IN-DEPTH

Corporate Governance

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Corporate Governance

EDITION 14

Contributing Editor

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In-Depth: Corporate Governance (formerly The Corporate Governance Review) is a useful overview of the corporate governance regimes in key jurisdictions worldwide. Through the lens of recent trends and developments, it examines the most consequential rules relating to board composition and practices; director duties; reporting and disclosure requirements; corporate responsibility; shareholder rights and duties; and much more.

Generated: April 19, 2024

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USA

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Summary

Introduction

The sources of corporate governance law and regulation in the United States are varied and interrelated. US corporate governance practices are also heavily influenced by investor and proxy advisory firm pressures, as well as company-specific factors. There are four key sources of legal and regulatory requirements: state corporate law (predominantly Delaware, in which over half of all US publicly traded corporations are incorporated); the federal 1933 Securities Act and 1934 Securities Exchange Act, and the regulations of the US Securities and Exchange Commission (SEC) under those Acts; stock exchange listing rules (predominantly the New York Stock Exchange (NYSE) and the NASDAQ); and federal statutes in regard to particular areas of corporate practice (e.g., regulations promulgated by the Federal Reserve and other federal and state agencies with respect to banks and other financial institutions, and by other similar regulatory bodies in respect of communications, transportation and other regulated fields). Because of the federal system of US law, different sources of law are not always harmonised, and corporations are often subject to different obligations to federal and state governments, regulators at each level of government and demands of other relevant bodies, such as the applicable stock exchange. This mosaic of rules and regulations, and the mechanisms by which they are implemented and enforced, make for an environment of constant change and evolution.

Securities laws and regulations are civilly enforced by the SEC, and the SEC will review –- and at times must also grant affirmative clearance to – certain important corporate disclosure documents (such as proxy statements and certain securities registration statements). Larger and older corporations with a history of securities law compliance are subject to fewer pre-clearance requirements and may in certain cases use abbreviated forms of disclosure. Investors may also bring actions under many provisions of the securities laws to recover damages for misstatements or omissions in public statements and in certain other circumstances. The Department of Justice prosecutes criminal violations of federal securities laws and SEC rules.

State law fiduciary duties of directors and officers are predominantly enforced by private actions led by plaintiffs' lawyers. These private actions generally fall into one of two categories: class-action suits on behalf of a particular group of the corporation's shareholders (typically all shareholders who bought or sold during a particular period or all unaffiliated shareholders) and derivative suits, purportedly on behalf of the corporation itself. Putative class-action suits must satisfy the criteria under the Federal Rules of Civil Procedure or analogous provisions of state law before being permitted to proceed as a class action, including the numerousness of the class members, the commonality of legal and factual issues among members of the class, the typicality of the claims or defences of the representative parties to the class and the fairness and adequacy of the representative parties' protection of the class interests. Derivative suits, creatures of state corporate law, provide a mechanism by which shareholder plaintiffs can in theory represent the corporation in suing the corporation's own board of directors or management, sometimes after complying with a 'demand' procedure in which the plaintiff must request that the corporation file suit and be rebuffed. In certain circumstances, especially when it can be shown that the board of directors is for some reason conflicted with respect to the alleged breach of duty, this demand requirement is excused and the shareholder will be permitted to pursue a claim in the corporation's name without further enquiry.

The two primary US stock exchanges, the NYSE and the NASDAQ, each make rules with which corporations must comply as a condition to being listed on these exchanges. These listing rules address all aspects of corporate governance, including topics such as board composition and director independence, the composition of various board committees, requirements to submit certain matters to a vote of shareholders, regulation of dual-class stock structures and other special voting rights, publication of and topics covered by corporate governance guidelines, and even requirements concerning the corporation's public website. These rules are enforced by the threat of public reprimand from the exchanges, temporary suspension of trading for repeat offences and permanent delisting for perennially or egregiously non-compliant companies.

In addition, of long-standing importance to the US corporate governance regime are the proxy advisory firms (predominantly Institutional Shareholder Services (ISS) and, with lesser market share, Glass, Lewis & Co (Glass Lewis)), the influence those proxy advisers have on the institutional investor community and the prevailing and evolving views of the institutional investor community. That community's views have become particularly influential as the shareholder base of the vast majority of US publicly traded corporations consists of an overwhelming majority of institutional shareholders, including index funds, pension funds and mutual funds. As a result, major institutional investors are increasingly developing their own independent views on preferred governance practices.

Although proxy advisory firms are not a source of law, their guidelines figure significantly in the corporate governance landscape. These advisory firms exert pressure on corporations to conform to the governance standards they promulgate by issuing director election voting recommendations to each publicly traded corporation's shareholders based on the corporation's compliance with the advisory firm's published standards. In addition, when shareholders submit proposals to change a company's governance or disclosures to a vote, proxy advisory firms issue recommendations that are highly influential if not outcome-determinative in driving such proposals to receive majority support. Proxy advisory firms wield outsized influence on corporate elections, especially among institutional investors such as pension funds.[2] One study found that a recommendation from ISS to withhold a favourable vote in an uncontested director election correlated with an 18 per cent decline in favourable voting.[3] In addition, a 2022 study sponsored by Harvard Business School found that companies were altering their compensation programmes to comply with proxy advisory firms' ever-evolving policies, and more specifically that ISS policies are causally linked to elevated and longer-lasting levels of shareholder engagement.[4] The US Congress, the US Department of Labor and the SEC have raised questions regarding fiduciary responsibility in the context of the outsourcing of proxy voting decisions to proxy advisory firms. In 2020, following a comprehensive process that was conducted by SEC staff across a decade and two politically distinct administrations, the SEC, led by former President Trump's appointee chair Jay Clayton, adopted amendments to the proxy rules governing proxy advisers, which were designed to enhance the accuracy and transparency of proxy voting advice provided by proxy advisory firms to investors, including increasing disclosure around material conflicts of interest in proxy voting advice, providing an opportunity for a period of review and feedback through which companies and other soliciting parties would be able to identify errors in the proxy voting advice and codifying that proxy adviser vote recommendations are considered proxy solicitations and are therefore subject to the anti-fraud provisions of Rule 14a-9 under the federal Securities Exchange Act prohibiting any materially false or misleading statement. The change in administrations in the United States in 2021, and the resulting reshuffling in the leadership of the SEC, was accompanied by changes in the SEC's goals and priorities. In particular, while the SEC during the Trump Administration sought to loosen the regulations applicable to US public companies, the SEC during the Biden administration announced plans to scale up disclosure requirements around various issues, including environmental, social and governance (ESG) and proxy voting. In July 2022, however, the SEC rescinded the amendments adopted in 2020 relating to proxy voting in response to concerns expressed by investors and others that these amendments may impair the timeliness and independence of proxy voting advice and subject proxy advisers to undue litigation risks and compliance costs. The SEC's swift about-face created uncertainty regarding future rule-making as to proxy advisory services. Significantly, certain major institutional investors, such as BlackRock, Inc (which invests more than US$10 trillion in client assets) and the Vanguard Group (which invests more than US$7.2 trillion in client assets) have stated that they reach proxy voting decisions on the basis of their own internally developed guidelines, independent of proxy advisory firms, and have sought to engage directly and pragmatically with companies. These major institutions are uniquely positioned to use their influence to recalibrate the system to reduce reliance on proxy advisory firms. Importantly, and as further discussed later in this chapter, these major institutions are converging toward a more stakeholder-, and less stockholder-, focused vision of corporate governance.

The Dodd–Frank Wall Street Reform and Consumer Protection Act (the Dodd–Frank Act), signed into law in July 2010, was passed in response to corporate governance practices perceived by some to have contributed to the 2008–2010 economic crisis. The Dodd–Frank Act requires additional disclosure in corporate proxies and non-binding shareholder votes on various questions of corporate governance (notably, concerning executive compensation), and contemplates greater access for shareholder-proposed director nominees to the company proxy. In the latter regard, most S&P 500-listed companies now afford shareholders expanded proxy access rights to facilitate director nominations if certain requirements are met. In more recent years, the SEC has adopted rule amendments to streamline disclosure requirements, reduce duplicative or overlapping disclosure obligations and update the periodic disclosure requirements relating to a company's business, human capital resources, legal proceedings, risk factors and management's discussion and analysis of business trends and uncertainties. These changes seek to encourage flexible, principles-based disclosure and permit increased use of summaries, cross-references and hyperlinks to reduce repetition.

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Year in review

Over the past year, corporate governance expectations for companies, management and directors have continued to develop and evolve, creating new challenges and opportunities. In 2023, regulatory oversight became even more robust with the SEC issuing new rules and regulations concerning climate change risk and wide-ranging cybersecurity disclosures rules, with further expanded human capital management and diversity rules expected to come later in 2024. Also in 2023, with artificial intelligence (AI) coming into increased focus in the US and globally, the Biden administration issued a wide-ranging executive order on AI, and regulators, including the SEC, are joining in on this effort and actively working toward AI regulation in specific areas. The SEC proposed a rule aimed at protecting investors from AI technologies that could be optimised to place broker–dealer and investment advisory firms' interests ahead of their investors' interests, and we expect further activity that companies should monitor from the SEC and other regulators in this area over the coming years. Amendments to Regulation 13D-G to modernise the beneficial ownership reporting rules represent the most significant reforms to beneficial ownership reporting since the rules were initially adopted in 1968 and, importantly, increase the timeliness and quality of information that all market participants may access. At the same time, however, the term 'ESG' has steadily faded from the investor and corporate lexicon over the past year in the wake of cultural and political clashes over its meaning and purpose, yet many of the risks and opportunities that were previously lumped together under the ESG umbrella remain important to both businesses and investors and need to be addressed. Without the hype and polarising effect of the ESG mantle, companies and investors alike may have more flexibility to take a surgical approach to issues such as climate, sustainability, human capital and diversity, equity and inclusion and pursue tailored strategies that are firmly rooted in the creation of long-term sustainable value.

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Corporate leadership

Under Delaware law, the 'business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors'.[5] The corporate law of all other US states similarly assigns corporate managerial power to the board of directors.

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i Board structure and practices

Boards of directors customarily organise committees to carry out specific functions without the presence of the entire board. State law generally permits most of the functions of the board of directors to be delegated to committees,[6] and generally permits directors to rely on information, opinions, reports or statements presented to the board by its committees.-[7] Boards are specifically required by federal securities law to have an audit committee with certain prescribed functions relating to the retention, compensation and oversight of the company's independent auditor. Federal securities law and NYSE and NASDAQ listing rules also require listed companies to maintain compensation and nominating or corporate governance committees. Boards will often voluntarily establish additional committees: for example, a company in the technology sector might establish a technology committee comprising directors with the most applicable expertise to stay abreast of technological developments, safety committees are becoming more prevalent, and a company that has important relationships with labour unions might choose to establish a labour relations committee. The increased focus on ESG matters, sustainability and human capital management has led to enhanced board oversight and involvement in these areas, and some companies have created dedicated board-level committees and subcommittees, or expanded the mandate of an existing committee, to address these issues. By custom, many companies have established a risk committee (actually required of certain financial institutions by the Dodd–Frank Act), an executive committee, a finance committee, a public policy committee or some subset thereof. Boards may also establish temporary or permanent ad hoc committees in response to discrete or emergent developments.

A panoply of regulations and disclosure requirements affect the composition of boards of directors. Federal securities laws require all directors who serve on audit, compensation and nominating committees to be independent from the management of the company, and NYSE and NASDAQ listing rules require a majority of the board of directors to be independent. Companies are required by federal securities laws to disclose the experience, qualifications or skills of each director nominee that led the board to nominate that person to serve as a director. A company must also disclose whether and how its nominating committee considers diversity in identifying director nominees, and must make extensive disclosure about the nominating committee and how it functions. NASDAQ-listed companies are required to annually publish statistical information about board diversity in a uniform format, either in the company's annual proxy statement or on the company's website, and to have at least two 'diverse' directors by specified time frames or explain why they do not. States may impose additional requirements with respect to the composition of the board of directors. Such board diversity disclosures cover gender, racial, ethnic and sexual identity reporting. NYSE-listed companies are not subject to analogous diversity requirements. In 2018, California passed a law mandating female representation on the boards of publicly held companies based in the state, and in 2020 amended the law to address racial and ethnic diversity; however, the law was struck down by a California state court in 2022 upon a finding that it violated the equal protection clause of the state's constitution.

Today, less than half of large corporations in the United States have a common chief executive officer (CEO) and chair of the board of directors. Companies that have one person serving as both chair and CEO typically have a lead director with additional rights, responsibilities and compensation. In 2023, about 61 per cent of companies listed on the S&P 500 Index had separate chairs and CEOs (including companies with executive, non-independent chairs), up from 29 per cent in 2005. ISS generally recommends a vote in favour of shareholder proposals requiring an independent chair, taking into consideration the company's current board leadership structure (including whether the company maintains a strong lead director position), governance structure and practices (including overall board independence) and the company's performance. In 2023, shareholders brought proposals at 95 companies to require an independent chair: these proposals enjoyed an average level of support of 24 per cent. Companies are also required to describe in their annual meeting proxy statements the leadership structure of their board of directors, such as whether the same person serves as chair and CEO, and to explain why the company has determined that its leadership structure is appropriate. To date, the governance trend is towards ensuring an independent board leadership structure through a lead independent director, as opposed to separating the CEO and chair functions in all companies. The extent of disclosures regarding the prescribed duties of a lead independent director also continue to evolve.

Corporations are generally permitted by state corporate law to have classified, or staggered, boards of directors, in which roughly one-third of the directors are elected each year for three-year terms; however, classified boards have become substantially less common. With a classified board, shareholders can replace a majority of the directors only in two election cycles, so a classified board can promote the continuity and stability of a corporation's long-term strategy, reduce a corporation's vulnerability to abusive takeover tactics and ensure that the institutional experience of the board of directors will not be swept away in a single, lopsided election. On the other hand, classified boards historically have not halted well-priced, all-cash takeover bids. Under pressure from proxy advisers and the shareholder community, the percentage of S&P 500 companies with staggered boards has declined to approximately 12 per cent in 2023, down from approximately 57 per cent in 2003. Shareholder proposals to declassify boards of directors historically enjoyed strong support from shareholders. In 2022, shareholders voted on such proposals at eight companies, and the proposals averaged approximately 83 per cent shareholder support; in 2023, there were only three such proposals brought to a vote. Shareholders voted on 61 management-initiated proposals to declassify boards in 2023, and these averaged approximately 71 per cent shareholder support. However, corporations are more likely to implement a classified board in connection with an initial public offering (IPO). Despite an ISS policy of recommending a withhold vote for directors at the first public company annual meeting of a corporation that implements a classified board in connection with an IPO, in recent years about 83 per cent of IPO corporations implemented a classified board in connection with the offering,[8] although some companies provide that the classified board will be declassified within several years of the IPO. Notwithstanding the trend towards removing classified boards, a 2016 empirical study confirmed that classified boards can enhance shareholder value.[9]

Delaware law currently permits corporations to choose whether and how to afford insurgent director nominees access to a company's proxy statement, but rules implemented by the SEC enhance the ability of shareholders to propose providing groups of shareholders without control intent the right to nominate up to a certain portion of the company's entire board, known as proxy access. These shareholder proxy access proposals typically seek to permit shareholders to nominate between 20 and 25 per cent of a company's entire board. The interest in proxy access as a democratisation of corporate governance and voting began during the 2015 proxy season, during which 115 proxy access proposals were submitted, and continued to build over the next few years.[10] By 2023, however, the trend toward shareholder-initiated proposals for proxy access had shifted, and only two such proposals were brought to a vote, both of which failed. By this time, many companies had either proactively revised their by-laws to permit proxy access or submitted management-initiated proxy access proposals for shareholder consideration. In 2023, more than 86 per cent of S&P 500 companies permitted proxy access; however, a recent study revealed that proxy access had been used only twice in the United States.[11] In a similar vein, in late 2021, the SEC announced that for shareholder meetings involving proxy contests held after 31 August 2022, all valid director candidates would be listed on both the company proxy card and the dissident proxy card. The new 'universal proxy' rules came into effect in September 2022 and replaced the previous system wherein shareholders who voted by proxy in a contested election generally faced a binary choice between management and dissident slates. Shareholders are now able to engage in 'elective surgery' and opt away from individual board-nominated candidates whose skills, backgrounds, experiences and contributions compare unfavorably in their view relative to those of individual dissident nominees. The ease and ability of customising candidate choices may well place increased scrutiny on the backgrounds and qualifications of nominees. The extent to which the new universal proxy card rules result in more competitive director elections when there is a proxy contest remains to be seen, but these rules are likely to strengthen the position of activists and potentially result in more settlements between activists and boards seeking to avoid 'mix' and match voting results as individual directors will undergo increased scrutiny.[12]

Historically, brokers holding stock of a corporation on behalf of clients have voted that stock at their discretion when their clients did not provide specific voting instructions. However, the NYSE listing rules now prohibit broker discretionary voting for listed companies on certain topics, including governance-related proposals, and the Dodd–Frank Act eliminated broker discretionary voting in elections concerning election of directors, executive compensation and any other significant matter as determined by the SEC. As a result, directors in uncontested elections have more difficulty achieving majority votes. Lack of broker discretionary voting also increases the influence of activist shareholders and the power of proxy advisory firms such as ISS. Further concentrating voting power in the hands of activists is the problem of empty voting, whereby activists use derivatives and similar arrangements to purchase voting power without taking on commensurate economic exposure to the corporation's stock – for example, by simultaneously purchasing and short-selling a stock, resulting in no net economic exposure or investment costs aside from transaction fees.

In uncontested elections, directors were historically selected by plurality vote, but in recent years, majority voting election standards or policies have been adopted by approximately 90 per cent of companies included in the S&P 500 Index. Under a majority voting standard, directors in uncontested elections must receive a majority of the votes cast, rather than the plurality required by Delaware law, and if they do not, must tender their resignation, although Delaware courts will generally defer to a board's business judgement on whether to accept or reject a resignation from a director in these circumstances. These policies have relatively less effect in the context of contested elections where directors generally must win a plurality of votes to be elected (with the top vote-getters joining the board across the company and dissident slates); their primary effect is to increase the power of withhold recommendations from ISS against incumbent directors running in uncontested elections. Even at companies that do not have in place formal majority vote director election standards, it is common to have in place a 'plurality plus' policy, where directors who are elected by plurality vote but do not receive majority support tender a board-rejectable resignation for the nominating committee and board to consider, with public disclosure made of the decision reached by the board and underlying rationale.

ii Directors

Directors' most basic and important responsibility is to exercise their business judgement in a manner they reasonably believe to be in the best interests of a corporation. In fulfilling that duty, directors must consider and reconcile the interests of various stakeholders and their effect on the business of the corporation. In exercising their duties of care and loyalty, directors are afforded the safe harbour of the business judgement rule in seeking to promote sustainable, long-term investment and ESG principles in a manner designed to enhance the long-term value of their companies.

In most situations, directors do not and should not manage the day-to-day operations of the corporation, but instead exercise oversight in reasonable reliance on the advice of management, outside consultants hired by the corporation and their own understanding of the corporation's business. The courts will generally defer to decisions that boards make, granting them 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' – a presumption referred to as the business judgement rule.[13] This rule applies to most decisions that a board of directors makes. When a shareholder challenges a board's business judgement, 'the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives'.[14] To obtain the protection of the business judgement rule, directors must satisfy their duty of care, which entails reviewing the available material facts, and their duty of loyalty, which requires the disinterest and independence of the directors. In practice, the business judgement rule will protect directors when the corporate records reflect that they reviewed and considered the relevant facts and the advice of their advisers, and when the directors did not have a conflict of interest in the decision.

The board of directors should work with management to set an appropriate 'tone at the top' of the corporation to encourage conscientiousness, transparency, ethical behaviour and cooperation throughout the organisation. It should maintain a working partnership with the CEO and management and serve as a resource for management in charting the appropriate course for the corporation. Maintaining a relationship characterised by mutual trust and transparency with management is critical for the board's ability to stay current and effective in its day-to-day operations.[15]

It should approve the company's annual operating plan and guide its long-term strategy and fulfilment of the company's corporate purpose, and should monitor and periodically assess the corporation's performance in terms of these goals. The board should monitor and evaluate its own performance as well, noting any deficiencies in its expertise and composition with an eye towards rectifying them with future director nominations. While NASDAQ does not require board evaluations, the NYSE does, and such evaluations are nonetheless common among NASDAQ-listed companies. The board should monitor the organisation's risk management practices, as well as compliance with applicable law and best practices, set standards for corporate social responsibility, and oversee relations with regulators and the corporation's various constituencies, which increasingly includes engaging directly in director-level dialogue with shareholders. It should evaluate the corporation's CEO and senior management, and ensure that a succession plan is in place for the CEO and senior management, an issue that has received heightened focus in light of increased turnover rates and visible succession crises. When a company receives a proposal for a large transaction that creates a conflict – or the appearance of a conflict – between the interests of the corporation's shareholders and its management, the board should take care to place itself at the centre of the transaction, and should consider the merits of a special committee of independent directors to oversee the company's response to the proposal. The board should also be prepared to deal with crises, including macro events such as a pandemic, a natural disaster like an earthquake or hurricane, a liquidity squeeze, a long-term recession or a breakdown in international relations.

Directors enjoy substantial protection against personal liability for failures of board oversight. Under Delaware law, directors can be held personally liable for a failure to monitor only where there is 'sustained or systemic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists', which is a 'demanding test'.[16] Delaware courts have repeatedly emphasised that they will not impose liability under this standard unless directors have intentionally failed to implement any reporting system or controls or, having implemented such a system, intentionally refused to monitor the system or ignored any red flags that it raised. Recent *Caremark*-related rulings, however, demonstrate that the risk of exposure for failure of oversight and failure to have board-level (not just management-level) systems is real, especially in the context of 'mission-critical' risks facing a company.[17] That said, Delaware courts do continue to view oversight failure liability for boards to a 'deliberate failure to act'.-[18] Proxy advisory firms and institutional investors have also been increasingly willing to wield the threat of withhold vote recommendations in response to perceived risk oversight failures or mistakes.

Corporate disclosure

Public corporations are subject to a disclosure regime that generally requires annual and quarterly reports, as well as current reports, to be filed following the occurrence of certain events, such as entry into material agreements, completion of significant acquisitions or dispositions of assets, and changes in officers or directors and amendments to the corporation's charter or by-laws. Public disclosure is also required of certain transactions in the corporation's securities by corporate insiders, such as officers and directors, and of material non-public information that a corporate insider has disclosed to certain individuals, such as stock analysts or shareholders. Additionally, the corporation must make significant disclosure whenever it solicits proxies for the votes of shareholders, as it must in connection with the election of directors or significant transactions, such as mergers or the sale of substantially all corporate assets.

Securities regulations require substantial annual disclosure of compensation awarded to the five named executive officers (NEOs) of a corporation, which are the CEO, the chief financial officer and the three other most highly compensated executive officers. The disclosure must describe all material elements of the NEOs' compensation, including the overall objectives of the compensation programmes, the process for determining the amount of each element of compensation and the rationale underlying that process. Federal securities laws also require disclosure regarding the relationship between executive compensation and the company's financial performance, the company's policies governing hedging transactions of the company's stock by employees and directors and the ratio of the total compensation of the CEO to the median compensation of the company's employees. In furtherance of the Dodd–Frank Act requirements, in 2015 the SEC adopted a rule requiring companies to disclose in registration statements, proxy statements and annual reports the ratio of CEO compensation to the median compensation of the company's employees. The methodology for identifying the median employee compensation is not set forth in the rule, but is instead determined by each company.

Recently, a heightened focus on disclosure has permeated all corners of corporate governance, from risk oversight to environmental issues to cybersecurity.[19] In 2022, the SEC put forth proposed rules related to climate change risk, including disclosure of board and management oversight and governance related to material climate impacts, greenhouse gas emissions, as well as transition plans and reduction targets.[20] On 6 March 2024, the SEC released the final rules concerning climate change risk, which were significantly less onerous and more limited in the scope of disclosure requirements as compared to the proposed rules. In July 2023, the SEC adopted wide-ranging cybersecurity disclosure rules that would require the reporting of all material cybersecurity incidents within four business days of determining the event's materiality. The proposed rules also call for periodic reporting on company policies and procedures for managing cybersecurity risks.[21] At the SEC's Investor Advisory Committee meeting in September 2023, the subcommittee approved recommendations to expand human capital management disclosures concerning employee headcount, turnover metrics, compensation, demographics and diversity.[22] Additionally, new rules will come into force for companies whose fiscal year commences after 1 January 2024, and will require companies, among other things, to include in their annual report or proxy statement narrative disclosure regarding their policies and practices on timing of awards of stock options and other similar option-like instruments. All in all, if adopted, these new rules will drive corporations to expend considerable time and resources developing suitable oversight mechanisms and internal controls in order to comply with the new disclosure regime.[23]

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Environmental, social and governance

i Stakeholder governance

For several decades, there had been a prevailing assumption among many CEOs, directors, scholars, investors, asset managers and others that the sole purpose of corporations is to maximise value for shareholders. This exclusive focus on shareholder wealth maximisation had exacerbated pressure on corporations to take actions to maintain or boost the near-term stock price. This has led to increasing concern about the negative consequences of shareholder primacy and the short-termism it has facilitated, as well as the longer-term effects on broader socioeconomic and sustainability issues. In 2019, the Business Roundtable issued a statement on the purpose of a corporation, signed by 181 public company CEOs, departing from its long-standing endorsement of shareholder primacy and embracing stakeholder governance, which posits that the fiduciary duty of management and the board of directors is to promote the long-term value of the corporation for the benefit of all its constituents, not solely to maximise shareholder wealth. Several prominent institutional investors, including BlackRock, Inc, the Vanguard Group and State Street Global Advisors, subsequently issued public statements similarly endorsing stakeholder governance. The covid-19 pandemic, with its devastating human and economic toll, also emphasised the interconnectedness and codependencies of various constituents and intensified focus on stakeholder governance and the failings of the old governance paradigm. In 2022, in the wake of the pandemic, however, as ESG topics, and the term 'ESG' itself, rose in prominence, they also became increasingly polarised and politicised, with politicians at the highest levels of state and federal government, as well as activist investors and other players, publicly staking out positions on ESG and the extent to which it should (or should not) be considered by companies and asset managers.[24] Notably, a June 2023 decision from the Supreme Court of the United States in *Students For Fair Admissions, Inc v. Harvard College*, 132 S. Ct. 2141 (2024), saw the Court strike down admissions policies promoting affirmative action. While the decision was limited to a narrow instance in higher education, the consequences for other diversity, equity and inclusion initiatives (much of the 'S' in 'ESG') at various institutions and corporations remains to be seen.[25] At a minimum, the ruling serves to bolster anti-ESG sentiments, which have been proliferated by media and avoided by once-vocal defenders.[26] In the face of these attacks, supporters of stakeholder capitalism have accepted that the term 'ESG' may have become too politicised, and rather than defend the term itself, now instead advocate for responsible corporate governance in each of the ESG arenas.[27] Thus, although ESG may have fallen out of fashion, the risks and opportunities ESG seeks to address remain as poignant as ever.[28] Without the hype and polarising effect of the ESG mantle, companies and investors alike may have more flexibility to take a surgical approach to issues such as climate, sustainability, human capital and diversity, equity and inclusion, and pursue tailored strategies that are firmly rooted in the creation of long-term sustainable value.

Stakeholder governance is fully consistent with well-established principles of corporate law and the existing fiduciary framework for directors. Directors have a fiduciary duty to promote the best interests of the corporation in the long term, and in fulfilling that duty, directors exercise their business judgement in considering and reconciling the interests of various stakeholders and their effects on the business of the corporation. The special genius of Delaware law in particular, and one of the primary reasons why it has become the indisputably pre-eminent jurisdictional choice of most major US public companies, is that it has been animated by a fundamental sense of pragmatism and its fiduciary duty framework has afforded corporations the breathing room they need to address evolving business challenges as well as expectations of shareholders. Companies and investors alike have been rethinking the ways in which they engage and have been providing robust and increasingly tailored disclosures about their approaches to strategy, purpose and mission; board involvement, composition and practices; board oversight of strategy and risk management; the business case for long-term investments, reinvesting in the business and retraining employees; pursuing research and development, innovation and other capital allocation priorities; sustainability, ESG and human capital matters; stakeholder and shareholder relations; corporate governance; and corporate culture.

ii Risk management

The board of directors should ensure that the corporation has a healthy and balanced attitude towards risk – keeping in mind that there is danger in excessive risk aversion, just as there is danger in excessive risk-taking – and it should set standards for corporate risk management. Directors must identify key business risks, establish a system of board-level compliance monitoring and reporting to oversee the management of these risks and make a good-faith effort to ensure that the system is working effectively.[29] When the corporation's risk management functions raise a red flag, the board of directors should investigate the occurrence and see that the corporation takes appropriate measures to remedy any problems that it uncovers. The board should periodically review the effectiveness of the corporation's risk management reporting functions (including how risks are identified and reported upwards, how management responsibility for risk management is allocated and whether risk managers have access to the board of directors and senior management) and repair any deficiencies that it uncovers. Recent cybersecurity-related intrusions in the United States have brought heightened attention and scrutiny to questions of risk oversight, effective risk mitigation practices and adequate disclosure of incidents. These questions gained new salience in the wake of the covid-19 pandemic, which sowed chaos in the global economy and financial markets, exacerbating the systemic risk-management issues already faced by companies around the world, including human capital issues, business model and supply chain resilience and consumer welfare and social impact, as well as matters of environmental stewardship. In particular, where employee safety is concerned and at companies and in industries where product or service failures can jeopardise consumer or environmental safety, critical infrastructure or human life, the board should ensure that corporate culture does not, deliberately or due to inattention or insufficient resource allocation, prioritise cost-cutting or profits (which may include, as a matter of employee and public perception, compensation levels) over safety and compliance. Additionally, boards should closely monitor the continued developments regarding sexual and other misconduct in the workplace, as well as initiatives to promote diversity, inclusion and equity, as a delayed or indecisive response to a harassment or discrimination incident can have a damaging effect on corporate culture, employee morale and retention, consumer preferences and the reputation of the company as a whole, the members of the board and the executive management team as individuals. Last, but certainly not least, as generative AI continues to have a transformational effect throughout the economy, both in the US and globally, demand from stakeholders for board oversight and guardrails will expand. In October 2023, the Biden administration issued a wide-ranging executive order on AI, and regulators, including the SEC, are joining in on this effort and actively working towards AI regulation in specific areas. The SEC proposed a rule aimed at protecting investors from AI technologies that could be optimised to place broker-dealer and investment advisory firms' interests ahead of their investors' interests, and we expect further activity from the SEC and other regulators in this area over the coming years to manage the risks from AI, which companies should monitor closely.

Some corporations have a dedicated board-level risk management committee, which the Dodd–Frank Act requires of certain publicly traded bank holding companies and non-bank financial holding companies, but most boards situate the risk management function at the audit committee, in response to a listing rule of the NYSE that requires the audit committee to discuss risk assessment and risk management policies. Companies are required to disclose in their annual proxy statement the extent of the board's role in risk oversight activities and how the board administers its oversight function. The SEC has also issued specific guidance addressing when and how cybersecurity risks should be publicly disclosed. The reputational damage to boards and companies that fail to properly manage risk is a major threat, and ISS now includes specific reference to risk oversight as part of its criteria for choosing when to recommend withholding votes in uncontested director elections. To prepare for the evolving risks and the increased focus on corporations' risk management functions, boards will need to engage in director training to build on existing skills. In addition, the recruitment of new directors will need to address any potential gaps. These recruitment efforts may require the board to move away from approaches that seek to replicate the skill set and experiences of existing directors and instead look toward diverse candidates at various points in their careers to strengthen risk-oversight capabilities.

Shareholders

i Shareholder rights and powers

Shareholders are permitted to vote at annual and special meetings. State corporation law typically entitles shareholders to vote on matters such as elections of directors, amendments to the corporation's charter, transactions in which the corporation is acquired and sales of substantially all the corporation's assets. Stock exchange rules also grant shareholders the right to vote on certain matters; for example, the NYSE requires a shareholder vote prior to the issuance of stock that will exceed 20 per cent of the voting power or common stock outstanding after the issuance. Corporations must also conduct a non-binding shareholder vote at least every three years to approve the compensation of their NEOs – votes that ISS policy also encourages – and an additional non-binding shareholder vote at least every six years to determine the frequency of these say-on-pay votes.[30] Non-binding advisory votes are also required with respect to golden parachute compensation arrangements triggered by a merger or acquisition transaction. However, the Jumpstart Our Business Startups Act (the JOBS Act), signed into law in January 2012, exempts newly public 'emerging growth companies' from say-on-pay votes and certain other requirements for the earlier of five years or until the company meets specified size thresholds.

In addition, Rule 14a-8 under the federal Securities Exchange Act permits shareholders to propose and vote on additional non-binding resolutions, which typically concern issues of social justice or corporate responsibility. In 2023, shareholders voted on 359 shareholder proposals concerning ESG issues (of which 95 proposals focused specifically on environmental issues and 56 focused on lobbying and political issues).

ii Shareholders' duties and responsibilities

Under Regulation 13D of the Securities Exchange Act (as amended by the new rules described below), shareholders or groups of shareholders acting in concert who acquire more than 5 per cent of a company's stock must publicly disclose their ownership stake within the next five business days. Schedule 13D requires disclosure of the shareholder's or group's investment purposes, including any plans or proposals relating to significant transactions involving the company. The disclosure statement must also be amended within two business days to reflect any material changes to information previously disclosed. Passive investors acquiring more than 5 per cent of a company's stock who certify that the securities were not acquired, and are not held, with the purpose or effect of changing or influencing control of the issuer may instead disclose ownership on a short-form Schedule 13G, the disclosure requirements of which are less onerous than those of the long-form Schedule 13D. In October 2023, the SEC adopted amendments to Regulation 13D-G to modernise the beneficial ownership reporting rules, including by shortening certain filing deadlines for initial and amended Schedule 13D and 13G filings, expanding the types of securities that are included in the calculation of beneficial ownership to add derivative securities, and clarifying circumstances when a group may be formed via new guidance that gives more teeth to the 'group' concept under Section 13(d) of the Exchange Act. These amendments represent the most significant reforms to beneficial ownership reporting since the rules were initially adopted in 1968 and importantly increase the timeliness and quality of information that all market participants may access. The duties and responsibilities of shareholders in the United States differ in important ways from those of shareholders in other countries. Among other things, the mandatory offer concept common in Europe, India and other countries – in which an acquisition of a certain percentage of securities requires the bidder to make an offer for either the balance of the outstanding shares or for an additional percentage – is very different from US practice, which emphasises disclosure of beneficial ownership but does not mandate a takeover bid. In addition, as discussed in further detail below, permissible deal-protection structures, pricing requirements and defensive measures available to companies in the United States also differ, with boards generally benefiting from greater latitude to take actions to protect the corporation from shareholder activism and takeover attempts without first obtaining shareholder approval.

iii Shareholder activism

Hostile takeovers and shareholder activism – the capture of corporate control or influence over corporate policy by discrete groups of shareholders, typically to subjugate a corporation's long-term strategy in pursuit of short-term profits or the return of capital to shareholders – are a significant threat to US corporations, regardless of industry, size or performance.[31] While traditional activism focused on short-term profit, stock price and total shareholder return (TSR) continues, a new set of activists has emerged, emphasising ESG considerations. The activism landscape has also evolved to include dual purpose activists who combine both TSR and ESG arguments, as well as 'pincer attacks' from ESG and TSR activists acting independently or in concert against the same company.[32] In recent years, activist hedge fund activity has spiked against companies of various sizes, industry sectors and governance profiles, and these attacks are unlikely to be curbed by regulatory or market forces in the near future.[33] In addition to cultivating strong relationships with a long-term institutional shareholder base, dealing with unsolicited offers and pressure from shareholder activists is more art than science.[34] As activism attacks continue to intensify, companies are also beginning to engage proactively and to reach desired outcomes for their long-term shareholders and avoid disruptive consequences of short-term activist attacks.[35]

iv Takeover defences

A critically important tool for enabling boards of directors to discharge their fiduciary duties in the face of the threat of hostile takeovers and shareholder activism under current law remains the shareholder rights plan, or poison pill.

The shareholder rights plan entails a dividend of special rights to each of the corporation's shareholders. In the event that a shareholder amasses equity ownership, without the approval of the board of directors, in excess of a predetermined threshold – often between 10 and 15 per cent (with perhaps a higher threshold used for passive institutional investors) – the rights held by every other shareholder trigger and convert into the right to purchase stock of the corporation at a price substantially below the current market value.

Alternatively, most rights plans provide that the board of directors may instead choose to exchange one share of common stock for each right held by shareholders other than the hostile bidder or activist shareholder. Either way, the result of this conversion or exchange is that the ownership position of the triggering shareholder is substantially diluted.

The rights plan is the only structural takeover defence that allows a board to resist a hostile takeover attempt, and it has also been deployed in numerous activism situations. Although it does not provide complete immunity from a takeover, it allows the board to control the process and provides the corporation with leverage to bargain for a higher acquisition price and the power to reject underpriced or otherwise inappropriate bids. It is also implemented exclusively by the board of directors and does not require shareholder approval, so it can be put in place in very short order.

The principal disadvantage of the rights plan is that ISS will typically recommend a withhold vote for all directors after the adoption of a rights plan that the company does not subject to shareholder ratification within a year of adoption. As a result, and because a rights plan can be adopted quickly, most corporations adopt a rights plan only after a takeover threat appears – and prior to that time, the plan is 'kept on the shelf'. In the early months of the covid-19 pandemic, faced with a precipitous decline in their stock price, a number of companies quickly adopted a rights plan in the hope of deterring predatory activist investors or opportunistic takeover bids; however, the prevailing response in the absence of a specific threat was to have plans 'on the shelf and ready to go' at short notice.[36]

Keeping a rights plan on the shelf offers almost all of the protection of an active rights plan without any risk from an adverse ISS recommendation, but it can leave a corporation vulnerable to stealth acquisitions, in which an activist shareholder purchases just under 5 per cent of a company's stock, and then buys as much as possible on the open market within the next few days. Prior to the amendments to Regulation 13D-G described above, shareholders had 10 calendar days after acquiring more than 5 per cent of a company's stock to publicly disclose their ownership stake; as a result, shareholders could accumulate a substantial portion of a company's equity before it is ever disclosed.[37] Additionally, prior to the recent amendments, Regulation 13D patrolled a narrow beat with regard to derivatives. Although all interests were required to be disclosed after a shareholder crossed the 5 per cent threshold, only some derivative interests were counted towards that threshold – generally, only those that are settled in kind (for stock of the corporation rather than for cash from the derivatives counterparty), and only those that can be exercised within the next 60 days.[38] Thus, because an activist could accumulate its position in a corporation without public disclosure, it was possible for the board of directors not to have any warning of the activist's behaviour, and thus some risk that a company would not be able to adopt a rights plan in time to avoid a significant accumulation of stock in unfriendly and opportunistic hands. Under the amended rules, the window of opportunity for activist investors to build a position in a target was shortened to five business days. Moreover, disclosure is required now as to interests in all derivative securities, including cash-settled derivative securities that use the issuer's equity securities as a reference security.

Other defences against activist shareholders include a classified board of directors, limiting shareholders' ability to call a special meeting, adopting an advance notice by-law that requires rigorous disclosure of a shareholder's holdings and other interests in a corporation to nominate a director candidate or propose other items of business at a special or annual meeting, and limiting shareholders' ability to act by written consent (86 per cent of S&P 500 companies prohibit shareholder action by written consent).

Overall, the availability of takeover defences has been steadily eroded over the years, predominantly as a result of shareholder activism led by ISS, union and public pension funds and academics. Today, less than 1 per cent of S&P 500 companies have a rights plan in effect, down from 45 per cent in 2005 and 60 per cent in 2000. In 2023, shareholders at 59 companies voted on shareholder-initiated proposals to grant shareholders the right to call special meetings or to decrease the requirements to call a special meeting, with an average level of support of 39 per cent, and shareholders at 15 companies voted on shareholder-initiated proposals to grant shareholders the right to act by written consent or to decrease the requirements to act by written consent, with an average level of support of 47 per cent.

v Engagement with shareholders

Shareholder relations have become increasingly complicated as a result of activist trends and have required greater attention at the board level, prompting a renewed focus on the proper role of direct dialogue between boards and shareholders, and the benefits and disadvantages of more open, regular lines of communication. Shareholder engagement is increasing, as both companies and institutional investors have sought to engage in more regular dialogue on corporate governance matters. A report by the EY Center for Board Matters at Ernst & Young LLP reported that 91 per cent of Fortune 100 companies included disclosures about their shareholder engagement efforts in their 2019 proxy statements, compared with 82 per cent in 2016.[39] Recent disclosure reform efforts have also sought to require institutional shareholders to report their share positions on a more current basis as of the end of each quarter than is now the case, as well as suggesting more frequent reporting. In 2020, the SEC proposed an amendment to Form 13F that would exempt from filing all asset managers holding less than US$3.5 billion (up from the current US$100 million) of Section 13(f) securities, thereby slashing the number of reporting managers by 90 per cent and effectively abolishing Form 13F as a reporting system for most investors.-[40] The SEC's proposal, viewed by investors, companies and their advisers as flying in the face of their repeated demands for greater transparency and shareholder engagement, was met with a quick and widespread backlash, and the SEC shelved the proposal shortly afterwards.

Management generally serves as the primary caretaker of shareholder relationships, with the board providing oversight as to the presence of an effective shareholder relations programme. However, institutional investors are increasingly voicing their expectation that companies should provide access to independent directors. Some activists have also been seeking direct dialogue generally with companies in which they invest, independently of whether operational or other performance issues exist. In 2016, a group of large public companies and investors jointly developed and endorsed a set of principles on corporate governance that, among other things, called for active engagement with shareholders on key issues. Similarly, in 2018, BlackRock, Inc called for a new model of shareholder engagement based on year-round discussions between management, the board and shareholders about long-term value creation and long-term corporate contribution to society at large. Where shareholders request direct communications with the board, it may be desirable for directors, in appropriate circumstances and following consultation with management, to accommodate those requests. The policies and arrangements best suited for any given company will depend on, among other things, the preferences of directors, the nature and extent of existing relationships with major shareholders, the expressed preferences of those shareholders and the structure and staffing of the company's existing shareholder relations programme.

In 2000, the SEC promulgated Regulation FD to prevent companies from selectively disclosing material and non-public information to large investors and analysts. Under Regulation FD, certain employees of a company – including directors, officers, public relations or investor relations professionals, and others with similar responsibilities or who regularly communicate with market professionals or shareholders – may intentionally disclose material non-public information about a company only if the material is simultaneously disclosed to the public. If they disclose the information unintentionally, the same information must promptly be disclosed publicly. Disclosures made to the press and disclosures made in the ordinary course of business (e.g., customary communications with distributors or customers) are exempted. Intentional disclosures include disclosures in which the employee was reckless in not knowing that the information was material and non-public.

Information is considered material if there is a substantial likelihood that a reasonable investor would consider the information important when making investment decisions, and if the information adds significantly to the total mix of information available. Even if information is quantitatively insignificant, it may still be considered qualitatively material, and information is more likely to be deemed material in hindsight in light of subsequent reactions by the market. The SEC has issued guidance that certain categories of information are particularly likely to be considered material – among them, information about earnings; corporate events such as mergers, bankruptcy, tender offers or changes in control; and products, discoveries and developments with respect to material contracts, customers or suppliers. Although purported clarifications to previously announced information can themselves be considered material and nonpublic, 'Regulation FD does not require that corporate officials only utter verbatim statements that were previously publicly made.'[41]

Regulation FD makes unscripted dialogues between company officials and individual analysts and shareholders risky.[42] Although it is unusual for companies to prohibit such meetings altogether, they should be approached carefully and by professional spokespersons only. A board of directors should adopt corporate governance guidelines that ensure that the company's media strategy is executed only through approved channels, and with the understanding that analysts and shareholders will often engage in such private dialogues with the hope of ferreting out exactly the sort of information that Regulation FD forbids company officials from disclosing in such a forum.

Outlook and conclusions

Corporate governance in the United States has changed dramatically during the past 30 years, and will undoubtedly continue to evolve in significant ways in the coming years. In particular, the SEC has increased its focus on proxy plumbing, including with respect to the accuracy, transparency and efficiency of the voting process; shareholder communications and retail participation in the voting process; and misalignment of voting power and economic interests, including through empty voting strategies involving purchasing voting securities and then hedging away the economic exposure with derivatives. In 2022, the SEC adopted amendments to the 2020 rules governing the role of proxy advisory firms, such as ISS and Glass Lewis, that eliminate certain information sharing requirements applicable to these firms, which, in light of ISS's substantial influence in the evolution of corporate governance norms during the past several decades, may have long-term and far-reaching implications and are likely to lead to instability, uncertainty and a lack of transparency.[43] The SEC has also enacted reform of the Regulation 13D reporting regime, including encompassing additional forms of economic interests and shortening the 10-day reporting window that raiders have used in recent years to facilitate stealth acquisitions of control blocks without paying a premium, thereby improving market transparency in respect of beneficial ownership reporting, derivative ownership and short selling. In the same vein, the SEC has expressed its concerns with manipulation, information asymmetries in securities trading and transparency, and in 2022, adopted new rules that reshape the disclosure and corporate policy landscape with respect to issuer share buybacks, trading by corporate insiders and the use of Rule 10b5-1 plans as an affirmative defence against liability for insider trading. These rules include the imposition of further conditions required to utilise an affirmative defence to insider trading, as well as the establishment of required disclosures, including both periodic disclosures and disclosures triggered by transactions pursuant to Rule 10b5-1 plans on Forms 4 and 5. Additionally, as generative AI continues to have a transformational effect throughout the economy, both in the US and globally, demand from stakeholders for board oversight and guardrails is expanding. In October 2023, the Biden administration issued a wide-ranging executive order on AI, and regulators, including the SEC, are joining in on this effort and actively working toward AI regulation in specific areas. At the state level, the courts of Delaware have been refining the fiduciary duty rules applicable to conflict transactions and the review of merger and acquisition proposals in recent years, often to increase the scrutiny that directors will face in connection with such transactions and, more generally, to recalibrate the relative power of shareholders and directors.

From the accounting scandals of the early 2000s, to the financial crisis of 2008–2010, to the covid-19 pandemic, and now the post-pandemic politicisation of corporate governance and the rise of generative AI, the political and public appetite for strong governance remains robust, though the shape that governance ought to take is the subject of much debate. We have recently seen a heightened awareness of short-termist pressures in the markets and the effect on boards of directors charged with guiding a company's strategy to achieve long-term value creation, including an increased focus on the extent to which new corporate governance reforms may exacerbate, rather than ameliorate, short-termist pressures. The Business Roundtable's statement on the purpose of the corporation exemplifies the widespread acceptance by companies and institutional shareholders that corporations must consider the interests not only of shareholders but also those of employees, customers, suppliers, the environment, communities and other constituencies that are critical to the success of the corporation. There has been an awakening to the idea that corporate governance is not just about the allocation of decision-making authority and accountability as between corporations and shareholders; instead, it is being reconceived in light of the broader purpose and role of corporations as engines of the economy, ladders of socioeconomic mobility, innovators of technological progress and key stakeholders in environmental sustainability.

Shareholder engagement practices have evolved significantly as well, with the frequency and depth of engagement increasing alongside a more fundamental rethinking of the nature of relationships with shareholders and the role of these relationships in supporting – or undermining – board efforts to take long-term perspectives. A central aspect of the continuing debate is whether initiatives styled as governance reforms operate to shift the locus of control over the corporate enterprise from those with direct knowledge, involvement in and fiduciary responsibilities for the enterprise towards entities lacking those attributes, and whether imposing some form of duties, regulations or mandated best practices on those entities is needed.

In many respects, the relentless drive to adopt corporate governance mandates seems to have reached a plateau in the United States, with essentially all the prescribed best practices – including say on pay, the dismantling of takeover defences, majority voting in the election of directors and the declassification of board structures – having been codified in rules and regulations or voluntarily adopted by a majority of S&P 500 companies. On the other hand, the frenzied rise followed by the sharp decline of ESG speaks to the volatility of the landscape.

It remains to be seen whether the codification of best practices coupled with the flurry of activist activity portends a new era of more nuanced corporate governance debates, in which the focus has shifted from 'check the box' policies to more complex questions, such as striking the right balance in recruiting directors with complementary skill sets and diverse perspectives and tailoring the board's role in overseeing risk management to the specific needs of the company. With ESG fading into the background, a new emphasis on continued debate about, and the evolution of, US governance rules and the role of the stakeholder for the corporation (in all its disparate forms) appears likely.

Corporate governance in the United States has changed dramatically during the past 30 years, and will undoubtedly continue to evolve in significant ways in the coming years. In particular, the SEC has increased its focus on proxy plumbing, including with respect to the accuracy, transparency and efficiency of the voting process; shareholder communications and retail participation in the voting process; and misalignment of voting power and economic interests, including through empty voting strategies involving purchasing voting securities and then hedging away the economic exposure with derivatives. In 2022, the SEC adopted amendments to the 2020 rules governing the role of proxy advisory firms, such as ISS and Glass Lewis, that eliminate certain information sharing requirements applicable to these firms, which, in light of ISS's substantial influence in the evolution of corporate governance norms during the past several decades, may have long-term and far-reaching implications and are likely to lead to instability, uncertainty and a lack of transparency.[43] The SEC has also enacted reform of the Regulation 13D reporting regime, including encompassing additional forms of economic interests and shortening the 10-day reporting window that raiders have used in recent years to facilitate stealth acquisitions of control blocks without paying a premium, thereby improving market transparency in respect of beneficial ownership reporting, derivative ownership and short selling. In the same vein, the SEC has expressed its concerns with manipulation, information asymmetries in securities trading and transparency, and in 2022, adopted new rules that reshape the disclosure and corporate policy landscape with respect to issuer share buybacks, trading by corporate insiders and the use of Rule 10b5-1 plans as an affirmative defence against liability for insider trading. These rules include the imposition of further conditions required to utilise an affirmative defence to insider trading, as well as the establishment of required disclosures, including both periodic disclosures and disclosures triggered by transactions pursuant to Rule 10b5-1 plans on Forms 4 and 5. Additionally, as generative AI continues to have a transformational effect throughout the economy, both in the US and globally, demand from stakeholders for board oversight and guardrails is expanding. In October 2023, the Biden administration issued a wide-ranging executive order on AI, and regulators, including the SEC, are joining in on this effort and actively working toward AI regulation in specific areas. At the state level, the courts of Delaware have been refining the fiduciary duty rules applicable to conflict transactions and the review of merger and acquisition proposals in recent years, often to increase the scrutiny that directors will face in connection with such transactions and, more generally, to recalibrate the relative power of shareholders and directors.

From the accounting scandals of the early 2000s, to the financial crisis of 2008–2010, to the covid-19 pandemic, and now the post-pandemic politicisation of corporate governance and the rise of generative AI, the political and public appetite for strong governance remains robust, though the shape that governance ought to take is the subject of much debate. We have recently seen a heightened awareness of short-termist pressures in the markets and the effect on boards of directors charged with guiding a company's strategy to achieve long-term value creation, including an increased focus on the extent to which new corporate governance reforms may exacerbate, rather than ameliorate, short-termist pressures. The Business Roundtable's statement on the purpose of the corporation exemplifies the widespread acceptance by companies and institutional shareholders that corporations must consider the interests not only of shareholders but also those of employees, customers, suppliers, the environment, communities and other constituencies that are critical to the success of the corporation. There has been an awakening to the idea that corporate governance is not just about the allocation of decision-making authority and accountability as between corporations and shareholders; instead, it is being reconceived in light of the broader purpose and role of corporations as engines of the economy, ladders of socioeconomic mobility, innovators of technological progress and key stakeholders in environmental sustainability.

Shareholder engagement practices have evolved significantly as well, with the frequency and depth of engagement increasing alongside a more fundamental rethinking of the nature of relationships with shareholders and the role of these relationships in supporting – or undermining – board efforts to take long-term perspectives. A central aspect of the continuing debate is whether initiatives styled as governance reforms operate to shift the locus of control over the corporate enterprise from those with direct knowledge, involvement in and fiduciary responsibilities for the enterprise towards entities lacking those attributes, and whether imposing some form of duties, regulations or mandated best practices on those entities is needed.

In many respects, the relentless drive to adopt corporate governance mandates seems to have reached a plateau in the United States, with essentially all the prescribed best practices – including say on pay, the dismantling of takeover defences, majority voting in the election of directors and the declassification of board structures – having been codified in rules and regulations or voluntarily adopted by a majority of S&P 500 companies. On the other hand, the frenzied rise followed by the sharp decline of ESG speaks to the volatility of the landscape.

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