

# Stakeholder Amnesia in M&A Deals

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*The most fundamental and longstanding debate in corporate law—the purpose of the corporation—has found new energy in connection with broader discussions about the power of modern corporations and their role in society. Companies have increasingly embraced the consideration of employees, communities, and other stakeholders in the course of everyday business. However, these same considerations are virtually non-existent in merger and acquisition (M&A) transactions. Elon Musk’s recent acquisition of Twitter provides an illustration of this stark disconnect. Prior to the transaction, Twitter pursued numerous stakeholder-centric goals. In contrast, Musk had taken a skeptical, if not hostile, stance toward stakeholder governance. When Twitter negotiated its sale to Musk, the board succumbed to “stakeholder amnesia”—overlooking its stakeholder commitments in favor of the high-premium all-cash offer from Musk. Twitter is not alone: stakeholder amnesia is a widespread phenomenon in M&A.*

*In this Article, we argue that corporate boards have the legal and practical ability to consider stakeholder interests in their dealmaking. We examine three of the most significant barriers that might prevent a board from incorporating their stakeholder-related objectives into transactions—fiduciary duties, negotiation leverage, and contractual feasibility—and demonstrate that, outside of the Revlon context, none of these are compelling barriers. Rather, boards that consider stakeholder interests in their dealmaking can be acting consistently with their fiduciary duties. Moreover, boards often have the negotiation leverage and capability to incorporate stakeholder protections into their contractual agreements. We conclude that stakeholder considerations can pervade all aspects of managerial decision-making, including decisions about the sale of the company. In doing so, we also provide specific recommendations for courts, boards, and transaction planners.*

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## INTRODUCTION

The most fundamental and longstanding debate in corporate law involves a very basic question: what is the purpose of the corporation? The “shareholder primacy” view, most famously put forward by Milton Friedman in the 1970s, states that the purpose of corporations is to maximize value for shareholders. The “stakeholder capitalism” view, in contrast, posits that corporations should serve many constituencies—including employees, customers, and local communities—as well as shareholders.

While the debate has ebbed and flowed over the decades, it has found new energy over the past few years in connection with broader debates about the power of modern corporations and growing income inequality in the United States. The modern formulation of the stakeholder capitalism view is often referenced with the acronym “ESG”—Environmental, Social, and Governance factors. Many CEOs today have endorsed stakeholder-related goals in the everyday course of business. The Business Roundtable, for example, whose members are the CEOs of the largest U.S. public companies, issued a “Statement on the Purpose of the Corporation” in August 2019.<sup>1</sup> This statement, signed by 181 CEOs (including the CEOs of Amazon, Apple, and General Motors) expressed a

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1. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, <https://www.business-roundtable.org/opportunity-commitment> [<https://perma.cc/B8Q9-XT4U>].

“fundamental commitment to all of our stakeholders,” which included customers, employees, suppliers, and local communities.<sup>2</sup> Conspicuously last on the list was “[g]enerating long-term value for shareholders.”<sup>3</sup>

Some commentators reconcile the competing viewpoints of shareholder primacy and stakeholder capitalism with the claim that considering other constituencies will ultimately lead to long-term shareholder value. We agree that in many instances stakeholder governance enhances long-term corporate value. But this reconciliation assumes away the problem. Even the most strident opponents of stakeholder governance would support stakeholder-related initiatives that lead to long-term shareholder value. The intellectually interesting category is the subset of stakeholder initiatives that come at the expense of long-term shareholder value. It is here that the challenging legal and business questions arise.

In this Article, we make both a descriptive claim and a normative claim. The descriptive claim is that many public companies today at least appear to consider stakeholder interests in the ordinary course of business. However, those same considerations disappear in critical stages of the sale of the company. This “stakeholder amnesia” has not been widely observed by prior academic or practitioner commentators.

The normative claim is that corporate boards have the legal and practical ability to incorporate stakeholder interests into their dealmaking. We examine several of the most significant barriers that might preclude a board that otherwise embraces stakeholder governance from doing so in M&A—fiduciary duties, negotiation leverage, and contractual feasibility—to demonstrate that none of these barriers offers a compelling justification for stakeholder or ESG amnesia. Rather, boards that consider these objectives in dealmaking can act consistently with their fiduciary duties and often have the negotiation leverage to weave these objectives into their contractual agreements. We conclude that stakeholder considerations can pervade all aspects of managerial decision-making, including decisions about the sale of the company.

However, to the extent that corporate law does not currently give boards and managers the ability to consider ESG issues in the sale of the company, we argue that corporate law should make room to do so. Our proposal can be justified on straightforward efficiency grounds: if corporate boards had to consider solely shareholder value maximization in the sale of the company, buyers could offer terms that benefit shareholders in the short term but hurt other constituencies in ways that reduce overall societal value. A longstanding goal of corporate law is to encourage efficient (value-creating) transactions and deter inefficient (value-destroying) transactions.<sup>4</sup> An equally venerable literature in corporate law describes the ways that buyers can exploit externalities to benefit shareholders but hurt other constituencies.<sup>5</sup> Our proposal is a straightforward extension of these themes in corporate law to the modern context of stakeholder governance.

Importantly, our proposal does not *require* that corporate boards consider ESG and stakeholder interests in the sale of the company. Instead, it merely gives them the ability to do so. Critics might argue that our proposal gives boards too much discretion. But boards already have discretion to consider stakeholder factors in the everyday course of business;

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2. *Id.*

3. *Id.*

4. See sources cited *infra* note 247.

5. See *infra* note 249.

our proposal simply applies that discretion to the sale of the company. Just as a doctor should have the right (but not the obligation) to look at several measures in diagnosing the patient, important policy considerations dictate that boards should have the right to consider broader factors than just shareholder value maximization in determining whether to sell.

Our analysis proceeds as follows. Part I provides a motivating case study, involving the recent sale of Twitter (subsequently renamed “X”) to Elon Musk. Part II discusses the rise of stakeholder governance and ESG, as well as their growing role in everyday business operations. In this Part, we discuss the murky definitions of “stakeholder” and “ESG” and the brewing conflict between companies embracing stakeholder governance and their increasingly vocal critics. We also note that, despite these critics, there is growing support in scholarship and practice for considering stakeholder interests. In doing so, we document how companies increasingly embrace stakeholder governance.

Part III addresses the role of stakeholders and ESG in M&A transactions, arguing that despite the growing embrace of them in everyday business, these considerations largely go out the window at critical stages of M&A dealmaking. In this Part, we examine the role of ESG throughout the lifecycle of the deal, ranging from selecting a buyer/target to post-deal governance. Here, we underscore that stakeholder considerations have a role to play for boards in deciding whether to enter a transaction and for the parties in negotiating the terms of any transaction.

In Part IV, we examine three features of M&A that could function as barriers to boards incorporating their stakeholder objectives into their transactions. First, we demonstrate that boards generally have the legal ability to incorporate stakeholder considerations into dealmaking. In particular, we address how, outside of the *Revlon* context, boards can oppose a transaction on stakeholder and ESG grounds while comporting with their fiduciary duties under Delaware law. Next, we examine whether boards have the practical ability to incorporate stakeholder considerations into deal negotiations, arguing that devices like poison pills can generate sufficient negotiation leverage. Lastly, we turn to the feasibility of incorporating stakeholder and ESG-related provisions into M&A agreements. Here, we demonstrate that post-close protections for corporate stakeholders are virtually nonexistent in M&A agreements and provide a number of examples of how transaction planners could bridge this gap.

Part V provides the implications of our analysis for corporate governance and dealmaking. First, we situate the phenomenon of stakeholder amnesia in the broader governance landscape. We argue that when stakeholder interests are important to a board in the ordinary course of business, these considerations should pervade all aspects of managerial decision-making, including decisions about the sale of the company. In addition, we demonstrate that ESG and stakeholder considerations operate as tools for risk management. Lastly, we provide specific recommendations for boards of directors in their dealmaking, arguing in part for more substantial and meaningful director oversight to mitigate the risk of harm from self-interested managers. Throughout this Part, we also highlight the role of the deal lawyers in advising the board and structuring deal agreements.

## I. A MOTIVATING CASE STUDY: MUSK AND TWITTER

In January 2022, Elon Musk, the richest person in the world at the time, started to buy shares of the social media company Twitter.<sup>6</sup> Within a matter of weeks, Musk became Twitter's largest shareholder, acquiring 9.2% of the company.<sup>7</sup> In April 2022, Musk changed course from an activist shareholder agitating for change with his minority 9.2% stake to a potential acquirer by offering to purchase the company.<sup>8</sup>

On the day after Musk's offer, the Twitter board voted to unanimously adopt a "poison pill"—a type of defensive measure. Twitter's pill would substantially dilute an acquirer's stake by issuing shares to all other shareholders if the acquirer obtained 15% or more of Twitter's stock without the board's approval.<sup>9</sup> Musk, as a potential acquirer, was thus incentivized to negotiate with the board rather than to pursue a hostile acquisition, given the risk of dilution from triggering the pill.<sup>10</sup> Despite the Twitter board's initial reluctance to negotiate because of financing and other deal uncertainty, once Musk secured financing for his acquisition the Twitter board eventually agreed to enter negotiations.<sup>11</sup>

Twitter's agreement to negotiate with Musk surprised many given the deal uncertainty and parties' conflicting views of stakeholder governance and ESG-related matters. Twitter had long-embraced a stakeholder-centric model of governance to "promote the long-term interests of [its] stakeholders and help build public trust."<sup>12</sup> Among other things, Twitter's mission was to "bring [the] company and community together as a positive societal

6. Max Zahn, *A Timeline of Elon Musk's Tumultuous Twitter Acquisition*, ABC NEWS (Nov. 11, 2022), <https://abcnews.go.com/Business/timeline-elon-musks-tumultuous-twitter-acquisition-attempt/story?id=86611191>; James Clayton, *Elon Musk: How the World's Richest Person Bought Twitter*, BBC (Oct. 27, 2022), <https://www.bbc.com/news/technology-63408534> [<https://perma.cc/NLV3-NF8C>]; Twitter Inc., Proxy Statement Relating to a Merger or Acquisition (Form 14A) 45 (July 26, 2022) [hereinafter *Twitter 2022 Proxy Statement*]. After Musk acquired Twitter, he changed the name of the company to "X," reflecting his hopes to turn Twitter into an "everything app" from social networking to shopping and banking. See Ryan Mac & Tiffany Hsu, *From Twitter to X: Elon Musk Begins Erasing an Iconic Internet Brand*, N.Y. TIMES (July 24, 2023), <https://www.nytimes.com/2023/07/24/technology/twitter-x-elon-musk.html> (on file with the *Journal of Corporation Law*). Musk's decision to rebrand the company has been met with some criticism, with commentators highlighting Twitter's widespread brand recognition. *Id.* No longer is Twitter a "holy grail" and cultural phenomenon entrenched in the English lexicon, where posts became "tweets," "tweet" became a verb, and employees became "tweeps." *Id.* Because this Article discusses the Musk/Twitter deal and events that occurred largely before the name change, we use "Twitter" rather than "X" to refer to the company.

7. Twitter 2022 Proxy Statement, *supra* note 6, at 46; Twitter Inc., Schedule 13G (Mar. 14, 2022).

8. *Id.* at 46–48.

9. *Id.* at 50; Lauren Hirsch & Kate Conger, *Twitter Counters a Musk Takeover with a Time-Tested Barrier*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/business/twitter-poison-pill-elon-musk.html> (on file with the *Journal of Corporation Law*).

10. See Daniel P. Lefler, *Twitter's Board Handled Elon Musk Well*, WALL ST. J. (Apr. 27, 2022), <https://www.wsj.com/articles/twitter-board-of-directors-handled-elon-musk-well-acquisition-bought-free-speech-poison-pill-content-moderation-censorship-11651091583> (on file with the *Journal of Corporation Law*) ("Forcing a notoriously mercurial bidder with questionable financial capacity to deal with the board—which has the ability to negotiate deal terms that protect shareholders and others—was in line with its fiduciary responsibility.")

11. Twitter 2022 Proxy Statement, *supra* note 6, at 52–54.

12. *Governance Resources*, TWITTER, <https://investor.twitterinc.com/corporate-governance/Governance-Resources/default.aspx> [<https://perma.cc/JF9G-G5V6>].

force,”<sup>13</sup> “unite philanthropy with [its] business objectives,”<sup>14</sup> “be good stewards in the communit[y],”<sup>15</sup> and become “the world’s most inclusive, diverse, equitable, and accessible tech company”<sup>16</sup> as “a purpose-driven company that does good.”<sup>17</sup> The board’s Risk Committee was tasked to “focus on [the company’s] most important ESG issues”<sup>18</sup> like promoting and moderating public discourse and civic integrity on the platform, ensuring the fair compensation and treatment of Twitter employees, managing climate risks and promoting sustainability, and advancing humanitarian efforts.

Chief among Twitter’s goals were “protecting the health of the public conversation”<sup>19</sup> and ensuring that the conversation is “safe, inclusive and authentic.”<sup>20</sup> Twitter’s Hateful Conduct Policy sought to prevent efforts to “promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.”<sup>21</sup> In connection with this approach, Twitter would immediately and permanently suspend accounts engaging in hateful conduct.<sup>22</sup> Perhaps among the most notable were the suspensions of Donald Trump for the risk of further incitement of violence in the wake of the January 6, 2021 attack on the U.S. Capitol<sup>23</sup> and rapper Kanye West for antisemitic language.<sup>24</sup> Twitter also took steps to eliminate misinformation, conspiracy theories, and false

13. *Id.*

14. TWITTER, 2020 GLOBAL IMPACT REPORT 2 (2020), <https://about.twitter.com/content/dam/about-twitter/en/company/global-impact-2020.pdf> [https://perma.cc/DF2U-22MM].

15. *Id.*

16. *Inclusion, Diversity, Equity, and Accessibility*, TWITTER, <https://careers.twitter.com/en/diversity.html> [https://perma.cc/7U87-XS4Y].

17. TWITTER, *supra* note 14, at 4.

18. *Id.* at 18.

19. *Healthy Conversations*, TWITTER, <https://about.twitter.com/en> [https://perma.cc/3NFT-HNME].

20. *Id.* (Twitter’s then-CEO Parag Agarwal summarized the company’s approach as follows: “[O]ur role is to serve a healthy public conversation and our moves are reflective of things that we believe lead to a healthier public conversation.”); Annabelle Timsit, *Who Is Twitter’s New CEO, Parag Agrawal? 5 Things to Know*, WASH. POST (Nov. 30, 2021), <https://washingtonpost.com/technology/2021/11/30/new-twitter-ceo-parag-agrawal/> (on file with the *Journal of Corporation Law*).

21. *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [https://web.archive.org/web/20220312225215/https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy]. Twitter also noted that individuals from historically underrepresented and marginalized communities were disproportionately subjected to online abuse, further underscoring the need for strong protections. *Id.* (“Research has shown that some groups of people are disproportionately targeted with abuse online. This includes[:] women, people of color, lesbian, gay, bisexual, transgender, queer, intersex, asexual individuals, marginalized and historically underrepresented communities.”).

22. *Id.* (“[W]e have a zero tolerance policy against violent threats. Those deemed to be sharing violent threats will face immediate and permanent suspension of their account.”).

23. Twitter, *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/suspension](https://blog.twitter.com/en_us/topics/company/2020/suspension) [https://perma.cc/86AV-F4GF].

24. See Jamiel Lynch & David Williams, *Kanye West’s Twitter Account Locked for Antisemitic Tweet*, CNN (Oct. 10, 2022), <https://www.cnn.com/2022/10/09/entertainment/kanye-west-twitter-account-locked/index.html> [https://perma.cc/5HXQ-88PY] (providing and discussing Kanye West’s now-deleted tweets). After closing, Musk would reinstate nearly all previously banned accounts, including Kanye West’s account. See Rob McLean, *Kanye West’s Twitter Account Has Been Suspended After Elon Musk Says It Violated Rule Against Incitement to Violence*, CNN BUS. (Dec. 2, 2022), <https://www.cnn.com/2022/12/02/tech/elon-musk-kanye-west-twitter-suspension/index.html> [https://perma.cc/GFY9-EY8W]. However, Musk would then re-suspend Kanye West’s

narratives across a number of contexts, including elections and COVID-19.<sup>25</sup> These and Twitter's other policies were not without controversy.<sup>26</sup>

Philanthropic efforts at Twitter were also widespread. These efforts included donating \$1 million to media organizations that “advocate for the rights of vulnerable reporters” and “guarantee an equal share of voice for women in the industry,”<sup>27</sup> founding a socially responsible investment fund to bring \$1 billion in capital to underserved individuals and communities,<sup>28</sup> donating over \$5 million in financial grants to 116 nonprofits globally, providing \$4.5 million in pro bono advertising credits for over 550 nonprofits in a single year, and supporting the Black Lives Matter movement by donating \$500,000 to the National Association of Black Journalists and the Equal Justice Initiative.<sup>29</sup> In addition, Twitter organized biannual company-wide days of service, volunteering over 4,000 hours of service in 2020 alone.<sup>30</sup>

Twitter also pursued its commitment to the flexibility, diversity, and well-being of its employees, dubbed “Tweeps.”<sup>31</sup> Twitter was one of the first companies to allow remote work during COVID-19, emphasizing the company's “responsibility to support our communities” and declaring that “[o]ur top priority remains the health and safety of our Tweeps.”<sup>32</sup> The company underscored that employees would be allowed to work from

account after he once again tweeted an antisemitic message, this time an altered image of the Star of David with a swastika inside. *Id.*

25. For example, to “protect the conversation on Twitter during elections or other civic processes,” Twitter created a civic integrity team. See *Expanding Our Policies to Further Protect the Civic Conversation*, TWITTER (Sept. 10, 2020), <https://about.twitter.com/en/our-priorities/civic-integrity> [[https://web.archive.org/web/20240126205750/https://blog.twitter.com/en\\_us/topics/company/2020/civic-integrity-policy-update](https://web.archive.org/web/20240126205750/https://blog.twitter.com/en_us/topics/company/2020/civic-integrity-policy-update)]. In response to the COVID-19 pandemic, Twitter helped users find reliable information by adding a designated tab with curated pages, public service announcements, and Tweets from experts, as well as elevating credible, authoritative content to the top of search results. Twitter, *Coronavirus: Staying Safe and Informed on Twitter*, TWITTER BLOG (Jan. 12, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/covid-19#protecting](https://blog.twitter.com/en_us/topics/company/2020/covid-19#protecting) [<https://perma.cc/YHT8-89KT>] [hereinafter *Coronavirus on Twitter*]. Twitter also removed nearly 100,000 tweets and suspended more than 11,000 accounts for violating its COVID-19 misinformation policy. *COVID-19 Misinformation*, TWITTER, <https://transparency.twitter.com/en/reports/covid19.html#item1:2021-jul-dec> [<https://web.archive.org/web/20240916194028/https://transparency.x.com/en/reports/covid19#2021-jul-dec>].

26. See, e.g., *Missouri v. Biden*, 83 F.4th 350, 392 (5th Cir. 2023) (finding that “unrelenting pressure from certain government officials likely had the intended result of suppressing millions of protected free speech postings by American citizens”) (internal quotations omitted), *overruled by* *Murthy v. Missouri*, 144 S. Ct. 1972 (2024); Kate Conger & Mike Isaac, *In Reversal, Twitter is No Longer Blocking New York Post Article*, N.Y. TIMES (Apr. 17, 2021), <https://www.nytimes.com/2020/10/16/technology/twitter-new-york-post.html> (on file with the *Journal of Corporation Law*) (discussing Twitter's “backtracking” on its decision to limit distribution of a *New York Post* article about Hunter Biden).

27. *Coronavirus on Twitter*, *supra* note 25.

28. TWITTER, *supra* note 14, at 3. Twitter committed \$100 million for long-term, below-market-rate loans. *Id.*

29. *Id.* at 40–45.

30. *Id.* at 43.

31. *Tweep Life*, TWITTER (Apr. 16, 2021), <https://careers.twitter.com/en/tweep-life.html> [<https://web.archive.org/web/20210416011330/https://careers.twitter.com/en/tweep-life.html>] (“We take care of the whole you—from physical and mental to financial and professional. So no worries, we got you.”); *id.* (emphasizing “[w]e put people first” and that Twitter “take[s] care of our Tweeps”).

32. *Coronavirus on Twitter*, *supra* note 25. For contractors, vendors, and hourly workers who were not able to work from home, Twitter continued to pay their labor costs. *Id.* For parents impacted by daycare closures, Twitter provided daycare reimbursement. *Id.*

home “forever.”<sup>33</sup> Twitter’s “work from anywhere” policy implemented during the pandemic also dovetailed with its commitments to recruiting and retaining a diverse workforce by increasing workforce diversity.<sup>34</sup> In addition, Twitter tied executive pay, in part, to achieving diversity goals.<sup>35</sup> As a result of Twitter’s efforts, “Black workers were more than twice as likely to accept a job from Twitter [in 2021] compared with the prior year, and for Latinx applicants there was nearly a fivefold improvement.”<sup>36</sup> The company also committed to pay transparency and equal pay for equal work, reporting that women and underrepresented minorities earned 100% of the amount earned by equivalent male employees in the U.S.<sup>37</sup> Twitter also matched employee donations by up to \$2,000 per employee,<sup>38</sup> raising \$4 million in 2020 alone, approximately half from Twitter and half from its employees, for nonprofits around the world.<sup>39</sup>

In addition, Twitter embraced various environmental objectives, emphasizing that it was “committed to corporate responsibility and sustainability, which promote the long-term interests of [its] stakeholders.”<sup>40</sup> In 2019, Twitter started working with a nonprofit to offset emissions by funding green projects around the world<sup>41</sup> and converted over 300,000 square feet of office space to 100% renewable energy.<sup>42</sup> By 2020, 92% of Twitter’s global offices achieved “Green Building Certified” status.<sup>43</sup> In 2021, Twitter signed a pledge to significantly reduce greenhouse gas emissions, and in 2022 Twitter joined the EU Climate Pact.<sup>44</sup> Twitter also made significant progress on waste management—in 2019, the

33. Jennifer Christie, *Keeping Our Employees and Partners Safe During #coronavirus*, TWITTER BLOG (May 12, 2020), [https://blog.x.com/en\\_us/topics/company/2020/keeping-our-employees-and-partners-safe-during-coronavirus](https://blog.x.com/en_us/topics/company/2020/keeping-our-employees-and-partners-safe-during-coronavirus) [<https://perma.cc/QY4Q-CJL5>]; *Coronavirus on Twitter*, *supra* note 25 (“Opening offices will be our decision, when and if our employees come back, will be theirs.”).

34. The proportion of Black workers among Twitter’s U.S. workforce increased from 6.9% in 2020 to 9.4% in 2021, and the share of Latinx workers rose from 5.5% to 8% during that same period. Jeff Green & Kurt Wagner, *‘Work from Anywhere’ Helped Twitter Boost Black, Latinx Hires*, BLOOMBERG (Jan 13, 2022), <https://www.bloomberg.com/news/articles/2022-01-12/twitter-leaned-on-work-from-anywhere-to-recruit-more-black-latinx-employees#xj4y7vzkg> (on file with *the Journal of Corporation Law*). In 2020, Twitter promised that by 2025 women would be 50% of its workforce and that other underrepresented groups would be 25% of the workforce. *Id.*

35. *Id.*

36. *Id.*

37. TWITTER, *supra* note 14, at 30.

38. *Coronavirus on Twitter*, *supra* note 25.

39. TWITTER, *supra* note 14, at 43.

40. TWITTER, *supra* note 12 (highlighting “protecting the environment, reducing [its] carbon footprint, and fostering long-term sustainability projects”).

41. See Colin Crowell, *Taking Steps Toward Sustainability this Earth Day*, TWITTER BLOG (Apr. 22, 2019), [https://blog.twitter.com/en\\_us/topics/company/2019/taking-steps-toward-sustainability-this-earth-day](https://blog.twitter.com/en_us/topics/company/2019/taking-steps-toward-sustainability-this-earth-day) [<https://perma.cc/3QYZ-K5VH>] (discussing partnering with the San Francisco Parks Alliance to clean Cayuga Park); Global Government Affairs (@GlobalAffairs), TWITTER (Feb. 2, 2022), <https://twitter.com/Policy/status/1488890378107424774?s=20&t=jkutu3xVvuB53nb-lZsLHQ> [<https://perma.cc/LLR6-UUHB>] (reporting that Twitter “joined the #EUClimatePact alongside @EUClimateAction!”). By vote of Twitter’s employees, the three financial beneficiaries of Twitter’s offsetting initiatives were: protecting Brazil’s Jacundá Forest Reserve; tree-planting in India, Kenya and Uganda; and biodiversity projects in Indonesia. TWITTER, *supra* note 14, at 47.

42. TWITTER, *supra* note 14, at 48.

43. *Id.*

44. Sean Boyle & Casey Junod, *Accelerating Our Climate Commitments on Earth Day*, TWITTER BLOG (Apr. 22, 2021), [https://blog.x.com/en\\_us/topics/company/2022/accelerating-our-climate-commitments-on-earth-day](https://blog.x.com/en_us/topics/company/2022/accelerating-our-climate-commitments-on-earth-day) [<https://perma.cc/KD3W-BUBG>].



company introduced 100% recycled content mailer packages in its San Francisco location, and in 2020 composting was adopted as standard practice in 87% of Twitter's direct leased office space.<sup>45</sup> In addition, Twitter banned "misleading advertisements on Twitter that contradict the scientific consensus on climate change."<sup>46</sup>

Underscoring its stakeholder-centric approach, Twitter widely embraced another "core value" of "[d]efending and respecting the user's voice."<sup>47</sup> Under this policy, Twitter has challenged court orders to remove content or disclose user data, worked to support legal changes that enhance user privacy, created a Trust and Safety team to protect users, and published a transparency report bi-annually for nearly a decade.<sup>48</sup> Twitter has emphasized that it has "a responsibility to the public—particularly during periods of crisis—to proactively enforce our rules, preserve access to Twitter, elevate credible and reliable information, protect the privacy and safety of the people who use our service and others, and guard against efforts to manipulate the public conversation."<sup>49</sup> For example, following Russia's invasion of Ukraine, Twitter promptly suspended all advertising in the country<sup>50</sup> and limited content from over 300 Russian government accounts, "including that of Russian President Vladimir Putin."<sup>51</sup> Preliminary data indicates that engagement with Russian government accounts declined by 25% per Tweet, and "[t]he number of accounts that engaged with those Tweets decreased by 49%."<sup>52</sup> In a matter of weeks, Twitter labeled nearly 1 million unique Tweets containing links to Russian state-affiliated media, rendering them ineligible for amplification or recommendation.<sup>53</sup>

Musk, in contrast, had established himself as skeptical, if not hostile, toward ESG. He called ESG a "scam" that has "been weaponized by phony social justice warriors,"<sup>54</sup> described ESG as "the Devil Incarnate,"<sup>55</sup> and declared, among other things, that "ESG

45. TWITTER, *supra* note 14, at 50.

46. Boyle & Junod, *supra* note 44.

47. *Defending and Respecting the Rights of People Using Our Service*, TWITTER, <https://help.x.com/en/rules-and-policies/defending-and-respecting-our-users-voice> [<https://perma.cc/DTX6-XRSR>].

48. *Id.*

49. Sinéad McSweeney, *Our Ongoing Approach to the War in Ukraine*, TWITTER BLOG (Mar. 16, 2022), [https://blog.x.com/en\\_us/topics/company/2022/our-ongoing-approach-to-the-war-in-ukraine](https://blog.x.com/en_us/topics/company/2022/our-ongoing-approach-to-the-war-in-ukraine) [<https://perma.cc/L5SU-XRZ6>].

50. *Id.* (emphasizing Twitter's opposition to Russia's actions).

51. James Clayton, *Twitter Moves to Limit Russian Government Accounts*, BBC (Apr. 5, 2022), <https://www.bbc.com/news/technology-60992373> [<https://perma.cc/W8A7-BXC5>].

52. McSweeney, *supra* note 49; Elizabeth Dvoskin & Cat Zakrzewski, *Facebook and TikTok Ban Russian State Media in Europe*, WASH. POST (Feb. 28, 2022), <https://www.washingtonpost.com/technology/2022/02/28/facebook-ukraine-russian-disinformation/> (on file with the *Journal of Corporation Law*) (noting that Twitter stopped recommending tweets with these links and blocked them from appearing in its "Top Search" suggestions).

53. McSweeney, *supra* note 49 (noting that these interventions are estimated to have reduced the reach of such content by 30%).

54. Andrew Ross Sorkin et al., *Elon Musk's Next Target*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/business/dealbook/elon-musk-tesla-esg.html> (on file with the *Journal of Corporation Law*).

55. Elon Musk (@elonmusk), TWITTER (Apr. 3, 2022), <https://twitter.com/elonmusk/status/1510485792296210434> [<https://perma.cc/Q9SE-JPEY>].

should be deleted if not fixed.”<sup>56</sup> As a co-founder and CEO of Tesla, Musk led the company to underperform relative to its peers on a number of ESG metrics.<sup>57</sup> Musk has opposed ESG-related efforts related to climate change<sup>58</sup> and repeatedly expressed divergent ESG-related views from Twitter on matters including the COVID-19 pandemic;<sup>59</sup> Russia’s invasion of Ukraine;<sup>60</sup> and free speech.<sup>61</sup> In contrast to Twitter’s content-moderation approach, self-described “free-speech absolutist” Musk took a laissez-faire approach: “By ‘free speech’, I simply mean that which matches the law.”<sup>62</sup> Musk emphasized that “Twitter needs to be transformed,”<sup>63</sup> opposed Twitter’s long-standing, zero-tolerance Hateful

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56. Elon Musk (@elonmusk), TWITTER (Mar. 8, 2022), <https://twitter.com/elonmusk/status/1501263095607574532> [<https://perma.cc/C74H-AGH6>]

57. For example, while approximately 90% of America’s most prominent companies meet the “gold standard for transparency on racial representation,” Tesla is absent from this group. Jeff Green, Katherine Chiglinsky & Cedric Sam, *America’s Top Employers Are Winning at Race Data Transparency—Except Musk and Buffett*, BLOOMBERG (Mar. 21, 2022), <https://www.bloomberg.com/graphics/diversity-equality-in-american-business/> (on file with the *Journal of Corporation Law*); Sorkin et al., *supra* note 54. Despite making electric cars, and thereby doing enormous good for the “E” part of ESG, Tesla was removed from the S&P 500’s ESG index in May 2022. David Blackmon, *Musk Lashes Out at ESG as The Brand Starts to Lose its Luster*, FORBES (May 21, 2022), <https://www.forbes.com/sites/davidblackmon/2022/05/21/musk-lashes-out-at-esg-as-the-brand-starts-to-lose-its-luster/> [<https://perma.cc/HYS9-9K4F>] Tesla’s stock price fell more than 7% on the day after its removal was announced. *Id.*

58. For example, Musk has opposed government incentives to combat climate change, including President Biden’s Build Back Better legislation (despite receiving \$4.9 billion in government support for Tesla, SpaceX, and Solar City since 2010). See Margo T. Oge, *Where Does Elon Musk Really Stand on Fighting Climate Change?*, FORBES (Jan. 17, 2022), <https://www.forbes.com/sites/margooge/2022/01/17/where-does-elon-musk-really-stand-on-fighting-climate-change/> [<https://perma.cc/U9BM-8G7J>] (contrasting Musk’s previous enjoyment of government subsidies with his skepticism of the Build Back Better legislation).

59. See Joe Walsh, *Elon Musk’s False Covid Predictions: A Timeline*, FORBES (Mar. 13, 2021), <https://www.forbes.com/sites/joewalsh/2021/03/13/elon-musks-false-covid-predictions-a-timeline/> (on file with the *Journal of Corporation Law*) (quoting Musk asserting vaccines cause “quite a few negative reactions” and “kids are essentially immune”).

60. Elon Musk (@elonmusk), TWITTER (Mar. 4, 2022), <https://twitter.com/elonmusk/status/1499976967105433600> [<https://perma.cc/SLL7-E3QP>] (declaring that, unlike other internet providers, the satellite internet constellation he runs through SpaceX would not block Russian news sources “unless at gunpoint”). Before the deal with Twitter closed, Musk described Russian-owned media as offering “some good points.” Zach Schonfeld, *Musk Said Russian Media Had ‘Lot of Bulls—, but Some Good Points too’ After Ukraine Invasion*, THE HILL (Sept. 29, 2022), <https://thehill.com/policy/technology/3667902-musk-said-russian-media-had-lot-of-bulls-but-some-good-points-too-after-ukraine-invasion/> [<https://perma.cc/MVR8-JCTF>]. He also suggested a peace agreement that was described as “very positive” by the Kremlin. See Carly Olson, *Elon Musk Weighs in on How to End the War in Ukraine*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/world/europe/elon-musk-ukraine-war-tweets.html> (on file with the *Journal of Corporation Law*).

61. Elon Musk (@elonmusk), TWITTER (Apr. 26, 2022), <https://twitter.com/elonmusk/status/1519036983137509376> [<https://perma.cc/S8DB-YU3Q>]

62. *Id.*

63. Twitter Inc., Amendment No. 2 to Schedule 13D/A (Apr. 13, 2022).

Conduct Policy by arguing that “timeouts . . . are better than sort of permanent bans;”<sup>64</sup> and supported reducing content moderation to remove guardrails on free speech.<sup>65</sup>

To summarize, Twitter previously had a long-established commitment to its stakeholders and ESG matters. Musk represented a known threat to these commitments. Nevertheless, in negotiating the sale of Twitter to Musk, the Twitter board succumbed to “stakeholder amnesia”—abandoning its ESG commitments in favor of a high-premium, all-cash offer from Musk. The parties entered into an agreement on April 25, 2022, to sell Twitter for \$54.20 per share in cash.<sup>66</sup>

Shortly thereafter, stock prices across the technology sector sharply declined.<sup>67</sup> Musk then sought to escape the deal, alleging that Twitter materially breached the merger agreement by failing to disclose information and by making false and misleading representations.<sup>68</sup> Musk claimed, among other things, that Twitter erroneously reported that less than 5% of users were spam (or “bot”) accounts and that Twitter failed to provide the information necessary for Musk to calculate the number of bot accounts on the site, which Musk argued was a violation of the merger agreement.<sup>69</sup>

Twitter responded by filing suit in the Delaware Court of Chancery to enforce the provision of the merger agreement that entitled Twitter to obtain specific performance, which would compel Musk to complete the deal.<sup>70</sup> Shortly before trial, Musk agreed to

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64. *Elon Musk Talks Twitter, Tesla and How His Brain Works*, TED (Apr. 14, 2022), [https://www.ted.com/talks/elon\\_musk\\_elon\\_musk\\_talks\\_twitter\\_tesla\\_and\\_how\\_his\\_brain\\_works\\_live\\_at\\_ted2022/transcript?subtitle=en](https://www.ted.com/talks/elon_musk_elon_musk_talks_twitter_tesla_and_how_his_brain_works_live_at_ted2022/transcript?subtitle=en) [<https://perma.cc/FA7Z-8GPV>]. Unsurprisingly, shortly after signing Musk declared that he would reverse Twitter’s ban of Donald Trump’s account. Mike Isaac, *Elon Musk Says He Would ‘Reverse the Permanent Ban’ of Donald Trump on Twitter*, N.Y. TIMES (May 10, 2022), <https://www.nytimes.com/2022/05/10/technology/elon-musk-donald-trump-twitter-ban.html> (on file with the *Journal of Corporation Law*).

65. See Elizabeth Dwoskin, *Elon Musk Wants a Free Speech Utopia. Technologists Clap Back*, WASH. POST (Apr. 18, 2022), <https://www.washingtonpost.com/technology/2022/04/18/musk-twitter-free-speech/> (on file with the *Journal of Corporation Law*) (“Elon Musk’s vision for Twitter is a public town square where there are few restrictions on what people can or can’t say on the Internet.”).

66. Lauren Feiner, *Twitter Accepts Elon Musk’s Buyout Deal*, CNBC (Apr. 25, 2022), <https://www.cnbc.com/2022/04/25/twitter-accepts-elon-musks-buyout-deal.html> [<https://perma.cc/Z7RC-EN2U>].

67. Damian J. Troise, *Dow, S&P, NASDAQ Tech Stocks Closed Lower Tuesday a Day After Musk Bought Twitter*, USA TODAY (Apr. 26, 2022), <https://www.usatoday.com/story/money/markets/2022/04/26/elon-musk-deal-twitter/9538624002/> [<https://perma.cc/3XKA-WBNG>] (noting industry-wide declines and a 2.9% and 11% decline for Twitter and Tesla respectively).

68. Twitter 2022 Proxy Statement, *supra* note 6, at 77–81 (detailing the letter from Musk’s counsel purporting to exercise his right to terminate the merger agreement).

69. See *id.*; see also Elon Musk (@elonmusk), TWITTER (May 13, 2022), <https://twitter.com/elonmusk/status/1525049369552048129> [<https://perma.cc/H3P2-PFXD>] (“Twitter deal temporarily on hold pending details supporting calculation that spam/fake accounts do indeed represent less than 5% of users.”). It is dubious whether Musk would have succeeded on this claim. While Musk alleged that such “false and misleading representations” amounted to a material adverse effect under the merger agreement, Twitter had publicly, expressly, and repeatedly qualified its 5% estimate of the proportion of bots. Twitter 2022 Proxy Statement, *supra* note 6, at 77; see, e.g., Twitter Inc., Annual Report (Form 10-K) 5 (Feb. 16, 2021) (stating that it applied “significant judgment” in reaching the estimate and cautioning that its estimate “may not accurately represent the actual number of such accounts”).

70. See Verified Complaint at ¶ 147, *Twitter, Inc. v. Musk*, No. 2022-0613, 2022 WL 2713259 (Del. Ch. July 12, 2022) (“Swift remedial action in the form of specific performance and injunctive relief is warranted.”);

complete the transaction for the previously agreed-upon price of \$54.20 per share.<sup>71</sup> The deal closed on October 27, 2022, with Musk announcing, in a now-viral Tweet, that “the bird is freed.”<sup>72</sup> As a result of the acquisition, Twitter’s executives received over \$74 million and its shareholders received a 38% premium on their shares.<sup>73</sup>

Twitter’s stakeholders, however, did not fare as well. Under Musk’s leadership, Twitter laid off more than 75% of its employees in a matter of weeks,<sup>74</sup> including content moderators, the entire human rights and global conflicts team, and all but two of its ethical artificial intelligence teams.<sup>75</sup> These layoffs disproportionately affected women, people of color, and other minority groups.<sup>76</sup> The layoff process has been described as indicative of a “lack of care and thoughtfulness”<sup>77</sup> and “a particularly inhumane way to treat [employees].”<sup>78</sup> Those employees who survived the mass layoffs were now expected to work 80-

X Holdings I, Inc., X Holdings II, Inc., & Twitter, Inc., Agreement and Plan of Merger by and among X Holdings I, Inc., X Holdings II, Inc., and Twitter, Inc. 70 (Apr. 25, 2022) [hereinafter Musk/Twitter Merger Agreement] (“Accordingly, the parties hereto acknowledge and agree that the parties hereto shall be entitled to an injunction, specific performance and other equitable relief to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof, in addition to any other remedy to which they are entitled at law or in equity.”).

71. See Kate Conger & Lauren Hirsch, *Elon Musk Complete \$44 Billion Deal to Own Twitter*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html> (on file with the *Journal of Corporation Law*).

72. Elon Musk (@elonmusk), TWITTER (Oct. 27, 2022), <https://twitter.com/elonmusk/status/1585841080431321088> [<https://perma.cc/7E39-TJWJ>]; Thierry Breton, the European Union Commissioner for the internal market, responded with his own tweet that “[i]n Europe, the bird will fly by our rules.” Thierry Breton (@ThierryBreton), TWITTER (Oct. 28, 2022), <https://twitter.com/ThierryBreton/status/1585902196864045056> [<https://perma.cc/688V-PGS2>] Commissioner Breton referenced the EU Digital Services Act, which regulates social media in the EU. *Id.*

73. Lucian A. Bebchuk, Kobi Kastiel & Anna Toniolo, *How Twitter Pushed Stakeholders Under the Bus*, 28 STAN. J.L. BUS. & FIN. 307, 315 (2023).

74. Kate Conger, Ryan Mac & Mike Isaac, *In Latest Round of Job Cuts, Twitter is Said to Lay Off at Least 200 Employees*, N.Y. TIMES (Feb. 26, 2023), <https://www.nytimes.com/2023/02/26/technology/twitter-layoffs.html> (on file with the *Journal of Corporation Law*).

75. Barbara Ortutay & Matt O’Brien, *Elon Musk Defends Twitter Layoffs as Critics See a ‘Lack of Care and Thoughtfulness’*, FORTUNE (Nov. 5, 2022), <https://fortune.com/2022/11/05/elon-musk-twitter-layoffs-critics-lack-of-care-thoughtfulness/> [<https://perma.cc/EQ6X-W5YH>] [hereinafter Ortutay & O’Brien, *Musk Defends*]; Barbara Ortutay & Matt O’Brien, *Elon Musk Fires Outsourced Content Moderators Who Track Hate and Harmful Posts on Twitter*, FORTUNE (Nov. 13, 2022), <https://fortune.com/2022/11/13/twitter-elon-musk-fires-outsourced-content-moderators-track-hate-harmful> [<https://perma.cc/X4JB-RQEG>].

76. Twitter allegedly laid off 57% of its female employees and only 47% of its male employees (including 63% of women in engineering-related roles compared to only 48% of men in similar roles). See Class Action Complaint & Jury Demand at ¶ 31, 35, *Strifling, v. Twitter, Inc.*, No. 22-cv-07739, 2022 WL 17633657 (N.D. Cal. Dec. 7, 2022). Employees on work visas who lost their jobs also had their immigration status jeopardized, with a race against the clock to find a new company to sponsor them within 60 days or to leave the United States entirely. Ankita Sen, *Mass Twitter Layoffs Put H-1B Visa Holders in an Immigration Limbo*, ECON. TIMES (Nov. 6, 2022), <https://economictimes.indiatimes.com/nri/migrate/mass-twitter-layoffs-put-h-1b-visa-holders-in-an-immigration-limbo/articleshow/95319316.cms?from=mdr> [<https://perma.cc/4WLM-R672>].

77. Ortutay & O’Brien, *Musk Defends*, *supra* note 75.

78. Kate Conger, Ryan Mac & Mike Isaac, *Confusion and Frustration Reign as Elon Musk Cuts Half of Twitter’s Staff*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/technology/elon-musk-twitter-layoffs.html> (on file with the *Journal of Corporation Law*). In one now infamous incident, employee Haraldur Thorleifsson found himself locked out of his employee account and asked Musk via tweet whether he had been laid off. See Barbara Ortutay, *Elon Musk Apologizes After Mocking Disabled Twitter Employee*, AP NEWS (Mar.

hour weeks<sup>79</sup> with a minimum of 40 of those hours in the office.<sup>80</sup> Employees also saw a marked reduction in workplace benefits, with Musk reportedly slashing paid parental leave by as much as 90%<sup>81</sup> and converting some Twitter offices into bedrooms for staff to sleep in.<sup>82</sup>

Musk also moved swiftly after closing to reinstate nearly all previously banned accounts, including former president Donald Trump's, and discontinue various misinformation and conduct policies.<sup>83</sup> Unsurprisingly, the amount of hate speech on Twitter

7, 2023), <https://apnews.com/article/twitter-musk-iceland-fired-wheelchair-haraldur-employee-0329405846dac8f1f08ac55594881bb6> [https://perma.cc/Q59P-H9NE]. Musk alleged that Thorleifsson, who has muscular dystrophy and uses a wheelchair, “did no actual work, [and] claimed as an excuse that he had a disability that prevented him from typing.” Elon Musk (@elonmusk), TWITTER (Mar. 7, 2023), <https://twitter.com/elonmusk/status/1633011448459964417> [https://perma.cc/6Y37-6W3W]. Musk later re-instated Thorleifsson's job and apologized for the tweet. See Elon Musk (@elonmusk), TWITTER (Mar. 7, 2023), [https://twitter.com/elonmusk/status/1633253950198624257?s=46&t=-O17gPTgp9t\\_svwBrrg2bA](https://twitter.com/elonmusk/status/1633253950198624257?s=46&t=-O17gPTgp9t_svwBrrg2bA) [https://perma.cc/TK3F-FMD6] (claiming the misunderstanding “was based on things I was told that were untrue or, in some cases, true, but not meaningful”).

79. Ed Ludlow et al., *Musk Warns Twitter Bankruptcy Possible as Senior Executives Exit*, BLOOMBERG (Nov. 10, 2022), <https://www.bloomberg.com/news/articles/2022-11-10/musk-tells-twitter-staff-social-network-s-bankruptcy-is-possible> (on file with the *Journal of Corporation Law*).

80. Ian Johnston, Cristina Criddle & Hannah Murphy, *Elon Musk Bans Remote Work at Twitter*, FIN. TIMES (Nov. 10, 2022), <https://www.ft.com/content/899bb401-1ab0-43aa-8ab1-102111b49568> (on file with the *Journal of Corporation Law*). Shortly after the deal closed, Musk sent a Google form to all employees, requiring them to agree to work “long hours at high intensity” to remain at Twitter. Faiz Siddiqui & Jeremy B. Merrill, *Musk Issues Ultimatum to Staff: Commit to ‘Hardcore’ Twitter or Take Severance*, WASH. POST (Nov. 16, 2022), <https://www.washingtonpost.com/technology/2022/11/16/musk-twitter-email-ultimatum-termination/> (on file with the *Journal of Corporation Law*). Approximately 500 employees declined to do so and quit. Alex Heath & Mia Sato, *Hundreds of Employees Opt Out of Elon Musk's ‘Extremely Hardcore’ Twitter*, THE VERGE (Nov. 17, 2022), <https://www.theverge.com/2022/11/17/23465274/hundreds-of-twitter-employees-resign-from-elon-musk-hardcore-deadline> [https://perma.cc/6JZ8-M4P3].

81. Kate Conger (@kateconger), TWITTER (Apr. 25, 2023), <https://twitter.com/kateconger/status/1650971981909741572> [https://perma.cc/UT44-7ZUR] (a New York Times reporter citing to an internal email).

82. Dani Anguiano, *Elon Musk Accused of Turning Twitter Offices into Bedrooms*, THE GUARDIAN (Dec. 8, 2022), <https://www.theguardian.com/technology/2022/dec/07/twitter-san-francisco-investigating-offices-converted-bedrooms> [https://perma.cc/C8B8-CKNB].

83. See Elon Musk (@elonmusk), TWITTER (Nov. 19, 2022), <https://twitter.com/elonmusk/status/1594131768298315777> [https://perma.cc/8DR3-BS8G] (“The people have spoken. Trump will be reinstated. Vox Populi, Vox Dei.”); see also Taylor Lorenz, *‘Opening the Gates of Hell’: Musk Says He Will Revive Banned Accounts*, WASH. POST (Nov. 24, 2022), <https://www.washingtonpost.com/technology/2022/11/24/twitter-musk-reverses-suspensions/> (on file with the *Journal of Corporation Law*); *COVID-19 Misinformation*, TWITTER, <https://transparency.twitter.com/en/reports/covid19.html#item1:2021-jul-dec> [https://perma.cc/59DH-6X5R] (“Effective November 23, 2022, [Twitter] is no longer enforcing the COVID-19 misleading information policy.”). Following these reinstatements and Musk's reversal of Twitter's ban on political ads—created by Twitter in 2019 to prevent the spread of election misinformation—false narratives and misinformation about voting permeated Twitter in the lead-up to the 2022 midterm elections. Tiffany Hsu, *Elon Musk's Twitter Did Not Perform at Its Best on Election Day*, N.Y. TIMES (Nov. 9, 2022), <https://www.nytimes.com/2022/11/09/technology/elon-musk-twitter-marcopa-election-false-claims.html> (on file with the *Journal of Corporation Law*). Musk has also faced sharp criticism for his approach to labeling certain media accounts as government or state affiliated media (and then removing these labels entirely). See Matt O'Brien, *NPR Quits Elon Musk's Twitter Over ‘Government-Funded’ Label*, AP NEWS (Apr. 12, 2023), <https://apnews.com/article/npr-quits-twitter-stateaffiliated-media-label-elon-musk-94afa8e82cdc4bfc784a70725c9a8839> [https://perma.cc/A7S6-YHVZ]. Twitter has lifted account

surged following the deal closing, with slurs against Black Americans tripling,<sup>84</sup> antisemitic speech increasing by more than 60%,<sup>85</sup> and an increase in the use of specific misogynistic (33%), transphobic (62%), and homophobic (58%) slurs.<sup>86</sup> Reports have also found greater engagement with tweets containing slurs (273%).<sup>87</sup> Moreover, videos featuring hate speech, violence, and child abuse have racked up millions of views and thousands of retweets and likes following Musk's removal of guardrails and reductions in content moderation policies.<sup>88</sup>

The proliferation of hate speech and Twitter's inaction has landed the company in trouble globally, with Germany threatening Twitter with a €50 million fine for failing to tackle "illegal content" such as hate speech, personal threats, defamation, and antisemitism.<sup>89</sup> In addition, Twitter has complied with over 80% of government requests for censorship since Musk took over, many of which relate to blocking content critical of governments or leaders in foreign countries, including those accused of horrific crimes.<sup>90</sup> We take no position on whether Twitter's compliance with government requests was correct. Rather, we simply observe that the compliance seems to be in tension with Musk's self-

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restrictions, including 300 official Russian government accounts, Putin's among them, which had been accused of spreading misinformation, and has declined to censor content posted by Russian officials. Luc Olinga, *Elon Musk Makes Big Change About Russian Propaganda*, THE STREET (Apr. 12, 2023), <https://www.thestreet.com/technology/elon-musk-makes-big-change-about-russian-propaganda> [<https://perma.cc/CS9P-FTUU>].

84. Kate CONGER & RYAN MAC, CHARACTER LIMIT: HOW ELON MUSK DESTROYED TWITTER 392–93 (2024); see also *The Musk Bump: Quantifying the Rise in Hate Speech Under Elon Musk*, CTR. FOR COUNTERING DIGIT. HATE (Dec. 6, 2022), <https://counterhate.com/blog/the-musk-bump-quantifying-the-rise-in-hate-speech-under-elon-musk> [<https://perma.cc/43S3-JR2Z>] (finding a 202% increase in tweets containing the n-word).

85. CONGER & MAC, *supra* note 84.

86. *The Musk Bump: Quantifying the Rise in Hate Speech Under Elon Musk*, CTR. FOR COUNTERING DIGIT. HATE (Dec. 6, 2022), <https://counterhate.com/blog/the-musk-bump-quantifying-the-rise-in-hate-speech-under-elon-musk> [<https://perma.cc/43S3-JR2Z>]. Anti-LGBT extremists are growing in followers at more than four times the rate as before Musk's takeover and LGBT hate has gone viral, with 20 prominent hateful tweets amassing 35 million views. *Id.*

87. *Id.*; see also CONGER & MAC, *supra* note 84 ("Accounts showing terrorist affiliations with groups such as the Islamic State . . . also surged in the wake of the takeover.").

88. CONGER & MAC, *supra* note 84.

89. See Emma Woollacott, *Germany Threatens Twitter with €50 Million Fine for Failing to Tackle Illegal Content*, FORBES (Apr. 5, 2023), <https://www.forbes.com/sites/emmawoollacott/2023/04/05/germany-threatens-twitter-with-50m-fine-for-failing-to-tackle-illegal-content> (on file with the *Journal of Corporation Law*) (discussing Germany's proceedings against Twitter claiming the company has failed to deal adequately with illegal content).

90. Katherine Hamilton, *Twitter Has Complied with Almost Every Government Request For Censorship Since Musk Took Over, Report Finds*, FORBES (Apr. 27, 2023), <https://www.forbes.com/sites/katherinehamilton/2023/04/27/twitter-has-complied-with-almost-every-government-request-for-censorship-since-musk-took-over-report-finds> (on file with the *Journal of Corporation Law*) (noting that during Musk's first six months of owning Twitter, the company fully complied with 808 out of 971 requests it received compared to the six-month period before Musk's acquisition, when Twitter fully complied with 280 out of 550 requests). Most requests came from foreign governments, including India, Turkey, and the United Arab Emirates. *Id.*

described position as a “free-speech absolutist.”<sup>91</sup> We also observe that the decisions to honor government requests seem to be made by Musk and not through a broader process.<sup>92</sup>

Musk’s introduction of a paid verification feature exacerbated the misinformation and conduct issues on the platform and resulted in widespread impersonation of government officials, corporations, and celebrities.<sup>93</sup> State-backed disinformation campaigns often use fake accounts to amplify content and increase the perception of beliefs in fringe views.<sup>94</sup> Moreover, gatekeeping credibility in the global town square behind an \$8/month paywall will suppress the reach of voices from the most disenfranchised and vulnerable communities. As part of this pay-to-say regime, Musk recently announced that only verified accounts will be eligible to appear in the “For You” recommendations and be permitted to vote in polls.<sup>95</sup> Twitter also maintains a list of “around 35 VIP users” who receive increased visibility and support on the platform.<sup>96</sup> Creating a revenue stream from the blue checkmark also creates less dependency on advertisers, which ordinarily provide a market check on hate speech and disinformation by simply taking their advertising dollars elsewhere. These are merely a handful of the results following the Twitter deal, with more sure to come. Already, trust in Twitter is low, with one recent poll measuring the reputations of 100 companies finding that X (formerly Twitter) was ranked 99, below companies like TikTok, Fox Corporation, and Spirit Airlines.<sup>97</sup>

91. Margaret Sullivan, *Elon Musk’s Hypocrisy About Free Speech Hits a New Low*, THE GUARDIAN (Sept. 7, 2023), <https://www.theguardian.com/commentisfree/2023/sep/07/elon-musk-hypocrisy-about-free-speech-hits-a-new-low> [https://perma.cc/F9VC-F6AR].

92. See *infra* note 299–309 and accompanying text.

93. See Ryan Mac et al., *A Verifiable Mess: Twitter Users Create Havoc by Impersonating Brands*, N.Y. TIMES (Nov. 14, 2022), <https://www.nytimes.com/2022/11/11/technology/twitter-blue-fake-accounts.html> (on file with the *Journal of Corporation Law*). One user posed as pharmaceutical company Eli Lilly and sent false messages about providing free insulin to its customers. *Id.* Eli Lilly’s stock dropped more than 5% following the messages. *Id.* Another account bragged about child labor while posing as Tesla, Musk’s electric car company. *Id.*

94. Matt Burgess, *Elon Musk’s Twitter is a Scammer’s Paradise*, WIRED (Nov. 10, 2022), <https://www.wired.com/story/twitter-blue-check-verification-buy-scams> [https://perma.cc/SB4S-BWQ4] State-supported actors can create thousands of seemingly legitimate accounts, amplifying the power of misinformation campaigns. *Id.* Russia’s Internet Research Agency, which has consistently posted disinformation, has had an annual budget of approximately \$10 million. *Id.*

95. Elon Musk (@elonmusk), TWITTER (Mar. 27, 2023), <https://twitter.com/elonmusk/status/1640502698549075972> [https://perma.cc/P9LB-25MX]. Of course, Musk’s aversion to open polling may be due in part to the unfortunate outcome of a December 2022 poll in which a majority of users responded “Yes” to his question of “Should I step down as head of Twitter? I will abide by the results of this poll.” Elon Musk (@elonmusk), TWITTER (Dec. 18, 2022), <https://x.com/elonmusk/status/1604617643973124097> [https://perma.cc/L43L-E994]. Despite this poll, Musk did not step down in response.

96. Charisma Madarang, *Twitter’s Secret VIP List is Getting Preferential Treatment: Report*, ROLLING STONE (Mar. 28, 2023), <https://www.rollingstone.com/culture/culture-news/twitter-vip-list-boosted-tweets-report-1234704651> [https://perma.cc/H6JM-VE76]. VIPs include Musk, LeBron James, Ben Shapiro, President Joe Biden, YouTube personality MrBeast, and a handful of journalists. *Id.* One anonymous conservative account, known for spreading conspiracy theories and disinformation to its 1.6 million followers, is reportedly a Twitter VIP, and “has Musk chirping like a [ ] 24/7 tech support bot with every aired frustration about the site.” *Id.*

97. See *Corporate Reputation Rankings 2024*, THE AXIOS HARRIS POLL, <https://dev.theharrispollreports.com/overview> [https://perma.cc/N5QY-68CH] (finding that Twitter ranked only above The Trump Organization); see also *Trust Levels of US Adults for Bit Tech Brands/Media Companies vs. the US Government*, EMARKETER (May 28, 2024), <https://www.emarketer.com/chart/267571/trust-levels-of-us-adults-big-tech-brandsmedia-companies-vs-us-government-may-2024-of-respondents> [https://perma.cc/RQ28-NKAR] (finding that only 28% of respondents trust Twitter).

So, what does the future hold for Twitter? On one hand, there is the potential death of the company and the harm to its long-term value. As a private company, Twitter no longer has to report its financial performance, but the anecdotal evidence is not encouraging. Advertisers have historically contributed to the vast majority of Twitter's revenue, yet half of Twitter's top 100 advertisers "have either announced or seemingly stopped advertising" on the platform.<sup>98</sup> In addition, it is estimated that more than 30 million users will abandon Twitter by the end of 2024 "as they grow frustrated with technical issues and the proliferation of hateful or other unsavory content."<sup>99</sup> Even Musk has acknowledged the decline in corporate value under his leadership, estimating that Twitter is now worth only \$20 billion, less than half of what he paid for it.<sup>100</sup> And reportedly the debt used to finance Musk's acquisition is traded as distressed debt.<sup>101</sup>

On the other hand, Musk has, of course, famously brought other companies—notably, Tesla and SpaceX—back from the brink of failure, and he might do the same at Twitter. If instead, Twitter goes into bankruptcy, Musk will suffer the bulk of the financial loss. At that point, presumably, another social media platform will emerge to fill Twitter's place.<sup>102</sup> But it will no doubt impose massive costs to migrate 450 million people to a new global town square.

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98. Sharon Kann & Angelo Carusone, *In Less Than a Month, Elon Musk Has Driven Away Half of Twitter's Top 100 Advertisers*, MEDIA MATTERS FOR AM. (Nov. 22, 2022), <https://www.mediamatters.org/elon-musk/less-month-elon-musk-has-driven-away-half-twitters-top-100-advertisers> [<https://perma.cc/T4PL-XNEV>].

99. Sara Lebow, *Twitter to Lose More Than 30 Million Users in the Next Two Years*, EMARKETER (Dec. 13, 2022), <https://www.emarketer.com/content/twitter-lose-more-than-30-million-users-next-two-years> [<https://perma.cc/R94H-AJ3M>].

100. Daniel Kreps, *Elon Musk Says Twitter Worth \$20 Billion, or Less Than Half What He Bought It For*, ROLLING STONE (Mar. 26, 2023), <https://www.rollingstone.com/culture/culture-news/elon-musk-twitter-20-billion-value-1234703945/> [<https://perma.cc/LY4C-R2EV>]. Musk made light of his investment, tweeting: "How do you make a small fortune in social media?" His answer: "Start out with a large one." Elon Musk (@elonmusk), TWITTER (Nov. 17, 2022), <https://x.com/elonmusk/status/1593415171149791232> [<https://perma.cc/5GB7-J2S7>].

101. Claire Ruckin et al., *Twitter Buyout Loans Get Bid at 60 Cents as Banks Sound Out Investors*, BLOOMBERG L. (Nov. 10, 2022), <https://www.bloomberglaw.com/bloomberglawnews/mergers-and-acquisitions/XFM94GKO000000> (on file with the *Journal of Corporation Law*) ("[S]ome funds have offered to take a piece of the loan package at a discount as low as 60 cents on the dollar, which would be among the steepest markdowns in a decade.").

102. Most recently, commentators are increasingly pointing to Meta Platform's rival app Threads as the most promising potential Twitter replacement. See Katie Paul & Akash Sriram, *Meta's Twitter Rival Threads Surges to 100 Million Users Faster Than ChatGPT*, REUTERS (July 10, 2023), <https://www.reuters.com/technology/metatars-twitter-rival-threads-hits-100-mln-users-record-five-days-2023-07-10/> [<https://perma.cc/QT2V-6BXP>]. Threads reportedly had over 100 million sign-ups within five days of launch, becoming the fastest-growing online platform to reach the milestone. *Id.* While Threads' user base still pales in comparison to Twitter's 240 million monetizable daily active users, if Twitter implodes, Threads may be the social media website to replace Twitter as the global town square. *Id.*

Mastodon has also experienced a significant increase in users since Musk's takeover. By January 2023, Mastodon had approximately 1.4 million daily active users, which was 1 million more than it had a year before. Amanda Hoover, *The Mastodon Bump is Now a Slump*, WIRED (FEB. 7, 2023), <https://www.wired.com/story/the-mastodon-bump-is-now-a-slump/> [<https://perma.cc/TKK7-FSBM>]. Other commentators point to Bluesky, a service backed by Twitter cofounder Jack Dorsey with over 200,000 invite-only beta users since February 2022 and a waitlist of approximately 2 million, as a promising competitor. Paul & Sriram, *supra* note 102. For political conservatives, GETTR and Truth Social (founded by former U.S. President Donald Trump), with an estimated 144,000 and 607,000 monthly users respectively, provide another alternative. *Id.* But each of these fledgling competitors have a relatively small user base compared to Twitter.



In either event, when faced with Musk's offer the Twitter board departed from its long-standing commitment to consider the interests of stakeholders. The company is not unique in this regard; sell-side boards have increasingly embraced stakeholder governance in the ordinary course only to abandon it in times of deal activity.<sup>103</sup>

## II. STAKEHOLDER GOVERNANCE IN EVERYDAY BUSINESS

Corporate governance has undergone a fundamental transition. The purpose of the corporation is at the center of one of the most consequential debates in corporate law. This Part of the Article examines the various stakeholder-related approaches to governance and the role that stakeholder governance plays in the ordinary course of business.

### A. Determining Corporate Purpose

The debate about whether the purpose of the corporation is to maximize profits for shareholders ("shareholder primacy") or to act in the interest of stakeholders to promote long-term value ("stakeholder governance") dates back to a 1932 law review exchange between Merrick Dodd and Adolf Berle.<sup>104</sup> Stakeholder governance views governance "as a collaboration among corporations, shareholders, and other stakeholders working together to achieve long-term value and resist short-termism."<sup>105</sup> It considers the impact on non-shareholder constituencies, such as employees, customers, communities, and the environment. During the 1980s and 1990s, most states adopted statutes that explicitly allowed directors to consider the interests of non-shareholder constituencies in their governance of the company.<sup>106</sup>

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103. See Bebhuk, Kastiel & Toniolo, *supra* note 73, at 334 (discussing findings that support this proposition).

104. See E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932); Adolf Berle, *Note for Whom the Corporate Managers are Trustees*, 45 HARV. L. REV. 1365, 1367 (1932); see also Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG. Sept. 13, 1970, at 32 (embracing the shareholder primacy view and stating that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits"); Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 110 (1979) (embracing a stakeholder governance view and arguing that directors should consider the impact of a takeover on employees, customers, suppliers, and the community); see also, e.g., Lucian A. Bebhuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 94 (2020) (arguing against stakeholder governance); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309 (2021) (arguing that corporate purpose "facilitate[s] the goals of corporate participants"); Edward B. Rock, *For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 364–67 (2021) (summarizing the debate over corporate purpose); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 400 (2021) (arguing for "an overhaul to fit a twenty-first century economy").

105. MARTIN LIPTON ET AL., THE NEW PARADIGM: A ROADMAP FOR AN IMPLICIT CORPORATE GOVERNANCE PARTNERSHIP BETWEEN CORPORATIONS AND INVESTORS TO ACHIEVE SUSTAINABLE LONG-TERM INVESTMENT AND GROWTH 1 (2016), <https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf> [<https://perma.cc/YU5U-QTQS>].

106. See Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 1995–97 (2009) (analyzing constituency statutes); see also Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 23–26 (1992) (discussing the "disputed" and "diverse" coalitions responsible for antitakeover statutes, which may include legislative constituents and incumbent managers).

Over the past decade, investors, boards, and commentators have increasingly embraced stakeholder governance in corporate decision-making.<sup>107</sup> In 2019, the Business Roundtable issued a statement on the purpose of a corporation, signed by CEOs of 184 U.S. companies, which rejected shareholder primacy and declared “a fundamental commitment to all [corporate] stakeholders.”<sup>108</sup> In 2020, the World Economic Forum, an international organization with many major global corporations and thought leaders, launched the “Davos Manifesto” in support of stakeholder capitalism.<sup>109</sup> Major asset managers, including the “big three” (Blackrock, Vanguard, and State Street) have insisted that the companies they invest in adopt stakeholder governance practices. Larry Fink, the CEO of BlackRock, the world’s largest asset manager, issued a letter to all CEOs urging them to be “committed to embracing purpose and serving all stakeholders.”<sup>110</sup> Shareholders at major companies across the United States are also urging companies to embrace stakeholder governance.<sup>111</sup>

ESG is closely tied to stakeholder governance, yet the meaning of “ESG” remains highly contested. The term “ESG” was popularized—without being precisely defined—in the early 2000s following a United Nations report that contained the term.<sup>112</sup> The report

107. Support for stakeholder governance in academic scholarship can be traced back to the seminal work of Merrick Dodd in what is now one of the most cited law review articles of all time. See Dodd, Jr., *supra* note 104, at 1148; see also Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1499 (2012) (listing Dodd’s paper as the fifth most cited corporate and securities law paper). For additional notable works in support of stakeholder governance, see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) (arguing that corporate managers have “some legal discretion (implicit or explicit) to sacrifice profits in the public interest”); Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN’S L.J. 339, 368 (2012) (describing stakeholders as “various contributors of inputs” who “can draw on the resources of the firm while at the same time preserving and sustaining the firm’s asset pool”); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201 (1999) (exploring whether the SEC has the power to force “social as well as financial disclosure”).

108. BUS. ROUNDTABLE, *supra* note 1.

109. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution> [<https://perma.cc/774Y-ELFB>] (“The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders.”).

110. Larry Fink, *A Fundamental Reshaping of Finance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 16, 2020), <https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance> [<https://perma.cc/7VT3-CCJF>]. See Michal Barzua, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1244 (2020) (providing that “index funds are locked in a fierce contest to win the . . . assets of the millennial generation, who place a significant premium on social issues in their economic lives”).

111. See Matteo Tonello, *Shareholder Voting Trends (2018–2022): Environmental and Climate-Related Proposals (Brief 1)*, CONF. BD. (Sept. 27, 2022), <https://www.conference-board.org/topics/shareholder-voting/trends-2022-brief-1-environmental-climate-proposals> [<https://perma.cc/CQ7S-TDLA>] (discussing investors focus on ESG leading to “the highest volume of shareholder proposals in the last five years, driven by a growth in environmental and social proposals”).

112. See GLOB. COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD ii (2004) [hereinafter *Who Cares Wins*], [https://www.unepfi.org/fileadmin/events/2004/stocks/who\\_cares\\_wins\\_global\\_compact\\_2004.pdf](https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf) [<https://perma.cc/T2N6-GVRB>]. For a discussion of the history of the term “ESG,” see Elizabeth Pollman, *The Making and Meaning of ESG* 403 (Eur.

provided recommendations “on how to better integrate environmental, social and corporate governance issues.”<sup>113</sup> Whether ESG is about “issues,” “factors,” “risk management,” or “goals,” a synonym for “corporate social responsibility,” or something else entirely, remains murky.<sup>114</sup> Despite this ambiguity, ESG investments account for one-third of all professionally managed assets.<sup>115</sup>

Each component of ESG can, to an extent, be described more concretely. Environmental factors might include actions to reduce greenhouse gases, promote sustainability, reduce or recycle plastics, and minimize pollution. Social considerations might include the health and safety of employees, wage equality, reputational value and goodwill, employee diversity, and the relationship between the community and the corporation.<sup>116</sup> Governance factors encompass issues between shareholders, directors, and management. Differing uses of ESG are not necessarily mutually exclusive, but neither are they necessarily complementary.

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Corp. Governance Inst., L. Working Paper No. 659, 2022), <https://ssrn.com/abstract=4219857>; George Serafeim, *ESG: Hyperboles and Reality 2* (Harv. Bus. Sch. Resch. Paper Series, Working Paper No. 22-031, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3966695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966695) (discussing explosion of interest in ESG).

113. See *Who Cares Wins*, *supra* note 112, at vii (discussing backgrounds that led to the recommendations).

114. See Pollman, *supra* note 112, at 3; Andrew A. King & Kenneth P. Pucker, *ESG and Alpha: Sales or Substance?*, INSTITUTIONAL INV. (Feb. 25, 2022), <https://www.institutionalinvestor.com/article/b1wxqznltnqnyzj/ESG-and-Alpha-Sales-or-Substance> [<https://perma.cc/BY9U-SLYG>] (“ESG investing is not precisely defined.”); e.g., Elad L. Roisman, Comm’r, SEC, Keynote Speech at the Society for Corporate Governance National Conference (July 7, 2020), <https://www.sec.gov/news/speech/roisman-keynote-society-corporate-governance-national-conference-2020> [<https://perma.cc/CD4F-J4SG>] (“[T]here is not consensus on what, exactly, ‘ESG’ means.”); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1414 (2020) (“[O]ne would be hard-pressed to come up with a consistent definition for this phenomenon.”); David F. Larcker, Brian Tayan & Edward M. Watts, *Seven Myths of ESG*, STAN. CLOSER LOOK SERIES (Nov. 4, 2021) (noting that “considerable uncertainty exists over what ESG is”); Pollman, *supra* note 112, at 20 (“Scholars have previously observed that ESG lacks a ‘common theorization’—an agreement or shared beliefs establishing a common discourse on a term or concept.”). One survey found that 75% of institutional investors believe there is a lack of clarity around ESG terminology. Swasti Gupta-Mukherjee, *Climate Action is too Big for ESG Mandates*, STAN. SOCIAL INNOVATION REV. (Sept. 29, 2020), <https://ssir.org/articles/entry/climate-action-is-too-big-for-esg-mandates#> [<https://perma.cc/EJ3Q-28UC>]. Conversations with practitioners, scholars, and investors confirm widespread uncertainty and disagreement about the meaning of ESG.

115. Serafeim, *supra* note 112, at 2.

116. For further discussion of the ‘S’ in ESG, see David Wood, *What Do We Mean by the S in ESG? Society as a Stakeholder in Responsible Investment*, in THE ROUTLEDGE HANDBOOK OF RESPONSIBLE INVESTMENT 553, 553 (Tessa Hebb, et al. eds., 2015).

Today, ESG is often justified as a tool for risk management,<sup>117</sup> a method of generating long-term corporate value,<sup>118</sup> and a form of corporate social responsibility (CSR).<sup>119</sup> Among the more skeptical critics, ESG is characterized as an ideological preference.<sup>120</sup> Moreover, by combining E, S, and G into one term, ESG can be both too broad and too narrow. It can be highly flexible and broadly applicable but distort the analysis of any causal relationship between ESG and financial performance; the applicability and sufficiency of ESG ratings; and the relative value attributed to any one letter. We take no position in this Article on the correct definition of ESG.<sup>121</sup>

Rather, we focus on stakeholder governance more generally, with ESG as a proxy (albeit a messy one) for considering factors other than profit to shareholders. There is some overlap with stakeholder governance, but at times, ESG addresses factors that map less neatly onto a particular stakeholder group. Both stakeholder governance and ESG have

117. See, e.g., WACHTELL, LIPTON, ROSEN & KATZ, RISK MANAGEMENT AND THE BOARD OF DIRECTORS 1–2 (2022), <https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28180.22.pdf> [<https://perma.cc/QF9M-8RNR>] (noting that this acronym refers to three types of risks, initiatives, and policies; ESG is closely tied to shareholder value; and the failure to oversee and address ESG-related risks may subject directors to liability and destroy shareholder value); Gadinis & Miadzad, *supra* note 114, at 1410, 1415 (finding that “companies are using ESG” to “manage the risks facing the company due to its environmental and social impact”); John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 631 (discussing how ESG was justified based on improving returns by accounting for risk more accurately); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 629 (2022) (discussing ESG and risk-impacted returns).

118. See, e.g., Gordon, *supra* note 117, at 630 (arguing fund managers who do not engage with ESG are “falling short of the objective of maximizing risk-adjusted returns”).

119. See, e.g., Lynn M. LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 55 U.C. DAVIS L. REV. 1445, 1447 (2021) (“CSR is the abstract idea that corporations have a moral responsibility to voluntarily integrate environmental, social, and governance (‘ESG’) improvements into their business operations for the benefit of shareholders, other stakeholders, society as a whole, and the environment.”); *id.* at 1448 (“CSR is adherence to the actual values of corporate stakeholders, and ESG is a set of measurements from which conclusions about CSR can be drawn.”); David F. Larcker et al., *ESG Ratings: A Compass Without Direction 1* (Aug. 4, 2022) (unpublished manuscript) (on file with the Rock Center for Corporate Governance at Stanford University), <https://ssrn.com/abstract=4179647> (noting the widespread belief that ESG is synonymous with corporate responsibility); Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies’ CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740, 745–46 (2021) (describing ESG “as a subcategory of CSR [that] uses a metrics-driven format to measure a company’s commitment to social responsibilities”); Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH U. L. REV. 223, 247, 255 (2021) (referring to “CSR/ESG” and “ESG/CSR”); Pollman, *supra* note 112, at 20 (noting that ESG can also be equated with sustainability); Wood, *supra* note 116, at 553 (discussing improving long-term performance).

120. See Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 402 (2021) (“For some years, investing on the basis of ESG considerations was thought to be a preference predicated on ethical, political, religious, or other objectives rather than an investment strategy grounded in financial risk and return.”). In this sense, ESG can operate as a virtue signal or marketing tool. ESG in this context may be equated with ideological “woke capitalism.” See Andrew Ross Sorkin et al., *Larry Fink Defends Stakeholder Capitalism*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/business/dealbook/fink-blackrock-woke.html> (on file with the *Journal of Corporation Law*) (discussing BlackRock CEO Larry Fink’s rebuttal to claims that ESG is “bowing to anti-business interests” and that “stakeholder capitalism” is “woke”).

121. See Pollman, *supra* note 112, at 5 (giving an overview of some of the related controversies).

been widely embraced in day-to-day governance,<sup>122</sup> with the number of E&S shareholder proposals reaching record highs in recent years.<sup>123</sup>

### B. Stakeholder Governance and ESG Today

Despite claims that stakeholder governance and ESG efforts are “mostly for show,”<sup>124</sup> meaningful evidence to the contrary is readily observable. Recently, JP Morgan Chase committed \$30 billion to minority communities for racial equity,<sup>125</sup> General Motors elected a majority-female board of directors,<sup>126</sup> and Lego pledged \$15 million to reduce its carbon footprint.<sup>127</sup> Numerous companies have committed to benchmarking their performance against stakeholder capitalism metrics. For the stakeholders of these companies, the impact is real and meaningful.

Perhaps in part because companies today are widely embracing stakeholder governance, over the last few years there has been a wave of backlash. In August 2022, Florida adopted a resolution that required state pension funds to seek the highest return on investments, without considering “non-pecuniary factors” such as “social, political, or ideological interests.”<sup>128</sup> In December 2022, Florida announced that it would begin divesting \$2 billion of assets managed by BlackRock.<sup>129</sup> Louisiana, Missouri, South Carolina, Arkansas, Utah, and West Virginia also made similar announcements.<sup>130</sup>

122. See *supra* notes 107–11 and accompanying text.

123. See 2023 *United States Proxy Season Review: Environmental & Social*, ISS INSIGHTS (Dec. 29, 2023), <https://insights.issgovernance.com/posts/2023-united-states-proxy-season-review-environmental-and-social/> [<https://perma.cc/DX3C-3Y2P>] (“Number of environmental & social (E&S) shareholder proposals filed continued to grow. As of Aug. 30, 2023, 625 E&S proposals were submitted and of these 356 were voted on ballots.”).

124. See Bebhuk, Kastiel & Toniolo, *supra* note 73, at 334 (“[P]ro-stakeholder rhetoric, such as the pro-stakeholder commitments that Twitter consistently proclaimed prior to entering the Musk deal, are mostly for show.”); see also Bebhuk & Tallarita, *supra* note 104, at 96 (arguing that benefits from stakeholderism is “illusory”). Even if stakeholder-centric efforts are all “just for show” (a proposition we disagree with) they can serve a valuable signaling function and facilitate meaningful dialogue.

125. *Commitment to Racial Equity*, JPMORGAN CHASE, <https://www.jpmorganchase.com/impact/racialequity> [<https://perma.cc/XD52-ZXEU>].

126. Paul Lienert, *Women Hold Majority of Seats on GM’s Expanded Board of Directors*, REUTERS (Mar. 25, 2021), <https://www.reuters.com/business/sustainable-business/women-hold-majority-seats-gms-expanded-board-directors-2021-03-25/> [<https://perma.cc/72BA-MZ8H>].

127. Blaise Hope, *Top 10: Global Companies with Best Social Impact Initiatives*, SUSTAINABILITY MAG. (Apr. 5, 2022), <https://sustainabilitymag.com/top10/top-10-global-companies-with-best-social-impact-initiatives-esg> [<https://perma.cc/8N2D-JSJU>].

128. Press Release, Governor Ron DeSantis, Governor Ron DeSantis Eliminates ESG Considerations from State Pension Investments (Aug. 23, 2022), <https://www.flgov.com/2022/08/23/governor-ron-desantis-eliminates-esg-considerations-from-state-pension-investments/> [<https://perma.cc/HF77-H5UW>].

129. Press Release, Jimmy Patronis, CFO, Fla. Dep’t of Fin. Servs., CFO Jimmy Patronis: Florida Treasury Divesting from Blackrock (Dec. 1, 2022), <https://myfloridacfo.com/news/pressreleases/prior-press-releases/archive-details/2023/09/20/cfo-jimmy-patronis-florida-treasury-divesting-from-blackrock> [<https://perma.cc/KA52-FBVM>].

130. Martin Lipton, *Update on ESG, Stakeholder Governance, and Corporate Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 28, 2023), <https://corpgov.law.harvard.edu/2023/01/28/update-on-esg-stakeholder-governance-and-corporate-purpose> [<https://perma.cc/4PAX-K6XF>]; Martin Lipton et al., *Understanding the Role of ESG and Stakeholder Governance Within the Framework of Fiduciary Duties*, WACHTELL, LIPTON, ROSEN & KATZ 5 (2022), <https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.28209.22.pdf?ck=5050>

There are many other targets facing backlash for their stakeholder and ESG-related objectives. Among their ranks include asset managers,<sup>131</sup> banks,<sup>132</sup> and law firms.<sup>133</sup> Proxy advisory firms have also become a target, with twenty-one Republican attorneys general authoring a letter to Institutional Shareholder Services and Glass Lewis, two major proxy advisory firms, challenging their net-zero emissions policies and boardroom diversity policies.<sup>134</sup> Anti-ESG shareholder activism is also on the rise, with the launch of funds like Strive Asset Management, which has already approached at least four large U.S. companies (ExxonMobil, Disney, Chevron, and Home Depot) to demand that they adopt a shareholder

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[<https://perma.cc/A9K5-6KJB>] (“Although the divestments (both individually and in the aggregate) are a rounding error to the amount of funds managed by BlackRock, the symbolic impact is significant—the divestments have helped propel the anti-ESG movement and served as a call to arms for opponents of so-called ‘woke’ capitalism.”).

131. For example, conservative lawmakers recently published a report criticizing the big three asset managers (BlackRock, State Street, and Vanguard) for “advance[ing] liberal social goals” and promoting “political movements unmoored from financial performance.” See MINORITY STAFF OF THE U.S. SEN. COMM. ON BANKING, HOUS., & URB. AFFS., *THE NEW EMPERORS: RESPONDING TO THE GROWING INFLUENCE OF THE BIG THREE ASSET MANAGERS* 1–2 (2022), [https://www.banking.senate.gov/imo/media/doc/the\\_new\\_emperors\\_responding\\_to\\_the\\_growing\\_influence\\_of\\_the\\_big\\_three\\_asset\\_managers.pdf](https://www.banking.senate.gov/imo/media/doc/the_new_emperors_responding_to_the_growing_influence_of_the_big_three_asset_managers.pdf) [<https://perma.cc/7MPJ-WS6M>] (critiquing ESG as a way to allow corporate executives to dodge accountability for financial performance); see also Andrew Ross Sorkin et al., *An Activist Investor Takes On BlackRock Over E.S.G.*, N.Y. TIMES (Dec. 7, 2022), <https://www.nytimes.com/2022/12/07/business/dealbook/blackrock-esg-activist-bluebell.html> (on file with the *Journal of Corporation Law*) (quoting an activist investor as saying “BlackRock’s E.S.G. push had become politicized and a distraction, as several Republican state officials have moved to withdraw funds from BlackRock in protest.”). There is some evidence that this ESG backlash has been successful in stifling ESG efforts, with Vanguard announcing in December 2022 its decision to withdraw from the Net Zero Asset Managers initiative, defending this decision as being consistent with the “singular goal to maximize [investors’] long-term returns.” David A. Katz & Laura A. McIntosh, *ESG in 2023: Politics and Polemics*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2023), <https://corpgov.law.harvard.edu/2023/02/06/esg-in-2023-politics-and-polemics/> [<https://perma.cc/SYM6-7BRB>].

132. A coalition of nineteen state attorney generals announced an investigation into six major banks for their commitment to set emissions-reduction targets in their portfolios to reach net zero by 2050. Tom Higgins, *Attorneys General Issue ‘Anti-ESG’ Demands to Big Six US Banks*, NET ZERO INV. (Oct. 26, 2022), <https://www.net-zeroinvestor.net/news-and-views/attorneys-general-issue-anti-esg-demands-to-big-six-us-banks> [<https://perma.cc/MH9B-FEYL>].

133. Recently five Republican senators sent a letter to fifty law firms advising them to “preserve relevant documents” in anticipation of investigations on “institutionalized antitrust violations being committed in the name of ESG.” Lipton, *supra* note 130. In response, seventeen Democratic state attorneys general wrote a letter arguing that, consistent with their fiduciary duties to maximize returns for beneficiaries, pension fund managers may consider ESG factors and refuting the claim that doing so implicates liability under antitrust and competition laws. Letter from Karl A. Racine, Att’y. Gen., D.C. et al., to Senator Sherrod Brown et al. (Nov. 21, 2022), [https://oag.dc.gov/sites/default/files/2022-11/ESG%20Letter\\_Final\\_11.18.22.pdf](https://oag.dc.gov/sites/default/files/2022-11/ESG%20Letter_Final_11.18.22.pdf) [<https://perma.cc/EFY5-9X5V>].

134. Letter from Sean D. Reyes, Att’y. Gen. Utah et al., to Gary Retelny, President & CEO, Institutional S’holder. Servs., Inc., & Kevin Cameron, Exec. Chairman, Glass, Lewis & Co. (Jan. 17, 2023), <https://ago.wv.gov/Documents/2023-01-17%20Utah%20%20Texas%20Letter%20to%20Glass%20Lewis%20%20ISS.pdf> [<https://perma.cc/AR6T-REBY>] (arguing, in part, that net-zero emissions policies are based on the financial interests of beneficiaries rather than on social goals and claiming that boardroom diversity policies may violate contractual and fiduciary duties in addition to state anti-discrimination laws).

primacy model of governance and repeal certain ESG-related initiatives.<sup>135</sup> These anti-ESG efforts resulted in a record-high number of anti-ESG shareholder proposals in the 2023 proxy season, albeit with little support.<sup>136</sup>

Recently, corporate directors and officers have been increasingly targeted as well. In the aftermath of the Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, which struck down affirmative action in college and university admissions,<sup>137</sup> companies have faced a flurry of reverse-discrimination lawsuits over their diversity, equity, and inclusion (DEI) policies. These suits do not typically survive beyond the motion to dismiss stage, with courts emphasizing the long-standing deference afforded to the business judgment of the board.<sup>138</sup> However, some companies faced with litigation have voluntarily altered their policies as a result.<sup>139</sup>

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135. *Strive Impacts Corporate America: After Key Changes at Exxon and Disney, Strive Will Target Chevron and Home Depot in 2023 Proxy Voting Season*, BUSINESSWIRE (Dec. 6, 2022), <https://www.businesswire.com/news/home/20221206005395/en/Strive-Impacts-Corporate-America-After-Key-Changes-at-Exxon-and-Disney-Strive-Will-Target-Chevron-and-Home-Depot-in-2023-Proxy-Voting-Season> [https://perma.cc/7HZH-CWV2]. The rise of an anti-ESG movement and push for shareholder primacy also has significant implications for anti-takeover devices like poison pills, which serve a “critical purpose” by preventing activist plays “motivated by extracting value from other constituencies that today’s corporate governance world feels the need to preserve and promote, such as the various stakeholders that benefit from the board’s consideration of ESG issues.” Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 U. CHI. BUS. L. REV. 417, 424 (2022).

136. Andrew R. Droste, *A Brief Review of the 2023 US Proxy Season and What to Expect in 2024*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 10, 2024), <https://corpgov.law.harvard.edu/2024/04/10/a-brief-review-of-the-2023-us-proxy-season-and-what-to-expect-in-2024> [https://perma.cc/96G2-WPRM] (noting that in 2023 the amount of anti-ESG proposals filed increased by 60%, however the average support for these proposals stood at just 2.4%, far lower than the support for such proposals in 2022).

137. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 231 (2023) (characterizing affirmative action as unconstitutional racial discrimination).

138. *See Am. Nat’l Ctr. for Pub. Pol’y Rsch. v. Schultz*, No. 22-CV-00267, 2023 WL 5945958, at \*3 (E.D. Wash. Sept. 11, 2023) (written order confirming August 2023 oral ruling) (dismissing a derivative suit against Starbucks directors and officers for DEI and ESG initiatives and emphasizing that “[c]ourts of law have no business involving themselves with reasonable and legal decisions made by the board of directors of public corporations”); *Simeone v. Walt Disney Co.*, 302 A.3d 956, 959 (Del. Ch. 2023) (declining to grant a books and records request in a breach of fiduciary duty suit about Disney’s opposition to Florida’s so-called “Don’t Say Gay” bill because Disney’s “business decision” “cannot provide a credible basis to suspect potential mismanagement irrespective of its outcome”); *Lee v. Fisher*, 70 F.4th 1129, 1130 (9th Cir. 2023) (dismissing a breach of fiduciary duty suit that alleged that Gap Inc. and its directors breached their fiduciary duties by ignoring public promises to increase management-level diversity).

139. For example, shortly after *The American Alliance for Equal Rights*, a group founded by conservative legal strategist Edward Blum, sued law firms Perkins Coie and Morrison Foerster for their diversity fellowships, both firms altered their eligibility criteria to open the programs to all law students, not just those who are members of “historically underrepresented” groups. *See Tatyana Monnay, Morrison Foerster Changes DEI Fellowship Criteria Amid Lawsuit*, BLOOMBERG L. (Sept. 6, 2023), <https://news.bloomberglaw.com/business-and-practice/morrison-foerster-changes-dei-fellowship-criteria-amid-lawsuit> (on file with *the Journal of Corporation Law*); Nate Raymond, *Second Major US Law Firm Changes Diversity Fellowship After Lawsuit*, REUTERS (Oct. 6, 2023), <https://www.reuters.com/legal/second-major-us-law-firm-changes-diversity-fellowship-after-lawsuit-2023-10-06> [https://perma.cc/5DLD-ZTZ7].

Backlash along political lines remains a prominent feature of current governance discourse,<sup>140</sup> and it is no surprise that social issues are often the most vulnerable to backlash in light of the increasing politicization. However, stakeholder governance and ESG need not be politicized. Considering the interests of the company's stakeholders can be critical to sustainable long-term value and risk management. A fixation on profits risks increasing short-termism, and it overlooks the risk of long-term harm from negative externalities that impact a company's shareholders and stakeholders.

Regardless of the backlash for corporations worldwide, stakeholder and ESG-related disclosures are on the cusp of becoming a significant obligation. The European Union recently adopted the Corporate Sustainability Reporting Directive (CSRD), which directly covers an estimated 50,000 companies and indirectly covers many others that do significant business in the EU.<sup>141</sup> In the United States, a number of disclosure proposals are pending, largely focused on environmental issues, with additional proposals on social issues such as employee management and board diversity anticipated on the horizon.<sup>142</sup> Among investors, support remains high<sup>143</sup> and the stakeholder governance movement has continued to gain momentum.

### III. STAKEHOLDER GOVERNANCE IN M&A TRANSACTIONS

Despite the rise of stakeholder governance and ESG during the ordinary course of business, when it comes to one of the most significant events in a corporation's life—the sale of the company—such considerations are often set aside. This is a surprising omission because stakeholder considerations can play an important role throughout the M&A process. While every M&A deal is unique, a typical M&A deal involves a target that is being bought or sold, the seller that owns the target, and the buyer that is purchasing the target. In addition, the boards of each company and the shareholders of one or more of the companies typically need to approve the transaction. As a result, the stakeholder considerations can vary between the buy-side and the sell-side boards. In this Part, we examine three critical stages of M&A dealmaking: the search for a target or buyer, the deal negotiations and

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140. See Laura Davison, *Populist House Republicans Picking a Fight with US Business Over 'Woke Capitalism'*, BLOOMBERG (Nov. 28, 2022), <https://www.bloomberg.com/news/articles/2022-11-27/new-republican-house-majority-primed-to-pick-a-fight-over-woke-capitalism> (on file with the *Journal of Corporation Law*) (saying companies will have a “hell of a time” getting back support from the GOP). Of course, corporations have been enmeshed in social and political issues for decades, well before ESG's rise to fame. See, e.g., CORPORATIONS AND AMERICAN DEMOCRACY 2 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (examining the role of corporations in American democracy from founding to present); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1674 (2015) (examining the history of corporate constitutional rights including the First Amendment's extension to corporations); ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* xvii (2018) (documenting the “civil rights movement” of corporations).

141. Press Release, Euro. Parliament, Sustainable Economy: Parliament Adopts New Reporting Rules for Multinationals (Oct. 11, 2022), <https://www.europarl.europa.eu/news/en/press-room/20221107IPR49611/sustainable-economy-parliament-adopts-new-reporting-rules-for-multinationals> [<https://perma.cc/2FCC-98C3>].

142. Katz & McIntosh, *supra* note 131.

143. Ellen Kennedy, *The ESG Investing Backlash*, KIPLINGER (Sept. 6, 2022), <https://www.kiplinger.com/investing/esg/605184/the-esg-investing-backlash> [<https://perma.cc/VF6A-AGVH>] (noting that 85% of investors today interested in ESG financial products).



due diligence process, and the contractual terms of the deal, including post-closing arrangements. Through this examination, we demonstrate that stakeholder considerations play a meaningful role in the earlier stages of dealmaking, particularly for buy-side boards, but are virtually non-existent for sell-side boards.

#### A. *The Initial Search for a Buyer or Target*

On the buy-side, ESG and stakeholder interests can be key drivers of M&A activity. These can impact whether companies decide to pursue M&A deals and how companies select potential targets. Reportedly, 74% of U.S. investors integrate ESG in their M&A agenda.<sup>144</sup> Acquiring a company with a strong ESG profile can enhance the buyer's ability to deliver long-term value to its stakeholders and improve the buyer's own ESG credentials.<sup>145</sup> ESG can be incorporated into company valuations and risk assessments, ultimately influencing the value of the deal.<sup>146</sup> For example, when Royal Dutch Shell announced the sale of its Permian Basin assets to ConocoPhillips, both companies' stock prices rose.<sup>147</sup>

The demand for ESG data and analytics has driven particularly significant M&A activity among firms seeking to acquire ESG service providers. In 2020, Morningstar acquired Sustainalytics, a leading provider of ESG data and analysis.<sup>148</sup> In 2021, Deutsche Börse acquired a majority stake in Institutional Shareholder Services, a company with significant ESG capabilities.<sup>149</sup> Moody's, Blackstone, Nasdaq, JPMorgan, AXA, BlackRock, KKR, and McKinsey also all acquired data or consulting firms with ESG expertise.<sup>150</sup> In addition, Goldman Sachs and Affiliated Managers Group each acquired firms with strong ESG-related investment offerings.<sup>151</sup>

Boards can also incorporate ESG as a rationale in transaction announcements to sway shareholder approval of a deal. When ConocoPhillips announced its \$9.7 billion acquisition of Concho Resources, the company heavily emphasized that the deal represented an

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144. KPMG, THE SUSTAINABLE ADVANTAGE: LEVERAGING ESG DUE DILIGENCE TO UNLOCK VALUE 5 (2023) <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/esg-sustainable-advantage-1.pdf> [<https://perma.cc/6GA7-BDJH>] (noting that 82% of Europe, Middle East, and Africa (EMEA) investors integrate ESG into their M&A agendas). This study surveyed U.S. investors and, when applicable, non-U.S. investors, from both publicly and privately held companies. *Id.*

145. Afra Afsharipour, *ESG and Board-Shareholder Engagement in M&A*, in BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES, 297, 306 (Luca Enriques & Giovanni Strampelli eds., 2024) (“The Hershey Company . . . a candy bar and snack maker, prominently featured its . . . acquisitions of . . . a maker of low-sugar products as part of its strategy to offer . . . products that ‘support a healthy lifestyle.’”); Renee Levin, *ESG: The Next M&A Frontier*, FORDHAM J. CORP. & FIN. L. BLOG (Mar. 26, 2022), <https://news.law.fordham.edu/jcfl/2022/03/26/esg-the-next-ma-frontier> [<https://perma.cc/Z7M2-SDNM>].

146. Lindsay Delevingne et al., *The ESG Premium: New Perspectives on Value and Performance*, MCKINSEY & CO. (Feb. 12, 2020), <https://www.mckinsey.com/capabilities/sustainability/our-insights/the-esg-premium-new-perspectives-on-value-and-performance> [<https://perma.cc/P5PU-7EV8>].

147. Adam O. Emmerich & Trevor S. Norwitz, *2021's Most Interesting Developments in M&A*, 16 INT'L COMP. L. GUIDE: MERGERS & ACQUISITIONS, 1, 3 (2022).

148. *Id.*; Larcker et al., *supra* note 119, at 12.

149. Emmerich & Norwitz, *supra* note 147, at 3.

150. *Id.*

151. *Id.*

“[e]levated commitment to environmental, social and governance excellence.”<sup>152</sup> Buyers may also benefit from more attractive financing options when the deal parties have strong ESG ratings.<sup>153</sup>

On the sell-side, boards are less discerning about the identity of the buyer. A sell-side board may be interested in divesting undesirable assets—for example, the recent trend of divesting “brown” assets in favor of “green” assets<sup>154</sup>—but the identity of the buyer is all but irrelevant beyond its ability to pay. For deals where the consideration the sellers receive is solely cash, that effect is magnified because once the deal is complete, the sellers will have no financial interest in the company going forward. However, the buyer’s identity should matter more when the sellers will be receiving stock in the surviving company as part of their consideration. Nevertheless, in practice, stakeholder and ESG-related considerations in the search for a particular buyer all but disappear.<sup>155</sup>

### B. Due Diligence & Contractual Risk Allocation

Perhaps the area where ESG and stakeholder considerations are most prominently on display in M&A is during diligence. Due diligence is the process in which the buyer and seller verify, investigate, and gather information about one another before the deal closes. It provides the parties, particularly the buyer, with an assurance of what they are receiving in the transaction and the sufficiency of the purchase price. As such, the buyer typically conducts more due diligence and negotiates for more contractual provisions that provide assurance about the condition of the target. The focus of the due diligence process often depends on the industry in which the buyer operates and may include examining risks

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152. Press Release, ConocoPhillips, ConocoPhillips to Acquire Concho Resources in All-Stock Transaction (Oct. 19, 2020), <https://www.conocophillips.com/news-media/story/conocophillips-to-acquire-concho-resources-in-all-stock-transaction> [https://perma.cc/XP9K-752N]; see also Afsharipour, *supra* note 145.

153. See Levin, *supra* note 145 (reporting that “favorable financing terms [are] available to companies who seek to acquire targets with high ESG ratings”).

154. See Emmerich & Norwitz, *supra* note 147, at 3. For example, recently PSEG sold its fossil fuel plants as part of its plans to expand investments in nuclear and wind energy, and BP committed to divesting \$25 billion of assets by 2025 to support its shift toward renewables. *Id.* The global attention on sustainability and climate change has been a motivating driver of M&A activity worldwide. Engie’s recently announced sale of the French water and waste firm Veolia to Suez was reportedly motivated by the European Green Deal, a set of policy initiatives by the European Commission to reduce greenhouse gas emissions. Clare Connellan et al., *ESG Enters M&A Mainstream in a Year of Change*, WHITE & CASE (Jan. 29, 2021), <https://mergers.whitecase.com/highlights/esg-enters-ma-mainstream-in-a-year-of-change> [https://perma.cc/KV5Y-CKW9]. Similarly, it is widely accepted that Fiat Chrysler’s merger with Peugeot was undertaken in part to help the company avoid \$2 billion in European carbon emissions fines. See Jack Ewing, Liz Alderman & Neal E. Boudette, *Fiat Chrysler and Peugeot Planned Merger: A Big but Imperfect Union*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/business/flat-chrysler-psa-peugeot-merger.html> (on file with the *Journal of Corporation Law*) (noting that the combination “will reduce the average carbon-dioxide emissions of its vehicles and help [the company] avoid fines in the European Union that could come to €3.5 billion”). Likewise in the Middle East, the recent \$20+ billion merger between AQA and ADPower supports the UAE’s energy and water strategies to promote resource efficiency and cleaner energy. Connellan et al., *supra* note 154. Activists driven by ESG are increasingly agitating for M&A activity, with Elliott Management attacking SSE’s decision not to spin off its renewables business and activist hedge fund Third Point proposed a separation of Shell’s legacy oil and gas business from its newer carbon-light businesses. Emmerich & Norwitz, *supra* note 147, at 3.

155. For a discussion of why buy-side and sell-side boards differ in their approaches to ESG and stakeholder governance during M&A transactions, see discussion *infra* Part V.

related to regulations, reputation, shareholder activism, and litigation.<sup>156</sup> One recent study found that 33% of U.S. investors conducted ESG-related due diligence in the majority of their deals over the past few years.<sup>157</sup> Thus, these considerations play an important role in due diligence.

On the buy side, buyers are increasingly likely to impose a penalty or walk away entirely due to negative ESG features of the target.<sup>158</sup> One study found that material ESG-related risks identified in the due diligence process resulted in an astounding 53% of deals being canceled.<sup>159</sup> Among the deals that go through, 42% of investors sought a purchase price reduction because of material findings in ESG diligence,<sup>160</sup> and 39% sought additional indemnity from the seller.<sup>161</sup> On the other hand, executives are increasingly willing to pay an “ESG premium” for companies with positive ESG records.<sup>162</sup> Reportedly, 62% of U.S. investors are willing to pay a premium for companies that align with their ESG objectives.<sup>163</sup>

With deals that progress to signing, parties typically seek to have these ESG-related risks incorporated into the definitive merger agreement. Doing so helps effectuate the buyer’s interest in ensuring that any risks are factored into the price paid for the target company. On the sell-side, often the seller’s interest is in ensuring that the buyer can finance the deal. However, for deals where the consideration involves the shareholders receiving stock of the buyer, the seller also has an interest in ensuring that any risks are factored into the value it attributes to that stock.

Parties typically allocate risk through the representations and warranties section of the agreement. Representations and warranties are statements of fact and assurances made by the parties. While some representations and warranties are made without regard to time, many will have a limited duration, covering only the past three or five years. Moreover, typically representations and warranties are qualified by knowledge or materiality. For example, a party may state that a fact is true except as, individually or in the aggregate, would not reasonably be expected to have a material adverse effect.

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156. See *The Impact of ESG on M&A Transactions: Key Takeaways for Market Participants*, DENTONS (Nov. 24, 2022), <https://www.dentons.com/en/insights/articles/2022/november/24/the-impact-of-esg-on-ma-transactions> [<https://perma.cc/GKT8-V2BG>] (finding that among the most frequently observed litigation risks are those related to climate change and human rights).

157. See KPMG, *supra* note 144, at 3 (explaining that only 33% of investors conducted ESG due diligence in the past but 43% of United States investors will perform ESG due diligence on the majority of their deals in the future).

158. BEATRIZ ARAUJO ET AL., *MITIGATING ESG RISKS IN M&A TRANSACTIONS* 6 (2020), [https://www.bakermckenzie.com/-/media/files/insight/publications/2021/05/mitigating-esg-risks-in-ma-transactionsv2\\_110521.pdf](https://www.bakermckenzie.com/-/media/files/insight/publications/2021/05/mitigating-esg-risks-in-ma-transactionsv2_110521.pdf) [<https://perma.cc/Y6MF-KY6J>].

159. See KPMG, *supra* note 144, at 3.

160. *Id.*

161. *Id.*

162. Delevingne et al., *supra* note 146; BAIN & CO., *GLOBAL M&A REPORT 24* (2022), [https://www.bain.com/globalassets/noindex/2022/bain\\_report\\_global\\_m\\_and\\_a-report-2022.pdf](https://www.bain.com/globalassets/noindex/2022/bain_report_global_m_and_a-report-2022.pdf) [<https://perma.cc/BX53-RVV4>]. See Levin, *supra* note 145 (noting that some companies may use strong ESG credentials as “a key lever of value” in deal negotiations).

163. KPMG, *supra* note 144, at 7 (noting that 39% of respondents would be willing to pay a 1–5% premium, 19% of respondents would be willing to pay a 6–10% premium, and 4% of respondents would be willing to pay more than a 10% premium).

Merger agreements typically do not expressly reference “stakeholders” or “ESG.” However, there are a number of standard representations and warranties related to stakeholders and ESG in merger agreements.<sup>164</sup> Because representations and warranties are largely seen as an allocation of risk, typically the target company will make more of them (particularly for those related to a company’s stakeholders). In contrast, a buyer’s representations and warranties will be pared down to matters like its authority to close the transaction, regulatory compliance, and its financial ability to carry out the transaction. This trend is virtually ubiquitous in cash-only deals (where the target company has little financial interest in the company going forward). However, if the buyer is issuing stock—whether as the sole form of consideration, or mixed stock/cash consideration—the representations and warranties tend to be more reciprocal.<sup>165</sup>

Common representations and warranties include those addressing labor and employment, sexual harassment, environmental and sustainability matters, and data privacy and security.<sup>166</sup> Each is detailed further below:

*Employment and Labor Matters.* It is standard practice for merger agreements to have representations and warranties about employee and labor matters. In these provisions, a party represents that there have not been events like strikes, unfair labor practices, labor disputes, and employee health and safety violations. A party will often make representations and warranties about employee benefit plans, compensation (especially at the executive level), and the impact of the deal on equity vesting, among other things. Particularly during the height of the COVID-19 pandemic, these provisions might also relate to remote work and employee health and safety in a pandemic. A party might also make representations about the absence of discrimination or harassment in the hiring, firing, and treatment of employees. The representations and warranties will often vary depending on the party and their employment arrangements.

*Weinstein Clause.* One of the most recent additions to representations and warranties is the “Weinstein Clause,” a provision in merger agreements that emerged following the MeToo movement in 2018.<sup>167</sup> This provision is designed to address risks associated with past sexual harassment by executives and management. Weinstein clauses operate as

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164. See generally Caley Petrucci, Corporate Goodwill and the New Greenwashing (Nov. 5, 2024) (unpublished manuscript) (on file with author) (empirically examining representations & warranties in merger agreements); see also Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID*, 40 YALE J. ON REG. 60, 119 (2023) (discussing that such provisions are not widespread).

165. Petrucci, *supra* note 164 (finding that the disparities in representations and warranties are substantially reduced in stock and mixed consideration deals); See generally Grace Maral Burnett & Emily Rouleau, *A Fresh Look at #MeToo Reps & Warranties in M&A Deals*, ABA: BUS. L. SECTION (June 27, 2022), <https://businesslawtoday.org/2022/06/fresh-look-metoo-reps-warranties-ma-deals/> [<https://perma.cc/4VRQ-CXUM>] (finding that buyers rarely make ESG-related representations and warranties in cash deals, but that mixed consideration and stock deals typically contain reciprocal representations and warranties). The absence of ESG-related provisions by the buyer in a cash-only context may be evidence that the value of ESG for many target companies is limited to the extent it correlates with long-term value for that company (or its shareholders) and not an intrinsic value in ESG itself. See Petrucci, *supra* note 164 (discussing how ESG initiatives are viewed by executives as “very to extremely important to . . . long-term success). Unlike the buyer, a target company’s representations and warranties remain largely consistent regardless of deal consideration. *Id.*

166. See Petrucci, *supra* note 164 (describing common representations and warranties); Bebchuk, Kastiel & Tallarita, *supra* note 164, at 74 (describing stakeholders affected by COVID).

167. See generally Anna Windemuth, *The #MeToo Movement Migrates to M&A Boilerplate*, 129 YALE L.J. 488 (2019); Burnett & Rouleau, *supra* note 165.

representations that, to the knowledge of the company, no sexual harassment claims have been made against current or former executive officers, typically for a limited period of time. These are less common than other ESG-related representations and warranties.<sup>168</sup>

*Environmental Matters.* It is also standard practice in M&A to include a provision on environmental matters.<sup>169</sup> While often this provision is tied to legal requirements—representing and warranting that the company is compliant with environmental laws, has obtained necessary environmental permits and approvals, and is not facing threatened action under environmental laws—these provisions can also go further than the legal minimum. For example, the provisions might state that there are no contractual assumptions of liabilities and that there has been no release of hazardous material or contamination of properties.

*Data Privacy & Security.* For companies that collect, store, or otherwise interact with user data and information, it is common to have a data privacy and security representation and warranty.<sup>170</sup> These provisions often make assurances about the absence of security breaches or access incidents, compliance with applicable laws relating to privacy and data protection, and compliance with the party's rules, policies, and procedures relating to privacy, data protection, and the collection, retention, protection, transfer, use, and processing of personal data. These provisions might also include representations about implementing and maintaining a data security plan and safeguards to protect personal data.

In addition to representations and warranties, stakeholder considerations also impact other contractual provisions. For example, during the COVID-19 pandemic, the majority of M&A agreements modified the provisions in their material adverse effect clauses and interim operating covenants.<sup>171</sup> In addition, companies may address stakeholder and ESG-related liabilities through indemnification, holdbacks, and escrows.<sup>172</sup>

### C. Post-Closing Governance & Integration

Theoretically, stakeholder and ESG objectives can also shape post-deal governance. Post-closing covenants could play a critical role in facilitating these efforts. Despite the increasing inclusion of backward-looking representations and warranties, there is a notable absence of contractual provisions addressing ESG and stakeholder interests *on a going-forward basis*. Stakeholder-related initiatives and ESG monitoring need to be transferred, protected, and delegated post-acquisition. Integration efforts should be mindful of existing

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168. Burnett & Rouleau, *supra* note 165.

169. PRACTICAL GUIDANCE: M&A, CLAUSE DESCRIPTION - REPRESENTATIONS: ENVIRONMENTAL MATTERS, BLOOMBERG L. <https://www.bloomberglaw.com/document/XCQHIMTO000000> (on file with the *Journal of Corporation Law*).

170. Bianca Lewis & Jessica B. Lee, *Data Privacy and Security Considerations in M&A Transactions*, LOEB & LOEB (Feb. 2022), <https://www.loeb.com/en/insights/publications/2022/02/data-privacy-and-security-considerations-in-ma-transactions> [<https://perma.cc/AG52-4F2Y>].

171. For a discussion of how COVID-19 has impacted merger agreements, particularly with regards to the MAE clause and ordinary course covenants, see Guhan Subramanian & Caley Petrucci, *Deals in the Time of Pandemic*, 121 COLUM. L. REV. 1405, 1443 (2021).

172. See Afsharipour, *supra* note 145; Kramer Levin, *ESG's Impact on M&A*, JDSUPRA (July 25, 2022), <https://www.jdsupra.com/legalnews/esg-s-impact-on-m-a-7975911/> [<https://perma.cc/4ABR-GMQG>] (listing methods to address ESG risk “include[ing] enumerating certain excluded liabilities, providing for holdbacks or escrows, or even changing the purchase price”).

policies, procedures, and initiatives.<sup>173</sup> Yet provisions to address these forward-looking issues are largely absent from merger agreements. Forward-looking provisions relating to the environment, data privacy and security, and sexual harassment and discrimination are virtually nonexistent.<sup>174</sup>

Other than lending and financing related players, merger agreements generally purport to protect just one stakeholder group post-closing: employees. Most often, these protections include similar salary, wages, and/or benefits to continuing employees for a limited period following the closing.<sup>175</sup> Many M&A agreements also provide for comparable or specified severance.<sup>176</sup> Absent from these protections, however, are any limitations on the ability of the buyer or surviving company to terminate employees at will, with or without cause.<sup>177</sup> Provisions protecting employees after closing are also subject to a number of exceptions and limitations, including (1) a limited duration (typically 12 months); (2) applicability to only those employees who were employed by the target company prior to closing (“continuing employees”); (3) carveouts for equity compensation; and (4) “in the aggregate” or other similar qualifiers.<sup>178</sup>

Perhaps the most significant limitation is the inability of employees to seek enforcement of the protections they would appear to receive. Third-party beneficiaries are people or entities who, though not a party to the contract, stand to benefit from the contract’s performance and may be able to sue to enforce a contract or seek damages for breach. Employees could have been granted the power to enforce employee-related contract provisions like these, either expressly through a contractual provision or impliedly given the protections summarized above. However, M&A agreements typically exclude employees from being third-party beneficiaries.<sup>179</sup> Unequivocally, expressly, and intentionally,

173. Emmerich & Norwitz, *supra* note 147, at 4; Andrew R. Brownstein & Carmen X.W. Lu, *ESG and M&A in 2022: From Risk Mitigation to Value Creation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 24, 2022), <https://corpgov.law.harvard.edu/2022/01/24/esg-and-ma-in-2022-from-risk-mitigation-to-value-creation/> [<https://perma.cc/N9D8-X2BZ>].

174. For a discussion of why post-closing covenants relating to stakeholder and ESG matters are so uncommon, see discussion *infra* Part V.

175. Petrucci, *supra* note 164; see also Bebchuk, Kastiel & Tallarita, *supra* note 164, at 99–103 (discussing failure of boards to protect employee interests during M&A).

176. Petrucci, *supra* note 164.

177. *Id.* at 21–22.

178. *Id.*

179. *Id.*; see also Bebchuk, Kastiel & Tallarita, *supra* note 164, at 99–103 (“[T]his commitment is unenforceable: in none of the transactions . . . were employees granted the right to enforce any commitments made in their favor.”). For an example of these provisions, see T-Mobile/Sprint, Business Combination Agreement 100 (2018) (“Nothing contained in this Section 6.13 shall . . . create any third-party beneficiary rights or obligations in any person (*including any Employee*).” (emphasis added)); Take-Two Interactive Software, Inc. & Zynga, Inc., Agreement and Plan of Merger 42 (2022) (“Nothing contained in this Section 6.2 or any other provision of this Agreement, express or implied: . . . (iv) is intended to confer upon any Person (including for the avoidance of doubt *any current or former employee* . . . any right as a third-party beneficiary of this Agreement.” (emphasis added)). Evaluating whether a non-party to a deal is a third-party beneficiary able to seek damages is a “thorny legal issue” in Delaware law. See, e.g., *Crispo v. Musk*, 304 A.3d 567, 586 (Del. Ch. 2023) (holding that Twitter stockholder Luigi Crispo lacked standing to specifically enforce the merger agreement in part because the merger agreement did not confer third-party beneficiary status for that purpose, but leaving open the possibility of stockholders pursuing a claim for damages); *Consol. Edison, Inc. v. Ne. Utilities* 426 F.3d 524, 529 (2d Cir. 2005) (holding that a merger agreement’s no third-party beneficiaries clause precluded stockholders from having standing to sue

merger agreements provide that employees are not third-party beneficiaries and cannot, therefore, enforce any rights thereunder.

In short, stakeholder and ESG objectives are largely absent from M&A agreements when it comes to the operation of the company after closing with one notable exception: employee protections. Perhaps it is no surprise that employees receive such attention to incentivize them to remain at the company between signing and closing. However, the provisions supposedly protecting employees are narrow, riddled with limitations, and unenforceable by the very people they purport to protect. Other stakeholder groups likewise enjoy little to no protection post-close.

This absence creates an inconsistency. In the ordinary course of business, buy-side and sell-side boards can, and often do, embrace stakeholder considerations and ESG objectives.<sup>180</sup> To the extent boards embrace stakeholder considerations as meaningful during everyday governance, so too should they consider the impact on stakeholders and these objectives in their deal-making. Why then, do sell-side boards not do so? Put more precisely, let us next examine legal and practical constraints that may prevent boards that otherwise embrace stakeholder and ESG considerations from doing so in the M&A context.

#### IV. POTENTIAL BARRIERS TO STAKEHOLDER GOVERNANCE IN M&A

Thus far, we have examined how stakeholder and ESG considerations differ between M&A and the ordinary course of governance. Most significantly, even companies that embrace the considerations in day-to-day governance succumb to stakeholder and ESG amnesia in dealmaking. In this Part, we examine three potential barriers to a board incorporating its stakeholder and ESG objectives into transactions: fiduciary duties, negotiation leverage, and contractual feasibility. We demonstrate that these potential barriers do not necessitate stakeholder amnesia.

##### A. *Fiduciary Duties*

Corporate law imposes a fiduciary duty of care on boards of directors to act in a reasonably informed manner after adequate consideration of relevant information and sufficient deliberation.<sup>181</sup> Directors must make necessary efforts to obtain the information required and devote time to considering the information before deciding to either take or refrain from taking action.<sup>182</sup> The board's obligation to inform itself of and consider all

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for the lost share premium in a failed deal). *But see, e.g.*, *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, No. 2822, 2008 WL 4182998, at \*4 (Del. Ch. Sept. 11, 2008) (holding that stockholders could enforce certain obligations under a merger agreement despite a no third-party beneficiaries clause because the agreement manifested “an unambiguous intent to benefit” the stockholders). For further discussion of third-party beneficiary rights under Delaware law, see *Petrucci*, *supra* note 164.

180. *Emmerich & Norwitz*, *supra* note 147, at 3.

181. *See, e.g.*, *Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. 1985). In addition to the duty of care, directors also owe a fiduciary duty of loyalty, which requires that they act in the best interests of the corporation rather than their personal interest (for example, if the director has a conflict of interest that impacts decision-making). *See, e.g.*, *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (describing how the directors at issue had failed to exercise the oversight function in violation of their duty of loyalty). Depending on the state, other duties can fall under or relate to these two core duties, such as the duty of good faith, duty of disclosure, and duty of oversight. *See id.* (clarifying that in Delaware the duty of loyalty “encompasses cases where the fiduciary fails to act in good faith”).

182. *See generally In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

relevant information necessitates considering the interests of not only shareholders but also stakeholders who are critical to the success and operation of the company.<sup>183</sup> For example, corporate decision-making that overlooks the impact on stakeholders may result in disgruntled employees who leak confidential information or a harmed public that seeks recourse through litigation. By failing to consider the interests of stakeholders and ESG-related risks, a corporation will not be poised for long-term, sustainable growth. Thus, ESG and long-term value maximization are fully consistent with a board's fiduciary duty of care and obligation under the *Caremark* doctrine to implement and monitor systems and identify and address risks.<sup>184</sup>

### 1. The Doctrinal Backdrop

This consistency with fiduciary duties is often true in M&A as well, where a board that considers stakeholders in decision-making can act entirely consistent with the directors' duties. Delaware law imposes on boards of directors the duty to manage the business and affairs of the corporation.<sup>185</sup> It is well established under Delaware law that a board of directors carrying out its duties is ordinarily free to refuse offers to purchase the company.<sup>186</sup> Directors could do so based upon the belief that the long-term value of the company exceeds the offer price, that the acquirer would run the company in a manner that imposes external costs on the community, or even that the acquirer will fail to adequately protect the company's stakeholders. In each of these events, the board is not typically required to accept an offer, even one at a premium, from an acquirer who will operate the firm differently, and the board's decision is protected under the business judgment rule.<sup>187</sup>

The Delaware Supreme Court confirmed this principle in *Paramount Communications, Inc. v. Time, Inc. (Time Warner)*.<sup>188</sup> In *Time Warner*, Time and Warner Communications were negotiating an acquisition when Paramount Communications, Inc. announced an all-cash offer to purchase all outstanding shares of Time.<sup>189</sup> Paramount's offer to acquire Time was much higher than Warner's but contingent on several conditions, including that Time terminate its merger agreement with Warner.<sup>190</sup> In rejecting the proposal from Paramount, Time's board maintained that the Warner deal offered greater long-term value for Paramount's shareholders and, unlike Paramount's offer, did not pose a threat to Time's

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183. *Id.* at 970.

184. *See id.* (describing gathering information about risk as part of a director's duty); *Stone*, 911 A.3d at 369 (adopting the *Caremark* test).

185. DEL. CODE ANN. tit. 8, § 141(a) (West 2020). *Paramount Commc'ns, Inc. v. Time Inc. (Time Warner)*, 571 A.2d 1140, 1154 (Del. 1989) (stating that the board's "fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders.").

186. *See, e.g., Time Warner*, 571 A.2d at 1154. ("Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."). In only limited contexts, for example when a cash sale becomes "inevitable" and *Revlon* duties attach, does a sell-side board's duties change to selling the company for the best reasonably obtainable price. *See infra* note 193 and accompanying text.

187. *Time Warner*, 571 A.2d at 1140; *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 129 (Del. Ch. 2011).

188. *See generally Time Warner*, 571 A.2d at 1140.

189. *Id.* at 1147.

190. *Id.*



survival.<sup>191</sup> Paramount and Time shareholders sued, seeking to enjoin Time's tender offer for Warner's shares.<sup>192</sup> The Delaware Court of Chancery thus faced a "pivotal" question:

Under what circumstances must a board of directors abandon an in-place plan of corporate development in order to provide its shareholders with the option to elect and realize an immediate control premium? As applied to this case, the question becomes: Did Time's board, having developed a strategic plan of global expansion to be launched through a business combination with Warner, come under a fiduciary duty to jettison its plan and put the corporation's future in the hands of its shareholders?<sup>193</sup>

The Court of Chancery denied the plaintiffs' motion, ultimately maintaining that the Time board was entitled to the protection of the business judgment rule in pursuing its friendly deal with Warner and defending against the hostile offer from Paramount.<sup>194</sup>

The plaintiffs appealed, alleging that Time was required to maximize shareholder value.<sup>195</sup> Ordinarily, "[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."<sup>196</sup> This flexibility means that typically under Delaware law a board may refuse to sell the company. However, there is a narrow exception: when a sale becomes "inevitable," the board's duty changes "from the preservation of [the company] to the maximization of the company's value at a sale for the stockholders' benefit."<sup>197</sup> As such, the plaintiffs argued that Time's actions triggered these so-called *Revlon* duties, requiring that the Time board maximize shareholder value.<sup>198</sup>

The Delaware Supreme Court in *Time Warner* disagreed with the plaintiffs and instead affirmed the Chancery Court's judgment.<sup>199</sup> In doing so, it underscored that *Revlon* is a narrow exception under Delaware law. The court reasoned that Delaware law imposes on boards the duty to manage the business and affairs of the corporation.<sup>200</sup> As such, directors are generally "obliged to chart a course for a corporation which is in its best interests

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191. *Id.* at 1147–49.

192. *Id.* at 1149.

193. *Time Warner*, 571 A.2d at 1149–50.

194. *Id.* at 1141.

195. *Id.*

196. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

197. *Id.* at 182 ("The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."). Subsequent case law has provided some clarification on when these duties attach. *Revlon* duties may be triggered when a corporation initiates a bidding process seeking to sell itself or to affect a reorganization involving a break-up of the company or when, in response to a bidder's offer, a company abandons its long-term strategy and seeks an alternative transaction that involves the break-up of the company. *See, e.g., Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1284–85 (Del. 1988) (determining the company in question was for sale and thus *Revlon* duties attached).

198. *Time Warner*, 571 A.2d 1140, 1149 (Del. 1989) (pointing to (1) the Time-Warner exchange ratio of .465 favoring Warner and resulting in Warner shareholders receiving 62% of the combined company and (2) the Time directors' subjective intent that the market might perceive the Time-Warner merger as putting Time up "for sale" along with their adoption of various defensive measures). More specifically, Paramount and the other plaintiff shareholders argued that the Time board's decision to merge with Warner imposed a fiduciary duty to maximize the immediate value of the shares and not impose unreasonable barriers to other bids. *Id.*

199. *Id.* at 1149–50.

200. *Id.* at 1151; DEL. CODE ANN. tit. 8, § 141(a) (West 2020).

without regard to a fixed investment horizon.”<sup>201</sup> Therefore, “absent a limited set of circumstances as defined under *Revlon*,”<sup>202</sup> a board of directors “is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.”<sup>203</sup> The Delaware Supreme Court further reasoned that if a board’s reaction to a hostile tender offer constitutes “only a defensive response and not an abandonment of the corporation’s continued existence, *Revlon* duties are not triggered.”<sup>204</sup> Accordingly, the Delaware Supreme Court declined to extend *Revlon* simply because a transaction “might be construed as putting a corporation either ‘in play’ or ‘up for sale,’” emphasizing that the facts of this case were “entirely insufficient to invoke *Revlon* duties.”<sup>205</sup>

While the *Time Warner* court reasoned that *Revlon* duties did not apply to this context, it did not immediately apply the default business judgment review.<sup>206</sup> Rather, because Time adopted various takeover defenses, its actions were subject to *Unocal* review, an intermediate form of scrutiny.<sup>207</sup> In response to Paramount’s offer, Time took several defensive measures: it (1) agreed to an automatic share exchange with Warner that gave Warner the right to receive over 11% of Time’s outstanding common stock; (2) obtained “confidence letters” from its banks where the banks agreed to not finance a hostile acquisition of Time; and (3) agreed to a no-shop preventing it from considering any other consolidation proposal.<sup>208</sup> When a company adopts takeover defenses like these, under *Unocal* and its progeny, the defensive actions must be reasonable and proportionate in relation to a threat posed, and must not be preclusive or coercive.<sup>209</sup> Only once both parts of the *Unocal* test have been satisfied does the deferential business judgment rule attach to the company’s defensive actions.<sup>210</sup>

The *Time Warner* court applied the *Unocal* analysis to Time’s defensive tactics, ultimately affirming the Chancery Court’s judgment that Time satisfied these requirements. First, the court evaluated the threat posed by Paramount’s takeover bid, noting that directors may consider the “inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on ‘constituencies’ other than shareholders . . . the risk of nonconsummation, and the quality of securities being offered in the exchange.”<sup>211</sup> In examining the threats Time faced, the court gave great weight to Time’s interest in protecting the culture of *Time* magazine, noting the board’s “prevailing belief . . . that Paramount’s

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201. *Time Warner*, 571 A.2d at 1150.

202. *Id.* (rejecting the plaintiff’s *Revlon* claim because of “the absence of any substantial evidence to conclude that Time’s board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable, as was the case in *Revlon*”).

203. *Id.*

204. *Id.* at 1150–51 (citing *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1345 (Del. 1987)). Accordingly, the Delaware Supreme Court declined to extend *Revlon* simply because a transaction “might be construed as putting a corporation either ‘in play’ or ‘up for sale,’” emphasizing that “[t]he adoption of structural safety devices alone does not trigger *Revlon*.” *Id.* at 1151 (finding the evidence “entirely insufficient to invoke *Revlon* duties”) (internal quotations omitted).

205. *Time Warner*, 571 A.2d at 1151.

206. *Id.* at 1142.

207. *Id.*

208. *Id.* at 1146–47.

209. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985).

210. *Id.* at 954.

211. *Time Warner*, 571 A.2d at 1153 (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)).

bid posed a threat to Time’s control of its own destiny and retention of the ‘Time Culture.’”<sup>212</sup> The court further credited management’s interest in protecting Time’s culture of journalistic integrity, stating that the “record attests to the zealotry of Time’s executives . . . in seeing to the preservation of Time’s ‘culture,’ i.e., its perceived editorial integrity in journalism.”<sup>213</sup> The court explained the Time Culture as follows:

They [the outside directors of Time] believed that Time had become recognized in this country as an institution built upon a foundation of journalistic integrity. Time’s management made a studious effort to refrain from involvement in Time’s editorial policy. Several of Time’s outside directors feared that a merger with an entertainment company would divert Time’s focus from news journalism and threaten the Time Culture.<sup>214</sup>

Next, the *Time Warner* court turned to the second part of the *Unocal* analysis, finding Time’s response was reasonable and proportionate given the threat. This part of the analysis requires “an evaluation of the importance of the corporate objective threatened; alternative methods of protecting that objective; impacts of the ‘defensive’ action, and other relevant factors.”<sup>215</sup> The court noted that Time’s responsive actions were not seeking to “cram[] down” management-supported alternatives to the Paramount bid, but instead to carry out a pre-existing corporate strategy.<sup>216</sup> Thus, its “response was reasonably related to the threat.”<sup>217</sup> Furthermore, the defensive devices were proportionate and did not preclude Paramount from making an offer for the combined Time-Warner company or changing the terms of its offer to permit the merger.<sup>218</sup> As such, in *Time Warner*, the Delaware Supreme Court affirmed the Chancery Court’s judgment, holding that Time reasonably and proportionately responded to a competing offer.<sup>219</sup> Given the court’s emphasis on the “threat” of harm to Time’s culture, *Time Warner* thus “represents a significant shift in emphasis” from maximizing shareholder value to recognizing other stakeholder interests.<sup>220</sup>

After the *Time Warner* decision, Paramount was undeterred and just a few years later set its sights on Viacom, another company in the entertainment industry.<sup>221</sup> Paramount and Viacom entered into a merger agreement that contained several defensive provisions that

212. *Id.* at 1148.

213. *Id.* at 1152.

214. *Id.* at 1143 n.4.

215. *Id.* at 1154 (quoting *In re Time Inc. S’holder Litig.*, Nos. 10866, 10670, 10935, 1989 WL 79880 (Del. Ch. July 14, 1989) (internal quotation marks omitted)).

216. *Time Warner*, 571 A.2d at 1154–55.

217. *Id.* at 1155.

218. *Id.*

219. *Id.* at 1149–50.

220. See Jeffrey N. Gordon, *The Twitter Board Bears Personal Responsibility for a Bad Outcome in the Twitter Sale*, CLS BLUE SKY BLOG (May 5, 2022), <https://clsbluesky.law.columbia.edu/2022/05/05/the-twitter-board-bears-personal-responsibility-for-a-bad-outcome-in-the-twitter-sale> [https://perma.cc/7PJU-LXQ2] (“Let’s be clear about this: The Twitter board was under no legal compulsion to accept Elon Musk’s offer for the company.”); Trevor S. Norwitz, *The Metaphysics of Time: A Radical Corporate Vision*, 46 BUS. LAW. 377, 378, 384 (1990) (“The supreme court has now however recognized that the shareholders are not the only constituency whose interests are to be considered in the takeover context.”).

221. *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 35 (Del. 1994).

would make a competing bid from anyone besides Viacom much more difficult.<sup>222</sup> However, following the announcement of the planned Paramount-Viacom merger, QVC came forward proposing that it and Paramount merge instead while offering a greater price per share for the Paramount shareholders.<sup>223</sup> When the Paramount board ignored the proposal, QVC sued to enjoin the Paramount-Viacom merger.<sup>224</sup> A bidding war ensued. Although Viacom's highest offer price was \$85/share, which was less than QVC's \$90/share, the Paramount board continued to reject QVC's bid despite the higher price.<sup>225</sup> In determining that the QVC offer was not in the best interests of the shareholders, several Paramount directors expressed a belief that the Viacom merger would be more beneficial to Paramount's future prospects than the QVC merger.<sup>226</sup>

Everything came to a head in *Paramount Communications v. QVC Network*, which provided an important clarification on the applicability of *Revlon* duties. The Court of Chancery issued a preliminary injunction for Paramount's defensive measures.<sup>227</sup> The Delaware Supreme Court affirmed, holding that Paramount's merger with Viacom constituted a "sale of control," which triggered the Paramount board's *Revlon* duties to sell for the highest price.<sup>228</sup> Because of the structure of the Paramount-Viacom merger, the Paramount shareholders would transition from shareholders in a widely held company with no controlling shareholder to shareholders in a company that has a controlling shareholder—a "sale of control."<sup>229</sup> The new controlling shareholder would have the ability to control the future direction of the company, and Paramount's shareholders would not have the ability to obtain a control premium for their shares.<sup>230</sup> The court laid it out as follows:

As a result, the Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value. There being no such protective provisions in the Viacom-Paramount transaction, the Paramount directors had an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available.<sup>231</sup>

The court then held that *Revlon* applies and the Paramount board violated its fiduciary duties by (1) ignoring QVC's offer and failing to examine the competition; (2) failing to act with due care to obtain reasonably available information to compare the two offers or alternatives to them that might provide the best value reasonably available for shareholders; and (3) failing to negotiate with Viacom and QVC to get that value.<sup>232</sup> After *QVC*, it

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222. *Id.* at 39. Among these defenses were a no-shop provision, termination fee, and stock option agreement that would allow Viacom to purchase nearly 20% of Paramount's stock at a set price if the termination fee was triggered. *Id.*

223. *Id.* at 35.

224. *Id.*

225. *Paramount*, 637 A.2d at 41.

226. *Id.*

227. *Id.* at 34.

228. *Id.* at 34, 46-48.

229. *Id.* at 43.

230. *Paramount*, 637 A.2d at 43.

231. *Id.*

232. *Id.* at 49-51.

became clear that *Revlon* duties can be triggered by not only a sale of the company, but also the sale of a controlling stake of the company.

However, with respect to the *Revlon* duty to try in good faith to get the best price reasonably available, the *QVC* court's holding "ironically . . . narrowed the range of corporate transactions to which the principle of *Revlon* applies."<sup>233</sup> That is because "it explicitly recognized that where a stock for stock merger is involved, the business judgment of the board, concerning the quality and prospects of the stock the shareholders would receive in the merger, would be reviewed deferentially, as in other settings."<sup>234</sup> When a sale (or change of control) is inevitable and the board is choosing between two all-cash offers, the assessment of value is relatively straightforward: the board must select the higher offer.<sup>235</sup> However, in other contexts, "value" is a nebulous term that is not inherently limited to the current price per share. Delaware courts will generally defer to the board's good faith and informed decision-making.<sup>236</sup> If the board acts in good faith and on an informed basis, then even under *Revlon*, "directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there."<sup>237</sup> While *QVC* helped reduce uncertainty about the circumstances to which *Revlon* applies, it remains an open question under Delaware law of precisely when *Revlon* applies to deals that have non-cash consideration.<sup>238</sup> Nevertheless, boards enjoy significantly more deference in evaluating stock and mixed-consideration deals.

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233. *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1055 (Del. Ch. 1997).

234. *Id.*

235. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *see generally* Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: is There Any 'There' There?*, 75 S. CAL. L. REV. 1169, 1175 n.17 (2002) ("As a general matter, the *Revlon* case stands for the proposition that once a board of directors either decides to tell the company or engages in change of control transaction, it must act to secure the highest immediate value reasonably attainable."); *id.* at 1175 (defining "change of control" as "a sale of the corporation for cash" and a transaction resulting in the company getting a controlling shareholder).

236. *See* *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009); *see also* Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55, 69–70 (2019) (noting Delaware courts' "retreat" from reviewing boards' M&A-related decisions).

237. *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595–96 (Del. Ch. 2010). Thus, under *Revlon* a board might reasonably conclude that an offer, even a higher cash offer, is of less "value" to its shareholders than another, nominally lower offer. *See id.* For example, the offer might be substantially less likely to be consummated—because of financing, regulatory approvals, or otherwise—a risk that is directly related to shareholder value. The consideration mix (whether cash or stock) may also play a role in how "valuable" a deal is for shareholders. As such, directors "should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1994); *see, e.g., In re Dollar Thrifty S'holder Litig.*, 14 A.3d at 578 (finding that the Dollar Thrifty board had not violated its duties when declining a higher bid made post-signing because the directors concluded that the new bidder lacked the resources to finance the deal and that the deal faced greater antitrust risk).

238. *Compare In re Smurfit-Stone Container Corp. S'holder Litig.*, No. 6164, 2011 WL 2028076, at \*14 (Del. Ch. May 24, 2011) (holding that *Revlon* likely applied to a deal with 50% cash consideration), and *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 732 n.25 (Del. Ch. 1999), *aff'd sub nom.*, *Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (holding that *Revlon* likely applied to a deal with 62% cash consideration), with *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995) (holding that *Revlon* did not apply to a deal with 34% cash consideration), and *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1047 (Del. Ch. 2012) (holding that *Revlon* did not apply to a deal with 42% cash consideration).

For more than three decades since *Time Warner* and *QVC*, in a nod to then First Lady Nancy Regan's campaign against drugs, practitioners and academics have regularly summarized the decision as endorsing the right for target company boards to "Just Say No" to an unsolicited takeover offer.<sup>239</sup> Put differently, a board cannot be forced into *Revlon* mode—it can simply refuse to sell and continue on a going forward basis. However, twenty years later, *eBay v. Newmark* added important gloss to the "Just Say No" principle endorsed in *Time Warner*.<sup>240</sup> In this case, the Delaware Chancery Court rejected craigslist's use of a poison pill against corporate giant eBay:

Time did not hold that corporate culture, standing alone, is worthy of protection as an end in itself. Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders. When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value. Under the *Unocal* standard, however, the directors must act within the range of reasonableness.

Ultimately, defendants failed to prove that craigslist possesses a palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value to support the indefinite implementation of a poison pill.<sup>241</sup>

As a practical matter, *eBay* does not change the board's ability under *Time Warner* to consider non-shareholder constituencies, because a board can always make the case (or at least, create a record) that promotion of non-shareholder constituencies "ultimately promote[s] stockholder value."<sup>242</sup>

Given this doctrinal background, there is doctrinal support for the consideration of stakeholder interests in some deals, but not necessarily in others. More precisely, the doctrinal question turns on whether considering stakeholder interests results in increased or decreased shareholder value, as well as whether *Revlon* duties apply. Next, we discuss whether sellers can, and should, be able to consider stakeholder interests in M&A deals. We divide this discussion into those instances where stakeholder governance enhances long-term corporate value and the less common (but more interesting) scenario where these values depart from one another.

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239. Of course, despite this characterization, defenses to hostile takeovers must still satisfy *Unocal*. See, e.g., *Air Prods. & Chems. Inc. v. Airgas, Inc.*, 16 A.3d 48, 54 (Del. Ch. 2011).

240. See generally *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) (explaining the processes added to refusing an unsolicited takeover offer).

241. *Id.* at 33. The Court of Chancery characterized *Time Warner* as "a muted embrace" rather than broad acceptance of corporate culture, and emphasized that *Time Warner*, unlike *eBay*, involved "the journalistic independence of an iconic American institution." *Id.* at 32.

242. *Id.* at 33.

## 2. *The Straightforward Scenario: Increased Shareholder (and Stakeholder) Value*

As we highlighted at the outset of this article, the competing viewpoints of shareholder primacy and stakeholder governance are often reconciled by the claim that considering other constituencies will ultimately lead to long-term shareholder value. This is the “easy” scenario. When the consideration of stakeholder interests results in more value to shareholders, it is a win-win. Even the most vocal opponents of stakeholder governance would support stakeholder-related initiatives that lead to long-term shareholder value. The doctrinal landscape supports this conclusion as well.

Nevertheless, let us break it down for the sake of completeness. Ordinarily, under Delaware law, the board of directors manages the business and affairs of the corporation and is free to refuse offers to purchase the company.<sup>243</sup> When doing so, “[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”<sup>244</sup> In this scenario, if an interested buyer approaches the board for a merger, the board would analyze the impact of a proposed transaction on both its shareholders and stakeholders. Having determined that the transaction would be harmful to the stakeholders, which in turn would decrease long-term shareholder value. The board then declines to sell to the interested buyer. A sale in this context is not yet inevitable, thus *Revlon* would not apply. Instead, assume that the board determines the transaction is good for stockholders. It also projects that by paying modest bonuses to continuing employees, the employees will stay longer, and as a result the combined company’s stock value will be meaningfully higher. Here, the stakeholders (employees) would make more money, as would the stockholders, when compared with continuing as a stand-alone company. The board agrees to sell the company, and doing so results in greater value for all parties.

Alternatively, assume that the seller has put itself up for auction, and a sale is now inevitable. *Revlon* duties apply, which require that the board maximize the value for its shareholders. Let us return to the employee example from the prior paragraph: the parties determine that by offering bonuses to continuing employees, the combined company will be worth more money. Buyer A is willing to include the bonuses, and Buyer B is not. Here, the value-creating option for the stakeholders (employees) and shareholders is to include the employee bonuses and go with Buyer A. Instead, consider a scenario where the employee bonuses result in no overall change to the shareholder value. Perhaps the combined company would pay \$10 million in bonuses, and the stakeholders staying longer term would generate \$10 million in increased share value. Here, the impact of the stakeholder considerations would be neutral on overall shareholder value. In this scenario, a board that embraces stakeholder considerations would select Buyer A for the deal. A board that does not would be indifferent between Buyers A and B. In both scenarios, the board could consider stakeholder interests while complying with its fiduciary duties under existing Delaware law. In short, whether *Revlon* applies or not, if stakeholder considerations increase shareholder value, then boards are free to consider stakeholder interests under existing Delaware law.

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243. See, e.g., *Paramount Commc’ns, Inc. v. Time Inc. (Time Warner)*, 571 A.2d 1140, 1154 (Del. 1989) (explaining avenues that allow boards to refuse offers to purchase their company); *Air Prods. & Chems., Inc.*, 16 A.3d at 97 (discussing deference to management’s business decisions and the problems that can emerge).

244. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

Moreover, when the consideration of stakeholder interests increases shareholder value, boards could even be *required* to consider these interests. The logic is as follows: the fiduciary duty of care requires that boards act in a reasonably informed manner after adequate consideration of relevant information and sufficient deliberation.<sup>245</sup> To comply with this duty, presumably boards would need to be informed about the impact of their decisions on stakeholders, and whether that will in turn affect shareholder value. By failing to consider stakeholder interests (and their impact on shareholder value) a board is failing to act on an informed basis after sufficient deliberation. Although courts have not yet embraced this connection between the duty of care and stakeholder governance in practice, it is a natural application of existing doctrine to the fiduciary duty of care.

Now, in many instances, stakeholder considerations in M&A enhance long-term corporate value. But this equivalency assumes away the problem. The intellectually interesting category is the subset of stakeholder initiatives that come at the expense of long-term shareholder value. It is here that the challenging legal and business questions arise.

### 3. *The Challenging Scenario: Decreased Shareholder Value*

When stakeholder considerations negatively impact shareholder value, it is a much thornier issue. Doctrinally, “[p]romoting, protecting, or pursuing non[-]stockholder considerations must lead at some point to value for stockholders.”<sup>246</sup> Now, as a practical matter, a board can almost always consider non-shareholder constituencies because a board can always make the case (or at least create a record) that the promotion of non-shareholder constituencies “ultimately promote[s] stockholder value.”<sup>247</sup> But we believe that Delaware doctrine should give boards the ability to consider non-shareholder constituencies in M&A transactions, even in the hypothetical case where the board flatly states that such considerations come at the expense of shareholder value.

To see why, consider an M&A transaction in which a buyer can improve value for shareholders at a manufacturing company by increasing pollution, still within legal limits but beyond the pollution levels of its current owner. Or consider an M&A transaction in which the buyer can create shareholder value at a newspaper company by creating more salacious or sensational content. Does Delaware corporate law compel a sale in any of these situations, simply because the seller must “ultimately promote stockholder value?”<sup>248</sup>

Outside of the *Revlon* context, the answer must be no. That is, in part, because the stockholders have an interest in the company going forward. So, even if the stakeholder considerations come at the expense of shareholder value, theoretically it would be possible “at some point” for them to lead to value for stockholders. Moreover, an answer to the

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245. *See, e.g.*, *Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. 1985) (emphasizing the importance of making reasonably informed decisions). In addition to the duty of care, directors also owe a fiduciary duty of loyalty, which requires that they act in the best interests of the corporation rather than their personal interest (for example, if the director has a conflict of interest that impacts decision-making). *See, e.g.*, *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (explaining the duty of loyalty owed by directors). Depending on the state, other duties can fall under or relate to these two core duties, such as the duty of good faith, duty of disclosure, and duty of oversight. *See id.* (clarifying that in Delaware the duty of loyalty “encompasses cases where the fiduciary fails to act in good faith”).

246. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (citations omitted).

247. *Id.*; *see also supra* note 240 and accompanying text.

248. *Id.*



contrary would render illusory most stakeholder and ESG objectives that companies have, not just in the sale of the company but also in the everyday course of business. The manufacturing company would need to increase pollution itself to preempt the inevitable pro-pollution takeover offer (which, under this theory, the company must accept). The newspaper would have to adopt salacious or sensational content for the same reason. There cannot possibly be such a sharp disconnect between what most companies today pursue, in terms of stakeholder and ESG goals, and what Delaware corporate law requires.<sup>249</sup>

There is also an economic justification for this conclusion. Law & economics scholars seek to identify legal rules that maximize *allocational efficiency* in the M&A marketplace, i.e., legal rules that facilitate the flow of assets to their highest and best use.<sup>250</sup> In many cases, allocational efficiency can be achieved by maximizing shareholder value because shareholders are the residual claimants on the corporation's cash flows. In both examples above, however, the buyer is imposing an externality on third parties to the deal (the environment and the newspaper's readership and/or civic society, respectively). When there is such an externality, maximizing shareholder value does not necessarily yield allocational efficiency because the cost to third parties might be greater than the benefit to shareholders.<sup>251</sup> Of course, shareholders are also members of the broader community as well, and will therefore inevitably bear some of the cost of these externalities.

We do not claim that the board's consideration of negative externalities should come at the expense of stricter regulations. Shareholders elect corporate directors, and there are strong incentives to maximize the value, most immediately, to shareholders.<sup>252</sup> Often, a board's decision to ignore stakeholder interests in M&A may reflect this phenomenon. On the other hand, in cases where a sell-side board *does* incorporate stakeholder and ESG considerations that conflict with their short-term financial interests, it is evidence that the decisions are justified and disinterested. Nevertheless, the incentive to act in self-interest is inherent in the corporate form. Our approach and greater regulation are not mutually exclusive. It can be the case that the board should have the flexibility to consider these negative externalities, and that regulation should limit negative externalities.<sup>253</sup>

249. At the 2023 Ray Garrett Institute Conference held in Chicago, approximately 200 corporate law practitioners were asked whether Delaware law *should* require a sale in the polluting-buyer hypothetical described in the text. Only 21% of respondents answered "yes," and 79% of respondents answered "no." However, on the doctrinal question of whether Delaware law *does* require a sale, 56% answered "yes" and 44% answered "no." For reasons described in the text, we believe that the answer to both questions is no.

250. See, e.g., Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q. J. ECON. 957, 959 (1994) (describing "efficiency problems" that emerge from laws governing sale-of-control); John C. Coffee, Jr., *Transfers of Control and the Quest for Efficiency: Can Delaware Law Encourage Efficient Transactions While Chilling Inefficient Ones?*, 21 DEL. J. CORP. L. 359, 366–67 (1996) (discussing whether U.S. law can determine inefficient and efficient transactions).

251. Cf. Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 41–46 (Alan J. Auerbach ed., 1988) (arguing that breach of implicit contracts can motivate hostile takeovers, and such takeovers may be inefficient in the long run).

252. See, e.g., Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 171 (2012) ("To ensure that for-profit corporations do not generate excessive externalities, strong boundaries remain critical.").

253. For a discussion of the value of non-corporate law mechanisms in protecting non-shareholder constituencies, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 442 (2001) (arguing in support of shareholder primacy and asserting that "the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies . . . lie outside of corporate law.").

Thus, within the bounds established by regulatory efforts, if there are no conflicts of interest, the board of the target company is positioned to weigh these competing effects and ultimately determine whether the deal creates value overall. *Time Warner* gives boards the discretion to do this, at least insofar as *Revlon* duties do not apply. To the extent that this doctrinal conclusion is unclear under existing case law, we believe, based on foundational principles of law and economics, that courts should clarify that the shareholder value maximization goals articulated in *eBay* do not override the broader perspective that the board can take under *Time Warner*.

Professor Robert Miller provides an important contribution to this debate in a recent and provocatively titled article: *Delaware Law Requires Directors to Manage the Corporation for the Benefit of its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge's Why We Should Keep Teaching Dodge v. Ford Motor Co.*<sup>254</sup> We begin by observing two points of agreement with Professor Miller. First, as noted in the Introduction to this Article, we agree that the stakeholder and ESG issues most worth considering conflict with the goal of shareholder value maximization.<sup>255</sup> When these considerations create long-term shareholder value, no one doubts that the board should pursue them. Second, we agree with Professor Miller that the board can properly consider non-shareholder constituencies in rejecting a high-premium all-cash offer if the board believes in good faith that shareholders will do better in the long run by remaining independent.<sup>256</sup>

The interesting question—and our point of departure from Professor Miller—is what happens when the board receives an offer for the company that (in the board's view) exceeds the long-term value of the company but comes at the expense of other constituencies? To make the hypothetical more interesting, what happens when the board believes in good faith that the cost to these other constituencies exceeds the benefits to shareholders? These stylized facts quite possibly summarize the Twitter board's situation in April of 2022.

Professor Miller provides an exhaustive historical and doctrinal account to argue that the board is compelled to sell, even if the company is not currently in *Revlon* mode.<sup>257</sup> In effect, Professor Miller's analysis implies that all companies at all times are for sale to the highest bidder. And even in the ordinary course of business, CEOs who endorse goals that might come at the expense of shareholder value (for example, the 181 CEOs who signed the Business Roundtable Statement) are, in Professor Miller's view, openly violating their fiduciary duties under Delaware corporate law.<sup>258</sup>

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254. Robert T. Miller, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of its Stockholders and the Absurdity of Denying it: Reflections on Professor Bainbridge's Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. DIGIT. 32, 33 (2023) (“Directors are not permitted to . . . act for the end of benefiting either themselves or anyone else other than the shareholders.”).

255. *Id.* at 38 (“Some ESG advocates insist that the policies they champion will in fact increase shareholder value in the long run, and, in a very broad range of cases, they are obviously correct: *everyone* involved in corporate governance has long recognized that treating non-shareholder stakeholders such as employees, customers, creditors, and suppliers fairly and even generously tends to maximize value for shareholders in the long-term. If this were all ESG meant and ESG advocates desired, then ESG would not be controversial and certainly would not involve anything like a new paradigm of corporate governance.”).

256. *Id.* at 61 (“[D]irectors may (indeed should) consider the effects of various actions on non-shareholder constituencies in order to determine what is best for shareholders in the long term.”).

257. *Id.* at 64.

258. *Id.* at 38–40.

We do not agree with Professor Miller's emphatic and categorical doctrinal conclusion, even in *Revlon* mode, in part because the facts from our hypothetical above have never been presented to the Delaware courts. When *Revlon* applies, the company or control of the company is being sold. As such, unlike in non-*Revlon* situations, the promotion of non-shareholder constituencies at the expense of shareholders is unlikely to "ultimately promote stockholder value" simply because this is the moment when the stockholders are cashed out of the company. A strict application of existing doctrine may result in boards being unable to consider stakeholder interests in this scenario.

However, the facts from our hypothetical have never been presented to the Delaware courts. Delaware corporate law generally gravitates towards rules that maximize overall societal value, and mandating deals that impose large negative externalities would seem to cut against this goal. Professor Miller prominently cites former Delaware Chancellor and former Delaware Supreme Court Chief Justice Leo Strine, among others, for his claim that directors must always maximize shareholder value.<sup>259</sup> But Chief Justice Strine has expressed a more nuanced view about the obligation to maximize shareholder value, even in a *Revlon* situation.<sup>260</sup>

In any event, to the extent that Professor Miller is correct on the doctrinal point that Delaware law, at all times, requires shareholder value maximization, we offer in this Article the normative point that Delaware corporate law should make room for non-shareholder considerations in M&A transactions based on straightforward efficiency considerations.

### B. Negotiation Leverage

After a board approves a transaction or a deal becomes inevitable, contractual provisions can be incorporated into definitive transaction agreements. However, merger agreements almost entirely fail to consider the deal's impact on stakeholders and fall short in efforts to manage ESG-related risks.<sup>261</sup> Rather, when faced with a potential sale, sell-side boards appear to disregard the known risks to their long-standing objectives and fail to obtain valuable contractual provisions that could protect their stakeholders. Given this discrepancy, it is necessary to first examine whether boards have sufficient negotiation leverage to extract ESG-related contractual guardrails.

One of the most powerful plays in the board's negotiation playbook is the shareholder rights plan, also known as the poison pill. Returning to the Twitter case study, the Twitter board adopted a poison pill takeover defense with a 15% trigger threshold just one day

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259. Miller, *supra* note 254, at 36.

260. See, e.g., Strine, Jr., *supra* note 235, at 1181–86. In this article, Chief Justice Strine poses a hypothetical in which a sell-side board in *Revlon* mode recommends a lower-value deal:

It candidly admits that the deal is slightly less attractive in financial terms to its stockholders as an immediate matter than are the other two deals. . . . [A]s soon as the proxy solicitation begins, lawsuits are filed seeking a preliminary injunction against the merger agreement and the board's use of the pill . . . . The suits are all similar and make a simple point: the board has decided to sell the company. Thus, its duty is plain and singular: get the highest price . . . . I have no intention of opining as to how the case would be decided. I do suggest, however, that the answer would shed light on the fundamental purpose of the corporation in our society.

*Id.*

261. See discussion *supra* Part III.

after Musk's offer.<sup>262</sup> The “flip in” feature of the Twitter pill permitted each shareholder (other than Musk) to pay \$210 per share in cash and receive Twitter shares worth \$420 if Musk crossed 15% ownership.<sup>263</sup> Under this “flip-in” feature, Musk's 15% ownership in Twitter would be diluted down to 1.7%, and the value of his stake in Twitter would fall by approximately \$2.7 billion. However, the exercise of the flip-in feature would put \$157 billion of new cash on the Twitter balance sheet—more than three times the entire market capitalization of Twitter at the time. So, almost certainly, if Musk crossed 15%, the Twitter board would have used the exchange feature, which simply gives each Twitter shareholder one additional share for each share currently held. The exchange feature would create less dilution (Musk would go from 15% down to 8.1%), but it would still impose \$2.8 billion of cost on Musk and had the benefit of not adding any cash to the Twitter balance sheet.<sup>264</sup>

Of course, the purpose of the poison pill is not to impose dilution on the potential acquirer, but rather to force a negotiation between the acquirer and the board. If the board and acquirer agreed on a deal, the board would then redeem (eliminate) its poison pill, and let the acquirer proceed with the offer on the agreed-upon terms. Putting in a pill gives the board significant leverage to negotiate terms. This is a standard play in the M&A playbook.<sup>265</sup>

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262. Lauren Feiner, *Twitter Board Adopts 'Poison Pill' After Musk's \$43 Billion Bid to Buy Company*, CNBC (Apr. 15, 2022), <https://www.cnbc.com/2022/04/15/twitter-board-adopts-poison-pill-after-musk-43-billion-of-to-buy-company.html> [<https://perma.cc/2BT4-ZMVF>].

263. Both the \$54.20 deal price and the \$420 of Twitter shares were a reference to marijuana. *See, e.g.*, Matthew Fox, *Twitter's Poison Pill Continues the Pot Joke References by Including a Provision to Allow Investors to Receive Stock at \$420 Per Share*, MKTS. INSIDER (Apr. 19, 2022), <https://markets.businessinsider.com/news/stocks/twitter-poison-pill-420-provision-elon-musk-takeover-memes-2022-4> [<https://perma.cc/2PG7-UG57>].

264. Calculations on file with authors. Professor Eric Talley argued that an exercise of the Twitter pill “could wreak some weird forms of havoc that – if left unchecked – lead to absurd [negative] stock prices after triggering.” Eric Talley (@ProfEricTalley), TWITTER (Apr. 21, 2022), <https://twitter.com/ProfEricTalley/status/1517180857307521024> [<https://perma.cc/TQXZ-C2U7>]. The underlying flaw, according to Professor Talley, was that the Twitter pill had a fixed exercise price (\$210) while “most conventional pills simply give non-triggering SHs the right to buy a fixed # of add'l shares (say 5) for each 1 they currently own, at a 50% price discount.” Eric Talley (@ProfEricTalley), TWITTER (Apr. 21, 2022), <https://twitter.com/ProfEricTalley/status/1517180660905086976> [<https://perma.cc/65NF-FL5X>]. This is incorrect: virtually all pills have a fixed exercise price, like the Twitter pill. Upon exercise of the flip in feature, the Twitter pill (like every other pill) would add a massive amount to both the numerator of the stock price per share (in the form of cash from exercise) and to the denominator (in the form of number of shares), which means that the Twitter stock price would asymptotically approach zero but could not go below zero. Specifically, our calculations indicate that a Twitter flip-in exercise would push the stock price from \$46 to approximately \$26 per share. Using the exchange feature would similarly yield a post-exercise stock price of approximately \$25 per share. The Twitter pill had a different defect because it gave the board a “last look” in the event of a trigger event. *See* Olivier Baum & Guhan Subramanian, *Redemption Mechanisms in Poison Pills: Evidence on Pill Design and Law Firm Effects* (Aug. 14, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4526712](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4526712) (reporting that top-tier M&A law firms are far more likely to install a “trip wire” poison pill rather than a “last look” poison pill such as the Twitter pill).

265. *See, e.g.*, ROBERT F. BRUNER, *APPLIED MERGERS & ACQUISITIONS* 838 (2004) (“Generally, the pill preserves time and flexibility for the board to negotiate a more advantageous deal with the raider—as well as with other potential buyers.”).

The Twitter pill, like every poison pill—at least for Delaware companies<sup>266</sup>—was subject to the “safety valve” of a proxy contest. This means that if the Twitter board had rejected Musk’s \$54.20 per share offer, Musk could try to gain board control. If Musk was successful in gaining a majority of the board seats, the new Musk-controlled board could redeem the pill and allow Musk to proceed with his offer at \$54.20 per share. The proxy contest safety valve is indeed viable when all of the target company directors are up for re-election each year (a so-called “unitary” board).

But when a company has a staggered board, it is more difficult for the safety valve to operate effectively because only a fraction of its directors is up for re-election each year. At the time of the deal, Twitter had a staggered board, with one-third of its directors up for re-election each year. This is very unusual: the vast majority of public companies today have a unitary board, not a staggered board. Moreover, Twitter’s staggered board was “effective,” meaning that it could not be dismantled or evaded.<sup>267</sup> No bidder has ever been able to last through two proxy contests to gain board control against a company with an effective staggered board.<sup>268</sup> The annual meeting timeline at Twitter would have made board control particularly difficult for Musk. Musk made his initial offer on April 14, 2022, which was too late to be able to run a slate at the Twitter annual shareholders’ meeting scheduled for May 25, 2022.<sup>269</sup> At that meeting, two incumbent directors would be (and were) re-elected to three-year terms.<sup>270</sup> At the May 2023 annual meeting, Musk could have run a proxy contest to gain four seats, out of nine total directors.<sup>271</sup> And at the May 2024 annual meeting—a full two years after Musk’s initial approach in April 2022—Musk could theoretically win three more seats, gaining a 7-2 majority on the Twitter board.<sup>272</sup> Needless to say, two years is a lifetime for any company, and especially for a tech company such as Twitter. No bidder has ever lasted that long, and even someone (perhaps especially someone) like Musk would likely lose patience and go away long before the two years transpired.

These points imply that the combination of an effective staggered board and a poison pill gives a board a categorical right to “Just Say No” to an acquirer’s offer. This means that the board has an absolute right to veto any offer from a prospective acquirer unless they get the terms that they want. And of course, if the acquirer declined to do a deal on those terms, the company would continue as a stand-alone company.

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266. See Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 628 (2003) (noting that “dead hand” and “slow hand” poison pills are valid in Pennsylvania and Maryland).

267. See Lucian Arye Bebchuk, John C. Coates, IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence & Policy*, 54 STAN. L. REV. 887, 887 (2002) (describing “effective” staggered boards in terms of their structure and impacts).

268. *Id.*

269. Twitter 2022 Proxy Statement, *supra* note 6, at 49; Proxy Statement: Notice of 2022 Annual Meeting of Stockholders Relating to a Merger or Acquisition (Form DEFM14A) 10 (July 26, 2022) [hereinafter Twitter 2022 Notice].

270. Twitter 2022 Notice, *supra* note 269, at 10.

271. *Id.*

272. See *id.* (reporting four Class I directors, whose terms would expire in 2023; three Class II directors, whose terms would expire in 2024; and two Class III directors, whose terms would expire in 2025); see also Gordon, *supra* note 220 (“[F]rom a corporate governance structural point of view, [the Twitter board] was in an unassailable position until the 2024 shareholders meeting.”).

In our various presentations of these points to academic and practitioner audiences, some practitioners have expressed skepticism that the board could, as a practical matter, “Just Say No” to such a bidder’s high-premium all-cash offer. We disagree. Protection of content moderation and other stakeholder-related policies at a company like Twitter would be directly analogous to the protection of “Time Culture,” which the Delaware Supreme Court endorsed in *Time Warner* as a legitimate threat that the Twitter board could have responded to.<sup>273</sup> And indefinite use of a poison pill and effective staggered board takeover defense has also been squarely endorsed by the Delaware Court of Chancery<sup>274</sup> (notwithstanding suggestions from one of us, with others, that it should not<sup>275</sup>).

To illustrate the point, consider the scenario in which Donald Trump offered to acquire Twitter for \$54.20 per share in April 2022 (and put aside the question of whether Trump would be able to finance such a bid). Would the Twitter board have the legal right under Delaware corporate law and the practical ability, as a matter of takeover dynamics, to “Just Say No” to Trump’s offer? Or what about the scenario of whether Joe Biden offers to buy Truth Social at a premium, does the Truth Social board have the right to resist a sale? The answer to both is yes. For those who might remain skeptical, would the Twitter board have the legal right and practical ability to decline to sell Twitter to the Chinese government? Putting aside the point that the Committee on Foreign Investment in the United States (CFIUS) review would almost certainly block the deal, the answer must again be yes. And for those who still remain skeptical, consider one last hypothetical: would the Twitter board have the legal right and the practical ability to decline to sell Twitter to Vladimir Putin? Of course, the answer is yes. These extreme cases illustrate the general point that the Twitter board—or any board—could reasonably consider the identity of the buyer; and if the board had considered the buyer to be a threat to its culture, *Time Warner* indicates that they would have had the right to “Just Say No” to Musk’s offer in April 2022.<sup>276</sup> Instead, the board failed to obtain any meaningful protection for Twitter’s stakeholders, and the directors “did not even seek soft pledges or information”<sup>277</sup> on how stakeholders, such as its users, would be treated.

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273. *Paramount Commc’ns, Inc. v. Time Inc. (Time Warner)*, 571 A.2d 1140, 1148 (Del. 1989).

274. *Air Prod. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 116 n.449 (Del. Ch. 2011).

275. *Bebchuk, Coates & Subramanian*, *supra* note 267, at 994. For judicial commentary on this proposal, see, e.g., *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310, 347 n.215, 351 n.229 (Del. Ch. 2010) (noting the “plausible argument” that a pill should be considered preclusive after a target has lost a first proxy contest); Leo E. Strine, Jr., *The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic “Just Say No” Question*, 55 STAN. L. REV. 863, 877–81 (2002) (discussing how the argument puts “stress” on the various tools Delaware courts have used to avoid answering the “Just Say No” question).

276. *See Time Warner*, 571 A.2d at 1153 (noting that “[t]he usefulness of *Unocal* as an analytical tool is precisely its flexibility in the face of a variety of fact scenarios . . . . Thus, we have said that directors may consider, when evaluating the threat posed by a takeover bid, the ‘inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on ‘constituencies’ other than shareholders . . . the risk of nonconsummation, and the quality of securities being offered in the exchange.’ [quoting *Unocal*]. The open-ended analysis mandated by *Unocal* is not intended to lead to a simple mathematical exercise: that is, of comparing the discounted value of Time–Warner’s expected trading price at some future date with Paramount’s offer and determining which is the higher.”).

277. *See Bebhuk, Kastiel & Toniolo*, *supra* note 73, at 309 (focusing on failure to Twitter to protect its “tweeps”).

### C. Contractual Provisions in M&A Agreements

So, if a board considers stakeholder governance and ESG a valuable enterprise, and has the requisite fiduciary capability and negotiation leverage, what contractual provisions might the board seek? Other than financing lenders and institutions, merger agreements typically purport to protect one key group of stakeholders going forward: the employees. In the Musk/Twitter deal, most notable is a provision that for twelve months Twitter would provide to each of its continuing employees “at least the same base salary and wage rate” and “substantially comparable” employee benefits, along with severance payments and benefits “no less favorable” than those before the deal.<sup>278</sup> This employee provision is a textbook example of employee provisions in M&A agreements, nearly all of which contain similar assurances.<sup>279</sup>

In a typical merger agreement, markedly absent from the employee protections is a limitation on the company’s ability to terminate an employee. Quite the opposite—as shown in the Musk/Twitter agreement, typically the section on “Employee Benefits” expressly provides that: “Nothing contained in this Section [on Employee Benefits], expressed or implied, shall . . . obligate Parent or any of its Affiliates to . . . retain the employment or services of any Company Service Provider.”<sup>280</sup> The agreement defines a “Company Service Provider” as “each current or former director, employee, consultant or independent contractor of the Company or any of its Subsidiaries.”<sup>281</sup>

Moreover, carveouts, limitations, and exceptions are commonplace in any employee protections provided in merger agreements. The employee protections in the Musk/Twitter merger agreement are filled with the most common of these exceptions. For example, the employee protections only apply to “Employees of the Company or its Subsidiaries immediately prior to the Effective Time who remain employees of Parent, the Surviving Corporation or any of their Affiliates following the Effective Time” (referred to as “Continuing Employees”).<sup>282</sup> In addition, the duration of the provision is limited to one year.<sup>283</sup> Furthermore, the incentive compensation and benefit provisions each contain a carveout excluding equity and equity-based awards.<sup>284</sup> These limitations are not unique to the Twitter deal; rather, Twitter’s agreement provides an example of many of the most common trends observed in M&A dealmaking.

Most significantly, when it comes to enforcing the existing provisions, there is a catch: employees are not third-party beneficiaries of the merger agreement.<sup>285</sup> The Musk/Twitter merger agreement excludes employees from being third-party beneficiaries expressly and

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278. Musk/Twitter Merger Agreement, *supra* note 70, at 51.

279. For data on the prevalence of each of these features, see Petrucci, *supra* note 164.

280. Musk/Twitter Merger Agreement, *supra* note 70, at 52.

281. *Id.* at 6.

282. *Id.* at 51.

283. *Id.*

284. *Id.* (“Parent shall, or shall cause the Surviving Corporation or any of their Affiliates to, provide for each Continuing Employee . . . (ii) short- and long-term target incentive compensation opportunities that are no less favorable in the aggregate than those provided to each such Continuing Employee immediately prior to the Effective Time (provided that Parent shall *not be obligated to provide such incentives in the form of equity or equity-based awards*) and (iii) employee benefits (*excluding equity and equity-based awards*).” (emphasis added)).

285. Musk/Twitter Merger Agreement, *supra* note 70, at 69.

impliedly.<sup>286</sup> Within the section on employee matters, the agreement expressly provides that “Nothing contained in this Section [on Employee Benefits], expressed or implied, shall . . . give any Company Service Provider (including any beneficiary or dependent thereof) or other Person any third-party beneficiary or other rights.”<sup>287</sup> In addition to excluding employees expressly in the employee matters section, the agreement contains a broader provision that generally excludes any third-party beneficiaries.<sup>288</sup> The effect, in most deals, is that employees nominally receive some protection under the merger agreement, but they have no recourse to hold the acquirer accountable. Once again, this is a textbook approach to these clauses.

As a basic matter, boards could seek additional provisions to protect employees more fully. For example, parties could agree that an acquirer cannot fire employees without cause for a fixed duration of time, grant employees the power to enforce specific contractual provisions as third-party beneficiaries,<sup>289</sup> ensure similar post-close working conditions—such as remote work opportunities, number of hours worked per week, and vacation days—extend the duration of the provision or scope to cover employees hired after closing or require a particular (and humane) process for any terminations. Obtaining modest monetary commitments like these would be unlikely to hold up the deal given the minor financial cost relative to the overall deal value, which in Twitter’s case exceeded \$40 billion.<sup>290</sup> Yet there is no evidence the Twitter board even attempted to negotiate these protections. Our discussions with lawyers who were involved in the deal confirm that the Twitter board did not. This is a missed stakeholder moment in the Twitter deal and virtually all M&A deals more broadly.

Boards could also seek industry- and company-specific provisions that protect their most consequential stakeholders. These provisions would vary more greatly by deal and industry, but we can look to Twitter for one illustrative example. In our view, a major

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286. *Id.*

287. *Id.* at 51.

288. *Id.* at 69 (“Subject to Section 9.13, this Agreement is not intended to and shall not confer upon any Person other than the parties hereto any rights or remedies hereunder; provided, however, that it is specifically intended that (A) the D&O Indemnified Parties (with respect to Section 6.6 from and after the Effective Time), (B) the Company Related Parties (with respect to Section 8.3) are third-party beneficiaries and (C) the Parent Related Parties (with respect to Section 8.3) are third-party beneficiaries.”). While there are a handful of exceptions, such as for certain indemnified and financing-related parties, none of the exceptions address current or former employees. *Id.* But see Robert Freedman, *Behind the Snark, Counsel for Laid-off Twitter Staff Promises Musk a Rough Ride*, CFO DIVE (Dec. 8, 2022), <https://www.cfodive.com/news/laid-off-twitter-staff-severance-snarky-letter-akiva-cohen-employment-law-elon-musk-severance/638224/> [<https://perma.cc/K3JL-PN43>] (“Delaware law doesn’t treat these sort of recitals as dispositive.” (quoting attorney Akiva Cohen)). For a discussion of third-party beneficiaries in dealmaking under Delaware law, see sources cited *supra* note 179 and accompanying text.

289. It is a relatively straightforward matter for an agreement to provide that a group (here, employees) is a third-party beneficiary for the purposes of solely one provision. Many merger agreements already do so with regards to lenders helping finance the transaction. In the Musk/Twitter deal, designating employees as third-party beneficiaries would not only have provided a legal remedy for employees to prevent Musk from drastically reducing their hourly compensation and benefits, but also would have increased the employees’ bargaining power in any subsequent negotiations.

290. See Bebchuk, Kastiel & Toniolo, *supra* note 73, at 318 n.33 (noting that “a payment of, say, \$50,000 to each of the 3,700 [employees] who were fired immediately after the deal, while providing a meaningful cushion to laid-off workers, would have cost only \$185 million in the aggregate [to the shareholders], and thus just 1.8% of their total gains”).



missed opportunity—perhaps the biggest missed opportunity—in the Musk/Twitter deal was the absence of guardrails to protect content moderation policies at Twitter. Specifically, the Twitter board had a long history of promoting content moderation as its perceived best approach for governance of the company. It should have insisted on irrevocable delegation of content moderation policies to an independent, self-perpetuating, panel of experts.<sup>291</sup> Such a panel would have protected the global town square that Twitter provides and benefitted its users, communities, and other public stakeholders.

This approach is not without precedent. Perhaps most famously, when Unilever, a multinational food behemoth, purchased Ben and Jerry's in 2000, the parties agreed to establish an independent board of directors “for preserving and enhancing the objectives of the historical social mission of the Company.”<sup>292</sup> The board was set up to be self-selecting, with Unilever appointing only two out of the eleven board members.<sup>293</sup> The parties also agreed that this board would establish and oversee a “social venture fund” with \$5 million made available to the fund “to provide venture financing to (1) vendors owned by women, minorities or indigenous people, (2) vendors which give priority to a social change mission, and (3) such other third party entrepreneurial businesses within the scope of the Company's Social Mission Priorities.”<sup>294</sup>

A similar approach was also famously taken in the 1980s when Rupert Murdoch secured his purchase of The Times of London by legally promising to protect editorial freedom.<sup>295</sup> Murdoch guaranteed that he would not interfere with reporting and that he would let a board of outside directors decide on the future hiring and firing of editors.<sup>296</sup> Government officials and journalists cited a history of interference with his papers' news coverage to argue that these assurances were necessary.<sup>297</sup> Content moderation policies to protect a global town square are the direct modern-day technological descendant (though for far higher stakes) of the protection of editorial freedom at The Times of London in the 1980s and the protection of journalistic integrity and “Culture” at Time from *Time Warner* in 1990. A similar approach could have been taken in the Musk/Twitter deal. Yet, instead of negotiating guardrails to protect the global town square, the Twitter board was “blinded by the light” of a high-premium, all-cash offer.<sup>298</sup> The fact that the Twitter board did not

291. This could be achieved by putting the content moderation policies into the Twitter articles of incorporation and providing users with a right of action to enforce these policies.

292. Ben & Jerry's Homemade, Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 31 (Apr. 18, 2000). In addition, the surviving company's Articles of Incorporation provided that: “The Corporation has the following Mission Statement: We have a progressive, nonpartisan, social mission that seeks to meet human needs and eliminate injustices in our local, national and international communities by integrating these concerns into our business activities. Our focus is on children and families, and the environment.” *Id.* at 1.

293. *Id.* at 30.

294. *Id.* at 16–17.

295. Jonathan Friendly, *Ethics of Murdoch Papers Under Scrutiny as He Prepares to Buy London Times*, N.Y. TIMES (Feb. 12, 1981), <https://www.nytimes.com/1981/02/12/nyregion/ethics-of-murdoch-papers-under-scrutiny-as-he-prepares-to-buy-london.html> (on file with the *Journal of Corporation Law*).

296. *Id.*

297. *Id.*

298. This point fits with basic negotiation theory, that adding issues can expand the bargaining range between the parties. *See, e.g.*, MICHAEL KLAUSNER & GUHAN SUBRAMANIAN, *DEALS: THE ECONOMIC STRUCTURE OF BUSINESS TRANSACTIONS* (2023). In this case, adding guardrails as an issue shifts the negotiation away from a

protect content moderation policies—and did not even make any effort to do so—was an enormous missed ESG-moment.<sup>299</sup>

Critics of our proposal might respond that acquirers would typically want the absolute right to run the company as they see fit, including (in the Twitter context) the right to make content moderation decisions. Musk’s recent departure from the CEO role seems to suggest he is willing to delegate some managerial decision-making.<sup>300</sup> And even Musk should understand the symbolic and practical value of delegating content moderation decisions to a panel of experts rather than an individual. There is a strong argument, in our opinion, that delegating content moderation would have benefitted Musk as well. Consider the possibility, as the *New York Times* did, that the Chinese government could leverage Tesla factories operating in China to pressure Musk to amplify Chinese government tweets or suppress Chinese dissident tweets.<sup>301</sup> With an irrevocable delegation of content moderation, Musk could resist any foreign government demands. With no such guardrails, he cannot.

To the extent that this sounds speculative or even fanciful, under Musk, Twitter has repeatedly succumbed to government demands to suppress speech and complied with the overwhelming majority of government requests for censorship.<sup>302</sup> Many recent requests to suppress speech have come from foreign governments, including India.<sup>303</sup> Tesla has been in negotiations with the Indian government to be able to sell cars in the country for two years.<sup>304</sup> Just before his deal to acquire Twitter, Musk said that Tesla was “still working through a lot of challenges with the [Indian] government.”<sup>305</sup> In January 2023, shortly after Musk’s acquisition of Twitter had closed, the BBC aired a two-part documentary entitled *India: The Modi Question*, which explored allegations against Prime Minister Narendra Modi that he had promoted Hindu nationalism and fueled prejudice against India’s Muslim minority.<sup>306</sup> The Indian government ordered Twitter to block numerous accounts and all

zero-sum negotiation over price to a potential “win-win” negotiation over the price term and content moderation policies.

299. See also Gordon, *supra* note 220 (“If Twitter becomes a megaphone for misinformation and hateful speech, I think the Twitter directors will bear personal responsibility.”).

300. See Aisha Counts, Sarah Frier & Gerry Smith, *Elon Musk Picks Linda Yaccarino as Next Twitter CEO*, BLOOMBERG (May 12, 2023), <https://www.bloomberg.com/news/articles/2023-05-11/musk-to-name-new-twitter-ceo-will-shift-to-cto-executive-chair#xj4y7vzkg> (on file with the *Journal of Corporation Law*) (discussing Elon Musk’s selection of new Twitter CEO).

301. Steven Lee Myers & Paul Mozur, *Musk’s Ties to China Could Create Headaches for Twitter*, N. Y. TIMES (Apr. 29, 2022), <https://www.nytimes.com/2022/04/29/technology/elon-musk-china-tesla.html> (on file with the *Journal of Corporation Law*). As the *Times* explained: “Mr. Musk’s extensive investments in China could be at risk if Twitter upsets the Communist Party state, which has banned the platform at home but used it extensively to push Beijing’s foreign policy around the globe — often with false or misleading information.” *Id.*

302. Hamilton, *supra* note 90.

303. *Id.*

304. See generally Aditi Shah, *Tesla’s Musk Says ‘Working Through Challenges’ with India Government*, REUTERS (Jan. 13, 2022), <http://www.reuters.com/technology/teslas-musk-says-working-through-challenges-with-india-government-2022-01-13/> [<https://perma.cc/CRT6-8MGD>] (discussing the time period of negotiations between Tesla and India government).

305. *Id.*

306. Charisma Madarang, *Elon Musk Buckles Under Pressure from India to Remove BBC Doc Criticizing Modi*, ROLLING STONE (Jan. 24, 2023), <https://www.rollingstone.com/culture/culture-news/twitter-elon-musk-bbc-india-modi-1234667887> [<https://perma.cc/A6DP-9AD3>]. Opponents of Modi have repeatedly accused him of inaction in response to violent Hindu nationalism, alleging his deliberate inaction resulted in the massacre of

links to the film within the country.<sup>307</sup> Twitter complied, blocking hundreds of accounts and restricting an unspecified number of others from view within India.<sup>308</sup>

Two months later, India again requested Twitter censor speech, and Twitter again complied. Under the headline *Elon Musk's Twitter Widens Its Censorship of Modi's Critics*, The Intercept reported:

While Punjab police detained hundreds of suspected followers of [Amritpal] Singh [a Sikh nationalist leader], Twitter accounts from over 100 prominent politicians, activists, and journalists in India and abroad have been blocked in India at the request of the government. On Monday, the account of the BBC News Punjabi was also blocked — the second time in a few months that the Indian government has used Twitter to throttle BBC services in its country. The Twitter account for Jagmeet Singh (no relation to Amritpal), a leading progressive Sikh Canadian politician and critic of Modi, was also not viewable inside India.<sup>309</sup>

A similar dynamic may be at play in Turkey, where Musk has been exploring business opportunities for Tesla and SpaceX since 2017.<sup>310</sup> It is with this context that, after acquiring Twitter, Musk readily acceded to censorship requests by Turkey's President Recep Erdogan's government in a manner consistent with those business interests.<sup>311</sup> The censorship of Indian journalists and content in Turkey leading up to the country's presidential election is particularly jarring given Musk's claims to be a "free speech absolutist."<sup>312</sup> One wonders whether any of the censorship decisions were influenced by Tesla's efforts to enter certain international markets. With an irrevocable delegation of content moderation decisions, Musk could have eliminated any such influence.

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more than 1,000 Muslims in 2002 when he was the head of Gujarat, an Indian state. *See generally* Shreeya Sinha & Mark Suppes, *Timeline of the Riots in Modi's Gujarat*, N.Y. TIMES (Aug. 19, 2015), [https://www.nytimes.com/interactive/2014/04/06/world/asia/modi-gujarat-riots-timeline.html#/time287\\_8514](https://www.nytimes.com/interactive/2014/04/06/world/asia/modi-gujarat-riots-timeline.html#/time287_8514) (on file with the *Journal of Corporation Law*).

307. Karan Deep Singh, *Twitter Blocks Accounts in India as Modi Pressures Social Media*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/technology/india-twitter.html> (on file with the *Journal of Corporation Law*).

308. *Id.*

309. Ryan Grim & Murtaza Hussain, *Elon Musk's Twitter Widens its Censorship of Modi's Critics*, THE INTERCEPT (Mar. 28, 2023), <https://theintercept.com/2023/03/28/twitter-modi-india-punjab-amritpal-singh> [<https://perma.cc/4JCM-H7WW>].

310. *See* Cagan Koc, *Elon Musk and Erdogan Discuss Space Technology Cooperation*, BLOOMBERG (Jan. 27, 2021), <https://www.bloomberg.com/news/articles/2021-01-27/elon-musk-and-erdogan-discuss-space-technology-cooperation> (on file with the *Journal of Corporation Law*).

311. *See* Katherine Tangalakis-Lippert, 'Free Speech Opportunist' Elon Musk Caved to Government Pressure to Censor Tweets Ahead of the Turkish Election. Critics Argue SpaceX Dealings with the Country's Right-wing Leader May Have Caused the Reversal, BUS. INSIDER (May 14, 2023), <https://www.businessinsider.com/free-speech-censorship-elon-musk-throttled-tweets-turkey-presidential-election-2023-5> (on file with the *Journal of Corporation Law*) ("[A]ccounts chosen for restriction were some the Turkish government has traditionally targeted because they had ties to political opposition or whistleblowers who have been critical of the country's right-wing leader, President Recep Tayyip Erdogan.").

312. *See id.* ("Elon Musk's reputation as a free speech absolutist took another hit on Saturday after Twitter sided with the Turkish government and censored the accounts of political opponents ahead of a contentious election.").

There is an important doctrinal question as to when, precisely, the Twitter board could and should have asked for these guardrails to protect content moderation policies. Under *Time Warner*, the Twitter board had the doctrinal ability to demand content moderation guardrails before Twitter agreed to a deal in April 2022.<sup>313</sup> But once the Twitter board agreed to an all-cash sale of the company, *Revlon* duties would have arguably prevented Twitter from providing any discount to the deal price in exchange for guardrails.

Press reports indicate that Musk was looking for a 10% discount on the deal price (= \$48.80) in the months leading up to October 2022.<sup>314</sup> Suppose, in that timeframe, Musk had proposed a \$48.80 deal price in exchange for guardrails on content moderation at Twitter. The Twitter board would then (counter-factually) have had a fascinating choice: accept \$48.80 per share along with guardrails on Musk's ownership of Twitter or push to a Delaware Court of Chancery judgment that Musk must acquire Twitter for \$54.20, with no guardrails and likely significant litigation costs. Accepting \$48.80 plus guardrails would be good for society, while \$54.20 with no guardrails would be good for Twitter shareholders.

We hope that the Twitter board would have taken the \$48.80, though they would inevitably be sued by plaintiffs' lawyers claiming that they violated their *Revlon* duties by leaving \$5.40 per share on the table. In that litigation, we would further hope that, given the extraordinary circumstances, the Delaware Court of Chancery would have carved out an exception from *Revlon* duties to promote legitimate ESG goals. Some commentators have argued that this exception might already exist.<sup>315</sup> In effect, the Delaware Court of Chancery should be willing to make doctrinal room under *Revlon* to allow boards to do the right thing for society.<sup>316</sup>

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313. *Paramount Commc'ns, Inc. v. Time Inc. (Time Warner)*, 571 A.2d 1140, 1142 (Del. 1989).

314. Kate Conger & Michael S. Schmidt, *Elon Musk Offered to Buy Twitter at a Lower Price in Recent Talks*, N. Y. TIMES (Oct. 5, 2022), <https://www.nytimes.com/2022/10/05/technology/elon-musk-twitter-discount.html> (on file with the *Journal of Corporation Law*) ("Musk sought a discount of as much as 30 percent, three of the people said, a proposal that would have valued the company at roughly \$31 billion. Twitter rebuffed the proposal, said the people, who requested anonymity because the talks were confidential. In the past week, however, discussions narrowed to a discount of about 10 percent, which would have allowed Mr. Musk to pay about \$39.6 billion for Twitter.").

315. See, e.g., Eduardo Gallardo, *On an Expansive Definition of Shareholder Value in the Boardroom*, CLS BLUE SKY BLOG (Oct. 22, 2019), <https://clsbluesky.law.columbia.edu/2019/10/22/on-an-expansive-definition-of-shareholder-value-in-the-boardroom/> [<https://perma.cc/7WNP-CXSV>]; Strine, Jr., *supra* note 235, at 1181–86 (discussing a hypothetical that illustrates challenges with the board must sell theory).

316. An analysis of precisely how judicial review would work in practice is beyond the scope of this Article. Much like the concerns implicated by ESG more broadly, the courts must determine whether stated ESG goals are legitimate rather than veiled attempts to entrench management and resist takeovers. Delaware courts already engage in some form of this analysis, which may account for the differing outcomes in *Time Warner* and *eBay*. In *Time Warner*, the court emphasized that the record reflected the "zealousness" of Time's leadership in preserving Time's culture of editorial integrity in journalism. *Time Warner*, 571 A.2d at 1152. In contrast, the *eBay* court determined that the "defendants failed to prove that craigslist possesses a palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value." *eBay Domestic Holdings Inc. v. Newmark*, 16 A 3d 1, 32–33 (Del. Ch. 2010) (citations omitted). For a discussion of each case, see *supra* Part III.A. For a proposed mechanism of judicial review, see Yair Listokin & Aneil Kovvali, *Valuing ESG*, 49 BYU L. REV. 705, 712 (2024) (laying out "a workable compromise between shareholder interests and social interests").

## V. IMPLICATIONS

## A. Corporate Dealmaking Strategies

Corporate boards should consider their major stakeholders in evaluating potential deals and negotiating the terms of those deals. M&A deals have widespread implications for virtually all constituencies of the buyer and target companies.<sup>317</sup> Boards bear the responsibility for managing the corporation and courts will generally defer to the business judgment of the board as long as the directors act in good faith with reasonable care, diligence, and skill.<sup>318</sup> As a result of these duties, the “consideration of ESG factors and related metrics and the broader concepts of stakeholder governance and corporate purpose are entirely consistent with traditional conceptions of directors’ duties” in M&A.<sup>319</sup>

One of the board’s most critical roles at the intersection of ESG and M&A is its role as a strategic advisor. Here, boards are responsible for evaluating synergies and the impact on the company’s strategic plan and considering the “ESG-logic” of a deal.<sup>320</sup> Both buy-side and sell-side boards should evaluate not only financial impact but also the ESG and stakeholder impact of any transaction, with acquisitions of strong ESG-performing targets helping buyers maintain ESG performance and stakeholder value.<sup>321</sup> ESG-related factors such as the impact of a deal on the reputation, integration, and culture of the combined company are all important considerations for boards in today’s corporate landscape. Transactions can be spurred by the need to address ESG risks or to capitalize on ESG-related opportunities and synergies. When it comes to obtaining shareholder approval for transactions, boards may need to increasingly address ESG risks and opportunities related to the

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317. See Afsharipour, *supra* note 145, at 312; Spencer J. Hazan, *Considering Stakeholders in M&A*, 16 N.Y.U. J.L. & BUS. 749, 756 (2020) (“[I]n the M&A context . . . the stakes are immensely high and all stakeholders want their interests considered.”).

318. See Afsharipour, *supra* note 145, at 312 (explaining that corporate law assigns managing responsibility of corporations to the board); Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 47 (2022) (noting that boards have many avenues of responsibility for managing corporations such as “fair worker treatment, environment responsibility, and sound governance.”).

319. Andrew R. Brownstein, David M. Silk & Sabastian V. Niles, *The Coming Impact of ESG on M&A*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 20, 2020), <https://corpgov.law.harvard.edu/2020/02/20/the-coming-impact-of-esg-on-ma/> [<https://perma.cc/Q4S8-PCCH>].

320. Afsharipour, *supra* note 145, at 313; PWC, A CORPORATE DIRECTOR’S GUIDE TO OVERSEEING DEALS 10 (2022), <https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-gic-overseeing-deals.pdf> [<https://perma.cc/SV3X-UHDY>]; Alexandra R. Lajoux, *The Role of the Board in M&A*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 7, 2015), <https://corpgov.law.harvard.edu/2015/09/07/role-of-the-board-in-ma/> [<https://perma.cc/QWA-XFPT>].

321. See Ioannis Tampakoudis & Evgenia Anagnostopoulou, *The Effect of Mergers and Acquisitions on Environmental, Social and Governance Performance and Market Value: Evidence from EU Acquirers*, 29 BUS. STRATEGY & ENVIRONMENT 1865, 1866 (2020) (focusing on the connection between ESG and M&A performance). One recent survey found that 56% of private equity partners refused to enter into general partner agreements or turned down investments on ESG grounds, and that 72% of private equity partners always screen target companies for ESG risks and opportunities pre-acquisition. PWC, PRIVATE EQUITY’S ESG JOURNEY: FROM COMPLIANCE TO VALUE CREATION 4 (2021), <https://www.pwc.com/gx/en/private-equity/private-equity-survey/pwc-pe-survey-2021.pdf> [<https://perma.cc/3DAM-Q99D>].

deal. Recently, many key financial players have looked to expand their ESG data and analytical abilities, which will likely further drive ESG in M&A decision-making.<sup>322</sup>

Buy-side boards of companies with strong ESG profiles can enhance the company's ability to bring long-term, sustainable value to its stakeholders.<sup>323</sup> In addition, ESG can impact financing, with lenders increasingly considering ESG factors as part of the process for making their lending decisions.<sup>324</sup> S&P and Moody's recently integrated ESG considerations into credit ratings.<sup>325</sup> Cheaper financing in M&A will likely make companies with strong ESG performance more desirable targets while making efforts to divest underperforming ESG assets more difficult.<sup>326</sup> Senior management appears to be increasingly willing to pay an "ESG premium" for companies with positive ESG records.<sup>327</sup>

Sell-side boards should also elevate stakeholder governance and ESG's importance in M&A boardroom discussions. In consultation with legal advisors, boards should examine their fiduciary duties under Delaware law and whether the prospective transaction triggers *Revlon* duties. These boards should also evaluate the buyer's stakeholder interests, ESG performance, vulnerabilities, and policies, with close attention to whether these align with the target company's objectives. Relatedly, sell-side boards should evaluate how ESG and stakeholder concerns may influence "shareholder decisions to support or reject a proposed transaction, particularly where the deal consideration includes shares of the acquirer."<sup>328</sup> As a practical matter, when possible, the board should also create a record establishing that its consideration of non-shareholder constituencies "ultimately promote[s] stockholder value."

It is no easy task to incorporate stakeholder and ESG considerations into the boardroom during M&A deals. Boards face challenges, including the difficulty of defining and measuring these considerations, the possibility of reduced deal efficiency and certainty as a result of these considerations, and the difficulty of reconciling tensions between the

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322. See Brownstein & Lu, *supra* note 173 (noting that "Moody's, Blackstone, Nasdaq, JPMorgan, AXA, BlackRock, KKR, Deutsche Börse and McKinsey all acquired data analytics and/or consulting firms with ESG expertise" and that "Goldman Sachs' acquisition of NN Investment Partners and Affiliated Managers Group's acquisition of Parnassus reflect the integration of ESG strategies into mainstream investing and desire among major asset managers to expand their ESG investment platforms").

323. *Id.*

324. Major institutional asset managers such as BlackRock and State Street have announced that their investment decisions will be driven by ESG performance. Brooke Masters & Patrick Temple-West, *The Real Impact of the ESG Backlash*, GRIP (Dec. 5, 2023), <https://www.grip.globalrelay.com/the-real-impact-of-the-esg-backlash> [<https://perma.cc/P9AF-W2Z3>]. In addition, 113 financial institutions in 37 countries adopted the Equator Principles, which provides a framework for assessing and managing environmental and social risks. *Commercial International Bank (CIB) Adopts the Equator Principles*, EQUATOR PRINCIPLES (Apr. 5, 2021), <https://equator-principles.com/cib-adopts-the-equator-principles> [<https://perma.cc/4CGU-PS2U>]; but see Nina Lakhani & Dominic Rushe, *US Banks Abandon 'Bare Minimum' Environmental Standards Project, Alarming Climate Groups*, THE GUARDIAN (Mar. 5, 2024), <https://www.theguardian.com/business/2024/mar/05/us-banks-leave-esg-finance-climate-crisis> [<https://perma.cc/MX2G-D7UA>] (discussing recent exits from the Equator Principles).

325. Brownstein & Lu, *supra* note 173.

326. *Id.*

327. Delevingne et al., *supra* note 146.

328. Emmerich & Norwitz, *supra* note 147, at 4. See Afsharipour, *supra* note 145, at 314. (noting sell-side boards are often involved in strategy building for M&A).

various stakeholders that can arise in M&A transactions.<sup>329</sup> But a board that can successfully navigate these waters will find itself better positioned for long-term growth and corporate value.

### B. Board Oversight and Risk Management in M&A

Another one of the board's critical roles in M&A is as a monitor of risk management, with ESG playing an increased role in due diligence and risk mitigation. Monitoring risks have become a priority for boards, along with establishing the company's risk preferences and strategy.<sup>330</sup> For many companies, ESG is merely the consideration of various risks faced by the company relating to environmental, social, and governance matters.<sup>331</sup> Due diligence can play a meaningful role in helping boards identify and monitor these risks. Risks may be reputational risks associated with a deal, integration challenges likely to result from a given combination, or industry- or buyer-specific risks.<sup>332</sup> Through identifying risks in diligence, boards can also reduce the likelihood of overpayment<sup>333</sup> and increase their ability to identify synergistic relationships associated with superior long-term performance.<sup>334</sup>

As shown in Part II, diligence relating to a target company's employee and labor matters, sexual harassment and discrimination, environmental matters, and data privacy and

329. See Kenneth P. Pucker, *Overselling Sustainability Reporting*, HARV. BUS. REV. (May–June 2021), <https://hbr.org/2021/05/overselling-sustainability-reporting> [<https://perma.cc/4CW9-EC62>] (noting that five of the leading measurement bodies are working to streamline reporting practices); Larcker et al., *supra* note 119, at 2–4 (describing the ESG rating industry); Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 26 REV. FIN. 1315, 1319 (2022) (highlighting that the measurement of ESG performance is essential and that all ratings and metrics must be carefully considered for each application); Anna Hirai & Andrew Brady, *Managing ESG Data and Rating Risk*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 28, 2021), <https://corp.gov.law.harvard.edu/2021/07/28/managing-esg-data-and-rating-risk> [<https://perma.cc/2G4H-G346>] (noting that “understanding what the ESG ratings providers are trying to measure is important”); Afsharipour, *supra* note 145, at 314 (explaining that boards may face challenges in measuring the tensions in M&A transactions); *id.* at 16 (“A company may perform quite strongly on one aspect of ESG, but more poorly on another aspect of ESG. Tesla, for example, has faced numerous lawsuits alleging racial discrimination and sexual harassment at the company.”).

330. See OECD, RISK MANAGEMENT AND CORPORATE GOVERNANCE 10–12 (2014), [https://www.oecd-ilibrary.org/governance/risk-management-and-corporate-governance\\_9789264208636-en](https://www.oecd-ilibrary.org/governance/risk-management-and-corporate-governance_9789264208636-en) [<https://perma.cc/7RD7-C9QA>] (discussing in context of contemporary ESG risk management failures); WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 117, at 2–3; Afsharipour, *supra* note 145, at 315 (describing board responsibility for monitoring key risks).

331. See WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 117, at 3 (noting that the failure to oversee and address ESG-related risks may subject directors to liability and harm shareholder value); Gadinis & Miazad, *supra* note 114, at 1415 (“ESG has evolved into a separate corporate function, whose mission is to monitor and manage the risks facing the company due to environmental and social impact.”).

332. Reputational risks may include negative press, social media commentary, or controversial customers, users, or suppliers. For an example, see Afsharipour, *supra* note 145, at 315 (noting that “Microsoft's Activision deal demonstrates [that] boards can use ESG-related information to evaluate potential reputational risks connected to a deal or to question management on potential integration challenges”).

333. See Afra Afsharipour & V.C. Travis Laster, *Enhanced Scrutiny on the Buy-Side*, 53 GA. L. REV. 443, 449–57 (2019) (discussing overpayment).

334. See Fred Bereskin et al., *The Effect of Cultural Similarity on Mergers and Acquisitions: Evidence from Corporate Social Responsibility*, 53 J. FIN. & QUANTITATIVE ANALYSIS 1995, 1999–2000 (2018) (studying how corporate governance differences can affect merger decisions).

security are standard practice. In stock or mixed consideration deals, diligence about the buyer's ESG risk profile is commonplace.<sup>335</sup> Boards should further incorporate ESG into the due diligence process to better assess the company's risk exposure and potential liabilities, including reputational and financial risks. This diligence matters. More than half of deals with ESG-related diligence were canceled because of material findings related to that diligence.<sup>336</sup>

The consequences of overlooking stakeholder and ESG matters in transactions can be amplified by industry or deal size. Let us return to Twitter as an illustrative example. While the Musk/Twitter deal provided Twitter's shareholders with a premium on their shares,<sup>337</sup> the sale of one of the most consequential social media platforms of our time to an individual with a well-known opposition to stakeholder governance and ESG could easily be seen as threatening the integrity of public discourse. Twitter is not a public utility, but even Musk has acknowledged its role as a "public town square."<sup>338</sup> As one of the largest and most used social media platforms, Twitter's impact on the public is substantial. In March 2023, Twitter had over 450 million active users, 80 million of which are in the United States.<sup>339</sup> Over 6,000 tweets are posted each second on the platform, yielding 200 billion tweets per year.<sup>340</sup> Nearly a quarter of Americans use Twitter and almost 70% of U.S. users get their news on Twitter.<sup>341</sup> Perhaps in part due to this reach, Twitter has long recognized that one of the most important stakeholders is the public.

When the speech on platforms like Twitter is controlled not through moderation of hateful conduct and misinformation but rather by the highest bidder, speech is not truly free. Platforms for public speech, like Twitter, are widely used by activists, journalists, and politicians—all of which are influential in shaping policy and public opinion. As such, Twitter has "proved crucial for those organizing protests in places like India, Nigeria, and Argentina, and has provided an avenue for those living in highly controlled societies like Saudi Arabia to voice criticism of their governments."<sup>342</sup> The Twitter deal puts control of one of the most consequential outlets for speech into the hands of one billionaire (Musk), with Saudi Prince Alwaleed, nephew of the Saudi king, becoming Twitter's second-largest shareholder.<sup>343</sup>

335. See discussion *supra* Part II (discussing ESG as it relates to stakeholder governance).

336. See KPMG, *supra* note 144, at 9 (reporting on the key findings of a study on ESG-related factors).

337. Ayana Archie, *Twitter Shareholders Have Approved the \$44 Billion Sale to Elon Musk*, NPR (Sept. 15, 2022), <https://www.npr.org/2022/09/15/1123107704/twitter-elon-musk-deal-shareholder-approval-deadline> [<https://perma.cc/3W3K-XB8D>].

338. Elon Musk (@elonmusk), TWITTER (Mar. 26, 2022), <https://twitter.com/elonmusk/status/1507777261654605828> [<https://perma.cc/JDL3-XPBJ>].

339. Daniel Ruby, *58+ Twitter Statistics for Marketers In 2023 (Users & Trends)*, DEMANDSAGE (Mar. 1, 2023), <https://www.demandsage.com/twitter-statistics/> [<https://web.archive.org/web/20230311103321/https://www.demandsage.com/twitter-statistics/>].

340. *Id.*

341. Amy Mitchell, Elisa Shearer & Galen Stocking, *News on Twitter: Consumed by Most Users and Trusted by Many*, PEW RSCH. CTR. (Nov. 15, 2021), <https://www.pewresearch.org/journalism/2021/11/15/news-on-twitter-consumed-by-most-users-and-trusted-by-many/> [<https://perma.cc/L5G3-Q5XM>].

342. Vittoria Elliot, *Elon Musk Has Put Twitter's Free Speech in Danger*, WIRED (Nov. 7, 2022), <https://www.wired.com/story/twitter-free-speech-musk-takeover/> [<https://perma.cc/7GSW-QH5J>].

343. Matt Durot, *Saudi Prince Alwaleed Becomes Twitter's Second Largest Shareholder*, FORBES (Oct. 31, 2022), <https://www.forbes.com/sites/mattdurot/2022/10/31/saudi-prince-alwaleed-becomes-twitters-second-largest-shareholder/?sh=a4301e4523ab> (on file with the *Journal of Corporation Law*).



Moreover, in practice, free speech absolutism is not a democratic, user- or shareholder-centric approach; it is an owner-centric one. For Twitter, this feature is readily apparent. Musk has consistently complied with censorship requests from foreign governments when he has a personal and financial interest in developing a positive relationship with the country or regime in question.<sup>344</sup> To stifle speech that helps competition, he has banned links to other social media services and suspended accounts that direct users to alternative platforms.<sup>345</sup> And by gatekeeping credibility and reach of users in the global town square behind an \$8/month paywall, Musk's Twitter will suppress the reach of voices from the most disenfranchised and vulnerable communities while amplifying the voices of its wealthiest players, including those spreading misinformation. Some speech is more equal than others on Musk's Twitter, despite claims by Musk that his policies are about treating everyone equally. Prioritized speech is closely tied to wealth and fame. The verification feature also suppresses meaningful engagement, including through the inability to vote in polls and reach of those users who do not pay \$8/month for blue checkmark status.

While social media is "an extremely powerful way for people around the world to assert their human right to freedom of expression," that freedom is not without limits.<sup>346</sup> Removing or reducing content moderation could predictably amplify the ability of users to restrict the human rights of others and inflict physical and emotional harms. One need not look further than the proliferation of racist, sexist, and homophobic slurs following Musk's takeover of the company.<sup>347</sup> These ideas have power. Germany knows only too well the terrible results of permitting an unfettered marketplace for speech. Germany now prohibits denying the Holocaust, disseminating Nazi propaganda, or making statements in support of Hitler.<sup>348</sup> Yet these ideas are permitted to flourish on Twitter, at least outside of Germany.<sup>349</sup>

While stakeholder concerns are critical across industries, when a deal involves freedom of speech, the failure to consider stakeholders and address ESG-risks is amplified. Political polarization is among the biggest challenges that the United States faces today. Rather than helping citizens "find the truth that lies between people," the absence of meaningful content moderation policies will likely fuel the further polarization of political debate. Relatedly, facilitating an environment rife with misinformation will jeopardize civic integrity and trust in the legitimacy of an electoral process. Absolute freedom to speak without moderation will also undercut vital information to ensure the public can respond in a well-informed manner to real-world events such as the COVID-19 pandemic. From human rights to civic integrity and COVID-19, "free speech absolutism" jeopardizes the public. A board's missed stakeholder moment and the consequence of ESG amnesia in

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344. See *supra* notes 295–305 and accompanying text.

345. Brian Fung, *Elon Musk Says Twitter Will Ban Some Links to Other Social Media Sites, Sparking Backlash*, CNN (Dec. 18, 2022), <https://www.cnn.com/2022/12/18/tech/twitter-ban-social-media-links/index.html> [<https://perma.cc/P5NT-ATLU>].

346. Sarah Glozer, Emily Jane Godwin & Rita Mota, *Twitter and Elon Musk: Why Free Speech Absolutism Threatens Human Rights*, THE CONVERSATION (Nov. 7, 2022), <https://theconversation.com/twitter-and-elon-musk-why-free-speech-absolutism-threatens-human-rights-193877> [<https://perma.cc/RJ2P-A5TF>].

347. *The Musk Bump*, *supra* note 84.

348. See *Limits on Freedom of Expression: Germany*, LIBR. OF CONG., <https://maint.loc.gov/law/help/freedom-expression/germany.php> [<https://perma.cc/M6PP-GTQA>] (describing German laws on free speech)

349. Woollacott, *supra* note 85.

corporate deals, has a significant harm on the public when a company serves as a virtual town square.

Boards that abandon their stakeholder commitments in dealmaking also set their company up for increased risk and litigation post-closing. For example, Germany has threatened Twitter with a €50 million fine for its weakened content moderation policies—nearly double Twitter’s net worth—and Twitter was sued in Germany by HateAid and the European Union of Jewish Students over its failure to remove antisemitic content.<sup>350</sup> Musk’s treatment of former employees may also create exposure to security and data breaches, as well as litigation. Coinciding with Musk’s mass layoffs of employees, Twitter’s source code was leaked on GitHub, an online platform.<sup>351</sup> Under the headline “*A Year Ago, Musk Asked, ‘Is Twitter dying?’ He May Have His Answer,*” the *Washington Post* reported:

Twitter has been dramatically transformed under Musk and few — even among some in the billionaire’s corner — say the changes have been for the better. In recent weeks, government agencies, news organizations and powerful social media influencers have questioned the usefulness of the platform, with some major players publicly abandoning their accounts or telling users they can’t rely on it for urgent information. Advertisers have fled in droves over Musk’s policy changes and erratic behavior on the site, causing advertising revenue to recently drop by as much as 75 per cent . . . . Rounds of layoffs have left Twitter operating with a skeleton staff of 1,500 — an 80 percent reduction — and so riddled with bugs and glitches that the site goes down for hours at a time. . . . The resulting changes have left a key venue for seeking critical information unreliable, hindering the flow of critical information.<sup>352</sup>

ESG-focused disclosure requirements also implicate regulatory risks, such as the disclosure of non-financial statements on corporate social responsibility in Europe since 2018.<sup>353</sup> Because the cost of and access to capital for deal financing and business is increasingly being linked to ESG ratings and performance, financial risk management is also important and can be incorporated into the diligence process.

### *C. The Why Behind Stakeholder Amnesia*

In this Article, we have argued that a board has the legal and practical ability to incorporate their stakeholder and ESG objectives into their deal-making. So why, then, do sell-side boards so rarely do so? There are two natural responses to this question. The first, less

350. See, e.g., *id.* (detailing how Germany’s Federal Office of Justice has sufficient evidence to fine Twitter for illegal content).

351. Ryan Mac & Kate Conger, *Twitter Says Parts of Its Source Code Were Leaked Online*, N.Y. TIMES (Mar. 26, 2023), <https://www.nytimes.com/2023/03/26/technology/twitter-source-code-leak.html> (on file with the *Journal of Corporation Law*).

352. Faiz Siddiqui, Rachel Lerman & Jeremy B. Merrill, *A Year Ago, Musk Asked, ‘Is Twitter Dying?’ He May Have His Answer*, WASH. POST (Apr. 15, 2023), <https://www.washingtonpost.com/technology/2023/04/15/twitter-musk-bid-anniversary/> (on file with the *Journal of Corporation Law*).

353. Greg Norman et al., *Q&A: The EU Corporate Sustainability Reporting Directive – To Whom Does it Apply and What Should EU and Non-EU Companies Consider?*, SKADDEN (Oct. 9, 2023), <https://www.skadden.com/insights/publications/2023/10/qa-the-eu-corporate-sustainability-reporting-directive> [<https://perma.cc/2NVD-KKCW>]. See also Brownstein & Lu, *supra* note 173.

charitable interpretation: self-interested managers and executives are to blame. The second, more charitable response: doctrinal uncertainty incentivizes directors to “play it safe” by focusing on immediate shareholder value. We examine each of these in turn.

### 1. *Self-Interest of Managers and Executives*

Senior executives, particularly CEOs, play a significant role in driving corporate decision-making.<sup>354</sup> While board approval is a critical step in M&A, in many cases it is the senior managers and executives who direct the deal conversation and engage in much of the diligence, negotiation, and drafting that shapes the information presented to the board.<sup>355</sup> Increasingly, there is concern about the level of board deference to management in M&A, where the board’s decision-making can be “contaminated by the interests of managers and advisors on whom . . . directors rely.”<sup>356</sup> Executives may be incentivized to pursue deals that bring them personal financial benefits despite the harm it causes to the company.<sup>357</sup> They may also make decisions tainted by hubris, overconfidence, social ties, and personal reputation, among other factors.<sup>358</sup>

In the dealmaking context, the issues that arise when management has too much discretion—and pursues self-interested deals or terms as a result—are exacerbated. Managers might focus on shareholder and personal gains but fail to obtain meaningful protection for stakeholders. We believe that one root cause for ESG amnesia in the Twitter deal was the

354. See, e.g., Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. U. L. REV. 357, 367 (2016) (describing an “officer-dominated model of corporate governance” where officers exert “immense power and influence over the corporation”); Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1, 1 (2009) (centering officers as the “true corporate decision makers”).

355. See Orit Gadiesh et al., *A CEO’s Guide to the New Challenges of M&A Leadership*, 30 STRATEGY & LEADERSHIP, no. 3, 2002, at 13, 13–14 (laying out five roles: “visionary, cheerleader, closer, captain, and crusader”); Afsharipour, *supra* note 145, at 316; Gregory H. Shill & Matthew L. Strand, *Diversity, ESG and Latent Board Power*, 46 DEL. J. CORP. L. 255, 272 (2022) (evaluating how the historical role of a CEO should change amongst the board with respect to ESG decision making).

356. Afsharipour & Laster, *supra* note 333, at 447–48. In the words of former Chief Justice of the Delaware Supreme Court Leo Strine, Jr., all too often directors “act more like well-mannered season ticketholders to a stylized interactive theatre, in which performing managers shepherd the audience through ritualized plays, listen to management give set piece reports, ask a few brief questions so as not to disrupt the actors’ timing, and complete a series of management-driven acts.” Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679, 684–85 (2015).

357. Afsharipour & Laster, *supra* note 333, at 470–73.

358. See generally Afra Afsharipour, *Bias, Identity and M&A*, 2020 WIS. L. REV. 471, 477–79 (2019) (providing an overview of literature on bias and identity in M&A); Sanjay Dhir & Amita Mital, *Decision-Making for Mergers and Acquisitions: The Role of Agency Issues and Behavioral Biases*, 21 STRATEGIC CHANGE 59 (2012) (discussing managerial biases in M&A); James A. Fanto, *Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making*, 62 OHIO ST. L.J. 1333, 1354–57, 1372–74 (2001) (discussing confirmation biases in M&A); Vicki Bogan & David Just, *What Drives Merger Decision Making Behavior? Don’t Seek, Don’t Find, and Don’t Change Your Mind*, 72 J. ECON. BEHAV. & ORG. 930, 932 (2009) (discussing confirmation bias); Deepak Malhotra, *The Desire to Win: The Effects of Competitive Arousal on Motivation and Behavior*, 111 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 139, 139 (2010) (discussing the impact of competition on behavior); Deepak Malhotra, Gillian Ku & J. Keith Murnighan, *When Winning is Everything*, HARV. BUS. REV. (May 2008), <https://hbr.org/2008/05/when-winning-is-everything> [<https://perma.cc/P7HS-48QE>] (examining “three principal drivers of competitive arousal in business settings: rivalry, time pressure, and audience scrutiny”).

fact that Twitter shareholders gained approximately \$10.3 billion from Musk's acquisition (through the premium to market price that he offered) and Twitter's top executives gained approximately \$215 million (through cash severance payments and accelerated vesting of shares), while Twitter rank-and-file employees suffered, as did Twitter's commitments to its core values.<sup>359</sup>

## 2. *M&A in the Shadow of Uncertainty*

On a more charitable front, the doctrine is admittedly a point of contention among academics and practitioners. We have argued that *Revlon* is a narrow exception, and outside of the *Revlon* context boards have the freedom to refuse a sale. Some disagree. At the very least, there is a murky doctrine and uncertainty as a result. When faced with uncertainty, the incentive is to play it safe. Sell-side boards already face extensive deal-related litigation on a regular basis. The incentive is to avoid actions that will result in further litigation, and some shareholders are likely to sue if the board blocks a deal that has a reasonably big premium. The downside risk of a board considering stakeholder interests and ESG is that shareholders may sue as a result. There is no corresponding downside risk (at least when it comes to lawsuits in the short term) by ignoring stakeholders. More doctrinal clarity is needed on *Revlon* and the ability of boards to consider stakeholder interests in their decision-making.

## CONCLUSION

With stakeholder governance's rise to prominence and an increasing embrace of ESG, it is no surprise that in day-to-day governance, stakeholder considerations play a meaningful role. But when it comes time for one of the most significant events in a corporation's life, the sale of the company and what becomes of it thereafter, stakeholder considerations are all but nonexistent. Rather, boards succumb to stakeholder amnesia, overlooking prior commitments in favor of an offer to purchase the company at a premium.

Musk's recent acquisition of Twitter illustrates this stakeholder amnesia and the stark disconnect between governing in the ordinary course and dealmaking. The Twitter board, in our opinion, was "blinded by the light" of Musk's high-premium all-cash offer. The result was a missed stakeholder moment. The impact of stakeholder amnesia on content moderation (or the lack thereof) and free speech extends beyond Twitter. In 2013, Amazon founder Jeff Bezos bought The Washington Post for \$250 million.<sup>360</sup> That same year,

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359. See Bebhuk, Kastiel & Toniolo, *supra* note 73, at 309 (assessing financial payments in the Musk/Twitter deal). While we disagree with the authors' normative conclusion about what the Musk/Twitter deal means for the ESG debate, we agree with this financial assessment. For examination of stakeholder protections in private equity acquisitions, see Lucian A. Bebhuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1474–75 (2021) (finding that corporate leaders "generally did not negotiate for any stakeholder benefits or any constraints on the post-deal power of the private equity buyer to make choices that would adversely affect stakeholders").

360. Benjamin Mullin & Katie Robertson, *A Decade Ago, Jeff Bezos Bought a Newspaper. Now He's Paying Attention to It Again*, N.Y. TIMES (July 22, 2023), <https://www.nytimes.com/2023/07/22/business/media/jeff-bezos-washington-post.html> (on file with the *Journal of Corporation Law*).

Boston Red Sox owner John Henry acquired The Boston Globe for \$70 million.<sup>361</sup> In 2018, Salesforce CEO Marc Benioff and his wife Lynne purchased Time Magazine for \$190 million.<sup>362</sup> When it comes to social media in particular, Meta Platforms (formerly Facebook), founded by Mark Zuckerberg, bought Instagram for \$1 billion in 2012,<sup>363</sup> purchased WhatsApp in 2014 for \$19 billion,<sup>364</sup> and launched Threads as a competitor to Twitter in 2023.<sup>365</sup> Twitter is an example, but far from the only example, of the impact of stakeholder amnesia on content moderation and M&A more broadly.

While stakeholder amnesia is a widespread phenomenon among sell-side boards in corporate dealmaking, stakeholder considerations can pervade all aspects of managerial decision-making, including decisions about the sale of the company. In this Article, we have closely examined three prospective barriers to stakeholder considerations in M&A: fiduciary duties, negotiation leverage, and contractual terms. None of these provide a compelling barrier to widespread stakeholder amnesia. Rather, boards of directors that incorporate ESG and stakeholder considerations into their M&A deals can be acting entirely consistent with their fiduciary duties. Moreover, directors often have both the legal and practical ability to do so.

Stakeholder governance and ESG are not yet fully realized. However, the phenomenon of stakeholder amnesia in M&A does not warrant dismissal of the entire stakeholder enterprise as just cheap talk. Rather, boards of directors have a critical role to play during all stages of governance in this stakeholder era, with M&A chief among them.

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361. *Boston Globe, Once Bought for \$1.1 Billion, Sells for \$70 Million*, NBC NEWS (Aug. 3, 2013), <https://www.nbcnews.com/businessmain/boston-globe-once-bought-1-1-billion-sells-70-million-6c10835491> [https://perma.cc/Z2C9-AFJU].

362. Emma Bowman, *Meredith Corp. to Sell 'Time' Magazine to Salesforce Founder for \$190 Million*, NPR (Sept. 16, 2018), <https://www.npr.org/2018/09/16/648598950/meredith-corp-to-sell-time-magazine-to-salesforce-founder-for-190-million> [https://perma.cc/S43D-DPEJ].

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