

MONITORING FACEBOOK

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INTRODUCTION

From Facemash to Facebook to Meta, Mark Zuckerberg's path and company have been fraught with conflicts, controversy, and even illegality.¹ Did he steal the idea from the Winklevoss brothers? Has he invaded people's privacy? Does he care about privacy? Does he mean what he says?² Does he respect the law? Does he respect his shareholders? Does he respect his stakeholders? The answer to all of the above appears to be, no.

Zuckerberg has never played by the rules. Instead, from the beginning, he appears to have operated as if he were above the rules, not subject to regulation, and outside the zone where other people's concerns about privacy or false information were infringements on his rights instead of the reverse. His response, time and again, is to apologize, pay a fine if required, and then repeat the process. Yet, the harm created by Facebook is real and extensive—from human rights violations to election outcomes to teenage girls contemplating suicide—Facebook's reach is massive and its choices seeming unchecked. Zuckerberg apparently ignores the law, his fiduciary duties, the

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¹ Facemash was the initial Harvard version, complete with "attractiveness rankings" that landed Zuckerberg in front of Harvard's Administrative Board for privacy and emotional distress concerns. *See, e.g.*, Katharine A. Kaplan, *Facemash Creator Survives Ad Board*, THE HARVARD CRIMSON (Nov. 19, 2003). <https://www.thecrimson.com/article/2003/11/19/face-mash-creator-survives-ad-board-the/>.

² Zuckerberg testified to Congress that Facebook platforms are not harmful to children. *Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation: Hearing Before the H. Comm. On Energy and Commerce*, 117th Cong. (2021) (statement of Mark Zuckerberg, creator of Facebook, Inc.). Internal research available to Zuckerberg had previously revealed Facebook platforms "make body image issues worse for 1 in 3 teen girls." Keith Zubrow et al., *Whistleblower's SEC complaint: Facebook knew platform was used to "promote human trafficking and domestic servitude*, CBS NEWS (Oct. 4, 2021), <https://www.cbsnews.com/news/facebook-whistleblower-sec-complaint-60-minutes-2021-10-04/>.

harm his choices create, and the role of social license. He operates Facebook as if it were his own private company, emphasizing growth, scale, and profits over the law, stakeholders, and safety. He appears to operate without candor and appears to run roughshod over the norms and internal controls designed to ensure both that the company's corporate governance mechanisms are functioning *and* that it achieves sustained, profitable, and compliant growth.

As a result, the time has come to engage in a thought experiment, using Facebook and Zuckerberg as examples, about whether and when external governance controls should be imposed. This is a company, perhaps aptly now-named Meta, with a reach that exceeds its bounds, and the actual and potential harm it can do extends well beyond the shareholders and owners. The company's impact and its harms cross borders, impacting not just users, but the public more broadly. That reach is key to its revenue and growth model, and, without strong corporate governance, it is also key to the harms it imposes. In short, as this article reveals, Zuckerberg's cycle of harm, apology, fine, repeat, indicates that he (and through him the company) seemingly will not or cannot self-impose limits.

In normal course, the company's board would set those limits by effectuating the internal controls inherent in good corporate governance. Those controls are designed to mitigate conflicts and agency costs and to build profits, trust, and social license within the bounds of the law. Effective internal controls operate through candor and creative friction. Yet, these controls, along with candor and creative friction, appear to be missing at Facebook. Instead, as the case study herein reveals, Facebook apparently suffers from sustained and systemic governance challenges that, like Fox News before it, have not been resolved, prompting the analysis in this article about the use of outside monitors.

This article proceeds in three parts. Part I explores the story and scandals of Facebook, detailing its impact on stakeholders. From users, to human rights victims, to the governments of the United States and many other countries, Facebook plays a role in legal violations and tragedies. Facebook has paid a "price" for some of these and not for others, and in many cases, it has denied any role in or responsibility for horrendous circumstances and violence. Part II discusses Facebook's board, its internal controls (or lack thereof), its choices, operations and governance, and how those choices connect to publicness, social license, and fiduciary duties. This analysis reveals that the harms that Facebook imposes across countries and borders are likely connected to, and even rooted in, the gaps in its internal controls. In essence, Facebook's choices and structure are precluding it from monitoring itself and therefore, external governance may be warranted. Part III explores the Fox News Scandal and the resulting public monitoring system in operation at Fox, proposing consideration of a monitoring structure for Facebook that could deter further bad acts and push it on the path to rehabilitation and self-governance.

I. FACEBOOK'S CHOICES AND SCANDALS

Facebook is a company for which the scandals are unending. Consider the most recent—the eight whistleblower complaints filed with the SEC by former employee, product manager, and engineer, Frances Haugen (Haugen Complaints).³ These complaints raise allegations about the 2020 election, hate speech, the impact of Instagram on young girls, human trafficking, domestic servitude, and more. All of the complaints focus on the distinction between what Facebook said publicly and what the internal documents actually say.⁴ This is classic securities fraud,⁵ which is, of course, illegal and at least one example of potential lawbreaking on Facebook's part. The focus of this article, however, is not securities fraud. Instead, this article addresses the additional support the Haugen Complaints lend to the argument that Facebook should not be trusted to govern itself and may be in need of the friction that an outside monitor would provide.

The allegations in the Haugen Complaints are many, varied, and worth discussing in some detail. Haugen's argument is that the extent to which the company puts its interests above those of its users is alarming.⁶ Profit over safety and people appears to be the mantra, and profit comes from behavioral advertising (advertising that is targeted to specific users through the use of their browsing history).

The documents to which Haugen refers cover a wide array of issues. For example, the documents indicate that Facebook was aware of Instagram's toxicity.⁷ Indeed, it was aware that Instagram was causing body image issues and suicidal thoughts for teenage girls.⁸ Yet, just one month prior to the release of the documents, Facebook told members of Congress that its apps had a positive impact on users⁹ and dodged questions about the contradictory internal research Haugen later exposed.¹⁰ This incident alone indicates that Facebook's statements cannot be trusted.

The allegations about teenage girls are, however, just the tip of the iceberg. Documents also reveal that contrary to other statements and comments,

³ Zubrow et al., *supra* note 2.

⁴ *Id.*

⁵ 17 C.F.R. § 240.10b-5 (1951).

⁶ Ryan Mac & Cecilia Kang, *Whistle-Blower Says Facebook 'Chooses Profits Over Safety'*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/03/technology/whistle-blower-facebook-frances-haugen.html>.

⁷ Zubrow et al., *supra* note 2.

⁸ Georgia Wells et al., *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sep. 14, 2021, 7:59 AM), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?>. And despite the internal research, Facebook was in the process of creating an Instagram Kids Service for children 13 years old or younger. It has now paused development of it. *See, e.g.*, Adam Satarian & Ryan Mac, *Facebook Delays Instagram App for Users 13 and Younger*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/09/27/technology/facebook-instagram-for-kids.html>.

⁹ *See, e.g.*, Mac & Kang, *supra* note 6.

¹⁰ Zubrow et al., *supra* note 2.

Facebook treated some users as special, i.e. “whitelisted,” and subject to review through the XCheck (cross check) process.¹¹ Big users with big followings, those who are “newsworthy,” “influential or popular,” or “PR risky,” are treated differently from regular users—even when their posts contain harassment or incitement to violence.¹² In fact, there are over 5.8 million “whitelisted” accounts.¹³

The power of being a whitelisted user was real. When Neymar, a Brazilian soccer player with 150 million Instagram followers posted retaliatory revenge porn against a woman accusing him of rape, Facebook’s system prevented its deletion. Over 56 million Facebook and Instagram followers saw the revenge porn, it was reposted 6000 times, and the victim was harassed and bullied.¹⁴ Yet, a “normal” or non-whitelisted user posting revenge porn might have had their account blocked, suspended, or deleted.¹⁵ Neymar’s account, however, was left active.¹⁶

Again, despite Facebook’s public comments to the contrary, a 2019 internal review of whitelisting apparently concluded that the favoritism was widespread, not defensible, and a “breach of trust.”¹⁷ Nevertheless, Zuckerberg has repeatedly said publicly that all users are on equal footing, using it as an example of why Facebook matters—because, he says, it creates transparency and equality.¹⁸ Although the company says it has now suspended its whitelisting practices, in a typical lack of transparency and candor, it has not provided a date on which the practice was ended.¹⁹

Other documents released by Haugen raise further questions. For example, the documents reveal that insiders know more about the company’s role in the 2020 election and 2021 attack on the Capitol than previously revealed.²⁰ The company knew about extremist movements and groups attempting to undermine democracy and polarize Americans.²¹ Indeed,

¹¹ *Id.*

¹² Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That’s Exempt.*, WALL ST. J. (Sep. 13, 2021, 10:21 AM), <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Sheera Frenkel, *Facebook Says It Deleted 865 Million Posts, Mostly Spam*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/facebook-removal-posts-fake-accounts.html>.

¹⁶ Neymar was never charged with rape. The woman was charged with slander and extortion (charges were dropped) and fraud (she was acquitted). Dan Milmo, *Facebook: Some High-Profile Users ‘Allowed to Break Platform’s Rules’*, THE GUARDIAN (Sep. 13, 2021), <https://www.theguardian.com/technology/2021/sep/13/facebook-some-high-profile-users-allowed-to-break-platforms-rules>.

¹⁷ Horwitz, *supra* note 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *The Facebook Papers and their fallout.*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/2021/10/25/business/facebook-papers-takeaways.html>.

²¹ *Id.*

documents indicate that these problems are not restricted to the United States, describing Facebook's role in India as "amplified."²²

Perhaps even more troubling is the idea that Facebook's own product design is at the root of the problem. Or, put differently, the way in which Facebook's site functions along with the features it continues to create to encourage users to engage in social networking actually create an atmosphere in which "misinformation and hate speech flourish."²³ The company has apparently known for a while that "likes" and "shares" are most often deployed by users to amplify "toxic" content. The company also knew that modifications to help manage this issue are possible. But Facebook blocked the changes "in the service of growth and keeping users engaged."²⁴ After all, user engagement is key to behavioral advertising revenue.²⁵

Importantly, these troubling allegations are only the most recent. As long as Facebook has existed, Zuckerberg appears to have operated outside of the rules and laws, without transparency or candor, and has been "apologizing" for his choices. There is a pattern to the issues. Facebook makes a software design choice that emphasizes profits over privacy and users, but does not reveal the implications of the design with candor or transparency. Why? Because if users choose privacy, advertisers will complain and behavioral advertising revenues will decline.

Nevertheless, users do complain, and when they do, Facebook's response appears to be waiting to respond until pressure mounts. For example, in September of 2006, Zuckerberg apologized for Newsfeed.²⁶ The design of Newsfeed, a type of social software, resulted in all users' posts being revealed in one centralized place.²⁷ Advertisers were pleased and users were surprised.²⁸ His response: "we did a bad job of explaining what the new features were and an even worse job of giving you control of them."²⁹ Translation: "We did not explain how we planned to share your information, nor did we create transparent, easy, or accessible methods for you to control

²² Sheera Frenkel & Davey Alba, *In India, Facebook Grapples With an Amplified Version of Its Problems*, N.Y. TIMES (Oct. 23, 2021), <https://www.nytimes.com/2021/10/23/technology/facebook-india-misinformation.html>.

²³ N.Y. TIMES, *supra* note 20.

²⁴ Mike Isaac, *Facebook Wrestles With the Features It Used to Define Social Networking*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/25/technology/facebook-like-share-buttons.html>.

²⁵ See Georgia Wells, Jeff Horwitz, & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sep. 14, 2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?>.

²⁶ Mark Zuckerberg, *An Open Letter from Mark Zuckerberg*, FACEBOOK (Sep. 8, 2006), <https://www.facebook.com/notes/2832474983634072/>.

²⁷ See Jamin Warren & Vauhini Vara, *New Facebook Features Have Members in an Up-roar*, WALL ST. J. (Sep. 7, 2006), <https://www.wsj.com/articles/SB115759058710755893>.

²⁸ Jessi Hempel, *A Short History of Facebook's Privacy Gaffes*, WIRED (Mar. 30, 2018), <https://www.wired.com/story/facebook-a-history-of-mark-zuckerberg-apologizing/>.

²⁹ Zuckerberg, *supra* note 26.

the sharing. Our choices are not transparent, and we do not operate with candor.” Why? Advertising revenue.

Just over a year later, in December of 2007, he apologized again.³⁰ This time, Zuckerberg was responding to the “outrage” that he was taking user information and simply giving it to advertisers.³¹ What did he say? “It took us too long after people started contacting us to change the product so that users had to explicitly approve what they wanted to share.”³² Translation: “We redesigned things to give you “control,” but instead of actually giving you control up front, we created a default that was not transparent and gave us control.” Why? Advertising revenue.

Two years later, in December of 2009, he said that Facebook was going to “empower people to personalize control over their information.”³³ But it turns out the tools were excessively confusing and actually pushed users to make information public rather than private.³⁴ Why? Advertising revenue. The result this time was a Federal Trade Commission investigation.³⁵

In May of 2010, he was forced to apologize again. Advertisers were using a privacy loophole to retrieve personal information about users.³⁶ This time, what did Zuckerberg say? “Sometimes we move too fast. . .”³⁷ The reason for lightspeed product development and loopholes? Advertising revenue.

In November of 2011, Zuckerberg stated: “I’m the first to admit that we’ve made a bunch of mistakes.”³⁸ Why? Because the pursuit of advertising revenue resulted in a settlement with the FTC, which had charged the company with deceiving customers by telling them they could keep their information private, when in fact the company was sharing it and making it public.³⁹ He also announced new privacy tools and an additional Chief Privacy Officer.⁴⁰

The list goes on. In January of 2013, the company was forced to confront its prior promises that users controlled who had access to their infor-

³⁰ Jessi Hempel, *A Short History of Facebook’s Privacy Gaffes*, WIRED (Mar. 30, 2018), <https://www.wired.com/story/facebook-a-history-of-mark-zuckerberg-apologizing/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Emily Steel & Jessica E. Vascellaro, *Facebook, MySpace Confront Privacy Loophole*, WALL ST. J. (May 21, 2010), <https://www.wsj.com/articles/SB10001424052748704513104575256701215465596>.

³⁷ Mark Zuckerberg, *From Facebook, answering privacy concerns with new settings*, WASH. POST (May 24, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303828.html>.

³⁸ Mark Zuckerberg, *Our Commitment to the Facebook Community*, META (Nov. 29, 2011), <https://about.fb.com/news/2011/11/our-commitment-to-the-facebook-community/>.

³⁹ *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, FED. TRADE COMM’N (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

⁴⁰ Zuckerberg, *supra* note 38.

mation.⁴¹ Rather than keep this promise, the company instead created a search mechanism that allowed users to search any information not pro-actively protected, thus increasing the odds that information would be accessible.⁴² Again, Facebook's approach made it difficult for users to protect their information and lacked candor and transparency. Why? Advertising revenue.

Importantly, Facebook's choices, whether about privacy or otherwise, impact far more than users, including its decisions involving elections in the United States and other countries. Consider the Cambridge Analytica scandal. According to reports, Facebook allowed Cambridge Analytica and Strategic Communications Laboratories to take private user data from 87 million Facebook users.⁴³ Cambridge Analytica used that data in its work with the Trump Campaign, arguably impacting the United States's 2016 election outcome.⁴⁴ One board member, Peter Thiel, was connected to the scandal.⁴⁵ Facebook knew about the problem; yet, it revealed the breach only when it was about to become public, referring to a legal agreement with Cambridge Analytica to delete all of the data.⁴⁶

Unfortunately, Cambridge Analytica had not followed through with the agreement. As a result, Facebook harmed its users, but it also harmed stakeholders—here, non-users impacted by the 2016 election. Moreover, in a typical lack of candor and transparency, Facebook owned its choices only when the issue was about to become public,⁴⁷ saying, “[t]his is another unacceptable violation of trust.”⁴⁸ Ironically, however, the violation of trust to which it was referring was not its violation with its users or its stakeholders. It was referring to Cambridge Analytica's violation of trust with Facebook.⁴⁹

On the user violations, the company said, “we’ve heard loud and clear that privacy settings and other important tools are too hard to find and that

⁴¹ Hempel, *supra* note 30.

⁴² *Id.*

⁴³ Issie Lapowsky, *Facebook Exposed 87 Million Users to Cambridge Analytica*, WIRED (Apr. 4, 2018), <https://www.wired.com/story/facebook-exposed-87-million-users-to-cambridge-analytica/>.

⁴⁴ Andrea Valdez, *Everything You Need to Know About Facebook and Cambridge Analytica*, WIRED (Mar. 23, 2018), <https://www.wired.com/story/wired-facebook-cambridge-analytica-coverage/>.

⁴⁵ Peter Thiel owns Palantir, a company that is alleged to have had several senior employees working on the Facebook profile data acquired by Cambridge Analytica. *See, e.g.*, Nicholas Confessore & Matthew Rosenberg, *Peter Thiel employee helped Cambridge Analytica before it harvested data*, CNBC (Mar. 28, 2018), <https://www.cnbc.com/2018/03/28/new-york-times-digital-peter-thiel-employee-helped-cambridge-analytica-before-it-harvested-data.html>; Arjun Kharpal, *Palantir worked with Cambridge Analytica on the Facebook data it acquired, whistleblower alleges*, CNBC (Mar. 27, 2018), <https://www.cnbc.com/2018/03/27/palantir-worked-with-cambridge-analytica-on-the-facebook-data-whistleblower.html>.

⁴⁶ Valdez, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

we must do more to keep people informed.”⁵⁰ Sound familiar? It should. Facebook had been saying exactly this for a decade, but it did not make simple or transparent mechanisms. Why? Advertising revenue.

Sadly, Zuckerberg’s initial response to the Cambridge Analytica mess apparently was to spend the weekend of the scandal arguing about who was most to blame. In his view, it was Cambridge Analytica.⁵¹ While he was perseverating and worrying about testifying in front of Congress, #deletefacebook was trending on Twitter.⁵² When he finally spoke, he apologized, announced further changes to the platform, and promised to audit apps that had access to large amounts of information, noting that apps that would not agree to audits would be banned.⁵³ Perhaps this was a response to the stakeholder violations, but if so, it certainly lacks candor and transparency. Moreover, the problem is that this was just one of many privacy scandals, one of many apologies, and one of many preventable situations—if only Zuckerberg or Facebook cared about stakeholders and social license and not just advertising revenue and growth.

This is the nub of it. Facebook’s revenue model is in tension with both good corporate governance and privacy protection as well as with publicness and social license more generally.⁵⁴ The model is one of selling access to advertisers and news producers supported by the “religious tenet” that Facebook is an “open, neutral platform”⁵⁵ “for all ideas.”⁵⁶ Neutrality, of course, means that the company takes no position.⁵⁷ Taking no position, however, is not the same as being objective.⁵⁸ Indeed, neutrality breeds ill-informed consumers.⁵⁹ Objectivity, on the other hand, would mean that the company addressed or even corrected for prejudice and even falsity.⁶⁰ Yet, neither Zuckerberg nor the company seems to take ownership or accepts responsibility for the lack of objectivity.

⁵⁰ Hempel, *supra* note 30.

⁵¹ Valdez, *supra* note 44.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Facebook has held back on fixing problems “for fear of hurting its business.” Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That’s Exempt*, WALL ST. J. (Sep. 13, 2021), <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353>.

⁵⁵ Nicholas Thompson & Fred Vogelstein, *Inside the Two Years That Shook Facebook—and the World*, WIRED (Feb. 12, 2018), <https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell>.

⁵⁶ Nick Statt, *Zuckerberg calls Facebook ‘a platform for all ideas’ after meeting with conservatives*, VERGE (May 18, 2016), <https://www.theverge.com/2016/5/18/11706266/mark-zuckerberg-facebook-conservative-news-censorship-meeting>.

⁵⁷ Thompson & Vogelstein, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ Johann N. Neem, *Reporters can’t be objective if they remain neutral*, SEATTLE TIMES (Oct. 4, 2007), <https://www.seattletimes.com/opinion/reporters-cant-be-objective-if-they-remain-neutral>.

⁶⁰ Thompson & Vogelstein, *supra* note 55.

Instead, as the Trump administration assumed office and began populating regulatory agencies, Zuckerberg began to assume more responsibility for the company's role in D.C., doubling down on his choices not to act, not to fact check, and not to take responsibility for the outcomes of choices.⁶¹ In essence, Zuckerberg continues to confuse neutrality with objectivity, stating that changes, if any, should come through regulation.⁶² Add to that the tension between privacy and targeted advertising, attracting publishers, driving user growth, and other aspects of the revenue model, the result is an endless cycle of harm, apology (fine), repeat—without any real change.

Media accounts of Facebook's scandals also reveal what are arguably significant fiduciary gaps in the choices of Zuckerberg and Sheryl Sandberg, the Chief Operating Officer.⁶³ Although their relationship is now reportedly strained, they have been partners at the company for 13 years.⁶⁴ Throughout that time, Sandberg's role has been generating revenue from users—regardless of how or why the users were using the site.⁶⁵ Indeed, more users are good for revenues even if those users are caught up in conspiracy theories—and that is a key challenge for the company. It might also explain why Sandberg, too, appears to operate without candor and transparency.

Consider the media reports of a 2017 board meeting following the Cambridge Analytica scandal. Apparently, Sandberg invited two corporate officers involved in the internal review of Russian interference to brief the board's audit committee, which was chaired by Erskine Bowles, former President Emeritus of the University of North Carolina.⁶⁶ According to the media, the General Counsel, Colin Stretch, and the Chief Security Officer, Alex Stamos, knew that the company did not yet understand the depth of the interference or its role in electing Donald Trump.⁶⁷ Bowles grilled the two men, occasionally cursing, on how Facebook had allowed itself to become a tool for Russian interference. [Stretch and Stamos] were forthcoming with the Audit Committee on the extent of what they had found and what might yet be discovered.⁶⁸ Bowles demanded to know both why it had taken so long to uncover the activity, and why Facebook directors were only now being told. That afternoon, in a full board meeting, Bowles pressed Zuckerberg and Sandberg, "pelt[ing]" them with questions.⁶⁹ As reported, Sandberg's reaction was to complain, stating that Stretch and Stamos, by being candid, "had

⁶¹ Sheera Frenkel & Cecilia Kang, *Mark Zuckerberg and Sheryl Sandberg's Partnership Did Not Survive Trump*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/07/08/business/mark-zuckerberg-sheryl-sandberg-facebook.html>.

⁶² *Id.*

⁶³ Sheera Frenkel et al., *Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html>.

⁶⁴ Frenkel & Kang, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ Frenkel et al., *supra* note 63.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

thrown [Zuckerberg and Sandberg] under the bus.”^{70,71} They were, however, actually fulfilling their own fiduciary obligations—something neither Sandberg nor Zuckerberg appear to understand.⁷² Now, Stretch and Stamos have left the company, exiting in 2018. Stamos’s departure was reportedly over the company’s choices around the handling of the election fallout.⁷³ Bowles resigned from the board as well.

Consider next the FTC investigations of the company and how Facebook has enacted its settlements with the agency. After the 2016 elections and the revelations about the privacy violations, the FTC commenced an investigation into the company’s practices, arguing that it had violated a 2012 Settlement/Consent Decree.⁷⁴ Facebook settled with the FTC in 2019, resulting in another consent decree (the 2019 Settlement/Consent Decree). Notably, both Democratic members of the FTC dissented from the 2019 FTC Settlement,⁷⁵ arguing, in part, that the provisions were insufficient and vague and that real change required changes to governance at the top.⁷⁶

It appears that they were right. In August of 2021, Facebook aggravated the FTC by pushing two researchers from NYU’s Ad Observatory off of the platform,⁷⁷ insinuating that the terms of the 2019 FTC Settlement required it to do so.⁷⁸ The researchers were searching Facebook’s Ad Library to understand the social and political effects of ads, focusing on vaccine hesitancy and the January 6 Capitol attack.⁷⁹ The researchers had also found that politi-

⁷⁰ *Id.*

⁷¹ In reality, Sandberg was likely violating her own fiduciary duties as a director and as an officer. See, e.g., *OptimisCorp v. Waite*, 2015 WL 5147038, at *72 (Del. Ch. Aug. 26, 2015), *aff’d*, 137 A.3d 970 (Del. 2016) (holding that directors who were aware of a key issue breached their duty of candor by not alerting their fellow directors.); *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) (Delaware officers owe the same duties to the corporation as directors).

⁷² *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (“Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.”).

⁷³ Devin Coldewey, *Facebook loses its chief security officer Alex Stamos*, TECH CRUNCH (Aug. 1, 2018), <https://techcrunch.com/2018/08/01/facebook-loses-its-chief-security-officer-alex-stamos/>. It appears that Bowles understood what the officers did not: the outcome of this information was not going to be good and his role as a director was to press the officers to get it right and for candor. See *infra* notes 101–03 and accompanying text.

⁷⁴ *FTC’s \$5 billion Facebook settlement: Record-breaking and history-making*, FED. TRADE COMM’N, (July 24, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history>.

⁷⁵ *Id.*

⁷⁶ *In re Facebook*, F.T.C. No. 1823109 (2019) (Chopra, Comm’r, dissenting).

⁷⁷ Jeff Horwitz, *Facebook Seeks Shutdown of NYU Research Project Into Political Ad Targeting*, WALL ST. J. (Oct. 23, 2020), <https://www.wsj.com/articles/facebook-seeks-shutdown-of-nyu-research-project-into-political-ad-targeting-11603488533>.

⁷⁸ Lois Anne DeLong, *Facebook Disables Ad Observatory; Academicians and Journalists Fire Back*, NYU CTR. FOR CYBER SEC. (Aug. 21, 2021), <https://cyber.nyu.edu/2021/08/21/facebook-disables-ad-observatory-academicians-and-journalists-fire-back/>.

⁷⁹ Sue Halpern, *Why Facebook Is Suddenly Afraid of the F.T.C.*, THE NEW YORKER (Aug. 23, 2021), <https://www.newyorker.com/news/daily-comment/why-facebook-is-suddenly-afraid-of-the-ftc>.

cal ads were not labeled with information about who was paying—despite Facebook’s public disclosures to the contrary.⁸⁰

In response to Facebook’s insinuations that the 2019 FTC Settlement required it to oust the researchers from the platform, the FTC’s acting Director of Consumer Protection pushed back, stating,

I am disappointed by how your company has conducted itself in this matter. Only last week, Facebook’s General Counsel, Jennifer Newstead, committed the company to “timely, transparent communication to BCP staff about significant developments.” Yet the FTC received no notice that Facebook would be publicly invoking our consent decree to justify terminating academic research earlier this week.

Had you honored your commitment to contact us in advance, we would have pointed out that the consent decree does not bar Facebook from creating exceptions for good-faith research in the public interest. Indeed, the FTC supports efforts to shed light on opaque business practices, especially around surveillance-based advertising. While it is not our role to resolve individual disputes between Facebook and third parties, we hope that the company is not invoking privacy—much less the FTC consent order—as a pretext to advance other aims.⁸¹

Seen in their best light, Facebook’s insinuations are cynical. However, they are arguably far worse. They appear to indicate outright disregard for the law, here the 2019 FTC Settlement/Consent Decree, as well as flagrant disregard for the company’s stakeholders. That disregard has real and significant consequences—like the company’s impact on the 2016 elections. Notably, harm in that context extends well beyond privacy concerns and harm to stakeholders and users. It extends to US citizens more generally. The same is true for any role the company may have played in the coordination and facilitation of the January 6 assault on the US Capitol.⁸² And for what it appears to have done to teenage girls. And for the role it seems to play in human trafficking. And for elections outside the US and human rights violations worldwide. Indeed, the list is long. Disregard for the company’s users, clients, and for the public generally, is part of the fabric of the company and its

⁸⁰ Craig Silverman & Ryan Mac, *Facebook Promised To Label Political Ads, But Ads for Biden, The Daily Wire, And Interest Groups Are Slipping Through*, BUZZFEED (Oct. 22, 2020), <https://www.buzzfeednews.com/article/craigsilverman/facebook-biden-election-ads>

⁸¹ Samuel Levine, *Letter from Acting Director of the Bureau of Consumer Protection Samuel Levine to Facebook*, FED. TRADE COMM’N. (Aug. 5, 2021), <https://www.ftc.gov/news-events/blogs/consumer-blog/2021/08/letter-acting-director-bureau-consumer-protection-samuel>. Facebook is also facing a 2020 antitrust complaint from the FTC.

⁸² See Craig Timberg et al., *Inside Facebook, Jan. 6 violence fueled anger, regret over missed warning signs*, WASH. POST (Oct. 22, 2021), <https://www.washingtonpost.com/technology/2021/10/22/jan-6-capitol-riot-facebook/>.

revenue model. Moreover, it flourishes as a result of a lack of candor, transparency, and internal controls.

II. FACEBOOK'S BOARD AND THE LACK OF INTERNAL CONTROLS

These issues—concerns about targeted advertising, neutrality, objectivity, and stakeholder harm—are all actually questions about the corporate strategy. Strategy is in the domain of the board of directors and is to be set by management in consultation with the board. Indeed, this is one of the board's core responsibilities (the other two being risk and people (including Zuckerberg)).⁸³ Strategy is tied to culture, which is set through tone from the top.⁸⁴ Healthy corporate governance and the friction it provides in the corporate boardroom also connect to culture. But at Facebook, governance is complicated by Zuckerberg himself. He is a controlling shareholder who, according to news reports and filings, tolerates little dissent or pushback from the board.⁸⁵ The result is a lack of the innovative friction, let alone internal controls, that a healthy and engaged board can provide.⁸⁶

Friction occurs both through discussion and through the actual internal control mechanisms imposed by corporate law. Directors, like officers, have fiduciary responsibilities to the company. All corporate directors are required to engage in monitoring and provide oversight.⁸⁷ This fiduciary duty is actually part of the duty of loyalty and generally referred to as the good-faith obligation.⁸⁸ The duty also includes conflicts of interest and corporate opportunities.⁸⁹

The array of fiduciary obligations for directors also includes the duties of care and candor.⁹⁰ The duty of care requires that directors engage in good

⁸³ Corporate Governance Guidelines, FACEBOOK (Dec. 3, 2020), <https://investor.fb.com/leadership-and-governance/corporate-governance-guidelines/default.aspx>

⁸⁴ See BRANDON L. GARRETT, TOO BIG TO JAIL, 184 (2014); Donald C. Langevoort & Hillary A. Sale, *Corporate Adolescence: Why Did "We" Not Work?*, TEX. L. REV. 1347, 1378 (2021).

⁸⁵ See Jeff Horwitz & Deepa Seetharaman, *Facebook Nears Complete Board Overhaul With Latest Exit*, WALL ST. J. (Mar. 26, 2020), <https://www.wsj.com/articles/facebook-names-former-deputy-secretary-of-the-treasury-to-its-board-11585256495>.

⁸⁶ Langevoort & Sale, *supra* note 84; Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2015–16 (2013).

⁸⁷ *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) (“If *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care.”); see Pollman, *supra* note 86 at 2023 (“And a decade later, in 2006, a pair of cases came before the Delaware Supreme Court that affirmed the validity of a *Caremark* claim, gave meaning to the fiduciary duty of good faith and cabined it within the fiduciary duty of loyalty. . .”).

⁸⁸ See *Stone v. Ritter*, 911 A.2d 362.

⁸⁹ See, e.g., *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1061–62 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005), *judgment entered*, (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005); *Guth v. Loft, Inc.*, 5 A.2d 503, 510–11 (Del. 1939); *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996).

⁹⁰ Peter A. Atkins, Marc S. Gerber, & Edward B. Micheletti, *Directors' Fiduciary Duties: Back to Delaware Law Basics*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 10, 2020),

processes, which this board repeatedly fails to do, and ensure that they have sufficient information before making decisions.⁹¹

Candor, however, is embedded in every duty.⁹² Indeed, good faith actions and discourse built on transparent processes backed by candor can help to produce the kind of culture that avoids the cycle of problems described in this article. Thus, candor plays a powerful role in ensuring fiduciary behavior. It is part of the information-forcing substance theory that is tied to disclosure discourse.⁹³ Good candor ensures informed decision making.⁹⁴ Information, in turn, impacts substantive outcomes. It can, for example, affirm a decision.⁹⁵ It can also result in a different choice.⁹⁶ Candor in the decision-making process helps to ensure that directors are fulfilling their role: engagement with management over strategy and risks.⁹⁷ The case study reveals, however, that Sandberg and Zuckerberg, as well as some board members, appear to lack candor in their dealings with the board-at-large. These choices, in combination with the sustained cycle of apparent legal and disclosure violations, indicate systemic issues that require intervention and the friction and engagement that external monitors can provide.

In essence, good governance requires an active and engaged board that values and uses candor in its dealings. One that asks questions and questions

<https://corpgov.law.harvard.edu/2020/03/10/directors-fiduciary-duties-back-to-delaware-law-basics/>

⁹¹ See Hillary A. Sale & Donald C. Langevoort, “*We Believe*”: Omnicare, *Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 788 (2016) (discussing information-forcing-substance theory and candid discourse amongst board members); *In re Zale Corp.*, 2015 WL 5853693, *19 n.106 (Del. Ch. Oct. 1, 2015) (“Delaware law instructs that the core inquiry [under the duty of care] is whether there was a real effort to be informed and exercise judgment.”) (citing *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996)), *op. amended on rearg.*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015). *McMullin v. Beran*, 765 A.2d 910, 921 (Del. 2000) (“The bar for liability ‘is predicated upon concepts of gross negligence.’”) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)); see generally Hillary A. Sale, *Disclosure’s Purpose*, 107 GEO. L.J. 1050 (2019).

⁹² As discussed above, candor is embedded in the duty of care; however, candor is also involved in the duty of loyalty and requires disclosure of material facts relating to interest or conflicts or the need to be in good faith. See *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001) (holding the duty of disclosure to be “the application in a specific context of the board’s fiduciary duties of care, good faith, and loyalty.”); see also *OptimisCorp v. Waite* 2015 WL 5147038, at *72 (Del. Ch. Aug. 26, 2015), *aff’d*, 137 A.3d 970 (Del. 2016) (discussing director duty of candor).

⁹³ See Donald C. Langevoort, *Agency Law inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1204 (2003) (theorizing that federally required disclosures inherently require candid discourse amongst board members); see Sale & Langevoort, *supra* note 92 (discussing the necessity for candid dialogue between directors to “ensure accurate and complete disclosures.”)

⁹⁴ Directors may also have a duty to disclose to fellow directors. See, e.g., *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 119 (Del. Ch. 1999) (stating directors “had an ‘unremitting obligation’ to deal candidly with their fellow directors”) (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989)).

⁹⁵ See also Sale & Langevoort, *supra* note 91 at 30.

⁹⁶ *Id.*

⁹⁷ This is creative friction in action. Hillary A. Sale, *Chapter X: In re Walt Disney Co. Derivative Litig.*, in *FEMINIST JUDGMENTS: REWRITTEN CORPORATE LAW UPDATE* 35–45, (on file with author).

answers.⁹⁸ Indeed, the failure to engage is a breach of the fiduciary duty of loyalty.⁹⁹ And the failure to ask questions can result in the loss of the protections of the business judgment rule.¹⁰⁰ Although litigation in this space is notoriously difficult for plaintiffs to win, judicial opinions, even if largely at the motion to dismiss stage, play an important role in setting tone and guideposts for directors seeking to act with independence and to better understand their role.

Nevertheless, it appears that some directors at Facebook failed to act independently, and those that tried are no longer on the board. Indeed, in the space of just one year, four independent directors left the board, reportedly after “clashing” with Zuckerberg on the platform’s discourse issues.¹⁰¹ The departing directors included former President Emeritus of the University of North Carolina, Erskine Bowles, Netflix CEO, Reed Hastings, Facebook’s Lead Director and then CEO of the Gates Foundation, Susan Desmond-Hellmann, and former CEO of American Express, Kenneth Chennault.¹⁰²

Notably, although the departures of Bowles and Hastings were announced at the same time, the other two resignations happened very closely thereafter, resulting in what the media reported as “serious departures”¹⁰³ and “a shake up.”¹⁰⁴ In the case of Hastings, media reports focused on his clashes with fellow board member Thiel’s support for Donald Trump and Cambridge Analytica.¹⁰⁵ It appears that for Bowles, the issue was the company’s handling of the Russian interference in the election.¹⁰⁶ Kenneth Chennault managed to stick it out for longer, but he, too, reportedly resigned as a result of governance disagreements and policies.¹⁰⁷ His departure followed Desmond-Hellman’s.¹⁰⁸

⁹⁸ See Langevoort & Sale, *supra* note 84; see also Hillary A. Sale & Donald C. Langevoort, “We Believe”: Omnicare, *Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 788 (2016); Sale, *supra* note 91.

⁹⁹ Hillary A. Sale, *Monitoring Caremark’s Good Faith*, 32 DEL. J. CORP. L. 719, 729–30 (2007).

¹⁰⁰ *Smith v. Van Gorkom*, 488 A.2d 858, 863 (Del. 1985). See also *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (noting that the business judgment rule presumes that directors “acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”).

¹⁰¹ Taylor Hatmaker, *Facebook taps Peggy Alford for its board, Reed Hastings and Erskine Bowles to depart*, WIRED (Apr. 12, 2019), <https://techcrunch.com/2019/04/12/facebook-board-peggy-alford-reed-hastings-erskin-bowles>; Horwitz & Seetharaman, *supra* note 86.

¹⁰² *Id.*

¹⁰³ Hatmaker, *supra* note 101.

¹⁰⁴ Horwitz & Seetharaman, *supra* note 85.

¹⁰⁵ John Lynch, *Netflix’s CEO reportedly offered to resign from Facebook’s board after slamming Peter Thiel’s support of Trump — but Mark Zuckerberg said ‘no’*, BUS. INSIDER (Feb. 15, 2018), <https://www.businessinsider.com/netflix-reed-hastings-offered-to-resign-facebook-board-over-peter-thiel-disagreement-2018-2>.

¹⁰⁶ Frenkel et al., *supra* note 63.

¹⁰⁷ Jeff Horwitz & Deepa Seetharaman, *Chennault Leaves Facebook Board After Disagreements With Zuckerberg*, WALL ST. J. (Mar. 13, 2020) <https://www.wsj.com/articles/chennault-leaves-facebook-board-after-disagreements-with-zuckerberg-11584140731?>

¹⁰⁸ Horwitz & Seetharaman, *supra* note 85.

According to the media, the replacement directors are all people “who have preexisting social or business relationships with Mr. Zuckerberg.”¹⁰⁹ Although these types of connections are not disqualifying for board member independence, for this board and its lack of internal controls, those ties are worth questioning. As of today, the board has nine directors, including Zuckerberg and Sandberg. Two original, “independent” directors, Peter Thiel and Marc Andreessen, remain. One new director joined in 2019 and the other four in 2020—significant turnover and a very new board.¹¹⁰

Importantly, when the four independent directors left the board, they left behind directors who legal and media documents indicate were unlikely to engage effectively. Effective engagement from the board perspective means that directors provide a healthy check on the agency problems and opportunities in the company. Director fiduciary duties are designed to create an environment in which internal controls operate to ensure that the company’s strategy and culture are aligned—as well as that the company is engaged in lawful conduct and healthy risk management. Good governance supports those goals as well as helping the company to develop its social license and cope with publicness (the interplay between internal governance and public perception).

Consider, for example, the fact that Facebook faces repeated privacy issues, promises change, and fails to deliver. Is that a breach of a fiduciary duty on the part of Zuckerberg? It might be, and it might also be a violation of the securities laws.¹¹¹ Recall that Sandberg was reportedly angry with Stretch and Stamos for sharing information with the audit committee about the Russian election interference. One possible implication is that Sandberg and Zuckerberg were withholding material information from the board. If true, that would be a breach of their duty of candor.¹¹²

As discussed above, the duty of candor is key to good governance, and its premise is that management and directors owe each other material information necessary to perform their duties.¹¹³ In fact, without candor, it is difficult to see how directors can fulfill their fiduciary duties. By definition, outside directors are not supposed to be fully engaged in the company. In the context of the Cambridge Analytica scandal, however, the directors needed information about the extent and nature of the Russian interference so that

¹⁰⁹ Horwitz & Seetharaman, *supra* note 107.

¹¹⁰ It takes most directors six months to a year to get up to speed and make an impact. *See, e.g.,* Rusty O’Kelley III & Susanne Suhonen, *Enhancing Director Performance and Impact*, HARV. L. F. CORP. GOVERNANCE (Jul. 25, 2018), <https://corpgov.law.harvard.edu/2018/07/25/enhancing-director-performance-and-impact>; Mark Byford, Michael D. Watkins, & Lena Triantogiannis, *Onboarding Isn’t Enough*, HARV. BUS. REV. (May 2017), <https://hbr.org/2017/05/onboarding-isnt-enough>.

¹¹¹ It may well be a violation of the securities laws.

¹¹² *See generally* Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187 (2003).

¹¹³ *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009) (stating that the “duty of disclosure is not an independent duty, but derives from the duties of care and loyalty” (internal quotation marks omitted)).

they could assess the risk it might pose to the company. Arguably, they should not have had to ask, but once they did, they deserved fulsome and complete answers. Directors need this information to fulfill their own monitoring obligations.¹¹⁴ Apparently, Stretch and Stamos provided it, but Zuckerberg and Sandberg did not.

As we know, Zuckerberg's approach to the "truth" is less than fulsome. Recall his repeated statements to the public about "equal footing" for all users.¹¹⁵ Now contrast it with the company's whitelisting practice.¹¹⁶ Add to that the statements to Congress, seemingly denying the existence of whitelisting.¹¹⁷ Or his assurances on the impact of Facebook on teenage girls. These are just two examples of how the leader of the company appears to treat disclosures. The result is an organization where transparency and candor do not exist at the top or further down.

To ensure that this environment flourishes, there are laws and regulations designed to establish independence on the part of a majority of the board and to protect against conflicts of interest. Independence is about mindset, i.e., directors should not be beholden to or captured by others, and here in particular, by Zuckerberg. Disinterest is usually defined with reference to conflicts of interest, and, here, Facebook also failed to meet the standard.

A key conflict of interest at Facebook occurred when Zuckerberg wanted to sell stock to fund his foundation, but he wanted to do so without impacting his controlling position at Facebook.¹¹⁸ He requested that the board reclassify stock to protect him.¹¹⁹ This was a conflicting interest transaction.¹²⁰ Zuckerberg was on both sides.¹²¹

¹¹⁴ See generally Langevoort, *supra* note 112.

¹¹⁵ Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, WALL ST. J. (Sep. 13, 2021), <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353>.

¹¹⁶ *Id.*

¹¹⁷ Elizabeth Dwoskin, Craig Timberg, & Tony Romm, *Facebook allegedly offered advertisers special access to users' data and activities, according to documents released by British lawmakers*, WASH. POST. (Dec. 5, 2018), <https://www.washingtonpost.com/technology/2018/12/05/facebook-allegedly-offered-advertisers-special-access-users-data-activities-according-to-documents-released-by-british-lawmakers>.

¹¹⁸ Jessica Guynn, *Facebook proposes new shares to keep Zuckerberg control*, USA TODAY (Apr. 27, 2016), <https://www.usatoday.com/story/tech/news/2016/04/27/facebook-mark-zuckerberg-class-c-nonvoting-stock-proposal/83612842/>.

¹¹⁹ Michelle Castillo, *Facebook cancels plans to change ownership share structure*, CNBC (Sep. 22, 2017), <https://www.cnbc.com/2017/09/22/facebook-cancelled-plan-to-change-ownership-structure.html>.

¹²⁰ See Del. Code. Ann. Tit. 8 § 144 (2019); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) ("The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest."); *Personal Touch Holding Corp. v. Glaubach*, No. CV 11199-CB, 2019 WL 937180, at *19 (Del. Ch. Feb. 25, 2019) ("[I]n a typical self-dealing transaction, the fiduciary is the recipient of an allegedly improper personal benefit, which usually comes in the form of obtaining something of value or eliminating a liability.").

¹²¹ See Del. Code. Ann. Tit. 8 § 144 (2019); *Valeant Pharms. Int'l v. Jersey*, 921 A.2d 732, 745 (Del. Ch. 2007) (conflict of interest transactions that are approved by a committee of

Conflicts of interest occur for fiduciaries. Indeed, they are not forbidden.¹²² Instead, fiduciaries are expected to operate with clean hands and engage in cleansing—full information, transparency, recusal, independent approvals, and outside advisors.¹²³ This is standard operating procedure, but not at Facebook. Instead, like so many things at Facebook, the process surrounding this transaction was far from clean.

Apparently, the board established an “independent” Special Committee to review and advise on Zuckerberg’s proposal: that he sell stock to fund his philanthropic goals, but that the board issue non-voting stock to existing shareholders to ensure that he did not lose his controlling position.¹²⁴ The board appointed a Special Committee, composed of Andreessen, Desmond-Hellman, and Bowles to evaluate the proposal.¹²⁵

Appointing a special and independent committee is the right choice in a circumstance like this, but appointing one that operated like Facebook’s is not. There are multiple governance issues surrounding the Special Committee. Apparently, it was required to develop a charter, which should have included responsibilities and duties.¹²⁶ It did not do so.¹²⁷ It did hire financial and legal advisers, but without meeting them first.¹²⁸ The result was a lead banker that stated it was hired after the transaction was under way, and a financial advisor that had been Zuckerberg’s own personal advisor on the same transaction.¹²⁹ The former is sloppy governance at best; the latter is a classic no-no.¹³⁰

disinterested directors are subject to review under the business judgment standard rather than entire fairness standard).

¹²² Del. Code Ann. Tit.8, § 144 (2019); *Valeant Pharms.*, 921 A.2d at 745.

¹²³ To determine whether an interested-director transaction satisfies Section 144(a) there must be disinterested directors acting in good faith who were aware of the material facts relating to the conflict and the transaction. Del. Code. Ann. Tit. 8 § 144(a)(1) (2019); *Kahn v M&F Worldwide Corp.*, 88 A.3d 645, 645 (Del. 2014).

¹²⁴ Dan Levine, *Facebook Hit with Lawsuit Over Plan to Issue New Stock*, REUTERS (Apr. 29, 2016), <https://www.reuters.com/article/us-facebook-stocks-lawsuit/facebook-hit-with-lawsuit-over-plan-to-issue-new-stock-idUSKCN0XQ2LM>.

¹²⁵ Steven Davidoff Solomon, *A Potential Hitch in Zuckerberg’s Stock Plan for Facebook*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/business/dealbook/a-potential-hitch-in-zuckerbergs-stock-plan-for-facebook.html>.

¹²⁶ Second Verified Amended Complaint at 309, *In re Facebook, Inc. Derivative Litig.*, No. 2018-0307) 2021 WL 4552158 (Del. Ch. Oct. 5, 2021).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ The mere existence of a special committee is not enough to cleanse a transaction. *Rabkin v. Olin Corp.*, C.A. No. 7547, 1990 WL 47648, at *6 (Del. Ch. Apr. 17, 1990), *aff’d*, 586 A.2d 1202 (Del. 1990). Instead, a court will examine special approval to ensure that the majority shareholder did not dictate the transaction’s terms and the committee had real bargaining power. *Kahn v. Lynch Commc’n Sys.*, 638 A.2d 1110, 1120 (Del. 1994). A special committee can be rendered ineffective because of “subtle influences, such as a network of relationships with the controller which, in aggregate, raises doubt.” *Frederick Hsu Living Tr. v. Oak Hill Capital Partners III, L.P.*, C.A. No. 12108-VCL, slip op. at 34 (Del. Ch. May 4, 2020).

According to court documents, the Special Committee asked Zuckerberg for concessions.¹³¹ Zuckerberg rejected them.¹³² So, the Special Committee appears to have rolled over, with Desmond-Hellman testifying that “the committee believed that it had no real ability to say ‘no’ to Zuckerberg.”¹³³ The shareholders, however, disagreed. Although there were 5.1 billion votes in favor of the transaction, the vast majority of those votes were Zuckerberg’s.¹³⁴ Without his votes, there were only 453 million votes in favor with 1.5 billion votes against.¹³⁵

Then there is Marc Andreessen and his role on the Special Committee. According to the court documents, throughout the process, Andreessen was in constant contact with Zuckerberg—despite the fact that the Special Committee was supposed to be independent.¹³⁶ His texts were filled with smiley faces and assurances that Andreessen was working to get Zuckerberg what Zuckerberg wanted.¹³⁷ In the words of the plaintiffs’ complaint, Andreessen was a “mole” for Zuckerberg.¹³⁸ And, when the vote of the Special Committee took place, Zuckerberg and Thiel were both present even though good governance would indicate that only committee members should have been.¹³⁹

¹³¹ Second Verified Amended Complaint at 310, *In re Facebook, Inc. Derivative Litig.*, No. 2018-0307, 2021 WL 4552158 (Del. Ch. Oct. 5, 2021).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ For a special committee to be valid, it must conduct a process where the majority shareholder does not dictate the terms of the transaction and the special committee has real bargaining power that it exercises with the majority shareholder on an arm’s-length basis. *Kahn v. Lynch Comm’n Sys.*, 638 A.2d 1110, 1120 (Del. 1994). The evidence of Andreessen and Zuckerberg’s communications thus invalidate the ability of the special committee to act independently.

¹³⁷ Deepa Seetharaman, *Facebook’s Plan to Keep Zuckerberg in Control Was Flawed, Lawsuit Says*, WALL ST. J. (Dec. 9, 2016), <https://www.wsj.com/articles/facebooks-plan-to-keep-zuckerberg-in-control-was-flawed-lawsuit-says-1481314730>.

¹³⁸ Second Verified Amended Complaint at 310, *In re Facebook, Inc. Derivative Litig.*, No. 2018-0307, 2021 WL 4552158 (Del. Ch. Oct. 5, 2021).

¹³⁹ *In Re Pilgrim’s Pride Corp. Derivative Litig.*, No. CV 2018-0058-JTL, 2019 WL 1224556, at *15 (Del. Ch. Mar. 15, 2019) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–11 (Del. 1983) (“[d]irector[s] can avoid liability for an interested transaction by totally abstaining from any participation in the transaction.”)). Delaware courts have expressed increased skepticism over transactions involving conflicted controllers. See, e.g., *Kahn*, 638 A.2d at 1117 (holding that a special committee must have the ability to say no to any proposed transaction without fear of retaliation); *Tornetta v. Musk*, 250 A.3d 793, 800 (Del. Ch. 2019) (stating that there is “an obvious fear that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation and its public stockholders”); *In re Pure Resources, Inc. Shareholders Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002) (describing the controlling shareholder as an 800-pound gorilla to whom independent directors are unlikely to stand up to due to loyalties or fear of retribution). Accordingly, Zuckerberg’s presence in the room with the special committee makes it even more unlikely that the independent directors would feel able to say no to him. For that reason, he should have recused himself. See, e.g., AM. BAR ASS’N CORP. LAWS COMM., CORPORA-
TE DIRECTOR’S GUIDEBOOK 22–23 (7th ed. 2020).

In its review, the Chancery Court noted that Andreessen was likely lacking in independence.¹⁴⁰ Moreover, the court also noted that the way he shared information with Zuckerberg infected what was supposed to be a conflict cleansing process.¹⁴¹ The court also noted, without so ruling, that a second committee member, Desmond-Hellman, was likely not independent.¹⁴² Unfortunately, this was the committee that the board selected to cleanse the transaction, leaving the board's ability to act in an objective fashion open to question.

The real issues at Facebook, however, are those of publicness and governance, which impact each other. Publicness is the “interplay between the inside corporate governance players, like the officers and the board, and outside actors who report on, reframe, and impact information about the company as well as its public perception.”¹⁴³ All companies, whether publicly held or not, are subject to publicness and its impact on governance choices.¹⁴⁴ They are all also both social and economic actors, and the two cannot be separated.¹⁴⁵ This is the concept of social license, or that businesses exist with permission from the communities and stakeholders impacted by them.¹⁴⁶ This is a lesson that Uber, while still privately held, learned painfully and publicly and for which its founder was ousted.¹⁴⁷ It is, however, a lesson that Zuckerberg and Facebook have yet to learn and for which the stakeholders are paying.

¹⁴⁰ The Delaware Supreme Court referred to the back-channel communications as “facially dubious.” *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1044 (Del. 2021).

¹⁴¹ *United Food & Com. Workers Union v. Zuckerberg*, 250 A.3d 862, 893 (Del. Ch. 2020).

¹⁴² *Id.* at 900.

¹⁴³ Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785, 785 (2021); see also Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1630 (2014); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013–14 (2013); Hillary A. Sale, *The New “Public” Corporation*, 74 L. & CONTEMPORARY PROBS. 137, 141 (2011); Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L. J. 337, 340 (2013); Onnig H. Dombalagian, *Principles for Publicness*, 67 FLA. L. REV. 649, 653–55 (2015).

¹⁴⁴ See generally Sale, *The Corporate Purpose of Social License*, *supra* note 143, at 769–818 (discussing the scandals of Wells Fargo and Uber).

¹⁴⁵ *Id.* at 789; see also Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 962–64 (2017).

¹⁴⁶ Sale, *The Corporate Purpose of Social License*, *supra* note 143 at 789; see also Domene Mele & Jaume Armengou, *Moral Legitimacy in Controversial Projects and its Relationship with Social License to Operate: A Case Study*, 136 J. BUS. ETHICS 729 (2016); Jeffrey Bone, *Legal Perspective on Corporate Responsibility: Contractarian or Communitarian Thought*, 24 CAN. J. L. & JURIS. 277, 288 (2011) (stating that corporations possess social contracts with their constituent and societal shareholders).

¹⁴⁷ Sale, *The Corporate Purpose of Social License*, *supra* note 143 at 795, 811–13 (Uber's desire to launch an IPO and show its willingness to change required it to make the Holder Report public. This report included recommendations to change the culture and accountability of the company including diminishing CEO Kalanick's role and calling for enhanced board oversight with an independent committee).

Facebook's impact extends well beyond its users, for example to the victims of election fraud, to the victims of human trafficking, to its employees, and, of course, to its shareholders, among others. As this case study reveals, Zuckerberg appears to value revenues, growth, and control over all else, and that is at the core of the challenge. Facebook's revenue model is one of behavioral advertising,¹⁴⁸ mining users for personal information it can sell to enable targeted ads.¹⁴⁹ Without that approach, Facebook's growth might have been slower. Either way, the revenue model is core to the strategy, at the root of the harm, and, therefore, core to the board's role.¹⁵⁰ Yet, to date, the board has proven itself ineffective in this area and, arguably, those who tried exited in 2019 and 2020.

In short, Facebook has proved that it cannot effectively manage or control its reach. Its officers have proved, time and again, that they either cannot or will not engage with candor or monitor themselves. This lack of transparency extends to their relations with the board of directors. The members of the board, in turn, have also arguably failed to impose limits on Zuckerberg or manage the concerns effectively. Regardless of whether they believed themselves incapable of exercising effective challenge or setting limits (as Desmond-Hellman testified), or they simply ignored the limits (Andreessen), or they resigned in frustration, the outcome is the same. The internal control mechanisms that are inherent in an effective and engaged board appear to be simply missing.

Those mechanisms, however, are designed to produce the friction that results in decision making rooted in a healthy process at the board level. They are also designed to ensure candor and transparency: that the board is consulted and allowed to question strategic choices and has a role in setting the culture. Instead, at Facebook, the culture appears to be toxic. And, as the recent documents and August 2021 letter from the FTC indicate, the current board is seemingly not up to fulfilling the fiduciary duties that are part of the internal controls scheme built into corporate law. The result is likely to be repeated compliance issues, repeated privacy violations, repeated settlements and apologies, and ongoing harm to stakeholders and users.

Indeed, the repeated "disclosures" and "apologies" on privacy are striking when viewed together. Here is the timeline:

- 2003, Facemash misuses student information,
 - Zuckerberg says, "Issues about violating people's privacy don't seem to be surmountable," "I'm not willing to risk insulting anyone."¹⁵¹

¹⁴⁸ FACEBOOK, INC., 2020 Annual Report 15 (2021), <https://investor.fb.com/financials/default.aspx>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 17.

¹⁵¹ Katharine A. Kaplan, *Facemash Creator Survives Ad Board*, THE HARV. CRIMSON (Nov. 19, 2003), <https://www.thecrimson.com/article/2003/11/19/facemash-creator-survives-ad-board-the>.

- 2006, Newsfeed design reveals user information,¹⁵²
 - Zuckerberg says, “We did a bad job of explaining . . . the new features . . . and an even worse job of giving [users] control of them.”¹⁵³
- 2007, Facebook is caught sharing information with advertisers,¹⁵⁴
 - Zuckerberg says, “we released a new feature called Beacon to try to help people share information with their friends about things they do on the web. We’ve made a lot of mistakes building this feature, but we’ve made even more with how we’ve handled them.”¹⁵⁵
- 2009, the FTC launches an investigation into Facebook for its unfair and deceptive privacy promises.¹⁵⁶
- 2010, Facebook’s privacy loophole is revealed,¹⁵⁷
 - Zuckerberg says, “Sometimes we move too fast—and after listening to recent concerns, we’re responding.”¹⁵⁸
- 2011, Facebook settles with the FTC over claims about deceptive privacy statements.¹⁵⁹
 - Zuckerberg says, “I’m the first to admit that we’ve made a bunch of mistakes.”¹⁶⁰
- 2013, Facebook admits that a system bug exposed 6 million users’ phone numbers and email addresses to unauthorized viewers over the year.¹⁶¹
 - Facebook says the problem is, “something we’re upset and embarrassed by. . . .”¹⁶²

¹⁵² Jamin Warren & Vauhini Vara, *New Facebook Features Have Members in an Uproar*, WALL ST. J. (Sep. 7, 2006), <https://www.wsj.com/articles/SB115759058710755893>.

¹⁵³ Zuckerberg, *supra* note 26.

¹⁵⁴ Caroline McCarthy, *MoveOn to Facebook: We caught you red-handed*, CNET (Nov. 26, 2007), <https://www.cnet.com/news/moveon-to-facebook-we-caught-you-red-handed>.

¹⁵⁵ Mark Zuckerberg, *Thoughts on Beacon*, FACEBOOK (Dec. 6, 2007), <https://about.fb.com/news/2007/12/announcement-facebook-users-can-now-opt-out-of-beacon-feature>.

¹⁵⁶ *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, FED. TRADE COMM’N. (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>; Complaint, In the Matter of Facebook, Inc., <https://epic.org/wp-content/uploads/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>.

¹⁵⁷ Emily Steel & Jessica E. Vascellaro, *Facebook, MySpace Confront Privacy Loophole*, WALL ST. J. (May 21, 2010), <https://www.wsj.com/articles/SB10001424052748704513104575256701215465596>.

¹⁵⁸ Mark Zuckerberg, *From Facebook, answering privacy concerns with new settings*, WASH. POST (May 24, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303828.html>.

¹⁵⁹ FED. TRADE COMM’N, *supra* note 156.

¹⁶⁰ Zuckerberg, *supra* note 38.

¹⁶¹ Gerry Shih, *Facebook admits year-long data breach exposed 6 million users*, REUTERS (June 21, 2013), <https://www.reuters.com/article/net-us-facebook-security/facebook-admits-year-long-data-breach-exposed-6-million-users-idUSBRE95K18Y20130621>.

¹⁶² *Id.*

- 2018, Facebook’s use of the firm, “Definers Public Affairs,” for attack research on competitors and members of Congress becomes public,¹⁶³
 - Zuckerberg says, “I understand that a lot of D.C.-type firms might do this kind of work. When I learned about it I decided that we don’t want to be doing it.”¹⁶⁴
- 2018, Cambridge Analytica misuses user information,¹⁶⁵
 - Zuckerberg says, “it’s a breach of trust, and I am sorry.”¹⁶⁶
- 2019, Facebook enters into a settlement/consent decree with the FTC.
 - Zuckerberg apologizes.
- 2021, Facebook is chastised by the FTC for breaching the 2019 Settlement/Consent Decree.
- 2021, Zuckerberg tells Congress that platforms are not harmful to children despite internal evidence on human trafficking, domestic servitude, and body image issues,¹⁶⁷
 - Zuckerberg *stops* apologizing.¹⁶⁸

The Cambridge Analytica scandal is perhaps the most powerful of all, because the statement from Zuckerberg following it was, “We have a responsibility to protect your data, and if we can’t then we don’t deserve to serve you.”¹⁶⁹

This article contends that it appears Facebook does not deserve to serve users or harm stakeholders anymore—at least not on its own. Instead, as the case study in Part I and the governance discussion above reveal, Facebook’s internal governance mechanisms seems to be broken and it may now need external governance mechanisms to get back on track, provide friction in its processes, and allow the board to govern effectively.

¹⁶³ Mike Isaac & Jack Nicas, *Facebook Cuts Ties With Washington Firm That Sought to Discredit Social Network’s Critics*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/technology/facebook-definers-soros.html>.

¹⁶⁴ Jack Nicas & Matthew Rosenberg, *A Look Inside the Tactics of Definers, Facebook’s Attack Dog*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/technology/facebook-definers-opposition-research.html>.

¹⁶⁵ Alvin Chang, *The Facebook and Cambridge Analytica scandal, explained with a simple diagram*, VOX (May 2, 2018), <https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-cambridge-analytica-trump-diagram>.

¹⁶⁶ *Facebook Boss Apologises in UK and US newspaper ads*, BBC NEWS (Mar. 25, 2018), <https://www.bbc.com/news/business-43532948>.

¹⁶⁷ See Lauren Feiner, *Lawmakers demand answers from Zuckerberg after investigation finds Instagram is toxic for teen girls*, CNBC (Sep. 15, 2021), <https://www.cnn.com/2021/09/15/lawmakers-demand-facebook-answer-how-it-impacts-kids-mental-health.html>; Mark Zuckerberg, *I Wanted to Share a Note*, FACEBOOK (Oct. 5, 2021), <https://www.facebook.com/zuck/posts/10113961365418581>.

¹⁶⁸ *Id.*

¹⁶⁹ Jessi Hempel, *A Short History of Facebook’s Privacy Gaffes*, WIRED (Mar. 30, 2018), <https://www.wired.com/story/facebook-a-history-of-mark-zuckerberg-apologizing/>.

III. MONITORS AS EXTERNAL GOVERNANCE

Although the use of monitors is more common in government settlements,¹⁷⁰ judges in private litigation have approved their use. A powerful and recent example occurred in the Fox News derivative litigation of fiduciary duty breaches.¹⁷¹ This litigation arose out of the sexual harassment and other allegations against Roger Ailes and others at the company. The litigation was settled for 90 million dollars and with non-monetary relief that resulted in the creation of a Professionalism and Inclusion Council—outside monitors who engage with company leaders to provide information, and arguably, friction, to address the systemic issues underlying the litigation.

The Council is structured to provide that friction through access to the board and information and through some of the hallmarks of independent governance and controls. For example, it reports directly to the Company's Nominating and Governance Committee and semi-annual public reports are required.¹⁷² As established, it was to be composed of six members, one from human resources at Twenty-First Century Fox and one from Fox News Channel, and the other four appointed and independent.¹⁷³ Notably, all four independent appointees required approval by the Plaintiff.¹⁷⁴ The settlement document further stipulated that two of the nominees had to have relevant expertise and the other two had to be “of respected stature with relevant experience in the media industry.”¹⁷⁵

There are multiple other stipulations designed to ensure strong members, access to information, and a process with integrity.¹⁷⁶ Council members are paid at a fair and reasonable rate, and five senior staff members at Fox News help with its work.¹⁷⁷ The Council has full authority and responsibility, the power to convene in executive sessions, and must meet four times per year on its own, two times per year with the chair of the nominating and governance committee, and at least once with the full committee.¹⁷⁸ It has the power to hire outside consultants and is guaranteed access to internal infor-

¹⁷⁰ Veronica Root Martinez, *Third Party and Appointed Monitorships*, Chapter 53, in CAMBRIDGE HANDBOOK ON COMPLIANCE CH. 53, NOTRE DAME LEGAL STUDIES PAPER NO. 200424 (forthcoming), <https://ssrn.com/abstract=3585725>.

¹⁷¹ Jonathan Stempel, *21st Century Fox in \$90 million settlement tied to sexual harassment scandal*, REUTERS (Nov. 20, 2017), <https://www.reuters.com/article/us-fox-settlement/21st-century-fox-in-90-million-settlement-tied-to-sexual-harassment-scandal-idUSKBN1DK2NI>.

¹⁷² Non-Monetary Relief, *City of Monroe Emps.' Ret. Sys. v. Murdoch*, C.A. No. 2017-0833-AGB ¶ 4, 7 (Del. Ch. 2018).

¹⁷³ *Id.* at ¶ 6.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at ¶ 7.

¹⁷⁶ *Id.* at ¶ 10–28.

¹⁷⁷ *Id.* at ¶ 9–10.

¹⁷⁸ Ironically, the Zuckerberg apology portion of the cycle appears to be at an end. The company is now focused on a public relations campaign instead. Ryan Mac & Sheera Frenkel, *No More Apologies: Inside Facebook's Push to Defend Its Image*, N.Y. TIMES (Sep. 21, 2021), <https://www.nytimes.com/2021/09/21/technology/zuckerberg-facebook-project-amplify.html>.

mation on allegations of harassment, discrimination or retaliation at Fox News.¹⁷⁹ It also conducts anonymous surveys, paid for by the company.¹⁸⁰

There are also public accountability mechanisms. The Council drafts reports to the Board that are posted publicly.¹⁸¹ It is required to make recommendations to management about how to foster a harassment, discrimination, and retaliation free environment.¹⁸² It is also empowered to make recommendations on internal reporting requirements and appropriate remedial actions.¹⁸³ It was designed to engage with both Twentieth-First Century Fox and its subsidiary, Fox News (and, thereby, eliminating any plausible deniability at that level).¹⁸⁴ In short, the Council is empowered to monitor the company and work with its board to ensure that the company makes strides in developing a better and more appropriate culture at Fox News and based on that, to develop reports that will become public.

These are powerful mechanisms.¹⁸⁵ They introduce friction into the process by forcing consultation with Council members who are experts in the field—first at the management level and then at the board level. Although the company had input into the selection of Council members, it did not control their selection and does not control their work.¹⁸⁶ Instead, the experts were judicially appointed and are empowered to do the work, hire outside consultants, meet in executive sessions and more. Ironically, these are exactly the types of governance mechanisms lacking in the Facebook Special Committee.

Notably, Twenty-First Century Fox and Fox News were, like Facebook, even though publicly traded, controlled by the Murdoch family. Moreover, Roger Ailes and Bill O'Reilly, both accused of very serious sexual harassment and more, were key to the Fox News revenue model and protected by Rupert Murdoch.¹⁸⁷ Indeed, multiple suits against O'Reilly were settled over

¹⁷⁹ Non-Monetary Relief, *City of Monroe Emps.' Ret. Sys.*, No. 2017-0833-AGB at ¶ 16-17.

¹⁸⁰ *Id.* at ¶ 20.

¹⁸¹ *Id.* at ¶ 15.

¹⁸² *Id.* at ¶ 21.

¹⁸³ *Id.* at ¶ 23.

¹⁸⁴ *Id.*

¹⁸⁵ Although Disney bought most of the entertainment assets from Rupert Murdoch's Twenty-First Century Fox in 2019, Murdoch still owns the Fox broadcast network, Fox News and many local Fox television stations.

¹⁸⁶ The monitors were judicially appointed, removing competition from the market and lowering any incentive for a monitor to succumb to corporate capture. Further, unlike auditors and other gatekeepers, the pay of the Fox monitors is not related to the pecuniary interests of the company, adding another layer of protection from capture. Lastly, the monitors at Fox have reputational capital at risk – their work is transparent and other opportunities, monitoring or not, depend on their reputation for honesty and accountability. See JOHN C. COFFEE, *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* (2006) (analyzing the nature of lawyers, auditors, as gatekeepers that have been complicit in fraud and scandals over time).

¹⁸⁷ Jonathan Stempel, *21st Century Fox in \$90 million settlement tied to sexual harassment scandal*, REUTERS (Nov. 20, 2017), <https://www.reuters.com/article/us-fox-settlement/21st-century-fox-in-90-million-settlement-tied-to-sexual-harassment-scandal-idUSKBN1DK2NI>; Michael M. Grynbaum & John Koblin, *Fox Settles With Gretchen Carlson*

the years, with payments by Fox News, but seemingly without outside investigation. Yet, it appears that when the news of Gretchen Carlson's suit against Roger Ailes broke, the Murdoch brothers, James (CEO of Twenty-First Century Fox) and Lachlan (co-chairman of Fox News), decided to hire outside counsel to investigate the allegations.¹⁸⁸ The rest is the subject of documentaries, movies, extensive media coverage, and biographies.¹⁸⁹

The result is a story of a culture in which degradation, harassment, retaliation, and discriminatory behavior were allegedly rampant. At least twenty women came forward with sexual harassment claims.¹⁹⁰ One woman alleged that Ailes videotaped her and used the footage to blackmail¹⁹¹ her into "pressuring other women into situations in which Ailes could harass them."¹⁹² Fox settled harassment claims from her.¹⁹³ Ailes also reportedly used Fox money to hire private detectives to go after his enemies—both inside and outside the company.¹⁹⁴ If true, this use of company money for personal expenses was a breach of the fiduciary duty of loyalty.¹⁹⁵ He also reportedly tapped phones and surveilled employees.¹⁹⁶

That behavior is reminiscent of the British phone tapping scandal in 2011 and involved allegations of phone hacking of the Royal Family and other celebrities and bribery to pursue news stories.¹⁹⁷ That scandal was so

Over Roger Ailes Sex Harassment Claims, N.Y. TIMES (Sep. 6, 2016), <https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html>.

¹⁸⁸ Rupert was unavailable, and that might well be the reason an outside law firm was hired to do an independent investigation. Sarah Ellison, *Inside the Final Days of Roger Ailes's Reign at Fox News*, VANITY FAIR (Sep. 22, 2016) <https://www.vanityfair.com/news/2016/09/roger-ailes-fox-news-final-days>.

¹⁸⁹ BOMBHELL (BRON STUDIOS 2019); Emily Crockett, *Here are the women who have publicly accused Roger Ailes of sexual harassment*, VOX (Aug. 15, 2016), <https://www.vox.com/2016/8/15/12416662/roger-ailes-fox-sexual-harassment-women-list>.

¹⁹⁰ *Id.*

¹⁹¹ Gabriel Sherman, *Former Fox News Booker Says She Was Sexually Harassed and 'Psychologically Tortured' by Roger Ailes for More Than 20 Years*, N.Y. MAG. (July 29, 2016), <https://nymag.com/intelligencer/2016/07/fmr-fox-booker-harassed-by-ailes-for-20-years.html>.

¹⁹² Eliana Dockterman, *The True Story Behind Bombshell and the Fox News Sexual Harassment Scandal*, TIME (Dec. 16, 2018), <https://time.com/5748267/bombshell-true-story-fox-news/>.

¹⁹³ Gabriel Sherman, *Former Fox News Booker Says She Was Sexually Harassed and 'Psychologically Tortured' by Roger Ailes for More Than 20 Years*, N.Y. MAG. DAILY INTELLIGENCER (July 29, 2016), <https://nymag.com/intelligencer/2016/07/fmr-fox-booker-harassed-by-ailes-for-20-years.html>.

¹⁹⁴ Dylan Byers, *Roger Ailes' alleged use of Fox funds raises liability questions*, CNN (Aug. 8, 2016), <https://money.cnn.com/2016/08/08/media/roger-ailes-consultants-21st-century-fox-liability/index.html>.

¹⁹⁵ *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005) ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation. . .")

¹⁹⁶ Mark Hensch, *Fox News staff feared Ailes was monitoring them: report*, THE HILL (Aug. 8, 2016), <https://thehill.com/blogs/blog-briefing-room/news/290810-fox-news-staff-feared-ailes-was-monitoring-them>.

¹⁹⁷ Jim Rutenberg, *Fox News Turmoil Recalls News Corp. Phone Hacking Scandal*, N.Y. TIMES (Aug. 14, 2016), <https://www.nytimes.com/2016/08/15/business/fox-news-turmoil-recalls-news-corp-phone-hacking-scandal.html>.

damaging that it led to the resignations of Rupert Murdoch as chair of, and James as executive chair of, News Corporation.¹⁹⁸ In testimony for a public inquiry in Britain, Rupert Murdoch admitted that there was a cover-up, and the report issued after the inquiry noted that he was willfully blind and not fit to run the company.¹⁹⁹ In short, the company culture was broken.

That, it turns out, was also true of Fox News. Ailes left the company within 15 days of Carlson filing suit.²⁰⁰ The internal investigation that followed was very narrow and designed to determine the company's potential exposure.²⁰¹ Although that was a legitimate legal decision, it resulted in an investigation that did not focus on the depth of the alleged harm and the nature of the culture. Instead, the corporate fiduciary litigation addressed those issues with the above-described monitor program. That program appears to have been necessary both because of the extent and nature of the harms and because of the company's failure to address them. Just like Facebook.

Monitors in private civil litigation are rare, but this article contends there are times when they are appropriate.²⁰² Presumably, the judge and the lawyers in the Fox News case agreed that monitors were necessary. Why? The harm to the women was very significant, of course. It was also ongoing, extensive, repeated,²⁰³ unaddressed, involved surveillance and blackmail, and more. The magnitude of the harm was high and so was the probability of more occurrences. In short, it was sustained and systemic. And it was part of the culture—a culture where the leader, Ailes, seemingly had complete control. And where others, like O'Reilly, Eric Bolling, Ed Henry, and Judge Andrew Napolitano, were also terminated over sexual harassment and misconduct allegations.²⁰⁴

¹⁹⁸ Christina Boyle, *British phone-hacking scandal was a low point for Rupert Murdoch*, L.A. TIMES (June 11, 2015), <https://www.latimes.com/world/europe/la-fg-british-scandal-murdoch-20150611-story.html>.

¹⁹⁹ John Hall, *Rupert Murdoch 'not a fit person' to run News Corporation*, INDEP. (May 1, 2012), <https://www.independent.co.uk/news/uk/politics/rupert-murdoch-not-a-fit-person-to-run-news-corporation-7703623.html>.

²⁰⁰ Daniel Wiessner & Jessica Toonkel, *Fox Settles Sexual Harassment Lawsuit For \$20 Million on Ailes' behalf*, REUTERS (Sept. 6, 2016), <https://www.reuters.com/article/us-twenty-first-fox-ailes/fox-settles-sexual-harassment-lawsuit-for-20-million-on-ailes-behalf-idUSKCN11C1J5>. She had sued him personally, not the company, to avoid an arbitration clause. Jonathan Stempel, *Fox News' Ailes moves for arbitration in Carlson employment case*, REUTERS (Jul. 8, 2016), <https://www.reuters.com/article/us-foxnews-lawsuit/fox-news-ailes-moves-for-arbitration-in-carlson-employment-case-idUSKCN0Z02I7>.

²⁰¹ Jim Rutenberg, Ben Protes & Emily Steel, *Internal Inquiry Sealed the Fate of Roger Ailes at Fox*, THE N.Y. TIMES (July 20, 2016), <https://www.nytimes.com/2016/07/21/business/media/as-an-internal-inquiry-sinks-ailes-questions-about-fox-news-fate.html>.

²⁰² Courts have imposed monitors in civil litigation with the government, including with the SEC, EPA, OIG, and HHS. See GARRETT, *supra* note 84 at 191.

²⁰³ Emily Steel & Michael S. Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html>.

²⁰⁴ Emily Steel & Michael S. Schmidt, *Bill O'Reilly Is Forced Out at Fox News*, N.Y. TIMES (Aug. 19, 2017), <https://www.nytimes.com/2017/04/19/business/media/bill-oreilly-fox->

Murdoch, Ailes's leader, also had power, but chose not to exercise it. Instead, Rupert Murdoch is reported to have said, "Leave him alone He knows what he is doing."²⁰⁵ Presumably, Ailes did know what he was doing in the context of building the Fox News brand and empire, but as verified by the internal investigation and termination, leaving him alone was not the right response. Add to that the seeming absence of the board and internal controls, and the result was the need for external governance.

Like Fox News, Facebook is an example of a company that might be ready for a monitor group—one that has a focus beyond privacy and leans in on social license, publicness, and corporate governance.²⁰⁶ The approach may be appropriate here because the harm Facebook imposes is not just about user privacy, it is about stakeholders and about shareholders; it is about young girls, human trafficking, and elections. It is also about how, as Parts I and II make clear, Zuckerberg appears to maintain control over the board and has shown repeated inability to engage or set limits.

Indeed, time and again, Facebook commits to hiring people with titles that seemingly indicate that they will have a role in making change. Yet change does not occur. Consider the case of Yael Eisenstat, a former CIA officer and Facebook's global head of elections and integrity operations. She expressed "cautious optimism" when hired to focus on the company's threat to democracy, but resigned shortly thereafter, stating she was "intentionally

news-allegations.html; Emily Steel, *Fox News Ousts Eric Bolling After Probe Into Lewd Text Messages*, N.Y. TIMES (Sep. 8, 2017), <https://www.nytimes.com/2017/09/08/business/media/fox-news-ousts-eric-bolling-after-probe-into-lewd-text-messages.html>; Michael M. Grynbaum, *Fox News Fires Ed Henry Over Sexual Misconduct Claim*, N.Y. TIMES (Jul. 1, 2020), <https://www.nytimes.com/2020/07/01/business/media/ed-henry-fired-fox-news.html>; John Koblin, *Fox News Sidelines Andrew Napolitano After Wiretap Allegation*, N.Y. TIMES (Mar. 21, 2017), <https://www.nytimes.com/2017/03/21/nyregion/fox-news-sidelines-andrew-napolitano-after-wiretap-allegation.html>.

²⁰⁵ Sarah Ellison, *Inside the Final Days of Roger Ailes's Reign at Fox News*, VANITY FAIR (Sep. 22, 2016), <https://www.vanityfair.com/news/2016/09/roger-ailes-fox-news-final-days>.

²⁰⁶ Privacy and concerns about it are, of course, important to many Facebook users. The FTC has attempted to address the privacy concerns with several measures. It has demanded that the board create a privacy committee, composed of independent directors, who can be removed only with a supermajority vote. That committee will oversee designated *privacy* compliance officers, who must make reports internally and to the FTC on *privacy* matters. In addition, the FTC settlement requires a third-party assessor on *privacy*, appointed with FTC approval and subject to reporting obligations. There are other provisions as well, but all are *privacy* related. See *Complaint, United States v. Facebook, Inc.*, 456 F. Supp. 3d. 115 (D.D.C. 2020) https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf; FED. TRADE COMM'N., *supra* note 74.

In theory, the Privacy Committee is a good step for a board that has been unable to manage these issues. Whether it is effective remains to be seen. Given past practice, the recent issues with the Ad Observatory, and the fact that one of the members of the Privacy Committee, which is required to be composed solely of independent members, is a former employee of the Chan Zuckerberg Foundation certainly gives pause. Rob Price, *Facebook has appointed the 'privacy committee' on its board designed to prevent another Cambridge Analytica scandal*, BUS. INSIDER (May 13, 2020), <https://www.businessinsider.com/facebook-announces-privacy-committee-board-of-directors-2020-5>.

sidelined” on day two and never allowed to participate in meetings about the very issues for which she was hired.²⁰⁷

She is not alone. Also in 2020, Ashok Chandwaey, a software engineer, left the company. Why? Because he “[could] no longer stomach contributing to an organization that is profiting off hate in the US and globally”. He pointed to the violence fueled in Myanmar by Facebook (the UN cited Facebook as a leading cause) and for which Facebook created a separate committee to examine issues (again) and violence in Kenosha, Wisconsin, among others. He also said that although Facebook created a Civil Rights Commission to help it address issues, the company ignored its advice.²⁰⁸ But, these are not “privacy” issues. They are governance issues.

Employees have said that company town halls feel pressured. They need to “act as though everything is fine and that [they] love working [there].”²⁰⁹ They describe the culture as requiring them to elevate Facebook and follow orders, i.e., do not dissent or speak up. Rather than a place that encourages people to speak up, employees say that the company is an echo chamber.²¹⁰ Diverse employees have departed, citing both the lack of diversity at the company and the bullying they faced when they raised the issue.²¹¹ Transparency, dialogue, and the resulting creative friction seems to be missing. Again, these are also not privacy issues. They are about culture, choices at the top, and the company’s board and governance.

Add to that the notable recent departure of Frances Haugen along with her whistleblower complaints. And, of course, the board members who resigned in rapid succession: Bowles, Hastings, Desmond-Hellman, and Chennault. Indeed, although Facebook is large, and, therefore, size alone might result in departures and complaints from many, it is impossible to dismiss the departures of four directors in a short period of time and the massive detail in the Haugen documents.

This is where governance matters and for Facebook, where external support is vital. External monitors bring perspective and expertise.²¹² They

²⁰⁷ Ian Tucker, Yael Eisenstat: “Facebook is ripe for manipulation and viral misinformation”, *THE GUARDIAN* (Jul. 26, 2020), <https://www.theguardian.com/technology/2020/jul/26/yael-eisenstat-facebook-is-ripe-for-manipulation-and-viral-misinformation>.

²⁰⁸ Craig Timberg & Elizabeth Dwoskin, *Another Facebook worker quits in disgust, saying the company “is on the wrong side of history”*, *THE WASH. POST* (Sept. 8, 2020), <https://www.washingtonpost.com/technology/2020/09/08/facebook-employee-quit-racism>.

²⁰⁹ Salvador Rodriguez, *Inside Facebook’s ‘cult-like’ workplace, where dissent is discouraged and employees pretend to be happy all the time*, *CNBC* (Jan. 8, 2019), <https://www.cnbc.com/2019/01/08/cnbcs-salvador-rodriguez-inside-facebooks-cult-like-workplace-where-dissent-is-discouraged-and-employees-pretend-to-be-happy-all-the-time.html>.

²¹⁰ *Id.*

²¹¹ Salvador Rodriguez, *Facebook manager says in internal post she quit after being ‘harassed’ over views on diversity*, *CNBC* (Jan. 17, 2019), <https://www.cnbc.com/2019/01/17/facebook-manager-quits-after-being-harassed-over-views-on-diversity.html>.

²¹² See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 *MICH. L. REV.* 1713, 1729, 1736 (2007).

also bring power and reform.²¹³ In government-imposed monitor agreements, their roles range from fact-finding and reporting to recommendations about governance and culture.²¹⁴ The DOJ recommends that criminal monitors be restricted to specific wrongdoing, and a monitor appointed through corporate civil litigation presumably would have appropriate limits as well. Thus, the Fox News monitors are focused on employment and human resources issues, and any monitor at Facebook should be focused on internal controls and providing friction in the board's governance process.²¹⁵

Like the criminal approach, civilly imposed monitors can serve the same key goals of punishment: deterrence, incapacitation of wrongdoing, and rehabilitation/reform, while working cooperatively with the company.²¹⁶ They can help to deter bad acts, like acts not in good faith. Deterrence occurs both through the costs of monitors and the actual challenges imposed by outside oversight. It occurs for the company on whom the monitor is imposed but also on other companies that might fear the same outcome.

Properly implemented, monitors can also increase transparency, which, in turn, can help to further the second goal, incapacitating wrongdoing.²¹⁷ For example, monitor oversight makes it harder for corporate actors to make bad decisions or to, in the case of Facebook, continue to deny, admit, and apologize and move on without real change. Further public monitoring report requirements, like those at Fox, mean that shareholders and stakeholders alike know what choices the company is making and why—with the added assurance that independent experts are advising and, presumably, consenting. Indeed, this sort of publicness is likely key to an effective monitorship.²¹⁸

The final goal is rehabilitation, or actual reform. Here, the goals are usually cultural change and the development of internal controls and procedures.²¹⁹ Both changes can reduce the potential for future issues and misconduct.²²⁰ For the Facebook board, processes designed to be clean and effected in a clean manner, i.e. not like the Special Committee, would be a powerful start. Other potential outcomes in this space would include increased trans-

²¹³ See generally, *Sec. & Exch. Comm'n. v. WorldCom, Inc.*, 273 F. Supp. 2d 431 (S.D.N.Y. 2003).

²¹⁴ ANTHONY S. BARKOW ET AL., *THE GUIDE TO MONITORSHIPS* 3 (3rd ed. 2022).

²¹⁵ See generally, *WorldCom, Inc.*, 273 F. Supp. 2d 431.

²¹⁶ BARKOW, *supra* note 214 at 10–11.

²¹⁷ See Veronica Root, *Modern-Day Monitorships*, 33 *YALE J. ON REG.* 109, 148–150 (2016); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 *BROOK. J. CORP. FIN. & COM. L.* 89, 99–100 (2006).

²¹⁸ GARRETT, *supra* note 84, at 184.

²¹⁹ BARKOW ET AL., *supra* note 214 at 8; see also Veronica Root, *The Monitor-Client Relationship*, 100 *VA. L. REV.* 523, 532 (2014); Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 *J. CORP. L.* 679, 734–35 (2009).

²²⁰ See Lindsey A. Gallo, Kendall Lynch, & Rimmy Tomy, *Out of Site, Out of Mind? The Role of the Government-Appointed Corporate Monitor* (The Univ. of Chi. Booth Sch. of Bus., Research Paper No. 22-07, 2022), <http://dx.doi.org/10.2139/ssrn.4027017> (noting that monitors can reduce recidivism).

parency and candor between board members, between officers and the board, and between the company and its stakeholders—with fewer after-the-fact apologies needed. None of this will work, however, without public accountability either through ongoing judicial monitoring or public reporting to the shareholders.

In short, the role of external monitors is to move the company forward on a path of sustainable change.²²¹ When the bad behavior is sustained, systemic, and part of the strategy, as it is at Facebook, the monitors will need to work to improve the company's culture of compliance by working with management.²²² Thus, as at Fox, the appropriate members of management must be part of the conversation and the solution. There, members of the human resources team partner with the board and the monitors.²²³ Note the importance of the plural here. Fox has a group of monitors thus enhancing accountability and decreasing potential capture issues.²²⁴ Facebook would need a similar structure, but because the problems extend well beyond user privacy concerns, the monitors need internal participants who manage election, human trafficking, and other issues.

This partnership factor is key and is ensured through transparency.²²⁵ A Facebook monitoring council would need to be empowered to report both to appropriate and actually independent board members and the stakeholding public. Notably at Fox, the public accountability mechanisms include more than just public reports, they include an option for minority reports. Presumably, this provision was designed to ensure that individual monitors are able to preserve their integrity and to make their concerns known when necessary. Importantly, at Facebook, absent whistleblowers, this type of transparency does not exist now and is, arguably, shamed and pressured from the top down. Thus, implementing it would help Facebook progress on both the deterrence and rehabilitation goals of monitoring more generally.

The Fox Council has other powers that, as described above, are similar to the internal controls important to good corporate governance and should be part of a Facebook monitoring council. The powers delegated to the council should be broad and include, for example, the power to investigate stakeholder issues, responses to internal complaints, and more. Where necessary, the council should have the power to hire its own consultants so that it can focus its efforts on where to incapacitate, or decrease, wrongdoing and where rehabilitation is necessary.

Surveys are also an important element for monitors. In a culture like Facebook's where dissent is seemingly discouraged and dismissed, the monitors need to hear directly from employees about the climate, the culture,

²²¹ BARKOW ET AL., *supra* note 214, at 11–12.

²²² *Id.* at 12; *see* Root, *supra* note 217 at 135–36.

²²³ GARRETT, *supra* note 84, at 185.

²²⁴ *See supra* note 186.

²²⁵ *See* Root, *supra* note 219, at 555.

and the challenges of raising issues involving stakeholders. Not all employees can afford to leave, let alone to leave with a noisy exit. Still others would like to stay and continue to further Facebook's mission, within bounds. Anonymous survey mechanisms can help provide information to the monitors and to the board about where the gaps, challenges, and frustrations currently exist. Solutions, of course, must follow, but the information is a key early step in determining what the approaches to decrease wrongdoing might be, which might be sustainable, and where rehabilitation is possible or change is needed.

The final key mechanism in the Fox approach is the five-year term, with required disclosure and transparency around any decision to discontinue it. Although it remains to be seen if five years is sufficient, the Fox Council is given time to investigate and opine on the challenges and propose solutions to the opportunities.²²⁶ It can determine whether culture changes, if any, are gaining traction. It can weigh whether the board is paying appropriate attention and if board members are raising good questions and questioning answers. As we have seen, those internal controls are key to good governance and to the protection of stakeholders, and at Fox, the employees.

Importantly, if at the five-year mark, the board decides to eliminate the Council, it must share its reasoning publicly. This is transparency. It is accountability. It builds on the other mechanisms, and it is backed by the securities laws and the fact that members of the Council would not, presumably, quietly go along with a statement with which they did not agree. In short, discontinuation requires consensus that the deterrence function is no longer needed, that mechanisms for addressing wrongdoing are in place and working, and that rehabilitation is underway.

Taken together, the elements of the monitoring approach at Fox have considerable promise. What we do not know of course, is whether they will be successful. Nor do we know enough about whether monitors generally are. There are examples of successful cultural and corporate changes in some instances, like Richard Breeden at Worldcom and Dr. Theo Waigel at Siemens. These monitorships both uncovered additional wrongdoing and cultural issues and also appear to have had real impacts in shifting the culture over time. Further, recent data suggest the presence of corporate monitors does reduce recidivism rates and future misconduct throughout the term of the monitorship.²²⁷ The data also, however, indicate that absent long-term cultural change, the power of the monitorship may end when the monitor

²²⁶ The critical inquiry with respect to the time involved in a monitorship is about the nature of the engagement with the organization and its employees. Dr. Waigel spent four years at Siemens, but made strong progress by taking 1500 meetings and being physically present in the building. Indeed, Siemens gave him the "best office" in the building. Retired U.S. district judge Frederick B. Lacey monitored Bristol-Myers-Squibb for only two years and declared the company "transformed." But, in the same report, Judge Lacey acknowledged BMS had recently pleaded guilty again, this time for lying to the FTC. Garrett, *supra* note 84, at 191–92.

²²⁷ Gallo, *supra* note 220 at 5.

exits, raising questions about whether and how to determine the length or termination of a monitorship.²²⁸

Thus, to see the real value of monitors, we need to consider what success looks like and then begin to measure it. There are several ways in which we might do that. For example, it makes sense for monitors to engage in the collection of qualitative data on the company and its culture at the beginning and throughout the monitoring process. There are multiple forms of assessment in existence for corporate culture, and those might provide a starting point. We also need real accountability for monitors. Public reporting measures, as at Fox, are vital. They provide accountability to investors and to stakeholders, and as this article argues, both would be vitally important in the case of Facebook. Periodic judicial review and reports, supplementing public reporting, might also be a good buttress, particularly in criminal matters.²²⁹

With respect to the monitors themselves, it is important to assess what types of individual backgrounds are effective in which situations. Of course, some familiarity with the issue(s) to be monitored or remedied matter, like sexual harassment at Fox. Indeed, the Fox monitoring group appears to have been designed to compensate for what was otherwise a toxic culture lacking in internal controls. Nevertheless, it is also possible that a true governance expert would have been a value add at Fox, because the problem was not just an “HR” issue. It was also a board level governance problem. The company had a pattern of settling with victims and not being transparent with Twenty-First Century Fox. Perhaps Rupert Murdoch knew, but information was not shared transparently with the board. That lack of candor produced an environment in which sexual harassment and degradation allegedly flourished. As the case study in this article reveals, at Facebook, stakeholder and investor harm seems to flourish, and will continue to do so absent internal controls and improved board-level governance.

CONCLUSION

The challenge that this article has made clear is that Facebook’s reach is global—and so are its harms. If the company were dumping toxic sludge into the water supplies of multiple countries, including the United States and Europe, it is reasonable to think that regulators would have stopped it by now. In fact, Facebook is arguably dumping toxic harm all over the world, and a more global response may be warranted. The FTC cannot address these stakeholder issues on its own because the issues exceed its jurisdiction. Indeed, as the Haugen Complaints reveal, the magnitude of the harm is literally incalculable. Facebook’s reach is as large as the internet, and the harms

²²⁸ *Id.*

²²⁹ GARRETT, *supra* note 84, at 191–92.

are not limited to user privacy or consumer fraud. Facebook is designed to impact stakeholders across the world, and it does so.

Facebook has pledged to address some of the issues; yet, as the harm/apology/repeat cycle and Haugen documents reveal, the likelihood of it successfully doing so is low in its current form and the likelihood of repeated problems and harm is high. Although the FTC is attempting to address the privacy angle of the issues, the analysis in this article reveals that the problems at the company are seemingly, at their core, governance related. As documents from the company indicate, the company is likely aware of and has ignored solutions for some of the issues. Employees have left the company over these and other issues, and directors appear to have left the board in frustration over governance and candor.

In short, Facebook's challenges are sustained and systemic and embedded in the company's culture and strategy. As a result, in Zuckerberg's words, the company "does not deserve to serve us," at least on its own. Instead, as the case study and thought experiment in this article reveal, Facebook might be a company in which achieving effective internal controls might require an outside governance model. The goal would be to shift the culture to one where transparency and social license matter, and so do stakeholders and users.

