

Woke Capital Revisited

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ABSTRACT

Inclusive corporate leadership is now at the forefront of discussions related to corporate governance. Two corporate theories help to explain the rise in prominence of diversity, equity, and inclusion (“DEI”) efforts in corporate leadership. First, an expanded definition of corporate purpose which elevated the idea of the importance of stakeholders, contributed to the momentum from business and legal quarters for broader corporate inclusion. Second, the increasing publicness of corporations—the social expectation of how large, typically public corporations should act given their position of power—also led to corporations becoming more active in the DEI space. It is against this backdrop that companies began to embrace diversity measures in form and sometimes, substance. Put simply, for companies to attract and retain talent, customers, and investors, their leaders need to lead—or at least be perceived to lead—on corporate inclusivity, especially with respect to the most visible members. However, the implementation of DEI measures within corporate leadership has not been without its challenges. Some have characterized such measures as “woke capital.” Too often, such efforts are limited to press releases, speeches, and reports on diversity statistics. In other words, companies emphasize form over substance.

This Article analyzes how the reconceiving of corporate purpose and societal pressures has impacted corporations’ implementation of DEI measures in the boardroom and throughout the corporation itself. In addition, this Article explores the question of whether a company can ground the fiduciary duties of officers and directors in its duties to society generally. As a complement to environmental, social, and governance and human capital management-related activities of companies, this Article also proposes ways to hold senior executives and boards accountable for

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diversity-related goals that are touted in public forums. It identifies legal and business mechanisms that could amplify corporate DEI commitments or spur more action.

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INTRODUCTION

Corporations continue to wield enormous influence in society, perhaps now more than ever.¹ Their increased influence has come with increased expectations. In fact, as governments around the world continue to struggle to address societal problems, “corporations are seen as having untapped potential to help mitigate these problems.”² It is not uncommon to see corporations—typically through their chief executive officers—making public comments about particular social issues.³ Those critical of corporations’ foray into the realm of social issues staunchly believe that corporations should not venture into such territory. One such critic is Senator Mitch McConnell, Senate Minority Leader, who stated:

From election law to environmentalism to radical social agendas to the Second Amendment, parts of the private sector keep dabbling in behaving like a woke parallel government . . . Corporations will invite serious consequences if they become a vehicle for far-left mobs to hijack our country from outside the constitutional order.⁴

Businesses have long been speaking out on social issues.⁵ However, in the aftermath of COVID-19, the perception that businesses should provide leadership on social issues became even more pronounced. In a May 2021 survey conducted by the Edelman Trust Barometer, trust in businesses had increased from a poll taken earlier in the year and continued to be higher than trust in non-governmental organizations (“NGOs”), government, or the media.⁶ A majority of people in each of the surveyed countries agreed that “our country will not be able to overcome

1. See, e.g., *Over 100 Companies Have Responded to Supreme Court Overturning Roe v. Wade*, CNET (July 29, 2022), <https://www.cnet.com/news/over-100-companies-have-responded-to-supreme-court-overturning-roe-v-wade/> [<https://perma.cc/Z2MX-WCMH>]; Marisa Taylor, *Inside Corporate America’s Stand Against Transgender Discrimination*, GUARDIAN (Oct. 1, 2016), <https://www.theguardian.com/sustainable-business/2016/oct/01/north-carolina-hb2-law-transgender-issues-corporate-businesses-protest> [<https://perma.cc/MCB5-RVF3>].

2. Lynn S. Paine & Suraj Srinivasan, *A Guide to the Big Ideas and Debates in Corporate Governance*, HARV. BUS. REV. (Oct. 14, 2019), <https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance> [<https://perma.cc/YK9T-AAYT>].

3. See generally Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441 (2019).

4. Nicole Goodkind, *Hundreds of CEOs Are Taking a Stand Against New Republican Voting Laws*, FORTUNE (Apr. 14, 2021), <https://fortune.com/2021/04/14/ceos-republican-voting-laws-voter-suppression-apple-amazon-blackrock-facebook-warren-buffett/> [<https://perma.cc/A8BW-UMKE>].

5. See Fan, *supra* note 3; Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REGUL. 174, 185–86 (2001) (noting that shareholder support differed for corporate governance proposals compared to social policy proposals).

6. The survey included nearly 17,000 people in fourteen countries. EDELMAN, EDELMAN TR. BAROMETER 2021, SPRING UPDATE: A WORLD IN TRAUMA 2, 5, 7, <https://www.edelman.com/sites/g/files/aatuss191/files/2021-05/2021%20Edelman%20Trust%20Barometer%20Spring%20Updat.pdf> [<https://perma.cc/XYN7-SM9W>].

our challenges without business' involvement."⁷ In fact, businesses are seen as outperforming the government in a number of different areas ranging from economic growth to addressing systemic inequalities and climate change.⁸ The trust that people—more specifically, employees—have in companies has also led to increased expectations that employers will act on issues such as automation/retraining, climate change, the infodemic,⁹ racism, and vaccine hesitancy.¹⁰ From the employee perspective, employees expect their employers to act on a variety of pressing social problems. At the top of the list were: vaccine hesitancy (84%), climate change (81%), automation (79%), the “infodemic” (79%), and racism (79%).¹¹ Respondents were less enthusiastic about CEOs getting involved in “political issues.”¹² In the U.S. and India, more people said CEOs were “too involved” in political issues than said they were “not involved enough.”¹³

Part of the reason people turn to companies for guidance is because the government has repeatedly failed to provide it. For example, in an ideal world, businesses and governments would strategize on what a return to an in-person work world would look like; instead of clear mandates, however, counties and states in the U.S. had a patchwork of policies.¹⁴ The survey also made clear that there was more support for chief executive officers (“CEOs”) to prioritize social issues over political ones.¹⁵ Even the Division of Corporation Finance tacitly acknowledged the importance of social policy on shareholder proposals when it released a staff bulletin

7. *Id.* at 26.

8. *Id.* at 22.

9. See WORLD HEALTH ORG., *Infodemic*, https://www.who.int/health-topics/infodemic/the-covid-19-infodemic#tab=tab_1 [<https://perma.cc/8D5W-HH9N>] (“An infodemic is too much information including false or misleading information in digital and physical environments during a disease outbreak. It causes confusion and risk-taking behaviours that can harm health.”).

10. EDELMAN, *supra* note 6, at 8, 15, 28. 77% of employees have a high degree of trust in their employer, and 72% have a high degree of trust in the CEO of their employer; almost eight in ten employees expect employers to act on the issues above. *Id.* at 8, 15, 28.

11. *Id.* at 28.

12. *Id.* at 30.

13. *Id.*

14. Devin Tomb, *Return to the Office? An Argument for, and Against*, MORNING BREW (Aug. 11, 2021), <https://www.morningbrew.com/daily/stories/2021/08/11/return-office-argument> [<https://perma.cc/9LZX-MGLT>]. Even when the federal government has tried to provide guidance, such as a vaccine or test mandate, it has met with defeat in courts. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022). (“The court grants the applications to stay in the Occupation Safety & Health Administration’s challenged rule mandating that employers with at least 100 employees require covered workers to receive a COVID-19 vaccine.”). *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/national-federation-of-independent-business-v-osha/> [<https://perma.cc/78WL-PCXY>].

15. EDELMAN, *supra* note 6, at 30.

noting that it would “no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.”¹⁶

In a different survey, 86% of Americans agreed that companies need to disclose more about their social impacts.¹⁷ 82% of respondents believed that the activities and behaviors of America’s largest corporations impact them and their lives.¹⁸ Eighty-two percent also believed that large companies are responsible for cultivating a diverse and inclusive workplace; 70% believed that they should protect the democratic process.¹⁹ A substantial percentage, irrespective of their political affiliation or race, said it was important to have reporting standards for corporate social and environmental data by demographic.²⁰ These increased expectations demonstrate that Americans want more transparency from the companies they support.

Ideally, companies should strike a balance between acting on social issues and supporting from behind the scenes. As CEO Richard Edelman stated, “Business must lead on areas of comparative advantage—retraining, skills development, innovation—and it must continue to take meaningful action on societal issues from sustainability to racial justice, starting with getting its own house in order.”²¹ However, he cautioned against business taking over the role of government. “[I]t must resist the

16. SEC Staff Legal Bulletin No. 14L(CF) (Nov. 3, 2021) (citing example of a proposal “raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company”; previously it would have been viewed as excludable under Rule 14a-8(i)(7)).

17. JENNIFER TONTI, JUST CAPITAL, SURVEY ANALYSIS: AMERICANS WANT TO SEE GREATER TRANSPARENCY ON ESG ISSUES AND VIEW FEDERAL REQUIREMENTS AS A KEY LEVER FOR INCREASING DISCLOSURE 5 (2022), https://com-justcapital-web-v2.s3.amazonaws.com/pdf/JUSTCapital_CorporateDisclosureStandardsSurveyReport_SSRS_Ceres_PublicCitizen_Feb2022.pdf [<https://perma.cc/F39S-QFXT>]. The survey was conducted by SSRS, a full-service survey and market research firm, on behalf of JUST Capital, a non-profit focused on measuring and improving corporate performance in the stakeholder economy, in collaboration with Public Citizen, a non-profit, consumer rights advocacy group and Ceres, a non-profit focused on sustainability. *See id.* at 1. The survey was conducted between November 30 through December 9, 2021, and included interviews of a representative sample of 1,115 U.S. adults. *Id.* “Americans believe it is important that large U.S. companies be transparent about their societal and environmental impact, and support efforts from the federal government to require standard disclosures on human capital and climate impact metrics.” *Id.*

18. *Id.* at 3.

19. *Id.* at 7.

20. *Id.* at 12. 90% total believed in the importance of such reporting standard: 86% Republican, 98% Democrats, 88% independent/other, 89% White (not Hispanic), 96% Black (not Hispanic) and 91% Hispanic. *Id.*

21. Richard Edelman, *Business: Beware the Siren Song*, EDELMAN (May 20, 2021), <https://www.edelman.com/trust/2021-trust-barometer/spring-update/business-beware-siren-song> [<https://perma.cc/6EHB-HG9U>].

temptation to be the A student doing all the work on the group project because government is slacking.”²²

The foregoing raises the important question of how we should define corporate purpose and, by extension, what the expectations should be of corporate leadership if leaders commit to certain social goals, such as diversity, equity, and inclusion (“DEI”). For decades, academics have debated about whether there should be a more narrow corporate purpose focused on maximizing shareholder wealth or a broader definition of corporate purpose covering all stakeholders.²³ “With investors, regulators, and the public calling for greater clarity of corporate purpose, boards and managers will want to give this issue serious consideration and take steps to confirm that they have a shared understanding of their purpose in governing and leading.”²⁴ One of the criticisms of boards and managers is that they are not investing enough in longer-term issues dealing with human capital management, or environmental, social, and governing concerns due to the influence of investors’ short-term expectations.²⁵ Even when they do invest in such issues, however, it is unclear how solid their commitment is.²⁶

Overlaid on top of corporate purpose is the idea of “publicness.” Corporate publicness “stresses the behavioral demands that come from social expectations about the terms and conditions that go with the exercise of corporate power.”²⁷ As Donald Langevoort points out in a prior Berle symposium article, “Many important legal scholars have drawn useful insights for how corporate law operates (or should operate) from the assumption that general social norms strongly influence corporate behavior.”²⁸ However, as the political divide has widened and stakeholders

22. *Id.*

23. Paine & Srinivasan, *supra* note 2 (“While some academics and many in the financial community continue to hold that the purpose of the corporation is to maximize the wealth of its shareholders, and should be governed to that end, others call for a more robust definition of corporate purpose.”); *see, e.g.*, Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and “Privateness” on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 378 (2020) (referencing shareholder primacy and stakeholder theory).

24. Paine & Srinivasan, *supra* note 2.

25. *See* John R. Graham, Campbell R. Harvey & Shiva Rajgopal, *The Economic Implications of Corporate Financial Reporting*, 40 J. ACCT. & ECON. 3, 3–4 (2005).

26. It is also difficult to ascertain how “well” a corporation is doing in terms of social commitments that they make publicly due to the variability in disclosure and the fact that such disclosures are not standardized. “High information asymmetry coupled with potentially adverse consequences from bad news, or even not-so-bad news, that cannot be processed with precision . . . incentivizes disclosure gamesmanship.” Langevoort, *supra* note 23, at 401.

27. *Id.* at 394.

28. *Id.*; *see, e.g.*, John C. Coffee Jr., *Do Norms Matter? A Cross-Country Examination*, 149 U. PA. L. REV. 2151 (2001) (exploring alternative explanations behind why average private benefits of control vary greatly across countries and jurisdictions).

have become vocal agitators for societal changes that extend to corporations, so has what constitutes general social norms.²⁹

Another challenge is that even if corporate purpose is broadly defined and corporations embrace their publicness, there are differing viewpoints on whether that translates into discussions of social or political issues within corporations. However, the reality is that these types of discussions often are inextricably tied to diversity and inclusion-related efforts related to corporate leadership. By casting such discussions as social or political ones, it gives corporations “cover” and the ability to ignore issues related to sexism and racism. Whenever issues of sexism and racism are discussed in the corporate context, it is not uncommon for a company to be branded as woke; in fact, “woke capitalism” is frequently used as a pejorative term.³⁰ One author has described brands that “gravitate toward low-cost, high-noise signals as [a] substitute for genuine reform, to ensure their survival” as the “iron law of woke capitalism.”³¹ Also, some private companies choose not to focus on addressing gender and racial and ethnic disparities.³² For example, although venture capital-backed startups are rife with startup biases and homophilic tendencies, their private status affords them the luxury of not addressing diversity because they are not subject to the same rules and regulations as public companies.³³ The only expectation is to build the company fast.³⁴ Given these challenges, it is important to discuss the benefits and role of diversity in the workplace, and to contemplate ways companies can amplify diversity through their business practices and policies.

This Article proceeds in five Parts and primarily focuses on inclusive corporate leadership and diversity-related initiatives in the public company context. Part I explains the value of diversity in corporations. Part II provides an overview of the evolution of corporate purpose and the advent of publicness, including an analysis of how those concepts impact

29. See generally Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 2019 UTAH L. REV. 973 (2019) (noting the impact of employees’ activism on legal scholars’ current understanding of private ordering).

30. Ross Douthat coined the term “woke capitalism.” Ross Douthat, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html> [<https://perma.cc/K729-G7ZW>]. Some have even termed woke capitalism as “synthetic activism.” Helen Lewis, *How Capitalism Drives Cancel Culture*, ATLANTIC (July 14, 2020), <https://www.theatlantic.com/international/archive/2020/07/cancel-culture-and-problem-woke-capitalism/614086/> [<https://perma.cc/9EQH-E9M4>].

31. Lewis, *supra* note 30.

32. See generally Jennifer S. Fan, *Startup Biases*, 56 U.C. DAVIS L. REV. 1423 (2023) (discussing how the prioritization of DEI issues is up to the discretion of founders and investors and often not addressed at all).

33. *Id.*

34. See Jennifer S. Fan, *The Landscape of Startup Corporate Governance in the Founder-Friendly Era*, 18 N.Y.U. J. L. & BUS. 317, 340 (2022).

diversity initiatives. Part III discusses corporate inclusivity in leadership in the public and private company contexts. Part III also examines the successes and failures of diversity-related agendas using specific case studies in the areas of the Black Lives Matter movement, voting rights, and transgender youth and the LGBTQ+ community. Part IV considers the question of whether the fiduciary duties of officers and directors can be grounded in a company's duties to society more generally. Lastly, Part V identifies legal and business mechanisms that could amplify corporate DEI commitments or spur more action.

I. VALUE OF DIVERSITY

Numerous studies demonstrate that more diversity brings myriad benefits. In particular, diversity has a positive impact on innovation. A survey involving employees at more than 1,700 companies in eight countries across a variety of sizes and industries found that “companies that reported above-average diversity on their management teams also reported innovation revenue that was nineteen percentage points higher than that of companies with below-average leadership diversity—45% of total revenue versus just 26%.”³⁵ Increased diversity also means improved financial performance.³⁶ More diverse organizations reported “EBIT margins that were [nine] percentage points higher than those of companies with below-average diversity on their management teams.”³⁷

Diversity also has a positive impact on organizations as a whole. “A growing body of evidence demonstrates that diverse, equitable, inclusive, and accessible workplaces yield higher-performing organizations.”³⁸ For example, in a global survey of nearly 22,000 public companies from ninety-one countries, “women’s presence in corporate leadership is positively correlated with firm characteristics such as size as well as national characteristics such as girls’ math scores, the absence of discriminatory attitudes toward female executives, and the availability of paternal leave.”³⁹ Notable progress has been made in some areas. Consider

35. Rocío Lorenzo, Nicole Voigt, Miki Tsusaka, Matt Krentz & Katie Abouzahr, *How Diverse Leadership Teams Boost Innovation*, BOS. CONSULTING GRP. (Jan. 23, 2018), <https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation> [https://perma.cc/2YE6-KGZY].

36. *Id.* “In both developing and developed economies, companies with above-average diversity on their leadership teams report a greater payoff from innovation and higher EBIT margins. Even more persuasive, companies can start generating gains with relatively small changes in the makeup of their senior teams.” *Id.*

37. *Id.*

38. Exec. Order No. 14035, 86 Fed. Reg. 34,593 (June 25, 2021).

39. Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey*, 1 (Peterson Inst. for Int’l Econ. Working Paper, Paper No. 16-3, 2016) https://papers.ssm.com/sol3/papers.cfm?abstract_id=2729348.

that at the end of 2021, women held 31% of all S&P 500 board seats; in 2017, women held 22% of such seats.⁴⁰ In part, this dramatic improvement in gender diversity on boards may be due to legislative actions, such as California's gender diversity quota and shareholder pressure.⁴¹

Yet, more needs to be done if we hope to achieve corporate inclusivity in leadership. Only forty-one women served as CEOs in Fortune 500 companies in 2021, representing 8.2% of all such companies.⁴² Companies also have not had great success cultivating other types of diversity, such as race, nationality, and age.⁴³ There are also concerns with “‘checking the box’ initiatives and ‘tokenism’ for the sake of board diversity.”⁴⁴ Compelling reasons exist to seek out other types of diversity. For example, a McKinsey study found that executive teams with the most ethnic diversity outperformed those with the least by 36% profitability.⁴⁵ In another study, using a multi-dimensional measure (age, gender, race, financial expertise, and number of directorships) to analyze the effect of diverse boards on corporate policies and risks, researchers found that diversity on the board reduced stock return volatility and that diverse boards “tend to adopt policies that are more stable and persistent,

40. Jeff Green, *Women Hit a Record Share of S&P 500 Board Seats in 2021*, BLOOMBERG (Jan. 25, 2022), <https://www.bloomberg.com/news/articles/2022-01-25/women-in-s-p-500-boardrooms-gained-in-male-led-sectors-last-year?tpcc=nlbroadsheet> [<https://perma.cc/2HJ9-YEXU>].

41. See discussion *infra* Section III.A regarding S.B. 826; see also Alan Murray & Bernhard Warner, *Introducing “The Modern Board 25.” These Corporate Boards Rank Highest in Expertise, Independence and Diversity*, FORTUNE: CEO DAILY (Apr. 19, 2022), <https://fortune.com/2022/04/19/modern-board-25-ceodaily-expertise-independence-diversity/> [<https://perma.cc/TRT3-QHQ9>]. Although the California law has since been overturned, it had the intended effect of diversifying boards of directors while it was in place. Alisha Haridasani Gupta, *Another California Board Diversity Law Was Struck Down, but It Already Had a Big Impact*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/business/california-board-diversity-women.html> [<https://perma.cc/HWF8-J8QZ>]. There are other reasons why boards may have diversified, but it is difficult to prove a causal link to any one factor.

42. Emma Hinchliffe, *The Female CEOs on This Year's Fortune 500 Just Broke Three All-Time Records*, FORTUNE (June 2, 2021), <https://fortune.com/2021/06/02/female-ceos-fortune-500-2021-women-ceo-list-roz-brewer-walgreens-karen-lynn-cvs-thasunda-brown-duckett-tiaa/> [<https://perma.cc/X3C8-2PWC>].

43. Stephanie J. Creary, Mary-Hunter McDonnell, Sakshi Ghai & Jared Scruggs, *When and Why Diversity Improves Your Board's Performance*, HARV. BUS. REV. (Mar. 27, 2019), <https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance?tpcc=nlbroadsheet> [<https://perma.cc/SDR7-PJN7>].

44. *Id.*

45. See SUNDIATU DIXON-FYLE, VIVIAN HUNT, KEVIN DOLAN & SARA PRINCE, MCKINSEY & CO., *DIVERSITY WINS: HOW INCLUSION MATTERS 4* (2020), <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf> [<https://perma.cc/9NZJ-6F39>]; see also *Why It Pays to Invest in Gender Diversity*, MORGAN STANLEY (May 11, 2016), <https://www.morganstanley.com/ideas/gender-diversity-investment-framework> [<https://perma.cc/86TU-RW8U>].

consistent with the board decisions being less subject to idiosyncrasies.”⁴⁶ Furthermore, such boards also invest more in research and development “and these investments are more productive, leading to greater and higher quality innovation output.”⁴⁷ More diverse boards also “lead[] to both higher profitability and firm valuations, on average.”⁴⁸ The benefits of diversity enumerated here are just a few of many. It is because of these benefits that “many investors, asset managers, proxy advisors, and others incorporate[d] diversity into their proxy voting decisions.”⁴⁹

In the startup context, one study found that startups with female founders outperformed all-male teams by 63%.⁵⁰ In another report, diverse founding teams and diverse executive teams generated higher median realized multiples on startups that were acquired or went through an initial public offering. “Diverse Founding Teams returned 3.3x, while White Founding Teams returned 2.5x. The results are even more pronounced when looking at the perceived ethnicity of the executive team. Diverse Executive Teams returned 3.3x, while White Executive Teams only returned 2.0x.”⁵¹ Startups had stronger performance over time if founded or cofounded by women, “generating 10% more in cumulative revenue over a five-year period.”⁵² Indeed, there are many benefits of diversity in the private company realm.⁵³

46. Gennaro Bernile, Vineet Bhagwat & Scott Yonker, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J. FIN. ECON. 588, 608 (2018).

47. *Id.*

48. *Id. But cf.* “[T]he response times of diverse groups tends to be slower than more homogenous groups. This can be detrimental when firms must react quickly to new information.” *Id.*

49. Allison Herren Lee, Comm’r, U.S. Sec. & Exch. Comm’n, Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference (Sept. 22, 2020), <https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922#> [<https://perma.cc/KJE8-L9K3>].

50. FIRST ROUND, FIRST ROUND 10 YEAR PROJECT, <http://10years.firstround.com/#one> [<https://perma.cc/NW85-L2LD>] (this internal study was done by First Round, a venture capital firm using ten years of proprietary data (2005–2015) from its portfolio companies).

51. Collin West, Gopinath Sundaramurthy & Marlon Nichols, *Deconstructing the Pipeline Myth & the Power of Ethically Diverse Teams*, KAUFFMAN FELLOWS (Feb. 4, 2020), https://www.kauffmanfellows.org/journal_posts/the-pipeline-myth-ethnicity-fund-managers [<https://perma.cc/F6DU-56WP>] (The Kauffman Fellows collaborated with MaC Venture Capital and used software to analyze profile images of more than 260,000 startup founders and executives in the U.S. to gather empirical evidence.).

52. Katie Abouzahr, Matt Krentz, John Harthorne & Frances Brooks Taplett, *Why Women-Owned Startups Are a Better Bet*, BOS. CONSULTING GRP. (June 6, 2018), <https://www.bcg.com/publications/2018/why-women-owned-startups-are-better-bet> [<https://perma.cc/U7B8-JUJB>] (BCG reviewed five years of investment and revenue data collected by MassChallenge, “a US-based global network of accelerators that offers startup businesses access to mentors, industry experts, and other resources.”). “For every dollar of funding, these startups generated 78 cents, while male-founded startups generated less than half that—just 31 cents.” *Id.*

53. See generally Fan, *supra* note 32, for a comprehensive overview of these benefits.

With all the benefits that diversity brings, it is easy to see why many companies are making the shift. As former Securities and Exchange Commission (“SEC”) Commissioner Allison Herren Lee aptly noted, “[D]iversity in capital markets matters. It matters for fairness, it matters to consumers, and it matters in realizing the full potential of our talent base. All of that translates to performance and matters to investors.”⁵⁴ She went on to state, “We should consider better corporate disclosure, but we should do more. We should think more broadly, more creatively, and consider every opportunity we have to promote diversity and equality of opportunity in our economy.”⁵⁵

II. CORPORATE PURPOSE AND PUBLICNESS: BUSINESSES AS FIRST MOVERS ON SOCIAL ISSUES

While many believe that shareholder primacy is still the “dominant norm in American corporate governance,”⁵⁶ the stakeholder theory of governance is gaining ground, particularly in light of an expanded conception of corporate purpose in the business world. “Statements favoring a stakeholder approach are increasingly common, and come from such unlikely suspects as the largest institutional investor in the country and the association of the CEOs of America’s largest corporations.”⁵⁷ This Part begins by showing the evolution of corporate purpose to include social good, such as diversity, and then discusses the demands of publicness primarily in the public company context with a brief discussion on publicness in the venture capital-backed, private company context.

54. Lee, *supra* note 49.

55. *Id.*

56. Langevoort, *supra* note 23, at 378. “To enthusiasts for this principal-agent model of governance, this embrace of the shareholder primacy norm in the last three or four decades has paid off in greater productivity, innovation, and capital formation. Many in financial economics and corporate law, thus, now take it as a normative given.” *Id.* Before that, in the middle of last century, “benevolent managerialism” was the governance model of choice; it was a topic of study for Adolf Berle. See generally William W. Bratton & Michael L. Wachter, *Tracking Berle’s Footsteps: The Trail of the Modern Corporation’s Last Chapter*, 33 SEATTLE U. L. REV. 849 (2010) (summarizing three phases building upon the last chapter of *The Modern Corporation’s* final chapter. The first phase examines the particular and the general reasons for community obligations, neutral technocrats, and the concept of ongoing corporate government corporation without ties to transitory political events. The second phase examines Berle’s later political economy writings. The third phase examines a world post-Berle.).

57. Brett H. McDonnell, *Stakeholder Engagement* (Minnesota Legal Stud. Research Paper No. 22-16, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4262976 (analyzing how large corporations engage with their stakeholders). *But cf.* “A common argument against the stakeholder approach is that it reduces managerial accountability.” *Id.*

A. Corporate Purpose

The Principles of Corporate Governance viewed corporate purpose through the shareholder primacy lens, but more than two decades after its issuance, the Business Roundtable announced its commitment to all stakeholders, seemingly elevating the stakeholder theory over shareholder primacy.⁵⁸

As the public face of corporations, some institutional investors, like BlackRock, have advocated for companies to have a clear corporate purpose. In his 2022 annual letter to CEOs, Larry Fink, BlackRock Chairman and CEO, stated: “It’s never been more essential for CEOs to have a consistent voice, a clear purpose, a coherent strategy, and a long-term view. Your company’s purpose is its north star in this tumultuous environment.”⁵⁹

Other countries are also broadening their conception of what encompasses corporate purpose. For example, in the U.K., The Purposeful Company Taskforce, which was established with the support of the Bank of England, espoused that the corporate purpose of companies should be to “embed[] a human and moral purpose into the DNA of a company.”⁶⁰ In order to accomplish this, it advocated for laws mandating that

58. See BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE (1997), <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf> [<https://perma.cc/N7PH-HFWW>]. The 2019 statement which embraced a stakeholder theory of corporate governance was signed by 181 chief executive officers. See *Our Commitment*, BUS. ROUNDTABLE, <https://opportunity.businessroundtable.org/ourcommitment/> [<https://perma.cc/XQN2-MZM5>]. Stakeholder theory had its origins in those who advocated for greater social responsibility in the 1970s and 1980s, but it did not gain traction like the other two theories of governance. Langevoort, *supra* note 23, at 384. It was not until 2001 and 2002, in the wake of the Enron and Worldcom debacle, that “the counternarrative had emerged, in sociology in particular, that treated agency cost theory and shareholder primacy as destructive myths that became deeply internalized as legitimate yet promoted corporate irresponsibility.” *Id.* Jill Fisch notes, “[The Business Roundtable] is a membership organization of chief executive officers, not corporations, and it is not entirely clear why a CEO’s individual support of a social policy would or should drive corporate action.” Jill E. Fisch, *Purposeful Proposals*, 1 U. CHI. BUS. L. REV. 113, 115 (2022). One study concluded, “that the BRT statement should be viewed as mostly for show rather than the harbinger of a major change.” Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 126 (2020).

59. Larry Fink, *Larry Fink’s 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/JDU4-P9FD>]. Fink then stated, “Putting your company’s purpose at the foundation of your relationships with your stakeholders is critical to long-term success.” *Id.* Specifically, “[e]mployees need to understand and connect with your purpose . . . Customers want to see and hear what you stand for . . . And shareholders need to understand the guiding principle driving your vision and mission.” *Id.*

60. *Transforming U.K. Businesses*, PURPOSEFUL CO., <https://thepurposefulcompany.org/> [<https://perma.cc/42WX-MC9U>].

companies incorporate their purpose into their articles of association.⁶¹ In France, the Pacte Law requires companies to include their purpose in their by-laws.⁶²

However, turning stakeholder-oriented corporate purpose into reality is difficult, even if corporations have the best intentions. One challenge corporations face is justifying the allocation of adequate resources to fund externalities such as costs and benefits to third parties (e.g., diversifying the workforce or using more diverse suppliers) when there are numerous competing financial interests.⁶³ Additionally, managers may be tempted to depend on standard financial tools rather than trying to achieve certain social goals related to DEI because standardized metrics of success are lacking.⁶⁴ When diversity is tied to corporate purpose, as opposed to financial resources, there are similar if not greater difficulties, such as accountability to the public.

B. Publicness

Publicness heightens corporations' focus on corporate purpose. At its core, publicness is subject to "external, socially-generated pressures in the name of legitimacy, transparency, accountability, and outsider voice."⁶⁵ Put simply, stakeholders pressure companies to do more and be more because they believe that corporations should not only pursue corporate objectives but also make progress on certain particular social issues, such as diversity in leadership, because of their influence on local,

61. *About Us*, PURPOSEFUL CO., <https://thepurposefulcompany.org/about/> [<https://perma.cc/ZL6P-CJQM>]. In 2018, the U.K. Corporate Governance Code was revised to require companies to establish their purpose, values, and strategies. FIN. REPORTING COUNCIL, THE U.K. CORP. GOVERNANCE CODE (2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> [<https://perma.cc/464E-T8GQ>].

62. *With Enactment of the Pacte Statute, All French Companies Must Be Managed in Their Corporate Interest and Management Must Consider Social and Environmental Issues Deriving from Their Activities*, GIBSON DUNN (May 23, 2019), <https://www.gibsondunn.com/with-enactment-of-pacte-statute-french-companies-must-be-managed-in-corporate-interest-consider-social-environmental-issues/> [<https://perma.cc/9HQ3-LWTG>].

63. Paine & Srinivasan, *supra* note 2.

64. Evelyn R. Carter, *DEI Initiatives Are Futile Without Accountability*, HARV. BUS. REV. (Feb. 25, 2022), <https://hbr.org/2022/02/dei-initiatives-are-futile-without-accountability> [<https://perma.cc/268K-XE5V>].

65. Langevoort, *supra* note 23, at 380. "Societal unease with the unchecked pursuit of private wealth and power underlies the distinctive demands of publicness. . . . The label describes the consequences when influential actors in society expect corporate managers and owners to pay attention to public-regarding preferences and not heedlessly pursue selfish corporate objectives." *Id.* at 385. Furthermore, "[a]s applied to corporate governance, this commonly comes in the form of insistence on more transparency, openness to others' voices, and accountability for harms that threaten or are felt by persons outside the firm." *Id.*

regional, and global economies.⁶⁶ From a corporate governance viewpoint, the assumption is that publicness leads to more disclosure (transparency), accountability for their actions, and the consideration of outside perspectives to help inform corporations' decisions about how they will approach some of the most pressing social issues of our time. "Publicness is legitimacy-based, claiming that the corporation's right to exercise large-scale economic power comes with a quid pro quo—some sociologists pushing a similar idea call it 'social license.'" ⁶⁷ Professor Langevoort observed that to the extent "[publicness] has a normative rather than purely descriptive connotation—i.e., that transparency, voice, and accountability are valuable public goods, not just common memes—it shares space with the progressive agendas of corporate social responsibility and sustainability, albeit with more emphasis on the process of governance than particular outcomes."⁶⁸

By failing to meet public expectations, corporations will face reputational and legal consequences; therefore, boards of directors must be especially attuned to such expectations.⁶⁹ Corporate scandals such as Enron and stock options backdating led to "public scrutiny and government governance" to rescue corporations from management failures.⁷⁰ "Law is a very big part of publicness, in that sometimes these inchoate demands get worked into new legal rules or enforcement of existing rules by regulators and enforcers who share, promote, or are otherwise influenced by those societal values."⁷¹ Some scholars argue that only the largest companies should be subject to disclosure obligations and governance requirements, while smaller ones have fewer such obligations and requirements.⁷²

66. "[T]here are certain norms of social legitimacy increasingly placed not only on government actors, but on private institutions that exercise substantial power and have the capacity to inflict considerable harm on society." Donald C. Langevoort & Robert B. Thompson, "Publicness" in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L. J. 337, 378 (2013).

67. Langevoort, *supra* note 23, at 385.

68. *Id.*

69. *Id.*

The idea behind publicness is simple enough. Corporations that fall short of expectations suffer reputationally in many different ways when something serious goes wrong. And the legal consequences that follow will often be harsher because of those perceived shortcomings. Thus, it behooves boards of directors in particular to understand and acknowledge the special challenges that come when avoiding and dealing with potential scandals that implicate these values.

Id.

70. Hillary A. Sale, *The New "Public" Corporation*, 74 L. & CONTEMP. PROBS. 137, 140 (2011).

71. Langevoort, *supra* note 23, at 385.

72. "The implication thus seems clear: contemporary securities regulation should have two distinct tiers of companies, with the tier of smaller companies facing only core disclosure obligations and governance requirements. Full publicness treatment should be reserved for companies with a larger societal footprint." Langevoort & Thompson, *supra* note 66, at 342.

Ultimately, the theory of the corporation is one where expectations and obligations are fluid and ever-evolving instead of fixed.⁷³ This means that officers and directors must accept this publicness and change how they “understand and do their jobs.”⁷⁴ In other words, they must realize that they are not only beholden to shareholders, but to a number of stakeholders. As Hillary Sale aptly observed, “Public corporations are not just creatures of Wall Street. They are creatures of Main Street, the media, bloggers, Congress, and the government.”⁷⁵ She further opined:

The . . . view of corporate governance as solely about the relationship between directors, officers, and shareholders—establishing the balance of power between the groups that owned and ran corporations—is giving way to a more textured, substantive, and public view of governance, a form of “publicness,” defined by scrutiny and government.⁷⁶

Unfortunately, there are challenges to measuring publicness empirically.⁷⁷ Professor Langevoort suggests that there may be proxies for publicness, such as social responsibility and sustainability, but cautions that the assessments are still in their nascent stages.⁷⁸ He also discusses the limits of publicness generally, pointing out that “transparency remains limited, accountability often fails dramatically, and outsider voices are amplified but still may not matter.”⁷⁹ Langevoort astutely notes, “We may have what Marcel Kahan and Edward Rock have described as a world of corporate governance that uses symbolic public palliatives to normalize concentrated corporate control with weak effects in terms of outcomes. They can be more about identity politics than real stakeholder influence.”⁸⁰ Thus, companies can evade the negative effects of ignoring public expectations by engaging with issues in form but not substance.

The fluid nature of what is expected of corporations under publicness, especially with respect to diversity, coupled with a renewed emphasis on corporate purpose, leaves corporations with the difficult job of constantly assessing public perceptions and controlling the narrative

73. “The result is a theory of the corporation that operates in a public sphere—public in a different way—with changing obligations and an evolving, not a fixed, definition.” Sale, *supra* note 70, at 138.

74. *Id.* “The result is a theory of the corporation that operates in a public sphere—public in a different way—with changing obligations and an evolving, not a fixed, definition.” *Id.*

75. *Id.* at 137.

76. *Id.* at 141.

77. See Langevoort, *supra* note 23, at 405.

78. *Id.*

79. *Id.*

80. *Id.* (footnote omitted). “The pushback against publicness may overwhelm it so all that would fill the vacuum in the demise of shareholder empowerment is autonomy in the gathering and distribution of rents.” *Id.*

about their action—or inaction—on social issues. If corporations do a poor job, then their reputation suffers. To avoid such harm, corporations may opt to be proactive and implement company policies drafted by lawyers intending to function as a set of internal rules and regulations. This likely means that they will not get everything right, so there may be several iterations of such rules and regulations. In part, corporations' rationale to be proactive is also to prevent government intervention or regulation of their behavior.

In sum, unlike shareholder primacy, the worth of publicness is not based on efficiency or profitability. Instead, its value lies in fostering the public good. However, its rudimentary nature means that institutional investors or scandals will be the forcing function that creates opportunities to advance the ideas associated with publicness.⁸¹ The larger stakeholder community, particularly employees and those involved in social movements which place a spotlight on diversity issues (e.g., gender, racial or ethnic, or LGBTQ+ issues), can also impact publicness and the contours of what corporate inclusivity looks like in the leadership context. It is with the benefits and limitations of corporate purpose and publicness in mind that I now turn to a few case studies of corporate inclusivity in leadership.

III. CASE STUDIES IN DEI IN CORPORATE LEADERSHIP

Perhaps in an effort to avoid public scrutiny and government regulation, many corporations have taken the prophylactic step of speaking out on a range of social issues that intersect with and have an impact on corporate inclusivity, such as the Black Lives Matter movement and the rights of transgender youth and the LGBTQ+ community.⁸² And sometimes, corporations simply speak out on matters, such as voting rights, because of their importance and connection to the DEI realm beyond corporate inclusivity. In many instances, however, corporations fall short. State governments have tried to tackle some of the issues, especially in relation to diversifying the board of directors or reporting on diversity; however, those efforts have met with varying degrees of success.⁸³

81. *Id.* at 410.

82. "Speaking out on social issues is often a calculated decision, a form of 'values and identity-driven targeted marketing' By aligning corporate values with what customers care about, companies are hoping to build a sense of loyalty and a deeper sense of personal connection." Tiffany Hsu, *Corporate Voices Get Behind "Black Lives Matter" Cause*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html> [<https://perma.cc/Z6MA-XHPX>].

83. *See, e.g.*, Maeve Allsup, *Diversity Disclosure Rules Thrive as Mandates Die in Court (1)*, BLOOMBERG L. (June 14, 2022), <https://news.bloomberglaw.com/esg/board-diversity-disclosure-rules-thrive-as-mandates-die-in-court> [<https://perma.cc/QH58-64KB>] (discussing the successful

Note, too, that leaders of both public and private companies have addressed diversity issues differently based on legal and public expectations. Subject to less regulation and transparency than their public company counterparts, private companies can evade the issue of diversifying leadership because as a general matter they are not subject to the same “publicness” that public companies are.

*A. Public Companies, Corporate Inclusivity,
and Government Regulation*

Public companies have taken measures—both mandated by law and not—to diversify their leadership ranks. Many of the efforts regarding diversity have occurred at the level of the board of directors and involved disclosure.⁸⁴ The government has provided the legal foundation upon which corporations can act.⁸⁵ Yet, government-led diversity efforts are not without challenges. Consider that the SEC approved a final rule regarding proxy disclosure enhancements which included the disclosure of diversity on the board of directors;⁸⁶ however, defining “diversity” was left in the purview of the boards or committees of the boards “to define diversity in ways that they consider appropriate.”⁸⁷ In the SEC’s amendment of Regulation S-K in 2020, “human capital” was also left undefined.⁸⁸ Therefore, it is within the company’s discretion to determine whether the disclosure of DEI measures is relevant.

Giving companies such broad discretion to determine the materiality of diversity information, however, “has led to spotty information that is not standardized, not consistent period to period, not comparable across companies, and not necessarily reliable.”⁸⁹ Furthermore, companies may be “woke washing” by “attempt[ing] to portray themselves in a light they

effects of California’s mandates, even while their legality was challenged); David Roeder, *Diversity on Illinois Corporate Board Shows Slow Growth, New Report Finds*, CHI. SUN TIMES (Mar. 1, 2022), <https://chicago.suntimes.com/business/2022/3/1/22956898/diversity-illinois-corporate-boards-2021-report-university-of-illinois> [<https://perma.cc/P72J-DVY4>] (explaining that while Illinois laws have seen some success, progress has been slow, especially for certain racial groups).

84. See Fan, *supra* note 32.

85. See *id.*

86. George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 644 (2021).

87. Thomas Lee Hazen, *Diversity on Corporate Boards: Limits of the Business Case and the Connection Between Supporting Rationales and the Appropriate Response of the Law*, 89 N.C. L. REV. 887, 896 (2011).

88. Modernization of Regulation S-K Items 101, 103, and 105, Exchange Act Release No. 33-10825, 85 Fed. Reg. 63,726 (Aug. 26, 2020) (codified at 17 C.F.R. pts. 229, 239, 240); Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009) (codified at 17 C.F.R. pts. 229, 239, 240, 249 and 274).

89. Lee, *supra* note 49.

believe will be advantageous for them on issues like diversity.”⁹⁰ In an effort to remedy these inconsistencies, the SEC approved the Nasdaq’s board diversity listing standards in 2021, which would require companies listed on Nasdaq to disclose the ethnic and gender composition of their boards beginning August 8, 2022.⁹¹ If such companies do not meet the “recommended minimum objective of one or two diverse directors (depending on board size)” they must provide an explanation.⁹² Complimentary board recruiting services will also be available to certain eligible Nasdaq-listed companies, courtesy of Nasdaq.⁹³ In announcing its approval of Nasdaq’s proposed rule, SEC Chair, Gary Gensler, noted, “[it] reflect[s] calls from investors for greater transparency about the people who lead public companies”⁹⁴ Commissioners Allison Herren Lee and Caroline A. Crenshaw jointly issued a statement that read in part: “There is a continued, harmful disparity in the representation of a wide range of communities in our capital markets. Because enhanced diversity is critically important for investors, the markets, and our economy, we hope this is a starting point for initiatives related to diversity, not the finish line.”⁹⁵ But despite the SEC’s efforts to create a system for gathering consistent and comparable information, there is a pending lawsuit against the SEC alleging that it exceeded its authority by approving the rule.⁹⁶

Congress tried to address the issue of board diversity as well, but the bills related to the issue failed to pass in 2019 and 2021.⁹⁷ The bills were

90. *Id.*

91. See Self-Regulatory Organizations Order, Exchange Act Release No. 34-92590 (Aug. 6, 2021) (order approving SR-NASDAQ-2020-081 and SR-NASDAQ-2020-082) (hereinafter Self-Regulatory Organizations Order).

92. *Enhancing Transparency on Diversity*, NASDAQ, <https://www.nasdaq.com/board-diversity> [<https://perma.cc/9QL4-C4R9>]. There is now a court case pending in the Fifth Circuit on the legality of this rule. See Jessica Corso, *5th Circ. Questions Challenge to Nasdaq Board Diversity Rule*, LAW360 (Aug. 29, 2022), <https://www.law360.com/benefits/articles/1525193/5th-circ-questions-challenge-to-nasdaq-board-diversity-rule-> [<https://perma.cc/H2WJ-HZK2>].

93. See Self-Regulatory Organizations Order, *supra* note 91.

94. Gary Gensler, Chair, U.S. Sec. & Exch. Comm’n, Statement on the Commission’s Approval of Nasdaq’s Proposal for Disclosure about Board Diversity and Proposal for Board Recruiting Service (Aug. 6, 2021), <https://www.sec.gov/news/public-statement/gensler-statement-nasdaq-proposal-disclosure-board-diversity-080621> [<https://perma.cc/6XSG-4WGL>].

95. Allison Herren Lee & Caroline Crenshaw, Comm’rs, U.S. Sec. & Exch. Comm’n, Statement on Nasdaq’s Diversity Proposals: A Positive First Step for Investors (Aug. 6, 2021), <https://www.sec.gov/news/public-statement/statement-nasdaq-diversity-080621> [<https://perma.cc/Q7ZE-HKUS>].

96. See Reply Brief with Supporting Declaration for Petitioner, All. for Fair Bd. Recruitment v. Sec. & Exch. Comm’n, No. 21-60626 (5th Cir. 2022), 2022 WL 1046875.

97. Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019); Press Release, Gregory Meeks, U.S. Rep., Rep. Meeks and Sen. Menendez Reintroduce Corporate Diversity Bill (Feb. 23, 2021), <https://meeks.house.gov/media/press-releases/rep-meeks-and-sen-menendez-reintroduce-corporate-diversity-bill> [<https://perma.cc/E8KL-V9NA>]; Majority

disclosure-focused and “mandated the disclosure of racial, ethnic, and gender composition and veteran status of boards of directors and executive officers for certain issuers of securities. Any plan to promote racial, ethnic, and gender diversity would also be required to be disclosed.”⁹⁸ In addition, the bills would have established a Diversity Advisory Group within the SEC, which “would report on strategies to expand gender, racial, and ethnic diversity among members of the board of directors.”⁹⁹

State governments also led the way in inclusive corporate leadership. Consider that California passed board diversity laws—related to gender and race and ethnicity in 2018 and 2019, respectively.¹⁰⁰ However, a 2022 court decision ruled that the board diversity law related to race and ethnicity violated the equal protection clause of California’s constitution.¹⁰¹ Likewise, California’s gender diversity law was declared unconstitutional.¹⁰² Additionally, Colorado, Illinois, Maryland, New York, Pennsylvania, and Washington passed laws related to board diversity measures.¹⁰³ Other states have proposed legislation as well.¹⁰⁴

In sum, while public companies have taken measures to diversify their ranks, the challenges posed to enacting legislation make achieving standardized, reliable, and comparable information among companies difficult.

B. Private Companies and Corporate Inclusivity

The leaders of private companies have not done much to advance diversity goals; in fact, for them, the work has just begun.¹⁰⁵ Due to their private company status, they are not subject to the same set of robust rules

Press Release, U.S. Sen. Comm. on Banking, Hous., & Urb. Affs., Menendez Introduces Bill to Promote Corporate Diversity (Feb. 23, 2021), <https://www.banking.senate.gov/newsroom/majority/menendez-bill-corporate-diversity> [<https://perma.cc/HW4L-75FM>].

98. See Fan, *supra* note 32, at 34 (footnote omitted).

99. See *id.*

100. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018) (codified as CAL. CORP. CODE § 301.3) (board gender diversity law mandating a certain number of women on public company boards for those companies headquartered in California); A.B. 979, 2020 Leg., Reg. Sess. (Cal. 2020) (codified as CAL. CORP. CODE § 301.4) (board race and ethnic diversity law mandating a certain number of board members from underrepresented communities).

101. *Crest v. Padilla*, No. 20 STCV 37513, 2022 WL 1073294 (Cal. Super Ct. Apr. 1, 2022).

102. *Crest v. Padilla*, No. 19 STCV 27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022). The State of California is now appealing the ruling. Cydney Posner, *California to Appeal Decision Striking Down Board Gender Diversity Statute*, COOLEY PUBCO (Aug. 19, 2022), <https://cooleypubco.com/2022/05/23/appeal-board-gender-diversity-statute/> [<https://perma.cc/KJL8-7RYF>]. Regardless of how the court case is decided, it has already had a positive impact on diversifying the ranks of public company boards. Gupta, *supra* note 41.

103. Fan, *supra* note 32, at 36–37.

104. *Id.* This list includes Connecticut, Hawaii, Massachusetts, Michigan, New Jersey, Oregon, and Ohio. For more details on the proposed legislation see generally *id.*

105. See Fan, *supra* note 34.

and regulations as public companies, however, some private companies—particularly unicorns—have not been immune to public pressure.¹⁰⁶ For example, when WeWork was about to go public, there was an outcry over its all-male board prior to its failed initial public offering; in response, WeWork appointed a female board member.¹⁰⁷ In my Article, *Startup Biases*, I extensively document biases in startups, and I advocate for a multi-pronged approach to diversify startups, including diversifying the founders who are funded, employees in middle and executive management, corporate boards, venture capital firms and other funders, and limited partners.¹⁰⁸ Generally, private companies are not impacted by publicness to the same degree that public companies are and therefore lag significantly behind public companies with respect to corporate inclusivity in leadership.¹⁰⁹

C. Case Studies

In 1970, Milton Friedman referred to corporate social responsibility as “pure and unadulterated socialism.”¹¹⁰ More than five decades later, however, the role corporations play in societal issues has taken center stage. Companies have been both lauded and villainized depending on how they are perceived on social issues.¹¹¹ In a recent survey, 79% of respondents said that they expect CEOs to speak out about societal challenges.¹¹² Companies themselves acknowledge this role. BlackRock CEO, Larry Fink, wrote in his annual letter to CEOs: “The stakeholders your company relies upon to deliver profits for shareholders need to hear

106. See generally Fan, *supra* note 32.

107. Meghan Morris, *WeWork's Board Shakeup Sees 3 Longtime Directors Depart. Another Is Leaving in April, and the Company Is Adding Its First Female Board Member*, BUS. INSIDER (Feb. 6, 2020), <https://www.businessinsider.com/weworks-board-shakeup-3-departures-first-woman-director-2020-2> [<https://perma.cc/5CCW-CVT5>].

108. See generally Fan, *supra* note 32.

109. *Id.*

110. Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/2S74-S59T>] (characterizing the businessman who takes on corporate social responsibility as “simultaneously legislator, executive and jurist” and someone who is “in effect a public employe[e], a civil servant, even though he remains in name an employe[e] of private enterprise”).

111. 70% of consumers believe that it is important for brands to publicize their stance on social and political issues. *#BrandsGetReal: Brands Creating Change in the Conscious Consumer Era*, SPROUT SOC., <https://sproutsocial.com/insights/data/brands-creating-change/> [<https://perma.cc/9JN4-5BRE>]. “But with so many organizations eager to voice their beliefs, the social media landscape has become saturated with brand-sponsored cause marketing and even accusations of ‘woke-washing’—or brands using social activism as an advertising ploy.” *Id.*

112. EDELMAN, *supra* note 6, at 28. The societal challenges listed include the pandemic, impact of job automation, societal issues, and local community issues. *Id.*

directly from you—to be engaged and inspired by you.”¹¹³ However, according to Fink, there is a limit to their leadership.¹¹⁴ “They don’t want to hear us, as CEOs, opine on every issue of the day, but they do need to know where we stand on the societal issues intrinsic to our companies’ long-term success.”¹¹⁵ Whether a company’s purpose and the scrutiny of its actions always translate into meaningful action or is simply a marketing tactic is up for debate. Using case studies in the areas of the Black Lives Matter movement, voting rights, and the rights of transgender youth and the LGBTQ+ community, I explore the reach and limitations of fulfilling both corporate purpose and the public scrutiny (and expectations) that accompany corporations’ positions of power. Based on the various laws discussed above and the general understanding of corporations of the value of diversity, corporations have begun to take an active role in showcasing their commitment (or lack thereof). In this way, they acknowledge the public’s expectations of them to do social good from a diversity perspective.

1. The Black Lives Matter Movement

As a result of the Black Lives Matter movement, “America’s 50 biggest public companies and their foundations collectively committed at least \$49.5 billion since [George] Floyd’s murder [in May 2020] to addressing racial inequality—an amount that appears unequaled in sheer scale.”¹¹⁶ Over 90%—or \$45.2 billion—was designated as loans, investments, and other initiatives; over half was allocated to mortgages.¹¹⁷ Bank of America and JPMorgan Chase comprised almost all of those commitments.¹¹⁸ Grants totaled \$4.2 billion of the amount pledged, with approximately \$70 million allocated to organizations involved in criminal justice reform; some grants will be disbursed over a decade-long period.¹¹⁹ The total amount of grants “represents less than 1 percent of the \$525.6 billion in net income earned by the 50 companies in the most recent year.”¹²⁰ In another study, a different amount of pledges was reported.

113. Fink, *supra* note 59.

114. *Id.*

115. *Id.*

116. Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America’s \$50 Billion Promise*, WASH. POST (Aug. 24, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/4KG3-L273>].

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

“Corporations are not set up to wield their power for the greater good as much as we give them credit for, a lot of times,” said Phillip Atiba Goff, a professor at Yale University who co-founded the Center for Policing Equity. “They are constrained by things they feel they

According to this study, as of June 24, 2021, there were \$67.186 billion pledges to Black Lives Matter, but only \$652 million—less than 1%—had been disbursed.¹²¹ Companies likely funded these Black Lives Matter initiatives to make themselves appear in both form and substance as champions of diversity. They made sweeping claims regarding the actions they would take, “pledging to be a force for societal change and to fight racism and injustice, including violence against Black Americans.”¹²² However, the reality was much different. *The Washington Post* investigation indicates that the vast majority of the funds went to loans and mortgages that companies could profit from.¹²³ Of the remaining \$4.2 billion in donations, \$2.1 billion went to economic equality.¹²⁴ As one academic pointed out, “Corporations are not set up to wield their power for the greater good as much as we give them credit for, a lot of times.”¹²⁵ In addition to the pledges, “companies said they are diversifying their workforces up to the highest-paid C-suite jobs as well as increasing their purchases of goods and services from Black-owned businesses.”¹²⁶

In contrast to the public company outpouring of support for the Black Lives Matter movement, the response from the private company realm differed dramatically. Consider that in the wake of the Black Lives Matter movement, some employees at Coinbase¹²⁷ wondered if their CEO, Brian Armstrong, would make a statement in support of the racial justice movement. Armstrong demurred when pressed and eventually a virtual “walkout” began.¹²⁸ In the aftermath of the walkout, Armstrong wrote “Black Lives Matter” on his personal Twitter feed, voiced his support for

need to do to manage their brand in a world where Black liberation does not have consensus.”

Id.

121. *Holding Corporations Accountable to Their Black Lives Matter Pledges*, GREEN AM. (Oct. 12, 2021), <https://www.greenamerica.org/blog/holding-corporations-accountable-their-black-lives-matter-pledges> [<https://perma.cc/G58E-3M62>].

122. Jan, McGregor & Hoyer, *supra* note 116.

123. *Id.*

124. *Id.* In addition, \$499 million to education, \$304 million to health, \$233 million to culture, and \$102 million in community investments, among others. *Id.*

125. *Id.* Professor Phillip Atiba Goff of Yale University went on to state: “They are constrained by things they feel they need to do to manage their brand in a world where Black liberation does not have consensus.” *Id.*

126. *Id.*

127. Coinbase is a cryptocurrency exchange that went public in April 2021. Shawn Tully, *Coinbase Seals Its Rank as the 7th Biggest New U.S. Listing of All Time*, FORTUNE (Apr. 14, 2021), <https://fortune.com/2021/04/14/coinbase-ipo-direct-listing-stock-coin-shares-7th-biggest-all-time-nasdaq/> [<https://perma.cc/H3V4-ZPZT>]; Coinbase Global Inc., Registration Statement Under the Securities Act of 1933 (Form S-1) (Feb. 25, 2021).

128. Gregory Barber, *The Turmoil over “Black Lives Matter” and Political Speech at Coinbase*, WIRED (Oct. 5, 2020), <https://www.wired.com/story/turmoil-black-lives-matter-political-speech-coinbase/> [<https://perma.cc/YAS8-SAQM>].

Black employees at Coinbase, and committed to donate to causes selected by staff.¹²⁹ However, a few weeks later, the tone had changed and new guidelines were issued restricting discussion of political issues in the workplace.¹³⁰ Armstrong then stated in a blog post that some employees interpreted the company's mission regarding equality and justice more broadly than he did.¹³¹ He believed that Coinbase was "trying to create infrastructure for the cryptoeconomy, and that yes, this would create more equality of access for all people, but [Coinbase wasn't] trying to solve all forms of inequality in the world . . . I don't think companies can succeed trying to do everything."¹³² In particular, Armstrong noted such engagement in social and political activities would be "a distraction from [Coinbase's] mission."¹³³ He cited Google and Facebook as examples of how strife and decreased productivity are created by such engagements and "have the potential to destroy a lot of value at most companies, both by being a distraction, and by creating internal division."¹³⁴ Armstrong offered severance packages for employees who disagreed that employee activism

129. *Id.*

130. *Id.*

131. Brian Armstrong, *Coinbase Is a Mission Focused Company*, COINBASE (Sept. 27, 2020), <https://blog.coinbase.com/coinbase-is-a-mission-focused-company-af882df8804> [<https://perma.cc/6HC7-CEKT>].

132. *Id.*

133. *Id.*; Robert Hackett, *There Is No Such Thing as "Apolitical Culture"*, FORTUNE (Sept. 30, 2020), <https://fortune.com/2020/09/30/coinbase-ceo-brian-armstrong-apolitical-culture/> [<https://perma.cc/VR96-LBTL>].

134. Armstrong, *supra* note 131. But compare that instead of being a distraction, such conversations at Google alleging that the company's leadership team did not handle employee complaints of sexual misconduct and discrimination appropriately led to a settlement, which included limited use of non-disclosure agreements, optional (as opposed to mandatory) arbitration, corporate governance updates, and the launch of a \$310 million program to strengthen diversity and inclusion at the company. Jennifer Elias, *Google's \$310 Million Sexual Harassment Settlement Aims to Set New Industry Standards*, CNBC (Sept. 29, 2020), <https://www.cnbc.com/2020/09/29/googles-310-million-sexual-misconduct-settlement-details.html> [<https://perma.cc/ARA8-NXS5>]. Ultimately, both Google and Facebook did increase the moderation of their respective internal message boards. Salvador Rodriguez, *Facebook Issues New Rules on Internal Employee Communication*, CNBC (Sept. 17, 2020), <https://www.cnbc.com/2020/09/17/facebook-issues-new-rules-on-internal-employee-communication-.html> [<https://perma.cc/X6P5-C7RQ>]. Google stated, "We hope this strikes the right balance between keeping Google the open culture you expect while also putting in safeguards that keep our communities welcoming all kinds of Googlers." Jennifer Elias, *Google Is Tightening Rules on Internal Message Boards as "New World Creates Urgency"*, CNBC (Sept. 16, 2020), <https://www.cnbc.com/2020/09/16/google-content-moderation-internal-message-boards-memegen.html> [<https://perma.cc/D2A4-BGMF>].

and discussing political and social issues at work should not be allowed.¹³⁵ Over sixty employees—or 5% of the company—took the exit package.¹³⁶

Basecamp’s Jason Fried followed suit.¹³⁷ He wrote a blog noting that social and political discussions would no longer be allowed on the company account.¹³⁸ In a separate post, Basecamp announced that the company would not “weigh-in publicly on societal political affairs, outside those that directly connect to the business.”¹³⁹ Over a dozen employees left after the company’s announcement, many of them citing “recent changes and new policies” as the reason for their respective departures.¹⁴⁰

Furthermore, after Derek Chauvin’s guilty verdict in the murder of George Floyd, CEOs of companies offered their thoughts in various mediums—tweets, press releases, and the like:

- In a Facebook post, Mark Zuckerberg wrote, “Right now I’m thinking of George Floyd, his family and those who knew him. I hope this verdict brings some measure of comfort to them We stand in solidarity with you, knowing that this is part of a bigger struggle against racism and injustice.”¹⁴¹ To some, these words rang hollow.¹⁴²
- In a tweet, Mary Barra, General Motors CEO, stated, “While the guilty verdicts in the trial seeking justice for George Floyd are a step in the fight against bias and injustice, we must remain

135. Kate Rooney, *Coinbase CEO Discourages Politics at Work, Offers Generous Severance to Employees Who Want to Quit*, CNBC (Sept. 30, 2020), <https://www.cnbc.com/2020/09/30/coinbase-ceo-offers-severance-to-employees-leaving-over-politics.html> [<https://perma.cc/9JU3-BL35>].

136. The number may have been even higher since conversations were ongoing at the time the article was published. Rachel Sandler, *60 Employees Leave Coinbase over CEO’s Pledge to Be Apolitical*, FORBES (Oct. 8, 2020), <https://www.forbes.com/sites/rachelsandler/2020/10/08/60-employees-leave-coinbase-over-ceos-pledge-to-be-apolitical/?sh=78a2bc7a5a06> [<https://perma.cc/3H42-2RY5>].

137. Basecamp is a private company that develops workplace productivity software. *We the Basecamp!*, BASECAMP, <https://basecamp.com/about> [<https://perma.cc/GW4W-K8HY>].

138. Jason Fried, *Changes at Basecamp*, HEY (Apr. 26, 2021), <https://world.hey.com/jason/changes-at-basecamp-7f32afc5> [<https://perma.cc/JQZ6-5MAU>].

139. David Heinemeier Hansson, *Basecamp’s New Etiquette Regarding Societal Politics at Work*, HEY (Apr. 26, 2021), <https://world.hey.com/dhh/basecamp-s-new-etiquette-regarding-societal-politics-at-work-b44bef69> [<https://perma.cc/WU9K-9XB4>].

140. Ellen Huet & Bloomberg, *Basecamp’s Ban on Political Talk Prompts Wave of Employees to Quit*, FORTUNE (Apr. 30, 2021), https://fortune.com/2021/04/30/basecamp-employee-exodus-political-talk-ban/?utm_source=email&utm_medium=newsletter&utm_campaign=data-sheet&utm_content=2021050313pm [<https://perma.cc/LA2L-XDDM>].

141. Mark Zuckerberg, FACEBOOK (Apr. 20, 2021), <https://www.facebook.com/zuck/posts/10112914985991341> [<https://perma.cc/B9ML-KV2D>].

142. *See, e.g.*, Bob Grewal, FACEBOOK (Apr. 20, 2021), <https://www.facebook.com/zuck/posts/10112914985991341> [<https://perma.cc/B9ML-KV2D>] (response to Zuckerberg post “Your words and actions don’t match.”).

determined to drive meaningful, deliberate change on a broad scale.”¹⁴³

- Salesforce tweeted, “Today’s verdict was a defining & important moment. We recognize this does not make up for so much loss and injustice experienced by the Black community. George Floyd should be alive today. The work continues. We will keep taking action for racial equality and a more just world.”¹⁴⁴
- Starbucks also tweeted, “We still have work to do to address systemic racism and ensure everyone has an equal chance to succeed and thrive. Black lives matter, and we stand with our Black customers and partners.”¹⁴⁵

However, the tweets and public missives did not translate into action by corporations, illustrating the limitations of publicness.

Thus, while the Black Lives Matter movement caused many public companies to publicly acknowledge and take a stance on the movement, many of these companies did not make lasting and effective policy changes, and a number of the actions taken by the companies were performative or profitable. On the other hand, many private companies made clear they intended to be uninvolved in the movement and made no changes to their policies or actions.

2. Voting Rights

When former President Donald J. Trump lost the 2020 election, and President Joseph R. Biden was declared the winner, some of America’s top chief executive officers convened “to discuss the possibility of . . . Trump’s refusing to leave office.”¹⁴⁶ Although former President Trump’s claims of “massive voter fraud and ‘illegal’ votes” were false, it led to a slew of legislation in various states to restrict voting rights.¹⁴⁷

143. Mary Barra (@mtbarra), TWITTER (Apr. 20, 2021, 2:35 PM), <https://twitter.com/mtbarra/status/1384621807781793792> [<https://perma.cc/9AVV-5BUX>].

144. Salesforce (@salesforce), TWITTER (Apr. 20, 2021, 3:40 PM), <https://twitter.com/salesforce/status/1384638234378919938> [<https://perma.cc/ZB7J-F9B2>].

145. STARBUCKS COFFEE (@Starbucks), TWITTER (Apr. 20, 2021, 6:29 PM), <https://twitter.com/Starbucks/status/1384680708271087620> [<https://perma.cc/RWH9-G546>].

146. Nicole Goodkind, *Top CEOs Secretly Met to Plan Collective Response to Trump’s Denial of Election Results*, FORTUNE (Nov. 13, 2020), <https://fortune.com/2020/11/13/trump-not-conceding-ceo-response-business-roundtable/> [<https://perma.cc/K3ZP-QDLZ>]. They had discussed using both collective public action and private discussions with Republican members of Congress to ensure the peaceful transition of power. *Id.*

147. *Id.*; see also Atlantic Council’s DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), <https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/> [<https://perma.cc/JZW4-7LES>]; Laura Hautala, *Misinformation About Election Has Flooded the Internet. Here’s How to Spot False Reports*, CNET (Nov. 11, 2020),

In forty-nine states, state legislators introduced more than 440 bills with restrictive voting provisions.¹⁴⁸ Texas, Georgia, and Arizona were the states with the highest initial number of such bills totaling forty-nine, twenty-five, and twenty-three bills, respectively, by March 2021.¹⁴⁹ For example, on March 25, 2021, Georgia's governor, Brian Kemp, signed an omnibus elections bill (SB 202) into law which limits absentee voting, restricts the availability and hours of drop boxes, reduces early voting, and allows "mass challenges" to voter eligibility, among other restrictive measures.¹⁵⁰ In light of the disproportionate impact these voting restrictions would have on the voting rights of communities of color, particularly the Black community, seventy-two Black executives (both current and retired) led by American Express CEO, Ken Chenault, and outgoing Merck CEO, Ken Frazier, signed an open letter in opposition to the bill and then rallied other chief executive officers to join their call to action.¹⁵¹ "The campaign appears to be the first time that so many powerful Black executives have organized to directly call out their peers for failing to stand up for racial justice."¹⁵² When participating in an interview discussing the efforts to fight restrictive voting laws, Chenault stated, "Corporations have to stand up. There is no middle ground."¹⁵³

Company responses varied; some of them depended on whether the company had a presence in Georgia. Microsoft announced in February 2021 that it would grow its presence in Georgia such that it would eventually be one of Microsoft's largest U.S. hubs after Puget Sound and

<https://www.cnet.com/news/politics/misinformation-about-election-fraud-has-flooded-the-internet-heres-how-to-spot-false-reports/> [<https://perma.cc/A2P5-ACY8>].

148. These numbers are accurate as of January 12, 2022. *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [<https://perma.cc/D3B8-KX7S>].

149. These numbers are accurate as of April 1, 2021. *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021> [<https://perma.cc/VLL3-MNEB>].

150. *Id.* These mass challenges allow an individual to challenge the eligibility of an unlimited number of voters. *Id.*

151. Andrew Ross Sorkin & David Gelles, *Black Executives Call on Corporations to Fight Restrictive Voting Laws*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/2021/03/31/business/voting-rights-georgia-corporations.html> [<https://perma.cc/V5LM-ZQMY>]; "Hundreds of companies . . . and executives . . . signed on to a statement opposing 'any discriminatory legislation' that would make it more difficult for Americans to vote." Goodkind, *supra* note 4. The statement was published as an ad in *The New York Times* and *Washington Post*. *Id.*

152. Sorkin & Gelles, *supra* note 151. Black Economic Alliance put out an ad as well. *We Stand for Democracy*, BLACK ECON. ALL., <https://blackeconomicalliance.org/app/uploads/2021/04/voting-rights-ad2-1234249601132.pdf> [<https://perma.cc/N7U8-KJRL>].

153. Kevin Stankiewicz, "There Is No Middle Ground"—Black CEOs Urge Companies to Oppose Restrictive Voting Laws, CNBC (Mar. 31, 2021), <https://www.cnbc.com/2021/03/31/ken-frazier-black-ceos-urge-firms-to-oppose-restrictive-voting-laws.html> [<https://perma.cc/UTK7-BLKP>].

Silicon Valley.¹⁵⁴ Brad Smith, President and Vice Chair of Microsoft, spoke out against the law via Twitter even before it was passed.¹⁵⁵ After the law's passage, he said, "We are concerned by the law's impact on communities of color, on every voter, and on our employees and their families."¹⁵⁶ Smith further stated, "We share the views of other corporate leaders that it's not only right but essential for the business community to stand together in opposition to the harmful provisions and other similar legislation that may be considered elsewhere."¹⁵⁷

In making statements condemning the Georgia law, many companies avoided naming Georgia directly.¹⁵⁸ Initially, they did not threaten to boycott doing business in particular states like they did when states were contemplating so-called bathroom bills, which discriminated against those who identify as transgender.¹⁵⁹ Also, some Atlanta-based companies, such as Coca-Cola Co. and Delta Airlines, did not criticize the law until after it had already been signed.¹⁶⁰ Notably, "[n]one of the companies disclosed any concrete steps they might take in response to the law."¹⁶¹ Civil rights groups, such as the ACLU, NAACP, and Southern Poverty Law Center, are taking the lead in suing Georgia over the law.¹⁶²

154. Brad Smith, *Investing to Grow in and with Atlanta*, OFF. MICROSOFT BLOG (Feb. 11, 2021), <https://blogs.microsoft.com/blog/2021/02/11/investing-to-grow-in-and-with-atlanta/> [<https://perma.cc/E7VD-Q4VD>].

155. Brad Smith (@BradSmi), TWITTER (Mar. 22, 2021, 11:55 AM), <https://twitter.com/BradSmi/status/1374072187263533057> [<https://perma.cc/KD8V-DBZY>].

156. Brad Smith, *Why We Are Concerned About Georgia's New Election Law*, MICROSOFT ON ISSUES (Mar. 31, 2021), <https://blogs.microsoft.com/on-the-issues/2021/03/31/why-we-are-concerned-about-georgias-new-election-law/> [<https://perma.cc/T9AH-43UR>].

157. *Id.*

158. In a tweet, Cisco CEO and Chairman, Chuck Robbins, commented, "Voting is a fundamental right in our democracy. Our vote is our voice, and everyone deserves the opportunity to be heard. Governments should be working to make it easier to vote, not harder. Ensuring equal #VotingRights isn't a political issue, it's an issue of right and wrong." Chuck Robbins (@ChuckRobbins), TWITTER (Mar. 31, 2021, 9:41 AM), <https://twitter.com/ChuckRobbins/status/1377299929257873416> [<https://perma.cc/5TLW-BCRT>].

159. See Fan, *supra* note 3. However, recently, there have been discussions about boycotts. "Activists are now calling for boycotts of Delta and Coca-Cola for their tepid engagement before the Georgia law was passed." Sorkin & Gelles, *supra* note 151. "Top executives at Georgia-headquartered giants Coca-Cola and Delta Airlines, as well as the country's biggest bank, JPMorgan Chase, are now issuing public statements that call the legislation 'wrong' and 'based on a lie' and vowing unspecified action to help change it." Christopher J. Brooks, *Coca-Cola, Delta and JPMorgan Lead Companies in Condemning Georgia's Voting Law*, CBS NEWS (Mar. 31, 2021), <https://www.cbsnews.com/news/georgia-voting-law-delta-chase-ups-home-depot-jim-crow/> [<https://perma.cc/SH84-4YLH>].

160. David Shepardson & Uday Sampath Kumar, *Delta, Coca-Cola Blast Home State Georgia's Voting Restrictions as "Unacceptable"*, REUTERS (Mar. 31, 2021), <https://www.reuters.com/article/us-usa-georgia-voting-companies-idUSKBN2BN1M9> [<https://perma.cc/6RSG-3NEJ>].

161. *Id.*

162. Ivana Saric, *Civil Rights Groups Sue Georgia over Law Restricting Voter Access*, AXIOS (Mar. 30, 2021), <https://www.axios.com/civil-rights-groups-sue-georgia-voting-restrictions-bbd8b2a0-2670-404d-89b6-5c6b10da00c3.html> [<https://perma.cc/T4W3-Y6R2>]. Many of the

Although the CEOs of public companies intended to lead the way on a social issue, a nuanced understanding of the connection between voting rights and diversity made the messaging regarding corporate inclusivity more complex. The connection between corporations and voting rights as they relate to corporate inclusivity in leadership is tenuous at best, and the rampant misinformation that the 2020 election was stolen means that these corporate efforts had less broad-based appeal than something like the war in Ukraine would have.¹⁶³

3. Transgender Youth and the LGBTQ+ Community

In the Centers for Disease Control and Prevention's national Youth Risk Behavior Surveillance results, the data showed that 43% of transgender youth experienced bullying on school property, and 29% attempted suicide.¹⁶⁴ "In many areas of the data, transgender students are facing more disparities in 2019 than they were in 2017."¹⁶⁵

While battles over LGBTQ+ rights may briefly have seemed to fade from the forefront of the American political scene, some governors—perhaps emboldened by the outspoken cultural conservatism popularized by Donald Trump—have recently steamrolled ahead with bills against transgender youth.¹⁶⁶ In February 2022, Texas Governor Greg Abbott signed an executive order "that equates providing treatments to trans teenagers to child abuse."¹⁶⁷ In response, the Human Rights

lawsuits have been consolidated into *In re: SB 202*. Emma Hurt, *A Guide to Georgia's Election Lawsuits*, AXIOS ATLANTA (Aug. 4, 2022), <https://www.axios.com/local/atlanta/2022/08/04/georgia-election-lawsuits-guide> [https://perma.cc/U8TS-U2ST].

163. Atlantic Council's DFRLab, *supra* note 147; Hautala, *supra* note 147; Katherine V. Smith, *How Companies Are Responding to the War in Ukraine: A Roundup*, BOS. COLL. CTR. CORP. CITIZENSHIP (May 20, 2022), <https://ccc.bc.edu/content/ccc/blog-home/2022/03/companies-respond-to-war-in-ukraine.html> [https://perma.cc/C493-H9LV]; Jill Goldenziel, *Corporations Can't Afford to Stay out of Russia's War in Ukraine*, FORBES (Mar. 6, 2022), <https://www.forbes.com/sites/jillgoldenziel/2022/03/06/corporations-cant-afford-to-stay-out-of-russias-war-in-ukraine/?sh=487198d11fcb> [https://perma.cc/RAP8-UHKL].

164. Madeleine Roberts, *New CDC Data Shows LGBTQ Youth Are More Likely to Be Bullied Than Straight Cisgender Youth*, HUM. RTS. CAMPAIGN (Aug. 26, 2020), <https://www.hrc.org/news/new-cdc-data-shows-lgbtq-youth-are-more-likely-to-be-bullied-than-straight-cisgender-youth> [https://perma.cc/V4XD-Z5RM]. See generally Michelle M. Johns, Richard Lowry, Laura T. Haderxhanaj, Catherine N. Rasberry, Leah Robin, Lamont Scales, Deborah Stone & Nicolas A. Suarez, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students—Youth Risk Behavior Survey, United States, 2015–2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 1 (2020).

165. Roberts, *supra* note 164.

166. David Leonhardt & Ian Prasad Philbrick, *Culture War, Redux*, N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/briefing/culture-war-lgbt-rights-us-politics.html> [https://perma.cc/MK7Y-RYZ4].

167. Andrew Marquardt, *Apple, Google, and Gap Join Dozens of Businesses Renouncing Texas's Anti-Trans Law*, FORTUNE (Mar. 11, 2022), <https://fortune.com/2022/03/11/apple-google-gap-companies-renounce-texas-law-trans-youth/> [https://perma.cc/87QT-2TW4]; Letter from Greg

Campaign, an LGBTQ+ civil rights organization, took out a full-page ad in *Dallas Morning News* in the form of an open letter calling on Abbott to rescind the order.¹⁶⁸ It was signed by over sixty major businesses, including Apple, Google, Gap, Meta, and Ikea.¹⁶⁹

Similarly, Florida Governor Ron DeSantis signed the bill “Parental Rights in Education”—known to opponents as the “Don’t Say Gay” bill—which bans public school teachers in Florida from instructing their classes about sexual orientation or gender identity.¹⁷⁰ “Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”¹⁷¹

Employees at Walt Disney World in Florida responded by demanding the company denounce the legislation. In response to the demands, the Walt Disney Company’s CEO, Bob Chapek, acknowledged the lack of response at an annual meeting of shareholders stating, “many are upset that we didn’t speak out against the bill.”¹⁷² Although Disney stated that leaders at the company were opposed to the bill from the beginning, they opted not to take a public position, reasoning that they could be more effective working with lawmakers from both sides of the aisle behind-the-scenes.¹⁷³ Chapek also announced that Disney would cease making political donations in Florida, which had largely benefitted

Abbott, Governor, State of Tex., to Jaime Masters, Comm’r, Tex. Dept. Fam. & Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://perma.cc/4EME-RXLF>]; Letter from Ken Paxton, Tex. Att’y Gen., to Matt Krause, Chair, House Comm. on Gen. Investigating (Feb. 18, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://perma.cc/4EME-RXLF>] (affirming an August 2021 correspondence from the Office of the Attorney General, this executive order notes that a “number of so-called ‘sex-change’ procedures constitute child abuse under existing Texas Law[.]” and that the Texas Department of Family and Protective Services is responsible for protecting children from this form of abuse). Licensed professionals such as doctors, nurses and teachers are required to report any direct contact with such children and are subject to criminal penalties for failure to report such “child abuse.” See TEX. FAM. CODE ANN. §§ 261.001(1)(A)–(D), 261.101(b), 261.109(a-1) (2017) (defining “abuse”). Members of the general public are also subject to these reporting requirements and criminal penalties for failure to report. TEX. FAM. ANN. CODE §§ 261.101(a), 261.109(a) (2017).

168. Marquardt, *supra* note 167.

169. *Id.*

170. Jaclyn Diaz, *Florida’s Governor Signs Controversial Law Opponents Dubbed “Don’t Say Gay”*, NPR (Mar. 28, 2022), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> [<https://perma.cc/PP3K-H9P4>].

171. H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

172. Elizabeth Blair, *After Protests, Disney CEO Speaks Out Against Florida’s “Don’t Say Gay” Bill*, NPR (Mar. 10, 2022), <https://www.npr.org/2022/03/08/1085130633/disney-response-florida-bill-dont-say-gay> [<https://perma.cc/Z2ER-DXZ9>].

173. *Id.* Chapek noted that they are “reassessing our approach to advocacy—including political giving in Florida and beyond.” *Id.*

Republicans.¹⁷⁴ When Disney spoke out against the bill, DeSantis dubbed it “[w]oke Disney.”¹⁷⁵ DeSantis responded to critics, claiming, “I don’t care what Hollywood says. I don’t care what big corporations say. Here I stand. I am not backing down.”¹⁷⁶

In his feud with Disney, DeSantis wanted the state legislature to review “independent special districts that were established prior to November 5, 1968.”¹⁷⁷ Notably, this includes the Reedy Creek Improvement District, where Walt Disney World is located.¹⁷⁸ The Reedy Creek Improvement District “acts as Walt Disney World’s own government with two cities and land in Orange and Osceola counties.”¹⁷⁹ Ultimately, in April 2022, DeSantis wielded his gubernatorial power by introducing a bill to repeal Disney’s self-governing status.¹⁸⁰ This has economic implications for Disney. The bill DeSantis and the Republican-controlled state legislature passed in retaliation for Disney’s comments would not only adversely impact Disney once it goes into effect, but businesses and residents of Reedy Creek will likely face increased taxes.¹⁸¹

174. Steve Contorno, *DeSantis Moves Against Disney with Push to Eliminate Special Status for Florida Theme Park*, ABC57 (Apr. 19, 2022), <https://www.abc57.com/news/desantis-moves-against-disney-with-push-to-eliminate-special-status-for-florida-theme-park> [<https://perma.cc/K27Z-5K7V>].

175. Jessica Guynn, *Why Is DeSantis Fighting Disney? It’s a Warning to “Woke” Big Business to Stay out of Culture Wars*, YAHOO! FIN. (Apr. 25, 2022), <https://finance.yahoo.com/news/stay-culture-war-disney-desantis-205615301.html>? [<https://perma.cc/W6XD-6ETQ>].

176. Diaz, *supra* note 170.

177. Contorno, *supra* note 174.

178. *Id.* The Reedy Creek Improvement Act of 1967 was passed to help establish Walt Disney World. *Id.*

179. Carolina Cardona, “*It Would Be a Disaster: Florida Lawmakers Discuss Repealing Disney’s Reedy Creek Government*,” CLICKORLANDO.COM (Mar. 30, 2022), <https://www.clickorlando.com/news/local/2022/03/30/it-would-be-a-disaster-florida-lawmakers-discuss-repealing-disneys-reedy-creek-government/> [<https://perma.cc/SJ93-CX8S>]; H.B. 3-C, 2022 Leg., Reg. Sess. (Fla. 2022).

180. Zac Anderson, *DeSantis Unchained: Disney Fight Shows a Powerful Governor, Emboldened and Vengeful*, YAHOO! NEWS (Apr. 23, 2022), <https://www.yahoo.com/news/desantis-unchained-disney-fight-shows-100139029.html> [<https://perma.cc/NU4Q-3HNL>].

181. Bill Chappell, *DeSantis Wanted to Punish Disney. Repealing Its Tax Status May Hurt Taxpayers Instead*, NPR (Apr. 22, 2022), <https://www.npr.org/2022/04/22/1094316591/disney-world-desantis-florida-counties-taxes> [<https://perma.cc/US3X-M4BP>]. A related bill provides for the formal renaming and restructuring of the Reedy Creek Improvement District, beginning in June 2023. Lawrence Mower, *Disney’s Reedy Creek to Be Renamed, Get DeSantis-Picked Board*, TAMPA BAY TIMES (Feb. 6, 2023), <https://www.tampabay.com/news/florida-politics/2023/02/06/disneys-reedy-creek-will-be-renamed-get-desantis-picked-board/> [<https://perma.cc/NM7P-HXS4>]. However, in April 2023, Disney sued DeSantis hoping to dissolve both bills on the theory that “they were enacted in retaliation for Disney’s speech in violation of the First Amendment.” Drew Taylor, *Disney Sues Florida Gov. Ron DeSantis, Citing “Targeted Campaign of Government Retaliation”*, YAHOO! (Apr. 26, 2023), <https://autos.yahoo.com/autos/disney-sues-florida-gov-ron-161042358.html> [<https://perma.cc/U9R4-7ZYC>]. The Disney-DeSantis saga is far from over: In May 2023, Disney World’s governing board, comprised of DeSantis appointees, filed a lawsuit against Disney. Mike Schneider, *DeSantis Board Approves Suing Disney in Latest Tug-of-War*, ASSOCIATED PRESS (May

Even some conservatives thought that the Republicans had gone too far. One person stated, “The governor already won. There is no need for the Republican Party of Florida to salt the earth.”¹⁸² Other companies, such as Apple, spoke out against the bill but did not face similar repercussions.¹⁸³ Note, however, that in 2021, DeSantis signed Senate Bill 7072, which allowed people to sue Big Tech companies for censorship but exempted companies that owned theme parks, such as Disney.¹⁸⁴ DeSantis now wants to remove that exemption, too.¹⁸⁵ A federal judge initially blocked the law, but Florida appealed the ruling.¹⁸⁶ The case went to the Eleventh Circuit, which affirmed in part and vacated and remanded in part on May 23, 2022.¹⁸⁷ The court held “that the district court did not abuse its discretion when it preliminarily enjoined those provisions of S.B. 7072 that are substantially likely to violate the First Amendment. But the district court did abuse its discretion when it enjoined provisions of S.B. 7072 that aren’t likely unconstitutional.”¹⁸⁸

In considering what transpired among corporations regarding these LGBTQ+ issues, it appears that although corporations denounced the actions taken against members of the LGBTQ+ community, especially transgender youth, they opted not to use their considerable clout to make LGBTQ+ individuals a part of the conversation about inclusive corporate leadership. Instead, the LGBTQ+ community was left with empty tweets and no actions. With the exception of Disney, most companies did not face the ire of their employees when they failed to speak up in support of the LGBTQ+ community, so they chose not to act. Notably, when Disney did speak out, it faced harsh consequences for its actions.

1, 2023), <https://apnews.com/article/disney-desantis-florida-theme-parks-lawsuit-8e650a78aec6d882921f61947b5ce31f> [<https://perma.cc/5MPZ-GMLA>].

182. Charles C. W. Cooke, *Ron DeSantis’s Misguided Attacks on Disney’s Legal Status*, NAT’L REV. (Apr. 20, 2022), <https://www.nationalreview.com/2022/04/ron-desantiss-misguided-attack-on-disneys-legal-status/> [<https://perma.cc/HE9V-CJAF>].

183. Apple CEO Tim Cook, who is gay, denounced these recent proposals and voiced his support for the LGBTQ+ community in a tweet: “As a proud member of the LGBTQ+ community, I am deeply concerned about laws being enacted across the country, particularly those focused on our vulnerable youth. I stand with them and the families, loved ones, and allies who support them.” Tim Cook (@tim_cook), TWITTER (Mar. 10, 2022, 5:23 P.M.), https://twitter.com/tim_cook/status/1502092765265420289 [<https://perma.cc/JT2J-78TW>]. See generally Lucas Laursen, *Apple CEO Tim Cook Again Says Being Gay “Is a Gift from God.” Why it Might Mean More This Time Around*, FORTUNE (Oct. 25, 2018), <https://fortune.com/2018/10/25/apple-tim-cook-gay-gift-from-god/> [<https://perma.cc/LKW5-YDSL>] (discussing how despite progress since 2014 regarding LGBT people and other minorities, the U.S. government has unfortunately continued to make “life more uncertain and difficult”).

184. S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

185. Contorno, *supra* note 174.

186. NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021).

187. NetChoice, LLC v. Attorney Gen., Florida, 34 F.4th 1196 (11th Cir. 2022).

188. *Id.* at 1231.

IV. APPLICABILITY OF FIDUCIARY DUTIES TO CORPORATE SOCIAL RESPONSIBILITY

In a recent paper, Cynthia A. Williams posed the following question within the environmental context: “[C]ould the internal standards of agents’ responsibilities to the firm, their fiduciary duties, be used to extend responsible action beyond the firm and through that mechanism actuate what many are calling for as the firm’s social responsibilities?”¹⁸⁹ In this Part, I examine whether the duties of care and loyalty—which directors and officers, as agents of the corporations, and shareholders are expected to act in accordance with as fiduciaries—can be applicable with respect to the firm’s corporate social responsibilities in the DEI context. I will begin by briefly describing the different duties and then analyzing whether a plausible case can be made for these fiduciary duties to apply in the social responsibility context.

A. Fiduciary Duties Under Delaware Law

1. Duty of Care

Delaware is the state where many companies choose to incorporate because it has

a modern and nationally recognized corporation statute and a well-developed case law that facilitates business planning; the respected Court of Chancery to deal with corporation law issues should they arise; an efficient and user-friendly Secretary of State’s Office; and a legislature that puts a high priority on corporation law matters and is committed to keeping Delaware’s business laws current.¹⁹⁰

Sixty-eight percent of Fortune 500 companies and 93% of the U.S.-based companies that have initial public offerings are registered in Delaware.¹⁹¹ Delaware law imposes a duty of care, which requires officers and directors to make informed business decisions by evaluating “all material information reasonably available to them.”¹⁹² A gross negligence standard

189. Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV. 1875, 1879 (2021).

190. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 10 (2007).

191. Chauncey Crail, Rob Watts & Jane Haskins, *Why Incorporate in Delaware? Benefits & Considerations*, FORBES (Aug. 7, 2022), <https://www.forbes.com/advisor/business/incorporating-in-delaware/> [https://perma.cc/6M9A-K542].

192. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). Section 141(a) of the Delaware General Corporation Law states: “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.” DEL. CODE ANN. tit. 8, § 141(a) (2022); see *The Delaware Way: Deference to the Business Judgement of Directors Who Act Loyal and Carefully*, DELAWARE,

is typically applied under Delaware law to determine whether the duty of care has been satisfied.¹⁹³ In other words, officers and directors need to reach an informed business judgment to satisfy the duty of care and protect themselves against liability.¹⁹⁴ The evidentiary presumption of the business judgment rule, even in situations where the company experiences an economic loss, means that the courts will not second-guess board decisions absent evidence of gross negligence in the board decision-making process.¹⁹⁵ Other ways to overcome the presumption include proof that “the decision was unlawful;¹⁹⁶ . . . the decision was not made in good faith;¹⁹⁷ or . . . where unconsidered inaction is the basis of the loss, that is, where there is no business decision to protect.”¹⁹⁸ Intervention by Delaware courts occurs only if the officers and directors have dramatically diverged from what would have been expected in their roles as fiduciaries.¹⁹⁹ Under Section 102(b)(7), companies may use exculpation clauses, set forth in the certificate of incorporation, to eliminate or limit

<https://corplaw.delaware.gov/delaware-way-business-judgment/> [<https://perma.cc/U9KW-EQHD>] (hereinafter *The Delaware Way*) (provides descriptions of duty of care and duty of loyalty under Delaware corporate law).

193. See, e.g., *Van Gorkom*, 488 A.2d at 873.

194. *Id.* at 874 (concluding “that the Board of Directors did not reach an informed business judgment . . . [because they] (1) did not adequately inform themselves as to Van Gorkom’s [CEO] role in forcing the ‘sale’ of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the ‘sale’ of the Company upon two hours’ consideration, without prior notice [of the meeting agenda], and without the exigency of a crisis or emergency”). In *Smith v. Van Gorkom*, the directors of Trans Union Company were found to be personally liable in approving the sale of Trans Union which was based on a two-hour meeting that only relied on Van Gorkom’s (the chairman and chief executive officer) representation of the proposed transaction; no attempt was made to independently verify the merger price. According to the Delaware Supreme Court, the lack of due care precluded the application of the business judgment rule. “The enduring legacy of *Van Gorkom* is the understanding that corporate directors should not be held financially liable for corporate board decisions that lack due care.” Bernard S. Sharfman, *The Enduring Legacy of Smith v. Van Gorkom*, 33.2 DEL. J. CORP. L. 287, 287 (2008). Furthermore, “it was not the holding of *Van Gorkom* that established this understanding (a holding that found such liability to exist), rather, it was created by the chain of events that occurred in its wake.” *Id.* at 290.

195. Under the business judgment rule, the “presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

196. Williams, *supra* note 189, at 1889 n.47 (citing the PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (Am. L. Inst. 1994)) (providing no business judgment rule protection for knowing violations of law); *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759, 763 (3d Cir. 1974) (holding the same).

197. Williams, *supra* note 189, at 1889 n.48 (citing *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 62 (Del. 2006)) (reviewing the standard for good faith determinations).

198. *Id.* at 1889 n.49 (citing *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 278 (Del. Ch. 2003)). Directors’ actions would not be protected by the business judgment rule if plaintiffs’ allegations were proven at trial.

199. *The Delaware Way*, *supra* note 192.

the personal liability of a director or officer “to the corporation or its stockholders for monetary damages for breach of fiduciary duty.”²⁰⁰ Such clauses, which cover directors and officers under certain circumstances, are not applicable to “a director or officer for any breach of the director’s or officer’s duty of loyalty to the corporation or its stockholders; a director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;” a director under Section 174 of Title 8 of the Delaware General Corporation Law; “a director or officer for any transaction from which the director or officer derived an improper personal benefit; or [a]n officer in any action by or in the right of the corporation.”²⁰¹ In certain instances, “Delaware’s ‘most onerous standard of review,’”²⁰² the entire fairness doctrine, applies. This standard is triggered when a majority stockholder is on both sides of the transaction, or a majority of the directors who are approving the transaction are interested; it shifts the burden of proof from the plaintiff to the corporate board.²⁰³ The entire fairness standard requires both robust inquiries into the economics of the transaction (fair price) and the process which culminated in the transaction (fair dealing).²⁰⁴

2. Duty of Loyalty

Pursuant to the duty of loyalty,²⁰⁵ officers and directors need to act in the best interests of the company—this requires that they act in good faith.²⁰⁶ By acting in good faith, they cannot act in their own self-interest and must refrain from actions that would harm the corporation. For example, a conflict of interest situation typically implicates the duty of loyalty.²⁰⁷ Duty of oversight claims are also a subsidiary element of the

200. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2022).

201. *Id.*

202. *In re Multiplan Corp. S’holders Litig.* 268 A.3d 784, 809 (Del. 2022).

203. Brent J. Horton, *Terra Incognita: Applying the Entire Fairness Standard of Review to Benefit Corporations*, 22 U. PA. J. BUS. L. 842, 869, 898 n.10 (2020).

204. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). The burden may be shifted back to the plaintiffs if procedural safeguards, such as the establishment of a special committee of independent and disinterested stockholders, are instituted. *See, e.g., In re MFW S’holders Litig.*, 67 A.3d 496, 500 (Del. Ch. 2013).

205. *See CertiSign Holding, Inc. v. Kulikovsky*, No. CV 12055-VCS, 2018 WL 2938311, at *15 (Del. Ch. June 7, 2018) (“A public policy, existing through the years . . . demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty [of loyalty], not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation”); *see also id.* at *15 nn.183–84.

206. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006) (clarifying the definition of “good faith”).

207. *See DEL. CODE ANN. tit. 8, § 144* (2010). A conflict of interest situation could be one where the officers or directors are on both side of a transaction. The board can reinstate the business judgment rule or demonstrate that despite the conflict of interest the transaction is entirely fair to the corporation. *See Weinberger*, 457 A.2d at 709 n.7, 710.

duty of loyalty.²⁰⁸ Since the *Caremark* decision, where the Delaware Court of Chancery held that the board of directors of Caremark did not exhibit a lack of good faith regarding their monitoring responsibilities, nor did they otherwise conscientiously permit a known violation of the corporation to occur (in this case violations by Caremark employees of federal and state laws and regulations relevant to health care providers), few oversight claims have made it past the motion to dismiss stage.²⁰⁹ However, those that have since *Marchand v. Barnhill*²¹⁰ have been met with mixed results in the Delaware courts. In *Moneygram*, Vice Chancellor Sam Glasscock III noted, “[b]ad oversight is not bad-faith oversight”;²¹¹ only the latter can trigger liability pursuant to *Caremark*. *Marchand* made clear that the Delaware courts will scrutinize the nature of the business and industry of the company; therefore, companies must specifically tailor oversight mechanisms to address risk on an industry- and company-specific basis. In the *Marchand* case, the “monoline company”²¹² operated in “a heavily regulated industry,” and was subject to both FDA requirements and state regulations; protocols (or lack thereof in this case) were important in considering this matter.²¹³ Notably, in order to litigate a *Caremark* case past the motion to dismiss, as *Marchand* was, the cases had one common thread: they appear to be based on a highly fact-driven and content-specific inquiry in Delaware courts.

A few trends have emerged in the wake of *Caremark* and its related cases. First, oversight claims are more likely to overcome motions to dismiss if the underlying problem connects to the company’s “mission critical” operations; some examples where motions to dismiss were denied

208. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). Duty of oversight (or “duty to monitor”) was originally considered to be part of the duty of care. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

209. Note that some scholars are critical of the *Caremark* decision. See for example Professor Stephen Bainbridge’s comment on the decision. Bainbridge believes that “*Caremark* was a mistake from the outset . . . [T]he steady expansion of *Caremark* liability in recent years has been an appalling error.” *A Comment on Leo Strine’s Article on “Board Practices in the Digital Era”: Time to Revisit Outsourcing the Board with a Note on the Ever Expanding Caremark Doctrine*, PROFESSORBAINBRIDGE.COM (Mar. 31, 2022), <https://www.professorbainbridge.com/professorbainbridge.com/2022/03/index.html> [<https://perma.cc/ZG5V-FDB4>].

210. 212 A.3d 805 (Del. 2019).

211. *Richardson as Tr. of Richardson Living Tr. v. Clark*, No. 2019-1015-SG, 2020 WL 7861335, at *2 (Del. Ch. Dec. 31, 2020).

212. *Marchand*, 212 A.3d at 809 (“As a monoline company that makes a single product—ice cream—Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat. That is, one of Blue Bell’s central compliance issues is food safety. Despite this fact, the complaint alleges that Blue Bell’s Board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments.”).

213. *Id.* at 810.

were in *Clovis* and *Inter-Marketing*.²¹⁴ In *Clovis*, the allegations related to the company's "most promising" drug and failures to oversee its safety and efficacy; in *Inter-Marketing*, the allegations related to an oil pipeline and failures to oversee its safety.²¹⁵ Second, if cases involve critical safety issues, the courts are generally less likely to dismiss the cases. Consider that in *Marchand*, the court upheld claims arising from a listeria outbreak which ultimately resulted in three deaths, and in *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, the court upheld claims arising from cancer drugs that were contaminated.²¹⁶ In contrast, in *GoPro*, claims related to allegedly inaccurate financial statements were dismissed.²¹⁷ In asserting a *Caremark* claim, a plaintiff must either show that the board "utterly failed" in its implementation of an effective compliance and reporting system; or demonstrate that, despite the presence of a monitoring and reporting system, the board "consciously fail[ed] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."²¹⁸ These Delaware law developments demonstrate the importance for companies and their boards to evaluate, review, and update their internal controls and reporting systems on a regular basis to avoid potential liability under *Caremark*.

B. Fiduciary Duties and DEI

The fiduciary duty upon which corporate social responsibility and, more specifically, DEI, rests is the duty of loyalty. The duty of care reviews the decision-making process of the board of directors and, more specifically, whether the board had adequate information to make a decision in a well-informed manner. In essence, it is a procedural duty. The duty of loyalty, at its core, requires directors to act in the best interests of the corporation, which is a substantive inquiry. Professor Chris Brummer and former Chief Justice of the Delaware Supreme Court Leo Strine contend that the "affirmative component of fiduciary duty law gives business leaders [considerable discretion] to pursue policies they rationally believe to be in the best interests of the corporation in terms of its sustained profitability and reputational integrity with its stakeholders,

214. *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019); *Inter-Mktg. Grp. USA, Inc. v. Armstrong*, No. 2017-0030-TMR, 2020 WL 756965 (Del. Ch. Jan. 31, 2020).

215. *Clovis*, 2019 WL 4850188; *Inter-Mktg.*, 2020 WL 756965.

216. *Marchand*, 212 A.3d 805; *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, No. 2019-0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020).

217. *In re GoPro, Inc.*, No. 2018-0784-JRS, 2020 WL 2036602 (Del. Ch. Apr. 28, 2020).

218. *Marchand*, 212 A.3d at 821.

society, and regulators.”²¹⁹ Brummer and Strine argue that in fulfilling “their normative duty of loyalty by taking affirmative steps to improve sustainable corporate profitability,” leaders such as corporate managers and directors “can safely embrace a commitment to Diversity, Equity, and Inclusion—i.e., more ambitious DEI policies that go beyond their duty under *Caremark* to monitor core antidiscrimination compliance obligations.”²²⁰ In essence, the business judgment rule provides a “safe harbor” for fiduciaries to have the discretion to “go beyond mere law compliance.”²²¹ Brummer and Strine make the important point that the duty of loyalty “does *not* in fact put the pursuit of profit above all else.”²²² Instead, “the most fundamental requirement is that the directors and officers be loyal to the corporation’s basic license from society, which allows the corporation to seek profit, but only conducting lawful business by lawful means.”²²³ In sum, the broad discretion that corporations have under the business judgment rule with respect to DEI matters form the legal basis by which they can pursue “the full range of equity issues in which corporations affect their stakeholders and society.”²²⁴

V. AMPLIFICATION OF DEI GOALS

Although there is a credible legal argument that corporations can pursue DEI goals as detailed in Section IV.B above, the question is whether they will try to do it at all and, if they do, how corporations should be held accountable for diversifying their leadership ranks.²²⁵ In order to make meaningful progress on this question, companies need to address the

219. Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 7 (2022). Indeed, “thinkers like Berle and [Elizabeth] Anderson have . . . come to the powerful conclusion that the fulfillment of the American ideal cannot occur unless powerful corporations themselves embed a commitment to equality and respect in their way of doing business.” *Id.* at 66.

220. *Id.* at 8.

221. *Id.* at 67. Brummer and Strine cite the *Time-Warner* case to make their case “that the business judgment rule provides a corporate law safe harbor for directors to pursue their own vision for what is good for the company so long as there is a rational basis for their course of action.” *Id.* at 79.

222. *Id.* at 70.

223. *Id.*

224. *Id.* at 82.

225. *But cf.* Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCH. BULL. 255, 262 (1999) (noting the limitations of accountability).

[M]uch depends on whether the views of the prospective audience are known or unknown, on whether people learn of being accountable before or after exposure to the evidence, on whether people learn of being accountable before or after making a difficult-to-reverse public commitment, and on a host of other ground rules that define the accountability relationship.

Id. Accountability has its limitations. “In short, accountability is a logically complex construct that interacts with characteristics of decision makers and properties of the task environment to produce an array of effects—only some of which are beneficial.” *Id.* at 270.

problem of “homogeneity among leaders . . . at lower levels of the companies.”²²⁶ Indeed, “data shows that most company leaders—primarily white, heterosexual males—still underestimate the challenges diverse employees face. These leaders control budgets and decide which diversity programs to pursue.”²²⁷ Without leadership’s understanding of the issues, effective solutions will continue to elude companies. Notably, one study has shown that leaders are much better at identifying the challenges women face, likely because of the extensive media coverage on this topic.²²⁸ A large gulf remains, however, between what white men versus people of color and LGBTQ+ employees perceive as obstacles to advancement in the workplace.²²⁹ Thus, by increasing diversity in leadership positions, companies will be better equipped to understand the challenges diverse employees face and to implement programs to address those challenges.

But “[e]ven with a diverse management team in place, companies will be able to take advantage of the unique viewpoints and perspectives of leaders only if they have the right inclusive foundation.”²³⁰ Certain factors are necessary for this foundation: “fair employment practices, such as equal pay; participative leadership, with different views being heard and valued; a strategic emphasis on diversity led by the CEO; frequent and open communication; and a culture of openness to new ideas.”²³¹

Considering these factors, there are numerous steps companies can take to enforce accountability and amplify DEI goals. Companies must revisit their legal policies related to diversity and communicate them to their employees. Their CEOs must take an active lead in promoting those policies. Companies can also work together in a whole-of-company approach: expanding their leadership teams; fueling cultural changes; creating avenues of corporate reflection and discussion; engaging in additional disclosures; and incorporating diversity into their relationships with third parties.

A. Revisiting and Communicating Legal Policies

First and foremost, each company needs to review its legal policies related to diversity to create a strong foundation for diversity initiatives to succeed. Most employees likely have never seen or read such policies

226. Matt Krentz, Justin Dean, Jennifer Garcia-Alonso, Miki Tsusaka & Elliot Vaughn, *Fixing the Flawed Approach to Diversity*, BOS. CONSULTING GRP. (Jan. 17, 2019), <https://www.bcg.com/publications/2019/fixing-the-flawed-approach-to-diversity> [<https://perma.cc/CVD8-H9ZH>].

227. *Id.*

228. *Id.*

229. *Id.*

230. Lorenzo, Voigt, Tsusaka, Krentz & Abouzahr, *supra* note 35.

231. *Id.*

(which are typically posted on company intranets), therefore, regular communication about them would signal that the company believes in their importance.²³² Companies must adhere to the policies and act when the policies dictate that steps should be taken.

Microsoft is typically cited as an exemplar when discussing corporate inclusivity. Indeed, in its first top twenty-five ranking of the modern board, Fortune ranked Microsoft first; Hewlett Packard Enterprise, Walgreen Boots Alliance, Intel, and 3M rounded out the top five.²³³ In describing the boards selected, Fortune observed, “[a]s companies seek to drive change on talent strategy, diversity, sustainability, and social issues, they’ll need more diversified leadership at the very top. But they’ll also need the insight and strength that come with experience.”²³⁴

On Microsoft’s website, under its “Legal” section, it states:

Microsoft believes that a diverse and inclusive workplace leads to better products and services for our customers. As our workforce evolves to reflect the growing diversity of our communities and marketplace, the ability to leverage different perspectives for innovation and problem solving becomes increasingly important. Diversity and inclusion are foundational to a One Microsoft culture, fueling our business growth by allowing us to attract, retain, and develop the best talent from around the world. We address diversity and inclusion through clear, measurable strategies aligned to the priorities of the Microsoft CEO and senior leadership team.²³⁵

In addition, in a different section on its website, Microsoft notes that the company looks to “sociology, psychology, behavioral science and neuroscience to understand what leads to exclusion, and to find effective ways to chang[e] [its] habits and behaviors.”²³⁶ It also offers the public access to the resources it has collected in connection with these areas of study.²³⁷ Microsoft provides an example of a company using data rather than a hunch about what needs to be addressed and fixed in order to create more diverse leadership and, by extension, a more diverse workforce.

232. Krentz, Dean, Garcia-Alonso, Tsusaka & Vaughn, *supra* note 226.

233. Aman Kidwai, *Fortune Modern Board 25*, FORTUNE, <https://fortune.com/modern-board-25/> [<https://perma.cc/GY4S-JSTS>].

234. *Id.*

235. *Diversity and Inclusion at Microsoft*, MICROSOFT, <https://careers.microsoft.com/usa/en/legalpolicies> [<https://perma.cc/V6G8-2RDF>].

236. *Beyond Microsoft*, MICROSOFT: GLOB. DIVERSITY & INCLUSION, <https://www.microsoft.com/en-us/diversity/beyond-microsoft/default.aspx> [<https://perma.cc/9NQK-7J6T>].

237. *See generally Content Library*, MICROSOFT: INCLUSION JOURNEY, <https://www.microsoft.com/en-us/inclusion-journey/library> [<https://perma.cc/K594-GRDR>].

But even a company like Microsoft, which is often touted as a leader in corporate inclusivity, has more work to be done on diversity. Consider that during Microsoft's 2021 annual meeting, Microsoft shareholders passed a resolution—with the support of nearly 78% of shareholders—to review the policies the company had implemented to protect its employees against abuse and unwanted sexual advances; in order to comply with the resolution, Microsoft retained a law firm to review its sexual harassment and gender discrimination policies.²³⁸ Due, in part, to the publicness of the company and the image Microsoft has cultivated through its corporate purpose, it was “under intense public scrutiny due to numerous claims of sexual harassment and an alleged failure to address them adequately and transparently.”²³⁹ Furthermore, “[r]eports of Bill Gates’s inappropriate relationships and sexual advances toward Microsoft employees have only exacerbated concerns, putting in question the culture set by top leadership and the board’s role holding those culpable accountable.”²⁴⁰ Because its shareholders forced it to take action, Microsoft was able to identify where its legal policies needed to be bolstered to address its problems related to gender diversity and sexual harassment, thereby affirming the importance of revisiting legal policies and listening to the concerns of employees.

B. Leadership

Companies can take two steps with regard to leadership to amplify diversity: require their CEOs to take an active lead in diversity initiatives and expand their leadership teams. First, the CEO needs to take an active lead in diversity initiatives to ensure that diverse hires succeed in their positions. Using a project management framework, companies must provide a plan that sets milestones within a certain timeframe along with a system of accountability and consequences if goals are not met. To set such milestones, CEOs must ask themselves a series of questions: “What is your target? How fast do you hope to achieve it? Who will implement it? And what are the consequences if an initiative falls short?”²⁴¹ Indeed, studies have shown that a passive approach, such as simply hiring people from diverse backgrounds without an infrastructure to support them once they are hired, will not work.²⁴² Therefore, along with prioritizing hiring diverse candidates, leadership needs to consider the metrics the company

238. Emily Flitter, *Microsoft Opens a Review of Its Sexual Harassment Policies*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/technology/microsoft-sexual-harassment-policy-review.html> [<https://perma.cc/F5L6-QA8K>].

239. *Id.*

240. *Id.*

241. Lorenzo, Voigt, Tsusaka, Krentz & Abouzahr, *supra* note 35.

242. *See, e.g.*, discussion of BCG Study in *supra* Part I; Lorenzo, Voigt, Tsusaka, Krentz & Abouzahr, *supra* note 35.

hopes to achieve and the types of programs it needs to ensure that diverse hires succeed in the workplace despite the in-built biases against them. Additionally, the company can consider employing racial equity audits to help them to measure their performance in DEI-related goals.²⁴³ Airbnb, Facebook (now Meta), and Starbucks have already performed such audits.²⁴⁴

Second, corporations can consider expanding their leadership teams to include newly created positions or leaders that have not been part of the conversation on corporate inclusivity. Consider that in the startup world, some startup companies, such as venture capital firm GV, have already taken the step of hiring diversity and inclusion partners.²⁴⁵ GV's policy states that the head of DEI should be at C-suite level meetings and appear before the board regularly to give updates on the company's progress toward achieving their DEI goals.²⁴⁶ Furthermore, in cultivating future leaders, companies should implement formal mentorship programs to ensure that diverse employees have the necessary support system to succeed as they are promoted into more senior positions.²⁴⁷

Finally, the company leadership should consider forming a body to hold themselves accountable to their corporate inclusivity goals; essentially, this body would ensure that proclamations about DEI do not remain empty words. High-ranking officers across the company, such as the CEO, CFO, and the like, should be involved in achieving the goals related to DEI. Companies can draft a living document with pillars and commitments so that there is a roadmap for action. For example, Crunchbase "created an initial anti-racism plan of action . . . with specific steps targeted at dismantling racist systems."²⁴⁸ The pillars of the plan

243. A racial equity audit is an independent analysis of a company's business practices in an effort to identify and ferret out practices that may have a discriminatory effect. Such an audit could also evaluate a company's current efforts or efforts in response to the events in the summer of 2020.

RACIAL EQUITY AUDIT PROPOSAL Q&A, CTW INV. GRP. & SERV. EMP. INT'L UNION (2020), https://static1.squarespace.com/static/5d374de8aae9940001c8ed59/t/605cdec4e6861277202f0b46/16699076603/Racial+Equity+Audit+QA_CtW_SEIU+%28002%29.pdf [<https://perma.cc/TW2R-QVJW>].

244. *Id.*

245. Candice Morgan, *How to Build a Race-Conscious Equity, Diversity, and Inclusion Strategy*, FAST CO. (Sept. 2, 2020), <https://www.fastcompany.com/90545070/how-to-build-a-race-conscious-equity-diversity-and-inclusion-strategy> [<https://perma.cc/YC9E-XTMV>].

246. *Id.*

247. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/9BTQ-SWBZ>].

248. Jager McConnel, *Anti-Racism Action Plan: Crunchbase's Commitment to Fighting Systemic Racism*, CRUNCHBASE (May 23, 2022), https://about.crunchbase.com/blog/anti-racism-action-plan/?utm_source=cb_daily&utm_medium=email&utm_campaign [<https://perma.cc/4WAQ-M4FQ>].

included hiring, philanthropy, leadership, brand and advocacy, product, partnerships and payments, and culture and inclusion, with commitments to increase representation for underrepresented groups and equity.²⁴⁹ Each commitment pillar has specific actions that are tracked according to status (review, execution ongoing, completion, etc.).²⁵⁰ Companies should also consider whether hiring a head of diversity would be helpful. Thus, companies can amplify diversity by requiring their CEOs to take an active lead in diversity initiatives, expanding their leadership teams, and implementing programs that promote success after hiring or promotion.

C. Whole-of-Company Approach

Much like the way the Biden Administration advocated for a whole-of-government strategy to create a more diverse federal workforce, companies can band together in a whole-of-company approach.²⁵¹ There is precedent for this in the era of apartheid in South Africa. Based on “protest divestment,” over 200 U.S. companies severed economic connections with South Africa, causing a loss of \$1 billion in direct American investment from 1985 to 1990.²⁵² General Motors Corporation (G.M.) and International Business Machines Corporation (I.B.M.) were among those who shuttered their South African operations.²⁵³

“The withdrawal of G.M. and I.B.M. sends a message to the Government of South Africa that time is running out for the presence of American companies if apartheid is not ended soon,” said . . . [Rev. Leon H.] Sullivan, a black Baptist minister who in 1977 created a set of equal-employment guidelines for companies with South African operations . . . who also sits on the board of G.M. “I’m not

249. *Id.*

250. *Id.* For example, under the commitment pillar of brand and advocacy, Crunchbase notes that it “will publish at least one story per week . . . [focused on] underrepresented people . . . [and use its] social platforms to highlight [their] diversity-focused content.” *Id.*

251. In an Executive Order, Biden stated,

On my first day in office, I signed Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), which established that affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. To further advance equity within the Federal Government, this order establishes that it is the policy of my Administration to cultivate a workforce that draws from the full diversity of the Nation.

Exec. Order No. 14035, 86 Fed. Reg. 34,593 (June 25, 2021).

252. Gregory Gethard, *Protest Divestment and the End of Apartheid*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/articles/economics/08/protest-divestment-south-africa.asp> [<https://perma.cc/9Z9N-UGMX>].

253. *Sullivan Principles’ Author Hopes for Change*, N.Y. TIMES (Oct. 22, 1986), <https://www.nytimes.com/1986/10/22/business/sullivan-principles-author-hopes-for-change.html> [<https://perma.cc/QE5Y-VEW8>]. Rev. Sullivan’s guidelines which came to be known as the Sullivan principles, were “adopted by 160 of the 244 American companies with direct investment in South Africa.” *Id.*

discouraged, I'm hopeful. I'm hoping it will wake the Government up to move aggressively to dismantle the apartheid system.”²⁵⁴

Bishop Desmond Tutu remarked that the “U.S. corporate blockade ‘was essential to reach the larger public that systemic change was vital or there would be no future.’”²⁵⁵ Jeffrey Sonnenfeld, a senior associate dean and Lester Crown Professor of Leadership Practice at the Yale School of Management, argues that while the economic cost of withdrawing to the companies was high, it helped to lead to the dismantlement of apartheid; the withdrawal of these companies to protest apartheid “provides a powerful roadmap for why and how CEOs should affirm American values amidst global challenges.”²⁵⁶

In addition to taking economic measures, some companies also embarked upon “civic-minded human rights initiatives.”²⁵⁷ For example, Coca-Cola sold off “all its holdings in South Africa to a multiracial group of investors in that country.”²⁵⁸ It also allocated \$10 million to an “Equal Opportunity Fund,” which was “administered by a board of prominent South Africans including the late Bishop Desmond Tutu, to open up opportunities in business, housing, and education for Black South Africans.”²⁵⁹ This type of initiative may be difficult to implement, however, given the disparate expectations different people have of companies. To a certain degree, the economic measures taken by companies in response to the Black Lives Matter movement in 2020 may have some corollary to the actions taken here. But it is difficult to determine how companies could implement a similar economic blockade in the case of systemic racism or gender bias. The closest example of an economic blockade is when corporations pressured state legislatures to overturn their bathroom bills by withdrawing their business from those states.²⁶⁰ Thus, while difficult to implement, a whole-of-company approach would effectively create avenues for systemic change and benefit diversity in workplaces.

254. *Id.*

255. Jeffrey Sonnenfeld, *The Great Business Retreat Matters in Russia Today—Just as It Mattered in 1986 South Africa*, FORTUNE (Mar. 7, 2022), <https://fortune.com/2022/03/07/great-business-retreat-matters-russia-sanctions-1986-south-africa-putin-ukraine-world-politics-jeffrey-sonnenfeld/> [https://perma.cc/DKA6-GQ49].

256. *Id.*

257. *Id.*

258. Michael Isikoff, *Coke to Sell All Holdings in S. Africa*, WASH. POST (Sept. 18, 1986), <https://www.washingtonpost.com/archive/politics/1986/09/18/coke-to-sell-all-holdings-in-s-africa/495f0069-2682-4d67-8769-506f4fbd2d83/> [https://perma.cc/9J83-XBPL].

259. Sonnenfeld, *supra* note 255.

260. Fan, *supra* note 3, at 480–81 (discussing North Carolina’s “bathroom bill” which was passed in 2016 and repealed in March 2017 after it was projected to cost the state \$3.7 billion in lost revenue over a dozen years due to corporations withdrawing business from the state due to the bill).

D. Cultural Changes

Another avenue of change may be a cultural one in which there are more “egalitarian boards” instead of “hierarchical boards.”²⁶¹ In essence, this means a “collegial’ board culture . . . [where] all board members [are] able to speak openly and ask questions at meetings . . . with little ‘back channeling’ or meeting outside of the formal meeting to raise concerns.”²⁶² Such boards are also “more likely to accept and integrate differences of opinion. Members of these boards believe that both their expertise and willingness to learn is recognized and incorporated into the board’s work.”²⁶³ In sum, in considering board composition, demographics, skills, and expertise should play important roles in the recruiting process; less of an emphasis should be placed on recruiting board members who are already a part of current board members’ personal and professional networks.²⁶⁴ In addition, considering board candidates outside of the CEO and chief financial officer positions, such as chief innovation officer or chief technology officer, is also helpful in creating an egalitarian culture.²⁶⁵ “To make diverse boards more effective, boards need to have a more egalitarian culture—one that elevates different voices, integrates contrasting insights, and welcomes conversations about diversity.”²⁶⁶

Furthermore, it is important for corporations to determine who on the board should be tasked with considering, implementing, and reporting on diversity-related measures. By giving one or more people on the board such responsibilities or creating a committee to address such measures, it ensures that someone will take ownership of such metrics, which can then be more widely distributed. For example, options could include the creation of a separate stand-alone committee or addressing such issues within an existing committee, such as the nomination and governance committee. Consider that the nomination and governance committee could be the committee responsible for overseeing and complying with Nasdaq’s new diversity disclosures or relevant state diversity laws. Thus, companies can amplify diversity by creating a more egalitarian board by diversifying the board and ensuring one or more of their board members are focused on DEI matters.

261. Creary, McDonnell, Ghai & Scruggs, *supra* note 43.

262. *Id.*

263. *Id.*

264. *Id.* “As one long-time board director described it: ‘The problem is how boards get formed and how you fill vacancies. It might be unconscious bias. Sometimes, it’s laziness. ‘Oh, we have an opening, who do we know?’ He shared that many times board members only knew people like them.”
Id.

265. *Id.*

266. *Id.*

*E. Creating Avenues Within the Corporation for
Reflection and Discussion*

Companies should create internal avenues for reflection and discussion, which would amplify diversity by ensuring each person in the company is heard and understands the company's diversity initiatives. To do so, companies should focus inward and critically examine how they address DEI in leadership at an all-hands meeting. Then, companies can convene smaller groups to function as dedicated working groups. Employee resource groups that identify race, gender, or other attributes can be helpful in the working group context. Companies can also bring in guest speakers to facilitate discussions related to DEI.

F. Additional Disclosures

Another way to promote company accountability and amplify diversity is to require additional disclosures. For example, on March 21, 2022, the SEC proposed rules that would require the disclosure of climate-related information by public companies in their SEC filings.²⁶⁷ Although many companies already disclose such information in their proxy statements, sustainability reports, or on their websites, there are wide variations on how much information companies disclose, what type of detail they provide, and what format is used. The SEC's proposed release states that the rules "would provide consistent, comparable, and reliable—and therefore decision-useful—information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments."²⁶⁸ In addition, the SEC posits that "[c]limate-related risks can affect a company's business and its financial performance and position in a number of ways."²⁶⁹

Similarly, public companies already disclose information about diversity in their proxy statements, sustainability reports, or on their

267. The proposed rules would create a new Subpart 1500 to Regulation S-X and new Article 14 to Regulation S-X. Press Release, Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46> [<https://perma.cc/YH8D-7A3E>]; The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (codified at 17 C.F.R. pts. 210, 229, 232, 249).

268. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (codified at 17 C.F.R. pts. 210, 229, 232, 249); Letter from Lawrence A. Cunningham, Professor of Law, George Washington Univ., on behalf of twenty Professors of Law and Finance, Comment Letter on Proposal on Climate-Related Disclosures for Investors (Apr. 25, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf> [<https://perma.cc/BG6A-UAEQ>] (a group of law professors arguing that the SEC exceeded its authority in its proposal on climate-related disclosures for investors).

269. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (codified at 17 C.F.R. pts. 210, 229, 232, 249).

websites.²⁷⁰ The SEC is likely to propose a similar rule for diversity-related disclosure, given the non-uniform way such information is presented. Consider that if the SEC requires diversity disclosures, any proposed rule will likely follow the template provided by the proposed rule for climate-related disclosure, including the public company's disclosure of the material impact of diversity-related risks on a company's business and consolidated financial statements over different time periods; the effect of diversity-related risks on strategy, business model, and outlook; the oversight and governance of diversity-related risks by the company's board and management (such as which board members or committees and whether members of management are responsible for the oversight of diversity-related risks); processes for identifying, assessing, and managing diversity-related risks and whether they are integrated into the public company's overall risk management system or processes; and any diversity-related targets or goals. This type of detailed and standardized disclosure can give companies a better sense of where they can improve vis-à-vis their peers.

G. Third-Party Suppliers

Lastly, the company should move beyond looking at its own workforce and consider what changes should be made regarding how it does business in a way that incorporates the goals of DEI. For example, the company should evaluate its third-party suppliers and ensure they service diverse markets and have diverse leadership. When diversity of leadership is intentionally incorporated into every segment of a company, it becomes the norm rather than the exception.

CONCLUSION

The leaders of public and private companies have challenges—but not insurmountable ones—in addressing corporate inclusivity in leadership. But it will take time and commitment before lasting change can be made to the leadership composition of corporations. The levers of corporate purpose and publicness have their benefits but also their limitations in advancing such corporate inclusivity. Although an argument can be made that the fiduciary duty of loyalty could include the consideration of diversity-related initiatives in leadership, whether or not corporations choose to pursue such initiatives is a separate question. Therefore, we are left with a mix of legal and business measures to tackle

270. See, e.g., *Beyond Microsoft*, *supra* note 236; MICROSOFT, 2021 ENVIRONMENTAL SUSTAINABILITY REPORT: FROM PLEDGES TO PROGRESS (2021), <https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE4Rwfv> [<https://perma.cc/3CJP-E8JC>].

the issue of making leadership in corporations more reflective of what we look like as a society. Ultimately, a holistic approach must be adopted in cultivating corporate inclusivity in leadership; anything less means that diversity will remain an elusive goal.