# BOARD COMMITTEE CHARTERS AND ESG ACCOUNTABILITY

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## INTRODUCTION

In the last few years, we have witnessed a sharp increase in corporate attention on environmental, sustainability, and governance ("ESG").[1] This increase has been propelled and buttressed by pressure from an ever-widen-

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[1] *See* MARTIN LIPTON ET AL., SOME THOUGHTS FOR BOARDS OF DIRECTORS IN 2022, at 4–6 (2021) [hereinafter LIPTON, SOME THOUGHTS 2022], www.wlrk.com/docs/Some_Thoughts_

ing array of large and influential shareholders, as well as non-shareholder stakeholders, prompting many to assert that ESG has gone "mainstream."[2]

The steep rise in corporate focus on ESG has inevitably prompted discourse around accountability as we seek to ensure that corporations deliver on their ESG goals and commitments. A wide range of accountability measures has been discussed, proposed, and even implemented, from increased ESG disclosure[3] to tying ESG goals to CEO compensation.[4]

In light of the board's accountability role in the corporate landscape, ESG accountability discussions inevitably coalesce around demand for board-level accountability over ESG activities.[5] Consistent with this demand, proxy data reveals increased disclosure on board oversight of ESG issues.[6] I conducted my own survey of the top 50 companies in the *Fortune* 100, which revealed a sizeable increase in the number of corporations altering their board committee charters to account for enhanced board oversight over ESG activities.

for_Boards_of_Directors_in_2022.pdf. (noting that the corporate focus on ESG is "pervasive and intense")

[2] *See* Jill E. Fisch et al., Why Corporate Sustainability Disclosure Has Become a Mainstream Demand 2–3, https://www.law.nyu.edu/sites/default/files/Corporate%20Sustainability%20Disclosure%20by%20Fisch%20Johnson%20Williams%209.18.pdf (last visited March 26, 2022); IW Staff, *Corporations' New Purpose— to Serve All Stakeholders Not Just Shareholders*, Industry Week (Aug. 20, 2019), https://www.industryweek.com/leadership/article/22028107/corporations-new-purpose-to-serve-all-stakeholders-not-just-shareholders ("[I]t seems the corporate world is all in."); Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, Harv. Bus. Rev., May–June 2019, at 106–16, https://hbr.org/2019/05/the-investor-revolution (ESG issues "almost universally" at the top of the minds of executives); Daniel Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 36 Yale J. on Reg. 625, 633–34 (2019). (The cited portion of the last article provides very tenuous support for the assertion, although it seems like it could support with further explanation).

[3] *See* David Silk et al., Mandatory Climate Change Disclosure Rules—A Preview from the SEC Chair? (2019), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.27758.21.pdf (highlighting Chair Gensler's expectation that the SEC will establish a climate risk disclosure regime by end of 2021); Gary Gensler, Chairman, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021), https://www.sec.gov/news/speech/gensler-pri-2021-07-28; Statement, Allison Herren Lee, Acting Chair, Sec. & Exch. Comm'n, Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure (directing Division of Corporation Finance to increase focus on public company disclosure of climate change); Statement, Allison Herren Lee, Acting Chair, Sec. & Exch. Comm'n, Public Input Welcomed on Climate Change Disclosures (Mar. 13, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures (asking for an evaluation of disclosure rules "with an eye toward facilitating the disclosure of consistent comparable, and reliable information on climate change").

[4] *See* Era Anagnosti et al., *ESG Disclosure Trends in SEC Filings*, White & Case (Aug. 13, 2020), https://www.whitecase.com/publications/alert/esg-disclosure-trends-sec-filings# (noting trend of tying ESG metrics to compensation of named executive officers).

[5] *See* Lipton, Some Thoughts 2022, *supra* note 1, at 4–6; Martin Lipton et al, Some Thoughts for Boards of Directors in 2021, at 4–5 (2020) [hereinafter Lipton, Some Thoughts 2021], https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.27168.20.pdf (noting expectation for "ESG competent" boards).

[6] *See* Anagnosti et al., *supra* note 4, at 1.

This essay argues that the proliferation of committee charters delineating board oversight of ESG activities is a welcome and vital accountability measure for those seeking to ensure that corporations make real on their ESG commitments. This essay makes several important contributions. First, this essay not only highlights the large number of board committee charters reflecting board oversight of ESG activities, but also reveals that such charters have been revised or adopted within the last three years. In so doing, this essay argues that this increase serves as a strong indication that boards have begun to take necessary steps to increase their oversight of ESG matters. Second, this essay argues that board oversight of ESG activities is a necessary—though far from sufficient or perfect—measure for ensuring greater accountability over corporate ESG activities, and thus that committee charters reflecting ESG oversight are a welcome and important development for purposes of enhancing ESG accountability. Third, this essay asserts that the existence of these revised committee charters repudiates claims that corporate ESG rhetoric has not translated into at least some increased board and corporate focus on ESG activities. Indeed, several prominent scholars have questioned, if not dismissed, the recent rise in corporate commitment to ESG, referring to it as illusory, opportunistic, greenwashing, and mere rhetoric.[7] While in no means suggesting that corporate ESG commitments are perfectly aligned with corporate behavior, this essay and its survey calls into the question the broad-sweeping condemnation of corporate ESG commitments as performative and thus insignificant. Finally, given the importance of committee charters to the board oversight and accountability function, this essay suggest that we should be mindful of the specific ESG activities emphasized in, as well as those left out of, this new wave of committee charters. An examination of committee charters sheds important light on the kinds of ESG activities boards are purporting to oversee. Such examination also reveals several disconnects between board oversight, on the one hand, and corporate disclosure and corporate rhetoric, on the other. Given Delaware courts' recent emphasis on the need for board-level oversight of core ESG activities to be specifically tailored,[8] this essay argues that these diver-

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[7] *See, e.g.,* Lucian A. Bebchuk & Roberto Tallarita, *'Stakeholder' Talk Proves Empty Again*, WALL ST. J. (Apr. 18, 2021, 6:20 PM), https://www.wsj.com/articles/stakeholder-capitalism-esg-business-roundtable-diversity-and-inclusion-green-washing-11629313759; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* 30–31 (Cornell L. Sch., Discussion Paper No. 1052, 2020); Edward B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose* (Eur. Corp. Governance Inst., Law Working Paper No. 515/2020, 2020); Jesse Fried, *The Roundtable's Stakeholderism Rhetoric is Empty, Thankfully*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 22, 2019) https://corpgov.law.harvard.edu/2019/11/22/the-roundtables-stakeholderism-rhetoric-is-empty-thankfully/; *see also* Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?,* HARV. BUS. REV. (August 30, 2019), https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric.

[8] *See infra* notes 99-108 and accompanying text.

gences not only may reflect troubling accountability gaps, but also may expose directors to increased potential for legal liability.

Part I of this essay details my committee charter survey and the manner in which it highlights increased board oversight of ESG activities. Part II first advances the argument that board oversight represents an important accountability measure and then argues that board committee charters reflecting ESG oversight are a strong indication of board oversight of ESG matters. Part II also demonstrates the way committee charters refute claims that corporate ESG rhetoric has not translated into important board and corporate action. Part III acknowledges and grapples with the limitations of board oversight as an accountability mechanism, with particular attention on the limitations associated with seeking to ensure appropriate board oversight over the admittedly broad array of potential ESG issues. Part III also outlines disconnections between board oversight and key ESG issues and examines why those disconnections may matter for purposes of effective ESG oversight. Overall, this essay insists that the uptick in board oversight of ESG as reflected in committee charters is a welcome and valuable tool in the ESG accountability arsenal.

## I. Committee Charters and Board Oversight

The term "ESG" encompasses three distinct categories: (1) "E" for environmental, which includes such issues as climate change, carbon neutrality, water usage, recycling, and greenhouse gas emissions, (2) "S" for social, which includes by far the largest array of issues encompassing employee health and safety, employee demographics, diversity, equity, and inclusion ("DEI") initiatives, employee retention, promotion, and turnover, other human capital management issues, political spending and lobbying activities, pay equity, human rights, child labor, vendor relations, and supply chain concerns, and (3) "G" for governance, which includes such issues as majority voting, proxy access, board declassification, elimination of supermajority voting provisions, special and virtual meeting policies, independent board chair, shareholder engagement and participation, board diversity and composition, and executive compensation.[9] While my review of committee charters focused on ESG more generally, I paid special attention to issues within the "E" and "S" categories not only because corporations and boards have historically focused on issues within the "G" category and thus board oversight associated with those issues are more familiar and well-

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[9] *See* Sidley Austin LLP, Environmental, Social, and Governance Disclosures in Proxy Statements: Benchmarking the Fortune 50, at 2 (2021) [hereinafter Sidley Report], https://www.sidley.com/en/insights/newsupdates/2021/08/environmental-social-and-governance-disclosures-in-proxy; Sullivan & Cromwell LLP, 2021 Proxy Season Review Part 1: Rule 14A-8 Shareholder Proposals 1 (2021) [hereinafter Sullivan 2021 Proxy Report], https://www.sullcrom.com/files/upload/sc-publication-2021-Proxy-Season-Review-Part-1-Rule14a-8.pdf.

documented,[10] but also because the focus on the "E" and "S" is more recent, more intense at the current moment, and more controversial.

### *A. The Survey Results*

I reviewed available public data on board committee charters of the top 50 companies in the 2021 list of *Fortune* 100 companies (the "*Fortune* 50"). My survey of those companies revealed that 86% of such companies currently have a board-level committee or committees responsible for oversight over ESG. The survey therefore reveals a sizeable portion of committee charters reflecting board-level oversight of ESG activities within the *Fortune* 50.

My survey is consistent with proxy data reflecting a sharp rise in corporate disclosure of board oversight over ESG activities.[11] A 2020 survey of the top 50 companies in the *Fortune* 100 revealed that 88% of the largest companies reported board oversight of ESG issues, and 44% of such companies increased disclosure related to board oversight of ESG issues in their 2020 proxy statements.[12] According to the survey, this increase in disclosure around board oversight of ESG is notable because it moved such disclosure from sixth place in 2019 to fourth in 2020 in terms of the top issues around which corporations make disclosures in their proxy, thereby signaling a heightened focus on the disclosure of board-level ESG oversight.[13]

My survey revealed that a significant majority of companies incorporated most, if not all, of their ESG oversight into their Nominating and Governance Committee.[14] Consistent with this finding, proxy data reveals that most boards locate their ESG oversight function in their Nominating and Governance Committee, while others have begun to create stand-alone ESG committees.[15] In my survey, of the companies with board-level oversight of ESG, 63% located most, if not all, of the ESG oversight function in their Nominating and Governance Committee. One corporation, Alphabet, located the ESG oversight function within its audit committee. The remaining 37% of companies with board oversight of ESG located most of that function in a separate stand-alone committee. The titles differed for these stand-alone committees. A few corporations had "sustainability" or "ESG" committees, such as Centene's "Environmental and Social Responsibility Committee" or

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[10] *See* Sidley Austin, *supra* note 9, at 1; Sullivan 2021 Proxy Report, *supra* note 9, at 15 (detailing shareholder proposals' focus on governance issues such as majority voting, board declassification and the elimination of super majority voting)

[11] *See* Anagnosti et al., *supra* note 4, at 6.

[12] *See id.*

[13] *See id.*

[14] Corporations used many different titles for their committees. However, my survey designated a committee as a "nomination and governance" committee so long as the committee had primary responsibility for governance, including identifying, recommending and nominating directors to the board.

[15] *See* Anagnosti et al., *supra* note 4, at 6.

Lowe's "Sustainability Committee." Other companies incorporated board oversight of ESG into public policy committees such as AT&T's "Public Policy and Corporate Reputation Committee" or Microsoft's "Regulatory and Public Policy Committee." Some corporations, like Wells Fargo, located board oversight of ESG in their "Corporate Responsibility Committee." Still others located their board oversight of ESG into a "Human Capital Management Committee," such as Target's "Compensation and Human Capital Management Committee." Perhaps unsurprisingly, companies that incorporated ESG oversight into their Human Capital Management Committee were much more likely to include issues such as pay equity, employee-related compensation, and corporate culture in their ESG oversight responsibilities.

Some corporations separated their board-level ESG oversight into several board committees. For example, Amazon, Ford, IBM, and Target incorporated board oversight of most ESG activities into their Nominating and Governance Committee, while also incorporating some ESG issues into a separate Human Capital Management Committee. In addition, my survey and proxy data reveal that some corporations separate their ESG oversight into multiple committees.[16] Nonetheless, my survey and available proxy data confirm that most corporations anchor the board ESG oversight function in their Nominating and Governance Committee.[17]

My survey revealed significant variation in the content of committee charters. Of course, at a minimum, most charters contained a broad statement of committee responsibility over environmental, social, and governance matters.[18] However, even the wording of those statements differed from company to company. For example, IBM's Directors and Corporate Governance Committee Charter states that the committee "reviews and considers the Company's position and practices on significant issues of corporate public responsibility such as workforce diversity, protection of the environment, and philanthropic contributions."[19] By comparison, Procter and Gamble's Governance and Public Responsibility Committee Charter states that the committee has responsibility for reviewing "systems and plans," making "recommendations to the Board" on matters including "sustainability development (including environmental quality, economic development and corporate social responsibility)" and for "overseeing protection of the Company's corporate reputation and other matters of importance to the Company and its stakeholders (including employees, consumers, customers, suppliers, share-

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[16] *See id.*

[17] *See id.*

[18] To the extent committees did not refer to ESG in their charter, the charters indicated that the board had oversight over "sustainability" issues.

[19] IBM, Directors and Corporate Governance Committee Charter 1 (2007), https://www.ibm.com/investor/att/pdf/Directors_and_Corporate_Governance_Committee_Charter.pdf.

holders, governments, local communities and the general public)."[20] Lockheed's Nominating and Corporate Governance Committee Charter describes one of its committee purposes as follows: "to assist the Board of Directors in fulfilling its oversight responsibilities relating to the Corporation's ethical conduct, sustainability, environmental stewardship, corporate culture and health and safety programs."[21] In the rare case when a company charter did not include a broad statement of responsibility for ESG matters, such charter generally included a statement proclaiming responsibility for oversight of "sustainability" issues.

Of note, my survey revealed instances where the corporate website's description of a committee charter did not exactly match the description in the charter. For example, while Procter and Gamble's website indicated that its governance committee considered the topic of "organizational diversity," that topic was not specifically identified in the charter even though all other topics highlighted on the website were specifically identified in the charter.[22]

### *B. Notable ESG Topics*

My survey revealed significant variation among the ESG issues specifically identified in committee charters as those over which committees had oversight. A few board charters only contained a broad one or two sentence statement about the committee's oversight of ESG without any delineation of specific ESG topics. However, most charters included both a broad ESG oversight statement as well as several statements or bullet points regarding specific categories of ESG issues over which the committee had oversight responsibilities. These categories differed from company to company. There also was some difference in the terminology corporations used to identify specific ESG categories. The table and discussion below delve into these differences.

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[20] The Procter & Gamble Co. Bd. of Dirs., Governance & Public Responsibility Committee Charter 1–3 https://assets.ctfassets.net/oggad6svuzkv/43lV04me5PiANPpZF-FruSP/45e41c37d48a29fa963cadbd39a2fdb3/G_PR_Committee_Charter.pdf.

[21] Lockheed Martin, Nominating and Corporate Governance Committee Charter 1 (2021), https://www.lockheedmartin.com/en-us/who-we-are/leadership-governance/board-of-directors/nominating-corporate-governance-committee-charter.html.

[22] *See* Procter & Gamble, Board Committees & Charters, Structure and Governance, https://us.pg.com/structure-and-governance/board-committees-and-charters/. Similarly, IBM's website did not include "workforce diversity" in its list of "significant issues" over which the board had responsibility even though that issue was listed in its charter, and the website used the phrase "public policy" issues rather than "corporate public responsibility" when describing the issues over which its committee reviewed and considered. *See Committees of the Board*, IBM, https://www.ibm.com/investor/governance/committees-of-the-board (last visited May 22, 2022).

TABLE 1. TOP TEN ESG CATEGORIES SPECIFICALLY IDENTIFIED IN COMMITTEE CHARTERS.

| *Category* | *Number of Charters in Which Identified* | *Percentage of Charters in Which Identified* |
|---|---|---|
| Environmental | 35 | 81% |
| Political/Lobbying | 26 | 60% |
| Charitable Contributions | 18 | 42% |
| Diversity | 17 | 39% |
| Corporate Responsibility | 16 | 37% |
| Human Rights | 10 | 23% |
| Health and Safety | 10 | 23% |
| Governmental Relations | 9 | 20% |
| Corporate Culture | 8 | 18% |
| Ethics | 8 | 18% |
| Human Capital Management | 8 | 18% |

Other top categories specifically identified in committee charters included reputation (16%) and employees/talent development (14%).

1. Environmental Consensus

The emphasis on environmental matters should come as no surprise given the current increased emphasis on climate change and environmental issues more broadly. As the above chart reveals, the vast majority of charters (81%) specifically referenced oversight of environmental matters. The increased emphasis aligns with stakeholder interests and expectations.[23] Indeed, there is a growing consensus around the importance of environmental matters and the corporation's role in overseeing them from governments, regulators, and NGOs.[24]

The emphasis on environmental oversight in committee charters also aligns with enhanced corporate focus on environmental issues. Many corporations have professed an increased desire to attend to these issues, including making climate pledges and setting "net zero" goals.[25] In addition, there has

[23] *See* HEIDRICK & STRUGGLES, CHANGING THE CLIMATE IN THE BOARDROOM 7 (2021), https://www.heidrick.com/en/insights/sustainability/changing-the-climate-in-the-boardroom?utm_source=press&utm_medium=press+Release&utm_campaign=Changing+the+climate+in+the+boardroom (noting societal and investor changing expectations around climate change); *see also supra* note 3 (discussing SEC focus on climate and environmental matters).

[24] *See supra* note 2.

[25] *Net Zero Carbon by 2040*, THE CLIMATE PLEDGE, https://www.theclimatepledge.com/ (last accessed March 26, 2022) (listing 313 businesses that have committed to The Climate Pledge; *See* Peter Eavis & Clifford Krauss, *What's Really Behind Corporate Promises on Climate Change*?, N.Y. TIMES, May 12, 2021, https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html; Press Release, Ceres, Despite Ambitious

been an increased amount of disclosure on environmental matters in proxy statements and other publicly required filings. Thus, a 2020 survey of *Fortune* 50 companies revealed that nearly every surveyed company included disclosure related to environmental matters in their proxy statement, and 29% of such companies increased their disclosure related to such matters.[26]

The emphasis on committee oversight of environmental issues also aligns with shareholder expectations. The intensity of shareholder focus appears to be epitomized by the successful proxy fight by activist shareholder Engine No. 1, which won three board seats by challenging ExxonMobil on its handling of environmental matters, its board-level expertise in environmental matters, and seeking board commitment for ExxonMobil to be carbon neutral by 2050.[27] Engine No. 1 only held .02% of the company's stock and hence some have argued that its victory reflected large institutional shareholders' willingness to use their voting power to support environmental issues.[28] Another example of enhanced shareholder focus on environmental issues can be found in the shareholder proposal arena: 2021 witnessed a record number of environmental shareholder proposal submissions, increased shareholder support for such submissions, as well as a record number of environmental-related proposals that passed.[29] In addition, a meaningfully higher number of environmental shareholder proposals were withdrawn following corporate commitments to take specific actions around environmental goals.[30]

The significant emphasis in committee charters on oversight of environmental matters therefore reflects strong consensus on the importance of those matters from corporations, shareholders, and non-shareholder stakeholders. Indeed, a recent survey revealed that 75% of boards expressed the

Corporate Pledges, Major U.S. Companies Shy From Climate Policy Lobbying, New Report Finds (July 13, 2021), https://www.ceres.org/news-center/press-releases/despite-ambitious-corporate-pledges-major-us-companies-shy-climate (noting that 92% of S&P 100 companies have committed to reducing their own emissions).

[26] *See* Anagnosti et al., *supra* note 4, at 4 (noting that 94% or 47 companies included environmental disclosure in their proxy statement, including specific disclosure around climate change, emissions reduction and renewable energy).

[27] *See* Christopher Matthews, *Exxon vs. Activists*, WALL ST. J. (May 25, 2021), https://www.wsj.com/articles/exxon-vs-activists-battle-over-future-of-oil-and-gas-reaches-showdown-11621950967?mod=hp_lead_pos7 (noting activists sought commitment from ExxonMobil to be carbon neutral by 2050); *see also* Rusty O'Kelley & Andrew Droste, *Why ExxonMobil's Proxy Contest Loss is a Wakeup Call to all Boards*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (July 5, 2021), https://corpgov.law.harvard.edu/2021/07/05/why-exxonmobils-proxy-contest-loss-is-a-wakeup-call-for-all-boards/ (noting that Engine No. 1 challenged ExxonMobil on its shortcomings in board experience in oil and gas and slow transition to low carbon and that ExxonMobil lost is a sign that shareholders expect corporations to take action on ESG); *cf.* Matt Levine, *Exxon Lost a Climate Proxy Fight*, BLOOMBERG (May 27, 2021), https://www.bloomberg.com/opinion/articles/2021-05-27/exxon-lost-a-climate-proxy-fight.

[28] *See* O'Kelley & Droste, *supra* note 27, at 1.

[29] *See* SULLIVAN 2021 PROXY REPORT, *supra* note 9, at 1, 20–22.

[30] *See id.* at 21.

belief that climate change is very important or entirely important to their company's strategic success.[31]

Interestingly, however, most committee charters did not delineate oversight of specific environmental matters, such as climate or greenhouse gas emissions. This stands in comparison to committee charter treatment of "S" issues, whereby charters often pinpointed specific "S" issues. Thus, only 8 or 18% of committee charters specifically used the term "climate." Only one corporation, Ford, had a charter that specifically referenced "greenhouse gas emissions" as a type of ESG activity over which the committee had oversight responsibility.[32]

### 2. Political Oversight Without Disclosure

On the one hand, the considerable focus on board oversight of political matters and lobbying activities aligns with stakeholder and shareholder interests. Sixty percent (60%) of charters specifically referenced oversight of political and/or lobbying matters. A study conducted by the Center for Political Accountability (the "CPA") similarly found significant board oversight of political spending. According to the CPA's most recent report, 59% of S&P 500 companies had board oversight of political spending, a 12% increase from 2020.[33] This focus is reflected in shareholder and stakeholder emphasis. Certainly the 2010 landmark Supreme Court case of *Citizens United v. FEC*,[34] which held that the government could not restrict political contributions from corporations, labor unions, and other organizations, ushered in an enhanced interest in corporate political spending and how best to monitor it.[35] In *Citizens United*, Justice Kennedy, writing for the majority, infamously proclaimed: "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters" and "[s]hareholders can determine whether their corporation's political speech advances the corporation's interest in making profits."[36] In an effort to make real on this proclamation, shareholders and non-shareholder stakeholders alike have pressured corporations for more disclosure and monitoring of corporate po-

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[31] *See* Heidrick & Struggles, *supra* note 23, at 4.

[32] *See* Ford Motor Co., Charter of the Sustainability and Innovation Committee of the Board of Directors 2, https://corporate.ford.com/content/corporate/us/en-us/operations/governance-and-policies.html (describing committee responsibility to include oversight of strategies, policies, and practices related to "energy consumption, climate change, greenhouse gas and other criteria pollutant emissions, waste disposal and water use").

[33] *See* Ctr. for Pol. Accountability & The Carol and Lawrence Zicklin Ctr. for Bus. Ethics Rsch., 2021 CPA-Zicklin Index of Corporate Political Disclosure and Accountability 14 (Dan Carroll et al. eds., 2021), https://www.politicalaccountability.net/wp-content/uploads/2021/11/2021-CPA-Zicklin-Index.pdf [hereinafter CPA Index].

[34] Citizens United v. FEC, 558 U.S. 310 (2010).

[35] *See* CPA Index, *supra* note 33, at 15 (discussing the impact of *Citizens United* on political spending contribution).

[36] *Citizens United*, 558 U.S. at 370.

litical spending and lobbying activities.[37] Spurred by concerns around lack of transparency and inappropriate corporate influence over elections, these groups have sought more robust corporate political spending disclosure, exemplified by a Securities and Exchange Commission ("SEC") petition requesting such disclosure along with increased focus on disclosure of political spending policies and practices in the shareholder proposal arena.[38] Although political and lobbying proposals declined after the 2020 election, the January 6, 2021 armed insurrection revitalized and enhanced attention on political spending.[39] Indeed, according to the CPA, board oversight of various forms of political spending accelerated over the past two years.[40] This increase is mirrored in shareholder proposal activity. In 2021, political spending and lobbying proposals represented the third largest subcategory of social proposals, behind social capital management proposals and diversity-related proposals.[41] Most of the political proposals sought better disclosure of political spending or political contribution policies. Average shareholder support for such proposals has increased: the average shareholder vote for such proposals was 41% in 2021, an increase from 35% in 2020.[42] Also, about 25% of the political spending proposals that reached a vote passed, an increase over 2020, where only 10% of such proposals reaching a vote passed.[43] Given this increased emphasis and support, it may seem unsurprising that so many committee charters specifically pinpointed board oversight of political contributions.

On the other hand, this emphasis on board oversight of political spending matters in committee charters is not reflected in enhanced disclosure in proxy statements or other required filing. Thus, political spending disclosure does not appear in the top ten list of issues around which corporations make disclosures in their proxy. Indeed, corporations have been significantly resistant to such required disclosure as well as any regulatory or legislative efforts aimed at providing for such disclosure.[44] Research reveals that the number of nonprofit groups that do not disclose their donors skyrocketed after *Citizens United*, and that much of the undisclosed spending takes the form of millions of dollars of politically-motivated ads.[45] In 2015, Justice Kennedy acknowledged that the disclosure system was "not working the way it should."[46] According to the CPA's most recent report, 55% of S&P

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[37] *See* CPA INDEX, *supra* note 33, at 34.
[38] *See id.* at 16.
[39] *See* SULLIVAN 2021 PROXY REPORT, *supra* note 9, at 13.
[40] *See* CPA INDEX, *supra* note 33, at 19.
[41] *See* SULLIVAN 2021 PROXY REPORT, *supra* note 9, at 6.
[42] *See id.* at 6.
[43] *See id.* at 13.
[44] *See* CPA INDEX, *supra* note 33, at 24–25.
[45] *Id.*
[46] *See* Paul Blumenthal, *Anthony Kennedy's Citizens United Disclosure Salve 'Not Working,'* HUFFINGTON POST (Nov. 2, 2015), https://www.huffpost.com/entry/citizens-united-anthony-kennedy_n_5637c481e4b0631799134b92 (quoting Justice Kennedy's interview with Harvard Law School dean).

500 companies do not disclose the political contributions they funnel through social welfare organizations while 43% do not disclose contributions to trade associations.[47] To be sure, the CPA report revealed that many corporations voluntarily disclose at least some of their political spending, though there is significantly less disclosure with respect to indirect contributions funneled through trade associations or nonprofits.[48] Moreover, the CPA report revealed a rising number of political spending policies, along with a steady adoption of more detailed political spending policies from S&P 500 companies.[49] However, proxy data suggest that those policies and practices are not making their way into required disclosure documents such as the proxy or annual reports. Importantly, the CPA report noted that effective board oversight includes board decision-making around whether to disclose political spending and political spending policies.[50] From this perspective, there appears to be disclosure gaps around corporate political spending, as well as some disconnect between the emphasized board oversight in this area and shareholder and stakeholder expectation around more robust corporate disclosure.

3. Much Ado about Charity

The charter emphasis on charitable giving reflects a different kind of disconnect. On the one hand, the focus on charitable contributions in committee charters appears consistent with corporate emphasis in terms of disclosure trends. Forty-two percent (42%) of charters specifically referenced oversight of charitable contributions. Consistently, in a recent study of proxy filings, twelve of the twenty-one surveyed filings, or 57%, included some information on charitable giving.[51] However, this emphasis does not appear to be consistent with shareholder or stakeholder emphasis. Thus, charitable contribution does not appear on the list of top issues around which shareholder seek engagement, nor does it appear on the list of top shareholder proposals. Its absence as an area of emphasis for shareholders seems misaligned with the strong level of board oversight reflected in committee charters.

4. Diversity and Inclusion—Hold the Equity

While the presence of diversity on the list of identified issues within board charters is not surprising, there is divergence between the amount of emphasis on diversity in charters and its emphasis more broadly by corporations, shareholders, and stakeholders. Board oversight of diversity was the

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[47] *See* CPA Index, *supra* note 33, at 24–25.
[48] *Id.*
[49] *See id.*
[50] *Id.* at 28.
[51] *See* Anagnosti et al., *supra* note 4, at 7.

fourth most identified ESG issue in committee charters. However, it was significantly eclipsed by oversight of environmental and political spending. Hence, just seventeen or 39% of committee charters specifically identified diversity as an issue over which boards had oversight responsibility. In other words, 61% of charters with ESG oversight neglected to specifically emphasize diversity. This emphasis seems inconsistent with increased emphasis on issues of race, equity, and inclusion. The police killings of George Floyd and other unarmed Black men and women and the corresponding protests in the summer of 2020 sparked national attention on issues of race, equity, and inclusion.[52] For the first time in history, polls revealed that the majority of Americans believed that racism and discrimination against people of color was a serious concern and that protests related to that concern were justified.[53] This kind of sentiment not only triggered a national conversation around race and equity, but also prompted commitments to adopt policies and practices aimed at alleviating racial inequities.[54] Against this backdrop, the 39% emphasis on diversity in board committee charters seems misaligned with stakeholder emphasis. It also appears inconsistent with shareholder emphasis. Thus, in 2021 diversity-related shareholder proposals represented the largest subcategory of social proposals (54%).[55] This eclipsed political spending despite its much greater emphasis in board committee charters. Additionally, shareholder proposals submitted on employee-related DEI matters nearly doubled.[56] A record number of disclosure-related workforce diversity shareholder proposals that went to vote passed.[57] Shareholder engagement around diversity issues also has skyrocketed and thus reflects an emphasis not mirrored in the board oversight realm.

The relatively lower level of charter emphasis on diversity also diverges from corporate emphasis. Thus, since the summer of 2020, corporate proxy disclosure around diversity has increased dramatically. One survey revealed that roughly 82% of proxy filings disclosed some information on employee

[52] *See* David Gelles, *Corporate America Has Failed Black America*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/business/corporate-america-has-failed-black-america.html (noting that it seemed like "every major company has publicly condemned racism"); Sahil Patel, *Brands Follow Antiracist Statements With Donations. What's Next?,* WALL ST. J. (June 6, 2020), https://www.wsj.com/articles/brands-follow-anti-racist-statements-with-donations-whats-next-11591437600; Mellody Hobson, *"Talk is Cheap—Ariel Investments' Mellody Hobson on Corporate America's Responsibility to Fight Inequality*, MSN (June 1, 2020), https://www.msn.com/en-us/video/superbowl-special-2020/talk-is-cheap%E2%80%94 ariel-investments-mellody-hobson-on-corporate-americas-responsibility-to-fight-inequality/vp-BB14SAOc.

[53] *See* Giovanni Russonello, *Why Most Americans Support the Protest,* N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html; *see also* Joel Anderson, *Why the NFL is Suddenly Standing Up for Black Lives*, SLATE (June 7, 2020), https://slate.com/culture/2020/06/nfl-roger-goodell-black-lives-matter-players-video-kaepernick.html.

[54] *See supra* note 53.

[55] *See* SULLIVAN 2021 PROXY REPORT*, supra* note 9, at 2.

[56] *See id.* at 10.

[57] *See id.* at 11.

diversity.[58] Then too, the national attention on DEI issues sparked increased corporate support for the Black Lives Matter movement. Indeed, my own research reveals that 90% of the *Fortune* 50 companies issued a Black Lives Matter statement in the summer of 2020.[59] By contrast, only 34% of *Fortune* 50 companies have a committee charter that specifically includes board oversight of diversity and inclusion efforts. This is true despite the fact that 86% of the *Fortune* 50 companies that issued a Black Lives Matter statement altered their committee charters to reflect a range of ESG activities over which boards would oversee.[60] Indeed, only 39% of the companies that changed their committee charters made it a point to specifically include board oversight of diversity or inclusion in their statements of board ESG oversight.[61] In this regard, board oversight of diversity does not appear to reflect corporations' own emphasis on such issues in other arenas.

There is also arguably a disconnect between the type of diversity issues over which boards indicate an oversight responsibility and the national conversation surrounding race. Most proxy disclosures and shareholder proposals focus on employee diversity.[62] By comparison, some company charters only emphasized board oversight of "supplier diversity." In addition, although it has become a term of art, only three committee charters used the acronym "DEI" in reference to their oversight responsibilities.

Perhaps most interestingly, very few committee charters used the term "equity" in describing their board oversight responsibilities related to diversity. Thus, only four of the seventeen charters that referenced diversity included the term "equity." Most other committee charters referred only to "diversity and inclusion." A few used the phrase "equal opportunity" rather than equity. The fact that DEI has become a term of art, and yet most companies shy away from using it, begs the question about why corporations appear to have intentionally refrained from using the term equity when referencing their oversight responsibilities. The fact that corporations refrained from using the term "equity" is especially noteworthy because that term refers to ensuring equal opportunity and responding to bias and discrimination.

The fact that corporations steered clear of the term "equity" is also noteworthy in light of increased shareholder focus on racial equity audits. Proxy data reveals that there has been a rise in shareholder proposals requesting such audits. Several of the *Fortune* 50 corporations received such requests. In 2021, Wells Fargo, JP Morgan Chase, Bank of America, Amazon, and Johnson and Johnson all received racial equity audit shareholder

[58] *See* Anagnosti et al., *supra* note 4, at 3.
[59] Research on file with author.
[60] *See id.*
[61] *See id.*
[62] *See* Sullivan 2021 Proxy Report, *supra* note 9, at 2, 10-11.

proposals.[63] In response, each of the companies recommended shareholders vote against the racial equity proposal because such companies were already making significant progress on racial equity issues.[64] However, of those companies, only Amazon has a committee charter specifically identifying board oversight of diversity and inclusion policies.[65] Moreover, Amazon's charter does not include the term "equity" in those board oversight responsibilities. In this regard, it is not clear whether and to what extent board oversight of diversity issues maps onto corporations' professed commitments and activities surrounding diversity.

* * *

Despite these disconnects, the survey reveals that a large number of *Fortune* 50 corporations currently incorporate ESG oversight into their board charters. This incorporation aligns with the increased focus on ESG. To be sure, there is both variation regarding how corporations articulate their board's ESG oversight responsibilities as well as the types of ESG issues over which committees specifically emphasize oversight responsibilities. Moreover, there are areas of disconnect between the issues identified in committee charters and those around which there are areas of emphasis. However, these observations do not negate the fact that many corporations have embraced board oversight of ESG through their committee charters.

My survey focused on the top 50 *Fortune* companies, and thus we should be mindful about the inferences we draw from such a small and unique group. Indeed, research reveals that even when large companies adopt governance policies and practices aimed at improving board accountability in extremely large numbers such as majority voting or proxy access, there is considerably less adoption for small- and mid-size firms, undermining the theory of a "trickle-down effect" associated with best governance practices.[66] Nevertheless, the actions of the largest companies may be especially relevant for several reasons. The largest companies are important standard-setters, and thus their actions impact the actions of the broader corporate landscape—at least with respect to companies in the S&P 500 or *Fortune* 500.[67] Then too, even if mid-size and smaller companies do not

[63] *See id.* at 8. Twelve companies received such proposals, including Bank of America, Citibank, Goldman Sachs, JP Morgan, Morgan Stanley, Wells Fargo, BlackRock, State Street, Amazon, Amgen, CoreCivic and Johnson and Johnson.

[64] *See id.* at 8 n.16.

[65] *See* Amazon, Leadership Development and Compensation Committee, https://ir.aboutamazon.com/corporate-governance/documents-and-charters/leadership-development-and-compensation-committee/default.aspx (last visited March 26, 2022) (indicating that the committee oversees and monitors the company's diversity and inclusion policies).

[66] *See* Institutional S'holder Servs., U.S. Board Study: Board Accountability Practices Review 2–4 (2018), https://www.issgovernance.com/file/publications/board-accountability-practices-review-2018.pdf (pinpointing a "tale of two governance regimes").

[67] *See id.*

follow their lead, as the largest companies in the country, their ESG activities have a broader and more significant impact because they have a larger environmental footprint, a larger employment base, and a larger impact on a variety of different stakeholder groups. Thus, accountability related to those activities is especially critical for advancing ESG. Hence, the survey's focus provides important and relevant information. Moreover, the signatories of the Business Roundtable Statement were large companies, and thus those characterizing the Business Roundtable Statement as illusory specifically focused on the pool of large companies. My survey of the largest companies is thus appropriate as a basis for responding to those characterizations.

## II. Accountability Benefits of Board ESG Oversight

### *A. Charters + Committees + Oversight = Accountability*

#### 1. Board Oversight as Accountability

Board oversight, particularly oversight by independent directors, has always been viewed as a critical component of corporate accountability.[68] Corporate statutes provide that every corporation must be managed by or under the direction of the board of directors. Boards then have a fiduciary responsibility to act in the best interests of the corporation and to monitor the corporation and its affairs, ensuring that corporate actions are made in a manner that best benefits the corporation.[69] Board oversight is critical to accountability for several reasons. Such oversight increases the likelihood that boards will pay closer attention to the issues over which they have responsibility for overseeing. Board oversight increases the likelihood that boards will ask probing questions and closely review and examine material information. Indeed, effective board oversight requires boards to receive, review, and discuss critical aspects of material information. In this regard, board oversight means that certain topics will reach the board and be the subject of board focus, review, and discussion, enhancing the board's ability to play an effective accountability role.

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[68] *See* Nicola Sharpe, *Informational Autonomy in the Boardroom*, 2013 U. Ill. L. Rev. 1089, 1116 (2013); Claire Hill and Brett McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. Ill. L. Rev. 859, 862 (2013) ("One of the canonical roles for boards is to monitor"); Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 Del. J. Corp. L. 719, 733 (2007) ("Caremark and Stone make clear that monitoring and oversight are key to the good-faith obligations of fiduciaries and to the role of boards of directors as managers of managers."); *see also,* CPA Index*, supra* note 33, at 20 ("Board oversight is a vital component of accountability.").

[69] *See* Smith v. Van Gorkom, 488 A.2d. 858, 872 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 Wash. & Lee L. Rev. 409, 439 (2002).

Effective board oversight is also linked to accountability because of its impact on corporate culture and the behavior of corporate executives and officers. An important byproduct of board oversight is its impact on the broader corporate population. Indeed, board oversight increases the likelihood that corporate officers will pay closer attention to certain issues because board oversight brings with it an expectation that boards will receive updates, presentations, and reports around key issues. In other words, board oversight increases the likelihood that others within the corporate ecosystem will be held accountable for their actions with regard to the overseen issues by enhancing the rigor associated with the production and distribution of information about their actions. For example, the fact that boards oversee the audit function not only means that the board has an expectation that they will be kept apprised of issues associated with managing the corporation's finances, but also that the CFO and other corporate actors responsible for furnishing financial information are put on notice that they must account to the board for the information they produce and the corresponding activities associated with that information. Board oversight is thus a touchstone for accountability because it serves to increase the likelihood of corporate attention with respect to the overseen matters.

Current law reinforces the significance of board oversight as a source of accountability. In Delaware's landmark *Caremark* decision—the modern seminal Delaware case articulating boards' oversight responsibilities—the Delaware court made clear that directors have an obligation to actively monitor the corporation and its activities and thus can be exposed to liability for a failure to appropriately attend to their oversight responsibilities.[70] Importantly, *Caremark* makes clear that directors can only satisfy their oversight obligation if they make a good faith effort to ensure the establishment of information and reporting systems reasonably designed to provide them with information about the corporation's activities and compliance with laws.[71] *Caremark* also makes clear that directors' oversight obligation only can be satisfied when directors *actively* monitor the adequacy of the information and reporting process they have implemented.[72] This interpretation of boards' oversight responsibilities encourages active and consistent board attention, thereby increasing the potential that board oversight translates into greater accountability.

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[70] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969–70 (Del. Ch. 1996); Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[71] *See* In re *Caremark*, 698 A.2d at 969-70; *Ritter*, 911 A.2d at 370.

[72] *See* In re *Caremark*, 698 A2d. at 970; Marchand v. Barnhill, 212 A.3d 805, 809 (2019); *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *24 (Del. Ch. Sept. 7, 2021); *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 121–23 (Del. Ch. 2009).

### 2. Board Committees as Accountability

Independent board committees play a vital role in board oversight and thus accountability. Committees are critical to board oversight—they are in fact the genesis of the board's oversight functions.[73] This is because boards operate primarily through their committees. Such committees enable boards to more effectively carry out their oversight duties by enabling them to delve more deeply into discrete issues viewed as important to the corporate enterprise. In recognition of their significance, federal law essentially requires that public companies have independent board committees for three vital functions—audit, nominating and governance, and executive compensation.[74] The emphasis on ensuring board-level committees serves to ensure more effective board oversight and thus accountability.

Current law emphasizes and thereby reinforces the importance of board committees to boards' oversight and accountability functions. Cases implicating director oversight consistently emphasize board committees as a hallmark of effective oversight. In *Caremark* the court viewed the existence of an independent audit committee as an important fact in its determination of whether the board had complied with its oversight duties.[75] In *Stone v. Ritter*, the Delaware Supreme Court confirmed the viability of *Caremark* and its oversight requirements, similarly acknowledging the existence of a well-functioning board committee as a core aspect of compliance with the board's oversight responsibilities.[76] Other cases have confirmed the notion that the existence of a well-functioning board-level committee represents a critical measure supporting the board's compliance with its oversight duties.[77]

The importance of committees to board oversight has also been prominent in more recent cases addressing oversight of ESG matters. In *Marchand v. Barnhill*, the Delaware Supreme Court for the first time in its history found that shareholders had successfully pled facts sufficient to demonstrate a strong likelihood that the board had breached its oversight duties, and thus *Marchand* is the first oversight case to make it past the motion to dismiss phase.[78] Importantly, *Marchand* is also the first Delaware case suggesting that boards' oversight duty extends to monitoring specific ESG activities, at least to the extent that such activities can be deemed critical to the core mission of a company in a monoline business.[79] The Delaware Supreme Court in *Marchand* began by pointing out that plaintiffs "usually lose" their

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[73] In re *Boeing*, 2021 WL 4059934, at *24.

[74] *See supra* note 68.

[75] *See* In re *Caremark*, 698 A.2d at 963.

[76] *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[77] *See* Desimone v. Barrows, 924 A.2d 908, 940 (Del. Ch. 2007) (dismissing oversight claim based on the existence of a properly formed and well-functioning audit committee); Guttman v. Huang, 823 A.2d 492, 506–07 (Del. Ch. 2003) (dismissing *Caremark* claim based on the existence of an audit committee).

[78] *See Marchand*, 212 A.3d at 809.

[79] *See id.*

oversight claims "because they must concede the existence of a board-level system of monitoring and oversight such as a relevant committee, a regular protocol requiring board-level reports about the relevant risk or the board's use of third-party monitors, auditors, and consultants."[80] Moreover, *Marchand* identified the lack of a board committee as one of several "dispositive deficiencies" in board-level oversight.[81] In so doing, the Court highlighted the link between effective board oversight and board committees. In fact, the Delaware Supreme Court in *Marchand* rejected the board's argument that it had complied with its oversight duties by complying with routine regulatory requirements, concluding such requirements were not directed at the board, and thus at best only demonstrate that management followed certain regulatory protocols.[82] This rejection further highlights the importance of board-level committees to boards' compliance with their oversight duties. In 2021, in *In re Boeing Derivative Litigation*, the Delaware Chancery Court relied on *Marchand* when it found that Boeing shareholders had alleged sufficient facts demonstrating that Boeing directors faced a substantial likelihood of oversight liability related to the ESG issue of airplane safety.[83] Importantly, the *Boeing* court emphasized with approval the fact that the board created a board-level committee focused on safety reporting. The late timing of the creation of the committee, and the fact that committee meetings were sparsely attended, caused the court to conclude that the committee was an ineffective measure for ensuring that the board had appropriately comported with its oversight duties.[84] Nonetheless, these cases underscore the importance of board committees to the oversight and accountability function of boards, including in the context of ESG matters.

### 3. Board Committee Charters as Accountability

The centrality of board committees to board oversight necessarily means that board committee charters represent an important feature for the board oversight and accountability function. Indeed, if committees are a critical focal point for board oversight, then the charters establishing them and outlining the contours of the committee's responsibility are also critical. Indeed, committee charters are one of the few board-specific documents. As such, committee charters must be approved by the entire board. Importantly, unlike bylaws or general corporate governance guidelines, committee charters are the only documents that solely and explicitly identify board responsibilities and duties. As a consequence, boards likely pay particularly close

[80] *See id.* at 823.

[81] *See id.* at 822; *In re* Boeing Co. Derivative Litig., *20 (Del. Ch. Sept. 7, 2021).

[82] *See Marchand*, 212 A.3d at 822–23.

[83] *In re* Boeing, 2021 WL 4059934, at 25–27 (finding that Boeing shareholders have alleged sufficient facts to demonstrate that Boeing directors face a substantial likelihood of oversight liability not only for their "failure to establish a reporting system for airplane safety," but also for "turning a blind eye to a red flag representing airplane safety problems").

[84] *See id.* at *18.

attention to the wording in the charter precisely because they are aware that the wording reflects an acknowledgement of the responsibilities with which they are agreeing to embrace once they adopt the charter. Then too, one of the critical features of charters is often the requirement of periodic reports. This includes reports *to* the committee as well as reports *from* the committee to the entire board, underscoring the manner in which such charters establish important information flows aimed at supporting boards' oversight function. Indeed, courts have specifically referred to the fact that charters obligate committees to regularly report to the board as a signal of responsible oversight processes.[85] Importantly, federal regulators have recognized the importance of board committee charters as a reflection of board oversight and engagement. In adopting the rules requiring public company disclosure related to audit committee charters, the SEC emphasized its belief that having board committees identify their responsibilities in a written charter will make it "more likely" that boards "play an effective role in overseeing company's financial reports."[86] All of these observations make clear that committee charters are a crucial component of board oversight.

As with committees, current law recognizes and reinforces the importance of committee charters to board oversight responsibilities. Delaware courts have made clear that the creation of board-level oversight through a committee charter is significant to the board's ability to establish that it complied with its oversight obligation of making a good faith attempt to put in place a system of monitoring and reporting.[87] The *Caremark* court emphasized the board's adoption of a new charter.[88] In *Boeing*, the Delaware Chancery Court quoted the entire responsibilities portion of the audit committee charter in its opinion, underscoring the importance of those responsibilities to boards' oversight duties.[89] When assessing the effectiveness of the board's oversight, the *Boeing* court paid special attention to the specific topics delineated in the committee charter as well as the fact that the charter obligated the committee to make regular reports to the board.[90] The 2019 case of *In re Clovis Oncology Inc. Derivative Litigation* represents another recent Delaware case in which shareholders successfully pled that the board had breached its oversight duty, and the duty related to an ESG matter.[91] In *Clovis*, the Delaware Chancery Court took special note of the fact that the board's Nominating and Governance Committee charter revealed that the committee was "specifically charged" with oversight of general compliance of healthcare requirements when it concluded that the board had an appropri-

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[85] *See id.* at *5.
[86] *See* Audit Committee Disclosure, 64 Fed. Reg. 73,389 (Dec. 30, 1999).
[87] *See* In re *Boeing*, 2021 WL 4059934, at *25.
[88] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 963 (Del. Ch. 1996).
[89] *See* In re *Boeing*, 2021 WL 4059934, at *5.
[90] *See id.*
[91] *In re* Clovis Oncology, Inc. Derivative Litig., No. 2019-0907-MTZ, 2019 WL 480188, at *13 (Del. Ch. Oct. 1, 2019).

ate information and reporting system to satisfy its oversight obligation.[92] Shareholders were able to demonstrate a strong likelihood that the board breached its duty by ignoring red flags. However, the court's emphasis on the charter as a measure of oversight compliance yet again underscores the importance of such charters to board oversight.

### *B. ESG Oversight, Committees, Charters, and Accountability*

It should come as no surprise that the emphasis on the board as an accountability check for the corporation has translated into increased demand for board oversight of ESG matters. Thus, proxy data reveals a sharp increase in investor demand for board oversight of ESG activities.[93] Surveys suggest that ESG and board oversight of ESG are the top issues shareholders want to discuss with directors.[94] Board ESG oversight is fast becoming a corporate governance best practice. Law firms and other corporate advisors have increasingly recommended that corporations focus on ensuring that there is board-level oversight of ESG issues.[95] Proxy advisors similarly emphasize an increased expectation of board-level ESG oversight.[96] "The salient question has shifted from *whether* a board of directors should take into account the interests of stakeholders other than shareholders, to *how* a board should do so."[97] The consensus is that board ESG oversight will enhance accountability for ESG.

Board committee charters along with the corresponding board committees are not only a response to this consensus, but also a strong indication of board oversight and accountability. As a result, board committee charters with oversight of ESG represent a strong proxy for board oversight of ESG activities. Indeed, the significant variation in the language and responsibilities covered by the charters strongly suggest board-level negotiation and input. Moreover, almost every charter indicates that boards will either be making or receiving reports related to the ESG matters over which they have oversight, underscoring the active monitoring role those charters anticipate. Courts have made clear that oversight is likely enhanced when charters emphasize periodic reports to the board, board presentations, and reviews of relevant ESG issues.[98] Thus, the board committee charters captured by this

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[92] *See id.*

[93] Most recent proxy report data reflects an increased level of disclosure around board oversight of ESG matters. *See* SIDLEY REPORT, *supra* note 9, at 3; SULLIVAN 2021 PROXY REPORT, *supra* note 9, at 20–22. *See also* Anagnosti, *supra* note 4, at 5.

[94] *See PwC 2021 Annual Corporate Directors Survey, The Director's New Playbook: Taking on Change*, PwC (2021) [hereinafter *PwC Survey*], https://www. pwc.com/us/en/services/govern ance-insights-center/library/annual-corporate -directors-survey.html.

[95] *See* LIPTON, SOME THOUGHTS 2022, *supra note* 1, at 4–6 (noting expectation for "ESG competent" boards).

[96] *See* Anagnosti et al., *supra* note 4, at 5, 9.

[97] *See* LIPTON, SOME THOUGHTS 2022, *supra note* 1, at 4–6.

[98] *See* Marchand v. Barnhill, 212 A.3d 805, 824 (2019) (emphasizing importance of periodic reports and reviews to plaintiffs' consistent loss of oversight claims).

survey reflect the kind of board oversight, and thus board accountability, favored by courts and stakeholders.

Importantly, current law makes very clear that specific reference to ESG issues within committees and committee charters is important for purposes of effective board oversight and accountability. In *Boeing*, for example, the Delaware Chancery Court concluded that the board faced a substantial likelihood of oversight liability for failing to establish a sufficient airplane safety reporting system. In so doing, the court noted that Boeing did not "implement or prioritize safety at the highest level of the corporate pyramid."[99] As evidence of this failure, the court noted that none of Boeing's board committees were specifically tasked with overseeing airplane safety, and that every committee charter was "silent" as to airplane safety.[100] The court construed this absence as confirmation that the board did not have "any tools to oversee safety."[101] Importantly, the court was specifically concerned by the fact that the Boeing committee charter did not specifically mention airplane safety even though the charter included the general responsibility to evaluate and assess risk.[102] The court also found fault with the fact that the specific ESG topic was not a regular agenda item or topic at Board meetings, and the audit committee's review of top risks did not "specifically" emphasis airplane safety.[103] In other words, the lack of a committee with direct responsibilities to monitor safety was interpreted to mean that the board did not regularly or meaningfully address airplane safety.[104] Of note, the court emphatically dismissed claims that the audit committee's responsibility for addressing risk more broadly satisfied its oversight function.[105] *Marchand* similarly makes clear that board committees with general oversight responsibility over risk or compliance are insufficient to satisfy directors' oversight responsibilities for critical ESG issues.[106] In *In re Clovis*, the Delaware Chancery court took special note of the fact that the Board's Nominating and Governance Committee was "specifically charged" with oversight of compliance with healthcare requirements when it concluded that the board had an appropriate information and reporting system to satisfy its oversight obligation.[107] These cases underscore the importance of ensuring that board committees go beyond generic statements and make specific reference to oversight of ESG issues.[108] They thus confirm the importance of

[99] *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *5 (Del. Ch. Sept 7, 2021).

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See id.* at *6.

[104] *See id.* at *27.

[105] *See id.*

[106] *See* Marchand v. Barnhill, 212 A.3d 805, 823–824 (2019).

[107] *See In re* Clovis Oncology, Inc. Derivative Litig., No. 2019-0907-MTZ, 2019 WL 480188, at *13 (Del. Ch. Oct. 1, 2019).

[108] *See In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *5 (Del. Ch. Sept 7, 2021).

charters reflecting specific oversight of ESG issues as a critical component of board oversight and accountability.

While by no means a panacea, the designation of board responsibility for ESG matters within committee charters strongly suggests enhanced board-level attention and oversight related to these matters. To be sure, as Part III discusses, the existence of these charters does not guarantee board ESG oversight, let alone effective board oversight and accountability over ESG matters. However, given the importance of such charters to board committees and overall board oversight, such charters are likely an important, if not necessary, first step. Indeed, as the instrument that articulates board responsibilities and duties, such charters represent the first step for ensuring increased and more targeted responsibility for board, and thus corporate, oversight of ESG. Thus, these charters are a strong signal of greater board accountability for ESG.

### *C. Refuting the Naysayers*

There has been considerable skepticism regarding the extent to which corporate support of ESG will translate into appropriate corporate behavior with respect to ESG. Many of the corporations embracing ESG commitments have a questionable, if not negative, historical track record with respect to ESG issues.[109] Moreover, research and anecdotal evidence suggest that corporations have engaged in problematic behavior related to ESG even after their recent ESG commitments.[110] In reliance on these facts, prominent regulators and scholars have insisted that we should dismiss this current rise in corporate focus on ESG as merely rhetorical and as an example of corporate greenwashing.[111] Most notably, when, in August 2019, the Business Roundtable released its statement "redefining" corporate purpose to include an emphasis on stakeholders and ESG matters,[112] Lucian Bebchuck and Roberto Tallarita referred to corporate ESG commitments as "illusory."[113] They then followed up with a survey of corporate documents including bylaws and governance guidelines, demonstrating that such documents failed to reflect any noticeable change related to ESG matters in the wake of the signing

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[109] *See* Dorothy Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1619–20 (2021); Barry Ritholtz, *Stakeholder Capitalism Will Fail If It's Just Talk*, BLOOMBERG (Aug. 21, 2019), https://www.bloomberg.com/opinion/articles/2019-08-21 /business-round table-share holder-primacy-shift-judged-by-actions; Winston, *supra* note 7.

[110] *See* Lund, *supra* note 109, at 1620; Bebchuk and Tallarita, *The Illusory Promise, supra* note 7, at 36, 40.

[111] *See* Bebchuk and Tallarita, *The Illusory Promise, supra* note 7, at 36, 40.

[112] *See* Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy that Serves All Americans,"* BUS. ROUNDTABLE (Aug. 19, 2019) [hereinafter *Business Roundtable Statement*], https://www.businessroundtable.org/business-round table-redefines-the-purpose-of-a-corporation-to-pro mote-an-economy-that-serves-all-americans.

[113] *See* Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 7, at 57.

of the Business Roundtable Statement.[114] This failure led Bebchuck and Tallarita to conclude that corporations were disingenuous in their ESG claims.

By contrast, this essay's survey suggests that at least the largest boards have taken steps to enhance their oversight of ESG issues. As noted above, changes to the charter and committee responsibilities are a strong proxy for changes in board oversight, and therefore such changes are likely more salient than bylaws or governance documents as a means for assessing corporate oversight of ESG. Moreover, my survey reveals a noticeable increase in board oversight of ESG activities, reflected by a significant change in board committee charters associated with ESG oversight. My survey indicates that at least 37 or 83% of *Fortune* 50 corporations altered their committee charters or otherwise created stand-alone committee charters to reflect increased board oversight of ESG matters within the last three years—that is, during 2019, 2020, or 2021—with the vast majority of changes adopted in the last two years. This suggests that the increased board oversight has been propelled by the most recent rise in corporate commitments to ESG and the corresponding increased demand for board-level ESG accountability.

The survey also suggests a notable uptick in board oversight of ESG activities by companies that made a commitment to engage in such activities. At least 88% or 32 of the 36 *Fortune* 50 companies that signed the Business Roundtable Statement in August 2019 have a charter indicating board-level oversight of ESG matters. Moreover, 80% of companies that signed the Business Roundtable Statement appeared to have altered their board charters to reflect some increased level of board oversight of ESG matters since the signing of such statement. In addition, 91% of the *Fortune* 50 companies that signed the Business Roundtable Statement and also have a committee charter reflecting ESG oversight updated their committee charter after signing the Business Roundtable Statement. Thus, the survey refutes claims that boards failed to take any steps to promote ESG, and thus refutes claims that corporate commitment to ESG activities should be categorically dismissed as merely rhetorical.

To be sure, this essay does not deny the questionable practices of boards and their corporations around ESG matters. Nor does this essay stand for the proposition that current ESG practices and policies are laudable. Indeed, evidence suggests that corporate commitments to ESG may lack appropriate goals and targets, thereby undermining their effectiveness. However, this essay does argue that, in light of the board's critical role in oversight and accountability, incorporating ESG oversight into committee charters, and thus committee responsibilities, represents an important first step towards enhanced board engagement around these issues. In this regard, it runs counter to the narrative that corporations and their boards are not making efforts to take ESG more seriously.

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[114] *See id.*

## III. Board Oversight Limits and Lingering Concerns

Board oversight as reflected in charters is by no means a guarantee of effective board oversight or accountability. As an initial matter, there is no mechanism for guaranteeing that the responsibilities delineated in committee charters translate into enhanced board oversight. Then too, even the most well-functioning information and reporting system will not catch all corporate transgression or otherwise ensure that material information makes its way to the board, which means that board oversight is no panacea. Finally, there are several concerns that may undermine the ability of the board to perform its oversight function, particularly with respect to ESG, and thus that may undermine accountability. This next section more deeply grapples with those concerns and their implications.

### *A. Liability as Accountability*

Commentators have consistently argued that the oversight duty does not serve as a strong accountability measure because of the near non-existent potential for legal liability for breaching that duty. As an initial matter, doubt has been raised about whether non-financial issues are encompassed in boards' oversight responsibilities.[115] However, several recent Delaware cases, including *Marchand*, *Boeing*, and *Clovis*, indicate an increased willingness to hold boards liable for oversight of ESG activities, at least to the extent a court views those activities as "core" or "mission critical."[116] While these cases leave open the question of what kinds of ESG activities should be included as "core" or "mission critical," it is entirely possible that the fact that boards intentionally specify certain activities in their committee charter may be viewed as a strong signal that such activities will be deemed mission critical for oversight purposes. Hence, both recent case law and the adoption of board charters reflecting oversight of ESG certainly suggests

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[115] *See In re* Citigroup Inc. Shareholder Derivative Litig., 964 A.2d 106, 131 (Del. Ch. 2009); Claire Hill & Brett McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. Ill. L. Rev. 859, 862 (2013); Robert T. Miller, *Oversight Liability for Risk-Management Failures at Financial Firms*, 84 S. Cal. L. Rev. 47, 100 (2010).

[116] *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805 (2018) (finding that plaintiffs pled facts sufficient to support a reasonable inference that board failed to implement any system to monitor food safety and compliance); *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934 (Del. Ch. Sept 7, 2021) (finding that Boeing shareholders have alleged sufficient facts to demonstrate that Boeing directors face a substantial likelihood of oversight liability not only for their failure to establish a reporting system for airplane safety, but also for "turning a blind eye" to "red flag[s] representing airplane safety problems."); *In re* Clovis Oncology, Inc. Derivative Litig., No. 2019-0907-MTZ, 2019 WL 480188 (Del. Ch. Oct. 1, 2019) (finding that plaintiffs had pled facts sufficient to demonstrate board breached oversight duty related to monitoring of clinical trial protocols by ignoring red flags in the failure to comply with clinical trial protocols). *See also Marchand*, 212 A.3d at 824 (emphasizing importance of board oversight functions for "mission critical" areas); In re *Boeing*, 2021 WL 4059934, at *5; In re *Clovis*, 2019 WL 4850188, at *1, 13 (emphasizing oversight duty when a monoline company operates in a highly regulated industry).

that board oversight liability extends to ESG. To the extent liability is linked to accountability, the potential for such liability supports ESG accountability.

Of course, many scholars dismiss oversight liability as a strong source of accountability because of the low level of potential liability associated with the oversight duty. Indeed, courts have consistently emphasized that oversight liability is one of the most difficult theories upon which plaintiffs can successfully hold directors liable for breaching their duty.[117] However, the fact that several recent cases have made it past the motion to dismiss stage suggests that courts may be making the effort to take the oversight duty more seriously, thereby enhancing its accountability potential. Perhaps more importantly, the fact that these recent cases have centered on ESG issues suggest that courts may be making the effort to better ensure that boards and corporations take their ESG responsibilities more seriously. At the very least, these cases indicate that there is a baseline expectation around board-oversight of ESG that may trigger liability, thereby reinforcing and supporting a baseline ESG accountability function for boards.

### *B. Shield or Sword?*

Board oversight as accountability may be limited by the possibility that board charters may serve as more shield than sword. In *Ritter*, the Delaware Supreme Court appeared to conclude that the establishment of board-level committees, combined with the board's receipt of periodic reports regarding particular activities, reflected a process sufficient to satisfy directors' oversight duty and thus shield directors from oversight liability. While recent decisions suggest that oversight liability may be viewed as encompassing ESG activities, they do not deviate from the seemingly low bar set by *Ritter*. The Delaware Supreme Court in *Marchand* pointed out that when boards embrace a procedure of adopting specific charters, establishing committees, and receiving periodic reports, that procedure almost always satisfies the requirement for board-level oversight needed to protect directors from oversight liability.[118] Indeed, in *Marchand*, it was the absence of a specific board-level committee, combined with the absence of board-level reports, agendas, and engagement, that prompted the Court to conclude that an oversight violation may have occurred. Similarly, in *Boeing*, the court based its conclusion of a potential oversight failure on the fact that none of Boeing's board committees were specifically tasked with overseeing airplane safety, and that every committee charter was "silent" as to airplane safety.[119] To the

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[117] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996); *see also* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); Guttman v. Huang, 823 A.2d 492, 506 n.33 (Del. 2003).

[118] *See Marchand*, 212 A.3d at 823.

[119] *See* In re *Boeing*, 2021 WL 4059934, at *5.

extent the absence of these processes served as a strong rationale for potential liability, it is possible that their presence may represent a shield against liability, even if they are not necessarily indicative of board attention and rigorous oversight.

On the one hand, this possibility could undermine the effectiveness of board oversight as an accountability mechanism. On the other hand, the focus on charters, committees, and board-level reports and reviews clearly increases the likelihood that boards will pay closer attention to overseen activities.

### C. *Informational Asymmetries*

When it comes to board oversight, informational asymmetries are a perennial concern. Many commentators bemoan the informational asymmetries that undermine the effectiveness of board oversight, particularly for boards comprised almost exclusively of independent directors, because of the significant divergence between the information known by management and that known by such directors.[120] This means that independent directors are at the mercy of the very managers they are charged to monitor for vital information about the company.[121] Informational asymmetries implicate at least two concerns. First is the lack of information making its way to the board. As an example, *Marchand* and *Boeing* highlighted the existence of significant problems, including significant internal employee complaints, that never reached the board.[122] The second concern regarding informational asymmetries stems from the potential that management may filter or otherwise manipulate information that does reach the board. On the one hand, management may opportunistically filter information, which the court concluded occurred in *Boeing*, wherein the court found that management reported information in a manner that distorted the quality of the information received by the board.[123] However, even if not done opportunistically, the voluminous amount of information associated with any given issue may ne-

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[120] *See* Lisa M. Fairfax, *The Uneasy Case for the Inside Director,* 996 IOWA L. REV. 127, 161 (2011); Melvin Eisenberg*, Legal Models of Management Structure in the Modern Corporation: Officers, Directors and Accountants*, 63 CALIF. L. REV. 375, 404 (1975) (noting the importance of obtaining accurate and objective information); Stephen Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1055 (1993) (noting that those with decision-making power must have information that is not distorted).

[121] *See* Fairfax, *supra* note 120, at 161; James Cox, *Managing and Monitoring Conflicts of Interests: Empowering the Outside Directors With Independent Counsel*, 48 VILL. L. REV. 1077, 1085 (2003).

[122] *See Marchand*, 212 A.3d at 811–12 (emphasizing instances in which the board was unaware of significant problems at various plants); In re *Boeing*, 2021 WL 4059934, at *7, *11–12, *13 (noting critical safety information that never reached the board and then noting that internal complaints were handled by mid-level employees, and thus never made their way to most senior officers or the board).

[123] *See* In re *Boeing*, 2021 WL 4059934, at *13–15. *See also* Fairfax, *The Uneasy Case*, *supra* note 122, at 161 (discussing potential for managerial distortion).

cessitate that management streamline, summarize, and thus filter, information in order to present it to the board. Hence, there is an inevitable potential that the process of reporting information to the board runs the risk of the information being misconstrued or distorted.[124]

However, while by no means a guarantee against problematic behaviors, a well-functioning reporting system may meaningfully close the informational gap, thereby enhancing the potential effectiveness of board oversight. In other words, the ability to close the informational gap depends on the quality of the information and reporting systems established by the board. Indeed, the court in both *Marchand* and *Boeing* suggested that informational asymmetries can be mitigated with more effective systems of internal reporting and controls. In this regard, charters and committees lay important groundwork for better ensuring that boards can appropriately overcome informational asymmetries.

### *D. The Challenge of ESG Expertise*

Effective board oversight and accountability may also be limited by the expertise of directors.[125] Critics of corporate involvement in ESG consistently point out that boards may not have the requisite expertise to appropriately oversee ESG.[126] Confirming this observation, recent research highlights a gap in board expertise related to ESG. For example, a recent study found that 85% of boards stated that they believe that board members need to increase their climate knowledge, and 46% of boards reported that the board had insufficient or no knowledge of how climate change impacted the company's financial performance.[127] A Bloomberg study of 600 directors revealed that only a handful of such directors had expertise in environmental or climate issues.[128] A report from NYU's Stern Center for Sustainable Business similarly found that only 29% of the more than 1,000 *Fortune* 100 directors surveyed had expertise in some ESG issues, and only 6% had any

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[124] *See* Fairfax, *supra* note 120, at 161; *see also supra* note 68.

[125] *See* Fairfax, *supra* note 120, at 164–165; Margaret Bancroft, *Knowledge is Power*, 1 J. Bus. & Tech. L. 145, 155 (2006) (indicating that many independent directors lack knowledge about specific industry and businesses on which they serve as directors).

[126] *See* Bebchuk and Tallarita, *The Illusory Promise*, *supra* note 7 at 24–25; Fin. Economists Roundtable, Statement on SEC Regulation of ESG Issues 2, 3–4 (2021), https://static1.squarespace.com/static/61a4492358cbd07dda5dd80f/t/61e8d6dd8c22c04330637bc9/1642649310539/2021.pdf (arguing that the SEC's expertise lies in financial disclosures and thus the SEC does not have the authority or expertise to mandate board ESG disclosure); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 Wash. & Lee L. Rev. 1423, 1435–42 (1993); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 Wash. & Lee L. Rev. 1409, 1418 (1993).

[127] *See* Heidrick & Struggles, *supra* note 23 at 4.

[128] *See* Tim Quinson, *Many U.S. Corporate Boards Don't Fully Understand the Climate Crisis*, Bloomberg — Quint (Jan. 13, 2021), https://www.bloombergquint.com/onweb/corporate-boards-don-t-get-the-climate-crisis-green-insight.

significant experience with respect to environmental issues.[129] A PricewaterhouseCoopers survey found that just 25% of directors indicated that they understand ESG risks very well, ranking their understanding of such risks the lowest of all the areas of oversight over which boards have responsibility.[130] All of these surveys strongly indicate that directors may not have the expertise necessary to engage in effective oversight of ESG.

To be sure, the concern around ESG expertise may be overstated. Indeed, research suggests that directors' expertise and knowledge deficit is not unique to ESG matters, but instead represents a problem with respect to all of the duties over which boards have responsibility.[131] However, commentators have not argued that this expertise deficit should cause us to remove more traditional issues from the purview of board oversight. This suggests that commentators may be inappropriately emphasizing the expertise deficit to opportunistically exclude ESG matters from board oversight.

Moreover, the concern around expertise can be mitigated in at least two ways. The first is through more effective board recruiting and outreach. Importantly, researchers point out that individuals typically chosen as directors do not have serious expertise in ESG matters, and that typically ESG knowledge is neither a formal requirement for joining the board, nor included in boards' competency matrix.[132] Hence, some of the concerns related to expertise can be overcome through prioritizing ESG matters in the board recruitment and outreach process. Indeed, for decades, scholars have argued that board diversity is linked to improved corporate performance precisely because it better ensures that boards include the range of perspectives necessary to understand and assess the array of issues they are being asked to oversee.[133] Put simply, board diversity is an imperative for boards seeking to

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[129] *See US Boards Suffer Inadequate Expertise in Material ESG Matters*, NYU Stern Center for Sustainable Business, https://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/center-sustainable-business/research/research-initiatives/fortune-100-board-members-lacking-esg-credentials (last visited March 26, 2022).

[130] *See PwC Survey, supra* note 94, at 6. In addition, only 28% of directors say they have a strong understanding of the company's ESG messaging. *See id.* at 9.

[131] *See* Fairfax, *supra* note 120, at 165; Sharpe, *supra* note 68, at 1109; Erica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 Nw. L. Rev. 1123, 1125 (2007); Stirling Home x Corp., Exchange Act Release No. 34-11516 (July 2, 1975) (noting that independent directors lacked sufficient grasp of the company's practices to make informed decisions); Charles Forelle & James Bandler, *How Did UnitedHealth's McGuire Get Same Options Twice*?, Wall St. J., Oct. 20, 2006, at B1 (noting directors did not fully understand option transactions).

[132] *See* Heidrick & Struggles, *supra* note 23, at 5 (noting that 69% of surveyed directors said that climate change knowledge was not a formal requirement for joining the board and 69% said that such knowledge was not included in the board's competency matrix).

[133] *See* Aaron Dhir, Challenging Boardroom Homogeneity 149 (2015); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make*?, 39 Del. J. Corp. L. 377, 382 (2014); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 Wis. L. Rev. 795 (2005); David A. Carter, et.al, *Corporate Governance, Board Diversity and Firm Value*, 38 Fin. Rev. 33, 34 (2003); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. Cin. L. Rev. 1233, 1306–08 (2003) (noting that "di-

ensure that they have directors with the skills needed to engage around the broad range of corporate issues over which they must oversee, including ESG issues. A second way to mitigate the concern around expertise is by enhancing board education and training related to ESG.[134]

### *E. Managing Tradeoffs*

Some may contend that board oversight of ESG may be insufficient for purposes of accountability because of the inability of boards to manage tradeoffs related to ESG.[135] Board oversight of ESG could be rendered meaningless without clear guidance about how best to weigh competing ESG interests and make appropriate tradeoffs. Without such guidance, not only may boards and managers be able to play groups off of one another, but also may not know how to prioritize the vast array of potential ESG issues confronted by companies. To be sure, this concern may underestimate the extent to which business people routinely make tradeoffs, including tradeoffs related to ESG matters.[136] Moreover, it is possible that boards already have begun making those tradeoffs. Indeed, one interpretation of the variation among board committee charters and the different emphasis on a relatively small number of discrete issues is that they reflect board tradeoffs. While there may be disagreement about the virtues of those tradeoffs, such an interpretation suggests that boards have begun the important task of prioritizing, and

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versity may enhance board effectiveness"); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 St. John's L. Rev. 837, 840–41 (2003); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363, 1391–96 (2002); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 75 (2000); Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 Acad. Mgmt. Rev. 489 (1999).

[134] *See PwC Survey, supra* note 94, at 6 (noting that boards can overcome their knowledge and expertise deficit through more appropriate and targeted education).

[135] *See* Bebchuk and Tallarita, *supra* note 7, at 24–25 (noting that how best to resolve tradeoffs is a challenging question that must be resolved by advocates of stakeholderism). Bebchuk and Tallarita note that some deemphasize the tradeoff problems, suggesting that there are "win-win" situations. This article agrees that such a suggestion is unrealistic. *See id*. at 33. These concerns have been raised in the context of constituency statutes and public benefit corporations that enable corporations to consider a range of stakeholder interests. *See* Roxanne Thorelli, Note*, Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 Minn. L. Rev. 1749, 1765 (2017); Anthony Bisconti, Note*: The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land*?, 42 Loy. L.A. L. Rev. 765, 794 (2009); Fin. Economists Roundtable*, supra* note 126 at 3–4; Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 Tex. L. Rev. 1309 , 1311–12 (2021); Bainbridge, *supra* note 126, at 1435–42; Green, *supra* note 126, at 1418.

[136] *See* Colin Mayer, *Shareholderism versus Stakeholderism–A Misconceived Contradiction: A Comment on* "The Illusory Promise of Stakeholder Governance*," by Lucian Bebchuk and Roberto Tallarita*, 106 Cornell L. Rev. 1859, 1859–61 (2021); *see also* Margaret Blair and Lynn Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247, 325 (1999) (insisting that businesspeople can be trusted to make critical tradeoffs).

hence, that such a task may not be a roadblock to effective oversight and accountability.

### *F. Board Bandwidth*

Board accountability through oversight may be limited by the daunting nature of the ESG oversight responsibility. In the past few decades, boards have been tasked with increased responsibilities over the audit function and nominating and compensation processes. Thus, we may be overburdening boards with responsibilities that they may not be able to effectively manage.[137] ESG promises to significantly enhance board responsibility, and thus, the extent of this burden. Indeed, unlike the relatively discrete categories associated with audit, nomination, and compensation, ESG covers a wide array of issues. This raises concern about whether directors have the necessary bandwidth to effectively carry out their responsibilities. This concern is particularly acute for independent directors, who are part time and may have other demanding jobs and responsibilities, and thus have even less time to devote to the myriad of ESG activities they are being required to oversee. Surveys suggest that boards currently spend between 150 and 250 hours on their board duties and still wrestle with ensuring that they have sufficient time to engage around critical issues.[138] When it comes to ESG, one recent board survey concluded that "directors are overwhelmed by the scale and complexity of their environmental, social, and governance (ESG) responsibilities."[139] That survey went as far as to suggest that boards may be "paralyzed" by the scale of the task involved with monitoring "the sheer breadth of the ESG spectrum."[140]

To be sure, there is no quick fix to this issue. The hope is that through prioritization and the development of effective board processes and procedures, boards can better manage their oversight ESG tasks along with their other board duties.

### *G. Missed Connections*

The effectiveness of board accountability through oversight also may be undermined by the disconnect between the matters over which committee charters reflect specific board oversight and the matters emphasized by corporations and shareholders. These disconnections fall along several spectrums: (1) corporate disclosure with no corresponding oversight; (2) board

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[137] *See* Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More than It Can Deliver?*, 10 U. St. Thomas L.J. 416, 418 (2012).

[138] *See PwC Survey*, *supra* note 94, at 21.

[139] Heidrick & Struggles*, supra* note 23, at 5.

[140] *Id.* at 24.

oversight with no corresponding disclosure; and (3) board oversight and corporate disclosure with no corresponding shareholder or stakeholder interest.

1. Disclosure without Oversight

Overall, there is some disconnect between the ESG issues around which there is significant corporate disclosure, and the ESG issues over which committee charters reflect board oversight. Indeed, there were several matters featured prominently in the proxy statement or other required public filing, but over which committee charters did not particularly emphasize board responsibility. For example, in 2020 76% (38 of 50) of *Fortune* 50 companies included disclosure on employee health and safety in required public filings.[141] However, my survey revealed that only 23% of *Fortune* 50 companies' committee charters specifically identified health and safety as an issue over which boards had ESG oversight. Another disconnect came by way of corporate culture. Thus, 43 or 85% of *Fortune* 50 companies included corporate culture disclosure in their Form 10-K or proxy statement, while 28% increased their disclosure in this area.[142] By comparison, only 18% of *Fortune* 50 company committee charters specifically identified corporate culture as an issue over which there was board oversight. As indicated in Part I of this essay, there also was noticeable disconnects with respect to equity and diversity issues, whereby there was significant corporate rhetoric and proxy emphasis, but less board oversight in the form of specification in the committee charter. Moreover, even when there was board oversight of diversity, the vast majority of charters excluded board oversight of equity.

Of course, the fact that certain ESG matters are not delineated in the committee charter may be of no consequence given that almost all charters associated with board ESG oversight contain a broad ESG statement, thereby encompassing the full range of potential issue issues under the boards' oversight umbrella. Hence, the mere fact that charters failed to specifically identify particular ESG issues does not mean that boards do not have oversight over those issues. For example, despite the tepid emphasis in committee charters, a recent survey reported that some 74% of boards indicated that board-level discussions regarding human capital or DEI strategy had increased in 2021.[143] This survey suggest that the absence of specific emphasis in the committee charter may not necessarily mean that such issues are not receiving increased board attention or oversight.

The lack of specific emphasis may be concerning nonetheless for at least two reasons. First is the possibility of an accountability gap. On the one hand, specific emphasis on particular issues in the committee charter does not guarantee that those issues receive enhanced attention, nor does it auto-

[141] Anagnosti et al., *supra* note 4, at 1.
[142] *Id.* at 5.
[143] *See PwC Survey*, *supra* note 94, at 16.

matically signal that issues that are not emphasized are completely ignored or otherwise do not receive sufficient attention. On the other hand, it does create an increased likelihood of those outcomes. Indeed, at least three things suggest the significance of the ESG issues highlighted in the committee charter. First is the aforementioned case law highlighting the importance of specificity in the board charter to the board oversight role. Second is corporate guidance around emphasizing ESG issues. Indeed, corporate guidance suggests that the decision to focus on particular kinds of ESG issues is a nuanced one, and thus made after careful consideration, including considerations related to the materiality of the ESG activity to the company and its operations, the risks and benefits of highlighting certain ESG activity, and the company's capacity for engaging around certain ESG activities.[144] In light of this guidance, it is reasonable to assume that boards carefully consider which among the range of ESG activities that they will choose to highlight in their committee charter. In other words, highlighted ESG issues reflect some level of prioritization and thus some expectation that those issues will receive greater focus. As a corollary, those issues that are not highlighted may be less likely to receive additional focus and prioritization. Finally, given the strong likelihood that charters reflect the result of board negotiation and discussion, the fact that some corporations took the extra step to specifically identify certain categories of ESG issues within their charters cannot be ignored, and thus suggests some level of greater emphasis around those issues. For these reasons, it is likely that the issues boards choose to highlight in their charters reflect intentional oversight choices by the board and its committees, and thus suggest that more attention will be paid to them. As a result, it is also likely that the issues boards choose to ignore also reflect intentional choices. From this perspective, the fact that there may be a disconnect between board oversight and corporate disclosure may suggest a critical accountability gap because it may reflect the possibility that there are issues being emphasized and disclosed for which there is no identifiable board oversight, and thus, fewer assurances of accountability.

Second, this disconnect could also raise legal liability concerns. Cases suggest that important issues need board oversight and that such oversight must be specific, rather than general. There is a strong likelihood that the issues being disclosed in required filings have been deemed important or material to the corporation. If concerns arise with respect to those issues, the lack of specific board-level oversight associated with those issues may make directors especially vulnerable to legal liability. Indeed, courts have made clear that one of the factors they will use to assess the adequacy of board-level oversight is the extent to which there is board-specific oversight as identified by the charter and committee responsibilities. Courts also have made clear that general oversight may be insufficient. Thus, the general oversight over ESG matters may not be enough to appropriately protect di-

[144] Anagnosti et al., *supra* note 4, at 11.

rectors from liability. In this regard, the disconnect between committee charters and corporate disclosure not only may suggest an inappropriate deemphasis, but also may increase directors' liability exposure.

### 2. Oversight without Disclosure

There are some issues where committee charters indicate board oversight, but for which there was no corresponding disclosure, at least in required documents. The most noticeable was political contributions. Importantly, both the Business Roundtable and the CPA have maintained that effective board oversight of political spending includes board decision-making around *whether* to disclose political spending and political spending policies.[145] In this regard, the disconnect raises the question of whether and to what extent boards are making the decision *not* to disclose.

### 3. Oversight without Interests

There also are some issues over which committee charters indicate board oversight, but for which it is not clear if that oversight aligns with shareholder or stakeholder interests, the most noticeable of which was charitable contributions. On the surface, this disconnect may not raise any concerns because surely one would agree that charitable contributions merit board oversight. However, given the need to prioritize ESG matters, the strong emphasis reflected in committee charters may be troubling. Then too, it may raise concerns around greenwashing, whereby corporations may be seeking to opportunistically emphasize positive and potentially less relevant ESG issues while ignoring or downplaying more problematic concerns. Indeed, commentators universally agree that while charitable giving may be laudable, it is a low priority and thus insufficient as a significant form of promoting ESG matters. To this end, emphasizing charitable giving may suggest that corporations are inappropriately focusing on this issue. It may also suggest that corporations may be using their focus on this issue to distract from deficits in more important areas, thereby triggering concerns around greenwashing.

## Conclusion

This essay has revealed that many boards have begun to incorporate ESG oversight into their committee charters. This revelation is significant. To be sure, board committee charters detailing oversight over ESG matters are not the entire answer to corporate accountability concerns related to ESG. Nonetheless, outlining ESG responsibilities and duties within the committee charter increases the possibility for enhanced attention and oversight

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[145] *See* CPA Index, *supra* note 33, at 28.

of important ESG matters by the board as well as key actors within the corporation. Then too, information and reporting systems, including board charters and committees, certainly better enable board and corporate oversight and thus better ensure appropriate accountability over the ESG activities that are the subject of that oversight. In this regard, the increased focus on ESG oversight in board charters is a notable and important development. That increase runs counter to those who would contend that board rhetoric on the importance of ESG has been all talk. That increase also may be a necessary first step not only in the effort to ensure greater board oversight and accountability for ESG, but also, and much more importantly, in the effort to ensure greater corporate attention to ESG overall.