A Test of Stakeholder Capitalism

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Stakeholder capitalism dominates the public debate about the future of the corporation. Business leaders and policymakers are calling for companies to abandon their stern adherence to profit maximization and consider a broader set of stakeholder interests, on issues ranging from workplace equity to climate change. Critics worry that managers can easily manipulate such lofty rhetoric to promote their own agendas and weaken constraints on their conduct that are typically benchmarked exclusively against financial performance. We argue instead that companies turn to stakeholders in order to derive information about the implications of their choices over a wider array of social issues that are outside the regular scope of corporate monitoring systems.

The arrival of COVID-19 in early 2020 provides a unique setting that allows us to test how companies understand and utilize stakeholder governance in practice. Forced to adjust swiftly to a new reality, companies might choose to economize and redirect resources away from peripheral stakeholder programs, as critics predict. Alternatively, COVID-19 could help underscore how closely companies depend on their stakeholders, such as their employees, their communities, and their governments, leading to greater efforts to address these broader needs. To explore how companies viewed stakeholders under mounting pressure brought about by COVID-19, we conducted interviews with CEOs, general counsel, and other top executives from large, well-known publicly traded companies with an established stakeholder governance presence. Our sample includes companies from various industries, including some that fared particularly well during COVID-19 such as technology, and others whose businesses were hit hard, such as travel and hospitality.

Our findings suggest that companies turned to stakeholders during the pandemic with increasing frequency and asked for input on issues that are central to their business. Companies relied on stakeholder communications with employees to negotiate the remote working environment and arrange for continuous operation and reopenings. Through stakeholder governance, companies better understood the needs of consumers in financial difficulty, and the concerns of local authorities regarding unnecessary and dangerous population movements, springing into action to support them. But stakeholders were not always

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** Founding Director and Senior Research Fellow, Business in Society Institute, UC Berkeley School of Law. We would like to thank Ofer Eldar, Brian Galle, Scott Hirst, Jill Fisch, Katerina Linos, Brett McDonnell, Frank Partnoy, Elizabeth Pollman, Dan Sokol, Steven Davidoff Solomon, as well as participants at the Organizations and Social Impact Workshop 2020. Lindsey McDonald, Peter Gutman, and Marissa Rael provided excellent research assistance.

successful in persuading managers and directors to follow their suggestions, particularly when stakeholders were themselves divided or where managers faced other critical hardships concurrently.

Stakeholder governance emerges from our interviews as a systematic framework that companies are developing in order to obtain information about the social impact of their practices. In the past, companies communicated with their stakeholders about specific issues as the need arose. Today, stakeholder governance seeks to proactively cover the company's social profile as comprehensively as possible, collecting information in a regular and standardized manner. To achieve this goal, stakeholder governance has established an institutional footprint within many corporations through specialized executive teams, direct oversight by the board, and external monitoring by investors and specialized professionals. This systematic framework, which has been overlooked by the corporate purpose debate, can help alleviate concerns about accountability and offers a blueprint for dealing with future global challenges.

I. INTRODUCTION

Surrounded by morning traffic in early March 2020, Amy Weaver was headed toward Salesforce's headquarters in downtown San Francisco.[1] As city life was bustling around her, she knew that the decision she and the leaders at Salesforce would make that day could soon bring everything to a standstill. Customers and contacts at partner and peer companies provided Salesforce with updates, giving them first-hand accounts of what they were seeing with respect to the COVID-19 virus. Based on this information, the company had already been canceling travel and tours. But as it became clear that the pandemic was spreading in the U.S., management was wondering: was it time to shut down the headquarters? As head of the company's legal, ethics, integrity and compliance team, Weaver's input would be decisive.[2] She opted for a coordinated approach, connecting with employees as well as other businesses and governments. Salesforce moved early into remote working.[3] "We started getting emails from other CEOs and business leaders asking what we knew . . . they were looking to us to lead."[4] Some inquiries were from their customers, but others were from peer companies, or companies

1. Online Interview with Amy Weaver, CFO, Salesforce (July 1, 2020). For an overview of interviews and participants, *see* Appendix A.

2. Amy Weaver has since transitioned into the CFO role at Salesforce. *See* Nina Trentmann, *Salesforce CFO Hands Reins to Successor After More Than Six Years at Helm*, WALL ST. J. (Feb. 1, 2021, 8:30 AM), https://www.wsj.com/articles/salesforce-cfo-hands-reins-to-successor-after-more-than-six-years-at-helm-11612186200 [https://perma.cc/575H-4BQW] (reporting on Ms. Weaver's transition to CFO).

3. *See* Taylor Locke, *Salesforce Asks Employees in California to Work Remotely in March Due to Coronavirus*, CNBC (Mar. 7, 2020, 4:40 PM), https://www.cnbc.com/2020/03/07/salesforce-asks-california-employees-to-work-remotely-amid-coronavirus.html [https://perma.cc/G25W-4PZX] (reporting on Salesforce's transition to remote work in earl March 2020, weeks before other companies made a similar transition); Devi Thomas & John Fee, *Working Remotely for the Good of All*, SALESFORCE (Mar. 10, 2020), https://www.salesforce.org/blog/working-remotely-for-the-good-of-all/ [https://perma.cc/M675-S6GH].

4. Interview with Amy Weaver, *supra* note 1.

located nearby. They were looking to obtain the superior information that Salesforce apparently had. Soon after, local authorities in the Bay Area, and then the state government, got in touch.[5]

A few weeks later, the fear of COVID-19 increased the demand for cleaning and sanitization products.[6] Benno Dorer, the CEO of Clorox, strove to increase the supply of their widely popular antibacterial wipes by boosting production capacity, but his efforts were quickly eclipsed by consumer demand.[7] Forced to prorate available products among its distributors, Clorox had to evaluate its priorities. Besides households, Clorox also supplies care facilities like hospitals and nursing homes, which became common epicenters of COVID-19 outbreaks. If the company continued to supply these facilities, it would be unable to satisfy demand by large retailers like Walmart or Target.[8] As a result, Clorox would have to back down from valuable distribution deals and cede expansive shelf space to alternative suppliers, with no assurance about when or whether it could claim it back. Moreover, the damaged relationship with retailers could hurt Clorox's other household products, whose sales depended more heavily on this distribution channel. Finally, Clorox's retreat from the retail market would provide an opportunity for competitors, many of whom had been trying to enter the market unsuccessfully for years. However, care providers told Clorox that it would be hard to source alternative sanitization supplies and might take weeks until new deliveries—endangering the lives of many people. "I chose to send our products to frontline workers," Dorer said.[9] For a little while, Clorox products all but disappeared from the shelves.[10] Consumers were

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5. *Id.*

6. *See* David Morris, *The Coronavirus Cleaning Boom Is Coming*, FORTUNE (May 11, 2020), https://fortune.com/2020/05/11/coronavirus-cleaning-disinfecting-office-buildings-restaurants/ [https://perma.cc/H5MS-BGMR] (reporting on increased demand for cleaning and disinfectant products as the pandemic raged); Sharon Terlep & Dave Sebastian, *Clorox Books Record Sales Jump on Disinfectant Demand*, WALL ST. J. (Nov. 2, 2020), https://www.wsj.com/articles/clorox-profit-more-than-doubles-continuing-gains-from-disinfectants-11604331733 [https://perma.cc/4XW3-7RWV].

7. *See* Sharon Terlep, *Makers of Wipes and Hand Sanitizers Step Up Production as Coronavirus Spreads*, WALL ST. J. (Feb. 27, 2020, 4:11 PM), https://www.wsj.com/articles/makers-of-wipes-and-hand-sanitizers-step-up-production-as-coronavirus-spreads-11582833364 [https://perma.cc/68W6-DYR5] (stating that companies that make household cleaning products are boosting production and have employees working overtime as they brace for a surge in demand due to the spread of coronavirus); Blayne Alexander & Tim Stelloh, *Clorox Ramps Up Production of Wipes, Disinfectants in Fight Against Coronavirus*, NBC NEWS (May 6, 2020, 4:47 PM), https://www.nbcnews.com/nightly-news/clorox-ramps-production-wipes-disinfectants-fight-against-coronavirus-n1201561 [https://perma.cc/L93M-4ZWF]; Roland Li, *Clorox's Coronavirus Challenge: 500% Demand Spikes and Nonstop Manufacturing*, S.F. CHRON. (May 23, 2020), https://www.sfchronicle.com/b usiness/article/Clorox-s-coronavirus-challenge-500-demand-15290369.php [https://perma.cc/G26W-G247].

8. *See* Richa Naidu, *Clorox Won't Have Enough Disinfecting Wipes Until 2021, its CEO Says*, REUTERS (Aug. 4, 2020), https://www.reuters.com/article/us-health-coronavirus-clorox-wipes/clorox-wont-have-enough-disinfecting-wipes-until-2021-its-ceo-says-idUSKCN2501EU [https://perma.cc/7PSU-N3VP] (stating that because Clorox products are sold and distributed to a variety of companies, meeting the demand for disinfectant wipes will take Clorox longer since the production process involves a stressed and complex supply chain); Lara Sorokanich, *Still Looking for Clorox Wipes? Here's How the Company Has Innovated to Meet Unprecedented Demand*, FAST CO. (Nov. 10, 2020), https://www.fastcompany.com/90572398/still-looking-for-clorox-wipes-heres-how-the-company-has-innovated-to-meet-unprecedented-demand [https://perma.cc/YW36-HZDF].

9. Online Interview with Benno Dorer, CEO, Clorox (Dec. 2, 2020).

10. *See* Jessica Guynn, *Still Looking for Clorox Wipes? CEO Warns Shelves Won't Be Fully Stocked with Disinfecting Cleaners Until Summer*, USA TODAY (May 6, 2020, 3:59 PM),

desperate, and the media covered the shortfall fueling further anxiety.[11] Retailers and investors expressed concerns but were ultimately assuaged.

As the pandemic engulfed western economies, closing borders[12] and decimating many retail industries,[13] supply chains in developing nations saw a tidal wave of order cancellations[14] just as they were trying to keep COVID-19 at bay. Levi Strauss & Co. (LS&Co.), the clothing company, quickly contacted their offshore vendors to reduce their orders, only to realize that many other companies had done the same, potentially driving some vendors in their supply chain out of business. Seth Jaffe, LS&Co. Executive Vice President and General Counsel noted that the supply chain leaders had spent years building relationships with their vendors, monitoring humane working conditions, and ensuring sustainable production methods. "If we turned our backs on our suppliers during the pandemic, we would be creating significant hardship for them, and we would undo

https://www.usatoday.com/story/money/2020/05/06/clorox-disinfectant-wipes-shortage-summer/5177753002/ [https://perma.cc/TQ97-LFCL] (reporting on bare store shelves, emptied of cleaning products by anxious consumers as the COVID-19 pandemic marched across the country).

11. *See* Julie Creswell, *'I Had Lost All Hope': Clorox Wipes Are Still the Hard-to-Find Pandemic Item*, N.Y. TIMES (Oct. 5, 2020), https://www.nytimes.com/2020/10/05/business/clorox-disinfecting-wipes-pandemic.html [https://perma.cc/FW3R-8ATP] (describing the experiences and challenges faced by consumers as they struggled to find Clorox disinfectant wipes and their usage of social media to find disinfectant products); Daniella Diaz, *Don't Expect to See Disinfectant Wipes or Sprays in Stores Anytime Soon, Experts Say*, CNN (Apr. 29, 2020, 12:34 PM), https://www.cnn.com/2020/04/29/politics/lysol-wipes-back-in-stores-when-disinfectant-sprays/index.html [https://perma.cc/G4NP-5YCH].

12. *See* Charles Kenny, *Pandemics Close Borders—And Keep Them Closed*, POLITICO (Mar. 25, 2020), https://www.politico.com/news/magazine/2020/03/25/trump-coronavirus-borders-history-plague-146788 [https://perma.cc/Y2SA-NR45] (analyzing closed-border policies and pandemics); Karen Schwartz, *I'm a U.S. Citizen. Where in the World Can I Go?*, N.Y. TIMES (Sept. 8, 2021), https://www.nytimes.com/article/coronavirus-travel-restrictions.html [https://perma.cc/6GLW-MJ3H]; Jayme Deerwester, *US Borders with Canada, Mexico to Remain Closed Through Feb. 21*, USA TODAY (Jan. 14, 2021, 10:00 AM), https://www.usatoday.com/story/travel/news/2021/01/14/us-canada-border-us-mexico-border-closures-extended-through-february/4156343001/ [https://perma.cc/9XAE-3RJM].

13. *See* Coral Murphy Marcos, *100,000 Retail Stores Could Close by 2025, Accelerated by COVID-19, Analysts Say*, USA TODAY (Apr. 21, 2020, 3:21 PM), https://www.usatoday.com/story/money/2020/04/21/100-000-retail-stores-could-close-by-2025-ubs-report/2997122001/ [https://perma.cc/WK2C-PM8T] ("Analysts at Wall Street firm UBS said in a research note this week that the pandemic could alter behaviors, leading more shoppers to continue buying online."); Hayley Peterson, *Coronavirus Could Trigger a Second Coming of the Retail Apocalypse, with a New Wave of Bankruptcies and Store Closings Expected to Sweep the Nation*, BUS. INSIDER (Apr. 9, 2020, 12:00 PM), https://www.businessinsider.com/coronavirus-could-trigger-retail-bankruptcies-and-mass-store-closings-2020-4 [https://perma.cc/DPV6-HD8J].

14. *See* Joe Emont, *Retailers Canceling Apparel Orders Amid Coronavirus Torments Clothes Makers*, WALL ST. J. (May 5, 2020, 8:52 AM), https://www.wsj.com/articles/retailers-canceling-apparel-orders-amid-coronavirus-torments-clothes-makers-11588683151 [https://perma.cc/WS2L-AYPX] (stating that payments have been delayed and orders have been canceled by retailers dealing with closing stores and plunging sales); Brooke Roberts-Islam, *The True Cost of Brands Not Paying for Orders During the COVID-19 Crisis*, FORBES (Mar. 30, 2020, 6:04 AM), https://www.forbes.com/sites/brookerobertsislam/2020/03/30/the-true-cost-of-brands-not-paying-for-orders-during-the-covid-19-crisis/?sh=6a947b4c5ccc [https://perma.cc/6BST-MS9M]; *Factbox: Fashion Brands Cut Orders with Asian Garment Makers*, REUTERS (May 18, 2020, 6:19 PM), https://www.reuters.com/article/us-health-coronavirus-garment-factbox/factbox-fashion-brands-cut-orders-with-asian-garment-makers-idUSKBN22U359 [https://perma.cc/SYB7-DHJQ]; Annie Kelly, *Garment Workers Going Hungry as Fallout from Cancelled Orders Takes Toll – Report*, GUARDIAN (Dec. 3, 2020, 9:32 AM), https://www.theguardian.com/global-development/2020/dec/03/garment-workers-going-hungry-as-fallout-from-cancelled-orders-takes-toll-report [https://perma.cc/DR5F-DAXE].

years of work," he said.[15] Thus, LS&Co. ensured that they would pay for orders already placed and would help vendors get international financing to stay afloat.

In addition to suppliers, companies also focused on the health and safety of individual workers throughout their supply chain. PepsiCo was about to complete a human rights report to uncover weaknesses in working conditions throughout its supply chain,[16] slated to be made public in February 2020, when COVID-19 began spreading throughout the world. At first, the immediacy of the pandemic pushed other topics further down the company's agenda. But as the company sought to support supply chain workers and enhance worker safety from COVID-19, they needed to pin down vulnerable populations and high-risk groups. The company quickly came to realize these groups largely overlapped with those highlighted in their human rights report. PepsiCo then turned to the information collected for their human rights report. It utilized the monitoring structures it had put in place as a tool for assisting suppliers in managing worker safety during the pandemic.

In the examples above, companies facing tough choices charted a way forward that took into account the perspective of those likely to be impacted by adverse events, collectively dubbed stakeholders. These included employees, peer companies, local economies, and governments in Salesforce's case, consumers and collaborators in the Clorox example, and supply chain vendors and workers in the examples of LS&Co. and PepsiCo. By incorporating stakeholders' viewpoints into their decision-making, these companies reflected a reorientation of corporate culture. Prominent CEOs,[17] investors,[18] academics,[19] and regulators[20] around the world have been urging companies to abandon

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15. Online Interview with Seth Jaffe, Executive Vice President & General Counsel, Levi Strauss & Co. (July 14, 2020).

16. *See generally* PEPSICO, OUR COMMITMENT TO HUMAN RIGHTS, (2019), https://www.pepsico.com/docs /album/esg-topics-policies/2019-pepsico-human-rights-report.pdf (addressing, among other topics, vulnerable workers, working hours and wages, and workplace health and safety issues in the company's supply chain).

17. *See* BUSINESS ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION, (2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf [https://perma.cc/MKR4-FALB] (signed by 181 company CEOs).

18. *See* Karen Firestone, *How Investors Have Reacted to the Business Roundtable Statement*, HARV. BUS. REV. (Nov. 20, 2019), https://hbr.org/2019/11/how-investors-have-reacted-to-the-business-roundtable-statement [https://perma.cc/FK2F-LHAC] (describing how investors in different regions have reacted to the Business Roundtable statement); CERES ET AL., THE ROLE OF INVESTORS IN SUPPORTING BETTER CORPORATE ESG PERFORMANCE: INFLUENCING STRATEGIES FOR SUSTAINABLE AND LONG-TERM VALUE CREATION (2019), https://www.ceres.org/sites/default/files/reports/2019-04/Investor_Influence_report.pdf [https://perma.cc/T83U9X8F] (describing the role of investors in moving away from an exclusive focus on shareholder profits).

19. *See, e.g.*, Colin Mayer, *Shareholder Primacy is Dead. Now We Need to Restore Trust in the Corporation*, REUTERS (Oct. 2, 2019), https://www.reutersevents.com/sustainability/shareholder-primacy-dead-now-we-need-restore-trust-corporation [https://perma.cc/3REQ-SJ8G]; Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy; A Reply to Professor Rock* (Ctr. for L. and Econ. Studies, Working Paper No. 637, 2020), https://papers.ssrn .com/sol3/papers.cfm?abstract_id=3749654 [https://perma.cc/8CED-U76Q].

20. *See* Mark Carney, *Fifty Shades of Green*, 56 FIN. & DEV. 12, 14 (2019) (stating that the Bank of England will be the first regulator to test a financial system based on more than shareholder profit); Roger Harrabin, *Bank of England Chief Mark Carney Issues Climate Change Warning*, BBC NEWS (Dec. 30, 2019), https://www.bbc.com/news/business-50868717 [https://perma.cc/87TU-9C4H] (reporting on outgoing Bank of

an exclusive focus on shareholder profits and instead adopt a broader view of their companies' purpose and objectives. By highlighting issues important to stakeholders such as workplace diversity and climate change, this movement has gained ground in the public debate[21] and has come to dominate policymaking agendas.[22] But it has also elicited a passionate rebuttal from legal academics. Some argued that management paid lip service to stakeholders while remaining tied to improving profits above all else,[23] and others questioned whether lumping all stakeholder interests together provides any real guidance to management and boards.[24]

COVID-19's swift and overpowering arrival put these competing approaches to the test. On the one hand, stakeholder needs were more urgent and critical than ever before, as the health and livelihood of many were in immediate threat. From individual employees to entire communities, local authorities to national governments, and retail consumers to raw material suppliers, COVID-19 brought many stakeholder concerns to the forefront.[25] On the other hand, companies' resources were under immense stress. Some sectors saw their turnover plunge practically overnight.[26] Even firms who saw a

England chief's plea to financial institutions to shift priorities and work to curb global investment in fossil fuels); Mark A. Wynne, *Global Perspectives: Mark Carney on Leading the Bank of England, Climate Change, COVID-19, and Community Involvement*, FED. RSRV. BANK OF DALL. (Dec. 1, 2020), https://www.dallasfed.org/research/economics/2020/1201 [https://perma.cc/VQ6K-WKAW] (discussing Bank of England officer Mark Carney's view on how financial institutions can help combat climate change).

21. *See* Richard S. Horvath, *Stakeholder Governance and the Freedom of Directors to Embrace Long-Term Value Creation*, HARV. L. SCH. F. CORP. GOV. (Sept. 12, 2019), https://corpgov.law.harvard.edu/2019/09/12/stakeholder-governance-and-the-freedom-of-directors-to-embrace-long-term-value-creation/ [https://perma.cc/Q9DF-25DB] (noting that the debate around sustainable governance has "reached a crescendo"); Jessica Strine et al., *The Age of ESG*, HARV. L. SCH. F. CORP. GOV. (Mar. 9, 2020), https://corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/ [https://perma.cc/W8UD-2MKG] ("Investors recognize that ESG factors can influence long-term business performance."); Leslie P. Norton, *Companies and Investors Heed the Call to Action*, BARRON'S (June 26, 2020), https://www.barrons.com/articles/why-big-companies-have-embraced-social-responsibility-51593215927 [https://perma.cc/P374-K9BA] (stating that due to the COVID-19 pandemic, the related economic downturn, and general social unrest, companies and investors have started to consider stakeholders beyond shareholders more fully).

22. Abby Schultz, *Impact Investors Issue Policy Agenda for Biden Administration*, BARRON'S (Dec. 15, 2020), https://www.barrons.com/articles/impact-investors-issue-policy-agenda-for-biden-administration-01608045252 [https://perma.cc/GL8H-7T4B]; Frederick Alexander et al., *From Shareholder Primacy to Stakeholder Capitalism*, HARV. L. SCH. F. CORP. GOV. (Oct. 26, 2020), https://corpgov.law.harvard.edu/2020/10/26/from-shareholder-primacy-to-stakeholder-capitalism/ [https://perma.cc/8VWS-A3DV]; Anthea Kelsick & Ben Anderson, *Today We Put Forward a Policy Agenda for Systems Change*, B CORP., https://bcorporation.net/news/today-we-put-forward-policy-agenda-systems-change [https://perma.cc/3X5G7XF6].

23. *See* Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 100–01 (2020) (arguing that much of stakeholderism is nothing more than a carefully crafted public relations façade designed to "obscure the critical need for external interventions to protect stakeholders via legislation, regulation, and policy design.").

24. *See generally* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose*?, 99 TEX. L. REV. 1309 (2020) (discussing the differing interests of stakeholders and how those can prevent challenges to boards of directors).

25. *See* Lora Jones et al., *Coronavirus: How the Pandemic Has Changed the World Economy*, BBC NEWS (Jan. 24, 2021), https://www.bbc.com/news/business-51706225 [https://perma.cc/8UNE-NVZD] (discussing how different industries were affected by COVID-19).

26. *See* Barbara Thau, *Experts Unpack the Massive Cross-Industry Impact of the Coronavirus, From Retail to Hospitality*, GOOD CO. BY U.S. CHAMBER OF COM. (2020), https://www.uschamber.com/co/good-

boost in demand due to COVID-19 had to make rapid and extensive readjustments to their production and distribution models to deal with remote working and social distancing.[27] Stakeholder initiatives, often attacked as luxuries even in the pre-COVID-19 era, were at risk of elimination.[28] With so much at stake, both for stakeholders and for the companies and their shareholders, management would have to resolve hard dilemmas when deciding how to best allocate company resources.

In this Article, we explore whether the stakeholder approach helped companies to address the COVID-19 challenge, sketching out both its successes and its weaknesses. We interviewed high-level executives in 14 large publicly-traded companies: Salesforce, Clorox, American Airlines, Airbnb, Uber, Lyft, PepsiCo, Levi's, Nestlé, Hershey, Mastercard, Millicom, Nokia, and MGM Resorts. Our sample includes companies from a variety of industries. Some were hit hard by COVID-19, such as transport and hospitality. Others performed well during the pandemic, such as technology, consumer goods, and finance. Prior to Covid, all companies in our sample had made solid commitments to promote stakeholder interests, and many were among the pioneer voices in the stakeholder movement.[29] Thus, our interviews capture how a relatively sophisticated stakeholder apparatus, already in place before COVID-19, responded to the pandemic.

Our interviewees uniformly report that, as the virus disrupted modes of production long taken for granted, like office work, they came to realize how deeply interdependent their firm was to their stakeholders and sought to recreate and transform these relationships where possible.[30] But how? Two key findings emerge from our conversations. First, from a substantive perspective, management recognized that without input from affected parties, it would be making decisions in the dark. For example, firms knew they needed to support employees working remotely during lockdowns, but who were those most in need, and what kind of support would be more helpful?[31] When

company/launch-pad/coronavirus-effects-on-major-industries [https://perma.cc/G9C8-LWU8] ("For much of the U.S. restaurant industry, business just disappeared overnight . . .") (internal quotations omitted). *See also* Grant Suneson, *Industries Hit Hardest By Coronavirus In the US Include Retail, Transportation, and Travel*, USA TODAY (Mar. 20, 2020), https://www.usatoday.com/story/money/2020/03/20/us-industries-being-devastated-by-the-coronavirus-travel-hotels-food/111431804/ [https://perma.cc/76R6-S8EP] (discussing the difficulties that the retail and transportation industries experienced do to the pandemic); Camille Egloff, *Hit Hard by COVID-19, Transportation & Logistics Companies Must Adapt to Keep Supplies Moving*, BCG CONSULTING GRP. (Apr. 4, 2020), https://www.bcg.com/en-us/hit-hard-by-covid-19-transportation-logistics-companies-must-adapt-to-keep -supplies-moving [https://perma.cc/7AGR-TXHL] (discussing the difficulties faced by transportation and logistics companies due to the pandemic).

27. *See e.g.*, Brian Sozzi, *Clorox Has Seen 500% Increases in Demand During the COVID-19 Pandemic: CEO*, YAHOO FIN. (May 5, 2020), https://www.yahoo.com/now/clorox-has-seen-500-increases-in-demand-during-the-covid-19-pandemic-ceo-132530052.html [https://perma.cc/ULB9-7ESM].

28. *See* Andrew Edgecliffe-Johnson, *Coronavirus Poses Big Test of Capitalism's Stakeholder Conversion*, FIN. TIMES (Mar. 3, 2020), https://www.ft.com/content/6d75fd96-5d71-11ea-b0ab-339c2307bcd4 [https://perma.cc/MZ9U-GQVA] ("Record profits have made it easier for chief executives to think magnanimously about constituents who have no power to oust them if they miss forecasts. The [pandemic] offers a stark reminder that such benign conditions will not last.").

29. Leslie P. Norton, *BofA, Mastercard, Salesforce, IBM to Report ESG Metrics Championed by World Economic Forum*, BARRON'S (Jan. 26, 2021), https://www.barrons.com/articles/bofa-mastercard-salesforce-ibm-to-report-esg-metrics-championed-by-world-economic-forum-51611681670 [https://perma.cc/DWV3-C4NF].

30. *Infra* Section VI.A.

31. *See infra* Section VI.B.

would employees feel safe returning to workplaces again, and under what conditions?[32] Similar questions arose for stakeholders outside the corporation, such as governments and consumers. When highly regulated activities, like airline operations, ground to a halt, how would governments view any ongoing obligations of these companies towards them?[33] Companies were expecting waves of customer defaults since many would be unable to pay their bills. Should they relegate those customers to debt collection, or should they preserve access to their services, and even expand it to help them overcome their financial troubles?[34] These are only some of the issues for which companies in our sample turned to stakeholders for feedback. By presenting management with previously unknown considerations, stakeholder governance steered companies toward novel, unanticipated solutions. In Part IV, we highlight how this exchange of information led to new approaches in many different aspects of company operations, from product development and consumer relations to supply chain vulnerabilities and government reactions.[35]

Our second finding is that stakeholder governance became a key procedural tool for sourcing information that proved indispensable for executive decision-making and board monitoring under COVID-19. Most companies reported an increase in the frequency of communications with stakeholders, especially employees, governments, and suppliers.[36] Virtual town halls with the CEO and thousands of workers became a weekly occurrence, especially at first. Consumer and employee surveys, which typically run monthly or quarterly, became weekly and more targeted.[37] In some cases, stakeholder governance officers, who had established closer connections with government officials and academic experts, were promoted from mid-ranking roles into the firm's core management team.[38] Executives reported spending more time in meetings with industry peers, government officials, and community leaders than any time before in their careers.[39] At the board level, directors asked to review stakeholder input directly and on an ongoing basis, and kept pressuring executives until, in some cases, management had to intervene.[40]

These stakeholder outreach efforts were not hastily invented to suit the needs of the pandemic. Instead, they were rather the intensification and culmination of a deliberate strategy established over many years before the arrival of COVID-19. Our interviewees describe a stakeholder governance process that aspires to be comprehensive in mapping all potentially affected parties, standardized in choosing achievable performance targets, and increasingly similar across companies.[41] To help this process succeed, companies embedded it into their corporate governance structure, by hiring specialized executives and building up their teams, arranging for board oversight, and accepting monitoring by outside parties, such as investors. During COVID-19, these information collection

32. *See id.*
33. Online Interview with Stephen Johnson, Executive Vice President, Corporate Affairs (Dec. 29, 2020).
34. *See infra* Section IV.A.i.
35. *See infra* Part IV.
36. *See infra* Part VI.A.
37. *See infra* Part VI.B.ii.
38. *See id.*
39. Online Interview with Stephen Johnson, *supra* note 33; online interview with Seth Jaffe, *supra* note 15.
40. *See infra* Part VI.B.ii.
41. *See infra id.*

systems operated in both directions, providing management with input about stakeholders' concerns and gauging their reaction to company actions. Part VI analyzes the operational and institutional features of stakeholder governance.[42]

While our interviewees valued the contributions of stakeholder governance in navigating COVID-19, the discussions also brought up its limitations. Stakeholder interests, albeit emphatically amplified, did not always win the day in management decisions. Companies in our sample pointed to actions deeply unpopular with some stakeholders, such as mass layoffs and location shutdowns.[43] In our interviewees' opinion, management made these hard choices to preserve the company's survival in the long run. Sometimes, interviewees pointed to conflicts among stakeholder interests that forced management to assess priorities. For example, some companies knew that supporting supply chain workers might push them to reduce their workforce at home, and other companies reduced the budget or delayed the implementation of climate change initiatives to better support workers during COVID-19.[44] Essentially, these weaknesses underlie the function of stakeholder governance as an information system. Its goal is to present management and directors with additional options for stakeholder-oriented actions, but on balance, management retains wide latitude to weigh these considerations against others.

Our findings help clarify the debate on corporate purpose and shareholder primacy, which is currently raging in academic venues, practitioner circles, and policymaking bodies.[45] Proponents of stakeholder governance are quick to turn a page on the previous five decades, promising to replace unbridled market competition with a gentler capitalism.[46] In response, supporters of shareholder primacy often point out that firm choices invoking stakeholder interests actually help companies increase or maintain their profitability.[47] Hence, the argument goes, stakeholder governance does not really

42. *See infra* Part VI.

43. *See infra* Part V.

44. Online Interview with Seth Jaffe, *supra* note 15; Online Interview with Jaren Dunning, Senior Counsel, Global Human Rights, PepsiCo (July 17, 2020).

45. *See infra* Part II.A.

46. *See* Peter S. Goodman, *Big Business Pledged Gentler Capitalism. It's Not Happening in a Pandemic*, N.Y. TIMES (Apr. 13, 2020), https://www.nytimes.com/2020/04/13/business/business-roundtable-coronavirus.html [https://perma.cc/3ZXP-35FN] (arguing CEOs reneged on their Business Roundtable promises with COVID-19 furloughs); *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/JXK8-RLGD] (claiming progress for stakeholder governance in place of shareholder primacy); Marc Benioff, *Marc Benioff: We Need a New Capitalism*, N.Y. TIMES (Oct. 14, 2019), https://www.nytimes.com/2019/10/14/opinion/benioff-salesforce-capitalism.html [https://perma.cc/2ASJ3RKM] (advocating for capitalism driven by corporate social responsibility initiatives).

47. *See* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD, OXFORD UNIV. PRESS 133 (2018) (arguing that successful firms carefully balance three kinds of capital: financial, social, and natural); Greg Rosalsky, *Does It Pay for Companies To Do Good?*, NPR (Sep. 17, 2019, 6:31 AM), https://www.npr.org/sections/money/2019/09/17/761312221/does-it-pay-for-companies-to-do-good [https://perma.cc/ZB3S-5XLV] (suggesting that corporate social responsibility initiatives can drive up profitability); Richard Levick, *Corporate Social Responsibility for Profit*, FORBES (Jan. 11, 2012, 11:41 AM), https://www.forbes.com/sites/richardlevick/2012/01/11/corporate-social-responsibility-for-profit/?sh=1c0abe2746f1 [https://perma.cc/HX66-F2P7] (describing profitable corporate strategies for broadly-appealing social responsibility initiatives).

represent a big shift in how companies are behaving, and there is little need to revisit decades-old corporate doctrines enshrining shareholders as the sole beneficiaries of corporate activity.

This normative clash seems removed from the descriptive reality of how companies actually behave, as our Article is the first to explore in-depth how companies utilize stakeholder governance in practice. In fact, none of the two archetypal approaches above would easily accommodate every one of the examples our interviewees provided. Sure, ensuring workers' safety under COVID-19 is essential if a company hopes to keep producing, selling, and making profits. But when it comes down to allocating sanitization products between health care facilities and retailers, or to assisting authorities build up protective equipment reserves, connections to profitability require multiple steps and more creativity. Rather than fitting corporate choices into normative procrustean beds, the true function of stakeholder governance, as it emerges from our interviews, is to provide managers and directors with information that they would otherwise have difficulty obtaining. Stakeholder governance puts forward a path that may lead directly to profitability, meander towards it, or circumvent it; but that path is new, and management would not have been able to construct it without input from stakeholders.

Some are worried that allowing managers to prioritize stakeholder interests will further weaken the already scant constrains to their behavior.[48] For the last forty years, reformers have painstakingly established checks on management discretion by emphasizing accountability to shareholders, such as through say-on-pay votes.[49] In contrast, stakeholder governance presents managers and directors with additional choices, thus arguably expanding the wide latitude afforded to them by corporate law doctrines such as the business judgment rule.[50] However, this expansion of discretion is subject to institutional checks that its detractors tend to discount. As a framework for gathering information, stakeholder governance generates an extensive record of messages, concerns, and feedback that can serve as the basis for assessing management choices.[51] Moreover, the growing standardization and comparability across companies provide additional benchmarks. Finally, our interviewees mentioned additional monitoring devices, such as audits by outside professionals, institutional investor engagement, and

48. *See* Lucian Bebchuk & Roberto Tallarita, *Was the Business Roundtable Statement Mostly for Show? – (2) Evidence from Corporate Governance Guidelines*, HARV. L. SCH. F. CORP. GOV. (Aug. 18, 2020), https://corpgov.law.harvard.edu/2020/08/18/was-the-business-roundtable-statement-mostly-for-show-2-evidence-from-corporate-governance-guidelines/ [https://perma.cc/S5N6-F595] (contending that commitments to stakeholder interests should still be viewed with skepticism); Bebchuk & Tallarita, *supra* note 23 (arguing in support of external constraints on managers to protect stakeholders); Maria Hengeveld, *Big Business Has a New Scam: The 'Purpose Paradigm'*, NATION (Jan. 4, 2019), https://www.thenation.com/article/archive/big-business-has-a-new-scam-the-purpose-paradigm/ (asserting that corporate social responsibility initiatives may be "a self-serving corporate fantasy . . . " obscuring the realization of stakeholder interests.).

49. *See* 17 C.F.R. § 240.14a–21(a) (guarding the abuse of executive compensation discretion through say-on-pay); Joseph E. Bechelder III, *Say-on-Pay Under Dodd Frank*, HARV. L. SCH. F. CORP. GOV. (Sep. 17, 2011), https://corpgov.law.harvard.edu/2011/09/17/say-on-pay-under-dodd-frank/ [https://perma.cc/XEZ6-3Z2G] (evaluating the practical efficacy of say-on-pay); Press Release, Sec. and Exch. Comm'n, SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act, (Jan. 25, 2011), https://www.sec.gov/news/press/2011/2011-25.htm [https://perma.cc/87MM-V9Q6] (announcing new SEC rules for say-on-pay).

50. *Infra* text accompanying notes 77–79.

51. *Infra* Part VI.C.

disclosures to shareholders. Through these institutional features, stakeholder governance can grow into a framework through which companies can self-regulate.

The Article proceeds as follows. Part II discusses why boards' elevated position in the corporate law edifice relies on their ability to gather information and argues that stakeholder feedback helps improve information flow to the board. Part III discusses our interview participants and methodology. Part IV presents findings from our interviews. To demonstrate how stakeholder input affected company choices during the pandemic, we group examples into four categories: product development, supply chain management, employee needs, and government relations. Part V discusses conditions under which stakeholder arguments did not manage to persuade managers and directors, based on our interviews. Part VI discusses the systematic features of stakeholder governance as a framework for assessing corporate behavior. Part VII offers concluding thoughts, linking our findings to looming challenges for corporations, like climate change.

II. STAKEHOLDER CAPITALISM DOMINATES CORPORATE LAW DEBATES

A. The Polarizing Debate on Stakeholder Capitalism

Business leaders are embracing stakeholder capitalism as a broader view of corporations' normative mission that encompasses social values alongside profits, but many commentators, both in the popular press and in academia, are skeptical. An impressive array of top CEOs signed onto the now well-publicized Business Roundtable Statement, rejecting the notion that "corporations exist principally to serve shareholders"[52] rather, arguing that companies must deliver value to all stakeholders including customers, employees, and communities.[53] By continuously balancing these diverse interests, proponents of stakeholder governance claim companies will be better able to produce profitable solutions to the problems of people and the planet.[54] One might take such balancing as a direct threat to shareholders' expected returns, as they are now called upon to share corporate profits with a wider set of constituents. Such worries are unfounded, stakeholder loyalists insist. By inspiring stakeholders around a common purpose, companies can actually increase their profitability, "grow the pie," and benefit shareholders in the long-term.[55] Others concede that there is a tension between the

52. *See* BUS. ROUNDTABLE, *supra* note 46 (quoting industry leaders as they plan to make a positive impact by committing to this statement).

53. *Id.*

54. *See generally* Mayer, *supra* note 47 (introducing the statement by major businesspeople announcing their new focus lessening the importance of shareholders); *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697, (2019) (arguing for co-determination and worker representation on boards); Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future* (Univ. of Pa. Ins. For L. & Econ. Research Paper, Paper No. 19-39, Oct. 2019), http://www.law .harvard.edu/programs/olin_center/ [https://perma.cc/3GD8-ND6B] (arguing for a broader definition of stakeholder interest through expansion of ESG to create a more explicit inclusion for a corporation's employees).

55. *See generally* ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND

incentives of managers and advancing societal good by offering reforms "to induce corporations to prioritize stakeholder goals."[56]

These claims have triggered frustration among theorists and policymakers who have defended shareholders as the ultimate beneficiaries of corporate activity. Without profit maximization as the benchmark for assessing performance, critics warn, managers will be better able to conceal their failures and camouflage self-serving behavior by pointing to supposed benefits for, say, communities or the environment.[57] According to this view, management's sudden fascination with stakeholder governance is simply one more attempt to cement the board's authority to do as it pleases with corporate assets.[58] Accepting shareholders as the sole and ultimate beneficiaries of corporate action underpins much of the governance norms, practices, and reforms of the last few decades. From curbing exorbitant compensation through say-on-pay votes[59] to facilitating activist campaigns,[60] increasing accountability to shareholders has been the keystone for curbing director intransigence. But introducing the stakeholder perspective alongside shareholders' interests erodes decades of hard-won management accountability because "accountability to everyone is accountability to no one."[61]

PROFIT (2020) (arguing that profit is a side effect of pursuing social value creation and that stakeholder oriented companies increase their total value or "grow the pie" more than those focused solely on financial profits); R. EDWARD FREEMAN ET AL., THE POWER OF AND: RESPONSIBLE BUSINESS WITHOUT TRADE-OFFS (2020) (arguing that stakeholder interests are mutually reinforcing and critiquing the focus on stakeholder tradeoffs).

56. *See generally* Dorothy S. Lund, *Corporate Finance for Social Good*, COLUM. L. REV. (forthcoming 2021), https://ssrn.com/abstract=3511631 [https://perma.cc/PYG4-7LEC] (proposing "that individuals use 'corporate social responsibility bonds' to offset costs associated with prosocial corporate decision-making").

57. *See* Charlie Gasparino & Lydia Moynihan, *BlackRock's Larry Fink Rattles Employees Amid Political Posturing*, FOX BUS. (Jan. 25, 2019), https://www.foxbusiness.com/business-leaders/blackrocks-larry-fink-rattles-employees-amid-political-posturing [https://perma.cc/T4UG-76AN] (focusing on corporate movement toward implementation of diversity programs); David Hessekeil, *Has Larry Fink Gone Too Far With Corporate Purpose Or Not Far Enough?*, FORBES (Jan. 28, 2019, 7:45 PM), https://www.forbes.com /sites/davidhessekiel/2019/01/28/has-larry-fink-gone-too-far-with-corporate-purpose-or-not-far-enough/#74d02 4631ab9 [https://perma.cc/4HZ4-XNZ4]; Benioff, *supra* note 46; Nancy Scola, *Tech's Woke CEO Takes the Stage*, POLITICO (Nov. 20, 2019, 5:16 AM), https://www.politico.com/news/2 019/11/20/marc-benioff-salesforce-industry-washington-leaders-071803 [https://perma.cc/L9VD-GH2R]; John Wilcox & Morrow Sodali, *Corporate Purpose and Culture*, HARV. L. SCH. F. CORP. GOV. (Feb. 21, 2020), https://corpgov.law.harvard.edu/2020/02/21/corporate-purpose-and-culture/ [https://perma.cc/R9P4-MWD7]; Stephen Bainbridge, *What's Salesforce CEO Marc Benioff up to? Stakeholder Capitalism or Woke Washing?*, PROFESSORBAINBRIDGE.COM (Aug. 29, 2020), https://www.professorbainbridge.com/professorbainbridge.com/2 020/08/whats-salesforce-ceo-marc-benioff-up-to-stakeholder-capitalism-or-woke-washing.html [https://pe rma.cc/XZ9M-QU7N].

58. *See* Bebchuk & Tallarita, *supra* note 23 (concluding that "stakeholderism" is counterproductive and inadequate when "addressing stakeholder concerns"); Hengeveld, *supra* note *48*.

59. *See* 17 C.F.R. § 240.14a–21(a) (prescribing the manner in which executive compensation receives shareholder approval); Bechelder III, *supra* note 49 (providing information about the different viewpoints surrounding say-on-pay shareholder practices).

60. *See* Frank Partnoy et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1730 (2008) ("We find that hedge funds increasingly engage in a new form of shareholder activism and monitoring that differs fundamentally from previous activist efforts by other institutional investors").

61. *See* Edward B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 6 (N.Y.U. L. Sch. Pub. L. Working Paper, Paper No. 20-16, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951 [https://perma.cc/693A-6934] (explaining the importance of the Business Roundtable statement and why it "attracted so much attention"); Press Release, Council of Inst. Inv., Council of Institutional Investors Responds to Business

This heated divide in theoretical perspectives has sparked a race to explore companies' choices to find confirmation either for the pro-stakeholder or the pro-shareholder view. A common line of attack, sometimes seen in the press,[62] points to business decisions that harm stakeholders and prioritize shareholders. Just this past year, COVID era layoffs continued unabated even among companies that touted their stakeholder credentials;[63] the gender and racial gaps in the workplace continued to widen;[64] climate change initiatives are giving way to cost-cutting measures to help companies better weather the pandemic.[65] On the other end of the spectrum, companies that have seen their business improve during COVID-19 have continued to distribute dividends to shareholders, showing in practice where their true loyalties lie.[66] Taken

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Roundtable Statement on Corporate Purpose (Aug. 19, 2019), https://www.cii.org/aug19_brt_response [https://perma.cc/R8U9-E83Z]; *see also* Fisch & Solomon, *supra* note 24.

62. *See generally* Peter Goodman, *Stakeholder Capitalism Gets a Report Card. It's Not Good*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/business/business-roudtable-stakeholder-capitalism.html [https://perma.cc/KCW5-J3JD] (comparing corporation philanthropic actions, or lack thereof, in response to the pandemic); Gavin Hinks, *ESG 'Not a Factor' in Share Price Resilience During COVID-19 Crisis*, BOARD AGENDA (Aug. 20, 2020), https://boardagenda.com/2020/08/20/esg-not-a-factor-in-share-price-resilience-during-COVID-19-crisis/ [https://perma.cc/Z2FJ-TNGJ]; Amy Whyte, *Academics Attack ESG for Failure to Outperform During Crisis*, INSTITUTIONAL INV. (Aug. 20, 2020), https://www.institutionalinvestor.com/article/b1n0tqh3vbj123/Academics-Attack-ESG-for-Failure-to-Outperform-During-Crisis [https://perma.cc/J95G-YU7K]; Elizabeth Demers, *ESG Didn't Immunize Stocks Against the COVID-19 Market Crash*, HARV. L. SCH. F. ON CORP. GOV. (Sept. 8, 2020), https://corpgov.law.harvard.edu/2020/09/08/esg-didnt-immunize-stocks-against-the-COVID-19-market-crash/ [https://perma.cc/68T4-4T27]; Bill Nauman et al., *New Research Muddles Case for ESG Outperformance*, FIN. TIMES (Aug. 28, 2020), https://www.ft.com/content/57911840-599b-420f-be5a-956bb949929b [https://perma.cc/V8KA-34MB].

63. *See* Aaron Tilley, *Salesforce Notifies Some Staff of Job Cuts*, WALL ST. J. (Aug. 26, 2020, 1:39 PM), https://www.wsj.com/articles/salesforce-notifies-some-staff-of-job-cuts-11598462934 [https://perma.cc/M834-577R] (showing that even corporations who joined a "no layoff" pledge were forced to partake in layoffs due to the pandemic); Erin Griffith, *Airbnb Was Like a Family, Until the Layoffs Started*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/07/17/technology/airbnb-coronavirus-layoffs-.html [https://perma.cc/JC9Z-3BZF]; Asa Fitch, *Coronavirus Layoffs Remake Silicon Valley Job Market*, WALL ST. J. (May 20, 2020), https://www.wsj.com/articles/coronavirus-layoffs-remake-silicon-valley-job-market-11589968800 [https://perma.cc/9D8N-JES4].

64. *See* Diane Boesch & Katie Hamm, *Valuing Women's Caregiving During and After the Coronavirus Crisis*, CTR. FOR AM. PROGRESS (June 3, 2020), https://www.americanprogress.org/issues/women/reports/2020/06/03/485855/valuing-womens-caregiving-coronavirus-crisis/ [https://perma.cc/G24G-P5C7]; Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html [https://perma.cc/D2HM-LAT6]; Elaine He & Nicole Torres, Opinion, *Women Are Bearing the Brunt of the Covid-19 Economic Pain*, BLOOMBERG (May 8, 2020), https://www.bloomberg.com/graphics/2020-opinion-coronavirus-gender-economic-impact-job-numbers/ [https://perma.cc/2ZTS-GHRV].

65. Press Release, U.S. Env't Prot. Agency, EPA Announces Enforcement Discretion Policy for COVID-19 Pandemic, (Mar. 26, 2020), https://www.epa.gov/newsreleases/epa-announces-enforcement-discretion-policy-COVID-19-pandemic [https://perma.cc/R9A2-SDAD]; Oliver Milman & Emily Holden, *Trump Administration Allows Companies to Break Pollution Laws During Coronavirus Pandemic*, GUARDIAN (Mar. 27, 2020), https://www.theguardian.com/environment/2020/mar/27/trump-pollution-laws-epa-allows-companies-pollute-without-penalty-during-coronavirus [https://perma.cc/B9ZS-UR77].

66. Peter Whoriskey, *U.S. Companies Cut Thousands of Workers While Continuing to Reward Shareholders During Pandemic*, WASH. POST (May 5, 2020), https://www.washingtonpost.com/business/2020/05/05/dividends-layoffs-coronavirus/ [https://perma.cc/9SZ9-L4CT]; Lisa Springer, *21 Dividend Increases Announced During the COVID-19 Crisis*, KIPLINGER (July 3,

together, critics argue, these moves suggest that stakeholder governance is quite simply an empty promise devoid of any true regard for stakeholders.[67] These arguments misread stakeholder governance, its defenders retort. Stakeholder governance has never stood for prioritizing stakeholders at every turn, or for offering swift solutions to complex societal ills. The pro-stakeholder camp likes to point to ambitious initiatives, such as the move to include at least one woman as a board member across publicly traded U.S. companies. The effectiveness of such initiatives has become the focus of specialized research in law and other social sciences. But the corporate law debate on stakeholder governance remains locked in the vicious circle of assessing the outcome of companies' choices as pro-shareholder, pro-stakeholder, or both.

These company choices, however, come at the conclusion of a governance process that remains largely unexplored in the current debate. Before reaching decisions, managers and directors collect information about the contours of the issue before them, pinpoint pros and cons, formulate proposals and negotiate solutions. In this crucial stage of deliberation, we argue stakeholder input has the most transformative effect. By establishing outreach to stakeholders as a regular step in analyzing its choices, the company collects input from sources that would not necessarily have provided their perspectives otherwise. Based on this new information, companies can adjust their choices, formulate new solutions, adopt ancillary measures, and more generally devise strategies that they would not have otherwise considered.

In this sense, we view the shift to stakeholder governance as the most recent effort to ensure that the company's managers and directors have the data necessary to make decisions and the open-mindedness required in their role. As a governance choice, it falls in line with longstanding efforts to improve the information flow to the board and enhance its impartiality, as we argue below. We start by illustrating that information and impartiality are the anchors of the modern corporate governance edifice, looking back at key inflection points in corporate governance theory and practice. In Part II.B below, we show that information was essential to some of the most important corporate law reforms, including the introduction of independent directors and professional gatekeepers. We explore how stakeholder governance improves the flow of information to managers and directors in Part II.C.

B. Information and Independence: Foundations of Board's Role

Modern corporate governance demarcates a division of labor between managers and directors: while managers run the company, directors monitor and oversee their conduct.[68] The board has the power to hire and fire chief executives, call shareholder

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2020), https://www.kiplinger.com/investing/stocks/dividend-stocks/600994/21-dividend-increases-announced-during-the-covid-crisis [https://perma.cc/WQ6P-TGBY]; Alwyn Scott et al., *U.S. Companies Criticized for Cutting Jobs Rather than Investor Payouts*, REUTERS (Apr. 8, 2020), https://www.reuters.com/article/us-health-coronavirus-corporatelayoffs-a/u-s-companies-criticized-for-cutting-jobs-rather-than-investor-payouts-idUSKBN21Q24Z [https://perma.cc/8K3Y-RJX7].

67. *See, e.g.*, Bebchuk & Tallarita, *supra* note 23 (discussing the illusory promise of shareholder governance).

68. *See* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1468 (2007) ("Directors are supposed to "monitor" the managers in view of shareholder interests."); Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0:*

meetings, issue shares and dilute existing shareholders, accept or reject takeover bids, and formulate merger proposals.[69] These powers rest on two interconnected justifications: boards' informational advantage over shareholders and markets, and directors' independence towards management.[70] Delaware courts have relied upon the informational advantage that boards have in pivotal rulings like *Unocal*,[71] which authorized a board to reject a takeover bid because the court trusted the board to decide whether it was underpriced.[72] Demonstrating their confidence in boards' ability to access information, courts have allowed them to trigger poison pills, finance campaigns against

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An Introduction 351, 359 (Ctr. for L. & Econ. Studies, Working Paper No. 602, 2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3297&context=faculty_scholarship [https://perma.cc/YL24-N2BM]; Geoffrey Christopher Rapp, *A New Direction for Shareholder Environmental Activism: The Aftermath of Caremark*, 31 WM. & MARY ENV'T. L. & POL'Y REV. 163, 172 (2006) (discussing "the board's supervisory and monitoring role under Section 141 of the Delaware General Corporation Law"); Nicola Faith Sharpe, *Informational Autonomy in the Boardroom*, 2013 U. ILL. L. REV. 1089, 1093 (2013); Adam B. Badawi, *Lobbying, Pandering, and Information in the Firm*, 38 SEATTLE U. L. REV. 215, 216 (2015) (noting that an effective board requires independent directors to act as monitors of managers); Nicola Faith Sharpe, *Questioning Authority: The Critical Link Between Board Power and Process*, 38 J. CORP. L. 1, 5 (2012) ("[M]anagers, not boards, control corporate decision-making processes and the information considered in them."); Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1098 (2014) ("The final key function of modern boards is to serve as a monitor of management."); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1281 (1982) ("The primary function of independent directors under these proposals would be to "monitor" management as opposed to running the business on a daily basis.").

69. *See, e.g.*, Peter Rudegeair, *LendingClub CEO Fired Over Faulty Loans*, WALL ST. J. (May 9, 2016) (discussing the power of a board to fire executives), https://www.wsj.com/articles/lendingclub-ceo-resigns-over-sales-review-1462795070 [https://perma.cc/UM6P-VMSC]; *see* N.Y. BUS. CORP. L. § 701 ("[T]he business and affairs of a corporation shall be managed by the board of directors."). *See also*, MODEL BUS. CORP. ACT. § 35; Del. Corp. Law § 141(a); 111. BUS. CORP. ACT § 33; Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 Bus. Law. 101, 101–02 (1979) ("[T]he usual rule that directors may accept or reject a takeover bid if they act on a reasonable basis and in good faith should continue."); Fischel, *supra* note 68, at 1281.

70. *See* Bernard S. Sharfman, *Activist Hedge Funds in a World of Board Independence: Creators or Destroyers of Long-Term Value?*, 2015 COLUM. BUS. L. REV. 813, 836 (2015) ("Shareholders . . . are at an informational disadvantage relative to directors."); Ahmed Elbadry et al., *Governance Quality and Information Asymmetry*, 24 J. FIN. MKTS., INST. & INSTRUMENT 127, 129 (2015) (discussing research supporting the notion that "board independence" and "greater board activity" undercut agency problems stemming from information asymmetries between shareholders, the market, and management). *See, e.g.*, NASDAQ, INC., NASDAQ STOCK MARKET RULES § 5605(b)(1) (2015) ("A majority of the board of directors must be comprised of [i]ndependent [d]irectors . . . "); N.Y. STOCK EXCHANGE, INC., N.Y. STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.01 (2015) ("Listed companies must have a majority of independent directors."); Lynn S. Paine & Suraj Srinivasan, *A Guide to the Big Ideas and Debates in Corporate Governance*, HARV. BUS. REV. (Oct. 14, 2019), https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance [https://perma.cc/8PJ7-2QCW] (noting that boards have become more independent over the past few decades by increasing the percentage of directors that have "neither commercial nor family ties with the company or its management").

71. *See* Bernard S. Sharfman, *The Tension Between Hedge Fund Activism and Corporate Law*, 12 J.L. ECON. & POL'Y 251, 264–65 ("[T]he Board has superior decision-making capabilities, based primarily on superior information . . . The parties recognize that a centralized, hierarchical authority is necessary for the successful management of a public company that can become extremely large in size"); Hutchison, *supra* note 69, at 1113–14, 1201 (discussing directors as corporate hierarchs well positioned to receive information necessary to hold management accountable); Bainbridge & Henderson, *supra* note 68, at 1098–99.

72. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985).

shareholder activists, and ward off shareholder bids.[73] On the other hand, attempts to block information flow to the board, such as a director's failure to disclose conflicts of interest or to relay information about external bids, typically gives rise to harsh sanctions.[74]

Even when placing constraints on the board's power, Delaware courts focus on whether the board obtained and considered information in its decision-making.[75] Since the mid-1980s, Delaware courts have been clarifying what officers and directors must do to keep management in check, while federal legislation has expanded the board's tasks.[76] In *Smith v. Van Gorkom*,[77] the Court proclaimed that, to enjoy the deference enshrined in the business judgment rule, the board must demonstrate that it has a mechanism for obtaining and considering information.[78] Since then, gathering information has become the hallmark of sound board governance.[79] For example, ahead of a merger or takeover bid, boards must hire advisors, obtain fairness opinions, and negotiate openly with prospective buyers.[80] Boards might find themselves in trouble if they fail to explore alternative takeover bids by negotiating "fiduciary-out" clauses.[81] When negotiating compensation packages, boards ought to be informed about and disclose industry practices.[82] As they monitor the company's legal compliance, boards have to demonstrate

73. *See, e.g.*, Paramount Comm. Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989) (ruling that Time's actions to fight a hostile takeover did not violate Delaware law).

74. *See* State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co., 64 Wash.2d 375, 383–84 (1964). *See also* City of Fort Meyers Gen. Emp. Pension Fund v. Haley, 235 A.3d 702 (Del. 2020) (finding CEO's failure to disclose compensation proposal to board of directors material); Berkman v. Rust Craft Greeting Cards Inc., 454 F.Supp. 787, 791 (S.D.N.Y. 1978) (granting preliminary injunction where director failed to disclose a known conflict of interest to other board members); Wal-Mart Stores, Inc. v. Coughlin, 369 Ark. 365, 373 (2007) (holding that an executive that failed to disclose material information to his corporation prior to entering into a self-dealing contract with the corporation violated his fiduciary duties); Johnston v. Pedersen, 28 A.3d 1079 (Del. Ch. 2011) (removing defendant directors that breached a duty of loyalty by failing to disclose material information from office and replacing with new directors); William Penn P'ship v. Saliba, 13 A.3d 749, 757–58 (Del. 2011) (in the context of the sale of an LLC, the court held against conflicted managers whose "manipulation of the sales process denied the [other LLC members] the benefit of knowing the price a fair bidding process might have brought").

75. Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2156–58 (2019).

76. *Id.*

77. Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985).

78. *Id.*

79. *See In re* Caremark Int'l, 698 A.2d 959, 970–71 (Del. Ch. 1996); Marchand v. Barnhill, 212 A.3d 805, 820–22 (Del. 2019); Teamsters Loc. 443 Health Serv. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 WL 5028065 at *10–13 (Del. Ch. Aug. 24, 2020).

80. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1390 (Del. 1995) ("[T]he burden on the plaintiffs will be to demonstrate . . . 'that the directors' decisions were *primarily* based on . . . being uninformed.'") (emphasis in original) (citing *Unocal*, 493 A.2d at 958); Lipton, *supra* note 69, at 120–22.

81. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 945 (Del. 2003) (Veasey, C.J., dissenting) (describing the practical import of a 'fiduciary out' as "a contractual provision, articulated in a manner to be negotiated, that would permit the board of the corporation being acquired to exit without breaching the merger agreement in the event of a superior offer"); Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 GEO. MASON L. REV. 157, 157 (2013) ("[A] fiduciary out is a provision in an acquisition agreement which allows the target company's board of directors not to comply with some, or all, of . . . the agreement if it is necessary for them to avoid a breach of fiduciary duties.").

82. *See In re* Tyson Foods, Inc., 919 A.2d 563, 592, n.75 (2007) (noting that executive compensation

active oversight, which requires them to be informed about compliance risks and investigate "red flags."[83] Laws now mandate that companies develop compliance systems that monitor employees' legal violations and conduct extensive investigations when required.[84]

To be effective monitors, boards must be impartial and independent.[85] By emphasizing the need for independence, corporate practitioners and Delaware courts alike recognized that, to exercise effective oversight, boards must show openness to outside considerations.[86] But even though independent directors are better placed to evaluate information, they also have disadvantages in accessing it.[87] Due to their lack of connections to the company, independent directors depend heavily on management for key information.[88] As a result, the hard-won benefits of impartiality risk being eclipsed by management's informational monopoly, which corporate law scholars have identified as a critical design flaw in modern corporate governance structures.[89] Many worry that managers are maneuvering to get their way by providing the board with too little, too much, or poorly organized information.[90] Expending management effort in contorting the information provided to the board is, in itself, a type of agency cost for shareholders.[91]

decisions "made honestly and disclosed in good faith, would be within the rational exercise of business judgment"); 17 CFR § 229.402 (requiring disclosure to and approval by shareholders of executive compensation for certain issuers).

83. Gadinis & Miazad, *supra* note 74, at 2150; Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2024 (2019).

84. *See generally* John Armour et al., *Taking Compliance Seriously*, 37 YALE J. REG. 1, 2, 15–17 (2020); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 937–40 (2017); Hui Chen & Eugene Soltes, *Why Compliance Programs Fail: And How to Fix Them*, 96 HARV. BUS. REV. 117 (2018), https://hbr.org/2018/03/why-compliance-programs-fail [https://perma.cc/2QVZ-K6NH].

85. Gordon, *supra* note 68; Gilson & Gordon, *supra* note 68, at 355–56.

86. *See generally* Martin Lipton, *Some Thoughts for Boards of Directors in 2021*, HARV. L. SCH. F. CORP. GOV. (2020), https://corpgov.law.harvard.edu/2020/12/08/some-thoughts-for-boards-of-directors-in-2021/ (discussing the increasing importance of ESG and the need for corporate boards to "integrate these considerations into strategic and operational decision-making"); David A. Katz & Laura McIntosh, *Director Oversight in the Context of COVID-19*, HARV. L. SCH. F. CORP. GOV. (2020); *View From the Top: How Corporate Boards Engage on Sustainability Performance*, CERES (Oct. 28, 2015), https://www.ceres.org/resources/reports/view-top-how-corporate-boards-engage-sustainability-performance [https://perma.cc/T7HP-VXR3].

87. Yaron Nili, *The Fallacy of Director Independence*, 2020 WIS. L. REV. 491, 506–07 (2020); *See* Robert J. Thomas et al., How Boards Can Be Better—a Manifesto, 50 MIT SLOAN MGMT. REV. 69, 72 (2009) (noting that in one survey of corporate boards, "more than 2/3 independent directors lack access to independent information channels"); *see also* Paul L. Davies & Klaus J. Hopt, *Corporate Boards in Europe-Accountability and Convergence*, 61 AM. J. COMP. L. 301, 322 (2013) (arguing that independent directors are not necessarily better placed to prevent scandals as they are generally nominated by and therefore have personal relationships with C-suite members of the corporation); *see also* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 161 (2010) ("Informational asymmetries inherent in the role of independent directors further limit such directors' ability to be effective monitors").

88. Kelli A. Alces, *Beyond the Board of Directors*, 46 WAKE FOREST L. REV. 783, 783 (2011); Davies & Hopt, *supra* note 86, at 301; Badawi, *supra* note 68, at 253.

89. Nili, *supra* note 86, at 506–07; Davies & Hopt, *supra* note 86, at 312; Usha Rodrigues, *A Conflict Primacy Model of the Public Board*, 2013 U. ILL. L. REV. 1051, 1061–62 (2013); J. Robert Brown, Jr., *The Demythification of the Board of Directors*, 52 AM. BUS. L.J. 131, 174–75 (2015).

90. Nicola Faith Sharpe, *Process over Structure: An Organizational Behavior Approach to Improving Corporate Boards*, 85 S. CAL. L. REV. 261, 309 (2012).

91. Badawi, *supra* note 68, at 251–52.

Another concern is that directors will be unable to cross check their information with other sources, including other officers outside top management.[92] Overall, then, directors might systematically obtain information that is far too rosy or one-sided to allow for a thorough check on management.

To counter this informational asymmetry, policymakers have put in place safeguards. Companies are required to develop internal control departments whose job is to ensure that the company accurately collects information to create its financial statements. Audit committees, responsible for internal controls, have direct access to company personnel.[93] Nominating and Compensation Committees, or committees set up to oversee investigations of significant corporate wrongdoing, have their own separate advisors.[94] Thus, the turn to gatekeepers and other third-party consultants, which motivated reforms such as the 2002 Sarbanes-Oxley Act, represent a response to the informational asymmetries plaguing corporate boards.[95] However, many doubt whether outside professionals can remedy directors' informational disadvantage.[96] To start, these gatekeepers rely on corporate executives for their information, resulting in bias.[97] Moreover, by requiring or rewarding the participation of independent directors in important board committees or functions, reformers have also increased the burden on their resources and the demand for more information, often leaving them ill-equipped to address the problem.[98] Thus, while gatekeepers can help provide certain information to directors, they suffer from biases, as they depend heavily on executives.[99]

As this section illustrates, improving managers' and directors' ability to access information and consider it independently has been the animating factor behind successive waves of corporate law reforms. As a result, modern corporations have

92. Brown, *supra* note 88.

93. Jody K. Upham, *Audit Committees: The Policemen of Corporate Responsibility*, TEX. J. BUS. L., Winter 2004, at 537, 554.

94. Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 262–63 (2020); Adam B. Badawi, *Influence Costs and the Scope of Board Authority*, 39 J. CORP. L. 675 (2014); Badawi, *supra* note 68.

95. Gadinis & Miazad, *supra* note 74, at 2153.

96. *See* Rodrigues, *supra* note 88, at 1059 (arguing that increasing board independence has actually weakened boards by populating them with outsiders who have little information about the corporation); *see also* Brown, *supra* note 88, at 174–75 (arguing that independent directors lack personal relationship to the corporation, meaning they are particularly dependent on gaining information from corporate management).

97. Fairfax, *supra* note 86, at 162.

98. Nili, *supra* note 86, at 506–07.

99. Gadinis & Miazad, *supra* note 74, at 2155–56; John C. Coffee Jr., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 146 (2006); Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 968 (2005) ("[T]o the extent general counsel participates at an early stage in shaping major transactions and corporate policy, counsel's ability to bring detached, professional judgment to bear in assessing their legality may be compromised, especially when the question of legality is tinged in shades of gray as opposed to black and white."); *see also* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1037 (2005) ("Inside counsel are subject to situational pressures . . .that induce them to acquiesce in managerial fraud."); *see also* William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 89 (2003) (noting doubts about an inside lawyer's ability to objectively preside over the merits of an intracorporate dispute); *see also* Langevoort, *supra* note 83, at 957–58 ("[L]awyer self-interest and client self-interest are more likely to converge in cognition and corporate culture, so that in-house lawyers, especially, are not particularly reliable enthusiasts for the socially optimal compliance point.").

invested in extensive internal controls and compliance departments, designed to scrutinize the quality of the information provided to directors and officers. In addition to reporting systems ensconced in legal mandates, management teams have developed their own information-gathering strategies. From daily sales trends to lab results, from advertising impact to labor productivity, management receives constant updates on the company's affairs, often turbocharged by technology.[100]

What conventional corporate governance systems tend to overlook, however, is information about the social impact of company choices. While companies' actions are designed to implement management's vision, they also impact a broad array of stakeholders. Because corporate law gives stakeholders no formal power to influence corporate behavior,[101] their perspective is easy to sideline. However, companies are increasingly realizing that stakeholders' input can help them avoid pitfalls and discover new opportunities. Stakeholder governance represents a systematic attempt to gather this input for the benefit of management decision-making and board monitoring. Below, we explore why stakeholders can contribute information that other corporate informational systems may fail to capture.

C. The Informational Value of Stakeholder Governance

Stakeholders are firsthand witnesses of corporate activity on the ground and are therefore, well placed to provide management with a direct account of developments. They can experience implications of corporate choices that management may not have intended or predicted and thus may not have considered gathering. Moreover, information from stakeholders can be quite granular, such as honing in on the needs of individual employees, which can help management design policies better suited to its workforce. When a crisis is emerging, stakeholders on the ground are the first ones to grapple with its consequences. Because of this, they are in a position to alert managers about ensuing problems. They can also monitor company practices, note strengths and weaknesses, and suggest improvements. To take advantage of stakeholders' intimate understanding of company choices, companies employ communication tools that typically appeal to stakeholders directly and eliminate intermediaries, such as surveys and town hall meetings.

While companies also establish their own reporting lines connecting employees on the ground to management, these reports are filtered through the corporate hierarchy, whose perspective might influence their accounts. Corporate hierarchies are focused on achieving the objectives set out in management plans and are thus prone to discounting or disregarding pieces of information that do not fit with their preferred narrative of success. Instead, stakeholder governance harnesses the inputs and skills of a diverse set of actors, including some outside the corporate apparatus, such as academics, governments, and

100. *See* Omer Tene & Jules Polonetsky, *Privacy in the Age of Big Data*, 64 STAN. L. REV. ONLINE, 63, 63 (2012) ("Data create enormous value for the global economy, driving innovation, productivity, efficiency, and growth."); *see, e.g.*, Kenneth Cukier, *Data, Data Everywhere*, ECONOMIST (Feb. 27, 2010), http://www.economist.com/node/15557443 [https://perma.cc/MX6Y-T93H]; Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV. (2012).

101. *See* Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499, 572 (2020).

communities. They can provide the company with unique insights and offer to collaborate with the companies in designing and implementing solutions that the company alone may not have imagined. The breadth and variety of these information sources are particularly helpful for directors' monitoring role, as it introduces alternative viewpoints that can help loosen the grip that management is thought to have over the board's informational horizon.

The plurality of perspectives that stakeholders introduce to boardroom discussions can help the company better adjust its strategies to the looming large-scale challenges of our era. From climate change to workplace equity, from humane working conditions to inclusivity, and from data privacy to artificial intelligence, corporations are operating in a vastly changing business and societal context. While it is becoming clear that addressing these challenges will require corporate involvement, the shape and scope of this involvement is still widely debated. Companies are much more likely to strike the right note if they develop their practices after receiving input from stakeholders, who are likely to be more attuned to societal agonies.

Overall, stakeholder governance helps bring to managers and directors a broader set of viewpoints that concern the wider social implications of company decisions that corporate actors might not have otherwise grasped. Companies can use this information to adjust their practices and better respond to evolving developments. Whether corporate responses are deemed, with the benefit of hindsight, as pro-shareholder or pro-stakeholder, does not help reveal the influence of stakeholder governance in managers' minds. To better sketch this influence, we conducted a series of interviews with corporate decision-makers, to which we turn next.

III. PARTICIPANTS AND METHODOLOGY

A. Why Study Companies During COVID-19? Our Hypotheses

In this research, we set out to explore whether stakeholder governance was helpful to companies during the pandemic and in what way. We hypothesize that stakeholder governance provides managers and directors with valuable information about the company's business that they may have difficulty obtaining otherwise.[102] Since information exchanges require communication between two parties, this hypothesis requires both that companies have information needs for which they reach out to stakeholders, and that stakeholders have this information and are willing to share it with companies. The onslaught of the global pandemic in February and March 2020 provides us with a setting well suited for studying the informational content of stakeholder communications.[103] Because of the swiftly imposed lockdowns in many locations in the U.S. and around the world, and the ensuing recommendations for working from home,

102. Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1411 (2020).

103. World Health Organization (@WHO), TWITTER (Mar. 11, 2020, 10:16 AM), https://twitter.com/WHO/status/1237777021742338049?s=20 [https://perma.cc/X598-RU8C]; Jason Abbruzzese, *WHO Says Coronavirus Outbreak Can Be Called a Pandemic*, NBC NEWS (Mar. 12, 2020, 2:59 AM), https://www.nbcnews.com/health/health-news/live-blog/coronavirus-updates-live-u-s-cases-top-1-000-spread-n1155241/ncrd1155646#blogHeader [https://perma.cc/83HW-LT6L] (stating that the COVID-19 outbreak was a pandemic).

social distancing, and avoiding travel, COVID-19 created an entirely new business environment for many industries.[104] This abrupt transition created heightened information needs for companies, which had to redesign their production operations and adjust their sales and business models to new realities.[105] At the same time, key company stakeholders, such as employees and governments, found themselves under severe strain and sought support and assistance from companies.[106] Thus, if companies do see stakeholder governance as a tool for sourcing information, they would be highly likely to utilize that tool under the unique circumstances of the pandemic.

Alternatively, if stakeholder governance does not offer to companies any useful tools against the pandemic, we should expect companies to either report no change in how they use stakeholder governance or to report reduced reliance on stakeholders during that time. COVID-19 put companies under significant pressure. In some sectors, companies saw dramatic drops in demand, which put their immediate survival at risk.[107] Even in sectors that performed well under COVID-19, there were significant adjustment costs required to transition into a new production model under COVID-19. According to this hypothesis, companies forced to economize are likely to redeploy resources from stakeholder governance, which they see as peripheral. At the outset of the lockdowns,

104. *See Coronavirus: Greatest Test Since World War Two, Says UN Chief*, BBC NEWS (Apr. 1, 2020), https://www.bbc.com/news/world-52114829 [https://perma.cc/8JLD-6Q84]; *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020 [https://perma.cc/EZZ2-G3HL] (discussing the measures taken in response to the outbreak of the COVID-19 virus in different countries around the world).

105. *See* Kevin Sneader & Shubham Singhal, *From Thinking About the Next Normal to Making It Work: What to Stop, Start, and Accelerate*, MCKINSEY & CO. (May 15, 2020), https://www.mckinsey.com/featured-insights/leadership/from-thinking-about-the-next-normal-to-making-it-work-what-to-stop-start-and-accelerate [https://perma.cc/D8A8-LQBL]; Nikolaus Lang et al., *Seven Lessons From the Corporate Frontlines*, BOS. CONSULTING GRP. (June 5, 2020), https://www.bcg.com/en-us/publications/2020/seven-lessons-from-the-corporate-frontlines [https://perma.cc/T3SP-957U] (discussing how business practices changed during the COVID-19 pandemic).

106. *See generally Employees: How to Cope With Job Stress and Build Resilience During the COVID-19 Pandemic*, CTRS. FOR DISEASE CONTROL& PREVENTION (Dec. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/mental-health-non-healthcare.html [https://perma.cc/ASS8-3TKS]; Alan Kohll, *How One Company is Taking Care of Employees During COVID-19*, FORBES (Apr. 6, 2020), https://www.forbes.com/sites/alankohll/2020/04/06/how-one-company-is-taking-care-of-employees-during-covid-19/?sh=6018d183488d [https://perma.cc/2PHY-JJ68]; Jonathan Emmett et al., *COVID-19 and the Employee Experience: How Leaders Can Seize the Moment*, MCKINSEY & CO. (June 29, 2020), https://www.mckinsey.com/business-functions/organization/our-insights/covid-19-and-the-employee-experience-how-leaders-can-seize-the-moment [https://perma.cc/TTM6-TL9P]; Samuel Stebbins & Evan Comen, *US Companies Dominate List of Those Landing Largest COVID-19 Contracts With the Government*, USA TODAY (June 16, 2020), https://www.usatoday.com/story/money/2020/06/16/30-companies-with-the-largest-covid-19-government-contracts/111955066/ [https://perma.cc/PQF6-X4A2] (discussing how companies treated their employees during the pandemic).

107. *See, e.g.*, Grant Suneson, *Neiman Marcus, StubHub Are Among the American Brands That Might Not Survive Coronavirus*, USA TODAY (May 12, 2020), https://www.usatoday.com/story/money/2020/05/12/american-brands-that-might-not-survive-thecoronavirus/111680774/ [https://perma.cc/VYM6-S2HP]; Emily Pandise, *One year into pandemic, Main Street Bankruptcies Continue*, NBC NEWS (May 15, 2020), https://www.nbcnews.com/business/consumer/which-major-retail-companies-have-filed-bankruptcy-coronavirus-pandemic-hit-n1207866 [https://perma.cc/6VMD-55CK] (giving examples of some of the major brands that faced financial distress during the COVID-19 pandemic).

many in the press predicted that the arrival of COVID-19 would signal the end of stakeholder governance, which they saw as a luxury item.[108]

The wide scope and unpredictability of the pandemic allow us to explore these hypotheses further. The consequences of COVID-19 left no company untouched—providing us with the rare opportunity to examine how the same crisis reverberated across many companies at the same time. With this enhanced comparability, we can more readily identify similarities and differences in firm responses and point to emerging patterns. Moreover, COVID-19's sudden and unexpected arrival allows us to explore how companies and stakeholders react to an entirely new situation, the parameters of which were not part of prior planning. Before COVID-19, the possibility of a pandemic was considered so remote that even companies with comprehensive risk plans had not included it in their preparations.[109] Thus, there is little reason to worry that stakeholder governance was successful in fighting the pandemic because it was designed to do so. In contrast, if stakeholder governance can help companies even during this unanticipated crisis, it will emerge as a significant tool for risk mitigation.

B. Participants and Methodology

Our study focused on large, publicly-traded corporations because these companies find themselves at the heart of the corporate purpose debate. Due to their size and complexity, these companies have a broad array of stakeholders.[110] They typically have a large and varied workforce ranging from highly skilled to unskilled labor, with different needs and resources.[111] Because these companies often have operations in multiple locations, they interact with many local authorities and national governments. Often, they impact not only the consumers of their products, but also the wider communities in which they operate. Many of these companies have explicitly embraced stakeholder governance through one or more public declarations such as becoming a signatory to the 2019 Business Roundtable Statement—credited with heralding commitment to stakeholders.[112]

108. *See* Edgecliffe-Johnson, *supra* note.

109. Online Interview with Amy Weaver, *supra* note 1; online interview with Stephen Johnson, *supra* note 33.

110. *See generally* Stanford Lewis, *Stakeholder Capitalism and the Pandemic Recovery*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (2020) (describing different types of stakeholders); *The COVID-19 Corporate Response Tracker: How America's Largest Employers Are Treating Stakeholders Amid the Coronavirus Crisis*, JUST CAP. https://justcapital.com/reports/the-covid-19-corporate-response-tracker-how-americas-largest-employers-are-tre ating-stakeholders-amid-the-coronavirus-crisis/ [https://perma.cc/PNN3-WWX7] (providing a data tracker of full Russell 1000 universe of employers)*; see, e.g.*, Pauline Meyer, *Google Stakeholders & Corporate Social Responsibility*, PANMORE INST. (Jan. 28, 2017), http://panmore.com/google-stakeholders-corporate-social-responsibility-csr-analysis [https://perma.cc/C39T-C2CE] (Google stakeholders are diverse because of the company's wide array of products); Mike Hower, *Stakeholder Engagement Secrets From Apple, Levi's and Wrigley*, GREENBIZ (Feb. 18, 2016), https://www.greenbiz.com/article/stakeholder-engagement-secrets-apple-levis-and-wrigley [https://perma.cc/4CF9-5DPP].

111. *See, e.g.*, MCKINSEY GLOB. INST., THE WORLD AT WORK: JOBS, PAY AND SKILLS FOR 3.5 BILLION PEOPLE 7 (2012) (discussing changes in labor force composition, including the increasing demand for highly skilled workers and decline in demand for low-skill labor in US businesses); Lawrence Mishel, *Uber and the Labor Market*, ECON. POL'Y INST. (May 15, 2018), https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy/ [https://perma.cc/7MB4-VXYF] (discussing hourly wages and average compensation for Uber's more than 800,000 drivers).

112. *See* BUS. ROUNDTABLE, *Statement on the Purpose of a Corporation*, *supra* note 17.

Yet, these companies also have dispersed shareholders[113] who may be unable to band together to adequately monitor management. Thus, concerns that managers might coopt stakeholder governance to promote their personal agenda are more pronounced in these companies.

Our sample includes companies from industries that performed well during the pandemic and companies in some of the hardest-hit sectors. Among those that saw mostly positive returns during COVID-19 are companies in the technology and telecommunications sector,[114] as well as companies that produce household items and packaged food.[115] On the other hand, companies in the transport,[116] entertainment, and hospitality industries,[117] and in the clothing industry,[118] mainly saw downward trends in sales under COVID-19. Finally, in some companies, such as those in finance, the impact of COVID-19 was less pronounced.[119]

This study targeted companies with an established stakeholder governance function, rather than companies that were trying to develop one in response to the pandemic, so that the institutional arrangements in all companies in our sample are at similar levels. Our interviewees are top executives—CEOs, Chairpersons, or members of the executive team whose responsibilities include stakeholder governance, typically the general counsel or chief sustainability officer. This allows us to explore how an established stakeholder relationship fares during the pandemic, even though it may introduce some bias into our responses because our interviewees are personally involved in managing stakeholder

113. *See, e.g.*, Christopher Small, *Ownership Structure, Voting, and Risk*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (2015) (discussing the implications of divergent shareholder interests).

114. Daisuke Wakabayashi et. al., *Big Tech Could Emerge From Coronavirus Crisis Stronger Than Ever*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/technology/coronavirus-facebook-amazon-youtube.html [https://perma.cc/GD2N-4589].

115. Bea Y Chiem et. al., *Packaged Food, Household Products Manage Coronavirus Pressure; Not So Pretty For Cosmetics*, S&P GLOB. (May 4, 2020), https://www.spglobal.com/ratings/en/research/articles/200504-packaged-food-household-products-manage-coronavirus-pressure-not-so-pretty-for-cosmetics-11472562; *Clorox Lifts Forecast After Best Sales Jump in Over 20 Years*, CNBC (Nov. 2, 2020), https://www.cnbc.com/2020/11/02/pandemic-cleaning-boom-spurs-clorox-to-lift-full-year-forecast.html [https://perma.cc/BW6S-6WCX].

116. Suneson, *supra* note 26; Egloff, *supra* note 26.

117. Leandra Bernstein, *Hardest Hit by COVID-19: Hospitality Industry Saw 40% of All Excess Unemployment*, WJLA (Aug. 13, 2020), https://wjla.com/news/nation-world/hardest-hit-by-covid-19-hospitality-industry-saw-40-of-all-excess-unemployment [https://perma.cc/M9SJ-Q3VW]; Brent Lang & Gene Maddaus, *Hollywood's Great Depression: Meet the Entertainment Workers Left Jobless by the Coronavirus Pandemic*, VARIETY (Apr. 29, 2020), https://variety.com/2020/biz/features/hollywood-coronavirus-entertainment-industry-unemployment-jobs-1234592106/ [https://perma.cc/H5DW-R2HE].

118. Caroline Warrick-Schkolnik, *Global Garment Industry Suffers from Coronavirus Pandemic*, BORGEN MAG. (Dec. 11, 2020), https://www.borgenmagazine.com/global-garment-industry/ [https://perma.cc/472D-RPWQ]; Steven McIntosh, *Coronavirus: Why the Fashion Industry Faces and 'Existential Crisis'*, BBC NEWS (Apr. 30, 2020), https://www.bbc.com/news/entertainment-arts-52394504 [https://perma.cc/PJG3-TW58].

119. *See* Scott Baret et. al., *COVID-19 Potential Implications for the Banking and Capital Markets Sector*, DELOITTE: DELOITTE INSIGHTS (Mar. 16, 2020), https://www2.deloitte.com/us/en/insights/economy/covid-19/banking-and-capital-markets-impact-covid-19.html [https://perma.cc/RDP5-SWQ3] (financial market and banking and capital market firms adopted method to retain resilience); Jaime Catmull, *Banks and Financial Companies Lend Support During COVID-19*, FORBES (May 1, 2020), https://www.forbes.com/sites/jaimecatmull/2020/05/01/banks-and-financial-companies-lend-support-during-covid-19/?sh=1b02412173eb [https://perma.cc/N76D-8SWT] (reporting on how financial institutions provided assistance to their customers and communities as the pandemic raged and the American economy froze).

relationships. The interviews were conducted remotely, based on a questionnaire communicated beforehand.

IV. INTERVIEWS: HOW STAKEHOLDER FEEDBACK HELPED COMPANIES DURING COVID-19

COVID-19's arrival took companies by surprise. As our interviewees repeatedly stated, they were not aware of any corporate risk management system that had envisioned a global pandemic. To rise to the challenge, companies went into overdrive: they needed to safeguard their workforce, reimagine their production operations, and reassess their clients' needs. Because they were forced to improvise, management turned again and again to stakeholders for guidance and feedback. From employees to consumers, from governments to NGOs, and from academics to industry partners, our interviewees report intensifying communications with their stakeholders during this period and describe how the subsequent exchange of perspectives shaped their company's response. Our findings are presented in four distinct sections: consumer and product development, employee needs, supply chain vulnerabilities, and community and government relations. For each section, we begin with an overview of key themes emphasized by multiple interviewees so as to highlight common trends and responses. We then present some examples from specific companies that showcase how input from stakeholders affected company choices.

A. Consumers and Product Development: Fighting Financial Distress and Health Anxiety

Navigating shifts in consumer habits brought about by COVID-19 was one of the main challenges for companies in our sample, and stakeholder communication was essential for transmitting a clear message to consumers. There is great variation in consumer needs depending on the industry, and we include specific examples from the telecommunications, household goods, and financial services sectors. But a common concern for companies in many different sectors was how to make consumers feel safe to interact with the company again,[120] particularly when having to enter a physical store or board a vehicle. At the beginning of the pandemic, where scientific evidence about the virus' transmissibility was scarce and hard to access, consumers mostly kept away, indeed, some companies reported a 90% drop in revenue compared to the equivalent timeframes in previous years.[121] While companies constantly surveyed consumers

120. *See* Elisabeth Rosenthal, *To Retain Customers, Businesses Need to Make Them Feel as Safe as Possible*, FORTUNE (Oct. 2, 2020, 7:00 AM), https://fortune.com/2020/10/02/covid-safety-business-shopping-airlines/ [https://perma.cc/H5NY-LMMU] (noting that as a consumer the author prioritizes interacting with companies that focus on safety); *see also* Kristina Rogers & Andrew Cosgrove, *Future Consumer Index: How to Serve the 'Anxious Consumer' After COVID-19*, EY (May 28, 2020), https://www.ey.com/en_gl/consumer-products-retail/how-to-serve-the-anxious-consumer-after-covid-19 [https://perma.cc/E44R-GKW2] (discussing the need for companies to invest in consumer safety); Stephen Rogers & Leon Pieters, *Small Positive Signs in the Consumers' Dual-Front Crisis*, DELOITTE INSIGHTS (June 4, 2020), https://www2.deloitte.com/us/en/insights/industry/retail-distribution/consumer-behavior-trends-state-of-the-consumer-tracker/covid-19recovery.html [https://perma.cc/7H2B-FFKB] (explaining consumers will not come back until they think it is safe to do so).

121. *See* Mackenzie Cullen, *American Airlines Revenue Drops 90 Percent*, TRAVEL PULSE (Apr. 15, 2020, 4:17 PM), https://www.travelpulse.com/news/airlines/american-airlines-revenue-drops-90-percent.html

throughout this period, it appeared that consumers themselves were confused and government authorities were slow in providing guidance.

To fill this gap, stakeholder governance officials recruited scientific experts and sought collaborations with industry peers. In some industries, companies were able to band together through professional associations, hire academics, and develop practices that they mutually agreed to enforce. By presenting a united front, these companies were able to project greater certainty about safety conditions in their outlets. In contrast, when companies in the same industry failed to come together, as in the airline industry, customer confusion persisted. This confusion often brought companies to a difficult position because it led to heated incidents with consumers, as shown in the many viral videos of airline passengers failing to wear masks.[122]

1. Dealing with Consumers in Financial Distress: Millicom

Even though many people turned to digital communication in massive numbers during the pandemic, others found themselves cut off from it. Unable to pay their monthly bills because of job losses, business shutdowns, and related financial distress, these consumers faced the prospect of losing their internet access too.[123] Millicom, a Nasdaq-listed telecommunications provider that operates largely in Latin America, was faced with a hard choice: if they disconnected customers who failed to pay subsequently, they would be cutting them off from the digital world just as life was transitioning online; but if they continued to provide their services for free, then no one would pay. Many of their competitors chose to proceed with widespread disconnections,[124] but Mauricio Ramos, Millicom's CEO, was determined to explore other solutions first.

The company started its outreach to stakeholders by consulting with consumers to

[https://perma.cc/N8BZ-ZDBE] (noting American Airlines suffered 90% reduction in revenue); *see also* Leslie Joseph, *US Airlines Are Losing Money for the First Time in Years as Coronavirus Ends Travel Boom*, CNBC: EARNINGS RUNDOWN (Apr. 23, 2020, 10:53 AM), https://www.cnbc.com/2020/04/23/coronavirus-us-airlines-set-to-report-their-first-losses-in-years-as-trave l-demand-falls.html [https://perma.cc/2LNR-D48V] (quoting the Delta CEO as saying the airline is experiencing a 90% reduction in revenue).

122. *See, e.g.*, Suzanne Rowan Kelleher, *'Bye Karen!' Viral Video Shows Airline Passengers Jeering as Anti-Masker is Kicked off a Flight*, FORBES (Dec. 5, 2020, 5:40 PM), https://www.forbes.com/site%20s/suzannero wankelleher/2020/12/05/bye-karen-viral-video-shows-airline-passengers-jeering-as-anti-masker-is-kicked-off-a-flight/?sh=435613231eba [https://perma.cc/K4FF-JMQ5] (noting the increase of mask disputes on planes).

123. *See* Nathan Bomey, *How Utility, Phone and Internet Companies are Giving Consumers a Break During Coronavirus Pandemic*, USA TODAY (Mar. 16, 2020, 2:40 PM), https://www.usatoday.com/story/money/2020/03/16/utility-cable-internet-phone-coronavirus-covid19/506008 4002/ [https://perma.cc/5RAS-NX73] (discussing companies that waived fees or provided free services to consumers financially struggling due to COVID-19); *see also* Johnny Diaz, *Internet Providers Won't Cut Off Users Over Unpaid Bills for 60 Days*, N.Y. TIMES (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/busi ness/internet-providers-coronavirus.html [https://perma.cc/J99Z-8CHA] (noting dozens of telecommunications companies have committed to not disconnecting service to residential and small business customers).

124. *See* Claire Atkinson, *Americans are Losing Service Despite FCC Pledge Not To Disconnect*, NBC NEWS (Apr. 15, 2020, 5:49 PM), https://www.nbcnews.com/business/consumer/americans-are-losing-service-despite-fcc-pledge-not-disconnect-n1182991 [https://perma.cc/9KUU-LVE3] (discussing Verizon, AT&T, and T-Mobile customers who had their services disconnected). *But cf*., Diaz, *supra* note 122 ("AT&T, Comcast and dozens of other telecommunications firms have committed to not disconnecting service to residential and small business customers who can't pay their bills because of the coronavirus outbreak . . .").

better understand their needs and financial horizons during COVID. Consumers' key concern was that, without internet access, job searches and social connections would be much more difficult, and virtual interviews would be practically impossible. At the same time, governments were concerned about the implications of widespread disconnections,[125] believing that people would be less willing to stay inside their homes and more likely to stir social unrest exacerbating the health crisis. Ramos started extensive consultations with nine national governments, with some officials calling for the company to provide free blanket access to all. With such divergent views, finding a compromise would require creativity and imagination.

Millicom designed a new service, with more limited but adequate connectivity for emails and video calls, and offered it for free to preexisting customers.[126] Once customers opted into the new service. They could maintain it for as long as necessary, and the company was willing to write off their past due invoices. About one-fifth of their customers ended up taking this option for at least some time—illustrating the extent of the financial pressure households were experiencing.[127] To finance this new service, the company paused shareholder dividends and buybacks.[128] Once it announced the plan, the company faced an uproar in the market,[129] and its share price suffered a decline. But despite investors' reservations, the board felt that this option would help the company preserve its relationship with customers, who would otherwise negatively associate the company with debt collection claims, reducing the probability that former customers once again retain Millicom's services after they get back on their feet.

2. Supplying Healthcare Facilities and Losing Consumer Market Share: Clorox

For Benno Dorer, the CEO of Clorox, the arrival of COVID-19 signaled a period of hard work beyond anything he had imagined. As early as January 2020, demand for the

125. *See Keep Americans Connected*, FED. COMMC'N COMM'N (Mar. 13, 2020), https://www.fcc.gov/keep-americans-connected [https://perma.cc/6DTD-3XSC] (noting the FCC Chairman asked broadband and telephone service providers to sign a pledge not to disrupt services); *see also* Press Release, Free Press, House Passes the HEROES Act, Providing Billions in Emergency Funds for Expanded Broadband Connectivity, (May 16, 2020), https://www.freepress.net/news/press-releases/house-passes-heroes-act-providing-billions-emergency-funds-expanded-broadband [https://perma.cc/38ZT-PPDM] (noting the Act would enable people to stay connected during the COVID-19 pandemic).

126. *See* Mauricio Ramos, *CEO Letter*, MILLICOM, https://www.millicom.com/media-center/features/ceo-letter-eng/ [https://perma.cc/GP7L-4QLX] ("We are providing a new minimum lifeline broadband product to those of our customers who are facing financial difficulties."). *See also* Jenny Casswell, *Pandemic Response in Action: Millicom in Latin America and Tanzania*, GSM ASS'N (Aug. 11, 2020), https://www.millicom.com/media-center/features/pandemic-response-in-action-millicom-in-latin-america-and-tanzania/ [https://perma.cc9855-XY42] (discussing how Millicom has made telecommunication technology capabilities available to communities wherever possible).

127. Online Interview with Mauricio Ramos, CEO, Millicom (Dec. 4, 2020).

128. *See* MILLICOM, EARNINGS RELEASE, Q1 2020 (2020), https://www.millicom.com/media/4034/millicom-earnings-release-q1-2020.pdf [https://perma.cc/UM5Q-VUXB] (showing impacts of COVID-19 on earnings in Q1 of 2020); Anne Morris, *Millicom Signals Cost Cutting Ahead Due to COVID-19 Impact*, LIGHT READING (May 1, 2020), https://www.lightreading.com/services/millicom-signals-cost-cutting-ahead-due-to-covid-19-impact/d/d-id/759344 [https://perma.cc/DS8H-FGDS] (reporting cost cutting measures due to COVID-19).

129. Online Interview with Mauricio Ramos, *supra* note 126.

company's disinfecting products began rising. By April, it had grown by 500%.[130] Dorer sought to increase capacity by prioritizing disinfectant wipes in production through operating plants around the clock and outsourcing some production to third parties―a move the company had been reluctant to make before.[131] These efforts were able to increase production by about 40%,[132] far less than required to satisfy demand. Clorox would have to let down some of their customers, but how would the company come to choose which ones? Clorox had a prized relationship with large retailers like Target, Walmart, and CVS, whose shelves laid empty as consumers were purchasing Clorox's disinfectant products in large quantities.[133] Clorox depended on these relationships not only for the ongoing distribution of their wipes but also for their other household products. It was clear―if Clorox was not able to supply them with enough wipes, these retailers would introduce alternate providers. For decades, Clorox had fought hard to fend off competitors like Johnson & Johnson, and now the company was about to hand them a prime opportunity voluntarily.[134] However, if Clorox prioritized large retailers, it would have to abandon its professional clients, mostly healthcare providers like hospitals and nursing homes.[135] These were precisely the institutions that needed the most support during a global pandemic, with their resources under immense strain and their personnel exposed to the highest possible transmission risk. After reaching out to these customers, Clorox realized that their sanitization needs had skyrocketed, because these facilities were either treating COVID-19 patients or could be more easily exposed to people with COVID-19, particularly in the early days of the pandemic when testing was not widely available. Clorox decided not only to continue providing disinfectant products to this population most in need, but also to increase their supply.[136] Dorer knew that it would not be an easy decision to explain to other stakeholders. Employees, already strained by social distancing and safety measures, had to work overtime to meet this demand. Importantly, however, these employees derived a deeper meaning from their work viewing it as one element of an essential mission to protect others from the pandemic.[137] In spite of this, consumers became very frustrated, and Clorox management started a publicity campaign trying to explain their choices hoping to maintain brand loyalty when their wipes reappeared on the shelves.[138] Dorer also had to explain this choice to investors who were concerned about the shortage but were ultimately supportive of the

130. Sozzi, *supra* note 27.

131. Li, *supra* note 7; Sozzi, *supra* note 27.

132. Li, *supra* note 7.

133. *See* Sozzi, *supra* note 27 ("[W]e're shipping to our stores every single day. But what we're shipping is pretty much scooped up right away. So it's gone after a few minutes.").

134. *See, e.g.*, Mark Hamstra, *Retailers Adapt To Meet Demand for Household Supplies*, SUPERMARKET NEWS (May 19, 2020), https://www.supermarketnews.com/center-store/retailers-adapt-meet-demand-household-supplies [https://perma.cc/YQ52-CGUU] (explaining retailers' responses to panic buying).

135. *See* Li, *supra* note 7 (quoting Clorox CEO Benno Dorer explaining that prioritizing deliveries to health care workers "can lead to, at times, difficult discussions with our retail customers. But is it the right thing to do, to take care of caregivers in hospitals and positively impact their lives first? It absolutely is.").

136. *See* Alexander & Stelloh, *supra* note 7 (noting that Clorox introduced a new 55-gallon barrel of disinfectant liquid, enough for 14,000 hospital beds).

137. *See id.*

138. *See* Julia Musto, *Clorox Says Product Shortages to Stretch Through Mid-2021*, YAHOO FIN. (Dec. 11, 2020), https://finance.yahoo.com/news/clorox-says-product-shortages-stretch-162038298.html [https://perma.cc/U9RN-AMSS] (detailing duration and extent of product shortages).

company.[139]

3. Reorienting Credit Card Services Toward Financial Inclusion: Mastercard

With the advent of peer-to-peer payment networks and other digital linkages, credit card companies like Mastercard were looking for ways to expand their customer base. As Rick Haythornthwaite, Mastercard's Global Chairman, told the board, "we cannot simply be a company that helps people buy Gucci bags." For years, Mastercard had sought strategies to expand its customer base among people who had not used credit cards before, but its efforts were failing to get much traction. Parallel to these business efforts, Mastercard was operating corporate social responsibility initiatives, often in countries with underdeveloped financial systems, to facilitate access to credit for low-income groups and boost financial inclusion.[140] Through these initiatives, Mastercard was able to better understand the needs and obstacles these groups faced and to establish connections with local collaborators.[141] Executives realized that with this information they could design new products better suited to the needs of users with no prior access to the financial system. Moreover, the company leveraged connections with operators on the ground to boost its outreach efforts.[142] As a result, the company has been hugely successful in gaining customers from these groups.[143] Today, financial inclusion has become central to Mastercard's business orientation.[144] It sponsors more initiatives in multiple countries, develops new products, and generally invests in an ongoing relationship with stakeholders.

B. Employee Needs: Renegotiating the Socially Distanced Workplace

Employee and worker well-being are arguably the most hard-hit areas of corporate activity in this pandemic. These areas, however, are where stakeholder governance's

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139. *See* Li, *supra* note 7 (noting that Clorox has entered into partnerships with United Airlines and Uber and has room for further growth); Teresa Rivas, *Clorox Stock Has Been a Pandemic Winner. Why Those Gains Could Be Permanent.*, BARRON'S (Dec. 14, 2020), https://www.barrons.com/articles/clorox-stock-has-been-a-pa ndemic-winner-why-those-gains-could-be-permanent-51607975968 [https://perma.cc/NWC2-ZRZM] (detailing Clorox's market performance during the pandemic and the company's response to that success).

140. *See* Mastercard, *Doing Well by Doing Good: Mastercard Releases 2018 Sustainability Report* (Aug. 16, 2019), SUSTAINABLE BRANDS, https://sustainablebrands.com/read/corporate-member-update/doing-well-by-doing-good-mastercard-releases-2018-sustainability-report [https://perma.cc/JK3B-BDSZ]; *Mastercard Foundation Announces Fifth Annual Symposium on Financial Inclusion*, BUS. WIRE (Oct. 24, 2017), https://www.businesswire.com/news/home/20171024005069/en/Mastercard-Foundation-Announces-Fifth-Annual-Symposium-on-Financial-Inclusion [https://perma.cc/83WQ-VJRY]; Mastercard, *Doing Well by Doing Good*, CORP. SUSTAINABILITY, https://www.mastercard.com/news/perspectives/2020/doing-well-by-doinggood/ [https://perma.cc/4NSA-JMNM] (reporting on various corporate responsibility initiatives).

141. *Id.*

142. *See, e.g.*, Press Release, Mastercard, Mastercard Commits to Connect 1 Billion People to the Digital Economy by 2025 (Apr. 28, 2020), https://www.mastercardcenter.org/press-releases/mastercard-commits-to-connect-1billion-by-2025 [https://perma.cc/XA8H-5W8V] ("Mastercard has worked with non-profit microfinance organization Grameen America to support its technology transformation and to transition low-income women entrepreneurs to digital banking.").

143. *See* MASTERCARD, DOING WELL BY DOING GOOD: CORPORATE SUSTAINABILITY REPORT 2019, (2020), https://www.mastercard.us/content/dam/mccom/global/aboutus/Sustainability/mastercard-sustainability-report-2019.pdf [https://perma.cc/UDJ4-ZFH2] (providing details on inclusive customer growth).

144. *Id.*

input proved transformative because it offered the most advanced platform for renegotiating the socially distanced workplace. For issues ranging from work expectations to safe reopening, sick leave to job insecurity, and mental health to technology training, management and employees used the stakeholder governance platform to collect information, express concerns, seek guidance, and formulate mutually acceptable solutions. Interviewees credited stakeholder governance with pointing to needs they would not have otherwise perceived and solutions they would never have imagined. This information proved so valuable that it ultimately transformed top executives' perceptions of stakeholder governance from an auxiliary means of inspiring employees to a necessary tool for navigating an unexpected crisis.

During COVID-19, companies significantly increased the frequency of communications with employees, who responded by increasing their participation rates. Weekly surveys became commonplace, and some executives preferred live online meetings. Marc Benioff, Salesforce's CEO, regularly held multi-hour gatherings with over 50,000 employees. Executives utilized these communications to provide updates about the company's condition, warn employees about upcoming challenges, and instill confidence in their ability to manage the pandemic. Interviewees emphasized how important it was for the workforce to see the executives talking from their homes, in casual attire, outside the trappings of workplace formality that sometimes inhibit true engagement. The meetings conveyed a sense of shared misfortune but also of continuity and unity of purpose.

The emergence of stakeholder governance as the key platform for renegotiating workplace relationships during COVID-19 is mostly due to the role it had played in working out solutions during previous upheavals, such as the #MeToo movement. Through stakeholder governance, employees had previously been able to obtain reforms on issues such as paid family leave and sick leave and facilitate remote working, which proved highly important during COVID-19. Moreover, stakeholder governance had raised the salience of issues such as workplace stress and anxiety, mental health, and sleep, previously seen as too personal or potentially stigmatizing for a professional environment. While the emphasis on these issues has fueled criticisms for "wokeness" from conservatives or "tokenism" from progressives, the resulting initiatives proved particularly helpful during the pandemic.

1. Reopening the Office after COVID-19 and Employees' Choices: Salesforce and Levi's

As COVID-19 restrictions were easing, Salesforce had started to plan how to reopen some locations, so that some teams could start working together more effectively. Management expected that those most eager to return to the office would be the sales team or others that collaborate closely with their colleagues, like the engineering team. When the company surveyed employees about their willingness to return to the office, however, responses took management by surprise. The people that wanted to go back to the office were those young people living in isolation or parents with young kids at home.[145] On the other hand, some employees were uncomfortable returning to the office

145. *See* Press Release, Salesforce, Deepening Support for Employees With Expanded Benefits (Aug. 27, 2020), https://www.salesforce.com/news/stories/deepening-support-for-employees-with-expanded-benefits/

before the COVID-19 threat had considerably eased. Importantly, these employees did not belong to a specific team or line of work, which was a challenge for the company's reopening plans. Thus, management changed course. So, rather than inviting entire teams back at a time, the company made office space available to people that wished to return and connect from there with the rest of their teams, who continued to work from home.[146] The company realized that employees' mental health would be more decisive for performance, compared to management's abstract determination of which teams work better in physical proximity. Since employees themselves were generally better positioned to assess their own mental health needs, the company decided to consider their input.

Some companies came to realize that employees might have such strong preferences regarding reopening that it made little sense to impose centrally mandated solutions. Levi's' employee surveys about willingness to return to the office yielded quite disparate results as some employees were concerned about the risk of infection and others eager to leave their challenging shelter-in-place surroundings. While there were some general trends, Levi's employee preferences defied easy classification based, say, on age, marital status, parenting, or income levels. This disparity meant that Levi's needed to gather information from its employees before mapping out a detailed reopening plan.[147]

C. Supply Chain Vulnerabilities: Supporting Collaborators Faced with Financial Ruin and Illness

The pandemic put the global supply chain production model under serious strain. Faced with border closures, uncontrolled outbreaks in different locations, delays in sourcing raw materials or reopening manufacturing plants, many companies came to rethink their supply chain strategy. As the pieces in the global supply chessboard are getting rearranged, top brands in hard-hit industries scaled back their orders, driving their suppliers into a tailspin. Companies in our sample took the opposite approach, seeking ways to assist their supply chain collaborators. Interviewees explained how stakeholder governance nudged them in this direction. This Section includes specific examples from companies that sought to offer financial support to overseas manufacturing plants as well as individual workers throughout their supply chain.

But, as they found themselves helping constituencies during the pandemic, companies in our sample came to realize firsthand how connected these stakeholders were with each other and with broader goals. Before COVID-19, companies often treated each stakeholder separately in their outreach efforts, considering employees' working conditions as entirely different from other management-level concerns such as climate change. Watching while the COVID-19 pandemic—a shock historian Adam Tooze called

[https://perma.cc/L2RY-RTNR] ("We understand that moving our offices to our homes is not always easy or comfortable—especially for those with families at home or for those who are feeling isolated . . . ").

146. Interview with Amy Weaver, *supra* note 1*; see also* Dawn Kawamoto, *Salesforce Delays Employees' Return to Office to Summer 2021*, S.F. BUS. TIMES (Aug. 19, 2020, 5:25 PM), https://www.bizjournals.com/sanfrancisco/news/2020/08/19/salesforce-delays-its-employees-return-to-the-offi.html [https://perma.cc/9PHU-X7BG] (discussing Salesforce's extension of remote work).

147. Interview with Seth Jaffe *supra* note 15, *See also* Press Release, Levi Strauss & Co., Navigating the Latest COVID-19 Wave (Dec. 14, 2020), https://www.levistrauss.com/2020/12/14/navigating-second-covid-19-wave/ [https://perma.cc/ZQJ9-J2CR] (describing the need for communication with employees).

"the first economic crisis of the Anthropocene"—devastated workers and their communities underscored the profound links between working conditions and efforts to curtail climate change.[148] To promote environmentally sustainable farming, companies also need to address issues like minimum wage and working conditions for agricultural workers. As a result, some interviewees launched a broader reassessment of their stakeholder initiatives.

1. *Helping Supply Chain Vendors Overcome Financial Difficulties: Levi's*

With public commitments to ethical conduct and sustainability dating back to the 1990s, Levi's had worked for decades with its supply chain vendors to reduce its environmental impact and improve conditions for workers.[149] COVID-19 threatened to quash all progress painstakingly achieved through these efforts. One clothing company after another was canceling orders,[150] leaving supply chain vendors with the prospect of going out of business. Levi's could have economized by stopping production and then looking for new suppliers once sales picked up again, betting that they could address challenges to business continuity. But it seemed inconsistent to spend years caring for worker welfare, focusing on their employees' "financial, physical health, and sense of well-being," only to abandon them in the first sign of difficulty.

As Seth Jaffe, Levi's executive vice president and general counsel put it, "it's being a bad partner." Besides, the company would also have to start from scratch in realigning new suppliers with its ethical commitments.

Instead, they chose to support supply chain vendors with whom they had longstanding relationships. "[A]s the values of the company include the notion of well-being and doing the right thing, we wanted to ensure that those relationships kept on," Jaffe says. At a moment when competitors were conserving financial resources and withholding payments to landlords and subcontractors,[151] Levi's prioritized payments to

148. *See* Adam Tooze, *'We Are Living Through the First Economic Crisis of the Anthropocene'*, GUARDIAN (May 7, 2020), https://www.theguardian.com/books/2020/may/07/we-are-living-through-the-first-economic-crisis-of-the-anthropocene [https://perma.cc/6N5Z-H6RR] (situating the COVID-19 pandemic inside the Anthropocene: the age of human-made climate).

149. *See generally* LEVI STRAUSS & CO., SUSTAINABILITY REVIEW (2019), https://www.levistrauss.com/wp-content/uploads/2020/07/LSCo.-2019-Sustainability-Review.pdf [https://perma.cc/D6H5-HFSB]; *see* Leslie Kaufman, *Stone-Washed Blue Jeans (Minus the Washed)*, N.Y. TIMES (Nov. 1, 2011), https://www.nytimes.com/2011/11/02/science/earth/levi-strauss-tries-to-minimize-water-use.html?pagewanted=all [https://perma.cc/7H6E-PV2X] (discussing Levi's reduction in water usage); Simon Mainwaring, *Sustainability Storytelling: How Levi's Inspires Engagement to Scale Impact*, FORBES (Oct. 3, 2015, 8:57 PM), https://www.forbes.com/sites/simonmainwaring/2015/10/03/sustainability-storytelling-how-levis-inspires-engagement-to-scale-impact/?sh=457fc8856221 [https://perma.cc/T6YG-HKYW] (explaining Levi's marketing engagement with water conservation and recycling programs); Ellie Pithers, *The Levi's Sustainability Team is Using Lockdown to Reflect on Consumption*, VOGUE U.K. (June 9, 2020), https://www.vogue.co.uk/fashion/article/levi-sustainability-wellthread-collection [https://perma.cc/6RHA-8TJB] (describing Levi's approach to mindful shopping).

150. Emont, *supra* note 14; Roberts-Islam, *supra* note 14; *Factbox*, *supra* note 14; Kelly, *supra* note 14.

151. Phil Bloomer, *'Millions of garment workers face destitution as fashion brands cancel orders'*, REUTERS (Apr. 24, 2020), https://www.reutersevents.com/sustainability/millions-garment-workers-face-destitution-fashion-brands-cancel-orders [https://perma.cc/MW4H-DPWW] (discussing how brands pass on the financial burden of COVID-19 to those at the bottom of their supply chains by not paying wages due to order cancellations).

supply chain vendors and even provided them with financial support by issuing credit. Moreover, they helped vendors find financing internationally. Management believes that supporting vendors at a difficult time will also make them more likely to want to work with Levi's in the future, further cementing the company's supply chain.

2. Supporting Vulnerable Supply Chain Workers: PepsiCo

For PepsiCo, one of the concerns was how to best support the individual workers showing up every day to continue production throughout their supply chain. In February 2020, right before COVID-19 hit, PepsiCo's Human Rights Office had almost completed a comprehensive report laying out the company's progress, identifying high-risk groups and vulnerable populations, and proposing a future human rights-focused development strategy.[152] Jaren Dunning, PepsiCo's Human Rights Director, was eager to see the report approved by the board and released to the public to boost transparency and improve stakeholder engagement. But when the pandemic toppled all other priorities, Dunning had to back-pedal. As the company's focus pivoted towards ensuring the safety of all employees, especially those on the frontline, management sought to identify those operations most at risk. It was handy, then, that the human rights report had provided a detailed picture of work conditions on the ground, encompassing concerns such as working hours, wages, leave, and family needs. At the height of the pandemic, this information helped the company make COVID-19-focused business decisions such as which facilities could allow employees to work from home, or if the facility had to remain open, under what conditions they could safely operate considering issues such as quarantine procedures, how to accommodate those at high risk, and how to deal with family demands.

Similarly, when the company looked for high-risk populations, they came to the realization that they largely overlapped with facilities at risk for committing human rights violations. The company quickly moved to utilize the information already collected by the Human Rights Office in the fight against the pandemic. "There were already structures in place," Dunning says, and "the structure . . . benefitted us."[153] Moreover, top management and directors had already become familiar with vulnerable populations and worker safety and readily agreed to work alongside similar priorities with regards to COVID-19.

D. Governments and Communities: Companies Help Governments Address Urgent Needs and Shortfalls

Companies often view governments with some trepidation due to their policymaking and enforcement powers. But during the pandemic, the urgency for cooperation and the need to establish appropriate practices and policies pushed governments to work closely with companies. Imposing lockdowns and the subsequent gradual reopening was the most common area where governments sought support from companies, as interviewees from many different industries reported. Companies joined forces with local authorities to help bring about the lockdowns, put in place safety protocols, and provide equipment and

152. PEPSICO, *supra* note 16.
153. Interview with Jaren Dunning *supra* note 44.

training. Local authorities realized that enforcing the lockdowns would be a herculean task, far outstretching their monitoring capacity. Thus, cooperation from companies would be essential, as the example of Airbnb below illustrates. In turn, companies were able to provide input in designing and maintaining appropriate safety frameworks.

Many companies made unique contributions to the pandemic effort, relying on expertise and capabilities into which governments often tapped. The governor of Rhode Island, who had collaborated briefly with Salesforce in some community efforts, sought its help in developing a COVID-19 tracing app. Within weeks, this app was in use in 35 states. Millicom had previously collaborated with governments on a training program for computer literacy in remote elementary schools in an effort to educate school children on screen time. Faced with the prospect of transitioning public education online, governments realized that they needed equipment, improved internet connectivity, and an online educational platform. Having to move as quickly as possible, governments asked Millicom to adjust its program to pandemic homeschooling, dramatically expanding their public schools' capacity for online offerings. MGM Resorts offered its transportation expertise and facilities to deploy large quantities of sensitive PCR testing kits that require refrigeration. In New York, which experienced one of the largest outbreaks, hospitality companies were offering food and drink to essential workers and the homeless and unemployed. Other companies helped source N95 masks and PPE equipment from abroad to boost local supplies. Overall, these contributions show that companies responded enthusiastically to governments' requests to recruit them in the common effort against the COVID-19 challenge, deploying resources that officials might have had trouble reaching themselves.

1. Helping Tourist Communities Limit Travel: Airbnb

With COVID-19's sudden and swift arrival in March 2020, the hospitality industry was hit the hardest. Many travelers had made reservations under strict cancellation policies, which required them to pay at least part of the overall fee.[154] Yet, travelers felt that they should not bear the financial burden of these cancellations since these were due to circumstances entirely out of their control, namely that traveling had become significantly riskier, if not outright prohibitive.[155] This problem was particularly acute for

154. *See* Curtis Tate, *Need to Cancel or Change Travel Plans? What to Know about COVID-19 Policies for Airline, Hotels, More*, USA TODAY (Nov. 24, 2020, 3:27 PM), https://www.usatoday.com/story/travel/2020/11/24/covid-19-travel-info-hotel-flight-cancellation-policies/6398350002/ [https://perma.cc/P2ZT-XTTB] (discussing the policies of various industries when cancelling for COVID-19 related reasons); Forbes, *Master List Of Hotel Coronavirus Change And Cancellation Policies*, FORBES TRAVEL GUIDE (Mar. 13, 2020, 7:22 AM), https://www.forbes.com/sites/forbestravelguide/2020/03/13/master-list-of-hotel-coronavirus-changeandcancellation-policies/?sh=4d1ef23f4ab1[https://perma.cc/ZNC6-KXLH]; Betsy Bloomenthal & Erin Florio, *How Hotel and Airbnb Cancellation Policies Are Changing Amid Coronavirus*, CONDÉ NAST TRAVELER (Apr. 17, 2020), https://www.cntraveler.com/story/coronavirus-hotel-cancellation-policy [https://perma.cc/92QD-VVH7]; Hannah Freedman & Emily Hochberg, *A Running List of All the Hotel Change and Cancellation Policies due to the Coronavirus Pandemic, Including Hilton, Marriott, and Airbnb*, BUS. INSIDER (July 28, 2020, 4:31 PM), https://www.businessinsider.com/coronavirus-hotel-airbnb-cancellation-change-policies#loews-hotels-12 [https://perma.cc/3A96-SQVA].

155. *Id.*; *see also* Catherine Hamm, *That COVID-19 Airline Refund You're Entitled to Might Require You to ... Un-complain*, L.A. TIMES (Nov. 12, 2020, 7:00 AM), https://www.latimes.com/travel/story/2020-11-12/covid-airline-refund-air-canada-complaint [https://perma.cc/557J-DAEZ] (explaining some travel refunds

Airbnb, whose locations often operate under stricter cancellation policies than traditional competitors such as hotels. But if Airbnb asked its hosts to absorb the costs of these cancellations, it risked dwindling the supply of appropriate locations once pandemic restrictions eased. Some Airbnb hosts depend on rental income to meet their financial obligations, particularly those that have developed multiple rentals as vacation destinations. With new reservations vanishing in the face of the pandemic, Airbnb hosts were opposed to losing income from those few that they had already locked in.[156] After communicating extensively with both categories of stakeholders, Airbnb's management realized that it was left with an unpleasant choice between displeasing customers and putting financial pressure on hosts.

According to Rob Chesnut, Airbnb's outgoing Chief Ethics Officer and former General Counsel, it was the company's concern for local communities and local governments that ultimately weighed in favor of easing cancellations. Through its stakeholder engagement links, Airbnb got in touch with local authorities that were concerned about a potential inflow of visitors from large urban centers that were among the epicenters of the virus at the time.[157] Officials were rolling out restrictions and prohibitions, but these often contain gaps allowing some travel to continue and are notoriously hard to police. Moreover, the authorities were recommending that people should curtail travel even when no formal prohibition was in place.[158] Thus, the authorities were hoping that Airbnb would make it easier for people to cancel and stay home. Airbnb has long sought to present itself to local governments as a partner rather than an unruly outsider.[159] Ultimately, Airbnb decided to ease cancellation restrictions

offered by airlines required the passenger to withdraw their complaint).

156. David Oliver, *'Tip of the Iceberg': Airbnb, Vrbo Guests Fighting for Refunds after Coronavirus Cancellations*, USA TODAY (June 25, 2020, 4:27 PM), https://www.usatoday.com/story/travel/hotels/2020/06/25/airbnb-covid-19-refund-struggles-anger-guests-after-cancellations/3248831001/ [https://perma.cc/26KD-FNH4]; Salvador Rodriguez, *Airbnb Promised Cash Refunds for Coronavirus Cancellations, but Some Guests Say It's Not That Simple*, CNBC (Apr. 7, 2020), https://www.cnbc.com/2020/04/07/airbnb-guests-complain-its-hard-to-get-coronavirus-refunds.html [https://perma.cc/EM66-DEDQ]; Natalie Compton, *You Asked: How Do I Get an Airbnb Refund for Canceled Plans?*, WASH. POST (Dec. 17, 2020, 3:05 PM), https://www.washingtonpost.com/travel/tips/airbnb-refund-policy-covid/ [https://perma.cc/8NTC-FXZN]; JD Shadel, *Airbnb Can Survive the Pandemic. But Can Airbnb Hosts?*, WASH. POST (July 16, 2020), https://www.washingtonpost.com/travel/2020/07/16/airbnb-can-survive-pandemic-can-airbnb-hosts/?tid=a_inl_manual [https://perma.cc/FDX3-8Q4S].

157. Michelle Gao, *Rural Airbnb Bookings Are Surging as Vacationers Look to Escape the Coronavirus*, CNBC (Aug. 6, 2020), https://www.cnbc.com/2020/08/06/rural-airbnb-bookings-are-surging-as-vacationers-look-to-escape-the-coronavirus.html [https://perma.cc/PN93-ZSU6]; Olivia Carville, *Airbnb Sees a Surge in Demand*, L.A. TIMES (June 7, 2020, 3:29 PM), https://www.latimes.com/business/story/2020-06-07/airbnb-coronavirus-demand; Tyler Sonnemaker & Ruobing Su, *Rural Airbnbs Are the Stars of the Suddenly Struggling Vacation-Rental Platform, as Americans Flee Cities to Escape the Coronavirus*, BUS. INSIDER (Mar. 27, 2020), https://www.businessinsider.com/rural-airbnbs-thriving-as-americans-flee-cities-to-escape-coronavirus-2020-3 [https://perma.cc/Q7JY-AGCW] (discussing the increase in Airbnb bookings in rural areas).

158. CDC Guidelines, *Domestic Travel During Covid-19*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html [https://perma.cc/H9L5-JBGU].

159. Airbnb Editorial Staff, *2019 in Review: Our Partnerships with Cities Around the World*, AIRBNB (Dec. 12, 2019), https://news.airbnb.com/2019-in-review-our-partnerships-with-cities-around-the-world/ [https://pe rma.cc/3HU2-DAL3]; Airbnb Editorial Staff, *Investing in our partnerships with local communities*, AIRBNB (Sep. 23, 2020), https://www.airbnb.com/resources/hosting-homes/a/investing-in-our-partnerships-with-local-commu nities-266 [https://perma.cc/5RRQ-SC7U]; Paris Martineau, *Inside Airbnb's 'Guerrilla War'*

during the early days of the pandemic[160] while also supporting hosts. They instituted a $250 million fund offering partial relief to hosts that had lost revenue due to the eased cancellation policy.[161] Overall, the company chose a course that took into account multiple stakeholder perspectives.

V. LIMITATIONS OF STAKEHOLDER GOVERNANCE

The aforementioned scenarios have illustrated how companies actively sought feedback from stakeholders and utilized this information to shape initiatives to combat COVID-19. While progressives hope that this information nudges management towards an outcome more favorable to stakeholders, this outcome is far from guaranteed. It falls on management and the board to take stakeholders' input into account and weigh it against other considerations to formulate the appropriate strategy for the company. Following this deliberation, the company may choose either to satisfy stakeholders' demands, disregard them, or even follow a policy anywhere between these two extremes. Stakeholder governance relies on the persuasive power of the information it gathers rather than on strict legal mandates. It does not challenge the function of managers and boards as the ultimate decision-makers in corporate law. This Part explores the conditions under which stakeholder perspectives, even though clearly identified and communicated to the company, fail to persuade in the boardroom.

Our interviews highlighted two sets of circumstances where the persuasive power of stakeholder arguments is significantly weaker. In the first setting, the stakeholder body had deeply divided preferences, thus failing to apply uniform pressure to management. These divided preferences are manifest in the debate surrounding the characterization of gig-economy workers as employees or independent contractors. In our interviews with Uber, the company emphasized the split among drivers regarding the implications of this characterization and Uber's decision to side with those workers who preferred the flexibility of independent contracting on which Uber had based its business model. But sometimes companies will make choices that directly harm the interests of all stakeholders involved, as evidenced in the second setting which focuses on mass layoffs. When conducting layoffs in the grave economic climate ushered in by the pandemic,

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Against Local Governments, WIRED (Mar. 20, 2019), https://www.wired.com/story/inside-airbnbs-guerrilla-war-against-local-governments/ [https://perma.cc/DS28-B73T]; Brian Eason, *Airbnb to Mayors: 'We Want to Pay Taxes'*, INDY STAR (June 25, 2016), https://www.indystar.com/story/news/politics/2016/06/25/airbnb-mayors-we-want-pay-taxes/86334388/ [https://perma.cc/ZR74-UZMK]; Patrick Sisson, *Airbnb's Data 'Portal' Promises a Better Relationship With Cities*, BLOOMBERG (Sept. 23, 2020), https://www.bloomberg.com/news/articles/2020-09-23/why-airbnb-launched-a-data-sharing-tool-for-cities [https://perma.cc/PX2W-ESEY].

160. *See* AIRBNB, *Extenuating Circumstances Policy and the coronavirus (COVID-19)*, https://www.airbnb.com/help/article/2701/extenuating-circumstances-policy-and-the-coronavirus-covid19 (last updated October 1, 2020) (altering policies after March 14, 2020).

161. Eric Newcomer, *Airbnb Will Give $250 Million to Hosts Who Lost Income to Virus*, BLOOMBERG (Mar. 30, 2020), https://www.bloomberg.com/news/articles/2020-03-30/airbnb-will-give-250-million-to-hosts-who-lost-income-to-virus [https://perma.cc/W5JU-64M5]. *But cf.*, Salvador Rodriguez, *Airbnb Hosts Say They're Getting Nothing or Comically Small Payments from $250 Million Relief Fund, Call it a 'Publicity Stunt'*, CNBC (Apr. 22, 2020), https://www.cnbc.com/2020/04/22/airbnb-hosts-getting-almost-nothing-from-250-million-relief-fund.html [https://perma.cc/69TX-K6HU] (noting that Airbnb hosts have reported receiving little in relief).

companies were well aware of the harm to employees and of the difficulty of finding alternate employment. Nevertheless, managers and boards took the view that their company would better adjust to the pandemic by shedding a significant part of its workforce.

Even though companies chose to contradict stakeholder preferences in the examples above, our interviewees still counted their involvement with stakeholders as a success because it helped management navigate the crises that their choices brought about. To garner public support for overturning the California state law on gig workers as employees, Uber emphasized the split in workers' preferences, which became the keystone argument in its referendum campaign. Many companies offered to support laid-off employees by extending health care coverage and relinquishing equipment such as laptops and mobile phones to help with connectivity in an era of limited mobility. Interviewees credited these moves for communicating a sentiment of empathy that helped blunt negative reactions to company choices. From their perspective, stakeholder governance showed its potential as a crisis management tool.

A. Health, Safety and Workers in the Gig Economy: Uber

In early 2020, Uber was gearing up for a landmark election fight in its home state of California in support of a constitutional amendment to undo a state law that would characterize gig economy workers as employees rather than independent contractors.[162] At first glance, gig economy work exhibits many features typical of independent contracting, with workers free to choose their timeframe and use their own equipment, such as tools and cars.[163] Progressives have long found this resemblance superficial, arguing that workers toil for long hours with few of the benefits typically associated with salaried employment, and blame this inequity on big technology firms' superior bargaining power.[164] The implications of classifying gig workers as employees are hard

162. *See* Jill Cowan, *The Uber Battle on California's Ballot*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/us/california-prop-22.html [https://perma.cc/7BUM-P845]; Kate Conger, *It's a Ballot Fight for Survival for Gig Companies Like Uber*, N.Y. TIMES (Oct. 23, 2020), https://www.nytimes.com/2020/10/23 /technology/uber-lyft-california-prop-22.html [https://perma.cc/7JYV-3HYA] (observing Uber's dedication and financial contributions to the campaign).

163. *See* John Frazier, *How The Gig Economy Is Reshaping Careers For The Next Generation*, FORBES (Feb. 15, 2019), https://www.forbes.com/sites/johnfrazer1/2019/02/15/how-the-gig-economy-is-reshaping-careers-for-the-next-generation/?sh=428d2edb49ad [https://perma.cc/L3E5-88YL]; Noah Scheiber & Kate Conger, *Fight Over Gig Workers Persists Despite Win for Uber and Lyft*, N.Y. TIMES (Nov. 11, 2020), https://www.nytimes.com/2020/11/11/business/economy/california-gig-workers-ballot-uber-lyft.html [https://perma.cc/J8KN-NJLP]; Kate Conger et al., *Pandemic Erodes Gig Economy Work*, N.Y. TIMES (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/technology/gig-economy-pandemic.html [https://perma.cc/K6EE-CYW6] (explaining the rise of people working in the gig economy due to ease of flexible scheduling).

164. *See* Suhauna Hussain et al., *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. TIMES (Nov. 13, 2020), https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22 [https://perma.cc/7AYA-CFPW]; Charles Towers-Clarke, *The Uberization Of Work: Pros And Cons Of The Gig Economy*, FORBES (June 8, 2020), https://www.forbes.com/sites/charlestowersclark /2019/07/08/the-uberization-of-work-pros-and-cons-of-the-gig-economy/?sh=50b1d58f1cc7 [https://perma.cc/3 YMP-BYY3]; The Editorial Board, *The Gig Economy's False Promise*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/opinion/the-gig-economys-false-promise.html [https://perma.cc/9VKA8P VW] (describing criticisms of keeping workers as independent contractors).

to overstate. For workers, the payoffs include access to cheaper healthcare through their employer, unemployment benefits, and the ability to unionize, among others.[165] However, workers would stand to lose the flexibility currently associated with the gig economy and could also see a reduction in revenue if prices go up.[166] On the other hand, classifying workers as employees would represent such a large hit to profitability for gig economy companies that companies would have to reimagine their business models if they are to remain viable.[167]

The fight over worker classification placed Uber on a collision course with organized labor supporters at a moment when the company had started making some concessions to its stakeholders. Just three years earlier, Uber was plagued by a stream of scandals, including allegations of widespread sexism and sexual harassment,[168] industrial spying for self-driving cars,[169] and deceiving law enforcement.[170] Keir Gumbs, Uber's

165. *See* Terri Gerstein, *What Happened in California Is a Cautionary Tale for Us All*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/opinion/prop-22-california-gig-workers.html [https://perma.cc/Y7AD-ZWSA]; The Editorial Board, *California, Reject Prop 22*, N.Y. TIMES (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/opinion/california-prop-22-uber-lyft.html [https://perma.cc/A7FN-TC96] (describing the benefits of gig workers if classified as employees).

166. *See* Dara Kerr, *Uber Says 158,000 Drivers Will Lose Work if They're Reclassified as Employees*, CNET (Jan. 28, 2021), https://www.cnet.com/tech/mobile/uber-says-158000-drivers-will-lose-work-if-theyre-reclassified-as-employees/ [https://perma.cc/4GMK-UTWJ] ("Uber said the higher prices would lower rider demand, meaning fewer trips and fewer work opportunities for drivers"); Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html [https://perma.cc/R9Z2-ZQLB] ("Uber and Lyft . . . have warned that recognizing drivers as employees could destroy their businesses").

167. Rachel Sandler, *Uber CEO Will Consider 'All Options' If Prop 22 Fails*, FORBES (Oct. 20, 2020), https://www.forbes.com/sites/rachelsandler/2020/10/20/uber-ceo-will-consider-all-options-if-prop-22-fails/?sh=3318837a51ab [https://perma.cc/LN6D-TWXX]; Ellen Huet, *California Prop 22 Vote Heralds Judgment Day for Uber, DoorDash*, BLOOMBERG (Oct. 29, 2020), https://www.bloomberg.com/news/features/2020-10-29/uber-lyft-brace-for-california-prop-22-vote-result-on-contractors [https://perma.cc/3VZQ-VH7M] (explaining the business consequences of classifying gig workers as employees).

168. *See* Kate Conger, *Uber Settles Federal Investigation Into Workplace Culture*, N.Y. TIMES (Dec. 18, 2020), https://www.nytimes.com/2019/12/18/technology/uber-settles-eeoc-investigation-workplace-culture.html [https://perma.cc/7VZP-U8KW]; Susan Fowler, *I Spoke Out Against Sexual Harassment at Uber. The Aftermath Was More Terrifying Than Anything I Faced Before*, TIME (Feb. 17, 2020, 7:00 AM), https://time.com/5784464/ susan-fowler-book-uber-sexual-harassment/ [https://perma.cc/A33M-V4UR]; *Uber investigated over gender discrimination*, BBC (July 16, 2018), https://www.bbc.com/news/business-44852852 [https://perma.cc/9VT4-6TUN]; Mike Isaac, *Inside Uber's Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html [https://perma.cc/9DUGGTLY]; Andrew Hawkins, *Uber Will Pay $4.4 Million to Settle a Federal Probe into Sexual Harassment and Retaliation*, VERGE (Dec. 19, 2020), https://www.theverge.com/2019/12/19/21029831/uber-settles-federal-probe-sexual-harassment-retaliation [https://perma.cc/GV8X-PK2X] (describing investigations over sexual harassment and gender discrimination claims).

169. *See* Charles Duhigg, *Did Uber Steal Google's Intellectual Property?*, NEW YORKER (Oct. 15, 2018), https://www.newyorker.com/magazine/2018/10/22/did-uber-steal-googles-intellectual-property [https://perma.cc/W5F8-T4XM] (discussing Google's self-driving programs co-founder departing for Uber with 14,000 files); Mark Harris, *The Tricks and Travails of Uber's Self-Driving Car Spies*, WIRED (Jan. 25, 2018), https://www.wired.com/story/uber-waymo-self-driving-car-ssg/ [https://perma.cc/M2WU-SFT2]; Vanessa Romo, *Former Uber Engineer Charged With 33 Counts Of Trade-Secret Theft*, NPR (Aug. 27, 2019),

Associate General Counsel, was tasked with transforming Uber's governance practices and improving internal controls with a special eye toward reforming diversity policies and gender equity. But compared to other governance issues, worker classification would have far graver implications for the company's bottom line.

The arrival of COVID-19 brought new urgency to the debate over worker classification. In a world devastated by a pandemic and economic decline, workers' access to healthcare and the social safety net mattered more than ever. Whether to transport individuals or to complete deliveries, workers sought to maintain precautions and remain healthy themselves. Drivers sought help from the company in acquiring the necessary protective equipment and instituting appropriate safety protocols. As far as access to healthcare was concerned, Gumbs explored ways to support drivers without overstepping the boundaries of an independent contracting relationship, only to realize that there was little the company could offer. Echoing his exasperation, Uber's top shareholders were asking management whether COVID-19 would cause the company to change how it treated drivers.

However, stakeholders were themselves divided on which classification would best serve their interests. Some drivers see ridesharing as their main source of income and expect to remain in that line of work in the long run.[171] Other drivers seek a more flexible arrangement to supplement income from other sources and would be unwilling to commit to 40-hour weeks.[172] This stark division of preferences severely weakened stakeholders' negotiating position towards the company, which chose to protect its long-established business model. In contrast, Uber sought to register this division in preferences among stakeholders through surveys and information campaigns. The company then reported this division to the public, turning it into a key argument in the public debate surrounding driver classification.

After state legislators passed a law siding with the employee classification camp,

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https://www.npr.org/2019/08/27/754895978/former-uber-engineer-charged-with-33-counts-of-trade-secret-theft [https://perma.cc/NVT9-U5SJ] (discussing the alleged theft of trade secrets by Uber).

170. Dan Levine & Joseph Menn, *Exclusive: Uber Faces Criminal Probe over Software Used to Evade Authorities*, REUTERS (May 4, 2017), https://www.reuters.com/article/us-uber-tech-crime-exclusive/exclusive-uber-faces-criminal-probe-over-software-used-to-evade-authorities-idUSKBN1802U1 [https://perma.cc/CER7-6YEN]; Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html [https://perma.cc/S5YW-BR8T]; Julia Carrie Wong, *Greyball: How Uber Used Secret Software to Dodge the Law*, GUARDIAN (Mar. 3, 2017), https://www.theguardian.com/technology/2017/mar/03/uber-secret-programgreyball-resignation-ed-baker [https://perma.cc/4CVK-DLNQ].

171. Jeremy B. White, *Many Uber and Lyft Drivers Now Rely on the Work as Their Primary Income Source, Report Finds*, INDEP. (May 30, 2018), https://www.independent.co.uk/news/business/news/uber-lyft-jobs-drivers-income-employees-independent-contractors-gig-economy-a8376271.html []; Mathew Foresta, *Uber Is My Primary Income Source. Each Time I Drive, I Risk Contracting Coronavirus*, USA TODAY (Mar. 19, 2020), https://www.usatoday.com/story/opinion/voices/2020/03/19/uber-my-primary-income-each-time-drive-risk-contracting-covid-19-column/2866159001/ [https://perma.cc/ZRB4-QBAJ].

172. *See* Harry Campbell, *Uber Drivers Just Want to Be Free*, N.Y. TIMES (Sept. 16, 2019), https://www.nyti mes.com/2019/09/16/opinion/uber-ab5-california.html [https://perma.cc/72C9-5XQW]; Suhauna Hussain & Johana Bhuiyan, *Uber, Lyft, DoorDash Works on Prop 22: 'I Don't Want to End Up on the Wrong Side'*, L.A. TIMES (Oct. 27, 2020), https://news.yahoo.com/uber-lyft-doordash-workers-prop-120007037.html [https://perma.cc/4TLN-S552] (reporting on some workers' interest to not be classified as employees).

Uber teamed up with other ridesharing companies in a referendum to overturn it.[173] In the ensuing public campaign, which shattered previous spending records, the company argued that the majority of its drivers preferred flexibility over rigid work structures, effectively casting their position as the one favored by most stakeholders.[174] In the November 2020 elections, Californians voted to overturn the classification registering a win for the company.[175] For those who lament the working conditions in the gig economy, however, the referendum result represents a step back.

The fight over employee classification illustrates significant limitations of stakeholder governance. For progressives who have hailed stakeholder governance as the Trojan horse against market forces, this example shows that when there are significant trade-offs between supporting one group of stakeholders versus another, the company's eventual position might not be in the direction they would have preferred. For companies that have embraced stakeholder governance as a tool, this example shows that better information can actually put them in a difficult spot. After extensive consultations with drivers, Uber's management understands very well the difficulties affecting a significant number of its drivers and sympathizes with their position. Under current law, however, Uber cannot offer much in additional healthcare and unemployment support to its drivers without crossing the boundaries into an employment relationship. This leaves management to defend a company practice that is more burdensome for stakeholders than they would have liked. Uber has pledged to work towards remedying that gap in the future, as the CEO openly acknowledged the problem and started a public conversation about the proper way to go about this goal.[176] But hopes for future reform do not go far in addressing current troubles.

B. Pandemic Layoffs

The harrowing rise in unemployment in Spring 2020 became a hallmark of the pandemic, which saw claims grow to levels unseen since the Great Depression.[177] Mass layoffs were common in many industries whose business was devastated by COVID-

173. Conger & Scheiber, *supra* note 166; Carolyn Said, *Federal Judge Tosses Uber Lawsuit Challenging AB5*, S.F. CHRON. (Sept. 19, 2020), https://www.sfchronicle.com/business/article/Federal-judge-tosses-Uber-lawsuit-challenging-AB5-15579191.php [https://perma.cc/32Y2-2L74]; Brittany Martin, *A Judge Will Grant a Temporary Stay Requested By Uber and Lyft, Sources Report*, L.A. MAG. (Aug. 20, 2020), https://www.lamag.com/citythinkblog/lyft-uber-lawsuit-california/ [https://perma.cc/PN7Y-MV5K].

174. *See* Hussain, *supra* note 164 (showing Uber and Lyft persuading California voters).

175. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html [https://perma.cc/8TET-SSE5]; Kari Paul & Julie Carrie Wong, *California Passes Prop 22 in a Major Victory for Uber and Lyft*, GUARDIAN (Nov. 4, 2020), https://www.theguardian.com/us-news/2020/nov/04/california-election-voters-prop-22-uber-lyft [https://perma.cc/QDJ8-ZU2Z].

176. *See* Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html [https://perma.cc/GJ9N-VAFL] (acknowledging the problems that exist for gig-economy workers and why the proposed solutions of switching from independent contractors to employees will not address the problems).

177. Paul Hannon, *Unemployment Expected to Reach Highest Level Since Great Depression*, WALL ST. J. (July 7, 2020), https://www.wsj.com/articles/unemployment-expected-to-reach-highest-level-since-great-depression-11594112400 [https://perma.cc/776Q-N6EY]; Nelson Schwartz et. al., *How Bad Is Unemployment? 'Literally Off the Charts'*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/interactive/2020/05/08/business/economy/april-jobs-report.html [https://perma.cc/L86M-T8AN].

19.[178] But for companies that had touted their commitment to stakeholders up to 2020, such as some in our sample, the prospective of layoffs presented unique challenges—it could make their earlier pronouncements ring hollow.

Consider Airbnb, whose motto for recruited employees centered on "belonging" to the company.[179] With travel restrictions and safety concerns looming, the company's turnover in 2020 was projected to be about half of 2019's.[180] In an effort to weather the storm, management raised $2 billion in equity and debt;[181] deals valuing the company at almost half of its pre-COVID-19 peak.[182] Some investors in these deals were preexisting shareholders, who agreed to dive into their pockets once more to support management but were also hoping to see some corrective moves soon.[183] On May 5, 2020, Airbnb announced that it was laying off almost one-quarter of its workforce. Although the company scaled back certain divisions and restructured others, the layoffs were not limited to restructured operations rather they were widespread across many departments, offices, and countries. This came as a huge blow to employees, and many expressed disenchantments with the company's professed commitment to trust and loyalty.[184] Apart

178. Taylor Borden et. al., *The Coronavirus Outbreak has Triggered Unprecedented Mass Layoffs and Furloughs*, BUS. INSIDER (Oct. 8, 2020), https://www.businessinsider.com/coronavirus-layoffs-furloughs-hospitality-service-travel-unemployment-2020#warnermedia-told-the-wall-street-journal-on-october-8-that-it-plans-to-cut-thousands-of-jobs-in-order-to-reduce-costs-by-20-the-companys-first-round-of-cuts-in-august-were-expected-to-impact-600-employees-mostly-at-warner-brothers-and-dc-comics-those-cuts-included-top-executives-2 [https://perma.cc/PV6H-E24M]; *see also* Los Angeles Times Staff, *Tracking how the coronavirus crushed California's workforce*, L.A. TIMES (Aug. 10), https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/unemployment/ [https://perma.cc/8DDP-C75B] (discussing how the coronavirus decimated California's economy by tracking unemployment by county and sectors).

179. Airbnb Editorial Staff, *Belonging is at our core*, AIRBNB, https://www.airbnb.com/diversity/belonging [https://perma.cc/EK7F-V9VH]; Leigh Gallagher, *How Airbnb Found a Mission—And a Brand*, FORTUNE MAG. (Dec. 22, 2016), https://fortune.com/longform/airbnb-travel-mission-brand/ [https://perma.cc/KG564JWJ].

180. Julie Bort, *Airbnb Expects Revenues to Be Slashed by More than Half This Year, CEO Says*, BUS. INSIDER (May 5, 2020), https://www.businessinsider.com/airbnbs-revenue-falls-more-than-half-brian-chesky-coronavirus-layoffs-2020-5 [https://perma.cc/496D-VN4A]; Dalvin Brown, *Airbnb Lays Off 25% of Its Workforce Due to the Coronavirus Fallout*, USA TODAY (May 6, 2020), https://www.usatoday.com/story/money/2020/05/06/airbnb-set-lose-half-its-revenue-sheds-25-its-workforce/5174729002/ [https://perma.cc/3NYC-XF4Y].

181. *See* Dierdre Bosa, *Airbnb Raising Another $1 billion in Debt as Coronavirus Ravages Tourism Business*, CNBC (Apr. 14, 2020), https://www.cnbc.com/2020/04/14/airbnb-raises-another-1-billion-in-debt.html [https://perma.cc/B68D-RM4H] (stating "[a] week after reeling in $1 billion fresh capital, Airbnb is raising another $1 billion in debt as it seeks to pad its balance sheet to get through the COVID-19 crisis . . .").

182. *See* Gillian Tan et. al., *Airbnb Raises Another $1 Billion in Debt, IPO Prospects Diminish*, BLOOMBERG (Apr. 15, 2020), https://www.bloombergquint.com/technology/airbnb-set-to-raise-1-billion-in-loans-from-apollo-owl-rock [https://perma.cc/U2TS-F457] (stating that the valuation of Airbnb fell from $18 million to $31 million).

183. *See* Gillian Tan & Davide Scigliuzzo, *Airbnb Lenders Reap $1 Billion Windfall on Pandemic Lifeline*, BLOOMBERG (Dec. 11, 2020), https://www.bloomberg.com/news/articles/2020-12-11/airbnb-lenders-reap-1-billion-windfall-on-pandemic-lifeline [https://perma.cc/H6L6-YUBD]; Natasha Lomas, *Airbnb Ups Its Debt by $1BN Amid the Coronavirus Travel Crunch*, TECH CRUNCH (Apr. 15, 2020), https://techcrunch.com/2020/04/15/airbnb-ups-its-debt-by-1bn-amid-the-coronavirus-travel-crunch/ [https://perma.cc/ME8W-N2YT]; Elizabeth Wollman, *Airbnb Gets $1 Billion Loan, Bringing Coronavirus Funding to $2 Billion*, WALL ST. J. (Apr. 15, 2020), https://www.wsj.com/articles/airbnb-gets-1-billion-loan-bringing-coronavirus-funding-to-2-billion-11586929819 [https://perma.cc/S78Q-K5GS] (stating that Silver Lake and Sixth Street Parteners—who already Airbnb investors—invested more money into the company during the COVID-19 pandemic).

184. Griffith, *supra* note 63.

from Airbnb, other companies in our sample that laid-off employees include Uber,[185] Levi's,[186] and MGM Casinos,[187] while other companies, such as American Airlines,[188] might still consider them.

One could see layoffs as essential proof that, even when flying the banner of stakeholder capitalism, management will continue to make decisions that harm stakeholders and prioritize shareholders. Companies may trumpet their dedication to their employees, their conviction to fight climate change, or their pledge to gender equality, but these do not typically amount to actionable commitments.[189] In contrast, corporate law provides the board with wide latitude to decide its preferred course of action, including to make trade-offs between shareholder wins and stakeholder losses. Critics are correct to point out that stakeholder governance does not guide the board towards a particular direction when multiple interests are implicated, much less towards the direction of prioritizing any stakeholder over profit. As a result, it is well within management's powers to chart a course that does not bode well for some parties. We have argued that stakeholder governance relies on the persuasive power and innovative spur brought about by furnishing new information to management. But when companies were faced with the prospect of laying off employees amidst a crisis, no piece of information was able to alter the ultimate outcome. This comes as a disappointment for those hoping that stakeholder governance can swiftly correct many perceived inequities in modern business[190] and, conversely, as validation for those arguing that it brings little change.[191]

But there is a further dimension in the account of the COVID-19 layoffs, which helps reveal the function of stakeholder governance. Even when management reaches a

185. Lauren Feiner, *Uber to Lay Off 3,700 Employees, about 14% of Workforce*, CNBC (May 6, 2020), https://www.cnbc.com/2020/05/06/uber-to-lay-off-3700-employees-about-14percent-of-workforce.html [https://perma.cc/V97P-KN9K].

186. Kelly Tyko, *Levi's Cutting 15% of its Corporate Workforce after Sales Drop Due to Coronavirus Pandemic*, USA TODAY (July 7, 2020), https://www.usatoday.com/story/money/2020/07/07/levi-strauss-job-cuts-covid-19-sales-decline/5394851002/ [https://perma.cc/RF6P-46JK].

187. Contessa Brewer, *MGM Resorts Lays Off 18,000 Previously Furloughed Employees*, CNBC (Aug. 28, 2020), https://www.cnbc.com/2020/08/28/mgm-resorts-sends-separation-letters-to-18000-furloughed-employees.html#:~:text=MGM%20Resorts%20International%20said%20Friday,Park%20MGM%20in%20Las%20Vegas [https://perma.cc/34MP-UHKG].

188. Tom Krisher & Cathy Bussewitz, *'I Don't Have a Plan B': 40,000 Airline Workers Brace for Mass Layoffs*, USA TODAY (Sep. 30, 2020), https://www.usatoday.com/story/travel/airline-news/2020/09/30/coronavirus-us-congress-help-airline-workers-avoid-layoffs/3585643001/ [https://perma.cc/KB4B-BBLW].

189. For a discussion of the accountability mechanisms for stakeholders in the Delaware Public Benefit Corporation, *see* Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism*, ROOSEVELT INST., (Aug. 13, 2020), https://rooseveltinstitute.org/publications/toward-fair-and-sustainable-capitalism/ [https://perma.cc/6U8S-GGUJ] ("The model authorizes enforcement suits for remedial action if a stockholder, such as a socially responsible investment fund, a pension fund, or a labor-affiliated fund, believes that the board is not living up to its required duties to stakeholders or society.").

190. Goodman, *supra* note 46.

191. *See* Geoff Colvin, *Revisiting the Business Roundtable's 'Stakeholder Capitalism,' one year later*, FORTUNE MAG. (Aug. 19, 2020), https://fortune.com/2020/08/19/business-roundtable-statement-principles-stakeholder-capitalism-corporate-governance/ [https://perma.cc/EAN5-P8WA]; Steve Denning, *Why Stakeholder Capitalism Will Fail*, FORBES (Jan. 5, 2020), https://www.forbes.com/sites/stevedenning/2020/01/05/why-stakeholder-capitalism-will-fail/?sh=77674215785a [https://perma.cc/B3RE-3T52] (illustrating some of arguments against stakeholder governance).

decision that overrides stakeholders' express wishes, such as ordering layoffs, it can still empathize with the deep impact of this decision, helping both stakeholders and itself navigate the crisis more smoothly than they otherwise would. Most companies in our sample instituted a series of measures aimed at mitigating the layoffs' impact, from extending healthcare coverage for months after severance[192] to relinquishing company equipment like laptops and mobile phones.[193] In many companies, top executives agreed to cut their own compensation as layoffs were announced in an effort to shed an image of merciless detachment that had dogged companies in earlier crises. While these moves could not alleviate the loss of income, they could help laid-off employees address some of the most dire consequences of losing their job during a global pandemic. From the company's perspective, these moves showed that management recognized how painful the layoffs would be and did not turn its back on stakeholders completely. Communicating this sentiment helped companies stem negative reactions to the layoffs that could harm their reputations. Whether working for past crises' veterans like the airline industry, or Silicon Valley unicorns in their first brush-up with business decline, interviewees repeatedly said that layoffs could bring "chaos" and "disorder." Instead, public attacks against companies never reached the level of poisonousness management had feared and interviewees credited their empathetic stance for this outcome. In an ironic reversal, then, stakeholder governance proved a highly effective pro-management tool in the handling of layoffs.[194]

Still, some might see stakeholder governance as simply another method for handling crises and running big organizations. Well before sustainability became ubiquitous, companies had sometimes found it in their interest to work closely with stakeholders, for example by rewarding talented employees with additional compensation and perks, by supporting communities where they operated through bequests, and even by listening to public reactions to their operations. In Part VI below, we argue that stakeholder governance systematizes and standardizes this approach, turning it from a sporadic bestowment of management goodwill to a fully developed corporate function. But if one wants an apt example of the shift the stakeholder perspective brings to corporate governance, we only need to hark back to the previous wave of mass layoffs during the 2008 financial crisis. At the time, the country was watching in astonishment as CEOs of

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192. Walecia Konrad, *Hanging On to Health Coverage, if the Job Goes Away*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2009/03/07/health/policy/07patient.html [https://perma.cc/XA5U-7EXS].

193. Online interview with Seth Jaffee, *supra* note 15; online interview with Rob Chestnut, former Chief Ethics Officer, Airbnb (April 22, 2020).

194. *See* Jack Kelly, *Airbnb Lays Off 25% Of Its Employees: CEO Brian Chesky Gives A Master Class In Empathy And Compassion*, FORBES (May 6, 2020), https://www.forbes.com/sites/jackkelly/2020/05/06/airbnb-lays-off-25-of-its-employees-ceo-brian-chesky-gives-a-master-class-in-empathy-and-compassion/?sh=1d828feeee30 [https://perma.cc/SM7T-F468]; Shana Lebowitz, *A Memo from Airbnb's CEO Announcing Huge Staff Cuts Is a Case Study in How Leaders Can Conduct Layoffs in a Compassionate Way*, BUS. INSIDER (May 5, 2020), https://www.businessinsider.com/airbnb-ceo-brian-chesky-layoffs-show-respect-compassion-for-employees-2020-5 [https://perma.cc/4BLY-RW94]; *A Message from Co-Founder and CEO Brian Chesky*, AIRBNB (May 5, 2020), https://news.airbnb.com/a-message-from-co-founder-and-ceo-brian-chesky/ [https://perma.cc/4WHL-FYP8]; Mckenna Moore, *How Hyatt's CEO is Leading with Empathy Through COVID-19 and a Corporate Reckoning with Racism*, FORTUNE MAG. (Aug. 11, 2020), https://fortune.com/2020/08/11/hyatt-ceo-mark-hoplamazian-covid-business-racism-layoffs/ [https://perma.cc/USM4-3BLZ] (illustrating how Airbnb's handling of layoffs and other decisions related to COVID-19 benefited the company's stakeholders).

fledgling financial institutions left their position with millions of dollars in extra compensation.[195] Even President Obama intervened to castigate bonus awards to AIG executives while the company required a federal bailout.[196] Compared to such precedents, the support and compassion expressed by companies in our sample represent a new attitude.

VI. ISN'T THIS JUST SHAREHOLDER PRIMACY? FROM AD HOC INCENTIVES TO A SYSTEMATIC FRAMEWORK

Public debate has cast stakeholder capitalism and shareholder primacy as adversaries with opposing worldviews.[197] Yet, our interviewees described their stakeholder-inspired initiatives as helping the executive team, their firms, and even themselves as individuals to navigate the pandemic. The examples in Part IV above show stakeholders alerting management to problems, addressing risks, or proposing solutions that helped companies emerge stronger.[198] At first glance, this outcome fits squarely with the expectations of shareholder primacy since stronger companies are likely to be more profitable.[199] Seen in this light, stakeholder governance does not seem as radical a departure from dominant corporate law norms as its ardent supporters claim. In fact, many critics have argued, if stakeholder governance simply helps companies be successful, then it is just shareholder primacy by other means.[200]

We argue this binary portrayal of corporate choices as either pro-shareholder or pro-stakeholder obscures the true shift that stakeholder governance represents. Our interviews portray a new systematic framework for gathering information from stakeholders which expands the range of choices corporations are likely to consider. During the last decade, stakeholder governance has grown significantly more regimented, standardized across

195. *See* Antionette Odoi, *Citigroup Boss Lands £45m Severance Deal*, GUARDIAN (Nov. 10, 2007), https://www.theguardian.com/business/2007/nov/10/citigroup; Ben Walsh, *7 Of The Most Outrageous Severance Packages in Recent Wall Street History*, BUS. INSIDER (Dec. 15, 2011), https://www.businessinsider.com/7-outrageous-severance-packages-2011-12#tom-montag-1 [https://perma.cc/D5EB-J2JT]; Jena McGregor, *Dismantling CEOs Golden Parachute*, WASH. POST (Mar. 26, 2014), https://www.washingtonpost.com/news/on-leade rship/wp/2014/03/26/dismantling-ceos-golden-parachutes/ [https://perma.cc/Q3ND-HXCX]; Reuters, *AIG Pays Former CEO a $47 Million Severance Package*, CNBC (Aug. 5, 2010) https://www.cnbc.com/id/25482825 [https://perma.cc/939M-N3GZ] (illustrating the severances given to the CEOs of major banks following the 2008 financial crisis).

196. Jeff Mason & David Alexander, *Outraged Obama Goes After AIG Bonus Payments*, REUTERS (Mar. 16, 2009), https://www.reuters.com/article/us-financial-aig-obama-sb/outraged-obama-goes-after-aig-bonus-pay ments-idUSTRE52F71P20090316 [https://perma.cc/S3PG-HEF8]; Eamon Javers & Mike Allen, *Obama: Block AIG Bonuses*, POLITICO (Mar. 16, 2009), https://www.politico.com/story/2009/03/obama-block-aig-bonuses-020 054 [https://perma.cc/8DXR-CBFW].

197. *Supra* Part II.A.

198. *Supra* Part IV.

199. Robert G. Eccles et. al., *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835, 2835 (2014) (quoting R. Edward Freeman et al., *Stakeholder Theory: The State of the Art*, THE ACAD. OF MGMT. ANNALS, June 2010, and Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.–Feb. 2011).

200. Bebchuk & Tallarita, *supra* note 23 ("Such an instrumental version of stakeholderism, we show, is not conceptually or operationally different from the traditional shareholder value principle, and there seem to be no good reasons for restating this principle in the language of enlightened shareholder value.").

industries, and transparent.[201] Moreover, it has obtained an institutional foothold within modern corporations, with specialized corporate functions and officers, internal monitoring by independent directors, and external oversight by markets and professionals.[202] Together, these characteristics lay the foundations for an additional pillar of corporate governance, comparable to gatekeepers' audits and validation and independent directors' responsiveness to market forces.

We develop this argument below. We first discuss why pitting stakeholders' interests against shareholders' focuses on the outcome of corporate actions but not on the decision-making process, where the true change lies. We then discuss how modern corporations have grasped a common-sense approach to dealing with stakeholders to develop a systematic framework for collecting information. We explore both the substantive and the institutional features of this framework.

A. Shareholder Primacy: Explanations and Gaps

Well before the stakeholder wave of the last ten years, companies have been consulting with stakeholders and adopting practices that favor them.[203] For example, companies have been offering employees compensation higher than minimum mandated pay or above industry average to retain talent.[204] Similarly, companies have catered to consumer demands by voluntarily committing to higher environmental standards, or certifications ensuring ethically sourced raw materials in products ranging from coffee to diamond jewelry.[205] From an aggregate societal perspective, these moves help keep negative implications of cut-throat competition in check. But from a corporate law perspective, these choices simply signal to consumers, employees, and other audiences the company's interest in a particular segment of the market, thus helping it secure greater sales and higher profitability. Often, such choices are part of a marketing strategy, designed to be advertised and intended to boost the company's upside potential.[206]

201. *Infra* Part VI.B.i.

202. *Id.*

203. For an earlier account *see generally* Edward Freeman, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984) (arguing that organizational management should account for the impact of business operations on stakeholders including employees, communities, customers, and suppliers).

204. *See generally* Jack Kelly, *Companies Who Focus On Their Workers Will Win The War For Talent When Offices Reopen*, FORBES (May 31, 2021), https://www.forbes.com/sites/jackkelly/2021/05/31/companies-who-fo cus-on-their-workers-will-win-the-war-for-talent-when-offices-reopen/?sh=4961ba0c6283. *See also* Christopher Rugaber & The Associated Press, *Worker pay rises strongly as businesses compete to attract talent*, FORTUNE (Jul. 30, 2021) https://fortune.com/2021/07/30/wages-salaries-increase-businesses-attract-talent-jobs/ [https://p erma.cc/9TLU-67BY].

205. *See generally* HIGH MEADOWS INST., THE ROLE OF INDUSTRY ASSOCIATIONS AND CIVIL PARTNERSHIPS IN CORPORATE RESPONSIBILITY (2020), http://www.highmeadowsinstitute.org/wpcontent/uploads/2020/10/The-Role-of-Industry-Associations-and-Civil-Partnerships-in-Corporate-Responsibility2020.pdf [https://perma.cc/82EW-4ERY] (providing a comprehensive survey of voluntary corporate social responsibility and sustainability business initiatives); David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. & SOC'Y 68 (2010) (providing an overview of voluntary standard compliance efforts by private companies).

206. *See* Jay Coen Gilbert et al., *Don't Believe the Business Roundtable has Changed Until its CEOs' Actions Match Their Words*, FAST CO. (Aug. 22, 2019), https://www.fastcompany.com/90393303/dontbelieve-the-business-roundtable-has-changed-until-its-ceos-actions-match-their-words [https://perma.cc/4TW4-MRHN] ("Unless we address the systemic context in which CEOs operate, celebrating their latest announcements about

Because these decisions are an integral element of the company's business proposition, they raise no real doubts as to whether directors and officers are acting to maximize profits for shareholders and fall squarely under the ambit of the business judgment rule.

It does not require a ton of imagination to look at corporate actions such as the ones described in our interviews and propose how they can contribute to a company's profitability. Ensuring the health and safety of employees and taking measures to help their productivity is essential in a global pandemic.[207] Assisting supply chain collaborators to survive the turmoil and keep their workers safe helps with business continuity.[208] Some company choices, like Clorox's decision to prioritize hospitals rather than large retailers, may look harder to square with shareholder primacy at first, but then, cutting off hospitals from the supply of sanitization products amidst a pandemic might not have played well with the company's consumer base either. With the benefit of hindsight and absent a conflict of interest, most corporate choices can be readily explained as falling in line with shareholder primacy.

This powerful logic is not particularly helpful analytically because it focuses only on the outcome which it seeks to characterize as pro-shareholder or pro-stakeholder, without really exploring how the company arrived at this outcome. In contrast, our interviewees described their actions and choices not simply as a balancing of pros and cons but as a culmination of a governance process seeking to identify, with greater accuracy and open-mindedness, the tradeoffs for their company. They described their efforts to cast as wide a net as possible to capture all stakeholders that could be implicated. They attested to the repeated use of certain tools to reach out to stakeholders. They often talked about long-term relationships with collaborators outside the company, which helped them share the necessary information. They also underlined the need to set measurable goals and assess progress towards these goals.

As a result of this governance process, our interviewees came across new solutions that they would not have been able to grasp otherwise, effectively expanding the range of possible outcomes for the firm. Our interviewees were convinced that their final choice, which resulted from better information, was superior to alternatives. Whether one would see their choice as belonging at the pro-stakeholder or pro-shareholder camp was not of particular concern. By the time COVID-19 hit corporate America in early 2020, stakeholder governance had made significant progress toward its evolution into a fully-fledged framework with distinct operational and institutional features. We turn to these features next.

B. Stakeholder Governance as A Systematic Framework for Obtaining Information

In describing their efforts to collect feedback and analyze implications for

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purpose will remain more hope than strategy.").

207. *See* Melissa Karsh et al., *From Mental Health to Credit Risk, Here Are the Big ESG Topics*, BLOOMBERG (Oct. 22, 2020), https://www.bloomberg.com/news/articles/2020-10-23/from-mental-health-to-credit-risk-here-are-next-big-esg-topics [https://perma.cc/CJ52-JCAA] (discussing the necessity of a shift from shareholder primacy toward a more positive overall culture in large corporations); Rana Mehta et al., *COVID-19 Places a Heightened Emphasis on Mental Health*, STRATEGY & BUS. (Oct. 8, 2020), https://www.strategy-business.com/article/COVID-19-places-a-heightened-emphasis-on-mental-health [https://perma.cc/LZ4C-DV38] (noting the performance benefits of increased support for employees' mental health).

208. Online interview with Seth Jaffe, *supra* note 15.

stakeholders, our interviewees outlined the key features of their governance process. While each company in our sample had tailored that process to its specific needs, based on factors such as industry, size, or geography, there were two key goals. The first goal relates to the substantive scope companies hope to cover. Our interviewees reported efforts to gather information from any available source, casting as wide a net as possible and ensuring that feedback is comprehensive and systematized. We analyze the strategies companies built to widen the scope of their inquiries in Part VI.B.i below. Second, companies adopt mechanisms to properly oversee the collection of information from stakeholders that enhance its credibility and ensure it reaches the executives and the board. These institutional features, which we discuss in Part VI.B.ii., seek to safeguard disclosure to investors and enhance the accountability of the stakeholder regime. Table 1 below provides an overview of these features.

Table 1. Stakeholder Governance as a Systematic Framework

SUBSTANTIVE SCOPE *Goal: Ensure wide ambit and practicality*		INSTITUTIONAL MECHANISMS *Goal: Ensure credibility and reporting*	
Comprehensive:	Map all stakeholders impacted by company policies	**Executive Teams:**	Dedicated officials with specialized knowledge that build relationships
Standardized:	Address common concerns with similar initiatives and metrics	**Board Oversight:**	Receive reporting by executives, supervision by committees
Regimented:	Reach out to stakeholders in regular intervals using similar communication tools	**External Monitoring:**	By investors through engagement and disclosure, and by professional firms

1. *Substantive Scope: Obtaining Stakeholder Information in a Comprehensive, Standardized, and Regimented Manner*

What sets the current stakeholder governance framework apart from past corporate practices is its explicit effort to be systematic when mapping social risks facing the company.[209] We see stakeholder governance as systematic because it seeks to be comprehensive, standardized, and regimented. Below, we discuss these goals in turn.

Consulting with potentially affected third parties is not an idea invented by

209. *See* Gadinis & Miazad, *supra* note 101, at 1429–30 (describing the stages of the internal governance process).

stakeholder governance, representing an approach often associated with sound management.[210] Tools embraced by stakeholder governance, such as employee surveys or preemptive contacts with governments, have been in use for decades. In the past, companies used these tools whenever the need arose, perhaps after a workplace debacle or an industry reckoning.[211] Companies realized that responding to a crisis is often harder than preventing it. Thus, modern stakeholder governance is proactive, deploying these methods to compose a comprehensive matrix of social challenges facing a company.[212] To do so, it identifies all constituencies that may be impacted by the company's choices and engages with them to understand their needs and concerns.[213] Because this open, bottom-up process points to a wide range of social issues, critics often portray it as unruly and wayward, or as evidence that management is falling off the rails. Yet, it is not management that dictates priorities but the multitude of the company's stakeholders.

To facilitate comprehensiveness across companies, stakeholder governance has become increasingly standardized. Companies in the same industry tend to address similar pools of stakeholders, look into the initiatives that their peers and competitors undertake, and utilize similar methods of consulting with stakeholders.[214] Sometimes, the goals that companies set follow a familiar pattern, e.g. become a net-zero emissions company by 2030 (or 2025 or 2040).[215] Reporting standards and frameworks, such as Sustainable Accounting Standards Board and Task Force on Climate-Related Financial Disclosures, help companies identify what issues they need to consider and develop appropriate goals.[216]

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210. For an example of how practitioners approach this method, *see* DELOITTE, EXTENDED ENTERPRISE RISK MANAGEMENT DRIVING PERFORMANCE THROUGH THE THIRD-PARTY ECOSYSTEM 5–8 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-extended-enterprise-risk-management.pdf [https://perma.cc/JLN5-U4BC] (explaining the holistic approach to managing third party relationships).

211. *See, e.g.*, Root Martinez, *supra* note 93. For a recent example, Wynn Hotels spearheaded a series of roundtables with female employees after a sexual harassment scandal. Eve Tahmincioglu, ***Directors & Boards / The Aftermath of #MeToo Allegations Against Wynn Resorts CEOs***, BETSYATKINS.COM (Aug. 21, 2018), https://betsyatkins.com/directors-boards-the-aftermath-of-metoo-allegations-against-wynn-resorts-ceos/ [https://perma.cc/3JJZ-55LN].

212. Gadinis & Miazad, *supra* note 101, at 1429–30.

213. *Id.*

214. The Sustainable Accounting Standards Board, which has developed standards for stakeholder issues, has organized them according to industry classification. SUSTANABILITY ACCT. STANDARDS BD., *77 Industry Standards*, https://www.sasb.org/standards/download/ [https://perma.cc/G4M7-C4CF].

215. *See, e.g.*, *We Are All in on The Climate Pledge: Net Zero Carbon by 2040*, AMAZON (June 23, 2020), https://www.aboutamazon.com/news/sustainability/we-are-all-in-on-the-climate-pledge-net-zero-carbon-by-2040 [https://perma.cc/L2U5-HRQT]; Press Release, Gen. Motors, GM, the Largest U.S. Automaker, Plans to Be Carbon Neutral by 2040 (Jan. 28, 2021), https://media.gm.com/media/us/en/gm/home.detail.html/content/Pages/news/us/en/2021/jan/0128-carbon.html [https://perma.cc/4GQE-4M8D]; Press Release, Walmart, Walmart Sets Goal to Become a Regenerative Company, (Sept. 21, 2020), https://corporate.walmart.com/newsroom/2020/09/21/walmart-sets-goal-to-become-a-regenerative-company [https://perma.cc/3PAN-XFAQ] (describing their corporate goals of reducing corporate carbon emissions).

216. For an example of a global initiative trying to standardize stakeholder governance metrics, *see* WORLD ECON. F., MEASURING STAKEHOLDER CAPITALISM TOWARDS COMMON METRICS AND CONSISTENT REPORTING OF SUSTAINABLE VALUE CREATION 6–10, (Sept. 2020), https://www.weforum.org/reports/measuring-stakeholder-capitalism-towards-common-metrics-and-consistent-reporting-of-sustainable-value-creation [https://perma.cc/QVQ7-6PVZ]; *see also* TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, https://www.fsb-tcfd.org/ [https://perma.cc/EN5F-AW5K] (advocating

In addition to the issues targeted and the metrics used, the process of collecting information itself has become more regimented. Companies commit to similar steps of reaching out to stakeholders and ensuring that information reaches management and board members. For example, most companies use surveys to solicit feedback from employees, whereas town hall meetings and direct communication with top executives and independent directors are becoming increasingly more common. Moreover, most companies agree to repeat these efforts in regular intervals, typically annually, to track progress, discover new grievances, and address newly emerged obstacles. Sometimes, companies increase the frequency of these meetings, as they did when COVID-19 erupted in the spring of 2020. But they still use venues familiar to stakeholders from their regular communications, such as town hall meetings and surveys.[217]

2. Institutional Features: Executive Teams, Board Oversight, and Investor Disclosures and Engagement

During the pandemic, executive officials tasked with managing stakeholder outreach became core members of the company's executive team, many interviewees reported.[218] Before COVID-19, companies in our sample had created dedicated teams tasked with addressing stakeholder concerns, sometimes overseen by other top executives, such as the legal counsel or CFO, and other times managed by a separate "Chief Sustainability Officer."[219] When COVID-19 erupted, management pulled these executives into their crisis response teams. According to interviewees, these executives were well placed to relay information not only about the implications of the pandemic across immediate company operations but also across a wider set of interests both within and outside the company. In times of need, they could immediately draw upon their ties with corporate insiders, like employees, vendors, and suppliers, in addition to governments, academics, NGOs, and community organizations. Because of their personal relationships and credibility, stakeholder executives were able to imagine mutually workable solutions and broker compromises, protecting the company's continued operation and reputation. Moreover, they were better able to track employee welfare which was essential during the pandemic. Raising the profile of stakeholder executives within the company will be, according to our interviewees, a lasting legacy of COVID-19 in corporate governance.

In addition to top management, boards intensified their efforts to oversee stakeholder issues during the pandemic. By January 2020, boards in our sample had either created specialized committees for stakeholder engagement or assigned the task to a preexisting committee. Interviewees underlined the value of the information provided through stakeholder communication by explaining that the board asked for regular updates from the moment the pandemic erupted. Board members wanted to know which stakeholder groups the company engaged, what their preferred method of communication

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corporations to develop initiatives to reduce climate-related risks).

217. Many companies in our sample relied on town halls to communicate with employees, including Salesforce, Uber, and Airbnb.

218. Companies whose management team incorporated stakeholder governance officials during the pandemic include Levi's, Salesforce, PepsiCo, and MGM Resorts.

219. Companies in our sample with a Chief Sustainability Officer or similar include Millicom, Levi's, MGM Resorts, Airbnb, and Nestlé.

was, and how frequent and comprehensive these communications were. Directors became increasingly persistent in learning about stakeholder feedback, in turn pushing management to intensify its own communications with stakeholders.[220] While such boundary-pushing is probably due to the extreme pressure that COVID-19 exercised on many companies, it illustrates how wholeheartedly some boards have embraced the value of stakeholder information and the contributions of the people that staff this function.

While these internal mechanisms help operationalize stakeholder governance, external monitoring by professionals and investors provides additional impetus and helps standardize requirements across companies and industries. To ensure that their stakeholder information system works as desired, companies often engage outside experts to perform external assurance-level audits by the Big Four firms, much as they do for internal controls and compliance.[221] Interviewees repeatedly recalled meetings with shareholders in the context of engagement, where they addressed questions about the governance process, the risks identified through stakeholder governance, and the resulting company initiatives.[222] Since companies' stances on many stakeholder-driven issues, such as climate change or workplace equity, are viewed as material for their financial performance, investors are behind the demand for greater disclosure.[223] As companies share information about their own materiality considerations and mitigating strategies, they also help create a commonly shared benchmark for evaluating other companies' efforts. Moreover, the requirement to provide accurate disclosures to the wider market has forced companies to become more disciplined in their internal efforts to collect information and evaluate its materiality. For example, when Salesforce decided to publish its Stakeholder Impact Report, the company's sustainability team and legal team worked closely together sharing information that may have otherwise remained in separate corporate silos.[224] Thus, the benefits of disclosure transcend the output or the report itself.

C. Why a Systematic Framework for Stakeholder Governance Helps Mitigate Concerns Over Accountability

A fundamental criticism leveled against stakeholder governance concerns the risk of

220. Companies in our sample that reported increased director interest in stakeholder governance during the pandemic include Levi's and Hershey.

221. KPMG, PwC, Deloitte, and E&Y all provide sustainability assurance audits. *See Environmental, Social, and Governance*, KPMG, https://audit.kpmg.us/esg.html [https://perma.cc/4LCK-V6H8]; *Sustainability Reporting and KPI Services*, DELOITTE, https://www2.deloitte.com/us/en/pages/audit/solutions/corporate-sustainability-reporting.html [https://perma.cc/HQU8-Q2C4]; *Sustainability, Compliance, and Assurance Services*, PRICEWATERHOUSECOOPERS, https://www.pwc.com/gx/en/services/sustainability/compliance-and-assurance.html [https://perma.cc/3DLT-BPFP]; *Climate Change and Sustainability Services*, EY, https://www.ey.com/en_us/climate-change-sustainability-services [https://perma.cc/SW9W-5FWW].

222. Companies in our sample that reported interest by investors on stakeholder governance include Levi's, MGM Resorts, and Millicom.

223. *See, e.g.*, Dawn Lim, *BlackRock's Fink Urges Companies to Disclose, Do More on Greenhouse Gas Emissions*, WALL ST. J. (Jan. 26, 2021), https://www.wsj.com/articles/blackrocks-fink-urges-companies-to-disclose-do-more-on-greenhouse-gas-emissions-11611670619 [https://perma.cc/N48F-RVLK] (reporting on the growing consensus that climate change-exacerbated risks should be disclosed to investors).

224. *See* SALESFORCE, FY19 STAKEHOLDER IMPACT REPORT 7 (2019).

reducing accountability for corporate leaders.[225] Managers and directors, the argument goes, will have little trouble connecting their questionable choices with the interests of a stakeholder from the expansive set of constituents they are now free to take under their wings.[226] By investing these choices with the legal shield of the business judgment rule and the moral mantle of corporate empathy, corporate leaders will be better placed to promote their agenda and overcome obstacles. They can convince large institutional investors to take their side, pointing out that they need to show support for stakeholders in peril. Boards can fend off attacks by shareholder activists by presenting themselves as the protectors of employees and communities against aggressive cost-cutting and consolidation. Because of its wide scope, do-good aspirations, and inherent ambiguity, stakeholder governance can help managers and directors elude well-deserved criticism.

While critics are right to suggest that stakeholder governance expands the justifications that managers and directors can claim for their choices, they do not take into account how the systematic framework described above helps mitigate their concerns. Fears of top-down manipulations from corporate leaders overlook that stakeholder governance is really a bottom-up process driven by outreach to stakeholders. It is stakeholders who frame worries, respond to proposed solutions, and monitor adherence to agreed goals. If the company is failing to fulfill its promises, stakeholders are likely to call it out. As stakeholder governance becomes more transparent and standardized, management is not as free to pick and choose among stakeholder causes as critics portray it. Best practices are developing regarding which stakeholders are important for each industry, what the best methods are for reaching out, and what initiatives successfully address concerns.[227] Overall, stakeholder input can constrain the latitude that corporate leaders have in manipulating stakeholder governance for self-serving purposes.

As a process, stakeholder governance also generates records and is well-suited to internal and external monitoring. Even before COVID-19 introduced digital recordings of company interactions as a routine, outreach to stakeholders and the ensuing feedback was extensively documented. Surveys, meeting minutes, initiative reports, and internal reviews provide an extensive record that would help courts determine whether managerial abuses have indeed occurred. Independent directors are overseeing stakeholder outreach efforts to provide stakeholders with a direct channel of communication with the board. Institutional investors are monitoring companies' stakeholder governance process through engagement, and outside professionals are available to conduct further audits where necessary. Overall, the foundations of the systematic framework for stakeholder governance work also to constrain the risk of abuse, which is inherent in any delegation of authority.

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225. *See, e.g.*, STEPHEN BAINBRIDGE, CORPORATE LAW 141 (2d ed. 2009) ("It is well-settled that directors have a duty to maximize shareholder wealth.") (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 776 (2015) ("Dodge v. Ford and eBay are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.")

226. Strine, Jr., *supra* note 6, at 776.

227. *Supra* notes 214–16 and accompanying text.

VII. CONCLUSION

The pandemic tested corporate America's commitment to stakeholder governance. As companies scrambled to adjust to a new reality seemingly overnight, managers and directors in our sample relied on stakeholder governance with growing frequency and for issues central to their companies' continued operation. Instead of making top-down decisions based on the CEO or board assumptions, they increasingly asked stakeholders for input. Companies sought feedback to help employees' transition to remote work and remain loyal and productive, addressing challenges from workplace safety and medical leaves to mental health support. Managers tailored consumer products to the difficulties of their client base in a pandemic and thought even harder about financial inclusivity. Recognizing the challenges COVID-19 brought to their overseas suppliers, companies offered financial support to struggling manufacturers and additional help to vulnerable workers. Moreover, companies worked together with governments to keep communities safer by eliminating unnecessary moves, develop helpful technology, and source supplies such as protective gear. However, stakeholders were not always able to persuade managers and directors. Particularly when faced with divisions among stakeholders or with mounting financial pressure, companies opted for other priorities.

Many have pointed to the *outcome* of company choices decisions, such as mass layoffs, to conclude that stakeholder governance has, in fact, failed its test.[228] After all, if a company is choosing to issue dividends to its shareholders as opposed to keeping its employees, then surely stakeholder governance seems nothing more than empty words for the benefit of public relations. Critics warn that stakeholder governance will allow directors and managers to reign free by dismantling the constraints on abusive conduct painstakingly established over the past decades, which are benchmarked on profit maximization. To such criticisms, proponents of stakeholder governance often respond by doggedly insisting that companies can reconcile stakeholder and shareholder perspectives. In support of this claim, they often point to their own set of examples where companies have managed to do well by doing good.

Rather than simply exploring the visible outcomes of company choices, we sought to chart the process that leads to these outcomes and the contribution of stakeholder communications in forging them. We found a unique opportunity to do so in the COVID-19 crisis, which affected a broad array of businesses at about the same time and thus increased the comparability of responses to a common challenge. To scrutinize the stakeholder governance in action, we interviewed executives and board members from large, publicly traded companies. We chose to focus on companies with a sophisticated stakeholder apparatus to uncover how this system responded during a pandemic.

Our findings revealed that stakeholder governance is a highly systematized, robust, and dynamic process for eliciting, collecting, and considering information.[229] This new information fortifies the board and management's decision-making process. Sometimes, the new information reveals tensions between stakeholders. Other times, it uncovers that management's assumptions about stakeholder preferences were misguided. Importantly,

228. Goodman, *supra* note 62.

229. *See supra* Part VI (discussing "how modern corporations have grasped a common sense approach to dealing with stakeholders to develop a systemic framework for collecting information.").

this communication with stakeholders is not merely transactional. By opening channels of communication, companies are able to build trust and strengthen relationships with stakeholders. These stakeholders are also the very constituencies that are prone to cause the company reputational or financial risk if a fallout ensues. But considering the viewpoints of stakeholders is not the same thing as bending to their whims. As our interviews revealed, in some cases a new piece of information caused management or the board to change its course, but in other cases, the board chose to disregard the input from stakeholders. Regardless of the outcome, the stakeholder input allowed the board and management to make decisions, cognizant of the impacts that those decisions will have on stakeholders.[230]

Stakeholder governance emerges from our findings as a tool companies utilize to obtain broader information and improve their decision-making, rather than as an overarching normative mandate. The heated corporate law debate around stakeholder governance risks overlooking its chief contribution, which consists in improving the flow of information to managers and directors. According to this account, stakeholder governance does not represent a swing of the pendulum back to an era of managerialism or socially benevolent companies. Moreover, there is less reason to fear that stakeholder governance represents a detour from the path of reform that corporate law has chosen in the last few decades by strengthening accountability mechanisms. When managers invoke the interests of other constituents to justify their choices, the record that stakeholder governance leaves behind offers the basis for assessing the truthfulness of their statements. By expanding the breadth of inputs and the diversity of viewpoints that corporate leaders take into account, stakeholder governance is in fact in line with efforts to better boards' chances of reaching informed and independent judgments.

That companies turned to stakeholder governance during the pandemic will likely have a lasting legacy since COVID-19 underlined how interdependent companies are with their various constituencies. Already, business leaders are treating their efforts to combat COVID-19 as the blueprint for looming challenges with far more threatening consequences, like climate change.[231] Companies and investors are increasingly subscribing to goals for "net zero" carbon emissions by a certain date, a common stakeholder governance device.[232] Corporate leaders cannot patiently wait for the shareholder/stakeholder debate to run its course or expect stakeholder governance to evolve on its own, before engaging with the great challenges of our time. Rather, we must build upon the corporate law reforms that bolstered the compliance and audit functions and mandate an independent corporate function that can systematically collect and assess stakeholder information. This function needs to be well resourced, robust and reinforced by board oversight.

There are many interdependent paths to this outcome. Many companies will continue to recognize the power of stakeholder governance and set up systems on their own. Investors can encourage this private ordering in a number of ways. First, rather than focusing on environmental and social *outputs*, they should focus their engagement

230. *See supra* Part V (arguing that stakeholder inspired initiatives can help inform corporations).

231. *See* Larry Fink, *Larry Fink's 2021 Letter to CEOs*, BLACKROCK (Jan. 14, 2021), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/V4ML-6RPK] (advising CEOs to utilize their COVID-19 strategies and apply them to the climate crisis).

232. *Id.*

priorities, disclosure demands, and voting strategy on ensuring that the board is receiving and assessing information from stakeholders. As regulators such as the SEC are gearing up for more ESG disclosure, they should similarly focus on board and executive oversight and anchor disclosure obligations to processes as opposed to outputs.[233] Other jurisdictions are already moving towards this model.[234] Stakeholder governance is proving its might by boosting the ability of managers and directors to navigate a global pandemic. Given the increasing complexity of the risk landscape facing companies, stakeholder governance is demonstrating that it is primed for the challenges of our day.

233. *See* Andrew Ramonas, *Biden SEC Likely to Push More Climate, Diversity Disclosures*, BLOOMBERG L. (Nov. 12, 2020), https://news.bloomberglaw.com/securities-law/biden-sec-likely-to-push-more-climate-diversity-disclosures [https://perma.cc/W95C-W577] (referring to the SEC's approval of regulations for company reporting on human capital measures and potential climate impact).

234. For a discussion of disclosure requirements about stakeholders in the United Kingdom, *see* KPMG, *The Section 172 Statement*, (2019), https://assets.kpmg/content/dam/kpmg/uk/pdf/2019/10/the-section-172-statement.pdf [https://perma.cc/WA6M-WPSC] (stating that strategic reports of large companies must include a Section 172 statement on long term investment relations with shareholders).

APPENDIX A – INTERVIEW PARTICIPANTS

Company	Interviewee	Date
American Airlines	Stephen Johnson, Executive Vice President, Corporate Affairs	December 29, 2020
Airbnb	Rob Chesnut, Chief Ethics Officer	April 22, 2020
Levis Strauss & Co.	Seth Jaffe, Executive Vice President & General Counsel	July 14, 2020
Lyft	Kristen Svercheck, General Counsel	July 31, 2020
Mastercard	Rick Haythornthwaite, Global Chairman	December 3, 2020
MGM Resorts	Jyoti Chopra, Chief People, Inclusion & Sustainability Officer	July 28, 2020
Millicom	Mauricio Ramos, Chief Executive Officer	December 4, 2020
Nestlé	Esteban Mezzano, General Counsel of the Americas & Head of Legal Sustainability	December 8, 2020

Nokia	Jeffrey Eglash, Chief Ethics & Compliance Officer	July 29, 2020
PepsiCo	Jaren Dunning, Senior Counsel, Global Human Rights	July 17, 2020
Salesforce	Amy Weaver, Executive Vice President and General Counsel	July 1, 2020
The Clorox Company	Benno Dorer Chief Executive Officer and Chairman of the Board	December 2, 2020
The Hershey Company	Rob Malcolm Board Member	December 18, 2020
Uber Technologies	Keir Gumbs, Head of Governance, Associate General Counsel	July 16, 2020

APPENDIX B – INTERVIEW QUESTIONS

1. What is your role in the company and what is the scope of your involvement with the company's ESG function?

2. How has COVID-19 impacted your sector? Was the impact on your company different than other companies in your sector?

3. How was your company's response different from other companies in your sector?

4. Who are the major stakeholders that you regularly communicated with before the COVID-19 crisis? Tell us some of your preferred channels of communication with these stakeholders.

5. Are there any stakeholders that you communicate with now that you didn't regularly communicate with before the crisis?

6. Has your relationship with these stakeholders before the crisis helped or hampered your response to the COVID-19 crisis? Can you provide specific examples for specific stakeholders (e.g., employees, suppliers, consumers, regulators, NGOs, investors)?

7. Has the frequency or channels of your communication changed with any of these stakeholders? Which ones? Can you describe the changes?

8. Is senior management and/or the board more interested in feedback from stakeholders after COVID-19? Which ones? Can you provide specific examples?

9. Has market attention and/or public attention to your company's ESG practices intensified as a result of COVID-19?

10. Do you think that your company's response to COVID-19 would have been different without feedback from stakeholders?

11. Has your company's engagement with stakeholders during the COVID-19 crisis informed your company's perspective on Black Lives Matter?

12. What has surprised you (either positively or negatively) about your relationship with stakeholders after COVID-19?

13. Is there anything that we didn't ask that you'd like to share about your relationship pre and post COVID-19 with stakeholders?