Buffalo Law Review

Volume 70 | Number 1 | Article 9

4-15-2022

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Recommended Citation
Lawrence J. Trautman, Seletha Butler, Frederick R. Chang, Michele Hooper, Rom McCray & Ruth Simmons, *Corporate Directors: Who They Are, What They Do, Cyber Risk and Other Challenges*, 70 Buff. L. Rev. 459 (2022).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol70/iss1/9

Buffalo Law Review

VOLUME 70 JANUARY 2022 NUMBER 1

Corporate Directors: Who They Are, What They Do, Cyber Risk and Other Challenges

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The authors wish to extend particular thanks to the following for their assistance: Tawab Attaie; Peter Gleason; Collin Johnson; Munir Quddus; Hesam Shahriari; Morgan Stewart; and Maia Taylor. All errors and omissions are our own.

OVERVIEW

Recently, Professors Bebchuk, Kastiel, Tallarita,[1] Strine,[2] Rock,[3] and others have continued the "fundamental and heated debate about the purpose that corporations should serve, an increasingly influential 'stakeholderism' view." This advocates giving corporate leaders the discretionary power to serve all stakeholders and not just shareholders.[4] Supporters of stakeholderism argue ". . .address[ing] growing concerns about . . .the impact of corporations on society and the environment."[5] Elsewhere, Professors Roe, Spamann, Fried, and Wang critique the 2020 European Commission report, "Study on directors' duties

1. *See* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021).

2. *See* Leo Strine, *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy – A Reply to Professor Rock*, 76 BUS. LAW. 397 (2021).

3. *See* Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363 (2021) (Professor Rock observes that "analytically and conceptually, there are four separate questions being asked. First, what is the best theory of the legal form we call 'the corporation'? Second, how should academic finance understand the properties of the legal form when building models or engaging in empirical research? Third, what are good management strategies for building valuable firms? And, finally, what are the social roles and obligations of large publicly traded firms? I argue that populist pressures that emerged from the financial crisis, combined with political dysfunction, have led to the confusion of these different questions, with regrettable results.").

4. Bebchuk et al., *supra* note 1.

5. *See id; see also generally* Stephen M. Bainbridge, Comment, *Long-Term Bias and Director Primacy*, 2020 COLUM. BUS. L. REV. 801 (2021); Stephen F. Diamond, The Myth of Corporate Governance (Jan. 12, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3742395; Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. PA. J. BUS. L. 429 (2021); Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345 (2021); Edward B. Rock, *Business Purpose and the Objective of the Corporation* (N.Y.U L. & Econ. Rsch., Working Paper No. 20–44, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724710; Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885 (2021).

and sustainable corporate governance."[6]

On November 9, 2020, six experienced corporate governance professionals gathered to discuss the duties and responsibilities of corporate directors and contemporary challenges, including cyber risk, pandemic, and diversity.[7] Sponsored by the Business Law Association of Prairie View A&M University, our Article results from that effort and is augmented with relevant scholarship citations where appropriate to assist the reader who is interested in more information. During 2020 and 2021, global governments, their citizens, and businesses all encountered disruptive economic and political stress. Particularly in such challenging times, effective corporate governance is essential for: business formation, the creation and growth of jobs, and maintenance of the economic engine that powers economies and allows for an environment fostering healthy populations and world peace. During stressful tragedies like the 2020-21 global pandemic, instances of corporate cyberbreach, and other times of crisis, it is the responsibility of corporate directors to provide the governance oversight to business enterprises as they navigate the struggle to preserve jobs and provide for corporate survival. We believe this Article

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6. Mark J. Roe, Holger Spamann, Jesse M. Fried & Charles C.Y. Wang, *The Sustainable Corporate Governance Initiative in Europe*, 38 YALE J. ON REG. BULL. 133, 133 (2021) ("First, the Report defines the corporate governance problem as one of pernicious short-termism that damages the environment, the climate, and stakeholders. But the Report mistakenly conflates time-horizon problems with externalities and distributional concerns. . . . Second, the Report's main ostensible evidence for an increase in corporate short-termism is rising gross payouts to shareholders (dividends and stock repurchases). However, the more relevant payout measure to assess corporations' ability to fund long-term investment is net payouts. . . . Third, when the Report turns to other evidence for short-termism, it selectively picks academic studies that support its views on short-termism, while failing to engage substantial contrary literature. . . . Finally, the Report touts cures whose effectiveness has little evidentiary support and, for some, there is real evidence that the cures could be counterproductive and costly.").

7. The discussion included within this Article includes the observations of these experts, based on their many years as corporate directors. The informal nature of this Article reflects that discussion and their expertise.

contributes to the literature by highlighting these issues and helping to bring a healthy discussion to a wider audience.

Our Article proceeds in twelve parts. First, we discuss the legal duties and responsibilities of corporate directors. Second, we focus on the demographics of directorship. Third, we look at required skills and desired experience for directors. Fourth, we focus on board committees and structuring the board for efficiency. Fifth, the audit committee is discussed. Sixth, we describe the function of the compensation committee. Seventh, the nomination and governance committee is examined. Eighth, we briefly discuss the lesser prevalent committees: executive, finance, risk, investment, technology, compliance, environment, health, safety, strategy, and other less frequently found committees. Ninth, we focus on the difficult task of governing cyber risks. Tenth, we look at the role of directors during crisis. Eleventh, we discuss the importance of board diversity. And last, we conclude.

Our Article inevitably fails to resolve the ongoing debate regarding the full scope of corporate purpose. However, we believe our comments and observations add to the necessary and important continuing discussion about the efficient function of directors as they seek to discharge their duties and responsibilities, particularly with regard to governing cybersecurity risk and issues of board diversity.

I. DUTIES AND RESPONSIBILITIES OF DIRECTORS

A. *General*

Seasoned director and Professor Seletha Butler explains that corporations are creatures of state corporate law and related governing documents. She states that only the board itself can act on behalf of and bind the corporation, not each individual director acting independently. Directors are elected by shareholders. Subject to statutory limitations, the articles/certificate of incorporation or bylaws establish the number of directors to serve the corporation. In accordance with the governing documents or state law, if direction is omitted in the governing documents, the established number of directors can be adjusted in resolutions or meeting minutes. The term for members of the board of directors usually is included in the corporate governing documents (articles/certificate of incorporation or bylaws) and otherwise follows the rule in the applicable state's corporation code. The typical term is one year. Directors of for-profit corporations typically receive some form of compensation (cash, stock, options, or a combination) for their service.

Directors hold meetings pursuant to bylaws with recorded minutes. The governing documents or applicable corporation code will dictate the percentage needed for approval or consent to take action. Typically, required approval is director majority vote, but "big ticket items" or other extraordinary items (i.e., amendments to articles of incorporation and certain bylaw provisions or approval of mergers, acquisitions and dissolution) may require supermajority approval or consent. Meetings require a quorum. Special meetings require notice, indicating the time, place, and reason for the meeting, which can only deal with that matter. Generally, directors have the following rights: to inspect the corporate books and records; to compensation; and to indemnification. Therefore, if a director is sued for acts as a director, the corporation typically guarantees indemnification (i.e., reimbursement) or purchases liability insurance to protect the directors from personal liability for acts taken.[8] Boards typically establish committees and allocate board responsibilities to these committees, discussed in greater detail.[9] Generally, committee meetings require a quorum, and each director has one vote. In sum, the legal duties and responsibilities of directors include: duties of

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8. *See* Lawrence J. Trautman & Kara Altenbaumer-Price, *D&O Insurance: A Primer*, 1 AM. U. BUS. L. REV. 337 (2012); JAMES F. MORGAN, BUSINESS LAW 852 (6th ed. 2019) (discussing indemnification and insurance).

9. *See infra* Part IV.

loyalty, care, and good faith, and are subject to the "business judgment rule." We will now discuss each.

B. *Duty of Loyalty*

The corporate duty of loyalty is the obligation to subordinate personal interests to the welfare of the corporation, which includes: no competition with the corporation; not engaging in conflict of interest transactions (unless a majority of the disinterested directors approve the transaction after full disclosure from the interested director); no illegal insider trading; no usurpation of corporation opportunities; and no transaction that is detrimental to the minority shareholders.[10]

C. *Duty of Care*

At its core, the duty of care is the obligation to act in good faith and in the best interest of the corporation, which includes: making an informed and reasonable decision (i.e., performing due diligence before making a decision); if expertise is needed, engage and rely on competent consultants and experts; exercising reasonable supervision over officers; and confidentiality. Professor Butler notes "a dissenting director that has his or her dissent recorded in the minutes is rarely held liable for breach of duty of care on that applicable action."[11]

D. *Business Judgment Rule*

The Business Judgment Rule (BJR) is the principle pursuant to which a director or officer is immunized from liability for consequences of a business decision that turns negative as long as the decision was reasonable, informed, made in good faith, and in the best interest of the

10. *See generally* MORGAN, *supra* note 8, at 849–851, 1021.

11. *Id.* at 850.

corporation. The BJR arises from the general view that informed directors acting in a manner consistent with the above are better informed and in a superior position to determine what is in the corporation's best interest. Accordingly, only when officers or directors fail to meet the duty of care or duty of loyalty will they be held personally liable.[12]

II. DIRECTORS: WHO THEY ARE

Corporate directors serve an important and influential role in our society. Many present or former chief executive officers are constantly recruited to serve on corporate boards due to their experience and expertise overseeing business enterprises. As we will discuss in the following pages, it is the role of directors to oversee management. To a considerable extent, the success or failure of corporate governance will determine the level of job creation and economic stability—and the ability of society to provide food, housing, and healthcare to its population. Many of these governance best practices and legal concepts are also applicable to directors or trustees serving in a non-profit setting.[13]

A. *The Demographics of Directorship*

1. Age and Length of Service

During 2020, the average age of directors serving on Russell 3000 Index companies is 62 years; with the average age limit for directors reportedly at 74 years-of-age.[14] The

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12. *Id.* at 849; *see also* H. Justin Pace & Lawrence J. Trautman, *Mission Critical:* Caremark*, Blue Bell, and Director Responsibility for Cybersecurity Governance*, 2022 WIS. L. REV. (forthcoming).

13. *See* Lawrence J. Trautman & Janet Ford, *Nonprofit Governance: The Basics*, 52 AKRON L. REV. 971 (2018).

14. NAT'L ASS'N OF CORP. DIRS., INSIDE THE PUBLIC COMPANY BOARDROOM 13 (2020).

National Association of Corporate Directors (NACD) reports that those directors serving as board chair have been on their company's board for 13 years and remain in their position as chair for an average of 8 years.[15] Overall board tenure for lead directors is twelve years; and, four years of service in that specific role.[16]

2. Skills and Experience

Most boards seek to recruit director candidates with executive leadership experience in their industry, and former CEOs are particularly preferred for their experience and understanding of business. Accordingly, 62 percent of new directors have an executive leadership background.[17] Because every public company is now required to have an audit committee composed entirely of independent directors, and at least one qualified "financial expert" serving on its audit committee, NACD reports that 40 percent of newly recruited directors have a "finance" background.[18] Although results from these earlier surveys do not reflect the impact from the large number of 2020-21 corporate cyber breaches, the results disclose that the third most prevalent skill represented among newly recruited directors is technology at 25 percent.[19]

3. Gender

Only about 19 percent of Russell 3000 index company directors during 2019 are women, up from 15 percent two years prior.[20] NACD observes, "Most of this growth is

15. *Id.*

16. *Id.*

17. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 9 (2019).

18. *Id.* ("Finance" is the category used in these surveys, rather than "public-company audit" or other, perhaps more accurate and informative term.).

19. *Id.* (The results do not include an additional 2% of new directors classified narrowly as "cybersecurity.").

20. *Id.* at 5. *See generally* Lawrence J. Trautman, *Present at the Creation:*

explained by an increasing number of women serving on boards of mid- and large-cap organizations rather than small- or mega-cap ones, as mega-cap companies already tend to have high percentages of women while small-cap companies have been slow to embrace this trend."[21] In terms of new director recruitment, NACD reports that 34 percent of new directors joining boards are women during 2019, up from just 26 percent the year prior.[22] Board gender numbers for 2020 show continued growth in the number of women directors, as the percentage increases to 21 percent.[23]

4. Diversity

The important topic of inadequate board ethnic and racial diversity is a major focus of this Article and discussed more fully later.[24] While historical data measuring ethnic and racial diversity are generally inadequate, NACD reports that the "percentage of new public-company directors who are non-Caucasian" increased from 9.7 percent in 2008 to 14 percent in 2018.[25]

Reflections on the Early Years of the National Association of Corporate Directors, 17 DUQ. BUS. L.J. 1 (2015) (discussing the important function, role, and mission of the NACD).

21. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 5 (2019). *See generally* Lawrence J. Trautman, *Who Sits on Texas Corporate Boards? Texas Corporate Directors: Who They Are & What They Do*, 16 HOUS. BUS. & TAX L.J. 44 (2016).

22. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 9 (2019).

23. NAT'L ASS'N OF CORP. DIRS., INSIDE THE PUBLIC COMPANY BOARDROOM 6 (2020). *See generally* Seletha R. Butler, *Business Ethics: Conceptualize Governing with the Ethic of Care and Justice*, 12 N.Y.U. J.L. & BUS. 99 (2015).

24. *See infra* Part XI.

25. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 9 (2019) (citing Kosmas Papadopoulos, *ISS Discusses U.S. Board Diversity Trends in 2019*, COLUM. L. SCH.: THE CLS BLUE SKY BLOG (June 20, 2019), https://clsbluesky.law.columbia.edu/2019/06/20/iss-discusses-u-s-board-diversity-trends-in-2019/). *See generally* Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 SCHOLAR 219 (2015) [hereinafter Trautman, *Diversity*].

III. Required Skills and Organizing for Efficiency

Every board must decide what human qualities and skills are desired as a minimum qualification of every director.

A. *Experience, Talent, and Personal Attributes*

As a threshold matter, "[e]ach director candidate should possess the following necessary core personal attributes: high standards of ethical behavior, availability, outstanding achievement in the individual's personal and professional life, possession of strong interpersonal and communication skills, independence, and soundness of judgment."[26] Professor Trautman states, "High standards of ethical behavior are an absolute must. The potential cost to the enterprise . . . due to lapses in personal integrity is a major reason why, when looking for replacements, boards tend to find directors who are already well-known to at least one sitting director."[27] Unfortunately, as will be discussed more fully later, this insular prejudice for "people like us" (those relationships of many years) is likely a major reason for the slow progress made toward achieving board racial diversity among U.S. boards.[28]

NACD reports, "Most directors (77%) are comfortable with oversight of current and future talent needs; just 43 percent have reviewed charters to ensure that talent oversight responsibilities are effectively allocated across the board. Finally, only 34 percent have set clear expectations for what the board requires from management."[29] We have

26. Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. 75, 82 (2012) [hereinafter Trautman, *Matrix*].

27. *Id.*

28. *See infra* Part XI.

29. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 5 (2019).

stated previously that highly-recruited directors tend to have executive leadership and finance skills.[30] NACD warns, "Skills areas that support growing business needs are often neglected. Skills and backgrounds in areas such as entrepreneurship, cybersecurity, and human capital were present in just 2 percent of new directors respectively."[31] In addition, this 2019 survey of 500 public-company directors reveals, "Sixty-one percent of directors report that they would be willing to compromise on cybersecurity to achieve business objectives, while 28 percent prioritize cybersecurity above all else."[32] As we ponder this data point, the same directors responded that among a list of 20 "areas for improvement:" 63% ranked "oversight of strategy execution" as their highest priority, followed by "oversight of cybersecurity."[33] We now turn our attention to a discussion about board committees.

IV. BOARD COMMITTEES

A. *Committee Structure*

Corporate directors organize themselves for efficiency, conducting their work through a committee system. Three standing committees are found on almost all boards: audit, compensation, and nomination and governance. Other, less common, committees found among the Russell 3000 in 2020 include: executive (19%); finance (11%); risk (9%); investment (4%); technology (6%); compliance (4%); environment, health, and safety (4%); strategy (2%); and a series of others (each reported at 1%).[34] We will now look at

30. *See supra* text accompanying notes 17–18.

31. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 5 (2019).

32. *Id.*

33. *Id.* at 35.

34. NAT'L ASS'N OF CORP. DIRS., INSIDE THE PUBLIC COMPANY BOARDROOM 25 (2020) (Nonstandard Committee Data).

the more prominent committees.

V. AUDIT COMMITTEE

The audit committee of the board, "will be a standing committee established to comply with the requirements of Section 3(a)(58)(A) of the Securities Exchange Act of 1934,[35] as amended. All members of the audit committee must be independent under the rules of the NYSE and the boards corporate governance guidelines."[36] Director Michele Hooper has chaired audit committees for over 25 years. With experience on major global boards, she states:

> The responsibility for audit committees falls into a couple of buckets, the most important of which is responsibility for ensuring that the organization is appropriately addressing the issue of financial reporting and that the committee has reviewed the alignment of the company's audit and audit-financial reporting structure. Compliance with complex and constantly-changing regulations and rules as to what the audit committee should be doing and the audit itself requires both time, expertise and experience to ensure management's responsibility for accurate and complete financial numbers. While the external auditors are providing assurance, responsibility begins and ends with company management.

Many issues of financial fraud have arisen over the years, as evidenced from the failures of Enron, Worldcom, Adelphia Communications, and many others about twenty years ago.[37] It was this environment during the early 2000s, which resulted in public outrage and Congressional action mandating strengthened changes in how boards addressed

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35. 15 U.S.C. §§ 78a-kk.

36. *See* N.Y. STOCK EXCH., NYSE: CORPORATE GOVERNANCE GUIDELINES 86 (Steven A. Rosenblum, Karessa L. Cain & Sabastian V. Niles eds. 2014), https://www.nyse.com/publicdocs/nyse/listing/NYSE_Corporate_Governance_Guide.pdf [https://perma.cc/57VQ-6HK3].

37. *See* Trautman, *Matrix*, *supra* note 26, at 84. *See generally* Robert A. Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of Section 404,* 29 CARDOZO L. REV. 703 (2007); Robert A. Prentice, *Enron: A Brief Behavioral Autopsy,* 40 AM. BUS. L.J. 417 (2003).

the issue of audit through the Sarbanes Oxley Act.[38] It was then that boards became even more responsible for assuring greater accountability by actually signing-off on the accuracy of financial reports.

The primary focus of a board audit committee is on risk—in for-profit corporations, nonprofits, and other enterprises (like educational enterprises). All of these are large, complex organizations and challenging for audit committee members to understand in great detail. This challenge is further complicated because individual audit committee members are only on company premises maybe a half a dozen times a year. By not being there every day, audit committee members don't see everything. However, these skilled and experienced professionals are able to look at risk areas—and then are able to build assurance structures around these areas of risk. This is how the audit committee structures its efforts to understand what needs to be done. As is the case in all the standing committees, audit committees have an annual agenda that is aligned to charter responsibilities and the committee's annual calendar. With these structures in place, the committee helps to ensure that all of the responsibilities required by law are addressed. Audit committees typically have a structure consisting of perhaps three or four board members that are assigned to audit. Audit committee members must deal with the complexity of information flow from key members of the management team. Director Ron McCray states:

> Particularly since the 2002 Sarbanes Oxley Act,[39] the audit committee has more accountability and there's a greater expectation for audit committee performance. To set the tone at the top, all the highly publicized corporate failures that happened about 2002, birthed the Sarbanes Oxley Act. Many companies got in trouble because boards of directors and members of senior management were found ineffective in keeping the corporate 'train

38. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

39. *See id.*

> on the tracks.' The Sarbanes Oxley Act intends to set a tone at the top, so that the board holds management to a high set of accountability and ethics through reporting procedures, like through hotlines that report fraudulent activity. Oversight of internal control procedures is also mandated.

An understanding of the year-2000-era history of corporate failures is particularly important for those living in and around Houston. The failure of financial fraud by the Enron Corporation resulted not only in the loss of tens-of-thousands of jobs, but also horrible carnage and suffering among families in Houston. The failure of Enron also led to the demise of accounting firm Arthur Andersen, one of the "big four" major accounting firms at the time. And located just about 200 miles or so east of Houston was Worldcom, also a major corporate failure due to financial fraud. Another example is Adelphia Communications. So, as is the case with so many things in life, after you have a tremendous societal failure, legislation gets crafted with a purported solution—and here we are. And that was the gestation of the Sarbanes Oxley. Director Ron McCray observes:

> If you look at company proxy statements or talk to directors, you will find that more often than not, the audit committee chair is paid more than the other directors. One of the reasons for this higher payment, that might not be so obvious to outsiders, is the considerable amount of work required by the audit committee. Not only is the workload regular and constant every quarter, but, depending on the company and unless there's a crisis in some other company area—probably involves a higher workload than that of the other committees.

Having conducted considerable scholarly research on the topic of board diversity, director and Professor Seletha Butler says:

> Much of my research about board diversity looks at who is on that audit committee and the criteria that a financial expert must have in terms of experience to earn a place of prominence like where Michele is in her career. Much of my research shows that it is very difficult for minority directors to be nominated for election.[40] There

40. *See generally* Seletha R. Butler, *"Financial Expert": A Subtle Blow to the*

> just has not been as much traction to have a more diverse slate on that committee, given the background that minority individuals tend to have.
>
> Business school and law students should look at future careers from the standpoint of a trajectory following graduation. My research shows that opportunities abound for people with a deep skill set and understanding of finance and accounting. From my research, many individuals having finance experience occupy these roles. We're talking about diversity that also plays into who is actually occupying that high paying role—and having the ability to bring these skills to the board as a whole.[41]

A. *The Financial Expert*

At least one audit committee financial expert is required for every public board and these individuals tend to: be experienced and knee-deep in audit and have previously worked as external auditors.[42] Director Michele Hooper observes:

> Before going into board service myself, I used to run businesses—and therefore, routinely dealt with the management of financial reporting—and so, along with other relevant experiences, qualify to be considered an audit committee 'financial expert,' which is how I got selected to serve on a number of audit committees, and also as an audit committee chair. My preference is to have other audit-experienced directors on my audit committee as well.
>
> Domain expertise is particular important in audit. For example, when I chaired the audit committee of a major pharmaceutical company, we had a former chair of the U.S. Food & Drug Administration (FDA) as an audit committee member, because she brought a valuable and different perspective, including detailed understanding of the drug regulation and approval process. By understanding the audit structure and the underlying numbers, audit committee members are informed about what the committee should be doing. There are many ways in which a board begins to approach this issue of audit and risk assessment. These are very

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Pool and Current Pipeline of Women on Corporate Boards, 14 GEO. J. GENDER & L. 1 (2013).

41. *See id.* at 33.

42. Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?*, 11 DEPAUL BUS. & COM. L.J. 205, 221–23 (2013).

important parts of the board's responsibilities.

B. *Center for Audit Quality*

Founded in 2007, the Center for Audit Quality (CAQ), pursues, "an overarching mission of enhancing investor confidence and public trust in the global capital markets."[43] The earlier Sarbanes-Oxley legislation "provided a new framework of oversight of public company audits through the establishment of the Public Company Accounting Oversight Board (PCAOB), which not only sets standards for public company auditing firms, but also has inspection and enforcement authority."[44] During 2005, the leadership of the American Institute of Certified Public Accountants (AICPA) "voted to create the Public Company Auditor's Forum, comprised of the AICPA, large audit firms, and public members. It was envisioned that the Forum would be an autonomous organization affiliated with the AICPA. . . . [T]he Forum would be a public policy entity focused exclusively on public company audits."[45]

Then, "in January 2007, this fledgling organization took flight as the Center for Audit Quality (CAQ) . . . [and] embarked immediately on a multi-month public dialogue tour to discuss with a variety of stakeholders potential improvements to the quality, relevance, and integrity of financial reporting."[46] The CAQ has now developed "resources for its members (public company auditing firms) and key stakeholders: guides, white papers, alerts, videos, research reports, investor surveys, and more. All of these resources remain available free of charge on the CAQ

43. *Our History*, CTR. FOR AUDIT QUALITY, https://www.thecaq.org/about-us/our-history/ [https://perma.cc/MC7D-XK68] (last visited Nov. 24, 2021).

44. *Id.*

45. *Id.*

46. *Id.*

website."[47] The CAQ also routinely engages and collaborates with interested parties (its stakeholders) such as: board audit committees, the academic community, investors, internal auditors, and many others.

C. *Foreign Corrupt Practices Act*

A constant problem area for those doing business around the world is the Foreign Corrupt Practices Act (FCPA), and the issues of bribery and corruption.[48] Particularly for law and accounting students, this is a huge practice problem. In the business world, before you know it, a business receives an email or phone call and, for example, it's the nephew of the Interior Minister of some country. The business proposition is that for only $50,000 you too can get an appointment to talk to the interior minister about those very valuable oil leases. This is likely the only job the nephew has, setting up appointments for the uncle, and it appears that this is how business is conducted in this fictious country. Exhibit 1 provides a recent example of an FCPA violation.

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47. *Id.*

48. *See generally* Neal Newman & Lawrence J. Trautman, *Securities Law: Overview and Contemporary Issues*, 16 OHIO ST. BUS. L.J. 149 (2021); Lawrence J. Trautman, *Rapid Technological Change and U.S. Entrepreneurial Risk in International Markets: Focus on Data Security, Information Privacy, Bribery and Corruption*, 49 CAP. U. L. REV. 67 (2021); Lawrence J. Trautman & Joanna Kimbell, *Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act*, 30 FLA. J. INT'L L. 191, 193–94 (2018); Lawrence J. Trautman, *Following the Money: Lessons from the "Panama Papers," Part 1: Tip of the Iceberg*, 121 PENN ST. L. REV. 807, 809–10 (2017); Lawrence J. Trautman & George P. Michaely, Jr., *The SEC & The Internet: Regulating the Web of Deceit*, 68 CONSUMER FIN. L.Q. REP. 262 (2014); Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns, and Money: The Bribery Problem and U.K. Bribery Act*, 47 INT'L LAW. 481, 483–85 (2013); Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance*, 41 SEC. REGUL. L.J. 241, 241–44 (2013); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145 (2011).

EXHIBIT 1. New Jersey Man Pleads Guilty to Violating the Foreign Corrupt Practices Act[49]

Thursday, December 17, 2020

NEWARK, N.J. – A New Jersey man today admitted that he paid a foreign official $100,000 in bribes to secure an improper business advantage and to obtain and retain business contracts, U.S. Attorney Craig Carpenito, Acting Assistant Attorney General Brian C. Rabbitt of the Justice Department's Criminal Division, and Special Agent in Charge George M. Crouch Jr. of the FBI's Newark Field Office announced.

Deck Won Kang, 50, of Englewood Cliffs, New Jersey, pleaded guilty by videoconference before U.S. District Judge Claire C. Cecchi to an information charging him with violating the anti-bribery provision of the Foreign Corrupt Practices Act.

According to documents filed in the case and statements made in court:

From January 2009 to February 2013, Kang was a citizen of the United States, a resident of New Jersey, and an officer, director, employee, and agent of two closely held New Jersey companies. The companies obtained and retained contracts with the Defense Acquisition Program Administration (DAPA), which was a state-owned and state-controlled agency within the Republic of Korea's Ministry of National Defense. Kang promised a high-ranking official in the Korean Navy and a procurement official for DAPA that he would provide him with something of value once he left public office. Kang made this promise to: (1) to secure an improper business advantage, specifically obtaining non-public information about the contracts; (2) aid the companies in obtaining and retaining the contracts; and (3) to induce the foreign official to use his influence with the Korean Navy and DAPA to affect and influence a decision of DAPA concerning the companies obtaining and retaining the contracts. Kang caused $100,000 to be sent to the foreign official between April 2012 and February 2013.

The charge of violating the Foreign Corrupt Practices Act is punishable by a maximum potential penalty of five years in prison and a fine of the greater of $250,000, twice the gross profits to Kang or twice the gross loss suffered by the victim. Sentencing is scheduled for April 21, 2021.

U.S. Attorney Carpenito credited special agents of the FBI's

49. Press Release, U.S. Dept. Justice, New Jersey Man Pleads Guilty to Violating the Foreign Corrupt Practices Act (Dec. 17, 2020), https://www.justice.gov/usao-nj/pr/new-jersey-man-admits-violating-foreign-corrupt-practices-act [https://perma.cc/6ZPB-GW8T].

> Newark Division with the investigation leading to today's guilty plea.
>
> The government is represented by Assistant U.S. Attorney Andrew Kogan of the District of New Jersey and Trial Attorney Della Sentilles of the Fraud Section of the Department of Justice. U.S. Attorney Carpenito also thanked the Department of Justice Office of International Affairs for its assistance with the case.

We can look at the Department of Justice and the SEC who bring these actions for guidance and numerous examples of FCPA violations. Most of the prosecutions are of larger companies like Siemens, which resulted in about a $1.8 billion fine. Professor Trautman states, "You've got to be selling a lot of product to pay $1.8 billion and still have something left over. For smaller companies, a Foreign Corrupt Practices Act (FCPA) violation can result in the end of the enterprise."

Director Ron McCray states,

> Aside from the egregious cases which by definition, oftentimes are easy, the Foreign Corrupt Practices Act can offer traps for the unwary. When I was an operating and staff executive for FCPA matters, I thought it very important for companies in my jurisdiction to have a code of conduct which speaks to the FCPA. Also important is to have someone from compliance or the legal department regularly provide instructions to executives who have exposure to FCPA risk. These regular sessions give employees a grounding and confidence about how they should think about doing their jobs and know whom to consult for advice. And if you do that, you have a chance of somebody not falling into one of these traps for the unwary.

Director Michele Hooper says:

> I would also add that from the board standpoint, one of the things that I found very important when I chaired audit committees of global companies, was getting up out of my chair and going to some of these locations, particularly high-risk international locations. I found actually being on location to be important, because people need to see you. They need to hear you. They need to hear you reinforcing the Ethics and integrity and expectations of the corporation and quite frankly, have them know that somebody cares and is watching. And sometimes, just to know that somebody is watching covers a whole lot of ground. For many corporations, it's not so much a focus on the $1.8 billion that a Siemens might pay,

> but it is reputational risk from these areas involving bribery and corruption. So, it's really important and very, very substantive for board members to be engaged.

Exhibit 2 provides, in relevant part, an SEC press release announcing charges of worldwide bribery and agreements by Siemens to pay settlement for alleged bribery payments in excess of $1.4 billion.[50]

EXHIBIT 2. SEC Charges Siemens AG for Engaging in Worldwide Bribery[51]

> *Washington, D.C., Dec. 15, 2008* — The Securities and Exchange Commission today announced an unprecedented settlement with Siemens AG to resolve SEC charges that the Munich, Germany-based manufacturer of industrial and consumer products violated the Foreign Corrupt Practices Act (FCPA) by engaging in a systematic practice of paying bribes to foreign government officials to obtain business.
>
> The SEC alleges that Siemens paid bribes on such widespread transactions as the design and construction of metro transit lines in Venezuela, power plants in Israel, and refineries in Mexico. Siemens also used bribes to obtain such business as developing mobile telephone networks in Bangladesh, national identity cards in Argentina, and medical devices in Vietnam, China, and Russia. According to the SEC's complaint, Siemens also paid kickbacks to Iraqi ministries in connection with sales of power stations and equipment to Iraq under the United Nations Oil for Food Program. Siemens earned more than $1.1 billion in profits on these and several other transactions.
>
> Siemens has agreed to pay $350 million in disgorgement to settle the SEC's charges, and a $450 million fine to the U.S. Department of Justice to settle criminal charges. Siemens also will pay a fine of approximately $569 million to the Office of the Prosecutor General in Munich, to whom the company previously paid an approximately $285 million fine in October 2007. . . .
>
> Linda Chatman Thomsen, Director of the SEC's Division of Enforcement, said, "This pattern of bribery by Siemens was unprecedented in scale and geographic reach. The corruption

50. Press Release, SEC, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), https://www.sec.gov/news/press/2008/2008-294.htm [https://perma.cc/4MPD-NL86].

51. *Id.*

> alleged in the SEC's complaint involved more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East, and the Americas. Our success in bringing the company to justice is a testament to the close, coordinated working relationship among the SEC, the U.S. Department of Justice, and international law enforcement, particularly the Office of the Prosecutor General in Munich."
>
> Cheryl J. Scarboro, an Associate Director in the SEC's Division of Enforcement, said, "The day is past when multi-national corporations could regard illicit payments to foreign officials as simply another cost of doing business. The $1.6 billion in combined sanctions that Siemens will pay in the U.S. and Germany should make clear that these corrupt business practices will be rooted out wherever they take place, and the sanctions for them will be severe."
>
> The SEC's complaint alleges that between March 12, 2001, and Sept. 30, 2007, Siemens created elaborate payment schemes to conceal the nature of its corrupt payments, and the company's inadequate internal controls allowed the conduct to flourish. Siemens made thousands of payments to third parties in ways that obscured the purpose for, and the ultimate recipients of, the money. Employees obtained large amounts of cash from cash desks, which were sometimes transported in suitcases across international borders for bribery. The authorizations for payments were placed on post-it notes and later removed to eradicate any permanent record. Siemens used numerous slush funds, off-books accounts maintained at unconsolidated entities, and a system of business consultants and intermediaries to facilitate the corrupt payments. Siemens made at least 4,283 payments, totaling approximately $1.4 billion, to bribe government officials in return for business to Siemens around the world. In addition, Siemens made approximately 1,185 separate payments to third parties totaling approximately $391 million, which were not properly controlled and were used, at least in part, for such illicit purposes as commercial bribery and embezzlement. . . .

Professional director and law professor Trautman counsels that "bribery and corruption is a root cause of medicines not getting to people in the most impoverished parts of the world as intended. Theft of food supplies intended for hungry populations result in people not eating. Accordingly, bribery and corruption may be considered a root cause of war." Therefore, the actions of multinational corporations play a major role impacting global political stability. Exhibit 3 presents the charter for Microsoft Corporation's audit committee.

EXHIBIT 3. Microsoft Corporation Audit Committee Charter[52]

Role

The Audit Committee assists the Board of Directors in fulfilling its responsibility for oversight of the quality and integrity of the accounting, auditing, and financial reporting practices of the Company oversight of the significant business, regulatory, and compliance risks described in the Audit Committee Responsibilities Calendar and such other duties as directed by the Board. The Committee's purpose is to oversee the accounting and financial reporting processes of the Company, the audits of the Company's financial statements, the qualifications of the public accounting firm engaged as the Company's independent auditor to prepare or issue an audit report on the financial statements of the Company and internal control over financial reporting, and the performance of the Company's internal audit function and independent auditor. The Committee reviews and assesses the qualitative aspects of the Company's financial reporting to shareholders, the Company's financial risk assessment and management, and the Company's ethics and compliance programs. The Committee is directly responsible for the appointment (subject to shareholder ratification), compensation, retention, and oversight of the independent auditor. The Committee also reviews and assesses the Company's processes to manage and control risk, except for risks assigned to other committees of the Board or retained by the Board.

Membership

The membership of the Committee consists of at least three directors, each of whom shall meet the independence requirements established by the Board and applicable laws, regulations, and listing requirements. Each member shall in the judgment of the Board have the ability to read and understand fundamental financial statements and otherwise meet the financial sophistication standard established by the requirements of the NASDAQ Stock Market, LLC. At least one member of the Committee shall in the judgment of the Board be an "audit committee financial expert" as defined by the rules and regulations of the Securities and Exchange Commission. The Board appoints the members of the Committee and the chairperson. The Board may remove any member from the Committee at any time with or

52. MICROSOFT CORP., AUDIT COMMITTEE CHARTER 1–3 (July 1, 2021), https://view.officeapps.live.com/op/view.aspx?src=https://c.s-microsoft.com/en-us/CMSFiles/Audit%20Committee%20Charter%20and%20Responsibilities%20Calendar.docx?version=7d3463d1-53da-1fc5-f470-b7cf1d06e6dc [https://perma.cc/67DK-JBQA].

without cause.

Generally, no member of the Committee may serve on more than three audit committees of publicly traded companies (including the Audit Committee of the Company) at the same time. For this purpose, service on the audit committees of a parent and its substantially-owned subsidiaries counts as service on a single audit committee.

Operations

The Committee meets at least eight times a year. Additional meetings may occur as a majority of the Committee or its chair deems advisable. The Committee will meet in executive session, from time to time, without Company management present. The Committee will cause to be kept adequate minutes of its proceedings, and will report on its actions and activities at the next quarterly meeting of the Board. Committee members will be furnished with copies of the minutes of each meeting and any action taken by unanimous consent. The Committee is governed by the same rules regarding meetings (including meetings by conference telephone or similar communications equipment), action without meetings, notice, waiver of notice, and quorum and voting requirements as are applicable to the Board. The Committee is authorized and empowered to adopt its own rules of procedure not inconsistent with (a) this Charter, (b) the Bylaws of the Company, or (c) the laws of the state of Washington.

Communications

The independent auditor reports directly to the Committee. The Committee is expected to maintain free and open communication with the independent auditor, the internal auditors, and management. This communication will include periodic private executive sessions with each of these parties.

Education

The Company is responsible for providing new members with appropriate orientation briefings and educational opportunities, and the full Committee with educational resources related to accounting principles and procedures, current accounting topics pertinent to the Company, and other matters as may be requested by the Committee. The Company will assist the Committee in maintaining appropriate financial literacy.

Authority

The Committee will have the resources and authority necessary to discharge its duties and responsibilities. The Committee has complete authority to retain and terminate outside counsel or other experts or consultants, as it deems appropriate, including complete authority to approve their fees and other retention terms. The Company will provide the Committee with appropriate funding, as the Committee determines, for the payment of compensation to the

> Company's independent auditor, outside counsel, and other advisors as it deems appropriate, and administrative expenses of the Committee that are necessary or appropriate in carrying out its duties. In discharging its oversight role, the Committee is empowered to investigate any matter brought to its attention. The Committee will have access to the Company's books, records, facilities, and personnel. Any communications between the Committee and legal counsel while obtaining legal advice will be privileged communications of the Company, and the Committee will take all necessary steps to preserve the privileged nature of those communications. The Committee may form and delegate authority to subcommittees and may delegate authority to one or more designated members of the Committee.
>
> **Responsibilities**
>
> The Committee's specific responsibilities in carrying out its oversight role are delineated in the Audit Committee Responsibilities Calendar. The Responsibilities Calendar will be updated annually as necessary to reflect changes in regulatory requirements, authoritative guidance, and evolving oversight practices. The most recently updated Responsibilities Calendar will be considered to be an addendum to this Charter.
>
> The Committee relies on the expertise and knowledge of management, the internal auditors, and the independent auditor in carrying out its oversight responsibilities. Management of the Company is responsible for determining the Company's financial statements are complete, accurate, and in accordance with generally accepted accounting principles ("GAAP") and establishing satisfactory internal control over financial reporting. The independent auditor is responsible for auditing the Company's financial statements and the effectiveness of the Company's internal control over financial reporting. It is not the duty of the Committee to plan or conduct audits, to determine that the financial statements are complete and accurate and in accordance with GAAP, to conduct investigations, to assure compliance with laws and regulations or the Company's standards of business conduct, codes of ethics, internal policies, procedures, and controls, or to manage and control risks to which the Company may be exposed.

We now turn our attention to the role and operation of the compensation committee.

VI. Compensation Committee

The NACD discloses that Compensation Committee chairpersons of Russell 3000 Index companies have tenure of 10 years on the board, and 4 years specifically in the role as chair.[53] Ron McCray states:

> The compensation committee is responsible for seeing that the executives get paid; normally accomplished by having the compensation committee, usually with the help of a consultant; determine how comparable companies are compensating their executives. This is important because one of the great risks, in every company, is the risk of loss of best employees if they are being under-paid and ensuring key executives are not being paid less than those executives at competing enterprises. It's just a matter of fairness—but beyond the issue of comparability, there is the issue of incentives. Most top-level officers have the primary leadership leverage in the success of the organization. Therefore, incentives to develop and implement the strategies and tactics with the support of the board to enhance stakeholder value is vital to the future success of the enterprise.

Compensation is designed so that it appropriately rewards success and allows executives to share in the rewards with shareholders. The benefit of any such performance increase will yield a value that accrues from their efforts, such that most executive packages will have a short-term bonus compensation, which will relate to measurable performance over a given time-period, probably a year. Then, long term compensation, which will normally be in the form of some form of equity often is employed. This schematic is used in order to align and incentivize the executives with the strategy that the Board and Management has agreed to and seeing that it is executed according to the agreed-upon plan. Most compensation committees for many companies are directly linked to executive talent development because these executives are so critical to the successful implementation of corporate strategy, management of risk, and so forth. The compensation committee oftentimes serves as a Management Development Committee and therefore has some visibility into the next line of management, certainly the successor to the CEO, but even beyond that because the

53. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 13 (2019).

board has an interest in having a long-term solid stewardship of the company.

Michele Hooper observes, "One of the basic things that the compensation committee does at the outset is to develop a pay philosophy . . . and this will serve as a guide to pay decisions of the activities within a board." Director Hooper continues:

> It's how you pay your employees; how you as an organization, think about pay and it could be that you want to align your compensation with a certain stewardship responsibility and an incentive to make sure that your executives have a stewardship approach about how they execute their duties. This is a way of thinking about how the company wants to align itself from an incentive standpoint, with your peers. Most organizations consider it good practice to write down their pay philosophy statement so that both employees and the board understand exactly what they want to do and how they want to do it. This human capital management development has just begun to be expanded as we have gone into the area of environmental, social and governance (ESG) issues.[54] We're finding now that Human Capital is getting to be an increasing part of compensation and these functional areas are actually changing their names to 'compensation and human capital management.' So, you're beginning to see a much higher focus on this particular area of the enterprise.

Director McCray adds, "When incentive pay is structured as an incentive for key executives to stay and a hefty pay package does not work out, particularly in the case of malfeasance, a relatively recent tool that companies are using that offers a tool to avoid the moral hazard dilemma is pay clawbacks." Exhibit 4 presents the charter for Cisco System's Compensation and Management Development Committee.

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54. Lawrence J. Trautman & Neal F. Newman, *The Environmental, Social, and Governance (ESG) Debate Emerges from the Soil of Climate Denial,* 53 U. MEM. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939898.

EXHIBIT 4. Cisco System's Compensation and Management Development Committee Charter[55]

1. Purpose

The Compensation and Management Development Committee's (the "Committee") basic responsibility is to review the performance and development of the Company's management in achieving corporate goals and objectives and to assure that the Company's executive officers (as defined below) are compensated effectively in a manner consistent with the strategy of the Company, competitive practice, sound corporate governance principles and stockholder interests. Toward that end, the Committee will review and approve all compensation to executive officers.

2. Composition of the Committee

The Committee will consist of not less than two directors, each of whom will be an "independent director" as required by the rules of The Nasdaq Stock Market ("Nasdaq"), including the additional independence requirements specific to compensation committee membership, and a "non-employee director" within the meaning of Rule 16b-3 issued by the Securities and Exchange Commission ("SEC"). Each appointed Committee member will be subject to annual reconfirmation and may be removed by the Board of Directors (the "Board") at any time.

3. Responsibilities and Duties

In carrying out its purpose, the Committee will have the following responsibilities and duties:

Review annually and approve the Company's compensation strategy to ensure that it promotes stockholder interests and supports the Company's strategic and tactical objectives, and that it provides appropriate rewards and incentives for management and employees of the Company, including review of compensation-related risk management.

Review annually and approve corporate goals and objectives relevant to executive compensation and evaluate performance in light of those goals.

Review annually and determine the individual elements of total compensation for the Chief Executive Officer and during such voting and deliberations the Chief Executive Officer will not be

55. CISCO SYS., INC., COMPENSATION AND MANAGEMENT DEVELOPMENT COMMITTEE CHARTER (Aug. 5, 2021), https://s2.q4cdn.com/951347115/files/doc_downloads/2021/08/Compensation-Committee-Charter-August-2021.pdf [https://perma.cc/E36Q-BTTN].

present.

Review annually and determine the individual elements of total compensation for all other "executive officers" within the meaning of Rule 3b-7 issued by the SEC and "officers" within the meaning of Rule 16a-1(f) issued by the SEC (together with the Chief Executive Officer, the "Officers").

Review and discuss the "Compensation Discussion and Analysis" disclosure prepared pursuant to the requirements of Item 402(b) of Regulation S-K (or any successor disclosure item), and based on such review and discussion recommend to the Board whether such "Compensation Discussion and Analysis" disclosure should be included in the Company's annual report on Form 10-K, proxy statement, information statement or similar document.

Communicate in the annual Board Compensation Committee Report to stockholders the disclosures required by Item 407(e)(5) of Regulation S-K (or any successor disclosure item).

Approve any special perquisites, special cash payments and other special compensation and benefit arrangements for the Company's Officers.

With sole and exclusive authority, make and approve equity grants and other discretionary awards under the Company's equity incentive plans to all persons who are Officers.

Grant equity awards and other discretionary awards under the Company's equity incentive plans to all other eligible individuals in the Company's service.

Amend the provisions of the Company's equity incentive plans, to the extent authorized by the Board, and make recommendations to the Board with respect to incentive compensation and equity-based plans.

Approve for submission to the stockholders equity incentive plans or amendments thereto.

Provide general oversight of the Company's employee benefit plans. Responsibility for day-to-day administration of the employee benefit plans and the investment of any assets, including the preparation and filing of all government reports and the preparation and delivery of all required employee materials and communications, will be the sole responsibility of Company personnel.

Ensure that incentive compensation plans are administered in a manner consistent with the Company's compensation strategy and the terms of such plan, including but not limited to the following: participation, target annual incentive awards, corporate financial goals, and actual awards paid to Officers.

Review matters related to management performance, compensation and succession planning (including periodic review and approval of Chief Executive Officer and other Officer succession planning) and executive development for executive staff.

Oversee and review the development and implementation of the Company's practices, strategies, and policies used for recruiting, managing, and developing employees (i.e., human capital management). These practices, strategies, and policies focus on diversity and inclusion, workplace environment and safety, and corporate culture. Discuss with management, as appropriate, their progress regarding such practices, strategies, and policies.

Approve separation packages and severance benefits for Officers.

Exercise, as necessary and appropriate, the authority of the Board with respect to the election of corporate officers of the Company during the periods between the regular meetings of the Board.

Have full access to the Company's executives and personnel as necessary to carry out its responsibilities.

Obtain such advice, data or other resources necessary to perform its duties hereunder, and the Committee has the authority to obtain external consultant reports or published salary surveys, and in its sole discretion may retain or obtain the advice of a compensation consultant, legal counsel or other advisors to assist it in connection with its functions hereunder. If the Committee retains the services of a compensation consultant, legal counsel or other advisor to assist it in connection with its functions, the Committee shall be directly responsible for the appointment, compensation and oversight of the work of any such advisor. The Company shall provide appropriate funding, as determined by the Committee, for payment of reasonable compensation to such advisors. Selection of, or receipt of advice from, any compensation consultant, legal counsel or other advisor shall be made only after the Committee takes into consideration factors relevant to that advisor's independence, including all factors specified by the rules of Nasdaq (including Nasdaq Rule 5605(d)(3)(D)).

Review and approve all reports and summaries of Officer compensation policies and decisions as may be appropriate for operational purposes or as may be required under applicable law.

Perform any other activities consistent with this Charter, the Company's Bylaws and governing law as the Committee or the Board deems necessary or appropriate.

Review at least annually the Committee Charter for adequacy and recommend any changes to the Board.

Report to the Board on the major items covered at each Committee meeting.

4. Committee Meetings

The Committee will meet as often as necessary to carry out its responsibilities. Meetings may be called by the Chair of the Committee and/or by the management of the Company. Minutes of each meeting will be duly filed in the Company records. Reports of meetings of the Committee will be made to the Board at its next regularly scheduled meeting following the Committee meeting accompanied by any recommendations to the Board approved by the Committee.

The Committee will also meet as necessary to act upon any other matters within its jurisdiction under this Charter. A majority of the total number of members of the Committee will constitute a quorum at all Committee meetings. Minutes will be kept of each meeting of the Committee.

VII. NOMINATION AND GOVERNANCE COMMITTEE

A survey conducted by the NACD discloses that the Nomination and Governance (Nom-Gov) Committee chairpersons of Russell 3000 Index companies have tenure of 10 years on the board, and 4 years specifically in the role as chair.[56] Director Michele Hooper says:

> A nominating and governance committee is responsible for two things: first, nomination for election by the shareholders of the individuals that are coming onto the board; and second, defining and understanding what the principles of governance are within the board as well as within the organization. So, things like the ethics and integrity statements are the purview of this committee, making sure that objectives are in alignment. From the nominating and governance standpoint, most corporations have somewhere between seven and twelve directors, depending on the size of the corporation. It is important to have a mix of skills and experiences because you want to make sure that you've got enough individuals on your board to really help understand the direction of the long-term sustainability and strategy of the company. Therefore, just like in a normal hiring process, the goal is to bring people onto the board that can help the company go to the next level. Accordingly, most organizations use something called a skills and experience matrix.
>
> This matrix analysis is something that the National Association of Corporate Directors (NACD) has really focused upon and has driven a strong focus and approach of nominating and governance committees to create a matrix. You ask, "What are the skills that we need to assure the long-term sustainability and strategy for the organization?" Then you compare these desired skills against who

56. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 13 (2019).

is currently on our board, their skills, and experience. Examining where current directors fit into this matrix helps to ensure the desired skills like required financial expertise for audit committees is present, along with younger directors whom will develop institutional memory over time. Other industry-specific skills and experience may also be at a premium. For example, at one of my boards, which is a healthcare board, we recognized the necessity to have healthcare experience. Common areas of experience required in other companies might include consumer marketing or brand marketing or somebody having cyber risk expertise. Both skills and experience are necessary.

All these considerations involve issues of diversity. Either geographic, age, ethnicity, gender, or race—and an attempt is made to align those skills with your company's long-term strategy and experiences. Then, the committee begins to use that matrix. The challenge becomes: we have x number of positions open and we want to find somebody with those skill sets and experience to fit. Hopefully, we conduct a gender- and race-blind assessment of candidates and recruit the optimal mix of people for available board positions. Part of the challenge we have is that in the past boards have tended to fish in the same ponds and so those same ponds get us the same people and those same people tended to be older white guys.

However, during 2020, what we're finding is that through a lot of hard work and through the unfortunate tragedy of the George Floyd's murder, boards are opening their eyes to the fact that many very talented and experienced individuals of Color possess the requisite skills and experience to make excellent directors. Quite frankly, this is a view that is relatively new in the United States. Americans have not focused on this expanded field of vision to produce minorities as viable director candidates. What's happening is not necessarily a gender issue, because we seem to have been focused during the last ten years on bringing women onto boards. And while many great women have been recruited, they tend to be white women. Now, recognizing there's a lot of minorities and people of Color who are qualified, let's open our aperture. Let's begin to look at people and bring on these additional talents that are available. Slowly, we're finding them and it's really a wonderful thing.[57]

Director and University President Ruth Simmons states:

From my experience, the nominating and governance committee at most places actually devotes a relatively small amount of time

57. *See infra* Part XI.

searching for directors, most of their work goes to governance. Many internal issues within companies get in the way of making progress in director diversity recruitment. Most CEOs are typically wrestling with numerous issues within the company that can span a range of types of issues, dominating time and focus. And for the most part, the CEO and the lead director, if there is one, and the board will lean on the governance committee to solve those issues. Sometimes, there can be issues with the performance of directors; there can be issues with working out the logical structure of decision making. There can be issues of taking a particular kind of action that the governance committee needs to recommend to the board.

So, I think of a governance committee as being the committee employed when companies get into trouble. During these times, you don't call on compensation, you don't call on audit. You don't call on any other committee to solve a broken company so much as you call on governance to do it because governance tends to serve a rescue function—because, inevitably, what is falling down in a company when it fails is an inattention to fundamentals of governance. So, I remember when I was chair of the governance committee at a large multinational company, we had a director who was disrupting every meeting. It became impossible for us to hold meetings because he was so disruptive. He had particular issues that he cared about. And so I was called on as chair of the governance committee to tell him that he needed to resign. So, the nom-gov committee is more or less a kind of 'fix it' committee, and this is not the only circumstance in which I had as chair of governance to do something like that. So, I regard governance as one of the very key committees of every board. And the search for directors is an ongoing thing. And we're fishing in the same pond, because we're using the same search firms principally. And these search firms are circulating the same names to all the companies and so on. So, governance and nomination committees tend to have a standing order to look for directors and that just goes on all the time. Throughout the year the nomination and governance committee is paying attention to the talent that's available, but often there isn't room on the board for another director. However, boards are often waiting for an opening, which may or may not occur near term. Following nomination, directors are elected by shareholders. Then, in order to be reappointed, directors have to be included on a proxy statement and be elected by shareholders.

Exhibit 5 presents the charter for General Motor's Governance and Corporate Responsibility Committee Charter.

EXHIBIT 5. General Motors Company Governance and Corporate Responsibility Committee Charter[58]

Purpose

The purpose of the Governance and Corporate Responsibility Committee of the Board of Directors of General Motors Company is to assist the Board in its oversight of the Company's governance structures, programs and policies by:

- Identifying individuals qualified to serve as members of the Board and, where appropriate, recommend individuals to be nominated by the Board for election by the shareholders or to be appointed by the Board to fill vacancies consistent with the criteria approved by the Board;
- Developing and recommending to the Board a set of corporate governance guidelines and other corporate governance policies and otherwise performing a leadership role in shaping the Company's corporate governance;
- Overseeing an annual evaluation of the performance of the Board and its standing committees; recommending to the Board the compensation of directors;
- Ensuring the Company has proper governance over environmental and social initiatives, strategies, and policies related to sustainability and corporate responsibility;
- Overseeing the Company's public policy priorities, including its U.S. political contributions and lobbying activities; and
- Performing such other duties and responsibilities requested by the Board or enumerated in and consistent with this Charter.

Membership

The Committee shall be composed of no fewer than three independent members, and the Committee's composition shall satisfy the Listing Standards of the New York Stock Exchange relating to nominating/corporate governance committee membership and such other requirements as shall be provided in the Company's Bylaws or as the Board shall otherwise determine. The members of the Committee and the Committee Chair shall be appointed, and may be replaced, by the Board upon consideration of the recommendations of the Committee; provided, however, that all members of the Committee shall be independent directors. The Committee members and the Committee Chair shall serve until they are replaced, they resign or their successors are duly elected

58. GEN. MOTORS CORP., GOVERNANCE AND CORPORATE RESPONSIBILITY COMMITTEE CHARTER (Aug. 17, 2021), https://investor.gm.com/static-files/094ef3c0-3ea0-4837-9976-fc025d5b8f5d [https://perma.cc/GW2N-REL8].

and qualified.

Meetings

The Committee shall meet as often as may be deemed necessary or appropriate. Attendance by one-third of the directors serving on the Committee, but not less than two members, shall constitute a quorum for the transaction of business. Except as otherwise desired by the Committee Chair, the Chair of the Board and Lead Director, if elected, shall be invited to every meeting and other directors who are not members of the Committee may attend meetings, but such non-Committee members shall have no voting rights. The Committee Chair may ask members of management or others to attend all or any portion of any meeting or to provide relevant information in written form. The Committee shall regularly meet in executive session absent GM management.

The Committee Chair shall be responsible for scheduling all meetings of the Committee and providing the Committee with a written agenda for each meeting. The Committee Chair shall preside at the meetings of the Committee. In the absence of the Committee Chair, the majority of the members of the Committee present at the meeting shall appoint a member to preside at the meeting. The Committee Chair shall report to the full Board regularly following each meeting and make such recommendations to the Board as the Committee deems appropriate. The Committee may adopt such other rules and regulations for calling and holding its meetings and for the transaction of business at such meetings as is necessary or desirable and not inconsistent with the provisions of the Company's Bylaws or this Charter.

Responsibilities and Duties

The Committee shall be responsible for matters related to service on the GM Board and associated issues of governance and corporate responsibility. To fulfill its responsibilities, the Committee shall:

<u>Board and Committee Composition</u>

- From time to time, conduct studies of the size and composition of the Board and review with the Board the criteria for Board membership.

- Prior to recommending an incumbent, replacement or additional director, review his or her qualifications, including individual performance and contributions, capability, availability to serve, conflicts of interest, and other relevant factors, such as environmental, social, or governance ("ESG") expertise. In fulfilling the Committee's responsibilities for recommending individuals for nomination for election to the Board, the Committee will apply the Board Membership Criteria outlined in the Board's Corporate Governance Guidelines and will review related party transactions and other matters that may have a bearing on the individual's independence or otherwise affect their suitability for membership on the Board.

•Prior to each Annual Meeting of Shareholders, recommend to the Board the individuals to constitute the nominees of the Board, for whom the Board will solicit proxies. In the interim between annual meetings, recommend to the Board candidates to be elected directors by the Board. Review and consider shareholder recommended candidates for nomination to the Board.

•Oversee the orientation process for new directors and advise non-employee directors on suggestions for their continuing education.

•Annually review and make recommendations to the Board as to the compensation of nonemployee directors.

•Make recommendations annually to the Board as to the independence of directors as defined by GM's Bylaws and the requirements set forth by the Securities and Exchange Commission, the NYSE, and other applicable regulatory authorities.

•Annually review and after taking into consideration the preferences of individual directors and the needs of the Company, make recommendations to the Board as to the membership, including the Chair, of each standing committee.

•Annually review the qualifications of the independent members of the Board to serve as Lead Director and make a recommendation to the independent directors as to the election of the Lead Director, if the CEO also serves as Chair.

•Consider and make recommendations to the Board with respect to any resignation tendered by a director pursuant to the Board's Corporate Governance Guidelines and GM's Bylaws.

<u>Governance and Performance</u>

•Periodically review and recommend to the Board revisions, as appropriate, to the Company's corporate governance framework, including its Certificate of Incorporation, Bylaws and Corporate Governance Guidelines.

•Monitor the Company's compliance with the Corporate Governance Guidelines.

•Establish and administer an annual assessment process relating to the performance of the Board and its committees and review annually the overall effectiveness of the Board recommending improvements where warranted.

<u>Sustainability, and Corporate Responsibility</u>

•Oversee the Company's development of ESG initiatives, strategies, policies, and practices related to matters of sustainability and corporate responsibility that may have a material impact on the Company.

•Annually review the Company's human rights practices, including responsible sourcing practices within the Company's supply chain.

•Review the Company's policies and practices related to corporate philanthropy globally; specifically, the support of charitable, educational, and social organizations.

•Review for approval, in consultation with the Audit Committee, the Sustainability Report.

Other Corporate Policies

•Review policy and requests to serve on outside for-profit boards for all GM employees designated by the Board as executive officers.

•Review transactions subject to the Company's Related Party Transactions Policy.

•Review and submit to the Board proposed revisions to the Board's Delegation of Authority.

•Review and approve revisions to executive officers' security and air travel policies. Annually review such officers' compliance with the Company's policies regarding private or charter aircraft usage.

•Review the Company's U.S. policies and practices related to political and campaign contributions, contributions to trade associations and other tax-exempt and similar organizations that may engage in political activity, lobbying activities, and reports on the Company's political spending and related audits. Procedurally, corporate political spending is reviewed and approved by senior management. Management oversight for political activity resides with the highest-ranking public policy executive of the Company.

Other Matters

•Review director stock ownership and holding requirements.

•Review and provide guidance to the Board and management about the framework for the Board's oversight of and involvement in shareholder engagement, and annually reviews shareholder sentiment and feedback, including on ESG.

•Review and make recommendations to the Board on shareholder proposals submitted for inclusion in the Company's proxy materials, which relate to governance, corporate responsibility, sustainability or political spending issues.

•Have and exercise such other powers, authority and responsibilities as may be determined by the Board.

Other Responsibilities and Charter Amendments

The Committee shall perform such other task or functions as may be delegated to or requested of the Committee by the Board. The Committee shall review annually its performance (including its effectiveness and compliance with this Charter). Amendments to this Charter must be approved by the Board.

Committee Authority

The Committee shall have the authority to undertake any other action or exercise such other powers, authority and responsibilities as the Committee determines necessary or appropriate to the discharge of the responsibilities and duties set forth in this Charter or the Company's Bylaws, or otherwise required by the Listing Standards of the New York Stock Exchange or other applicable laws, rules or regulations, or as shall otherwise be determined by the Board.

The Committee shall have full access to the books, records, facilities and personnel of the Company. The Committee may, at the Company's expense, obtain advice, assistance, and investigative support from outside advisors as it deems appropriate to perform its duties. The Committee shall have the sole authority to select, retain, compensate and terminate, set retention terms and approve the fees of any search firm used to identify director candidates or outside legal counsel or other advisors.

Subject to applicable laws, regulations or rules, or the Company's Bylaws, the Committee may delegate authority to members of management and also form and delegate authority to subcommittees consisting of one or more members, when it deems appropriate. In so delegating authority, the Committee shall not absolve itself from the responsibilities it bears under the terms of this Charter.

VIII. LESS PREVALENT COMMITTEES

Having discussed the three standing committees found on almost all boards: audit, compensation, and nomination, and governance, we now turn our attention to the other, less common committees found among the Russell 3000 during 2020 including: executive (19%); finance (11%); risk (9%); investment (4%); technology (6%); compliance (4%); environment, health, and safety (4%); strategy (2%) and others (each reported at 1%).[59]

59. *See* NAT'L ASS'N OF CORP. DIRS., INSIDE THE PUBLIC COMPANY BOARDROOM 25 (2020) (Nonstandard Committee Data).

A. *Executive Committee*

Executive committees exist primarily "to perform and exercise the powers of the board to direct the business and affairs of the company between meetings of the board. In some organizations, composition of this committee might consist of the chairman of the board and chairpersons of the standing committees."[60] Because the function of this committee is to conduct the board's business when a task needs to be performed and not enough time exists to call the board together, availability on short notice will be an important consideration for membership on this committee.

B. *Finance Committee*

NACD reports that eleven percent of Russell 3000 Index companies had finance committees during 2020, up from ten percent the year prior.[61] Finance committees monitor the organization's capital structure and govern management's efforts to achieve optimal finance of the enterprise.[62] Exhibit 6 presents the Charter of the Finance Committee for Ford Motor Company.

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60. *See* Trautman, *Matrix*, *supra* note 26, at 95.

61. NAT'L ASS'N OF CORP. DIRS., INSIDE THE PUBLIC COMPANY BOARDROOM 10 (2020).

62. *See* Neal F. Newman & Lawrence J. Trautman, *Special Purpose Acquisition Companies (SPACs) and the SEC*, 24 U. PA. J. BUS. L. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3905372 (discussing recent developments in corporate capital formation).

EXHIBIT 6. Charter of the Finance Committee of the Board of Directors Ford Motor Company[63]

I. Purpose

The Finance Committee shall provide assistance to the Board of Directors of the Company in fulfilling its responsibility to the shareholders in respect of the policies, practices, and strategies that relate to the management of the financial affairs of the Company. The Finance Committee also shall perform such other functions and exercise such other powers as may be delegated to it from time to time by the Board of Directors. The Finance Committee's primary purpose is to:

- Review management's plans to manage the Company's exposure to financial risk.
- Review the Company's cash plan, balance sheet, and capital structure.
- Review the Company's capital allocation strategy, including the cost of capital.
- Recommend dividend actions to the Board of Directors.
- Review the Company's pension strategy and performance and health care costs and funding.

II. Structure and Operations

Composition and Qualifications

The Finance Committee shall be comprised of three or more directors as determined by the Board (upon the recommendation of the Nominating and Governance Committee), each of whom shall be determined by the Board of Directors to possess financial acumen. All members of the Finance Committee shall have a working familiarity with basic finance practices, and at least one member of the Finance Committee shall have financial management expertise.

Appointment and Removal

The members of the Finance Committee shall be designated by the Board annually and shall serve until their successors shall be duly designated or until such member's earlier resignation or removal. Any member of the Finance Committee may be removed from the Committee, with or without cause, by a majority vote of the Board. Unless a Chair is designated by the full Board, the

63. FORD MOTOR CO., CHARTER OF THE FINANCE COMMITTEE OF THE BOARD OF DIRECTORS (Dec. 2012), https://corporate.ford.com/content/dam/corporate/us/en-us/documents/governance-and-policies/company-governance-finance-charter.pdf [https://perma.cc/VK5M-VZKE].

members of the Finance Committee shall designate a Chair by majority vote of the full Finance Committee membership. The Chair will chair all regular sessions of the Finance Committee and set agendas for Finance Committee meetings.

Delegation to Subcommittees

In fulfilling its responsibilities, the Finance Committee shall be entitled to delegate any or all of its responsibilities to a subcommittee of the Finance Committee and, to the extent not expressly reserved to the Finance Committee by the Board or by applicable law, rule or regulation, to any other committee of 2 directors of the Company appointed by it, which may or may not be composed of members of the Finance Committee.

III. Meetings

The Finance Committee shall ordinarily meet at least four times annually, or more frequently as circumstances dictate. Any director of the Company who is not a member of the Finance Committee may attend meetings of the Finance Committee; provided, however, that any director who is not a member of the Finance Committee may not vote on any matter coming before the Finance Committee for a vote. The Finance Committee also may invite to its meetings any member of management of the Company and such other persons as it deems appropriate in order to carry out its responsibilities. The Finance Committee may meet in executive session, as the Finance Committee deems necessary or appropriate.

IV. Responsibilities and Duties

To fulfill its responsibilities and duties, the Finance Committee shall:

Documents/Reports Review

<u>Capital Strategy</u>

(1) Review and make recommendations to the Board with respect to the Company's capital structure, including the registration, issuance, and redemption of Company equity securities, and material changes thereto.

(2) Recommend to the Board of Directors dividends to shareholders and other shareholder actions.

(3) Review capital allocation priorities, policies and guidelines, including the Company's cash flow, minimum cash requirements, and liquidity targets.

(4) Review Ford Motor Credit Company's capital strategy and the relevant key financial metrics used to guide Ford Motor Credit Company to continuously strengthening its balance sheet.

(5) Review Ford Motor Credit Company's funding and liquidity strategies and the relevant metrics used to ensure diversification and achievement of yearly funding objectives.

(6) Review the Company's capital strategies from rating agency

and investor perspectives.

(7) Review the Company's capital appropriations financial performance against targets by conducting interim reviews and an annual review of previously approved capital programs, and periodic review of acquisitions and new business investments.

(8) Review and approve recommendations to the Board in all significant areas of the Company's capital strategy.

<u>Treasury and Tax Matters</u>

(9) Review with Company management, at least annually, the Annual Report from the Treasurer of the Company's cash and funding plans and other Treasury matters.

(10) Review with Company management, at least annually, the Company's health care costs and plans for funding such costs.

(11) Review with Company management, at least annually, the Company's pension strategy and performance.

(12) Review, at least annually, policies with respect to financial risk assessment and financial risk management.

(13) Review any significant financial exposures and contingent liabilities of the Company, including foreign exchange, interest rate, and commodities exposures and the use of derivatives to hedge those risks.

(14) Review with management the financial aspects of insurance programs.

(15) Review with Company management, at least annually, the Company's tax strategy.

(16) Review and approve recommendations to the Board in all significant areas of the Company's Treasury and Tax matters.

Reports

(17) Report regularly to the Board (i) following meetings of the Finance Committee, (ii) with respect to such other matters as are relevant to the Finance Committee's discharge of its responsibilities and (iii) with respect to such recommendations as the Finance Committee may deem appropriate. The report to the Board may take the form of an oral report by the Chair or any other member of the Finance Committee designated by the Finance Committee to make such report.

Other Matters

(18) The Finance Committee shall perform a review and evaluation, at least annually, of the performance of the Finance Committee and its members, including a review of adherence of the Finance Committee to this Charter. In addition, the Finance Committee shall review and reassess, at least annually, the adequacy of this Charter and recommend to the Nominating and Governance Committee any improvements to this Charter that

> the Finance Committee considers necessary or appropriate. The Finance Committee shall conduct such evaluation and reviews in such manner as it deems appropriate.
>
> (19) Perform any other activities consistent with this Charter, the By-Laws of the Company and other applicable law, rules or regulations as the Finance Committee or the Board deems necessary or appropriate.

C. *Risk Committee*

During 2020, when describing the risk oversight role for every board, consultant PwC writes it "is a critical one. It can bring real value to a company and its shareholders both in times of crisis, and when it's just business as usual. It starts with understanding the strategic direction of the company, considering the broader stakeholder perspectives, and having an effective oversight function . . . ."[64]

D. *Investment Committee*

NACD reports that only 4.2% of Russell 3000 Index companies report having an "investment" committee during 2018.[65] An example of the Progressive Corporation Investment and Capital Corporation is found at Exhibit 7.

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64. *See* PWC, RISK OVERSIGHT AND THE BOARD OF DIRECTORS: NAVIGATING A COMPLEX, EVOLVING AREA 1 (Dec. 2020), https://www.pwc.com/us/en/governance-insights-center/publications/assets/pwc-risk-oversight-and-the-board-navigating-a-complex-evolving-area.pdf [https://perma.cc/Y2YY-NNXL].

65. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 8 (2019).

EXHIBIT 7. The Progressive Corporation Investment and Capital Committee Charter[66]

Organization

The Investment and Capital Committee (Committee), appointed by the Board of Directors (Board) of The Progressive Corporation (Company), shall consist of at least three directors including the Chairperson. The Chairperson shall be independent of the management of the Company (as defined by the listing standards of the New York Stock Exchange) and free of any relationship that, in the opinion of the Board, would interfere with his or her exercise of independent judgment as a Committee member. The Chief Executive Officer may be a member of the Committee. Each member of the Committee shall be financially literate.

Statement of Purpose

The Committee shall, through regular or special meetings with management, assist the Board in monitoring (1) whether the Company has adopted and adheres to a rational and prudent investment and capital management policy, (2) whether management's investment and capital management actions are consistent with attainment of the Company's investment policy, financial objectives and business goals, (3) the Company's compliance with legal and regulatory requirements pertaining to investment and capital management, (4) the competence, performance, and compensation of the Company's internal and external money managers, and (5) such other matters as the Board or Committee deems appropriate.

It is not the duty of the Committee to make operating decisions about money manager selection or compensation, asset allocation, market timing, sector rotation, or security selection. These are responsibilities of management. The Board must approve significant changes to the Company's capital structure, investment policy and dividend policy.

The Committee, in its discretion, shall have the authority to retain legal counsel or consultants to advise the Committee. The Committee may request any officer or employee of the Company or any of the Company's outside money managers or advisers to attend a meeting of, or to meet in executive session with, the Committee or to meet with any member of, or consultants to, the Committee.

The Board's Audit Committee is responsible for determining

66. PROGRESSIVE CORP., INVESTMENT AND CAPITAL COMMITTEE CHARTER, http://media.corporate-ir.net/media_files/IROL/81/81824/Investment%20and%20Capital%20Committee%20Charter.pdf [https://perma.cc/AFB5-PNCZ] (last viewed Nov. 24, 2021).

whether there is an appropriate segregation of duties between decision making, investment accounting and performance measurement.

The Board's Compensation Committee is responsible for approving compensation plans for the Company's senior investment staff. The Compensation Committee will consider the counsel of the Investment and Capital Committee before making such a decision.

The Investment and Capital Committee shall make regular reports to the Board on the Committee's activities.

Responsibilities of the Investment and Capital Committee

The Committee shall:

1. At least annually, review the continued adequacy of this Investment and Capital Committee Charter and recommend any changes to the Board for approval.

2. Review and recommend to the Board for approval the Company's clearly articulated Investment Policy, which specifies asset allocation and money management guidelines that provide reasonable assurance that the Company can meet its business and financial objectives with a reasoned balance between risk, return and cost. The over-riding constraints are to maintain the ability to meet any foreseeable financial obligation in a timely manner, support growth, and allow the Company to meet its financial goals.

3. Determine that investment guidelines are consistent with the Investment Policy, clearly defined, properly measured, and consistently followed and that procedures are in place to ensure that the investment portfolio is managed in a manner consistent with the Investment Policy and applicable investment guidelines.

4. Determine that the Company has a clearly articulated capital plan for capital structure, dividend policy, and share repurchases that considers future growth plans, business and financial risks, and financial and regulatory constraints.

5. Ensure that roles and responsibilities are clearly established for the Chief Investment Officer, internal and external money managers, and Treasurer.

6. Contribute to the evaluation of the qualifications and performance of the Company's Chief Investment Officer and Treasurer and provide feedback to the Chief Financial Officer and Chief Executive Officer.

7. Ensure that management reviews portfolio performance against objectives and assesses the performance of the Company's investment staff and outside investment advisers, and, as necessary, takes corrective action.

8. Ensure that systems and procedures are in place to inform the Company's investment staff of applicable state and federal legal

and regulatory requirements, to monitor compliance with those requirements, and to report and take remedial action in the event of any deviations therefrom.

9. Confirm that the Company has in place a policy which prohibits its investment personnel from misappropriating for their own benefit investment opportunities that are made available to the Company, and from knowingly trading or taking a position in any security in advance of the Company's planned execution of a trade in that security or taking any other action that may frustrate or undermine the investment strategy or plans of the Company.

10. Determine that policies and procedures are in place to help ensure that members of the Company's investment staff do not trade any security while in possession of material inside information regarding the issuer thereof in violation of the federal securities laws.

11. Determine that share repurchases by the Company are executed pursuant to a program that has been reviewed by legal counsel to ensure that the applicable legal requirements have been satisfied, including compliance with, as applicable, issuer tender offer rules, insider trading laws, Regulation M (which prohibits repurchases during a distribution of Investment and Capital Committee Charter securities) and the requirements of SEC's Rule 10b-18 promulgated under the Securities Act of 1934.

12. Determine that procedures are in place to ensure that any offer or sale by the Company of any of its debt or equity securities is made in compliance with applicable federal and state securities laws.

Communications with the Investment and Capital Committee

The Committee makes known to management and associates of the Company that the Investment and Capital Committee desires direct communication from them regarding concerns or issues related to the Committee's Charter. The Committee expects management to advise it promptly of any significant investment-related operational or accounting issues that vary from traditional practices, Progressive's investment policy or Progressive's investment constraints. The Chief Investment Officer and the Treasurer will have direct access to the Committee.

E. *Technology Committee*

PwC reports, "Many directors are not confident that management has a handle on cyber threats."[67] As shown in PwC's 2017 Annual Corporate Directors Survey, "only 39% of directors are very comfortable that their company has identified its most valuable and sensitive assets."[68] A year later, "44% of the 9,500 executives surveyed . . . say they don't have an overall information security strategy."[69] Given the growing risk and expense of cyber breach, consultant PWC states, "boards recognize the need for an effective cyber risk governance and oversight structure. Such a structure includes the board, IT and management so cyber risks are managed across the company."[70] Although this task will likely require time and top leadership commitment to achieve "such a cyber risk management program, the end goal is to have a cost-effective program that addresses the key risks, and allows the company to become cyber resilient."[71] In their 2018 Annual Corporate Directors Survey, PWC reports that responsibility for cybersecurity declined for audit committees between 2017 (50% of companies used the audit committee for this purpose) and 2018 (43%).[72] During the same time period, cyber responsibility being handled at the full board rose from 30% to 36%, with a designated "Risk" committee utilized among

67. Paula Loop, Catherine Bromilow & Sean Joyce, *Overseeing Cyber Risk*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 18, 2018), https://corpgov.law.harvard.edu/2018/02/18/overseeing-cyber-risk/.

68. *Id.*

69. *Id.* (citing PWC, STRENGTHENING DIGITAL SOCIETY AGAINST CYBER SHOCKS: KEY FINDINGS FROM THE GLOBAL STATE OF INFORMATION SECURITY SURVEY 2018 (2017), https://www.pwc.com/us/en/cybersecurity/assets/pwc-2018-gsiss-strengthening-digital-society-against-cyber-shocks.pdf [https://perma.cc/3X4L-X6PY]).

70. *See* PWC, HOW YOUR BOARD CAN BETTER OVERSEE CYBER RISK 9 (Nov. 2018), https://www.pwc.dk/da/publikationer/2018/pwc-how-your-board-can-better-oversee-cyber-risk.pdf [https://perma.cc/B48N-SC55].

71. *Id.*

72. *Id.* at 5.

12% of companies reporting, and 4% relying on an "IT/digital committee."[73]

F. *Strategy Committee*

Although only two (2%) percent of Russell 3000 Index companies report during 2020 to have committees actually bearing the name "strategy,"[74] "sixty-eight percent of responding directors report that their company can no longer count on extending its historical strategy over the next five years. Future growth will likely depend on the adoption of a different business model and an entirely new set of assumptions about what success will look like."[75] In addition, NACD discloses, "Directors identify growing business-model disruptions (52%) and a slowing global economy (51%) as the top trends most likely to impact their organization over the next 12 months."[76] More than forty years ago:

> Texas Instruments had a standing Strategic Planning committee of the board. Texas Instruments at that time was very homogeneous, with almost every member having an engineering background. The TI Strategic Planning Committee was chaired by lawyer Bryan Smith, Chancellor of the Texas University System and veteran director of numerous major boards. [Forty] years later, few standing board strategic planning committees are to be found, perhaps a testament of how hard this function is to institutionalize at the board level.[77]

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73. *Id.*

74. NAT'L ASS'N OF CORP. DIRS., INSIDE THE PUBLIC COMPANY BOARDROOM 10 (2020).

75. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 6 (2019).

76. *Id.*

77. *See* Trautman, *Matrix*, *supra* note 26, at 118.

G. *Other Committees*

Other lesser utilized titles for board committees include: "compliance committee" (NACD documents use in about 3.5% of reporting companies),[78] and "environment, health, and safety committee" (reported by 3% of companies).[79] During 2020, the following committee names were found among about one percent or less of Russell 3000 boards: research and development, public policy, corporate responsibility, acquisition, plan, cybersecurity, sustainability, special activities, loan; stock award, asset and liability, and capital.[80] Others, "having governance issues unique to their situation will have a committee structure reflecting these specific concerns. Examples . . . include the "nuclear oversight" committee and subcommittee of utility NRG, or the "reserve valuation committee" at oil and gas producer[s] . . . ."[81]

IX. GOVERNING CYBER RISKS

News reports continue to demonstrate the significant threats to global data systems.[82] Technological advancements create an ever-growing opportunity for malicious actors to gain access to the data systems and personal information of others. Cyber risk continues to be among the greatest threats to governments, business entities, and individuals worldwide.[83] For those engaged in

78. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 8 (2019).

79. *Id.*

80. *See* NAT'L ASS'N OF CORP. DIRS., INSIDE THE PUBLIC COMPANY BOARDROOM 25 (2020) (Nonstandard Committee Data).

81. *See* Trautman, *Matrix*, *supra* note 26, at 90 (citing *Board of Directors*, NRG, https://investors.nrg.com/corporate-governance/board-of-directors (last visited Nov. 24, 2021)).

82. David E. Sanger, Nicole Perlroth & Julien E. Barnes, *Scope of Russian Hacking Far Exceeds Initial Fears*, N.Y. TIMES, Jan. 3, 2021, at A1.

83. Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber*

corporate governance, cyber security is one of every board's greatest challenges.[84]

Professor Frederick R. Chang brings a unique perspective to our understanding of cyber threat. His career spans service in the private sector and in government including as the former Director of Research at the National Security Agency (NSA). He is currently the Co-Chair of the Intelligence Community Studies Board of the National Academies of Sciences, Engineering, and Medicine, and he is also a member of the Army Research Laboratory Technical Assessment Board of the National Academies. He has served: as a member of the Computer Science and Telecommunications Board of the National Academies; as a member of the Commission on Cybersecurity for the 44th Presidency; and has appeared before Congress as a cybersecurity expert witness on multiple occasions. Professor Chang warns:

> Basically what directors need to know about cyber is that it is a strategic risk and not just an IT thing. It's easy to think of it as if, there are some routers or some switches or some firewalls that get broken, resulting in exposed data—creating a problem. It's important to step back and reflect upon how cyber is a risk, like any other risk. It can be thought of like an earthquake, or a flood or a fire. Much like an earthquake, flood, or fire — you can't do anything about it if there's going to be an earthquake, and you are located in California. You can't stop the earthquake. All too often, it seems, there is a perception that cyber threat can actually be stopped. It can't be stopped. If a persistent attacker has a really high desire to break through, then they're going to get through. You can't stop them—and cyber has to be viewed as a risk, like any other risk[.] . . . [T]here are some things you can do to mitigate . . . the risk, but you can't eliminate the risk. Maybe you can buy insurance, you can

Vulnerabilities: Lessons from Stuxnet and the Internet of Things, 72 U. MIA. L. REV. 761, 763 (2018).

84. *See* Lawrence J. Trautman & Peter C. Ormerod, *Corporate Directors' and Officers' Cybersecurity Standard of Care: The Yahoo Data Breach*, 66 AM. U. L. REV. 1231, 1234–35 (2017); Lawrence J. Trautman, How Law Operates in a Wired Global Society: Cyber and E-Commerce Risk, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3033776 (prepared for the Korea Legislation Research Institute (KLRI), 2017 Legal Scholar Roundtable, Seoul, Korea, Sept. 21–22, 2017).

> bring in some more people to work on cybersecurity, and so forth. But cyber threat is fundamentally something you can't stop, and it needs to be viewed at that level. So, what steps does a board take to have enough intrinsic knowledge about cyber? The task can be a highly technical thing, but it isn't only a technical concern.

A. *Pandemic Impact of Cyber Security*

Professor Frederick R. Chang observes, "During this pandemic, cyber intrusions have increased dramatically. Just because everybody's online so much, including the shift toward employees working from home. A board has to decide whether there is enough cyber talent on the board, just to understand the complexity of issues."

Based on 416 surveyed directors, NACD found: 44 percent of companies conduct cybersecurity oversight primarily at the full board level; 41 percent within the audit committee; 10 percent in their risk committee; and 5 percent (other).[85] Cyber expert Frederick R. Chang states:

> Another issue worth mentioning here relates to the legal consequences of cyber and data privacy issues. Depending on the company's domicile and where business is being conducted—if in Texas, or if it's in California, or it's in New York – jurisdictions have different laws about disclosure. So, if you get breached, it turns out there are numerous different disclosure laws that a company must comply with. And legislation is constantly changing these requirements. It's really important that directors understand the legal consequences of a cyber breach in their company, in their state, in their industry. Consequences are different in the healthcare industry, different in retail, different in finance, and it's different in education. So, it's really important that directors understand the legal environment in which they are operating.[86]

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85. NAT'L ASS'N OF CORP. DIRS., PUBLIC COMPANY GOVERNANCE SURVEY 2019–2020, at 20 (2019).

86. *See* David D. Schein & Lawrence J. Trautman, *The Dark Web and Employer Liability*, 18 COLO. TECH. L.J. 49, 76–78 (2020); Lawrence J. Trautman, Tony Luppino & Malika Simmons, *Some Key Things U.S. Entrepreneurs Need to Know About the Law and Lawyers*, 46 TEX. J. BUS. L. 155, 161–66 (2016); Lawrence J. Trautman, Kenneth J. Sanney, Eric D. Yordy, Tammy W. Cowart & Destynie J. L. Sewell, *Teaching Ethics and Values in an Age of Rapid*

"In my experience, I have seen cyber risk handled a couple of different ways," says director Ron McCray. He continues:

> I serve on the board and on the audit committee of a major research university. Imagine the kind of exposure that university could have . . . . We have a subcommittee of the audit committee that's focused on cyber security and it's populated with trustees who have functional executive experience in the cyberspace. At another company board on which I serve . . . . we don't have a cyber security expert. Without board cyber security expertise, what we do have is a regular dialogue with the chief technology officer. And so, we manage the risk by giving keen oversight over what that CTO is seeing . . . and to the extent he or she can identify risk, we monitor what they're doing about managing, mitigating, or eliminating it.

"I agree with what . . . you are saying, . . . [and] in my experience, my boards have put the cyber oversight role in the audit committee and that's because that's where we're dealing with all things that involve risk," says director Michele Hooper. She adds:

> Most of my boards do not have a specific risk committee which tends to be found in finance or insurance type companies, as opposed to other industries. So, one of the things that I view as our keen responsibility is to listen, understand, and make sure that there's mitigation and other attention being given alongside with outside benchmarking. But to me, one of my primary responsibilities is to make sure that the cyber teams have enough resources to do the job in today's world. Part of the problem is that in many organizations the budget within the cyber and the information area has been increasing enormously. And part of our responsibility on the audit committee and full board is protecting the employees that are in cyber functions and ensuring that management provides the attention and the resources that are needed.
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> It is important that boards explore bringing an individual with cyber experience on to the board. However, in the absence of such cyber talent, one of the ways in which we manage is to have outside experts that come into the boardroom and talk to us. And one of the

Technological Change, 17 RUTGERS BUS. L. REV. 17 (2021) (discussing ethical and legal issues); Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis*, 20 PITT. J. TECH. L. & POL'Y 41 (2020); Lawrence J. Trautman, *How Google Perceives Customer Privacy, Cyber, E-Commerce, Political and Regulatory Compliance Risks*, 10 WM. & MARY BUS. L. REV. 1 (2018).

> reasons that we tend to do it that way is that we found that cyber developments and the risks around cyber change so much. We found that if we brought somebody who's retired, their knowledge goes stale very quickly. And so that's how we tend to handle it. The other pandemic development is that the business environment is going virtual. As a result, ransomware is an area that is exploding in terms of risk—and boards need to be aware and focused on ransomware.[87]

"In my last CEO job, I elevated the chief technology officer (CTO) to my leadership team," says director Ron McCray. He continues:

> We wanted all of the operating executives to have visibility into what the data function team was seeing around the company—and therefore, to have detailed insight into what all the operators were living. When we had board meetings, all of my leadership team joins me . . . . Therefore, we have a natural opportunity to elevate cyber security issues in the audit committee and among the full board. In addition, this format allows for the directors, the CTO and I as CEO, to all engage productively on the topic and to better identify the risks.

"Michele Hooper brings up a good point about budgets," says cyber expert Frederick R. Chang. He further states:

> I talk with plenty of chief information security officers (CISOs) where they say, 'The board has given me, lots of money to protect against a cyber breach. But, I don't have the people to spend all the money or I don't have all the talent to spend all the money so . . . I can't protect everything, even if you gave me five times the budget. I just can't do it . . . don't have the time. There aren't enough hours in the day.'

There should be an expectation that board members have of management—about having an analytical framework (dashboard) in which to measure risk. So,

87. *See* Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503, 506 (2019); Lawrence J. Trautman, Mohammed T. Hussein, Emmanuel U. Opara, Mason J. Molesky & Shahedur Rahman, *Posted: No Phishing*, 8 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 39, 41–42 (2021) (discussing ransomware threats); Lawrence J. Trautman, Mohammed T. Hussein, Louis Ngamassi & Mason J. Molesky, *Governance of The Internet of Things (IoT)*, 60 JURIMETRICS 315, 319–20 (2020) (discussing ransomware common threat vectors).

companies should ascribe a measurable risk of a weather event, a power loss event, a cyber event, or other event—and provide contingency plans for each. A gameplan must exist ahead of time to decide steps to be taken in the event of a cyber breach, weather risk, a power outage, etc. This discipline provides a framework to help decide what resources are dedicated toward the different risks. This allows management to have a framework to analyze these threats.[88]

Director Trautman observes, "For years now, something I hear in boardrooms is, 'Even if we spend every dollar we could borrow. We still wouldn't have spent enough on cyber. The North Koreans, Russians, Chinese . . . all these nations are engaged in cyber war. We don't have enough money around here to fight a war.'" As a result, many boards are just pushing the problem off on the government, on others, on their customers and there are few prosecutions, because cyber failures are so pervasive . . . because everybody's got the same problem."[89]

While time prohibits a full discussion here, Trautman

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88. *See* Fred Chang, Opinion, *Sputnik Offers a Lesson on Cybersecurity Workforce*, DALL. MORNING NEWS (Oct. 3, 2017, 12:25 PM), https://www.dallasnews.com/opinion/commentary/2017/10/03/sputnik-offers-a-lesson-on-cybersecurity-workforce/ (discussing cyber workforce shortage); *see also* Mohammed Hussein, Lawrence J. Trautman & Reginald Holloway, *Technology Employment, Information and Communication in the Digital Age* (Jan. 13, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3762273 (discussing information technology/cybersecurity employment opportunities).

89. *See* Lawrence J. Trautman, *Is Cyberattack The Next Pearl Harbor?*, 18 N.C. J.L. & TECH. 232, 257 (2016); Lawrence J. Trautman, *Managing Cyberthreat*, 33 SANTA CLARA HIGH TECH. L.J. 230, 232 (2016); Lawrence J. Trautman, *Congressional Cybersecurity Oversight: Who's Who and How It Works*, 5 J.L. & CYBER WARFARE 147, 149 (2016); Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?*, 2015 U. ILL. J.L. TECH. & POL'Y 341, 344 (2015); Lawrence J. Trautman, *Impeachment, Donald Trump and The Attempted Extortion of Ukraine*, 40 PACE L. REV. 141, 198–99 (2020) (discusses nation state active measures taken against U.S. elections); Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 568 (2019); Lawrence J. Trautman, *Democracy At Risk: Domestic Terrorism and Attack on the U.S. Capitol*, 45 SEATTLE U. L. REV. (forthcoming) http://ssrn.com/abstract=3808365.

also cautions, "Boards are always trying to manage what we know about . . . but it is those developments just barely visible, like the impact of quantum computing and other technological advancements that we don't yet fully understand that require thoughtful consideration."[90] Professor Frederick R. Chang warns:

> Cyber is one of these asymmetric attacks where directors can provide corporate cyber defenders with a big check, but, for a relatively small amount of money, an attacker can successfully get through defenses. So, while the defender has to defend a bunch of different positions, all the attacker has to do is find a way through one position, . . . one port, or one human clicking on a link that they shouldn't. Therefore, these situations are very difficult because an attacker doesn't have to spend too much in resources to do considerable damage, while the defender has spent a lot of money to create a fortress that is unfortunately, ultimately compromised. This is why these attacks are referred to as asymmetric.

Director Ron McCray observes, "Most companies probably have some sort of redundancy defense deployed, so that if they are hit by something from cyberspace, data systems are backed-up and easily recoverable. Every enterprise must have the ability to get up and running from somewhere else." Professor Chang adds, "There are plenty of examples of corporations that have moved some data operations from one part of the country to another part of the country for both cost and redundancy reasons."

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90. *See* Lawrence J. Trautman, *Bitcoin, Virtual Currencies, and the Struggle of Law and Regulation to Keep Pace*, 102 MARQ. L. REV. 447, 449 (2018); Lawrence J. Trautman & Mason J. Molesky, *A Primer for Blockchain*, 88 UMKC L. REV. 239 (2019); Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 CARDOZO L. REV. 1041, 1050 (2017); Lawrence J. Trautman, *E-Commerce, Cyber, and Electronic Payment System Risks: Lessons from PayPal*, 17 U.C. DAVIS BUS. L.J 261, 299 (2016); Lawrence J. Trautman, *Is Disruptive Blockchain Technology the Future of Financial Services?*, 69 CONSUMER FIN. L.Q. REP. 232, 234 (2016); Lawrence Trautman, *Virtual Currencies; Bitcoin & What Now After Liberty Reserve*, *Silk Road, and Mt. Gox?*, 20 RICH. J.L. & TECH. 13, at 2 (2014); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board's Responsibility for Information Technology Governance*, 28 J. MARSHALL J. COMPUT. & INFO. L. 313, 315–17 (2011).

X. DIRECTORS IN CRISIS

A. *Importance of a Crisis Game Plan*

Seasoned directors recognize "that a clear strategy and implementation plan for reasonably foreseeable industry disasters—before they take place—helps to prevent mistakes made under conditions of severe stress."[91] "I found it useful in every company where I've served to have a crisis management manual," says director Ron McCray. Consider:

> This manual delineates principal risks that might attend to the enterprise. And it gives management, a rough outline or map of how they should think about managing those risks. And every once in awhile, like you would with a fire risk, you have a fire-like drill to test drive the crisis management manual. This is one way that I have found effective to assure that through regular crisis 'fire drills' acquaintance with the risk management framework that we develop for crisis management is reinforced.

B. *2008 Financial Meltdown and 2020-2021 Challenges*

Elsewhere, Professor Trautman has written, "The seeds for the 2007-09 financial collapse were sewn over many years and nurtured by ill-advised governmental housing policy, the presence of pervasive fraud both large and small and the widespread failure of personal integrity."[92] This crisis resulted in pervasive job loss, widespread corporate failures, and a call to action under severe stress for almost every corporate board. Throughout history, financial crises occur all too frequently. As such, these events are foreseeable, and require detailed anticipatory planning. Much like the year-

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91. Lawrence J. Trautman, *The Board's Responsibility for Crisis Governance*, 13 HASTINGS BUS. L.J. 275, 275 (2017); *see also* Marianne Jennings & Lawrence J. Trautman, *Ethical Culture and Legal Liability: The GM Switch Crisis and Lessons in Governance*, 22 B.U. J. SCI. & TECH. L. 187, 228–29 (2016).

92. *See* Lawrence J. Trautman, Personal Ethics & the U.S. Financial Collapse of 2007-08: Decade Later After-Action Report 1 (Aug. 12, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502124.

2000-era corporate frauds resulted in Sarbanes-Oxley legislation,[93] the financial crisis of 2008 resulted in Dodd-Frank legislation.[94]

C. *Pandemics*

The pandemic of 2020-21 illustrates the critical role played by corporate directors during times of crisis. Global developments during this tragic time have brought tremendous stress to all institutions in our society. Many corporate directors have been required to preside over survival scenarios for their businesses. Job loss, rent and food insecurity, particularly for many of the least fortunate among us has resulted from this worldwide tragedy.[95] Almost no board has escaped impact from the crisis created by this pandemic.

Many industries have been severely impacted by the pandemic. Just one example is the transportation sector, such as airlines. Also, those companies operating in the hospitality space have a similar problem, along with many in-person entertainment companies. Michele Hooper says:

> I am on an airline board and I'm also on the United Health Group board, a health care board. So, I'm right in the thick of this pandemic. Part of the responsibilities that we have as directors is that we have an oversight role. We are not management. Management is responsible for understanding the company's immediate situation and coming up with plans, making day-to-day decisions, bringing those strategy recommendations to the board, making sure that the board understands what is going on and has ability to provide input and direction. On my airline board, as I'm sure you can imagine, as this pandemic unfolded, we had telephonic board meetings once or twice a week. This schedule became normal

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93. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

94. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111-203, 124 Stat. 1376 (2010) (codified in scattered titles of U.S.C.).

95. Eddie Bernice Johnson & Lawrence J. Trautman, *The Demographics of Death: An Early Look at Covid-19, Cultural and Racial Bias in America*, 48 HASTINGS CONST. L.Q. 357, 374 (2021).

> procedure until the middle of September 2020, and then we went to just the normal schedule for board meetings and other things that developed so we have been in the thick of things, but the actual responsibility for making those day-to-day plans for decision making falls on management. Airlines are a regulated industry—requiring, working with the government, working with those regulators and the other peers that we have so that we provide a united front from an industry perspective.
>
> As a director, along with my peers, we have responsibility for understanding the company's situation—then, weighing in helping to understand our actions, because this pandemic has been very, very expensive to corporate entities, but also very costly to our employees. Our airline industry is now a mere fraction of our former selves. We probably had to let go, either through voluntary or involuntary separation, almost 40,000 people. So it has been a horrific event, but what has happened requires transparency and insistence upon openness. Directors have a duty to make sure that the board and management inquires and understands the informed overview of all those issues impacting the company. In addition, it is my belief that it is important that we are open, honest, and transparent to the employee base. It's important that our employees and regulators know what we know—so, we're all in this together. And I think that's really the only way that we're going to have the most positive result on the other side of this tragedy.

"Another thing that we learned during the past few months is the destructive impact the pandemic has had on the sub-supply chains," says Ron McCray. He explains that

> companies are having a tougher time depending on the industry sourcing materials or getting a product to market. This required focus on the supply chain has made us think about how we organize for the future, what we are learning and can glean from this crisis, so that when we get on the other side of this crisis, we will be smarter. As painful as this pandemic experience has been, it appears that one or more green shoots of insight are emerging . . . about how we might go to market differently during the future, or how we might use office space differently, for instance—and how we might source material differently. So that during the future, we are positioned where we are more efficient or effective with procedures in place.

"Yes, today, there's a lot of discussion taking place in companies about process changes conducted now . . . and as we are working our way through this pandemic," states Michele Hooper. This discussion includes

> which of these process improvements we will want to keep. So, through time, some of what we are currently doing will fall by the wayside. But there's learning taking place . . . about how we do business, who we do business with, what processes are improved, the speed to market that will remain when the pandemic is over. We found that there is an incredible ability to turn around organizations on a dime. And to add to the credit of most organizations, their ability to change the way in which they do business and to have their employees, change the way they do business. It's been remarkable and has really shown us a side of how we conduct ourselves . . . and a capability that I don't think most companies realized they had.

D. *Tropical Storms*

The dramatic increase in severe weather during recent years is yet another wakeup call for humanity to take these warnings from science very seriously. During the fall of 2020, many students in the Houston area found themselves required to deal with disruptions caused by three different tropical storms within just a few months. Then, in February 2021, freezing temperatures result in frozen pipes, severe loss of electrical power and water for millions of Texan residents.[96]

XI. FOCUS ON DIVERSITY

The lack of diversity on corporate boards remains a long-standing problem with little dramatic progress having been made.[97] Director Michele Hooper observes,

> Corporate directors find themselves in 'sort of a foxhole,' and the question becomes, who do you want to have in the foxhole with you." I will tell you, there are minorities, people of Color, and others that are equally as talented, each having credentials and experience that would enable them to serve on those boards—and be able to perform not only adequately, but in a superior way. I went on my first board

96. Brad Plumer, *Frigid Onslaught Stretches Limits of Electrical Grids*, N.Y. TIMES, Feb. 17, 2021, at A1; Jack Healy, Richard Fausset & James Dobbins, *Texans Facing New Crisis: Too Little Drinkable Water*, N.Y. TIMES, Feb. 19, 2021, at A1.

97. *See* Trautman, *Diversity*, *supra* note 25, at 237.

> at the age of tender age of 38, . . . but at 38 . . . I did not have a lot of actual experience compared with starting board service when I was 55, which a lot of people do. But, upon reflection, during those early assignments, I would rank my experience and my ability to make sound judgments as strong as two-thirds of the guys with whom I served. Through my career in the nominating/governance chair role, . . . I've been recruiting people for a long time and have brought people onto other boards. While my experience seems to be better than two-thirds of the guys with whom I serve—recruitment appears to be based more about who you know, than a matter of being concerned about whether or not that you're bringing on people that have the appropriate or superior credentials. It is, I think, more a matter of bringing on people in your circle. People that look like you, people that you're comfortable with, and people that go to the same clubs, go to the same private lunch organizations. It appears to me that recruitment of minorities suffers from a fear of the unknown, or a bias more likely against the unknown.

"Michele, I agree with you. It seems people want other directors to be individuals who are their friends and colleagues, with very similar tastes and very similar approaches," says Director and University President Ruth Simmons. She adds:

> And, they just don't want to have to deal with people who are different in the boardroom. . . . They want a known quantity. So, trying to get someone untested onto a major board is very hard to do. Now, it's important to say that CEOs have a very important role in recruiting directors. Sometimes CEOs can lean into this and influence directors to bring on people who don't fit that mold. It's very hard for a single director to do that, no matter how qualified.
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> This reluctance to change appears to me to be one of the shocking elements of corporate culture. . . . The aperture is so narrow now for getting onto a corporate board. As an example, I never imagined myself wanting to be on a corporate board. Frankly, I had no interest whatsoever. But, when I was president of Smith, the CEO of Metropolitan Life was also a trustee of Smith, and he asked me to join their board. I didn't want to. So, I told board members that I was not inclined to do it. But, the board wanted me to do it. That's how I ended up taking on my first board. It was through someone that I actually knew. Someone I know recently conducted a survey of black directors, and they concluded that this is the experience of most blacks who serve on major corporate boards—they get on those boards because they knew someone who got them nominated. So, it's frankly shocking that in this day and age, the processes are not more open. However, the environment may be more conducive now to welcoming peoples of color onto major boards because of the recent focus on diversity and inclusion. But, this remains one of the

> sorry stories related to corporations: . . . the lack of leadership on corporate boards dedicated to the concept of diversity.

"To your point about getting recruited, . . . you get on a board because of who you know. . . . This is the case for everybody, . . . [and] how 75 to 80% of people go onto boards," says Michele Hooper. She further states,

> It's because of who they know . . . and they are recruited by somebody on the board. So that's just the way it is, unfortunately. However, it seems that we are in a moment here. Because of the tragic George Floyd murder, we are in a moment for African Americans in particular, and people of Color. . . . It has focused the mind and the attention of corporations and boards. There are several initiatives that are specifically looking at recruiting an additional director who is African American specifically . . . or a person of Color. A number of boards and nominating and governance committees are focused toward recruiting African Americans and recruiting African American women, who comprise a very, very sorry percentage of our boards of directors, . . . but we are in a moment. I don't think that this is a new wave, nor that it is going to go on ad infinitum. It's probably a window lasting just a couple of years. I'm afraid this moment will go out of fashion again and we'll be, unfortunately, back into having the same conversation. But we're in a moment at present. We need to seize this opportunity with both hands.

"To be candid, the discussion around the boardroom and around the nominating / governance committee is often tragically biased," adds Ruth Simmons. She adds,

> There are very prominent African Americans in this country who have the required financial knowledge, who have the contacts, who have enough of the education needed in all areas to be wonderful corporate directors. I've repeatedly heard boards pass on candidates because the minority candidates: may be too 'controversial'; they may be too 'outspoken'; or they may be too 'full of themselves.' And so, it's just that kind of thing that you hear repeatedly in boardrooms in passing overqualified individuals, particularly outspoken, intelligent, capable candidates . . . who are women and/or minorities. And the idea is, 'we don't want all that noise in the boardroom.' We just want somebody who is going to be like us; it's very discouraging.

Professor Seletha Butler, having written extensively about the topic of board diversity says, "I think it's a lot about the network that potential directors have and those individuals being tapped by various individuals in the decision making platform that has the ability to advocate for them. So, I agree with everything that has been said."[98] Director Trautman adds:

> We've been talking about the National Association of Corporate Directors, and I recall a number of years ago in New York sitting next to the Chairman of one of the largest feminine hygiene companies in the world. I remember saying to him [name omitted], "Let me get this straight, you don't have any women who have ever used your product on the board?" "No," he replied, "but we've got some doctors." So, if your company is doing business in India, for example, or some other culture is a major part of where you sell your product, and you have neither women nor anybody who understands the cultural differences involved marketing such a product in that environment, it is only common sense to improve your decision-making process. It just shows you how stupid as a culture and society we've been for a long time.

A. *Recent Developments*

Elsewhere, Professors Gow, Larcker, and Watts "investigate one important influence on diversity by studying whether shareholders value diversity on corporate boards in director elections. Using a broad sample of director elections from 2003 through 2018, [the authors] provide robust evidence that shareholders value diversity."[99] They explain that

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98. *See also* Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 65–67 (2012). *See generally* Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795; Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105 (2005); Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?,* 89 N.C. L. REV. 855 (2011).

99. Ian D. Gow, David F. Larcker & Edward M. Watts, *Board Diversity and Shareholder Voting* 5–6 (Rock Ctr. for Corp. Governance at Stanford Univ. Working Paper No. 245, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733054.

> the magnitude of these effects is heavily dependent on the type of diversity. Our findings suggest that while both the race or ethnicity and gender of candidates are important factors in the shareholder voting process, shareholders have historically been more likely to support gender diverse candidates than racially or ethnically diverse candidates. We also provide evidence that shareholders place significantly more value on boards' overall diversity rather than the diversity of individual candidates. Finally, the magnitude of the additional voting support for diverse candidates and boards has grown significantly over time, and there is considerable heterogeneity in voting behavior across shareholders along several important dimensions (e.g., the Big Three asset managers).[100]

CONCLUSION

While our discussion inevitably fails to resolve the ongoing debate regarding the full scope of corporate purpose, we believe our comments and observations add to the necessary and important continuing discussion about the efficient functioning of directors as they seek to discharge our duties and responsibilities, particularly with regard to governing cybersecurity risk and issues of board diversity.

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100. *Id.*