walmart have ended their DEI programs, decisions that follow the 2023 Supreme Court decision banning affirmative action in college admissions, as well as pressure from conservative political activists.").

"appropriate measures to encourage the private sector" to act similarly,[15] will likely further hasten this shift.

* * *

Whether from dealmaking, presidential elections, or other developments, it is an increasingly familiar story: Companies embrace the consideration not only of shareholders but also of employees, communities, and other stakeholders in the ordinary course only to abandon those commitments in times of change.[16] Policies, programs, and initiatives aimed at protecting stakeholder interests are quietly scaled back, sometimes cut entirely. Contractual agreements, such as the definitive transaction agreement in corporate dealmaking, are entered into without addressing the stakeholders, who are neither a party nor empowered with post-acquisition protections or third-party beneficiary status.[17] Equally of note, there are often no warnings or disclaimers. No disclosures in public filings. No enforceable mechanisms for stakeholder recourse.

And so, companies generate goodwill through affirmative statements and efforts supporting their stakeholders despite failing to uphold them in times of change. Such behavior may amount to little more than "greenwashing," a phenomenon that arises when corporations engage in deceptive marketing practices by making false or misleading claims about their prosocial stances.[18] Originally, greenwashing finds its roots in environmental matters, such as a company labeling its products "green" or "eco-friendly" in marketing despite unsustainable corporate policies and actions. Over the last few decades, the corporate world

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[15] Exec. Order No. 14,173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025) (targeting "illegal DEI discrimination and preferences" and directing federal agencies to identify up to nine publicly traded entities or other types of institutions that might be subject to investigation).

[16] The instances noted are merely a few illustrative examples of the phenomenon. Additional examples include Plum Organics after it was acquired by Campbell's, Green Chef after it was acquired by Hello Fresh, and many others. *See* Emilie Aguirre, *Beyond Profit*, 54 U.C. DAVIS L. REV. 2077, 2080 (2021) (discussing difficulties of firms "scaling" while preserving social mission and providing these examples). For a discussion of the absence of stakeholder considerations in M&A deals, see generally Caley Petrucci & Guhan Subramanian, *Stakeholder Amnesia in M&A Deals*, 50 J. CORP. L. 87 (2024).

[17] *See infra* notes 152–162 and accompanying text (discussing third-party beneficiaries).

[18] *See, e.g.*, The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21334, 21429 (codified at 17 C.F.R. pts. 210, 229, 232, 239, 249 (2025)), https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf [perma.cc/2R3M-C6WV] (defining "greenwashing" as "engagement in obfuscation and other misleading efforts . . . to manipulate the set of information available on corporate websites and sustainability reports with the goal of attaining higher ESG ratings, which are relied upon, in particular, by unsophisticated investors for the value of institutional certification"). Some use "corporate hypocrisy" to refer to similar conduct. *See, e.g.*, Lisa M. Fairfax, *ESG Hypocrisy and Voluntary Disclosure*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 127, 129 (2023) ("Corporate hypocrisy refers to circumstances whereby organizations, like people, convey information or commitments inconsistent from their own observed behaviors."); Tillmann Wagner, Richard J. Lutz & Barton A. Weitz, *Corporate Hypocrisy: Overcoming the Threat of Inconsistent Corporate Social Responsibility Perceptions*,73 J. MKTG. 77, 79 (2009).

has seen the rise of other forms of deceptive marketing practices, including "purple-washing" (gender equality) and "rainbow-washing" (LGBTQ support).[19] These forms of "washing" all reflect a divide between corporate action and words.

This disconnect matters. A network of disclosure-related rules in the United States rests on the idea that disclosure of information will increase accountability by reducing information asymmetries and monitoring costs.[20] Disclosures can be misleading either by action or omission.[21] Most often, the focus is on transparency and accountability to shareholders, those who invest in the corporation by purchasing its stock. This attention on shareholders is unsurprising, as shareholders use the information made available to them in assessing, in an informed manner, whether to purchase (or sell) shares and in evaluating how to vote on a given matter. There is also a connection to markets more generally, where disclosure results in more confidence in the market, which in turn increases access to capital for companies.[22] Moreover, disclosure protects the public more broadly because it may reduce market disruptions, corporate misconduct, and various negative externalities that corporations can impose on communities, customers, and employees, among others.[23]

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[19] While there are no universally agreed-upon definitions, the terms are commonly used in this manner. *See, e.g.*, Helee Lev, *How ESG Helps Expose Rainbow-Washing*, CONSERVICE ESG (June 28, 2022), https://esg.conservice.com/how-esg-helps-expose-rainbow-washing [perma.cc/GVJ3-UC5E]; Matt Symonds, *How to Detect Rainbow Washing Versus Genuine LGBT+ Support,* FORBES (June 26, 2024), https://www.forbes.com/sites/mattsymonds/2024/06/26/how-to-detect-rainbow-washing-versus-genuine-lgbtq-support/; *Understanding Purple-Washing and Its Impact*, NBS FACTORY, https://www.nbs-factory.com/understanding-purple-washing-and-its-impact [perma.cc/NE6M-Q7BB].

[20] *See, e.g.*, Securities Exchange Act of 1934, § 13 (codified as amended at 15 U.S.C. § 78m (2024)) (providing various disclosure and reporting requirements); *see also* Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 WASH. L. REV. 429, 482 (2000) (explaining that "Congress designed sections 11 and 12(a)(2) [of the Act] to eliminate the informational asymmetries inherent in the public-offering context by requiring companies to make full and accurate disclosures of specified company information before selling securities to the public" (footnote omitted)). The U.S. disclosure regime is premised on an information theory focused on disclosure rather than other policy goals. *See* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 117 (1999) (explaining the requirement to "volunteer any . . . information necessary to make [statements] not misleading").

[21] Hillary A. Sale & Donald C. Langevoort, *"We Believe":* Omnicare*, Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 767–68 (2016).

[22] *See, e.g.*, Arthur Levitt, *The Importance of High Quality Accounting Standards*, 12 ACCT. HORIZONS 79, 80 (1998) (former chairman of the SEC providing that "[d]isclosure systems that are founded on high quality standards give investors confidence in the credibility of financial reporting—and without investor confidence, markets cannot thrive").

[23] U.S. securities regimes emphasize how accurate disclosure can serve the wider public. *See* Securities Exchange Act of 1934 § 2 (codified as amended at15 U.S.C. § 78(b) (2024)) (discussing "national public interest" implicated by transactions involving securities); *see also* Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1045 (2019) ("The basic purpose of the disclosures is to level the playing field—for investors, issuers, and the public."); Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV'T L. REP. 10155, 10160 (2019) (discussing securities law's

This Article examines key events as drivers of corporations reneging on their prosocial commitments. In doing so, the Article contributes to the rigorous debate about the purpose of the corporation by examining whether such events fundamentally alter that purpose. It offers both descriptive and normative contributions to the literature. Descriptively, the Article uses novel, hand-coded data gathered from reviewing documents filed with the Securities and Exchange Commission (SEC) to examine the conflict between stakeholder treatment in the ordinary course and in times of change. Normatively, the Article argues that these types of events, be it taking a company public, the sale of the company, or a presidential election, are not as dissimilar as they may first seem. These events differ in whether they are endogenous versus exogenous. Nevertheless, these transitional contexts share distinct features, which incentivize corporations to engage in greenwashing-like conduct as a tool for risk management and to reorder claims between shareholders and stakeholders in the corporate enterprise.

As a result, the Article demonstrates that what otherwise seem to be disparate events share significant features that explain the rush to abandon stakeholder commitments and suggest more is on the horizon. Yet this departure does not warrant abandonment of the entire stakeholder enterprise as just cheap talk. Rather, during the ordinary course many boards use their judgment to pursue material and impactful prosocial conduct. Thus, the Article examines a range of doctrinal and policy proposals to reduce subtle corporate abandonment of longstanding causes, promote transparency, and increase accountability in corporate governance. These proposals include modifying the disclosure regime, leveraging durable contractual commitments, and expanding the role of third-party certifications.

A few clarifications are necessary before we proceed. First, this Article is not proposing that stakeholder governance be the mandated form of governance. It is a well-established principle in corporate law that a board of directors has wide latitude in managing the business and affairs of the corporation.[24] In line with this principle, for over 150 years courts have presumed that boards of

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"assumption that forced disclosure would decrease the likelihood that a company will behave in unethical ways" and noting that "disclosure has long been the primary lever for the U.S. government to influence corporate ethics"); Sale, *supra*, at 1050 ("[T]he harm from weak or bad governance extends well beyond shareholders.").

[24] *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2023) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ."); Paramount Commc'ns, Inc. v. Time Inc. (*Time-Warner*), 571 A.2d 1140, 1150 (Del. 1989) (discussing a corporate board's "broad mandate" and "duty to manage the business affairs of the corporation" and "set a corporate course of action" under Delaware law); *see also* MODEL BUS. CORP. ACT § 8.01(b) (A.B.A. 2025) ("[A]ll corporate powers shall be exercised by or under the authority of the board of directors, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of the board of directors.").

directors act on an informed basis, in good faith, and in the honest belief that their actions are in the best interests of the corporation—commonly referred to as the "business judgment rule."[25] Effectively a judicial abstention doctrine, as a policy matter the business judgment rule reflects the view that boards are better positioned to make business judgments than courts. Those judgments may include how to weigh short- versus long-term opportunities, as well as decision-making when the interests of the corporation differ from various groups of shareholders or non-shareholder constituencies.[26] Accordingly, this Article is not arguing that stakeholder governance should be compulsory. Rather, it argues that if a corporation benefits from goodwill because of purported stakeholder policies and protections, it should not continue to benefit from this goodwill once those protections are undone. In addition, while this Article focuses on U.S. corporations, much of the corporate conduct observed in the paper, and consequences of that conduct, apply globally.

Second, the focus on corporate abandonment of prosocial commitments in times of change is not to suggest that efforts in the ordinary course are inconsequential. These policies, programs, and initiatives have a real-world impact on hiring, compensation, and firing practices, and have led to millions of dollars of charitable donations.[27] Despite characterization by some commentators of stakeholder governance being largely "for show,"[28] many of these efforts are tangible, concrete benefits to stakeholders in the ordinary course.

Third, a note on terminology. This Article uses "corporations" and "shareholders" to refer to business entities and their owners, particularly in a for-profit corporation context. In part, that is because many of the most consequential businesses of our time are large, publicly traded corporations. Howev-

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[25] *See, e.g.*, *Time-Warner*, 571 A.2d at 1142.

[26] *See, e.g.*, *id.* at 1154 (noting that the board's "fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals . . . . [and] may not be delegated to the stockholders").

[27] For example, Twitter's prosocial efforts prior to Musk's acquisition included donating more than $5 million to over 100 nonprofits, including $500,000 to the National Association of Black Journalists and the Equal Justice Initiative, and additionally providing $4.5 million in advertising credits for over 550 nonprofits in a single year. TWITTER, 2020 GLOBAL IMPACT REPORT, *supra* note 4, at 2, 38–45.

[28] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORN. L. REV. 91, 94–95, 126 (2020) ("We conclude that the [2019 Business Roundtable statement committing its member CEOs to 'lead[ing] their companies for the benefit of all stakeholders'] should be viewed as mostly for show rather than the harbinger of a major change."); *see also* Jonathan Karpoff, *On A Stakeholder Model of Corporate Governance*, 50 FIN. MGMT. 321, 321 (2021) ("[T]he benefits of a stakeholder focus are limited because the social costs of many corporate activities already are internalized."); Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1619–20 (2021) (examining the inconsistency in behaviors of companies whose executives signed the Business Roundtable statement). *But see* Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 754–55 (2007).

er, the discussion in this paper is broadly applicable to a variety of entities and ownership structures.[29]

The Article proceeds in three parts. Part I situates the phenomenon of stakeholder governance within the broader debate of the purpose of the corporation, from the time of a 1930s law review exchange between Merrick Dodd and Adolf Berle to the heated modern debate on the role of environmental and social issues in governance. Part II demonstrates that corporations generate goodwill through public disclosures, policies, and programs targeting stakeholders, yet such promises are unmoored from durable, actionable commitment. As a result, when faced with periods of transition—whether that is a transaction or an election—these promises are all but ignored. This Part also examines the pressures and incentives that have led to the abandonment of stakeholders in times of change. It argues that certain events have a chilling effect on stakeholder governance because of efforts to avoid risk and minimize litigation, but that these explanations cannot fully explain the disconnect. Rather, these transition points are also points in time where corporations rearrange claimants and priorities. Lastly, Part III argues that there are multiple avenues available to reduce the phenomenon of corporate greenwashing. It examines a range of policy proposals to do so, including an enhanced disclosure regime, contractual mechanisms, and third-party certifications, to promote transparency and increase accountability in corporate governance.

I. CORPORATE PURPOSE

Over the last century, the debate about the purpose of the corporation has endured as one of the most fundamental questions in corporate law. During the 1930s, in a series of now-famous exchanges in the *Harvard Law Review* between Merrick Dodd and Adolf Berle, the two examined the purpose of the corporation.[30] The views expressed have come to be known as "shareholder primacy" and "stakeholder governance."[31] Shareholder primacy reflects the idea that the corporation's purpose is to maximize profits for its shareholders. Stakeholder governance, in contrast, represents the idea that corporations

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[29] For a discussion of stakeholders in non-profit enterprises, see Cathy Hwang & Dorothy Lund, *Purpose and Nonprofit Enterprise*, 125 COLUM. L. REV. 2267 (2025) (demonstrating how stakeholder enforcement is possible in purpose-driven businesses).

[30] *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (supporting "a view of the business corporation as an economic institution which has a social service as well as a profit-making function"); A.A. Berle, Jr., Note, *For Whom Corporate Managers* Are *Trustees*, 45 HARV. L. REV. 1365, 1367 (1932) (criticizing Dodd's position and advocating for a model where the purpose of a corporation is to maximize profit for shareholders).

[31] "Stakeholder governance" is also often referred to, interchangeably, as "stakeholderism" or "stakeholder capitalism."

should consider the interests of all stakeholders—including shareholders, employees, communities, and the environment—in decision-making.

On one hand, proponents of stakeholder governance emphasize the role that corporations play in contributing to societal problems and imposing negative externalities on non-shareholder constituencies, such as increasing economic inequality and greenhouse gas emissions.[32] Under this view, the corporation has a responsibility to society more broadly. Shareholders are one of many stakeholders and live in the society that bears these negative externalities. Theoretically, therefore, they will often stand to benefit from stakeholder governance as a result.[33] Moreover, corporate governance can operate as an alternative avenue to harness economic power when governments or political routes do not vindicate those same interests.[34]

On the other hand, critics of stakeholder governance argue that the corporation's purpose is to maximize shareholder value and thus it should consider these other interests only insofar as they lead to that end. Furthermore, stakeholder governance may be ineffective and even counterproductive, crowding out other reforms.[35] It may also facilitate managerial entrenchment and operate as a relatively ineffective mechanism for protecting stakeholder interests.[36] Indeed, one common critique of stakeholder governance is that protecting the interests of stakeholders should not be left to the discretion of corporate leadership, who have powerful incentives to act in self-interest.[37]

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[32] *See* William Savitt & Aneil Kovvali, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORN. L. REV. 1881, 1884 (2020); *see also* Bebchuk & Tallarita, *supra* note 28, at 168 ("There is currently a widespread and growing recognition that, although corporations have been a major engine for growth, their profit-seeking operations contribute to a wide array of society's problems and impose serious negative externalities on employees, communities, consumers, and the environment.").

[33] For example, because a handful of the largest institutional investors control between 15–20% of most major companies in the country, negative externalities imposed by one will naturally impact these other investments. *See* Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 735 (2019). Consider an institutional shareholder with a large stake in an oil company and a separate stake in a tourism company. If the oil company creates too much pollution or fails to follow best practices for oil spill prevention thus causing a spill, then tourism in the neighboring towns will likely decrease.

[34] *See* Susan S. Kuo & Benjamin Means, *The Political Economy of Corporate Exit*, 71 VAND. L. REV. 1293, 1296 (2018) ("When conventional political channels are inaccessible, citizens can harness corporate economic power instead.").

[35] *See, e.g.*, Bebchuk & Tallarita, *supra* note 28, at 176–77; *see also* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–69 (1994) (arguing that tax laws can more efficiently redistribute wealth).

[36] *See* Cathy Hwang & Emily Winston, *The Limits of Corporate Governance*, 47 SEATTLE U. L. REV. 677, 689–93 (2024) (arguing that regulation, rather than shareholder primacy or stakeholder governance, better addresses corporate misbehavior); Bebchuk & Tallarita, *supra* note 28, at 165.

[37] *See* Bebchuk & Tallarita, *supra* note 28, at 155 ("[O]nce the actual structure of incentives is taken into account, there is no basis for stakeholderist claims and hopes that CEOs would use their discretion in . . . a stakeholder-friendly way.").

For over 100 years, the purpose of the corporation has remained a heated matter of disagreement among commentators.[38] Most states eventually adopted statutes that expressly allowed directors to consider the interests of non-shareholder constituencies (referred to as "constituency statutes") in decision-making.[39] Courts have also weighed in on a number of matters that implicate corporate purpose, both in the ordinary course and in the dealmaking context.[40] Doctrinally, though, there remains much uncertainty on the permissible contours of stakeholder considerations in corporate dealmaking.[41]

Whether framed as corporate social responsibility, environmental social and governance (ESG), or stakeholderism, the purpose of the corporation remains one of the most significant matters in corporate governance today.[42] Increasingly, shareholders pressure corporations to make social and environmen-

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[38] *See, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 387 (1937); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1758 (1989); Luigi Zingales, *In Search of New Foundations*, 55 J. FIN. 1623, 1624 (2000); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sep. 13, 1970, at SM17; Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 563, 565, 568 (2003); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1446 (1989); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–42 (2001); Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863, 864 (2020); Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1447–52 (2021) (discussing the evolution of the corporate purpose debate); Roberto Tallarita, *Hohfeld in the Boardroom*, YALE J. ON REG. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5349969 (using the work of Wesley Hohfeld to examine corporate purpose); Caley Petrucci, *Corporate Purpose Revisited: A Lifecycle Theory of Corporate Purpose* (Jan. 2026) (unpublished manuscript) (on file with author) (arguing that corporate purpose changes across the firm's lifespan).

[39] *See* Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 1995–97 (2009) (examining constituency statutes). However, some have criticized these constituency statutes as being products of self-interested coalitions, such as incumbent managers. *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 23–26 (1992) (discussing the coalitions responsible for these statutes).

[40] *See, e.g.*, *Time-Warner*, 571 A.2d 1140, 1149–50 (Del. 1989) (discussing whether, in the context of a merger, directors had a duty to maximize value to shareholders or whether directors had the discretion to consider other purposes as well, such as preserving the company's "culture").

[41] For a discussion of the role of uncertainty, see *infra* Part II.B. For two alternative views about the permissibility of stakeholder governance in M&A, compare Robert T. Miller, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of Its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge's* Why We Should Keep Teaching *Dodge v. Ford Motor Co.*, 48 J. CORP. L. DIGIT. 32 (2023), jcl.law.uiowa.edu/articles/2023/11/delaware-law-requires-directors-manage-corporation-benefit-its-stockholders-and [perma.cc/LUC2-MGHM] (arguing that directors must manage the corporation for the benefit of the stockholders and may consider the interests of other constituencies only to that end under Delaware law), with Petrucci & Subramanian, *supra* note 16 (arguing that, outside of the *Revlon* context, directors may consider stakeholder interests in their dealmaking).

[42] For a discussion of the history and meaning of the term "ESG," see generally Elizabeth Pollman, *The Making and Meaning of ESG,* 14 HARV. BUS. L. REV. 403 (2024).

tal changes through the use of shareholder proposals,[43] with ESG proposals accounting for over half of all shareholder proposals submitted in recent years.[44] Today, many corporations incorporate prosocial and stakeholder considerations in the ordinary course of business, from voluntary disclosure of ESG objectives and metrics[45] to charitable contributions to racial equity funds[46] and pledges to reduce carbon footprints.[47] A similar commitment to stakeholder matters is shown in surveys of companies and executives, as well as statements from corporations, including the Business Roundtable's 2019 Statement on the Purpose of the Corporation signed by 181 CEOs.[48] In one

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[43] *See* SONIA GUPTA BARROS, HOLLY J. GREGORY & MAUREEN F. GORSEN, SIDLEY AUSTIN LLP, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE DISCLOSURE IN PROXY STATEMENTS: BENCHMARKING THE FORTUNE 50, at 2 (Aug. 31, 2021), https://www.sidley.com/en/insights/newsupdates/2021/08/environmental-social-and-governance-disclosures-in-proxy [perma.cc/MY32-SEKE] (discussing the increase in ESG-related shareholder proposals in 2021); *2021 Proxy Season Review: Part I, Rule 14a-8 Shareholder Proposals*, SULLIVAN & CROMWELL LLP 1 (July 27, 2021), https://www.sullcrom.com/insights/memo/2021/July/2021-Proxy-Season-Review-Part-1Rule-14a8-Shareholder-Proposals [perma.cc/EZ3Z-UA49] (same).

[44] *See* Melissa Sawyer & June M. Hu, *2022 Proxy Season ESG Lookback*, RETAIL INDUS. LEADERS ASS'N (Nov. 21, 2022), https://www.rila.org/blog/2022/11/2022-proxy-season-esg-lookback [perma.cc/8C3G-4YG3].

[45] *See* Lisa M. Fairfax, *Dynamic Disclosure: An Expose on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 278 n.25, 304–06 (2022); *see also, e.g.,* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 932 (2019); Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 YALE J. ON REG. 625, 633–34 (2019) (discussing positive effects of EPA-mandated disclosures).

[46] *See, e.g.*, *Commitment to Racial Equity*, JPMORGAN CHASE: ABOUT, https://www.jpmorganchase.com/impact/racialequity [perma.cc/V4Y4-JE5Z] (committing $30 billion to minority communities in an effort to promote racial equity).

[47] Blaise Hope, *Top 10: Global Companies with Best Social Impact Initiatives*, SUSTAINABILITY MAG. (Apr. 5, 2022), https://sustainabilitymag.com/top10/top-10-global-companies-with-best-social-impact-initiatives-esg [perma.cc/6X6F-RFWG] (describing Lego's pledge to spend $15 million to reduce its carbon footprint).

[48] *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [perma.cc/L4PR-U3EJ] (announcing the Business Roundtable statement of 181 CEOs "commit[ting] to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders"); *see also, e.g.*, Evie Liu, *Fund Companies Are Paying More Attention to ESG Matters, Survey Shows*, BARRON'S (July 22, 2021), https://www.barrons.com/articles/fund-companies-are-paying-more-attention-to-esg-matters-survey-shows-51626914577 [perma.cc/2AEU-Z4AB]; Sara Bernow, Robin Nuttal & Sean Brown, *Why ESG Is Here to Stay*, MCKINSEY & CO. (May 26, 2020), https://www.mckinsey.com/businessfunctions/strategy-and-corporate-finance/our-insights/why-esg-is-here-to-stay [perma.cc/73GE-M6LP] (discussing the rise in ESG considerations in M&A); Larry Fink, *Larry Fink's 2019 Letter to CEOs: Purpose and Profit*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter [perma.cc/LH8E-TV4U] (open letter from the CEO of BlackRock encouraging CEOs to embrace stakeholder-driven purpose); Chris Brindisi et al., *The Stakeholder Model and ESG*, PAY GOVERNANCE (Sep. 1, 2020), https://www.paygovernance.com/viewpoints/the-stakeholder-model-and-esg [perma.cc/466G-L2DT] (noting that 63% of CEOs agreed with the Business Roundtable Statement).

recent survey of 500 executives, every single respondent reported that ESG and sustainability were "important" to their business and 87% indicated these matters were "very to extremely important."[49]

That is not to say that these stakeholder actions have been without controversy. Recent backlash includes state legislatures seeking to require shareholder primacy in investment decision-making,[50] challenges from state attorneys general on proxy advisory firms' carbon emissions and board diversity policies,[51] and related shareholder activism.[52] Critics often frame social or other stakeholder considerations as a political "woke" agenda that should be dismantled or prohibited.[53] It should be noted, however, that stakeholder considerations also include those commonly associated with the political right, such as Chick-fil-A closing on Sundays and describing its mission as being to "glorify God"[54] or Hobby Lobby's refusal to provide birth control to its employees

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[49] ERNST & YOUNG, C-SUITE INSIGHTS: SUSTAINABILITY AND ESG TRENDS INDEX 2, 11 (2023), https://www.ey.com/content/dam/ey-unified-site/ey-com/en-us/campaigns/masters-sustainability/documents/ey-c-suite-insights-sustainability-and-esg-trends-index.pdf [perma.cc/9J43-L55N].

[50] *See, e.g.*, Press Release, Staff of Governor Ron DeSantis, Governor Ron DeSantis Eliminates ESG Considerations from State Pension Investments (Aug. 23, 2022), https://www.flgov.com/eog/news/press/2022/governor-ron-desantis-eliminates-esg-considerations-state-pension-investments [perma.cc/3ETM-S8EV] (announcing Florida's adoption of a resolution in 2022 that required state pension funds to seek the highest return on investment and not consider "non-pecuniary factors" like "social, political, or ideological interests").

[51] Letter from Sean D. Reyes, Att'y Gen. Utah et al., to Gary Retelny, President & CEO, Institutional S'holder Servs., Inc., & Kevin Cameron, Exec. Chairman, Glass, Lewis & Co. (Jan. 17, 2023), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Utah%20%26%20Texas%20Letter%20to%20Glass%20Lewis%20%26%20ISS%20FINAL.pdf [perma.cc/LDN7-RY8M].

[52] *Strive Impacts Corporate America: After Key Changes at Exxon and Disney, Strive Will Target Chevron and Home Depot in 2023 Proxy Voting Season*, BUSINESSWIRE (Dec. 6, 2022), https://www.businesswire.com/news/home/20221206005395/en/Strive-Impacts-Corporate-America-After-Key-Changes-at-Exxon-and-Disney-Strive-Will-Target-Chevron-and-Home-Depot-in-2023-Proxy-Voting-Season [perma.cc/N9P8-XVGD] (highlighting the goal of Strive Asset Management, chaired by Vivek Ramaswamy, to reverse the progress made by pro-ESG activist investor campaigns).

[53] *See, e.g.*, Kevin Schmidt, *Profits Over Politics: The Case for Anti-ESG ETFs*, CNBC (Oct. 6, 2022), https://www.cnbc.com/2022/10/05/profits-over-politics-the-case-for-anti-esg-etfs.html [perma.cc/KF6U-F6VK] (discussing Strive's attempt to "push back against 'woke capitalism'"); Press Release, Staff of Governor Ron DeSantis, Governor Ron DeSantis Further Prohibits Woke ESG Considerations from State Investments (Jan. 17, 2023), https://www.flgov.com/eog/news/press/2023/governor-ron-desantis-further-prohibits-woke-esg-considerations-state-investments [perma.cc/8YN8-YWJN] (announcing "measures to protect Florida's investments from woke environmental, social, and corporate governance (ESG), ensuring that all investment decisions focus solely on maximizing the highest rate of return"); Michael Smith, Nic Querulo & Bloomberg, *Up Next in Ron DeSantis' War Against the 'Woke Agenda': No ESG Criteria in Municipal Bonds*, FORTUNE (Feb. 13, 2023), https://fortune.com/2023/02/13/ron-desantis-esg-municipal-bonds-woke-agenda-florida/ [perma.cc/ZC5R-7YCX]. *But see* Tom C.W. Lin, *The New Corporate Political Governance*, 65 B.C. L. REV. 833, 878 (2024) ("The narrative that corporations were once apolitical and have suddenly become 'woke' simply does not reflect history or reality.").

[54] *Our Purpose*, CHICK-FIL-A, https://www.chick-fil-a.com/careers/culture [perma.cc/2995-8FC5]; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 703 (2014) ("In accordance with

on religious grounds.[55] Recent opposition to certain social causes has nevertheless caused some corporations to walk back their stakeholder commitments, or at least how vocally they discuss them.[56]

But despite some recent backlash, stakeholder considerations remain top of mind for corporations, consumers, legislators, and courts. One recent survey found that most CEOs and investors have increased, not decreased, their consideration of environmental, social, and governance issues.[57] And in the ordinary course many boards continue to consider stakeholder interests in decision-making. Moreover, studies have found that customers value prosocial brands and are willing to pay a premium for products from companies making prosocial claims.[58]

II. STAKEHOLDER COMMITMENTS IN TIMES OF CHANGE

So, many companies today embrace stakeholder governance in the ordinary course, where they market policies, programs, and other efforts as prosocial and pro-stakeholder. As a result of this marketing, shareholders, consumers, and other stakeholders hold more goodwill for an enterprise they see as

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[religious] commitments, Hobby Lobby and Mardel stores close on Sundays, even though the [owners] calculate that they lose millions in sales annually by doing so.").

[55] *See Hobby Lobby*, 573 U.S. at 703–04.

[56] S*ee, e.g.*, Matteo Tonello, *DEI in Transition: 2025 Corporate Diversity Disclosure Trends*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 20, 2025), https://corpgov.law.harvard.edu/2025/08/20/dei-in-transition-2025-corporate-diversity-disclosure-trends/ [perma.cc/X5XJ-2AC6] (finding a "sharp decline in references to 'diversity,' 'racial,' 'gender,' or 'DEI' in public company filings); *see also* VANGUARD, CORPORATE STATEMENT: AN UPDATE ON VANGUARD'S ENGAGEMENT WITH NET ZERO ASSET MANAGERS INITIATIVE (Dec. 7, 2022), https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/update-on-nzam-engagement.html [perma.cc/XTF4-TSU4] (announcing that Vanguard recently withdrew from the Net Zero Asset Managers Initiative, an international group of asset managers seeking to achieve net zero greenhouse gas emissions by 2025, but that it will still uphold its commitment to disclosure and efforts to address climate risk); Dan Byrne, *Understanding "Green Hushing" and Its Risks*, COMPLIANCE WK. (Nov. 12, 2022), https://www.complianceweek.com/esg/social-responsibility/understanding-green-hushing-and-its-risks/32343.article [perma.cc/8YJK-M6UT] (noting that many companies have climate goals but have decided not to publicize them).

[57] *See* Kensey Biggs, *Too Legit: ESG Won't Quit—U.S. ESG Trends for 2023*, TENEO (Jan. 31, 2023), https://www.teneo.com/too-legit-esg-wont-quit/ [perma.cc/Z3JY-JGVA] (noting that many equate strong ESG performance to increasing risk management and improving long-term value); *see also* ERNST & YOUNG, *supra* note 49, at 3 (finding that 82% of the top executives surveyed continued to pursue environmental goals).

[58] *See, e.g.*, SHERRY FREY ET AL., MCKINSEY & CO., CONSUMERS CARE ABOUT SUSTAINABILITY—AND BACK IT UP WITH THEIR WALLETS (Feb. 6, 2023), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets [perma.cc/US8E-AU3T] (finding that products making ESG-related claims averaged 28% growth over the past five-year period compared to 20% for products without such claims); Press Release, PwC, Consumers Willing to Pay 9.7% Sustainability Premium, Even as Cost-of-Living and Inflationary Concerns Weigh: PwC 2024 Voice of the Consumer Survey (May 15, 2025), https://www.pwc.com/gx/en/news-room/press-releases/2024/pwc-2024-voice-of-consumer-survey.html [perma.cc/NA79-ASV2].

supporting valuable causes. But such causes are readily abandoned during times of change, often with little disclosure about such departures. In this Part, the Article turns to two scenarios as case studies for boards facing the question of how to treat stakeholders in times of change: the turnover of governmental leadership and the sale of the company.

A. Shifts in Governmental Power

The U.S. presidential election was among the most noteworthy events of 2024. Donald Trump returned to the campaign trail, gaining momentum on a platform that included promises of mass deportations, scaling back environmental efforts to reduce climate change, and eradicating diversity, equity, and inclusion (DEI) and other race- and sex-based policies, programs, or initiatives.[59] On November 5, 2024, Trump won the election to become the 47th president of the United States.

Shortly after taking office in January 2025, Trump began carrying out many of his campaign promises. He started by ordering the elimination of DEI programs in the federal government.[60] As part of the same executive order, Trump directed federal agencies to take "appropriate measures to encourage the private sector" to act in a manner aligned with these views.[61] He also paused trillions of dollars in federal aid.[62] In addition, Trump issued a freeze on federal hiring (with a few exceptions),[63] fired prosecutors and others who worked on cases related to the January 6, 2021 insurrection at the Capitol, and froze civil rights and environmental litigation.[64] The effects of these efforts have been magnified by recent success at the courthouse.[65]

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[59] *See* Michael D. Shear & Michael Gold, *Donald Trump's Promises*, N.Y. TIMES (Jan. 19, 2025), https://www.nytimes.com/interactive/2025/01/19/us/politics/trump-president-promises.html [perma.cc/WL7M-7J77].

[60] Exec. Order No. 14,173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025).

[61] *Id.*

[62] Memorandum from Matthew J. Vaeth, Acting Director, Off. of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies, *Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs* (Jan. 27, 2025), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376044/168125.pdf [perma.cc/AQT4-WG9V]. A judge issued an extended pause on this plan to freeze loans, grants, and other federal financial assistance, providing that it would be "potentially catastrophic" for organizations that rely on federal funding to serve the public and carry out their missions. *See* Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, 763 F. Supp. 3d 36, 47 (D.D.C. 2025).

[63] Presidential Memorandum to Heads of Exec. Dep'ts & Agencies, *Hiring Freeze*, 90 Fed. Reg. 8247 (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/hiring-freeze/ [perma.cc/8YTS-8Q86] (making an exception for military, immigration, national security, and public safety roles).

[64] Sarah N. Lynch & Andrew Goudsward, *Trump's Justice Department Launches Sweeping Cuts Targeting Jan. 6 Prosecutors, FBI Agents*, REUTERS (Jan. 31, 2025), https://www.reuters.com/world/us/fbi-launches-wide-ranging-round-cuts-sources-say-2025-01-31/ [perma.cc/74XG-AUEH]; Sarah N.

When the Trump campaign gained momentum leading up to the election, and in the aftermath of Trump's victory, a wave of companies began walking back their prosocial commitments. Meta (the parent company of Facebook, Instagram, and WhatsApp) recently announced that the company was ending its well-established fact-checking program that had been created to curtail the spread of misinformation on its social media platforms.[66] At the same time, Meta has begun scaling back its DEI programs.[67] Walmart, the nation's largest retailer, and McDonald's, among others, announced similar cuts to DEI programs and policies.[68] Similarly, a number of companies have silently altered their DEI policies to remove language targeting "historically underrepresented" groups.[69] There has also been a meaningful shift in companies' approaches to board diversity disclosures in their proxy statements, with many companies removing explicit references to "DEI," "diversity," and other related factors.[70] Numerous companies also announced plans to stop sharing data with the Human Rights Campaign, a nonprofit that tracks LGBTQ related policies.[71] In line with Trump's environmental stances, JPMorgan Chase, BlackRock, and oth-

Lynch, *Trump Administration Halts Environmental Litigation, Sidelines Lawyers, Sources Say*, REUTERS (Jan. 24, 2025), https://www.reuters.com/world/us/trump-administration-halts-environmental-litigation-sidelines-lawyers-sources-2025-01-24/ [perma.cc/B5JY-2RFN]; Alanna Durkin Richer, *Trump's New Justice Department Leadership Orders a Freeze on Civil Rights Cases*, ASSOCIATED PRESS (Jan. 22, 2025), https://apnews.com/article/civil-rights-division-justice-department-trump-2dcb45cca7c9c9cdaea78282d4279c35 [perma.cc/C9SD-XF2S].

[65] *See*, *e.g.*, All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 185 (5th Cir. 2024) (en banc) (vacating an SEC order that approved the Nasdaq proposed board diversity rules).

[66] Sherman, *supra* note 9. Meta also agreed to a $25 million settlement of the lawsuit that Trump had filed against the company for suspending his social media accounts following his conduct on January 6. Mike Isaac & Maggie Haberman, *Meta Agrees to Pay Trump $25 Million to Settle His Lawsuit*, N.Y. TIMES (Jan. 29, 2025), https://www.nytimes.com/2025/01/29/technology/meta-trump-lawsuit-settlement.html [perma.cc/LW3C-K4F3].

[67] *Read: Meta's Memo to Employees Rolling Back DEI Programs*, *supra* note 11 (announcing changes to Meta's DEI efforts).

[68] Sherman, *supra* note 9.

[69] *See* Tatyana Monnay, *Morrison Foerster Changes DEI Fellowship Criteria Amid Lawsuit*, BLOOMBERG L. (Sep. 6, 2023), https://news.bloomberglaw.com/business-and-practice/morrison-foerster-changes-dei-fellowship-criteria-amid-lawsuit [perma.cc/Z67X-X5WR]. Much of this transition began following the Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College* but has hastened following Trump's re-election. *E.g.*, *Costco Shareholders Reject an Anti-DEI Measure, supra* note 14.

[70] *See* Hayden Goudy, Tierra Piens & Meghan Conway, *Evolving DEI Disclosure Practices in SEC Filings*, HARV. L. SCH. F. ON CORP. GOV. (June 10, 2025), https://corpgov.law.harvard.edu/2025/06/10/evolving-dei-disclosure-practices-in-sec-filings/ [perma.cc/8LKB-3SHW] (discussing recent shifts in DEI-related disclosure practices, where "the majority of large public companies in the US have removed references to 'DEI' and related language from their SEC filings, [but] most of these companies still have at least one diversity-related disclosure in their most recent annual report or proxy statement"); *see also* Tonello, *supra* note 56.

[71] Emma Goldberg, *Trump's D.E.I. Order Creates 'Fear and Confusion' Among Corporate Leaders*, N.Y. TIMES (Jan. 23, 2025), https://www.nytimes.com/2025/01/23/business/trump-dei-corporate-reaction.html [perma.cc/2N2R-PBNT].

ers began withdrawing from groups focused on addressing climate change risks.[72] Trump's executive orders will likely further hasten this shift.

And so, when faced with a transition—Donald Trump's (second) rise to power—these corporations abandoned their longstanding stakeholder commitments, reacting to these external pressures to change. While the magnitude may be notable, this reaction is nothing new. Rather, it is a hallmark of corporations faced with times of change.

B. The Sale of the Company

When it comes to corporate dealmaking, the story is similar, although a bit more complicated. Stakeholder considerations play a role in mergers and acquisitions (M&A) at various stages of the dealmaking process. When a buyer is searching for a target, the environmental, social, and governance profiles of prospective target companies can influence a buyer's decision. Thus, a prospective target company's performance on various stakeholder-related metrics can impact its valuation, risk assessments, and ultimate likelihood of interest from a buyer.[73] Financing parties may be more willing to lend when companies have stronger ESG ratings as well.[74] In this sense, stakeholder considerations can be a driver of M&A activity and also influence terms related to diligence and value.

Once a deal is underway, parties will engage in a due diligence process. Due diligence involves each party gathering information about the other to verify and investigate the other party's business before the deal closes. For the buyer, this process helps ensure that the purchase price adequately reflects the value of the corporation. Because ESG and stakeholder considerations can serve as indications of risk, these considerations are most directly in play dur-

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[72] Sherman, *supra* note 9.

[73] *See* Petrucci & Subramanian, *supra* note 16, at 110–17 (discussing stakeholder and ESG considerations in M&A deals); Afra Afsharipour, *ESG Dealmaking*, 26 U. PA. J. BUS. L. 985 (2024); Afra Afsharipour, *ESG and Board-Shareholder Engagement in M&A* ("Surveys of executives indicate that a target company's ESG leadership may justify higher valuation for the target. On the flip side, surveys indicate that buyers reported reducing bid prices after ESG due diligence or even walked away from an M&A target due to negative ESG issues at the target . . . . Risk assessment, including that related to non-financial factors, has long been an important focus of M&A due diligence. The emphasis on ESG heightens that focus."), *in* BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 297, 307 (Luca Enriques & Giovanni Strampelli eds., 2024). Nearly two-thirds of U.S. investors reportedly are willing to pay an ESG premium for companies with strong ESG profiles. MARK GOLOVCSENKO, CLARE LUNN, KIRK CARON & JAKOB SCHENKER, KPMG, THE SUSTAINABLE ADVANTAGE: LEVERAGING ESG DUE DILIGENCE TO UNLOCK VALUE 7 (2023) https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/esg-sustainable-advantage-1.pdf [perma.cc/JXN4-3K7G].

[74] Renee Levin, *ESG: The Next M&A Frontier*, FORDHAM J. CORP. & FIN. L. BLOG (Mar. 26, 2022), https://news.law.fordham.edu/jcfl/2022/03/26/esg-the-next-ma-frontier [perma.cc/VLX8-NQEE].

ing this part of the process. If the buyer finds information that is concerning, it can attempt to renegotiate or walk away from the deal entirely.[75]

While engaging in due diligence and negotiating the merger agreement or other definitive transaction agreement, the parties will typically allocate various ESG and stakeholder-related risks.[76] They often do so through the representations and warranties section of the agreement. In these provisions, a party will make various statements of fact and assurances, often qualified by knowledge, time, or materiality. Typically, the target company will make more representations and warranties while the buyer's representations and warranties will be focused on its ability to close the transaction. In mixed consideration and stock deals, however, the representations and warranties tend to be more reciprocal. These provisions will not reference "stakeholders" or "ESG" expressly, but many nonetheless relate to these categories.

Using data gathered through FactSet to identify completed transactions in the United States that were announced in the last five years with a deal value of at least $10 billion (the "Sample"), the following are common representations and warranties that relate most directly to stakeholders:[77]

Labor & Employment Matters. One hallmark of a typical merger agreement is a section in the representations and warranties on labor and employment matters. Within the Sample, 37% of buyers and 100% of sellers made representations and warranties about their employment and labor matters. Here, one or both parties will represent that they have complied with laws related to labor and employment, that there are no collective bargaining agreements, no organizational campaigns or unionization activity, unfair labor practice complaints, or threatened strikes.[78] (In each case, except as disclosed on

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[75] One recent study found that when there was material ESG-related risk identified in the due diligence process, 42% of investors sought a reduction in purchase price, 39% sought additional indemnity from the seller, and 53% canceled the deal. GOLOVCSENKO ET AL., *supra* note 73, at 9.

[76] For a discussion of ESG and non-financial risk management, see Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Non-Financial Risk*, 41 J. CORP. L. 647, 651 (2016); Fairfax, *supra* note 45, at 281–82, 287; *see also* Andrew Winden, *Jumpstarting Sustainability Disclosures*, 76 BUS. LAW. 1215, 1228 (2021).

[77] Data was gathered using FactSet to identify completed transactions in the United States that were announced in the last five years with a deal value of at least $10 billion. Findings from those agreements are reported in this Article. Additional preliminary findings suggest that these trends are similar in smaller deals as well (deal values of $200 million and above), but that there is a slightly lower frequency of each of these representations and warranties in smaller deals. Data is on file with the author.

[78] *See, e.g.*, Occidental Petroleum Corporation / Anadarko Petroleum Corporation, Merger Agreement Section 3.15 (May 9, 2019), https://www.sec.gov/Archives/edgar/data/773910/000119312519144401/d745029dex21.htm [perma.cc/UZV2-LU2V] ("[N]o work stoppage, slowdown or labor strike against the Company or any of its Subsidiaries is pending or, to the Company's knowledge, threatened, nor is the Company or any of its Subsidiaries involved in or, to the Company's knowledge, threatened with material labor disputes, grievances or litigation relating to labor matters, including with respect to Anti-Discrimination Laws.").

the disclosure schedules or related documents.) A party will also typically make representations and warranties about its employee benefit plans and material employment, consulting, severance, and other contracts that provide for employee benefits.[79]

Some parties also make representations about discrimination and harassment. These can be generally applicable to any kind of discrimination or harassment, or they can relate specifically to sexual harassment in a so-called "Weinstein clause." As the name suggests, the Weinstein clause emerged in the wake of the #MeToo movement in 2018 to address sexual harassment by corporate leadership.[80] A typical Weinstein clause may provide, for example, that for the past three years "there have not been any material allegations of sexual harassment made to the Company against any current or former director, officer or employee holding the position of Vice President or higher."[81] Often these provisions are qualified by time, by position (addressing only harassment by certain senior leadership, for example), and by knowledge. Approximately 46% of sellers and 13% of buyers in the Sample have made this representation.[82]

Environmental Matters. Another staple in merger agreements is a representation about environmental matters. Within the Sample, 98% of sellers and 41% of buyers have made an environmental representation and warranty. At times, this provision is linked to legal compliance with environmental laws, permits, and approvals. Other times, a party makes representations and warranties beyond minimum compliance with environmental laws—for example, providing that a party does not have certain environmental hazards on its properties and has not entered into contracts related to environmental liabilities.[83]

Customer Data Privacy & Security. It is also common practice for companies that obtain customer data to make data privacy and security representations and warranties. Parties may attest to the absence of data breaches and security incidents, and compliance with various data privacy and security

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[79] *See id.* (discussing benefit plans).

[80] Anna Windemuth, *The #MeToo Movement Migrates to M&A Boilerplate*, 129 YALE L.J. 488, 493–94 (2019). For a discussion of these clauses, see generally *id.*; Grace Maral Burnett & Emily Rouleau, *A Fresh Look at #MeToo Reps & Warranties in M&A Deals*, ABA: BUS. L. SECTION (June 27, 2022), https://businesslawtoday.org/2022/06/fresh-look-metoo-reps-warranties-ma-deals/ [perma.cc/9SMT-UG6D].

[81] *See, e.g.*, Microsoft Corporation / Nuance Communications Merger Agreement Section 3.21(f) (Apr. 11, 2021), https://www.sec.gov/Archives/edgar/data/1002517/000119312521113796/d100489dex21.htm [perma.cc/WKA2-HRWW].

[82] The proportion of merger agreements with a Weinstein clause has remained relatively consistent over the past few years, at 64% and 63% in 2021 and 2022 respectively.

[83] *See, e.g.*, MacDonald, Dettwiler and Associates Ltd. / DigitalGlobe, Inc. Merger Agreement Section 3.16(e) (Feb. 24, 2017), https://www.sec.gov/Archives/edgar/data/1208208/000110465917011405/a17-7147_1ex2d1.htm [perma.cc/59CT-GYXE] (providing that "[n]o underground storage tanks, friable asbestos, lead-based paint, or polychlorinated biphenyls are located at any property currently owned, leased or operated by the Company or any Company Subsidiaries").

laws.[84] They often also attest to compliance with internal policies about the handling of personal data, security guidelines, and other safeguards.[85] Within the Sample, data privacy and/or security representations and warranties are relatively common, made by approximately 93% of sellers and 28% of buyers.

Thus, when it comes to the diligence process and related contractual provisions, parties (primarily the buyer) leverage stakeholder considerations as a tool for risk management. The use of ESG and stakeholder-related provisions in representations and warranties (but not, generally speaking, in covenants) reflects a common understanding of ESG and stakeholder protections as rooted in concerns about shareholder value.[86]

However, these considerations are not present in the covenants that impact the company going forward—what are commonly referred to as post-closing covenants. The post-closing covenants address conduct after the deal closes. These often cover matters like indemnification and insurance for directors and officers. When it comes to stakeholders, post-closing protections are

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[84] *See, e.g.*, Livongo Health, Inc. / Teladoc Health, Inc. Merger Agreement Section 4.23 (Aug. 5, 2020), https://www.sec.gov/Archives/edgar/data/1639225/000119312520211028/d24064dex21.htm [perma.cc/3MTN-MNGZ] (providing, in part, that personal data collection efforts "have been in compliance in all material respects with . . . all Applicable Law governing the privacy, data protection, processing, transfer or security of Personal Data . . . except where any instances of non-compliance have not had, and would not reasonably be expected to have, a Lafite Material Adverse Effect").

[85] *See, e.g.*, *id.*

[86] *See, e.g.*, Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 322 (2017) ("Now . . . financial institutions who see companies' ESG performance as directly tied to investment risk and return across asset classes manage over half of all public debt and equity globally. These strategies are supported by evidence from over two thousand studies that, taken together, establish the financial materiality of many ESG factors to firm and portfolio risk and return." (footnote omitted)); Ho, *Risk-Related Activism*, *supra* note 76, at 665–68 (discussing positive effects of ESG indicators on firm value); SUNDIATU DIXON-FYLE, KEVIN DOLAN, DAME VIVIAN HUNT & SARA PRINCE, MCKINSEY & CO, DIVERSITY WINS: HOW INCLUSION MATTERS 3 (May 19, 2020), https://www.mckinsey.com/featuredinsights/diversity-and-inclusion/diversity-wins-how-inclusion-matters [perma.cc/6PFJ-BTFW] ("For diverse companies, the likelihood of outperforming industry peers on profitability has increased over time, while the penalties are getting steeper for those lacking diversity."); George Serafeim & Aaron Yoon, *Which Corporate ESG News Does the Market React To*? 3–4 (Harvard Bus. Sch., Working Paper No. 21-115, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832698 [perma.cc/BZ2E-V63H] (finding a positive market reaction to corporate disclosures of financially material ESG news, including news related to the impact of the product on consumers); *Why Your Company Should Be Paying Attention to ESG*, C2FO (Mar. 29, 2021), https://c2fo.com/resources/esg-and-diversity/why-your-company-should-be-paying-attention-to-esg/ [perma.cc/786X-3RMR] ("Put simply, companies who care about ESG will outlive ones that don't."). *But see, e.g.*, Wayne Winegarden, *ESG Disclosure Requirements Will Harm Economic Vibrancy*, FORBES (Sep. 20, 2021), https://www.forbes.com/sites/waynewinegarden/2021/09/20/esg-disclosure-requirements-will-harm-economic-vibrancy/ [perma.cc/8A4L-ZD68]; Robert Armstrong, *The ESG Investing Industry Is Dangerous*, FIN. TIMES (Aug. 24, 2021), https://www.ft.com/content/ec02fd5d-e8bd-45bd-b015-a5799ae820cf [perma.cc/P4T2-B8C2]; Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?* (Eur. Corp. Governance Inst., Working Paper No. 579, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642 [perma.cc/7BZN-UY3N] (examining the connection between financial performance and ESG).

virtually nonexistent.[87] Buyers are free to dismantle environmental efforts and increase pollution or to throw out data privacy and security policies meant to protect consumers. Besides lenders and other financial parties, who obtain contractually related protections in connection with financing the transaction, there is only one stakeholder group that nominally receives protection in M&A deals: the employees.

Among recent large M&A deals, parties universally included a provision on employee matters. Shareholders and other stakeholders learn of these employee protections in a number of ways. In addition to being in the merger agreement, the employee protections and a summary of them will be highlighted in a company's disclosures.[88] Generally, these provisions state that the party will provide similar salary or wages (93%), bonuses (91%), and/or benefits (91%) to continuing employees for a limited period following the closing. Many M&A agreements also provide for comparable severance for terminated employees, or severance as specified in separate severance agreements (74%). On first glance, these employee protections appear robust, meaningful, and powerful. Employees, as one of the most salient stakeholder groups, appear to receive significant protection.

But the reality is that these provisions are riddled with exceptions. Not a single agreement in the Sample limited the buyer's ability to terminate employees at-will, with or without cause. Nor do the protections have a significant staying power; they are time-limited, typically to a period of just twelve months.[89] These protections also do not apply to all employees and all forms of compensation. Only "continuing employees"—those employees who were employed by the target company prior to the closing—are covered by these provisions.[90] Any employees hired after closing would not be covered by these terms. Among continuing employees, certain types of compensation are often excluded, such as equity compensation (57%).[91] Merger agreements often also contain "in the aggregate" or other similar qualifiers for different treatment of employees pre- and post-close.[92]

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[87] One notable exception is financing and lending parties. *See, e.g.*, *infra* notes 100–104 and accompanying text (discussing exceptions to the "No Third-Party Beneficiaries" clause).

[88] *See, e.g.*, Twitter Inc., Proxy Statement Relating to a Merger or Acquisition (Form 14A) 8–9, 152 [hereinafter Twitter Definitive Proxy Statement] (July 26, 2022), https://www.sec.gov/Archives/edgar/data/1418091/000119312522202163/d283119ddefm14a.htm [perma.cc/6EHK-HFDU] (discussing these and other risks).

[89] Among the agreements studied, 81% of the provisions have a 12-month duration. The remaining provisions ranged in duration from 5-24 months. *See supra* note 77 and accompanying text.

[90] In the Sample, 100% of provisions are limited to continuing employees. *Id.*

[91] Some agreements carve it out wholesale, while others allow a cash substitution in lieu of equity. *Id.*

[92] "In the aggregate" qualifiers are present in 30% of salary/wages provisions, 51% of bonus provisions, and 94% of benefits provisions. *Id.*

Most significant, however, is that employees have little means of enforcing these provisions. Employees (and other stakeholders) are not parties to the merger agreement and thus do not have the direct right to enforce it.[93] Naturally, one might argue that they are beneficiaries of the agreement given the employment provisions and therefore should be entitled to enforce those provisions as third-party beneficiaries.[94] Third-party beneficiaries are people or entities who are not parties to the contract but stand to benefit from the contract's performance.[95] Because of this relationship, third-party beneficiaries may sue to enforce part of a contract or seek damages for breach.[96]

However, there is a straightforward basis for declining to confer third-party beneficiary status on stakeholders in an M&A context: the parties' intent expressed through the other terms of the contract. Contracting parties will often include express language in the contract to convey their intent. Generally, parties contract to expressly limit all or nearly all third-party beneficiaries. Often parties do so through a general provision disclaiming third-party beneficiaries. These provisions take the form of a "No Third-Party Beneficiaries" clause.[97] The court assigns a "non-trivial amount of weight" to these provisions when determining the parties' intent regarding third-party beneficiaries.[98]

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[93] *See, e.g.*, NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC, 922 A.2d 417, 434 (Del. Ch. 2007) ("As a general rule, only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions." (citing Comrie v. Enterasys Networks, Inc., No. Civ.A. 1925, 2004 WL 293337, at *2 (Del. Ch. Feb. 17, 2004))); *see also, e.g.*, Amirsaleh v. Bd. of Trade, No. 2822-CC, 2008 WL 4182998, at *4 (Del. Ch. Sep. 11, 2008) (discussing third-party beneficiary standing); E.I. du Pont de Nemours & Co. v. MacDermid Printing Sols. L.L.C., 248 F. Supp. 3d 570, 575 (D. Del. 2017) (same); Madison Realty Partners 7, LLC v. Ag ISA, LLC, No. Civ.A. 18094, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001) (same).

[94] *See, e.g.*, Triple C Railcar Serv., Inc. v. City of Wilmington, 630 A.2d 629, 633 (Del. 1993) ("[A] third person, who is, in effect, a stranger to the contract, may enforce a contractual promise in his own right and name if the contract has been made for his benefit." (citations omitted)).

[95] *See id.*

[96] *See id.*

[97] *See, e.g.*, CA Technologies Inc. / Broadcom Inc. Merger Agreement, Section 10.7(b), https://www.sec.gov/Archives/edgar/data/1730168/000119312518216419/d431012dex21.htm [perma.cc/8CLB-EUZ8] ("Except as [otherwise] provided . . . nothing in this Agreement . . . express or implied, is intended to confer upon any Person other than the Parties any rights or remedies hereunder or thereunder.").

[98] Crispo v. Musk, 304 A.3d 567, 574–75 (Del. Ch. 2023); *see also* Fortis Advisors LLC v. Meds. Co., No. 2019-0236, 2019 WL 7290945, at *3–4 (Del. Ch. Dec. 18, 2019) (discussing how Delaware courts approach both boilerplate clauses disclaiming intent to benefit third parties generally and clauses disclaiming intent to benefit specific third parties); United Rentals, Inc. v. RAM Holdings, Inc., No. 3360, 2007 WL 4327770, at *1 (Del. Ch. Nov. 29, 2007) (denying third-party beneficiary status when "[t]he merger agreement explicitly states that its only intended beneficiaries are the parties to the agreement themselves" (citation omitted)); Kronenberg v. Katz, 872 A.2d 568, 605 & n.74 (Del. Ch. 2004) (denying third-party beneficiary status when the "plain language" of the agreement disclaimed third-party beneficiary status unless "expressly provide[d]" otherwise); Capano v. Capano, No. 8721, 2014 WL 2964071, at *13 (Del. Ch. June 30, 2014) (denying third-party beneficiary status when the language of the agreement "plainly articulates its drafter's intent to exclude third-party beneficiaries").

Of note, ordinary canons of contract drafting and interpretation mean that "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[99] Thus, courts have held that a general no-third-party-beneficiaries provision does *not* apply when the contract includes specific language that reflects an intent to benefit a particular third party.[100] When these provisions carve out certain players, it is not for the benefit of employees or stakeholders more broadly. Rather, typical carveouts are for indemnified parties, debt, lending, or financing parties, and company or parent related parties.[101] Sometimes provisions exclude certain stockholder equity or merger consideration related provisions as well.[102] But notably, the general no-third-party-beneficiaries provisions do not expressly carve out employees or other stakeholders.

Because parties customize their no-third-party-beneficiaries provisions and carve out certain parties (such as the financing parties) while failing to carve out others (such as employees), courts have inferred that parties knew how to grant third-party beneficiary status and deliberately chose not to.[103]

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[99] DCV Holdings, Inc. v. ConAgra, Inc., 889 A.2d 954, 961 (Del. 2005) (citing Katell v. Morgan Stanley Grp., Inc., No. Civ.A. 12343, 1993 WL 205033, at *4 (Del. Ch. June 8, 1993)).

[100] *See, e.g.*, Amirsaleh v. Bd. of Trade, No. 2822-CC, 2008 WL 4182998, at *5 (Del. Ch. Sep. 11, 2008) (declining to apply a general no third-party beneficiaries provision when the agreement specifically provided certain benefits to third parties).

[101] *See, e.g.*, Cornerstone OnDemand, Inc. / Clearlake Capital Group LP Merger Agreement Section 8.7 (Aug. 5, 2021), https://www.sec.gov/Archives/edgar/data/1401680/000114036121030923/ny20000316x2_defm14a.htm [perma.cc/W94V-JTAG] ("Nothing in this Agreement, express or implied, is intended to or shall confer upon any Person (other than the Parties hereto) any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement; except for: (i) if the Closing occurs the right of the Company's stockholders to receive the Merger Consideration, as applicable; (ii) the provisions set forth in Section 5.6 [Indemnification]; (iii) the limitations on liability of the Company Related Parties set forth in Section 7.3; and (iv) the provisions of this Section 8.7 and Sections 5.14 [No Liability of Financing Sources], 7.3(f) [Termination Fee and Liability], 8.1 [Amendment] , 8.2 [Waiver] and 8.5 [Applicable Legal Requirements] are intended to benefit and shall be enforceable against all parties to this Agreement by each Financing Source."). Most often, indemnification provisions are for a duration of six years.

[102] *See, e.g.*, Kimco Realty / RPT Realty Merger Agreement Section 10.6 (Aug. 28, 2023), https://content.edgar-online.com/ExternalLink/EDGAR/0001140361-23-041382.html?hash=c1e480f33d2e5224cf6f261ad5ad74612afef3dba3fbfe9bd0a5dcf5ce2218b7&dest=brhc20058058_8k_htm#brhc20058058_8k_htm [perma.cc/68PQ-599Y] ("This Agreement is not intended to and shall not confer any rights or remedies upon any person other than the Parties and their respective successors and permitted assigns, except for the provisions of Article 2 and Article 3 (which entitles the holders of Company Common Shares, Company Series D Preferred Shares and Partnership OP Units to receive the Common Share Merger Consideration, the Preferred Share Merger Consideration and the Partnership Merger Consideration, respectively) and Section 7.5 (which from and after the Company Merger Effective Time shall be for the benefit of the Indemnified Parties).").

[103] *See, e.g.*, Fortis Advisors LLC v. Meds. Co., No. 2019-0236, 2019 WL 7290945, at *4 (Del. Ch. Dec. 18, 2019) ("[T]he carve-out reveals that the parties knew how to expressly confer third-party beneficiary status, and the Court presumes that excluding the former [shareholders] from the carve-out was intentional."). *But see* Delmarva Health Plan, Inc. v. Aceto, 750 A.2d 1213, 1216–18 (Del. Ch.

Thus, carve-outs from these provisions are considered strong evidence of intent to disclaim all other unlisted third-party beneficiaries.[104]

So, are stakeholders third-party beneficiaries to merger agreements? Even without a "No Third-Party Beneficiaries" provision, courts are unlikely to find employees and other stakeholders to be third-party beneficiaries. Setting aside common law principles for evaluating third-party beneficiary status more broadly,[105] given the general "No Third-Party Beneficiaries" provisions, the case against stakeholders as third-party beneficiaries becomes even stronger in an M&A context. Applying basic principles of contract construction, we can infer from the broad prohibition on third-party beneficiaries with a handful of enumerated exceptions that anyone intended to be excluded would have similarly been provided for.

When it comes to employees in particular, however, the answer becomes even clearer. Although one might argue that the employee protections suggest that employees are third-party beneficiaries, in nearly all merger agreements there are at least *two* provisions cabining third-party beneficiaries: the generally applicable provision, discussed above, and a provision targeting employees specifically. The "Employee Matters" section often includes express language to indicate the parties' intent that these protections do not grant the employees any enforcement rights.[106] Among recent large public company deals, 100% of the merger agreements contained either a no-third-party-beneficiaries provision that expressly references employees, or a prohibition on third-party beneficiaries that is embedded in the Employee Matters section.[107] In addition, 91% of agreements had a general, broadly applicable no-third-party-beneficiaries provision in the miscellaneous or general sections of the agreement.

The implication of this structure, either directly tying prohibition to employees or placing it geographically in the contract in close proximity, is that parties intend for employees not to have third-party beneficiary status. (Of

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1999) (declining to find that an enumerated list automatically excludes items not in the list that when the "general approach to exclusions . . . is to state them expressly").

[104] *See, e.g.*, Crispo v. Musk, 304 A.3d 567, 575 (Del. Ch. 2023) ("By contrast, Delaware courts have construed no-third-party-beneficiaries provisions that are customized by a carve-out as indicating a strong intent to disclaim third-party beneficiaries.").

[105] For a discussion of third-party beneficiary status more broadly, see *infra* notes 152–162 and accompanying text.

[106] *See, e.g.*, Take-Two Interactive Software, Inc. / Zynga, Inc. Merger Agreement Section 6.2 (Jan. 9, 2022), https://www.sec.gov/Archives/edgar/data/946581/000119312522005771/d282059dex21.htm [perma.cc/ZA43-8CXU] ("Nothing contained in this Section 6.2 or any other provision of this Agreement, express or implied . . . is intended to confer upon any Person (including for the avoidance of doubt *any current or former employee* . . .) any right as a third-party beneficiary of this Agreement." (emphasis added)).

[107] S*ee, e.g.*, T-Mobile / Sprint Merger Agreement Section 6.13 (Apr. 29, 2018), https://www.sec.gov/Archives/edgar/data/1283699/000110465918028086/a18-12444_1ex2d1.htm [perma.cc/LU93-H4Q7] ("Nothing contained in this Section . . . shall . . . create any third-party beneficiary rights or obligations in any person (*including any Employee*) . . . ." (emphasis added)).

note, although this approach was universal in the Sample, parties occasionally depart from this norm.)[108] Thus, given this prototypical structure and language in merger agreements, parties make clear their intent to exclude stakeholders who are not expressly carved out from the no-third-party-beneficiaries clause.

Why, then, are these employee-matters provisions so ubiquitous if they do not provide a right of enforcement for their apparent stakeholder beneficiaries? Well, in part they help facilitate stability during the interim period between signing and closing. In a typical M&A deal, there is a delay between when the parties sign the merger agreement ("signing") and when the transaction is completed ("closing").[109] During the interim period, employees are still working, and if the deal falls apart employees will continue to be employed at the target company. Without at least the appearance of protections, companies risk employees quitting, organizing, or otherwise taking affirmative actions given the risk to their jobs that accompanies any transaction. In addition, provisions purporting to protect employees may influence socially conscious shareholders in their voting decisions.

As a threshold matter, however, it should be noted that even if there is rarely enforcement power for employees under these provisions, these provisions are not entirely meaningless. They may serve an important signaling function about causes that the corporation (or society) value. Subsequent actions may be taken in the shadow of the bargain and related contractual language, even if these provisions are not enforceable by stakeholders; just as parties bargain in the shadow of the law,[110] so too do companies act in the shadow of their agreements.

Now, as a general matter, it is clear that (1) M&A agreements normally do not protect stakeholder interests and (2) the primary stakeholders that seemingly enjoy protection, employees, are unable to enforce the very provisions that would appear to protect their interests. Naturally, the next question that arises is: Do corporations convey this information to their shareholders and other stakeholders in connection with the deal? Are there disclaimers, caveats, or warnings of the risk that stakeholders will be harmed in dealmaking, that the

[108] *See, e.g.*, Vivint Smart Home, Inc. / NRG Energy, Inc. Merger Agreement Section 9.8 (Dec. 6, 2022), https://www.sec.gov/Archives/edgar/data/1713952/000119312522299484/d346932dex21.htm [perma.cc/X6YA-YZS7] ("This Agreement shall be binding upon and inure solely to the benefit of each Party hereto, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person any rights, benefits or remedies of any nature whatsoever under or by reason of this Agreement, other than (a) at and after the Effective Time, with respect to the provisions of Section 6.10 [Employee Benefits] which shall inure to the benefit of the Persons or entities benefiting therefrom who are intended to be third-party beneficiaries thereof . . . .").

[109] This delay may be due to a number of factors, such as holding a shareholder vote, antitrust approvals, and obtaining third-party consents.

[110] *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (discussing "the impact of the legal system on negotiations and bargaining that occur *outside* the courtroom" in the context of divorce).

buyer may reverse long-standing stakeholder-centric policies, and that employees are not able to enforce these protections?

Corporations are largely silent on the risks associated with dealmaking for their stakeholders, and in explaining the impact of the contractual provisions on stakeholders. As part of the required disclosures in connection with public dealmaking, corporations file a proxy statement that contains information about the transactions as well as various related documents, including the merger agreement.[111] Corporations also file annual, quarterly, and other reports following the announcement of a transaction. The information provided in these filings helps provide shareholders with necessary information to make informed voting decisions on matters related to the deal.

Included in these filings is a disclaimer, a warning about forward-looking statements and risks and uncertainties related to the transaction. A review of annual reports (Form 10-K), quarterly reports (Form 10-Q), current reports (Form 8-K), proxy statements (DEFM-14A), and other filings made after the announcement of a transaction reveals that corporations do not disclose the risk of stakeholder harm. Rather, the matters focused on in these disclosures include the risk of the transaction not being completed, actions post-merger that could affect the target's value, and changes in stock price in the interim.[112] The risk that the acquirer will act in a manner that harms stakeholders is not among them.[113] As such, corporations are able to obtain the reputational and other benefits from their conduct in the ordinary course—and from employee-matters provisions in M&A—without the corresponding consequences of abandonment in the most fundamental of corporate actions: the sale of the company.

C. An Economic Analysis of Commitments Lost

So why, then, do corporations that advertise, and pursue, a commitment to stakeholders in the ordinary course not provide meaningful protection in times of transition? The most simplistic, and least charitable, response would simply be to say that the corporations never cared for stakeholders in the first place. Under this view, shareholder primacy was always the policy, and these proso-

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[111] The "definitive proxy statement relating to a merger or acquisition" is known as SEC Form DEFM14A, and is required under Section 14(a) of the Securities Act of 1934. *See* 17 C.F.R. 240.14a-101 (2025). Merger agreements are generally included as Exhibit 2.1 under these filings. *E.g.*, Schedule 14A, TIME WARNER INC. (Jan. 9, 2017), https://www.sec.gov/Archives/edgar/data/1105705/000119312517005295/d249981ddefm14a.htm [perma.cc/L9QY-7DK7].

[112] *See, e.g.*, Twitter Definitive Proxy Statement, *supra* note 88, at 43 (discussing these and other risks).

[113] In addition to the disclaimers about forward-looking statements in the proxy statement, companies often qualify the proxy statement by the information contained or incorporated by reference within it, including information in the most recent filings on Form 10-K and Form 10-Q. Although risks like challenges on ability to hire, retain, and motivate highly skilled personnel are often identified, companies rarely identify the related risks faced *by* stakeholders.

cial programs and stances were adopted solely to extract goodwill to further the economic value to shareholders. In this view, transition points are a natural place to silently scale back these programs.

While for some corporations, undoubtedly, shareholder wealth maximization was the objective and stakeholder considerations a mere means to that end, for others the calculus is more complex. Rather, for these corporations, some tradeoff between shareholder value and stakeholder impact may be permissible, but only to a reasonable degree. Thus, when circumstances change, the negative economic consequences of protecting stakeholder interests begins to outweigh the value of doing so. Stakeholder governance thus has become too risky a venture in times of change when balanced against the benefits it provides.

These risks can take a number of forms and come from a range of external actors. Regulatory and compliance risks are one major driver of risk-averse behavior. Moreover, corporations can also be subject to political risk.[114] For example, when Trump took office, he ordered federal agencies to examine private-sector DEI initiatives, including those at corporations, directing each agency to identify "up to nine" organizations that could be investigated for civil compliance.[115] Corporations seeking to avoid becoming one of those nine will naturally engage in risk-averse behavior.[116] Risk of criminal liability also increases when the administration in charge condemns prosocial objectives as "illegal D.E.I." policies.[117]

Stakeholder governance may also increase the risk of private litigation. Directors owe fiduciary duties of loyalty and care to the corporation and its shareholders.[118] Shareholders are empowered to sue the directors and corpora-

[114] COURTNEY RICKERT MCCAFFREY, JON SHAMES & OLIVER JONES, ERNST & YOUNG, GEOSTRATEGY IN PRACTICE 30 (2021), https://www.ey.com/content/dam/ey-unified-site/ey-com/en-gl/insights/geostrategy/documents/ey-ceo-imperative-geostrategy-in-practice-2021.pdf [perma.cc/6ZW8-NH63] (defining political risk as 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," and "explor[ing] how senior executives of companies perceive, identify, assess and manage political risk"). For a taxonomy of political risk, see Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707, 732 (2023). For a discussion of countering political risk, see Hagit Levy, Sae Young Yoon & Emanuel Zur, *Countering Political Risk with Board Appointments*, 53 J. ACCT. & PUB. POL'Y 107352 (2025).

[115] Exec. Order No. 14,173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025).

[116] Goldberg, *supra* note 71.

[117] *See* Exec. Order No. 14,173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025); *supra* notes 12–13 and accompanying text.

[118] *See, e.g.*, Guth v. Loft. Inc., 5 A.2d 503, 510 (Del. 1939) (discussing fiduciary duties); *see also, e.g.,* MODEL BUS. CORP. ACT §§ 8.30–31 (A.B.A. 2025) (similar). Stakeholders, in contrast, are not owed these same fiduciary duties.

tion for perceived wrongs, including breach of fiduciary duty.[119] Regardless of whether the suing shareholders ultimately succeed, litigation is costly and time-consuming for the corporation. Stakeholders, in contrast, are generally not owed fiduciary duties by virtue of their stakeholder status and do not have the same rights to bring suit. Moreover, whether boards can legally consider stakeholder interests is subject to greater uncertainty.[120] In combination, these features mean that maximizing shareholder value in the short term, and in an economic sense, is the safer bet to minimize litigation. Thus, by focusing on economic value to shareholders, companies that take a shareholder-primacy approach may face a lower risk of litigation—though it bears noting that in a handful of cases shareholders have sued companies over failure to uphold pro-social promises.[121]

Of course, there are also market risks to considering stakeholder interests that make shareholder primacy a safer option to preserve reputation. Corporate reputation can, of course, be harmed through headlines in the news about pending litigation, as well as criminal or civil violations. But it can also be adversely impacted by policies that divide the customer base. Recently, for example, Bud Light faced backlash after collaborating with Dylan Mulvaney, a transgender influencer, losing $1.4 billion in U.S. beer sales and $27 billion in value.[122] The economic consequences of this decision—and Bud Light promptly walking back its actions afterwards—suggest that the company substantially miscalculated the values of its customer base. In addition, shareholders who are displeased may vote out the directors at the next election. Directors thus have a strong incentive to play it safe.

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[119] *E.g.*, Tooley v. Donaldson, Lufkin & Jenrette, Inc. 845 A.2d 1031 (Del. 2004). Shareholders may bring a direct suit for personal injuries suffered, or bring a derivative suit on the corporation's behalf. *See, e.g., id.* at 1035–39 (discussing Delaware's standards for direct and derivative suits).

[120] For a discussion of uncertainty and the scope of fiduciary duties, see text accompanying notes 132–136.

[121] *See, e.g.*, *In re* Lyft, Inc. Sec. Litig., 484 F. Supp. 3d 758, 766 (N.D. Cal. 2020) (describing how shareholders alleged that Lyft misrepresented the risks for rider safety and misrepresented themselves as a brand dedicated to "social responsibility"); *In re* Tahoe Res., Inc. Sec. Litig., No. 17-cv-1868, 2020 WL 1433514, at *2 (D. Nev. Mar. 23, 2020) (describing Rule 10b-5 allegations that the company had made false statements about the its prosocial policies given its mining operations in Guatemala); City of Pontiac Police & Fire Ret. Sys. v. Caldwell, No. 20-cv-06794, 2021 WL 2711750, at *2 (N.D. Cal. July 1, 2021) (describing allegations that the Board's statements that the company "effectively promotes diversity" at the company are misrepresentations); *see also* Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) (implicating stakeholders by describing food safety as "mission critical" at Blue Bell Creameries). For a discussion of social considerations and securities litigation risk, see Adam B. Badawi & Frank Partnoy, *Social Good and Litigation Risk*, 12 HARV. BUS. L. REV. 315, 324 (2022) (finding that ESG factors can be viewed as a tool for risk mitigation, at least at "[g]ood ESG firms").

[122] Alicia Park, *Bud Light Boycott Effects Endure—Brand Drops to Third,* FORBES (July 23, 2024), https://www.forbes.com/sites/aliciapark/2024/07/18/bud-light-boycott-effects-endure-brand-drops-to-third/ [perma.cc/6GHW-QTYL].

However, prosocial commitments can serve as value-*enhancing* measures if aligned with the stakeholder (and shareholder) base. For example, in the days following Trump's election to his second term, Costco shareholders overwhelmingly voted against a proposal targeting its pre-existing DEI initiatives.[123] Afterwards, Costco went viral, with sales increasing 7.5% in the following quarter and net income increasing 13% compared to the prior year.[124] Costco's stock price also reflects a positive market reception to this news, with its stock price increasing by 36% over the past year, outpacing the S&P 500's gain over that same time.[125] In this sense, investors can turn to corporations to vindicate their interests when traditional political channels are acting contrary to those interests.[126] Moreover, stakeholder engagement and resulting prosocial policies can safeguard against downside risks by introducing new perspectives into the company's decision-making process, gathering critical insight into the risks facing the company, and using this awareness to prevent or mitigate such risks.[127]

Nevertheless, a miscalculation can lead to disastrous consequences for a company, as well as for its directors. Playing it safe by focusing on shareholder wealth maximization is an attractive alternative, especially when the outcome of doing otherwise is uncertain. Thus, much of the chilling effect detailed so far reflects this focus on risk management, loss minimization, and promoting stable returns.

Now, many of these risks—such as litigation and market risks—are also challenges that a board faces on a day-to-day basis. It is therefore unsurprising that some corporations adopt a shareholder primacy approach in the ordinary course as well as in times of change. Thus, the more interesting question is: Why do corporations that adopt a stakeholder governance approach in the ordinary course *change* their approach during these key moments?

First, simply put, the risks are magnified in times of transition because these are also times of greater economic and other uncertainty. Risks, be they litigation, regulatory, or economic, are exacerbated when the rules are uncertain. Take the M&A context as an example. Boards of directors owe fiduciary duties of loyalty and care to the corporation and its shareholders.[128] But the

[123] *See, e.g.*, *Costco Shareholders Reject an Anti-DEI Measure, supra* note 14. Ninety-eight percent of Costco's shareholders voted against the proposal, which would have required that Costco review the potential risks of maintaining its DEI initiatives. *Id.*

[124] Nancy Marshall-Genzer, *Costco Doubles Down on DEI—and Benefits*, MARKETPLACE (May 22, 2025), https://www.marketplace.org/story/2025/05/22/costco-doubles-down-on-dei-and-benefits [perma.cc/F7LH-QKYL].

[125] *See Costco Shareholders Reject an Anti-DEI Measure, supra* note 14.

[126] *See* Kuo & Means, *supra* note 34.

[127] For a discussion of social risk and its intersection with sustainability, see Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1448–58 (2020).

[128] *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by*, Brehm v. Eisner, 746 A.2d 244 (Del. 2020); *see also, e.g.,* MODEL BUS. CORP. ACT §§ 8.30–.31 (A.B.A. 2025).

contours of these duties are subject to much debate among academics and practitioners alike. Some argue that a director's duties require that the board of directors act to maximize shareholder value, suggesting that corporations are always for sale to the highest bidder if the price is right.[129] Others argue that boards have wide discretion in their M&A dealmaking, including the ability to refuse to sell if the negative externalities are too great.[130] This disagreement matters: Under the former view, for example, Twitter would likely have been required to sell to Elon Musk. Under the latter, Twitter was free to refuse to sell and instead continue on a standalone basis going forward.[131]

Underlying this confusion is a series of cases that have created a murky landscape on the contours of a director's duties and when a director may consider the impact of their actions on stakeholders. As a general matter, "[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing" to its shareholders.[132] But what does it mean for an action to have "rationally related" benefits to the shareholders? Are these purely financial benefits, or does the fact that shareholders live in a society impact the "benefits" a shareholder might see from a board's actions? What is the timeline for these benefits? And when do exceptions to this general rule, most famously *Revlon* duties, attach?[133]

Regardless of which of these views is the "correct" statement of a director's duties, the mere existence of two conflicting doctrinal interpretations ex-

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[129] *See generally, e.g.*, Miller, *supra* note 41.

[130] Trevor S. Norwitz, "*The Metaphysics of Time": A Radical Corporate Vision*, 46 BUS. LAW. 377, 378 (1991); *id.* at 384 ("The [Delaware] [S]upreme [C]ourt has now however recognized that the shareholders are not the only constituency whose interests are to be considered in the takeover context."). *See generally* Petrucci & Subramanian, *supra* note 16.

[131] *See supra* notes 4–9 and accompanying text; Jeffrey N. Gordon, *The Twitter Board Bears Personal Responsibility for a Bad Outcome in the Twitter Sale*, CLS BLUE SKY BLOG (May 5, 2022), https://clsbluesky.law.columbia.edu/2022/05/05/the-twitter-board-bears-personal-responsibility-for-a-bad-outcome-in-the-twitter-sale/ [perma.cc/NHC7-K8NW] ("Let's be clear about this: The Twitter board was under no legal compulsion to accept Elon Musk's offer for the company . . . . The single motivating factor in its decision, apparently, was that the deal was a good one for Twitter shareholders, without apparent regard for how Musk might run the company and the consequence for the social media infrastructure that Twitter had created, much less the public welfare.").

[132] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

[133] *See id.* There are few contexts in which boards are affirmatively obligated to maximize immediate shareholder value. The primary context in which this would arise is when a board's *Revlon* duties are triggered. *See id. Revlon* duties require that the board maximize shareholder value when a sale of control is "inevitable." *See id.* But *Revlon* does not apply to all transactions. *See Time-Warner*, 571 A.2d 1140, 1150 (Del. 1989) (holding that, "absent a limited set of circumstances as defined under *Revlon*," 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"). Commentators disagree about whether, outside of the *Revlon* context, stakeholder governance in M&A is in accordance with a director's fiduciary duties. *Compare, e.g.*, Miller, *supra* note 41, at 33 ("Directors are not permitted to . . . act for the end of benefiting either themselves or anyone else other than the shareholders."), *with* Petrucci & Subramanian, *supra* note 6 (arguing that directors can consider stakeholder interests outside of a *Revlon* context).

acerbates uncertainty. Uncertainty creates a chilling effect.[134] Given the doctrinal uncertainty surrounding stakeholder governance, directors may fear that they will be held liable for breach of fiduciary duty if they consider stakeholder interests in their decision-making. Thus, doctrinal uncertainty incentivizes risk-averse behavior and, ultimately, shareholder primacy.[135] Put differently, the murky legal landscape surrounding corporate stakeholders deters boards from embracing stakeholder governance. This uncertainty is particularly heightened when applying these duties to changing contexts—be it an M&A deal or the legality of a new governmental regime's policies and interpretation of existing laws.[136]

Second, times of change are opportunities for the corporation to rearrange the priority among its different stakeholder groups. Many players have an interest in the corporation—shareholders, of course, but also employees, suppliers, customers, and communities, among others. These groups, and the individuals within them, are not monolithic. At times, their interests may align with one another. Policies that promote employee wellbeing, for example, may attract top-talent applicants and improve retention, in turn generating more value for the shareholders. As a result, the connection between stakeholder and shareholder value is sometimes clear—yet other times it may be more attenuated, such as with efforts to reduce greenhouse gas emissions that may be unprofitable for shareholders but result in cleaner air for the communities in which a company operates.

At times, there are also conflicts among the interests of the stakeholders.[137] For example, a corporation might increase profits by cutting back on safety precautions despite the increased employee injuries that result, or have a set donation budget that is not large enough to support all stakeholder groups. Given the heterogeneity of stakeholder interests, directors must weigh competing interests and may need to make tradeoffs between stakeholder groups in reaching a decision.

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[134] *Cf.* Federick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 685–94 (1978) (discussing the "chilling effect" in the context of the First Amendment); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1652–55 (2013) (similar). While discourse on the chilling effect is closely associated with the First Amendment literature, it is used more broadly to denote unintended deterrent effects across a range of matters. Kendrick, *supra*, at 1649 n.74.

[135] *See* Petrucci & Subramanian, *supra* note 16, at 146 (discussing the chilling effect in M&A deals).

[136] *See id.*

[137] *See generally* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1283 (2008) (discussing "some of the more common and troubling rifts that arise between activists and other shareholders in public firms"); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 564 (2006) (challenging "the characterization of shareholders as having interests that are fundamentally in harmony with one another"); K.A.D. Camara, *Classifying Institutional Investors*, 30 J. CORP. L. 219, 229–42 (2005) (classifying investors as "market-driven," "politically driven," "social driven," and "multilateral").

Each corporation will have implicitly established a hierarchy among these stakeholders in the ordinary course of business. This hierarchy will naturally differ between corporations. Maybe the corporation chose to prioritize donations to lower income communities ravaged by natural disasters. Or perhaps it focused on supporting a program that offers internships to high school students in hopes of encouraging the most promising to apply for full-time positions upon graduation.

During times of change, however, there is a rearranging of stakeholder claims on the corporation's resources, attention, and time. In an M&A deal, it is the financing parties, shareholders, and buyer whose claims are elevated while the others are subordinated to the interests of these players. For example, financing parties may receive third-party beneficiary status for the purpose of certain provisions in a merger agreement (in addition to the terms of any lending agreement),[138] and when *Revlon* is triggered, the board must attempt to get the best value reasonably available for its shareholders in the sale.[139] Following Trump's election to a second term, many stakeholder claims have been rearranged and reprioritized because of the changing risk landscape, particularly when it comes to employee diversity, customer safety, and climate impact.[140]

When viewed through the lens of reprioritization of stakeholder claimants, it becomes clear that although there is a decrease overall of stakeholder considerations in times of transition, there is not a total eradication. For example, Trump recently announced the launch of a task force "to eradicate anti-Christian bias" in the government.[141] Although like many of his DEI policies, the task force's focus is primarily on governmental bodies, the favorable signal for religious (particularly Christian) views has arguably made it *less* risky for corporations to embrace religious causes. As a result, religious stakeholders now have more power and greater priority in the corporate stakeholder hierarchy. The reprioritization of stakeholder interests thus may explain why there has been no similar walking back of religious commitments, or other matters that may be considered "conservative" stakeholder interests, among for-profit corporations.[142]

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[138] For a discussion of financing parties and carveouts to the "No Third-Party Beneficiaries" provision, see *supra* Section II.B.

[139] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

[140] *See supra* notes 59–72 and accompanying text.

[141] Exec. Order No. 14,202, Eradicating Anti-Christian Bias, 90 Fed. Reg. 9365 (Feb. 6, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/eradicating-anti-christian-bias/ [perma.cc/SVN6-S972].

[142] Take Chick-fil-A, a fast-food chain that is closed on Sundays, as one example. On the "Our Purpose" page of the company's website, the company describes its purpose as: "To glorify God by being a faithful steward of all that is entrusted to us." CHICK-FIL-A, *supra* note 54. Although it is likely that maximizing shareholder value would mean remaining open seven days a week, the compa-

Corporations during times of change get a metaphorical "fresh start" on arranging the interests of their stakeholders. The change in circumstances helps release pressure on previous commitments to stakeholders and provides cover for corporations to renege on commitments and deprioritize stakeholder claims. Reneging on commitments becomes simply following the crowd, and the public is ill-equipped to police such conduct.[143] Doing so might be a preservation tactic to protect corporate assets and minimize risk during tumultuous periods, or it may be an opportunity for an intentional adjustment going forward that has now become economically efficient.

Third, just as important in the analysis is the deceptive conduct. Greenwashing involves deceptive marketing practices: making false or misleading claims about prosocial stances.[144] Currently, companies that abandon stakeholders in times of change can do so without meaningful drawbacks. Often, they do so quietly, such as by deleting language in policies, removing webpages or programs, or donating to contrary causes. For example, Target, Amazon, and Meta, among others, have rolled back their diversity policies and programs in the days following Trump's election to a second term, often by altering the language on their webpages without fanfare.[145]

In the dealmaking context, it is the absence of any stakeholder protections that allows corporations to ignore stakeholder interests. Documentation in connection with the merger, including the merger agreement and public filings, focuses primarily on shareholders, executives, and financial parties such as lenders. Meanwhile, there is little discussion of the potential harms and risks to

ny continues to close on Sundays. *See Why Is Chick-fil-A Closed on Sunday?*, CHICK-FIL-A, https://www.chick-fil-a.com/customer-support/who-we-are/our-culture-and-values/why-is-chick-fil-a-closed-on-sunday/ [perma.cc/VL7V-KEZB] ("Having worked seven days a week in restaurants open 24 hours, Truett saw the importance of closing on Sundays so that he and his employees could set aside one day to rest, enjoy time with their families and loved ones or worship if they choose, a practice we uphold today."); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689, 703 (2014) (discussing two closely-held companies that choose to close their stores on Sundays for religious reasons, at the expense of profit).

[143] Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1200 (2022) ("[T]he reality is that stakeholders essentially have no formal accountability role in the current governance structure."); *see also* Aneesh Raghunandan & Shiva Rajgopal, *Do Socially Responsible Firms Walk the Talk?*, 67 J.L. & ECON. 767, 767 (2024) (finding an "underwhelming" relationship between corporations' public ESG commitments and their ESG performance). *See generally* John C. Coffee, Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2151–54 (2001) (arguing that compliance with social norms can impact market value).

[144] *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21334, 21429 (Apr. 11, 2022) (codified at 17 C.F.R. pts. 210, 229, 232, 239, 249 (2025)). Of course, some of this removal could be linguistic changes without substantive policy changes. For a discussion of changing approaches to DEI language, see Tonello, *supra* note 56.

[145] Conor Murray & Molly Bohannon, *IBM Reportedly Walks Back Diversity Policies, Citing 'Inherent Tensions': Here Are All The Companies Rolling Back DEI Programs*, FORBES (Apr. 11, 2025), https://www.forbes.com/sites/conormurray/2025/04/11/ibm-reportedly-walks-back-diversity-policies-citing-inherent-tensions-here-are-all-the-companies-rolling-back-dei-programs/ [perma.cc/XY2R-KQZ5].

employees, the environment, or other prosocial causes in the risk factors of the filings. There are no provisions in the merger agreements restricting the buyer from engaging in certain conduct post-closing. Nor are there provisions granting stakeholders, or a representative thereof, any form of legal recourse or beneficiary status. There is simply no mechanism to give potency to either of the merging companies' promises. Instead, there is just silence.

Embracing shareholder primacy at these times of change is following the crowd. There is little transparency, there is little accountability, and thus it is unsurprising that corporations engage in this conduct. Perhaps instead of asking why corporations engage in greenwashing behavior, the better question is: Why not?

III. Implications

With the widespread abandonment of prosocial commitments by corporations in times of change, there are a number of meaningful implications that follow. Can, or should, the phenomenon change how we conceptualize the role of the corporation? In this Part, the Article turns to the implications of this conduct for courts and regulators, examining various doctrinal and policy proposals that may reduce greenwashing behavior. Here, it focuses on the doctrine underlying third-party beneficiaries as well as securities disclosure rules. Lastly, it considers how boards, investors, and other private actors might promote transparency, increase accountability, and reduce greenwashing in corporate governance.

A. For Courts and Regulators

When the concern is a tension between corporate words and corporate action, a natural place to look is to the courts and regulators in reducing greenwashing-like conduct. First, this section will examine the doctrine underlying a stakeholder's ability to bring suit to vindicate their rights, whether for breach of fiduciary duty, breach of contract, or otherwise. Second, it will examine the federal securities disclosure regime as an avenue for increased corporate accountability and transparency. That is not to say that corporations are, as a general matter, *required* to act for stakeholders. Rather, it is only to say that if a corporation has been marketing itself to the public as a stakeholder-centric corporation, then it should either be subject to durable commitment mechanisms to protect its stakeholders or be required to disclose the risks, disconnects, or other departures to its stakeholders.

1. Stakeholder Litigation: Fiduciary Duties & Beneficiaries

Some scholars have proposed reforming fiduciary law as one means of ensuring corporations serve the interests of their stakeholders. Under this approach, there would be a fiduciary duty owed to stakeholders and stakeholders would have greater ability to bring suit.[146] However, such a stakeholder mandate would naturally be subject to criticism from shareholder primacy advocates as contrary to a shareholder-centric purpose of the corporation. Moreover, the resulting litigation would likely be extensive, given that a much broader constituency would have the ability to bring suits for breach of fiduciary duty. In addition, there would be great uncertainty about the scope of what these duties entail, how to weigh competing stakeholder interests, and whether such tensions may chill otherwise beneficial corporate action.[147] In addition, a fiduciary mandate may significantly expand board discretion.[148]

As an alternative approach, courts could alter the standard of review to require greater scrutiny of board decisions when there is a direct conflict of interest between the corporation and its stakeholders.[149] In other contexts, such as when a majority of directors has a conflict of interest, courts already take that approach.[150] But once again, this proposal runs into feasibility concerns. How does a board weigh interests when they conflict? Is it not the case that there is virtually always such a conflict, so an already overloaded judicial system would become even more burdened? Moreover, under well-established principles of corporate law, boards enjoy great discretion, and judges are loath to second-guess a board's decisions.[151]

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[146] *See, e.g.*, Fairfax, *supra* note 143, at 1207–09; Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 428 (2021); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 54, 72 (1999).

[147] *See* Fairfax, *supra* note 143, at 1208 (noting that a fiduciary mandate does not address the "trade-off concern" that "relates not only to trade-offs between shareholders and non-shareholder stakeholders, but also among stakeholder groups"); *see also* Anabtawi & Stout, *supra* note 137, at 1283 (noting that the belief that shareholders have "a common economic goal" is "inaccurate"); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1321 (2021) (noting that shareholders may have "heterogenous interests"); A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 54–55 (1991).

[148] *See* Sommer, *supra* note 147, at 43; Fairfax, *supra* note 143, at 1207–08; Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 107.

[149] *See* Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119, 120–21 (2015) (discussing standards of review).

[150] *See* DEL. CODE ANN. tit. 8, § 144 (2025) (providing for fairness review in interested director transactions unless certain conditions are satisfied).

[151] *Id.* § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); *see also, e.g.*, *Time-Warner*, 571 A.2d 1140, 1150 (Del. 1989) (discussing a corporate board's "broad mandate" and "duty to manage the business affairs of the corporation" under Delaware law); *id.* (noting that "absent a limited set of circumstances as defined under *Revlon*," a board of directors "is not under any *per se* duty to maximize shareholder value in the short term").

Another proposal involves the use of contractual, rather than fiduciary, mechanisms for stakeholder enforcement, such as third-party beneficiary status. However, courts are particularly reluctant to grant third-party beneficiary status in many corporate matters under common law.[152] Third-party beneficiaries are people or entities who are not parties to a given contract but stand to benefit from the contract's performance.[153] Because of this relationship, third-party beneficiaries may sue for enforcement of the contract or for damages. Evaluating whether to confer third-party beneficiary status can be a "thorny legal issue" under state law.[154] For a plaintiff to have standing as a third-party beneficiary, they must show that (i) the contracting parties intended that the third party benefit from the contract, (ii) the benefit was intended as a gift or satisfaction of a pre-existing obligation to that third-party, and (iii) the intent to benefit the third party was a material part of the contracting parties' purpose in entering the contract.[155] When there is a third-party beneficiary, their "rights are measured by the terms of the contract."[156] Thus, the parties to a contract can expressly or impliedly limit the rights of a third-party beneficiary to only a portion of the contract.[157] In this sense, such contract provisions can operate as an accountability mechanism to third parties.

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[152] *See supra* notes 106–121 (discussing third-party beneficiary status for employees in the context of merger agreements).

[153] *See supra* note 94 and accompanying text.

[154] *See* Crispo v. Musk, No. 2022-0666, 2022 WL 6693660, at *10 (Del. Ch. Oct. 11, 2022) (discussing the third-party beneficiary status of stockholders).

[155] Madison Realty Partners 7, LLC v. Ag ISA, LLC, No. Civ.A. 18094, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001) (citing Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1386–87 (Del. Super. Ct. 1990)).

[156] Bako Pathology LP v. Bakotic, 288 A.3d 252, 270–71 (Del. 2022) (citation omitted); *see also* Rumsey Elec. Co. v. Univ. of Del., 358 A.2d 712, 714 (Del. 1976) ("Plaintiff's rights, springing from its status as a third party beneficiary . . . are 'measured by the terms of the agreement between the principals.'" (citation omitted)); RESTATEMENT (SECOND) OF CONTRACTS § 309 (A.L.I. 1981) ("Where there is a contract, the right of a beneficiary is subject to any limitations imposed by the terms of the contract."); 13 WILLISTON ON CONTRACTS § 37:25 (4th ed. 2013) (stating that a third-party beneficiary's rights are "absolutely defined by the terms of the contract" (citing RESTATEMENT (SECOND) OF CONTRACTS § 309)).

[157] *See, e.g.*, Crispo v. Musk, 304 A.3d 567, 573 (Del. Ch. 2023) ("The benefits conveyed to third parties need not be coterminous with the rights of the promisee; rather, parties to an agreement may expressly or impliedly limit the rights of a third-party beneficiary."); NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC, 922 A.2d 417, 433 (Del. Ch. 2007) (finding that the third-party beneficiary had standing for claims regarding only one section of the contract); RESTATEMENT (SECOND) OF CONTRACTS § 309 ("Where there is a contract, the right of a beneficiary is subject to any limitations imposed by the terms of the contract."); 9 CORBIN ON CONTRACTS § 46.5 (2026) ("There can be no right in a third party beneficiary unless a contract was formed by the promisor and promisee and the beneficiary's rights are defined and limited by the contract that created those rights."); 3 E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 10.02 n.19 (2026) ("A person may, of course, have a right to enforce some, but not all, of a promisor's duties under a contract." (citing Nw. Airlines v. Crosetti Bros., 483 P.2d 70 (Or. 1971))).

Of third parties, shareholders arguably have the greatest potential claim to beneficiary status. They are, after all, the "owners" of the corporation, with a residual claim on the corporation's assets. Even for the shareholders, however, courts generally refuse to grant such status.[158] For nebulous "stakeholders," who have no direct economic claim to the corporation, the possibility is even more unlikely.

Given administrability and practicality concerns with expanding the meaning of third-party beneficiaries, courts have historically extended third-party beneficiary status under corporate contracts in only limited circumstances.[159] Even under merger agreements, for which certain third parties such as shareholders "are, undeniably, the intended economic beneficiaries of [the] agreements," courts have been reticent to confer third-party beneficiary status.[160] Merger agreements are arguably a distinct class of agreements even among corporate contracts. It is precisely the "unique aspects of merger agreements that enhances the need to recognize the contractual primacy of the board of directors in the sale context."[161] To reduce the concerns that arise when a board is faced with numerous suits from third parties under a merger agreement, "no-third-party-beneficiaries provisions are arguably entitled to greater weight in the context of merger agreements," where they are adopted ubiquitously "to prevent collective action and agency problems that would result."[162]

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[158] *See, e.g.*, *Crispo*, 304 A.3d at 575–76; Orban v. Field, No. Civ.A. 12820, 1993 WL 547187, at *9 (Del. Ch. Dec. 30, 1993) (emphasizing that "[t]he idea of shareholders having directly enforceable rights as third party beneficiaries to corporate contracts . . . is one that should be resisted"); *see also* Amirsaleh v. Bd. of Trade, No. 2822-CC, 2008 WL 4182998, at *4 (Del. Ch. Sep. 11, 2008) (discussing how the court has "previously bristled at the notion that a stockholder could have 'directly enforceable rights as third-party beneficiaries to corporate contracts'" (quoting *Orban*, 1993 WL 547187, at *9)).

[159] Notably, these extensions relate to shareholders, and not stakeholders more generally. *See* Arkansas Tchr. Ret. Sys. v. Alon USA Energy, No. 2017-0453, 2019 WL 2714331, at *12–14 (Del. Ch. June 28, 2019) (granting shareholders third-party beneficiary status); *Amirsaleh*, 2008 WL 4182998, at *4–5.

[160] *See Crispo*, 304 A.3d at 577 ("After all, merger agreements involve the payment of consideration directly to stockholders . . . . [Thus,] delivering this benefit to stockholders is typically the target corporation's purpose for entering into a merger agreement.").

[161] *Id.* For an analysis of the current use of these clauses in M&A deals, see *supra* notes 106–121 and accompanying text.

[162] *Crispo*, 304 A.3d at 577 (citing 2 ARTHUR FLEISCHER JR., GAIL WEINSTEIN & SCOTT B. LUFTGLASS, TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 19.06[C] (9th ed. 2022)); *see also* Kevin Miller, *The* ConEd *Decision—One Year Later: Significant Implications for Public Company Mergers Appear Largely Ignored*, M&A LAW. (2006) ("[B]oth acquirors and targets abhor granting third-party beneficiary rights to target shareholders for fear that such rights would deprive the acquiror and the target of the ability to control the transaction prior to the effective time and, if necessary, renegotiate the terms of a still desirable transaction following a change in circumstance."); Ryan D. Thomas & Russell E. Stair, *Revisiting* Consolidated Edison*—A Second Look at the Case That Has Many Questioning Traditional Assumptions Regarding the Availability of Shareholder Damages in Public Company Mergers*, 64 BUS. LAW. 329, 331–32 (2009) (discussing "the collective action and agency problems that would result from giving shareholders standing to sue under the merger agree-

So, perhaps the overarching question is whether stakeholders should have the right to bring suit, regardless of whether the basis is breach of fiduciary duty, breach of contract, or another claim. With a few exceptions,[163] stakeholders do not currently enjoy such a right. There would be many adverse consequences of broadly construing stakeholder enforcement rights. Doing so may infringe upon the board's authority to manage the business and affairs of the corporation.[164] Additionally, it would be neither administrable nor practical to grant stakeholders the right to sue for breach of contract as third-party beneficiaries or for breach of fiduciary duty. A proliferation of stakeholder suits would undoubtedly follow. Business would become more expensive, and the suits would result in substantial inefficiencies.[165]

There could be a middle ground between expressly granting stakeholders the ability to bring suit and prohibiting them from doing so. For example, there could be a stakeholder representative, such as the head of an employee union for the employees as a stakeholder group. This representative could be empowered

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ment"); Glenn D. West, *On Naval Ramming Bows and Contractual Boilerplate—Are Standard "No Third-Party Beneficiary" Clauses Always a Good Thing?*, WEIL, GOTSHAL & MANGES LLP: GLOB. PRIV. EQUITY WATCH (June 19, 2017), https://privateequity.weil.com/insights/naval-ramming-bows-contractual-boilerplate-standard-no-third-party-beneficiary-clauses-always-good-thing/ [perma.cc/28VU-6ZSR] (noting that "presumably . . . the motivation for the original drafter to create the 'no third-party beneficiary' clause that is now so common in most M&A-related agreements" is "to avoid any arguments by putative third-party beneficiaries regarding their status").

[163] *See* Kelli A. Alces, *Strategic Governance*, 50 ARIZ. L. REV. 1053, 1054–55 (2008) (discussing creditor rights in the "zone of insolvency"); Henry T.C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1384 (2007) (explaining that in addition to exclusive voting rights, "shareholder exclusivity as to inspection rights continues and shareholders continue to have rights to sue for fiduciary duty"); Jonathan C. Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189, 1203 (2003) ("[B]ecause directors owe fiduciary duties to the residual claimants of the firm, creditors will naturally become such claimants when the firm is insolvent. Thus, because unsecured creditors precede shareholders in order of priority (broadly understood), they become the beneficiaries of a duty."); Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No. 12150, 1991 WL 277613, at *1 (Del. Ch. Dec. 30, 1991) (discussing creditors' rights to remove a corporation's board members after default).

[164] DEL. CODE ANN, tit. 8 § 141(a) (2023) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."). The power to manage business and affairs includes the management of litigation. *See generally* Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984), *overruled on other grounds by*, Brehm v. Eisner, 746 A.2d 244 (Del. 2020); *Crispo*, 304 A.3d at 576. In the shareholder context, granting shareholders third-party beneficiary status may also undermine the demand requirement in derivative suits. *See Aronson*, 473 A.2d. at 812–14. While the context addressed in this Article is *stake*holders broadly, not solely *share*holders, the same critique of encroaching into the purview of the board applies.

[165] *See Crispo*, 304 A.3d at 576 (discussing how granting shareholder third-party beneficiary status "could lead to a proliferation of stockholder suits in a variety of commonplace scenarios, which would no doubt give rise to considerable inefficiencies both for specific entities and the system as a whole" which "in turn, could increase the cost of business for corporations"). These concerns are likely magnified in the context of stakeholders as third-party beneficiaries, because of their numerosity.

to bring any stakeholder claims that have merit given the contours of the corporate contract. Using a representative, as well as specific contractual language outlining the bounds of the commitments to stakeholders (if any),[166] would offer courts a more administrable way of evaluating stakeholder commitments.

Regardless of the approach taken, it is necessary to carefully consider which stakeholder groups should be entitled to any protection in a given deal. Stakeholders are not a monolithic group, and included among the stakeholder umbrella are customers, suppliers, users, and communities. Carefully tailoring any fiduciary duties, beneficiary status, and other protections to specific types of stakeholders can help mitigate administrability concerns associated with these approaches.

2. Disclosure & the SEC

Embedded in greenwashing is the idea that words contrary to action constitute false promises or deceptive practices. In the M&A context, this phenomenon may involve suggesting that a corporation's actions, or approval of a certain transaction, would be neutral or even beneficial to one's stakeholders.[167] In the reaction to other critical events, like an election, it may involve removing language from policies and cutting teams or programs without informing shareholders or other stakeholders of these changes despite marketing otherwise.[168] One way to increase transparency and reduce the misleading nature of current (or past) actions or statements on understanding, is simply to enhance disclosures.

Disclosure is a hallmark of corporate law. A web of disclosure-related rules in the United States arises from the premise that requiring disclosure of information will increase accountability by reducing information asymmetries.[169] This premise is unsurprising, because shareholders use the information made available to them in evaluating, in an informed manner, how to vote, or whether to buy or sell shares. Federal securities law applies to public dealmaking, and the SEC has created disclosure rules to protect investors and ensure that shareholders have all the necessary information to make an informed decision when voting on a given matter.[170] These rules require that disclosures are

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[166] *See infra* Part II.B (discussing private ordering solutions).

[167] Often, this implied impact may be through the absence of disclosure about the risks to stakeholders. *See infra* text accompanying notes 183–204.

[168] For example, one recent study of 2025 Form 10-Ks (annual reports) found that 53% of the 100 largest U.S. public companies "made material adjustments to DEI-related messaging, structure, or terminology compared to the prior year, reflecting a broader recalibration amid legal, political, and reputational pressures." Tonello, *supra* note 56.

[169] *See supra* note 23 and accompanying text.

[170] *See, e.g.*, 17 C.F.R. § 240.14a–3(a) (2025) (SEC rule requiring that companies deliver proxy statements to their shareholders simultaneously with or before soliciting proxies for their shareholder's meeting).

not misleading, whether from an affirmative disclosure or omission.[171] As a result, public companies provide their shareholders with detailed information about major transactions that require a shareholder vote.[172] Although these disclosures are intended primarily to benefit shareholders, they are publicly available and therefore accessible to employees, communities, regulators, and other stakeholders. Thus, they too can create increased accountability and more durable stakeholder commitments.[173] Disclosure obligations direct corporate focus to the matters that must be disclosed. In this sense, they are a mechanism for shaping public company behavior.[174]

A central consideration in any disclosure regime is whether it should be mandatory. Public disclosure allows shareholders and other stakeholders to better monitor corporate conduct and hold corporations to their promises.[175] Credibility and accountability effects are magnified when disclosure is mandatory and supported by consequences for inaccuracies.[176] Without mandatory disclosures, or a strong norm of disclosure, the level and nature of disclosures is likely to be suboptimal.[177] Uniform rules are necessary to allow stakeholders to assess not only a given corporation but also where it stands compared to others. Voluntary disclosures can also be thoughtfully drafted to avoid creating formal, binding commitments.[178] They therefore are not a strong accountability mechanism and many scholars have argued that disclosure must be mandatory

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[171] *See, e.g.*, Langevoort, *supra* note 20, at 90 (discussing omissions); *id.* at 117 (explaining the requirement to "volunteer any . . . information necessary to make [their statements] not misleading").

[172] *See* 17 C.F.R. § 240.14a–3(a); *see also, e.g.*, Twitter Definitive Proxy Statement, *supra* note 88 (providing disclosures in connection with a shareholder meeting to vote on Elon Musk's acquisition of Twitter).

[173] *See* Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 686–87 (2002) (arguing that the SEC's disclosure regime leads to more credible stakeholder commitment).

[174] *See* Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 861 (2003) ("[D]isclosure has become the most important method to regulate corporate managers . . . ."); Rissman & Kearney, *supra* note 23, at 10161 ("[T]he foremost method of controlling corporate ethics in the United States centers on the responsibilities that businesses have in communicating with their investors."); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 509 (2020) ("[D]isclosure operates to shape the behavior of corporate managers . . . . It deters managers from engaging in self-dealing and other aggrandizing misconduct . . . . Additionally, the obligation to disclose indirectly ensures that corporate managers will monitor the business at least sufficiently to gather, synthesize, and report the required data." (footnotes omitted)).

[175] Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORN. L. REV. 775, 822–23 (2006).

[176] *See* Rock, *supra* note 173, at 688 ("The content of the disclosure is credible because false statements are subject to significant sanctions.").

[177] *See* John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 722–23 (1984).

[178] Lipton, *supra* note 174, at 561–62 (quoting *10 Tips for 10-Ks and Proxy Statements*, MAYER BROWN LLP (Jan. 3, 2019), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/01/10-tips-for-10-ks-and-proxy-statements/files/update-10-tips_v7/fileattachment/update-10-tips_v7.pdf [perma.cc/MR4M-AKSQ]).

to have any weight.[179] Accordingly, some argue that voluntary disclosure alone is inadequate because corporations can issue social and environmental responsibility reports, or undertake certain initiatives, but not submit them to the SEC where they become subject to federal securities law requirements.[180]

To date, disclosure has focused more generally on the corporation in the ordinary course of business and not on the role of disclosures in times of change. The primary document provided to shareholders in connection with their vote on a transaction or other meaningful change requiring a shareholder vote is the proxy statement.[181] Among other things, a proxy statement will include a summary section, written in plain English, that provides an overview of the material terms of the deal.[182] This summary is intended to give shareholders enough information to understand the primary elements of the transaction and how it might impact their interests. As a general matter, it is expected that this section will also include the effects of the deal, whether it is completed or not.

Proxy statements also typically contain a section on forward-looking statements.[183] The Securities and Exchange Acts contain safe harbors for certain forward-looking statements.[184] This section is intended to help the target company protect itself from liability for non-historical information in the proxy statement.[185] Common forward-looking statements in M&A deals include the expected closing date of the transaction, the ability to obtain financ-

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[179] *See, e.g.*, Charles Anthony Smith, *Credible Commitments and the Early American Supreme Court*, 42 LAW & SOC'Y REV. 75, 79 (2008) ("Credibility is a critical aspect of any commitment because 'a promise is not valuable unless its beneficiary believes that it will be kept.'" (quoting DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 51 (1994))).

[180] SOL KWON, INV. RESP. RSCH. CTR. INST., STATE OF INTEGRATED AND SUSTAINABILITY REPORTING 2018, at 27 (Dec. 3, 2018), [perma.cc/4YB9-9N2S] (discussing sustainability disclosure practices among the S&P 500).

[181] *See* 17 C.F.R. § 240.14a–3(a) (2025) (requiring that companies deliver proxy statements to their shareholders in connection with shareholder meetings). Target companies must first file a preliminary and definitive proxy statement with the SEC before delivering the final definitive proxy materials to their shareholders. *See id.* § 240.14a-6. The information requirements for proxy statements are set out in 17 C.F.R. § 240.14a-101 Schedule 14A, which often refers to items in Regulation S-K, which is a key source of disclosure requirements in proxy materials, periodic reports, and other filings under the Securities Act and Exchange Act. *Id.* There are additional rules that regulate other merger-related communications not in a proxy (or registration) statement. *See id.* § 230.165; *id.* § 230.425; *id.* § 240.14a-12.

[182] *Id.* § 240.14a-101 Schedule 14A, Item 14(b)(1) (2025); *id.* § 229.1001 (setting out "plain English" requirement).

[183] The exact title of this section will vary, and can include "Forward-Looking Statements," "Forward-Looking Information," or "Cautionary Statement Regarding Forward-Looking Statements." It typically is located after the summary or Q&A portion of the proxy statement.

[184] *See* Securities Exchange Act of 1934, § 21E (codified as amended at 15 U.S.C. § 78u-5) (providing safe harbors for forward-looking statements); Securities Act of 1933, § 27A (codified as amended at 15 U.S.C. § 77z-2) (same). These safe harbors apply to both written and oral forward-looking statements as long as they meet certain requirements.

[185] *See* 15 U.S.C. § 78u-5; *id.* § 77z-2.

ing and regulatory approvals, and statements about future events or financial performance. The underlying principle for protection from liability in forward-looking statements is that a given company may make statements relating to the future, which it cannot know with certainty, but which may be helpful in informing a shareholder vote nonetheless. When it comes to forward-looking statements, disclosures typically only focus on stakeholder interests to the extent that they may correlate with shareholder value, such as the potential that it may be difficult to recruit or retain employees following the transaction. Companies generally do not account for statements related to the future that focus on stakeholder impact—for example, the possibility that the post-closing leadership may adopt different positions on the treatment of employees, moderation of content, protection of consumer and user data, and the like.

Generally, proxy statements expressly provide that all forward-looking statements are qualified by the information contained in the filing and incorporate by reference other recent filings, such as the Form 10-K (annual report) and Form 10-Q (quarterly report).[186] These other filings and reports also have a section titled "Risk Factors" that identifies risks faced by the company—material factors that may make investing in the company speculative or risky.[187] For each risk factor, the company generally provides a caption in bold typeface that describes the risk in one sentence, followed by an explanation of the risk and how it may impact the company.[188] Risk factors often include company-specific risks,[189] industry-related risks,[190] risks related to different laws and policies,[191] risks related to stock ownership,[192] and other risks.[193] Companies generally include risks related to fundamental changes insofar as they relate to financial performance, but they generally omit other risks faced by stakeholders.[194]

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[186] *See, e.g.*, Twitter Definitive Proxy Statement, *supra* note 88, at 33.

[187] *See generally* 17 C.F.R. § 229.105 ("Where appropriate, provide under the caption 'Risk Factors' a discussion of the material factors that make an investment in the registrant or offering speculative or risky."); *see also Item 1A, Part I, Form 10-K* (referring to *Item 105, Regulation S-K*), https://www.sec.gov/about/forms/form10-k.pdf.

[188] *See, e.g.*, ALPHABET, INC., Form 10-K (Annual Report) at 11–24 (2023), https://www.sec.gov/Archives/edgar/data/1652044/000165204424000022/goog-20231231.htm [perma.cc/RL9L-B2BS].

[189] *See, e.g.*, *id.* at 11 (discussing how ad blockers reduce amount of revenue from advertisers).

[190] *Id.* at 16 (discussing how liability might arise given Google's use and development of AI).

[191] *Id.* at 18–19 (discussing internationally-required ESG disclosures, the use of artificial intelligence, and a proposed EU AI Act, among other things).

[192] *Id.* at 22–23 (discussing controlling shareholders and stock price volatility).

[193] Often, these advisories are included under the heading "General Risks Factors" at the end of the Risk Factors section and can span a number of categories. *Id.* at 23–24 (discussing potential inability to retain key personnel in a section labelled "General Risk"). For additional information about risk disclosures, see the sources cited *supra* note 186.

[194] *See, e.g.*, ALPHABET, *supra* note 188, at 23 ("Acquisitions, joint ventures, investments, and divestitures could result in operating difficulties, dilution, and other consequences that could harm our business, financial condition, and operating results.").

There have been some recent efforts to change this—most notably, the SEC's climate-related disclosure rules adopted in March 2024, which aimed to have companies regularly disclose climate-related information that may materially affect their business and investor decision-making.[195] Of course, these climate disclosure rules are not without controversy. They were met with immediate backlash and litigation,[196] culminating with the SEC, under new leadership, voting to end its defense of the climate-related rules.[197] This conduct reflects an expected shift in the agency's approach to climate-related disclosures under the Trump administration.

It is well-established that omissions are a critical concern in the disclosure regime given the focus on adequate information, transparency, and informed decision-making.[198] Omissions occur when information that is missing would be required to prevent the disclosure from being false or materially misleading.[199] To the extent that disclosure rises to the level of material misrepresentation or omission, companies risk liability from shareholder suits and SEC action as a result, which can be financially and reputationally costly even if the company ultimately prevails.[200]

Disclosures generally do not address the impact of the contemplated transaction on the company's stakeholders. That is the case regardless of whether a given corporation has, prior to the deal, established a history of embracing

[195] *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21334, 21429 (Apr. 11, 2022) (codified at 17 C.F.R. pts. 210, 229, 232, 239, 249 (2025)).

[196] Shortly after the release of this climate rule, a number of suits were filed in federal court objecting to the rule, which were later consolidated in the U.S. Court of Appeals for the Eighth Circuit. *See* Iowa v. SEC, No. 24-1522 (8th Cir.); *see also* Amélie Champsaur, Helena Grannis & Shuangjun Wang, *A New Regulatory Environment for Climate and Other ESG Reporting Rules*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 8, 2025), https://corpgov.law.harvard.edu/2025/02/08/a-new-regulatory-environment-for-climate-and-other-esg-reporting-rules/ [perma.cc/597S-7PWC] ("[L]awsuits were filed in federal court objecting to the rule on multiple bases, including that the rule is arbitrary and capricious under the Administrative Procedure Act, the rule exceeds the SEC's statutory authority and the rule violates the First Amendment by compelling political speech."). Following these legal challenges, the SEC issued a voluntary stay of the climate rules. *See* Order Issuing Stay, SEC. & EXCH. COMM'N (Apr. 4, 2024), https://www.sec.gov/files/rules/other/2024/33-11280.pdf [perma.cc/HXK5-VS8X].

[197] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Votes to End Defense of Climate Disclosure Rules (Mar. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-58 [perma.cc/GP4S-TUJJ]. On September 12, 2025, the Eighth Circuit Court of Appeals rejected the SEC's request that the court proceed with the litigation challenging the SEC's final climate disclosure rule, and the petitions for review of the rule will be held in abeyance until such time as the SEC reconsiders or renews its defense of the rule. *See* Order, Iowa v. SEC, No. 24-1522 at 6 (8th Cir., Sep. 12, 2025).

[198] For discussion on omissions, half-truths, and mistakes, see Langevoort, *supra* note 20, at 117; G. Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773 (2004); Sale, *supra* note 23, at 1052; Sale & Langevoort*, supra* note 21, at 767.

[199] *See* Sale & Langevoort*, supra* note 21, at 767.

[200] *See, e.g.*, Daniel Wiessner, *The Gap Beats Shareholder Lawsuit Over Commitment to Diversity*, REUTERS (June 2, 2023), https://www.reuters.com/legal/government/gap-beats-shareholder-lawsuit-over-commitment-diversity-2023-06-02/ [perma.cc/884D-QX6B] (discussing a suit related to Gap's disclosures on DEI).

stakeholder governance. There are, of course, some who may argue that stakeholder-related disclosures do not implicate securities fraud concerns because they are not material.[201] Others, meanwhile, may argue that voluntary disclosures fall outside of the reach of federal securities laws because they are voluntary or because such disclosure appeared outside of the company's public filings with the SEC.[202] On both fronts, courts and the SEC have in the past pushed back, indicating that non-financial information could rise to the level of materiality.[203] Moreover, the SEC (under Biden) expressed acute concern that some companies are engaging in "obfuscation and other misleading efforts" with information they voluntarily disclose related to environmental and social objectives.[204]

The natural extension of recent disclosure trends would be to apply disclosure requirements to the impact of a deal on key corporate stakeholders. In part, this is because shareholders might reasonably be misled to believe that a stakeholder-governance company will consistently act, as it historically has, with an eye to stakeholder interests and thus interpret the absence of disclosures as suggesting that the event would not adversely impact stakeholders. Moreover, for M&A deals, a transaction's impact on stakeholders can be material to a shareholder's vote because it can impact the surviving company's financial condition. This concern is particularly relevant in deals involving stock consideration (either entirely stock or mixed cash and stock) because the sell-side shareholders will likely hold stock in the surviving corporation. Even to the extent that the stakeholder impact does not affect the company's financial condition, if it nevertheless affects the reputation of the surviving company (and its shareholders, as part owners of that corporation), then the pre-deal shareholders will naturally have an interest in preserving their personal reputation as well.

The more complete the disclosure, the more informed shareholder voting will be. Those shareholders who are unconcerned with the impact on stakeholders can simply vote as they otherwise would. Those who want to consider stakeholder impact are now so empowered. Already, companies must disclose

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[201] *See* Fairfax, *supra* note 18, at 156. *But see, e.g.*, GREGORY UNRUH ET AL., MIT SLOAN MGMT. REV., INVESTING FOR A SUSTAINABLE FUTURE 2 (May 11, 2016), http://marketing.mitsmr.com/offers/SU2016/57480-MITSMR-BCG-Sustainability2016.pdf [perma.cc/24W9-P6J6] ("[A] growing number of investors are paying attention to ESG performance, as evidence mounts that sustainability related activities are material to the financial success of a company over time.").

[202] *See* Fairfax, *supra* note 18, at 156.

[203] *See In re* BP P.L.C. Sec. Litig., No. 12-cv-1256, 2013 WL 6383968, at *21 (S.D. Tex. Dec. 5, 2013) (finding that non-financial information could be material); *In re* Hi-Crush Partners L.P. Sec. Litig., No. 12-cv-8557, 2013 WL 6233561, at *18 (S.D.N.Y. Dec. 2, 2013) (same).

[204] *See* The Enhancement and Standardization of Climate-Related Disclosure for Investors, 87 Fed. Reg. 21334, 21429 (Apr. 11, 2022) (codified at 17 C.F.R. pts. 210, 229, 232, 239, 249 (2025)).

material information in connection with a transaction. It may be past time to consider the disclosures associated with corporate stakeholders.

What might these stakeholder-interest disclosures look like? Some could be placed in the risk factors section of a Form 10-K or other periodic filings (incorporated by reference). Or they could be listed in the Forward-Looking Statements section of a proxy statement. Perhaps most ideally, they would be included in both.

In part, such disclosures could have language like the following:

Proxy Statement (Forward-Looking Statement):

> Risks and uncertainties include, but are not limited to, the risks detailed in our filings with the SEC, including in our most recent filings on Forms 10-K and 10-Q, factors and matters described or incorporated by reference in this proxy statement, and the following factors:
>
> - the occurrence of any event, change or other adverse impact on our stakeholders, including employees and users, as a result of the merger or pending election.

Annual Report (Form 10-K, Risk Factors):

> **The contemplated transaction(s) may adversely affect one or more key groups of stakeholders, including employees and users of our services, which could result in financial, reputational, or other harm to the corporation**.
>
> We have implemented robust ESG, stakeholder, and DEI programs, and announced a number of related goals and initiatives. We cannot guarantee that our existing programs and policies will be preserved by the Buyer. Nor can we guarantee that any goals or initiatives will be realized on the timelines we expect or at all. Any failure, or perceived failure, by the surviving company after the transaction(s) on these matters could harm our business, reputation, financial condition, and operating results.

The language above is just one way in which companies could include relevant disclosures.[205] The exact language—and risks—accounted for would inevitably vary by firm industry, event, and the input of a company's legal advisors.

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[205] For transactions, another possibility is to include a statement within the Background to the Merger section of the proxy statement, such as the following: "In addition to considering the strategic factors described above, the Company Board considered the following additional factors, [all] of which it viewed as supporting its decision to approve the merger agreement: the anticipated customer, supplier, employee, and other stakeholder reaction to the merger."

Interestingly, in the ordinary course of business some companies in recent years have begun addressing risks to stakeholders in their 10-Ks and other filings. A few entities have adopted similar types of disclosures already, albeit focused largely on climate risk and the impact of displeased stakeholders on the business.[206]

Of course, there are number of limitations to disclosure. Agency enforcement is sporadic, and private enforcement of securities laws is often criticized for encouraging strike suits[207] and resulting in excessive damages.[208] The SEC has had the power to make these changes for years yet has chosen not to do so, in part for practicality reasons. Political pressures, especially potent amid the recent anti-ESG backlash, and administrative priorities can alter the SEC's focus, particularly as it works with limited resources and a substantial volume of disclosures.

Recent developments suggest that prosocial disclosures are unlikely to be adopted under the current administration. A wave of litigation has followed the climate-change-related disclosure rule and would undoubtedly be magnified for stakeholder disclosure obligations more broadly.[209] The Fifth Circuit has vacated SEC and Department of Labor rules relating to environmental and social matters as arbitrary and capricious under the Administrative Procedure Act.[210] Perhaps most notably, the Fifth Circuit struck down a rule proposed by

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[206] *See, e.g.*, Ferguson PLC, Proxy Statement (Form DEFM14A), at vi, 24 (Apr. 18, 2024), https://www.sec.gov/Archives/edgar/data/1832433/000119312524100105/d795458ddefm14a.htm [perma.cc/4HMA-YT5E] (identifying "[t]he costs and risk exposure relating to environmental, social and governance ('*ESG*') matters, including sustainability issues, regulatory or legal requirements, and disparate stakeholder expectations" and noting that "[c]orporate responsibility, specifically related to ESG matters, may impose additional costs and expose us to new risks"); CSI Compressco LP, Proxy Statement (Form DEFM14A), at 51 (Feb. 21, 2024), https://www.sec.gov/Archives/edgar/data/1449488/000119312524041444/d766329ddefm14a.htm#anxarom475371_111 [perma.cc/MU8Y-WZ7Q] ("Kodiak's business is subject to climate-related transitional risks, including evolving climate change legislation, regulatory initiatives and stakeholder pressures, which could result in increased operating expenses and capital costs, financial risks and potential reduction in demand for Kodiak's services."); *id.* at 55 ("Increasing scrutiny and changing stakeholder expectations in respect of ESG and sustainability practices may impose additional costs or risks."); TrueBlue Inc., Annual Report (Form 10-K), at 19 (2024), https://www.sec.gov/Archives/edgar/data/768899/000076889925000043/tbi-20241229.htm [perma.cc/P7AU-AMLL] ("Our business is subject to evolving regulations and stakeholders' expectations, including environmental, social and governance ('*ESG*') matters, that could expose us to numerous risks."). Public Benefit Corporations (PBCs) are generally more likely to have such language, as well as stakeholder-centric contractual terms. This Article, however, focuses primarily on traditional for-profit entities, but looks to PBCs insofar as they provide illustrative examples that can be imported into other legal contexts.

[207] *See, e.g.*, A.C. Pritchard, Halliburton II*: A Loser's History*, 10 DUKE J. CONST. L. & PUB. POL'Y 27, 28 (2015).

[208] Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 639 (1996).

[209] *See supra* note 196 and accompanying text; *see also* Champsaur et al., *supra* note 196, at 2 (discussing the litigation).

[210] *See supra* note 196 and accompanying text.

Nasdaq and approved by the SEC that required most Nasdaq-listed companies to maintain at least two diverse directors on the board or explain the failure to do so, and to make other board-diversity data disclosures.[211] Following this decision, Institutional Shareholder Services (ISS), a leading proxy advisory firm that provides recommendations to investors to help them decide how to vote, updated its voting guidelines to provide that it will no longer consider gender, racial, or ethnic diversity of a company's board when making director-election voting recommendations.[212]

With this background, and with Trump's nomination of Paul Atkins as Chair of the SEC, many expect less regulation and oversight from the SEC, as well as the end of any ESG-related rulemaking initiatives. Of course, corporations operating in European markets will still need to comply with the EU's and other nations' disclosure requirements.[213] But mandatory stakeholder disclosures are unlikely to be a feasible path forward in the coming years in the United States. Targeted disclosure requirements aimed only at companies engaging in greenwashing-like conduct may avoid some of the concerns associated with broad, mandatory disclosure, but such selective disclosure requirements may nonetheless allow a chilling effect to remain for prosocial conduct more generally.

Moreover, compliance with disclosure requirements can be costly, even if there are related benefits. Disclosures are already lengthy, and the longer they become, the lower the probability that shareholders will read them in their entirety—effectively, companies risk "disclosure overload."[214] To lessen the bur-

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[211] All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 164–65, 185 (5th Cir. 2024) (en banc).

[212] ISS, PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS 12–13 (Feb. 2, 2025), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=2025.2 [perma.cc/9D9C-ZYM6]. Glass Lewis, the other leading proxy advisory firm, also released a statement that it has modified its approach related to the consideration of diversity. *See* GLASS LEWIS, SUPPLEMENTAL STATEMENT ON DIVERSITY CONSIDERATIONS AT U.S. COMPANIES 2 (Mar. 2025), https://resources.glasslewis.com/hubfs/Supplementary%20Guidance/2025%20Supplemental%20Statement%20on%20Diversity%20Consideration%20at%20US%20Companies.pdf [perma.cc/SU9B-3RP2].

[213] *See generally* EUROPEAN COMM'N, CORPORATE SUSTAINABILITY REPORTING (Dec. 9, 2025), https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en [perma.cc/JAG3-YNEN] (discussing the European Union's disclosure regime for environmental and social risks). Some states have adopted disclosure rules as well. For example, in 2018 Delaware passed the Adoption of Transparency and Sustainability Standards Act, providing a certification from Delaware if companies commit to following certain standards and make them public. DEL. CODE ANN. tit. 6, §§ 5000E-5008E (effective Oct. 1, 2018). More recently, California issued draft regulations implementing SB 253 (the Climate Corporate Data Accountability Act) and SB 261 (the Climate-related Financial Risk Act). *See* CAL. AIR RES. BD., CALIFORNIA CLIMATE DISCLOSURES (2025), https://ww2.arb.ca.gov/sites/default/files/2025-12/200s%20appA_regulatory%20text.pdf [perma.cc/QW8X-2EZB].

[214] *See also* Fairfax, *supra* note 18, at 162 (noting the problem of "information overload" that may arise with increased ESG disclosure); Barnali Choudhury, *Social Disclosure*, 13 BERKELEY BUS. L.J. 183, 197–98 (2016) (discussing information overload). *But see* Virginia Harper Ho, *Disclosure*

den of any stakeholder-related disclosures, a disclosure regime could address only large corporations and cover only information that they are otherwise required to disclose to governmental entities. Corporations file a range of reports with governmental and regulatory authorities, including to the EEOC (diversity disclosures), EPA (environmental disclosures), and OSHA (workplace safety and injury information).[215] Requiring disclosure of only critical stakeholder information that a company has already gathered could reduce the initial burden on a given corporation.

Yet there remains another concern: Just because there is more disclosure does not mean there is better-quality disclosure, or that more disclosure will result in more optimal outcomes.[216] Disclosure can "give the appearance of 'doing something'" without really doing anything.[217] It may lead to companies using boilerplate language that is not properly tailored to each company.[218] To be sure, lack of individual tailoring is a significant concern in risk and other disclosures, especially given the well-documented impact that the drafting law firm can have on the terms through its use of precedents.[219]

More disclosure may also lead to more shareholder suits, many of which would no doubt be dismissed, but not before slowing down the system and using corporate resources. The substance of any disclosures, and the sheer volume of corporate stakeholders, are further challenges. It is simply not possible for a corporation to identify and discuss all social issues impacting all their stakeholders. One scholar has argued that to remedy this concern, reforms

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Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release, 65 VILL. L. REV. 67, 74–78 (2020) (challenging the idea that increased disclosures are burdensome to investors).

[215] 29 C.F.R. § 1602.7 (2025) (mandating diversity disclosures to the EEOC); 40 C.F.R § 704 (2025) (mandating environmental disclosures to the EPA); 29 C.F.R. §§ 1904.7, 1904.39 (mandating workplace safety disclosures to OSHA); *see also* Lipton, *supra* note 174, at 564–65 (discussing mandatory disclosures).

[216] *See* Lipton, *supra* note 174, at 569–70 (providing that "disclosure may create a 'race to the bottom,' allowing an industry to settle on *suboptimal* norms by benchmarking poor practices against each other"); Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1127–28 (2007) (discussing potential costs of disclosure and unintended consequences); Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 624 (2013) (arguing that increased disclosure of executive pay may have increased executive pay over time, thwarting the objective of the disclosure regime); Fairfax, *supra* note 18, at 162 (noting the importance of quality, not just quantity, in disclosures).

[217] Davidoff & Hill, *supra* note 216, at 604.

[218] *See* Winden, *supra* note 76, at 1232 n.86; Fairfax, *supra* note 18, at 161–62 (discussing in context of voluntary ESG disclosures and various examples). Companies may have vague or imprecise disclosures by accidental, or as a strategic move. *See generally* Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010) (discussing strategic vagueness in a contract context).

[219] *See generally, e.g.*, John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CALIF. L. REV. 1301 (2001) (discussing the role of lawyers, and law firms, in shaping takeover defenses). This risk is not unique to stakeholder-related disclosures.

could require corporations to identify and discuss only their three most important social issues.[220] Yet many of the feasibility constraints on a disclosure regime remain.

B. For Boards, Investors, and Other Private Actors

Regardless, another channel for increasing corporate accountability for stakeholder promises is private ordering and other private action. Put differently: In addition to any regulatory considerations, private parties may contract to create durable stakeholder commitments; corporations may seek certifications from other (non-governmental) entities regarding their prosocial efforts; and shareholders may impose negative costs on corporations that renege on their commitments.

Corporations that embrace stakeholder governance can elect to certify as B Corporations (B Corp), a third-party certification widely considered to be the highest standard that a for-profit corporation can obtain for the pursuit of social objectives.[221] B Lab, a nonprofit organization, oversees this certification, which involves rigorous standards assessing a corporation's social and environmental performance.[222] Corporations must obtain a certain score across a number of stakeholder dimensions to obtain B Corp certification.[223] Once a corporation obtains B Corp certification, it must be recertified every three years.[224] Relatively few corporations voluntarily submit to the rigorous verification process and standards required for B Corp certification, and relatively few shareholders are aware of the certification and what it entails. The use of certifications such as this one can help signal that at least while the certification is maintained, the corporation's words and conduct are relatively aligned. Although corporations can easily abandon their efforts to maintain a certification when faced with times of change, the loss of the B Corp certification could result in negative market consequences that reduce the likelihood of a corporation choosing to do so.

Many players can also serve a gatekeeping role. For example, other businesses can negotiate into their contracts a right to inspect third parties. When they find an issue, whether that is wrongdoing or misleading statements, they

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[220] *See* Fisch, *supra* note 45, at 956.

[221] *See About B Corp Certification*, B LAB, https://bcorporation.net/certification [perma.cc/9GM9-SFE8]; Divyanshu Sehi, *Beyond the Badge: What the New B Corp Standards Mean for Purpose-Led Businesses*, ZEVERO (June 19, 2025), https://www.zevero.earth/blog/new-b-corp-standards [perma.cc/EV56-L2XR] ("B Corp certification is widely regarded as the gold standard for responsible business.").

[222] *See* B LAB, *supra* note 221 (looking to the "entire social and environmental impact" of the corporation).

[223] *Id.*

[224] *Id.*

can pressure or punish the perceived wrongdoer through contractual or economic means.[225] These wrongdoings could include engaging in greenwashing behavior. Proxy advisory firms, entities that help advise shareholders on their voting decisions, could also include recommendations or designations based on a corporation's stakeholder commitments and degree of greenwashing. Similarly, stock exchange rules can provide another guardrail, setting standards for corporations that choose to list on a given exchange.

With a decrease in information asymmetry, and an increase in transparency, shareholders are better equipped to hold corporations accountable to their commitments. Increasingly, shareholders care about these prosocial efforts.[226] Shareholders empowered with this information can vote down contrary proposals, vote out directors that promote misleading or disingenuous conduct, or even vote with their feet by selling off shares of stock for companies that fail to uphold their commitments. Market pressures from investors thus operate as an additional check on corporate greenwashing.

Boards have the difficult task of navigating the stakeholder landscape with competing interests and often unpredictable impacts on the financial side of the corporation. As a threshold matter, boards should begin by assessing their stakeholder impact and efforts. Awareness is critical in prioritizing among various stakeholder groups and minimizing the business risks associated with prosocial efforts. When a board determines that taking pro-stakeholder actions is appropriate, it can take those actions without relying on government authorities to lead the way.[227]

There is a range of actions a board may take to facilitate stakeholder commitments and align corporate incentives to stakeholder interests, but many popular proposals from stakeholder-governance advocates lack durable commitment in times of change. For example, one popular reform to better promote corporate action and social goals has been to tie part of executive com-

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[225] For a discussion of private corporations as public enforcers, see Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 469–72 (2020); see also Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344–45 (2004) (discussing a "new governance model" where private actors play a bigger role in regulation).

[226] *See* Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1291–95 (2020) (finding that millennials are more likely than prior generations to consider societal impact in investing decision-making).

[227] Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 139 (2019) ("Many private firms have adopted different forms of private environmental governance to improve their environmental footprints, going beyond mere compliance with rules of traditional environmental law.").

pensation to achieving these goals.[228] By doing so, executives of a given corporation are incentivized to meet these prosocial objectives.[229] Yet these efforts can be difficult to measure, the use of "soft" metrics in shaping these goals can render them virtually meaningless, and they may fail to resolve trade-off issues that arise in the consideration of stakeholder interests.[230] More saliently for the greenwashing discourse, executive-pay policies, like other stakeholder-friendly policies and programs, are often scaled back in times of transition. The use of DEI measures in executive pay fell from 75% to 67% between 2023 and 2024,[231] with more significant declines likely in the years to come. In this sense, executive compensation is as susceptible to backtracking as other commitments, in part because there is little external accountability.

Proposals to amend the charter and bylaws of the corporation or to obtain certifications are also subject to similar vulnerabilities. That is because during times of transition, such as the sale of the company, corporate control often changes hands. Any protections in the charter or bylaws can generally be easily removed when the party seeking to remove them holds most of the shares.[232] So, commitments through the traditional private ordering methods, namely the charter and bylaws, and executive compensation, are unlikely to create binding, enduring obligations following an acquisition. They are easily removed or ignored by the controller and the new board.

The reason that many of these approaches fail to prevent greenwashing is that they are internal commitments, not external obligations. Stakeholders, or their representatives, cannot successfully sue to enforce these promises. Perhaps the most promising alternative to create an enforcement mechanism and private right of action would be to turn to the use of contracts between a corporation and third parties. As illustrated in Part II, contracting parties currently

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[228] *See, e.g.*, Seymour Burchman & Mark Emanuel, *A Stakeholder Approach and Executive Compensation*, HARV. L. SCH. F. ON CORP. GOV. (Oct. 8, 2019), https://corpgov.law.harvard.edu/2019/10/08/a-stakeholder-approach-and-executive-compensation/ [perma.cc/T8WC-K5CY].

[229] *See id.*; Fairfax, *supra* note 143, at 1222; *see also* Bebchuk & Tallarita, *supra* note 28, at 147–53 (discussing the lack of CEO incentive to favor stakeholder interests above shareholder interests); Lund, *supra* note 28, at 1630–32 (discussing a tie between executive compensation and maximizing shareholder value). For additional discussion of managerial power, incentives, and compensation, see Michael B. Dorff, *Does One Hand Wash the Other? Testing the Managerial Power and Optimal Contracting Theories of Executive Compensation*, 30 J. CORP. L. 255, 257 (2005); Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002).

[230] *See* Fairfax, *supra* note 143, at 1221–22 (discussing the limitations of tying executive compensation to environmental and social commitments); David I. Walker, *The Challenge of Improving the Long-Term Focus of Executive Pay*, 51 B.C. L. REV. 435, 450–51 (2010).

[231] Andrew Ramonas, *DEI-Tied Executive Pay Loses Ground at Companies Amid Backlash,* BLOOMBERG L. (Dec. 12, 2024), https://news.bloomberglaw.com/esg/dei-tied-executive-pay-loses-ground-at-companies-amid-backlash [perma.cc/VEC2-SMKA].

[232] *See* Aguirre, *Beyond Profit*, *supra* note 16, at 2108 n.126; *see also* DEL. CODE ANN. tit. 8, § 144(a) (2023).

provide little protection for their stakeholders in times of transition.[233] One hallmark—and challenge—of dealmaking in this regard is the ability to negotiate for any such protections. On this front, however, the board has mechanisms to increase bargaining power, such as the poison pill.[234] It is also possible, as a technical matter, to draft into the contract particular protections for stakeholders.[235]

Accordingly, any mechanisms intended to hold companies to prior stakeholder commitments must be durable and enforceable even if the new board does not wish to follow them. Required disclosure by the SEC is one possible mechanism to create mandatory requirements, and so too is a contractually created right for third parties to sue. By incurring an obligation to one or more third parties, the surviving company cannot simply amend a charter to alter those obligations.

Most directly, and simply, these goals could be accomplished by conferring third-party beneficiary status on certain stakeholders. Doing so would remedy the enforcement problem and as a mechanical matter be relatively simple. The contracting parties could confer third-party beneficiary status directly through the language in the contract. But the natural concerns that arise with such an approach are the issues with administrability of potential claims and suits from so many stakeholders, defining the scope of who is a "stakeholder" for third-party beneficiary purposes, and more. Stakeholders are a broad and diverse group. Their interests may diverge. If any potential stakeholder could sue, it would be an inefficient use of time and funds that would take up substantial corporate and judicial resources.

However, a more modest scope of third-party beneficiaries could be a middle-ground solution—for example, permitting continuing employees to enforce solely the employee-matters portion.[236] Related to this prior point, existing protections for employees could be enhanced. Employees could be terminated only for cause.[237] Their hours and work-life quality could also be con-

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[233] *See supra* Part II.

[234] *See* Petrucci & Subramanian, *supra* note 16, at 130 ("Of course, the purpose of the poison pill is not to impose dilution on the potential acquirer, but rather to force a negotiation between the acquirer and the board."). Other governance mechanisms, such as a staggered board, could also increase bargaining power in a negotiation. *Id* at 131. For a discussion of bargaining power and its impact on contracts, see Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665 (2012).

[235] *See* Petrucci & Subramanian, *supra* note 16, at 133–35 (discussing contractual feasibility).

[236] A handful of companies already do this in practice, primarily for smaller M&A deals or those involving public benefit corporations or other corporations beyond traditional "for profit" entities.

[237] *See, e.g.*, Maine & Maritimes Corp., Proxy Statement (Form DEFM14A), at 64 (June 23, 2010), https://edgar.secdatabase.com/2547/119312510144467/filing-main.htm [perma.cc/U23C-GZEK] (committing, "[f]or the twelve months following the effective date of the merger, [to] refraining from imposing any involuntary termination or retirement on individuals who are their respective employees as

tractually guaranteed to avoid another Musk-like situation where hours were increased from a typical work week to 80-hour weeks,[238] 40 hours of which must be in person.[239] New and continuing employees could benefit from the provision. All of this, of course, would be a matter for negotiation.

The more interesting, and challenging, private ordering questions arise in the context beyond third-party beneficiaries. Parties can, and occasionally do, negotiate for specific stakeholder protections in their contracts.[240] What sorts of things might a party contract for? There is great flexibility, and the optimal arrangements will vary by firm and industry, but matters worth considering include:

1. Keeping the company's offices, headquarters, or other critical infrastructure (and related business, employees, etc.) in the same location.[241]
2. Dedicating funds to promote economic development in certain communities for a fixed time period.[242]
3. Maintaining the Company's amount of annual charitable giving following the transaction.[243]
4. Providing certain goods or services at a discount to customers for a limited period of time.[244]

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of the date of the Merger Agreement (other than those employees who are parties to employment contracts, and other than those terminated for 'cause' or for performance reasons)").

[238] Edward Ludlow, Kurt Wagner, Davey Alba & Paula Seligson, *Musk Warns Twitter Bankruptcy Possible as Senior Executives Exit*, BLOOMBERG (Nov. 10, 2022), https://www.bloomberg.com/news/articles/2022-11-10/musk-tells-twitter-staff-social-network-s-bankruptcy-is-possible [perma.cc/PY59-G5GP].

[239] Ian Johnston, Cristina Criddle & Hannah Murphy, *Elon Musk Bans Remote Work at Twitter*, FIN. TIMES (Nov. 10, 2022), https://www.ft.com/content/899bb401-1ab0-43aa-8ab1-102111b49568 [perma.cc/Q6ZJ-DYEP].

[240] *See infra* notes 241–245 and accompanying text. In practice, negotiation happens relatively rarely for most stakeholder groups, often only occurring in deals involving certified B Corps, PBCs, or certain foreign entities.

[241] *See, e.g.*, El Paso Electric Co., Proxy Statement (Form DEFM14A), at A-B-3 (Aug. 2, 2019), https://www.sec.gov/Archives/edgar/data/31978/000114036119014051/nc10003238x2_defm14a.htm [perma.cc/ 38L8-VV2Q] ("The Company's existing Headquarters will remain in El Paso, Texas for so long as IIF owns the Company."); Maine & Maritimes Corporation, Proxy Statement, *supra* note 237, at 64 (committing, "[f]or the twelve months following the effective date of the merger, [to] continuing to operate and staff the operations center, the three regional field offices and the call center for the Surviving Corporation's northern Maine service territory, in each case, in their present communities").

[242] *See, e.g.*, El Paso Electric Company, Proxy Statement, *supra* note 241, at 26. In another example, when Ben & Jerry's was acquired by Unilever, the parties agreed to a "social venture fund" with $5 million made available "to provide venture financing to (1) vendors owned by women, minorities or indigenous people, (2) vendors who prioritize a social change mission, and (3) such other third party entrepreneurial businesses within the scope of the Company's Social Mission Priorities." Ben & Jerry's Homemade, Inc., Proxy Statement (Form DEFM14A), at 16–17 (Apr. 18, 2000), https://www.sec.gov/Archives/edgar/data/768384/000091205700030913/defm14a.txt.

[243] *See, e.g.*, El Paso Electric Company, *supra* note 241, at 26.

[244] *See, e.g.*, *id.*

5. Refraining from firing any employees for 12 months without cause.
6. Establishing an independent, self-selecting body "for preserving and enhancing the objectives of the historical social mission of the Company."[245]
7. Using reasonable best efforts to obtain and maintain B Corp or other certifications.

These are just some of the ways in which boards (particularly sell-side boards) can incorporate stakeholder considerations into dealmaking in a durable manner that can last post-acquisition. Similar considerations and contractual language can be used in any transition point where there is an associated contract.

But a number of challenges may arise with these sorts of provisions. As a baseline matter, departing from standardized provisions in merger agreements can increase attorney hours and thus client costs. It can result in longer negotiation and drafting times, and novel, untested language may be subject to greater litigation risk.[246] Standardization, and relatively little tailoring, are attractive for these reasons.

Another challenge is the potential difficulty of convincing buyers to agree to a contract that limits their ability post-close to control the company. On this front, it is worth noting that when a lender extends funds, it often comes with strings attached, also known as restrictive debt covenants, that allow the lender to retain some ability to control or restrict the company.[247] These covenants are widely used and accepted in corporate practice. Theoretically, such covenants are not too dissimilar in the degree to which they restrict buyers.[248] Of course, without a third-party beneficiary of the applicable stakeholders (or their representative), these sorts of provisions could be subject to similar enforcement challenges as the current employee protections.

An additional consideration, especially for traditional for-profit corporations, is the conflict that can arise between a board's fiduciary duties and the covenants in the merger agreement. These two fundamental concepts can clash

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[245] Ben & Jerry's, *supra* note 242, at 30–31.

[246] *See* Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements,* 85 GEO. WASH. L. REV. 57, 61 (2017).

[247] *See* Aguirre, *supra* note 16, at 2134–38; *see also* Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1216–17 (2006); Robert P. Bartlett, III, *Shareholder Wealth Maximization as Means to an End*, 38 SEATTLE U. L. REV. 255, 257–58 (2015).

[248] Restrictive covenants in lending agreements help ensure that the borrower engages in or refrains from engaging in certain behaviors, typically related to financial matters like paying dividends. In theory, however, these covenants could address other matters beyond those directly related to finances, such as social measures. Under that type of covenant, if a corporation took or refrained from taking certain prosocial actions in violation of the covenant, then the lender could accelerate the debt.

when unexpected events arise after the merger agreement is signed, but before the transaction is completed.[249] So, what happens when a board has a contractual commitment to recommend the transaction to its shareholders, but an event occurs after entering the merger agreement that would ordinarily require the board to withdraw its recommendation in order to comply with its fiduciary duties? In response to this concern, many merger agreements contain so-called "fiduciary outs," contractual provisions that permit a party to act in a manner otherwise prohibited by the agreement, or to refrain from acting in a manner required by the agreement, if doing so is necessary to prevent a breach of the board's fiduciary duties.[250] Given the existing doctrinal landscape it may be advisable to include a fiduciary out when negotiating contractual protections for stakeholders, which could have the effect of weakening the stakeholder protections. Nevertheless, contractual protection for stakeholders remains one approach to consider for a company serious about its stakeholder commitments—and one that a handful of corporations have already incorporated with some success.[251]

Whether it is a more robust federal securities-law disclosure regime, granting stakeholders enforcement powers in the courts, or including express stakeholder provisions in a contract, each of these matters would increase accountability and transparency in governance. In part, that is because they increase the credibility of a company's promises.[252] These promises provide assurance that a corporation will honor its commitments and, at least theoretically, would result in more substantial benefits from prosocial commitments.[253]

As greenwashing conduct becomes more exposed—and less acceptable—these accountability mechanisms will also lead to the creation of norms. There is substantial research on the influence of norms on behavior.[254] Once a norm

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[249] The delay between when a deal is signed ("signing") and when a transaction is completed ("closing") can be due to many factors, including the need for antitrust approvals, shareholder votes, and third-party consents.

[250] *See* William T. Allen, *Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept*, 55 BUS. LAW. 653, 655–56 (2000); Celia R. Taylor, *"A Delicate Interplay:" Resolving the Contract and Corporate Law Tension in Mergers*, 74 TUL. L. REV. 561, 622 n.346 (1999); Christina M. Sautter, *Rethinking Contractual Limits on Fiduciary Duties*, 38 FLA. ST. U. L. REV. 55, 57–59 (2010); *see generally* Guy Firer & Adi Libson, *Out with Fiduciary Out?*, 49 J. CORP. L. 137 (2023); Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 939 (Del. 2003).

[251] *See, e.g., supra* notes 241–245 and accompanying text.

[252] *See* Smith, *supra* note 179, at 79.

[253] For applications of the credible commitment theory to corporate law, see, for example, Fairfax, *supra* note 143, at 1187–90; Gilson & Schwartz, *supra* note 149, at 120–21; Rock, *supra* note 173, at 676–77.

[254] *See* Fairfax, *supra* note 143, at 1228–40 (discussing norms); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractional Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 134–35 (1992) (discussing the "secrecy norm" in the diamond industry); David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 422–23 (2013) ("Even commercial actors sometimes prefer to structure their business agreements informally, with an

has been established, corporate actors will conform their behavior to norms irrespective of the formal rules, institutions, and sanctions at play.[255] In this sense, norms can enhance as well as supplement formal rules. As of now, the norm may be to walk back commitments, to generate goodwill with false or misleading statements about stakeholder values only to abandon those values in times of change. But the use of durable commitment mechanisms can shift those norms, creating a self-perpetuating system to reduce greenwashing.

CONCLUSION

When faced with the great debate on the purpose of the corporation, many corporations today choose stakeholder governance—at least in the ordinary course of business. Whether they choose it for charitable reasons or financial ones, the outcome remains that many corporations benefit from generating goodwill and reputation as a result. But from presidential elections to M&A deals, even the most ardent supporters of stakeholder governance often fail to protect their stakeholders when it matters most: during times of change. Underlying this greenwashing behavior are greater uncertainty, increased risk, and an implicit reorganization of stakeholder interests in the corporation. At its core, greenwashing is about a conflict between perception and reality, between words and actions. Thus, this Article has examined various mechanisms by which the two can be better aligned—such as increased disclosures, third-party certifications, and contractual terms, to promote transparency, enhance credibility, and increase accountability.

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implicit or explicit reliance on personal moral commitments and community norms rather than formal legal sanctions."); Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1, 20–22 (2004) (discussing the low-cost norms that are essential to supporting the creation of private legal systems); Adam B. Badawi, *Interpretive Preferences and the Limits of the New Formalism*, 6 BERKELEY BUS. L.J. 1, 12 (2009) (discussing the importance of a community's insularity in enforcing norms); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4 (1991) (discussing informal norms in the context of flag burning); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 216 (1994) (discussing the relationship between community norms and statutes as legal systems develop). *But see* Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 127–45 (2006) (challenging the theory that norms can effectively discipline corporate behavior).

[255] *See* Fairfax, *supra* note 143, at 1229–30.