Sex, Power, and Corporate Governance

Amelia Miazad∗

For decades, social scientists have warned us that sexual harassment training and compliance programs are ineffective. To mitigate the risk of sexual harassment, they insist that we must cure its root cause — power imbalances between men and women.

Gender-based power imbalances plague start-ups and billion-dollar companies across sectors and industries. These power imbalances start at the top, with the composition of the board and the identity of CEOs and executive management. Pay inequity and boilerplate contractual terms in employment contracts further cement these imbalances.

In response to the #MeToo movement, key stakeholders began to shift their focus from compliance to corporate culture. This influential group of stakeholders — which includes investors, employees, regulators, insurance carriers, and board advisors — started asking companies to uproot gender-based power imbalances. In response to mounting pressure, seismic corporate governance reforms are underway. Boards are becoming more gender diverse, companies are beginning to address pay inequity and abandon mandatory arbitration and non-disclosure agreements, and boards are holding CEOs to account for sexual harassment and misconduct.

While the “old boys’ club” is still thriving in corporate America, this Article is the first comprehensive account of how the power imbalances on which it depends are shifting.

∗ Copyright © 2021 Amelia Miazad. Amelia Miazad is the Founding Director and Senior Research Fellow of the Business in Society Institute at the University of California, Berkeley School of Law. This Article benefited from feedback from Afra Afsharipour, Lauren Edelman, Jill Fisch, Stavros Gadinis, Sonia Katyal, Melissa Murray, David Oppenheimer, Frank Partnoy, Elizabeth Pollman, Steven Davidoff-Solomon, the participants at The Worldwide #MeToo Movement: Global Resistance to Sexual Harassment and Violence in 2019, The Berkeley Center for Law and Business Faculty Workshop in 2019, and the participants at National Business Law Scholars Conference in 2021. I am grateful to Harris Mateen, Angeli Patel, Danielle Santos, and Caroline Soussloff for excellent research assistance. I would also like to thank the terrific team of editors at the UC Davis Law Review.
TABLE OF CONTENTS

INTRODUCTION ................................................................................. 1915

I. THE ERA OF COMPLIANCE — ADDRESSING SEXUAL
   HARASSMENT THROUGH POLICIES AND TRAINING PROGRAMS. 1921
   A. The Growth of Sexual Harassment Training and
      Compliance Programs...................................................... 1921
   B. Sexual Harassment Training and Compliance Programs
      Prove Ineffectual ............................................................ 1923

II. POWER IMBALANCES AND “SEX SEGREGATION” CREATE A
    CULTURE THAT INVITES SEXUAL HARASSMENT .......... 1926

III. THE POWER IMBALANCES THAT PERVADE CORPORATE
    AMERICA ............................................................................. 1930
    A. The Identity of Power Holders ........................................ 1930
    B. Gender Pay Inequity ...................................................... 1933
    C. Boilerplate Contractual Terms ........................................ 1934

IV. KEY STAKEHOLDERS CONVERGE ON CORPORATE CULTURE ... 1936
    A. The Investment Community .......................................... 1937
       1. The Big Three ........................................................... 1937
       2. Pension Funds .......................................................... 1941
       3. Proxy Advisors ......................................................... 1943
       4. Shareholder Activists .................................................. 1944
       5. Shareholder Plaintiffs .................................................. 1946
    B. Employees ....................................................................... 1950
    C. Lawmakers ..................................................................... 1951
    D. Regulatory Monitors ..................................................... 1953
       1. The EEOC ................................................................. 1953
       2. The SEC ..................................................................... 1954
    E. Insurance Brokers and Underwriters ............................ 1955
    F. Lawfirms and Board Advisors ...................................... 1957

V. THE ERA OF CULTURE: ADDRESSING SEXUAL HARASSMENT BY
    EMPOWERING WOMEN .......................................................... 1959
    A. Case Studies ................................................................. 1959
       1. Uber ............................................................................. 1959
       2. Signet Jewelers .......................................................... 1963
       3. 21st Century Fox ........................................................ 1965
       4. Wynn Resorts ............................................................ 1966
       5. Google ....................................................................... 1967
       6. McDonald’s ............................................................... 1968
    B. The Knock-on Effects of the #MeToo Movement ........... 1970
       1. Board Gender Diversity Is Reaching New
          Milestones .................................................................... 1970
2. Boards Are Amending Their Committee Charters to Signal Oversight of Culture............................. 1973
3. Boards Are Amending Executive Compensation Agreements to Explicitly Address Sexual Harassment and Reward Diversity and Inclusion.... 1976
4. Companies Are Adding #MeToo Inspired Representations and Warranties into Mergers and Acquisitions Agreements................................. 1980
5. The Venture Capital (“VC”) Community Is Increasing Its Due Diligence for “Cultural Risk” in Private Equity Deals ................................. 1982
7. Companies Are Abandoning Mandatory Arbitration of Sexual Harassment and Misconduct Claims...... 1985

CONCLUSION......................................................................................................................... 1986
APPENDIX A: INTERVIEW PARTICIPANTS ................................................................. 1987
APPENDIX B: TEXTUAL ANALYSIS OF DERIVATIVE COMPLAINTS ............ 1988
APPENDIX C: SAMPLE OF AMENDMENTS TO EXECUTIVE COMPENSATION AGREEMENTS .......................................................... 1995
APPENDIX D: TEXTUAL ANALYSIS OF BOARD COMPENSATION COMMITTEE CHARTERS ................................................ 1998

INTRODUCTION

The #MeToo movement1 catalyzed a transformation of corporate governance. Through an exhaustive analysis of key stakeholders’ demands and the inner-workings of companies, this Article is the first to reveal how, in response to the #MeToo movement, companies are addressing the risk of sexual harassment through corporate culture as opposed to compliance. This newfound approach is uprooting the long-

---

1 In 2006, Tarana Burke coined the term “MeToo” in a campaign to empower women of color who were survivors of sexual assault. The term spread as a hashtag after October 16, 2017 when actress Alyssa Milano used it in a tweet in response to the Harvey Weinstein revelations. See Sandra E. Garcia, The Woman Who Created #MeToo Long Before Hashtags, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/56YT-TZCP]. Many have attributed the growth of the #MeToo movement to the election of Donald Trump and the energy harnessed by the Women’s March. See, e.g., Ann Pellegrini, #MeToo: Before and After, 19 STUD. GENDER & SEXUALITY 262, 263 (2018) (coining the term “facilitative displacement” as a way to understand the impact of Trump's election on #MeToo). Thus, this Article will use January 21, 2017, the date of the Women's March, to demarcate the start of the #MeToo movement.
established power imbalances that have existed between men and women in corporate America.\textsuperscript{2}

Since 1964, when Title VII was enacted, the corporate community’s approach to sexual harassment has been operating in an era of compliance, defined by a myopic focus on legal liability.\textsuperscript{3} The prominence of compliance increased after 1998 as a result of two Supreme Court rulings that created an affirmative defense for employers if they made “reasonable efforts” to prevent sexual harassment.\textsuperscript{4} Legal scholars saw where this was headed — to avoid liability, companies would proliferate policies and offer trainings without scrutinizing or reforming the underlying corporate culture.\textsuperscript{5}

Companies also had the upper hand in avoiding reputational risk. Inside of the company, the ordinariness of sexual harassment prevented it from being registered as a red flag, and women often lacked the leverage to report the misconduct of powerful men.\textsuperscript{6} Legal boilerplate also provided employers with cover.\textsuperscript{7} By slipping non-disclosure agreements (“NDAs”) and mandatory arbitration clauses into employment agreements, companies kept ruinous details of sexual misconduct from slipping out into the public.\textsuperscript{8}

For decades, these safeguards protected companies from legal and business risk. That all changed when the pervasive sexual misconduct of high-profile executives of entertainment and technology giants from

---

\textsuperscript{2} This Article acknowledges that the #MeToo movement is restricted by its singular focus on gender which ignores the intersectional issues of race and gender. For a discussion of this limitation, see generally Angela Onwuachi-Willig, What About #UsToo?: The Invisibility of Race in the #MeToo Movement, 128 YALE L.J. 105, 111 (2018).

\textsuperscript{3} See infra Part I.A.


\textsuperscript{5} See, e.g., LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016) [hereinafter WORKING LAW] (“Employers create policies and programs that promise equal opportunity yet often maintain practices that perpetuate the advantages of whites and males.”); Anne Lawton, Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense, 13 COLUM. J. GENDER & L. 197, 199 (2004) (“If the employer can escape liability for workplace harassment by doing less rather than more, why should it expend the time and energy in developing evaluative mechanisms that actually may expose it to greater liability?”).

\textsuperscript{6} See Vicki Schultz, Reconceptualizing Sexual Harassment, Again, 128 YALE L.J.F. 22, 49 (2018) [hereinafter Reconceptualizing, Again] (discussing the majority of sexual harassment is perpetrated by men).

\textsuperscript{7} See infra Part III.C.

\textsuperscript{8} See infra Part III.C.
CBS to Google began to fill headlines. The #MeToo movement exposed just how anemic sexual harassment training programs are in practice, and the growing legion of “silence breakers” rendered the once trusted NDAs impotent. This Article examines the crossroads to which the #MeToo movement has brought corporate America. Through an analysis of a wide range of influential stakeholders’ public statements, supplemented by interviews, it uncovers that a paradigm shift from compliance to corporate culture has in fact already occurred.

Many recent examples reinforce this convergence on corporate culture. The second-largest asset manager in the world, State Street, has declared “corporate culture” its chief engagement priority. Shareholder activists like Arjuna Capital and Trillium Asset Management have brought shareholder proposals arguing that Nike’s male-dominated leadership creates a “culture of complicity” and hence

---


11 See infra Appendix A: Interview Participants.

12 See infra Part IV.

a business risk.\textsuperscript{14} Prominent law firms like Covington & Burling have created practice areas to conduct “cultural audits.”\textsuperscript{15} For the first time, shareholder plaintiffs are suing boards for their failure to oversee culture as evidenced by the growing use of terms like, “culture of sexual harassment,” “boys’ club culture,” and “brogrammer culture” in shareholder derivative complaints.\textsuperscript{16} In a recent victory for the shareholders of CBS, a federal court agreed that culture has become a business risk, finding that “[t]his behavior and culture created a risk that CBS would lose Moonves, its star executive, should his dirty laundry come to light.”\textsuperscript{17} Even insurance underwriters, whose business depends on predicting risk, have begun to assess “corporate culture” in their underwriting process.\textsuperscript{18}

While culture can be elusive, these stakeholders demand reforms that seek to uproot power imbalances by changing the gender diversity of the board, achieving gender pay equity, and removing mandatory arbitration and NDAs.\textsuperscript{19} The fact that a culture in which men hold power breeds harassment may seem intuitive — if not all too painfully obvious — especially to women. But the link between the risk of sexual harassment and gender inequality was rarely made by corporate stakeholders during the era of compliance. This blind spot appears in the law and finance literature, which has been consumed by a duel over gender diversity and firm value.\textsuperscript{20} Other legal scholars reject that

\begin{footnotesize}
\begin{enumerate}
\item[16] See infra Appendix B: Textual Analysis of Shareholder Derivative Complaints.
\item[18] See infra Part IV.E.
\item[19] See infra Part IV.
premise altogether and argue that gender diversity is warranted by social justice, irrespective of financial upside.\(^1\) While it has not been fully appreciated by either the law and finance literature, or the business world until recently, social science academics have long argued that power imbalances lead to unethical behavior, including sexual harassment.\(^2\) Given that the newfound reforms are rooted in the social science on the corrupting influence of power, this Article argues that they offer unique promise.

Cynics may disagree and claim that the mounting pressure by stakeholders is not penetrating the boardroom. A review of case studies of high profile #MeToo crises tells a different story.\(^3\) Examples include: Signet Jewelers, which has achieved gender parity on its board and executive management (commonly referred to as the “C-suite”); Alphabet Inc., which has abandoned mandatory arbitration; and Uber, which recently introduced diversity as a metric in executive compensation.\(^4\) These changes are not confined to the few large companies that have attracted media attention for their #MeToo scandals, but are beginning to catch on across the market.\(^5\) The first change, which is the easiest to observe, is the identity of power-holders as boards become more gender diverse.\(^6\) The way that power is
negotiated between the Chief Executive Officer (“CEO”) and the board is also shifting. Boards are signaling their increased scrutiny of CEO misconduct by amending executive compensation agreements to explicitly include sexual harassment as a cause for termination. In addition to these “sticks,” boards are using “carrots” by tying diversity metrics to executive compensation. Board compensation committees are also amending their charters to explicitly address their oversight of corporate culture, which is tethered to diversity and inclusion.

The #MeToo movement has also arrived on the doorstep of the male-dominated world of Mergers and Acquisitions (“M&A”), as evidenced by the addition of contractual innovations such as the “Weinstein Clause” to multi-billion-dollar deals. While more opaque, even the private equity world is increasing its “social due diligence” before funding new ventures. Change is underway in the context of pay equity as well, with more companies conducting equal pay audits and addressing the gender pay gap. Finally, an increasing number of companies are abandoning mandatory arbitration and NDAs, whether voluntarily or through regulation. Taken together, these changes


27 See infra Part V.B.
28 See infra Part V.B.
29 See infra Part V.B.
30 See infra Part V.B.
34 See infra Part V.B.
signal a shift to an era of corporate governance which is rooted in gender equity.

This Article makes several contributions. First, it offers a comprehensive and novel framework for understanding the transformative impact that the #MeToo movement is having on corporate governance. Second, by opening the aperture, this Article is the first to identify that key corporate stakeholders are converging on corporate culture as a way to mitigate the risk of sexual harassment. Third, this Article is the first to demonstrate that the specific reforms that stakeholders are seeking are supported by the social science on power, and thus offer unique promise. Finally, this Article identifies the ways that these stakeholders’ demands are beginning to impact corporate governance in crucial ways, while rejecting the claim that these changes are marginal because they are not yet widespread.

This Article proceeds in five parts. Part I describes how corporate boards have traditionally addressed the risk of sexual harassment through compliance. Part II analyzes the theoretical frameworks that support the view that sexual harassment is inextricably tied to structural power imbalances. Part III provides an account of the power imbalances that exist in corporate America today. Part IV reveals the coherence in the demands of key stakeholders, who are asking companies to address the risk of sexual harassment by focusing on corporate culture and addressing power differentials. The Article then turns to analyze whether and how corporate boards are responding. Part V begins this inquiry with case studies of high profile #MeToo incidents and exhibits how companies are reallocating power through corporate governance reforms. It then demonstrates how these changes are appearing across the broader market. The Article then briefly concludes.

I. THE ERA OF COMPLIANCE — ADDRESSING SEXUAL HARASSMENT THROUGH POLICIES AND TRAINING PROGRAMS

A. The Growth of Sexual Harassment Training and Compliance Programs

The evolution of sexual harassment training and compliance programs has closely tracked the legal evolution of employer liability for sexual harassment. This began in 1964 with the passage of Title VII of the Civil Rights Act, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and
Sexual harassment training first emerged at that time and mirrored civil rights sensitivity training, but it was not widespread because the contours of sex discrimination remained fuzzy. In the mid-1970s, feminist scholars had begun to define sexual harassment as sex discrimination. In 1979, Catharine A. MacKinnon published the *Sexual Harassment of Working Women*, which influenced The Equal Employment Opportunity Commission’s (“EEOC”) decision to advise employers to “take all steps necessary to prevent sexual harassment from occurring,” which invariably included training programs. As a result, human resources personnel began to rise in stature, and sexual harassment training programs proliferated.

The Supreme Court first recognized sexual harassment as a form of sex discrimination in *Meritor v. Vinson* in 1986. However, the Court failed to address when an employer could be held liable. While the Court in *Meritor* explicitly rejected the employer’s argument that its policies and grievance mechanisms should act as a liability shield, it stated in *dicta* that a better policy could have protected the employer. After *Meritor*, companies began to rely on their compliance programs in

---

37 See LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 20 (1978) (being the first to define sexual harassment as “[a]ny repeated and unwanted sexual comments, looks, suggestions, or physical contact that you find objectionable or offensive and causes you discomfort on your job”); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 32 (1979) (distinguishing between “quid pro quo” sexual harassment and sexual harassment as a condition of work). For an analysis of the feminist scholarship which argued that sexual harassment constituted sex discrimination under Title VII see Reva B. Siegel, A Short History of Sexual Harassment, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 8-18 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). See also Daniel Hemel & Dorothy Shapiro Lund, Sexual Harassment and Corporate Law, 118 Colum. L. Rev. 1583, 1603-10 (2018) (describing Title VII’s shortcomings).
38 The EEOC is the federal agency that protects job applicants and employees from discrimination. See Employees & Job Applicants, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www1.eeoc.gov/federal/fed_employees/ (last visited Jan. 27, 2020) [https://perma.cc/4LVC-WFNU].
39 29 C.F.R. § 1604.11(e)-(f) (2019).
41 See id. at 76-77.
42 See id. at 72-73; EDelman, WORKING LAW, supra note 5, at 202.
court filings.\textsuperscript{43} As a 1986 article aptly summarized, “[c]ompany confusion and concern have spurred a growth industry in training videos, seminars and consultants.”\textsuperscript{44} The Civil Rights Act of 1991, which elevated the damages for sex discrimination to those of racial discrimination, further fueled employer reliance on training.\textsuperscript{45}

Although training and compliance programs became more prevalent during the 1980s and 1990s, the Supreme Court’s 1998 decision in the companion cases \textit{Faragher v. Boca Raton} and \textit{Burlington v. Ellerth}\textsuperscript{46} have been credited for spurring their rapid proliferation.\textsuperscript{47} In both cases, the Court found that an employer could be held liable for sexual harassment perpetrated by an employee unless the employer could prove that it exercised reasonable care to prevent sexual harassment and that the plaintiff failed to take advantage of any preventive or corrective opportunities.\textsuperscript{48} These Supreme Court rulings defined the contours of employer liability and clarified that, to avoid liability for the acts of their employees, employers needed to mount the resources to establish the \textit{Faragher-Ellerth} defense.\textsuperscript{49} Offering comfort to employers, an entire industry of sexual harassment training was born, spurred by legal advisors warning that “[t]raining becomes important step to avoid liability.”\textsuperscript{50}

\section*{B. Sexual Harassment Training and Compliance Programs Prove Ineffectual}

In addition to lining the pockets of consultants and elevating the stature of human resources professionals, sexual harassment training and compliance programs have largely operated to shield deep

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{43}] See Edelman, \textit{Working Law}, supra note 5, at 165-66.
\item[\textsuperscript{44}] Dobbin & Kelley, \textit{How to Stop Harassment}, supra note 36, at 1216.
\item[\textsuperscript{45}] See id. at 1220.
\item[\textsuperscript{47}] See Edelman, \textit{Working Law}, supra note 5, at 207.
\item[\textsuperscript{48}] Ellerth, 524 U.S. at 764-65; Faragher, 524 U.S. at 806-07.
\item[\textsuperscript{49}] For a discussion of the \textit{Faragher-Ellerth} defense, see Edelman, \textit{Working Law}, supra note 5, at 4-5 (arguing that courts began to conflate the existence of compliance policies with actual compliance); Joanna L. Grossman, \textit{The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law}, 26 Harv. Women’s L.J. 3, 9-12 (2003) (discussing how the affirmative defense in Faragher led to the overreliance by courts on sexual harassment training programs).
\end{enumerate}
\end{footnotesize}
corporate pockets from the reach of victims. That courts would give little more than a wink and nod to these compliance programs was perhaps obvious to academics who have argued that law does not operate in a vacuum, but rather, is “shaped by widely accepted ideas within the social arena that law seeks to regulate.”

Many scholars in the law and society movement have emphasized the continuous interplay between social norms and how the law is applied by courts and operationalized in institutions. A related and interdisciplinary body of literature reveals how social movements, from the Civil Rights Movement to #MeToo, impact individual behavior in powerful ways, both shaping and eclipsing the impact of the law alone.


52 Edelman, Working Law, supra note 5, at 12.


governance scholars have also recognized how social norms can influence the inner workings of companies. In particular, there has been a resurgence of corporate governance scholarship on the convergence of corporate culture and social culture. These scholars argue that “the dominant sociological account of the corporate culture treats it as part of the much larger fabric of social culture, of which any given corporate culture is but a part.”

While many scholars have explored the impact of social norms on the application of law, Lauren Edelman was among the first to trace this “endogenous” feature of law in the context of workplace discrimination and sexual harassment. As Edelman explains, when anti-discrimination law is applied in a corporate setting, it is “managerialized,” meaning that judges and courts replace legal logic with management logic. In so doing, courts become unwilling conspirators with companies that avoid operationalizing social reform by relying instead on “check the box” compliance and training programs. But as the #MeToo movement has exposed, these policies often coexist with cultures that “maintain practices that perpetuate the advantages of whites and males.”

Even the EEOC, which has long championed more training, recently acknowledged that “training programs from the past 30 years clearly have not worked because they focus on preventing legal liability instead of the actual sexual harassment.”


56 Donald C. Langevoort, The Effects of Shareholder Primacy, Publicness, and “Privateness” on Corporate Cultures, 43 SEATTLE U. L. REV. 377, 394 (2020); see, e.g., Greg Urban, Corporations in the Flow of Culture, 39 SEATTLE U. L. REV. 321, 330 (2016) (discussing the impact that the external culture has on internal corporate actors throughout the corporate hierarchy).


58 Id. at 3.

The #MeToo movement exposed the limitations of harassment training and compliance programs. Ironically, however, it has also revived employers’ reliance on them. State legislatures have enacted new laws mandating or expanding sexual harassment training programs, promulgating their growth once again. Start-ups have begun to capitalize on this, parading newly-minted programs that feature more sophisticated technology. And consultants are busy peddling this growing suite of programs, which promise to achieve results through immersive experiences and more focus on bystander intervention. Admittedly, these improved training programs may address certain deficiencies in earlier trainings. But an over-reliance on them will continue to stunt progress towards directly addressing sexual harassment. As the next Part illuminates, these trainings sidestep what social psychologists have identified as the root cause of sexual harassment — a gender-imbalanced culture that encourages men to exploit their power over women.

II. POWER IMBALANCES AND “SEX SEGREGATION” CREATE A CULTURE THAT INVITES SEXUAL HARASSMENT

This Part introduces leading social science theories on the impact of power on behavior.

---


It is useful to begin with a definition of power, which social psychologists define as having “asymmetric control over valued resources, which in turn affords an individual the ability to control others’ outcomes, experiences, or behaviors.”64 A number of studies point to a correlation between power and unethical behavior.65 There are many theories as to why this occurs. Professor of Psychology Dacher Keltner has explained that power inhibits empathy and induces power-holders to exude impulsive behavior, including sexual harassment.66 As some ethicists have argued, “[t]his inverse power-empathy relationship is often a factor in headline sexual harassment/assault cases and in more subtle, everyday forms of discrimination, harassment and incivility.”67

Another way that power may impact behavior is through “self-serving impulsivity”68 which “encourages individuals to act on their own whims, desires, and impulses.”69 According to Keltner, in experiments,

---

64 Leigh Plunkett Tost, When, Why, and How Do Powerholders “Feel the Power”? Examining the Links Between Structural and Psychological Power and Reviving the Connection Between Power and Responsibility, 35 RES. ORGANIZATIONAL BEHAV. 29, 30-31 (2015) (citing Eric Depret & Susan T. Fiske, Social Cognition and Power: Some Cognitive Consequences of Social Structure as a Source of Control Deprivation, in CONTROL MOTIVATION AND SOCIAL COGNITION 176 (Gifford Weary et al. eds., 1993)); see, e.g., JOHN W. THIBAUT & HAROLD H. KELLEY, THE SOCIAL PSYCHOLOGY OF GROUPS 48 (1959) (noting how individuals are directed toward higher status levels, indicating that association with people of higher status yields certain rewards not available from people of lower status such as greater extrinsic means); Richard M. Emerson, Power-Dependence Relations, 27 AM. SOC. REV. 31 (1962) (examining how the power to control or influence others resides in valued things); Susan T. Fiske, Interpersonal Stratification: Status, Power, and Subordination, in HANDBOOK OF SOCIAL PSYCHOLOGY 941 (Susan T. Fiske et al. eds., 5th ed. 2010) (describing how “power specifically controls valued resources”); Adam D. Galinsky, Deborah H. Gruenfeld, Katie A. Liljenquist, Joe C. Magee & Jennifer A. Whitson, Power Reduces the Press of the Situation: Implications for Creativity, Conformity, and Dissonance, 95 J. PERSONALITY & SOC. PSYCHOL. 1430 (2008) (noting how power is often conceptualized as the capacity to influence others); Dacher Keltner, Deborah H. Gruenfeld & Cameron Anderson, Power, Approach, and Inhibition, 110 PSYCHOL. REV. 265 (2003) (defining power as “an individual’s relative capacity to modify others’ states by providing or withholding resources or administering punishments”).

65 See Joris Lammers, Adam D. Galinsky, David Dubois & Derek D. Rucker, Power and Morality, 6 CURRENT OPINION PSYCHOL. 15, 16 (2015).

66 See id. at 15 (citing Dacher Keltner et al., supra note 64).


power-holders are more likely to “physically touch others, flirt in a more direct fashion, [and] to make risky choices” among other self-serving behaviors. Power-holders also tend to display incivility and disrespect. Social psychologists have found that “people who feel powerful think and act fundamentally differently than people who feel less powerful.”

Wielding power also leads to “narratives of exceptionalism,” which makes abuses of power acceptable and even rational to the perpetrators. Psychologists have found that making an individual feel uninhibited in relation to others breeds inappropriate behaviors like harassment. Thus, narratives of exceptionalism may help explain the long history of sexual harassment by those with power, including CEOs. In addition to narratives of exceptionalism, psychologists Jonathan Kunstman and Jon Maner coined a phenomenon known as “sexual overperception” in which powerful individuals are more likely to expect sexual interest, misread social cues, and make unwanted advances towards subordinates.

Other organizational theorists take issue with the claim that sexual harassment is only about sexual desire or is necessarily perpetuated by power-brokers, instead arguing that “harassment is more about

---

70 Id.
71 See id.
72 Lammers et al., supra note 65, at 15 (citing Adam D. Galinsky et al., Power: Past Findings, Present Considerations, and Future Directions, in 3 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY (Mario Mikulincer & Phillip R. Shaver eds., 2015)).
74 See Keltner, The Power Paradox, supra note 68, at 130.
76 Id. at 1-2, 12.
77 While this Part focuses on organizational theorists, sociocultural theorists view sexual harassment through a different lens and argue that workplace harassment is a reflection of gendered power differentials in society more broadly. See, e.g., Rachel Arnow-Richman, Of Power and Process: Handling Harassers in an At-Will World, 128 YALE L.J.F. 83 (2018) (explaining that ignoring roles of gender and power in sexual harassment paves the way for misdirecting responses and indiscriminately targeting sexualized behavior rather than sex-based harassment); Grossman, supra note 49, at 35-37 (noting that sexual harassment is a result of those holding positions of authority, usually men, often practicing their power and exploiting their organizational positions). For a discussion of the power imbalances between the employer and employee, see Cynthia Estlund, Response, Truth, Lies, and Power at Work, 101 MINN. L. REV. 349, 360 (2017).
upholding gendered status and identity than it is about expressing sexual desire or sexuality."\textsuperscript{78} Thus, regardless of the power relationship between the individual victim and perpetrator, sexual harassment is prevalent in organizations where there is “sex segregation” and positions of authority are held by men.\textsuperscript{79} As Vicki Schultz explains, “[s]ex segregation of work can be both a cause and consequence of harassment” where “men hold the most powerful or prized jobs, while women hold lower-status positions.”\textsuperscript{80} According to Schultz, sex segregation breeds sexism, which creates a hierarchy between men and women.\textsuperscript{81} Other theorists agree that sexism depends upon a valuation of masculine norms or characteristics and a devaluation of feminine norms.\textsuperscript{82} Thus, “targeting only sexual misconduct without addressing deeper institutional dynamics has serious shortcomings that risk undermining the broader quest for gender equality.”\textsuperscript{83}

Consistent with this theory numerous studies have shown that organizational conditions are the most powerful predictors of whether harassment will occur.\textsuperscript{84} For example, one study revealed that “the ‘maleness’ of an organization” is positively correlated with an increase


\textsuperscript{79} See, e.g., \textsc{Catharine A. MacKinnon}, \textit{Butterfly Politics} 30 (2017) (arguing that “[p]ower’s latest myth in this area is that the problem of inequality between women and men has been solved”); Martha Chamallas, \textit{Writing About Sexual Harassment: A Guide to the Literature}, 4 UCLA WOMEN’S L.J. 37, 40 n.10 (1993) (describing Catharine MacKinnon’s structuralist theory of power, which argues that “women are susceptible to harassment because of occupational segregation, a situation in which most women occupy low status, low paying jobs and tend to be supervised by men”); Schultz, \textit{Reconceptualizing, Again}, supra note 6, at 49 (discussing the elimination of sex segregation as a necessary step to end harassment).

\textsuperscript{80} Schultz, \textit{Reconceptualizing, Again}, supra note 6, at 49.

\textsuperscript{81} See id. at 24.


\textsuperscript{84} See Chelsea R. Willness, Piers Steel & Kibeom Lee, \textit{A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment}, 60 PERSONNEL PSYCHOL. 127, 155-56 (2007).
in sexual harassment. Specifically, “women who work in places that are predominantly male report more instances of sexual harassment than women in more gender-balanced workplaces.”

A related study demonstrated that workplaces “that are currently or historically dominated by men, in terms of numbers and influence, may propagate cultural norms that support sexual bravado, sexual posturing, and the denigration of feminine behavior.”

In light of these findings, we cannot meaningfully address the risk of harassment in the corporate context without addressing the gender power imbalances which this Article identifies in the next Part.

III. THE POWER IMBALANCES THAT PERVERADE CORPORATE AMERICA

Corporate America is teeming with gendered power imbalances, and they start at the very top, with the composition of the board of directors, the CEO, and executive management. These power-holders reinforce gender imbalances through unequal pay practices and pay secrecy policies. Contractual provisions in employment agreements such as mandatory arbitration agreements and NDAs continue to ferment these imbalances by silencing victims and masking the pervasiveness of sexual harassment. And multi-million-dollar golden parachutes in executive compensation agreements offer plush landings and insulate offenders from accountability. This Part takes account of these power imbalances, laying the groundwork for an exploration of how the landscape is shifting in response to stakeholder pressure.

A. The Identity of Power Holders

In U.S. companies, men still rule the roost, and that starts with the composition of the board of directors. Despite an enduring debate in corporate law about how much power the board of directors wields vis-

86 Id. (citing Barbara A. Gutek et al., Predicting Social-Sexual Behavior at Work: A Contact Hypothesis, 33 ACAD. MGM. J. 560 (1990)) (defining “maleness” as “numerical dominance in the workforce, male-dominated norms that may stem from a history of numerical or institutional power dominance in a particular workplace, and male-dominated positions of importance”).
87 Id. (citing KAISA KAUPPINEN-TOROPAINEN & JAMES E. GRUBER, SEXUAL HARASSMENT OF WOMEN IN NON-TRADITIONAL JOBS: RESULTS FROM FIVE COUNTRIES (1993)).
à-vis management and investors, boards have formal oversight of corporate activity under Delaware Law. The board's functions fall broadly under two categories, decision-making and risk monitoring or oversight. Perhaps most importantly, boards hire, fire, and manage the CEO, a function which is magnified in times of crisis. At a minimum, boards command symbolic power at the top of the corporate hierarchy.

When it comes to board gender diversity, the U.S. trails behind most developed economies. In 2017, women accounted for just 16.2% of board directorships among companies in the Russell 3000 Index. Norway leads the world with 42% of directorships held by women. To be fair, Norway's relatively high percentage can be explained by its board diversity quota. Still, the low percentage of women directors in
U.S. companies is surprising, particularly given the investment community’s persistent claim that board diversity increases firm value. As Part V describes, change is undeniably afoot as board diversity advocates celebrate numerous recent milestones. They are more sanguine, however, when it comes to the gender diversity of CEOs. A mere 5% of Russell 3000 companies have a female CEO and the numbers are stagnant. The next set of power holders in the corporate hierarchy is the C-Suite. Here too, a mere 9% of C-suite positions in the Russell 3000 are held by women. Exacerbating the disparity, these positions are concentrated in Human Resources, the General Counsel, and the Chief Administrative Officer — positions which are rarely a track to becoming a CEO.

also Cathrine Seierstad & Morten Huse, Gender Quotas on Corporate Boards in Norway: Ten Years Later and Lessons Learned, in Gender Diversity in the Boardroom 11-12 (Cathrine Seierstad et al. eds., 2017).

95 See infra Part V.A; see, e.g., Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, Dangerous Categories: Narratives of Corporate Board Diversity, 89 N.C. L. REV. 759, 765-66 (2011) (observing how board diversity may positively affect firm performance, but the direction of the causal relationship between board diversity and company performance is unclear); see also Deborah L. Rhode & Amanda K. Packel, Diversity on Corporate Boards: How Much Difference Does Difference Make?, 39 DEP. J. CORP. L. 377, 383-85 (2014) (reviewing empirical literature); Knowledge@Wharton, supra note 20 (notwithstanding the apparent uniformity among the investment community’s belief that board diversity leads to economic returns, the empirical research is inconclusive).

96 See PAPADOPOULOS ET AL., supra note 93, at 2; Vanessa Fuhrmans, Women on Track to Gain Record Number of Board Seats, WALL ST. J. (June 21, 2018, 1:30 AM), https://www.wsj.com/articles/women-on-track-to-gain-record-number-of-board-seats-1529573401?mod=hp_lead_pos8 [https://perma.cc/V3UH-XND3]. But see Yaron Nili, Beyond the Numbers: Substantive Gender Diversity in Boardrooms, 94 IND. L.J. 145, 150 (2019) (cautioning that “investors and advocates of gender diversity must not only account for the ratio of gender-diverse directors in the boardroom. They must also account for the roles and functions that these directors serve once elected to the board — what in other contexts is often termed as substantive equality”).

97 This lack of female CEOs is magnified by the increasingly powerful role that CEOs are playing as “moral” or ethical leaders in companies. See David Gelles, The Moral Voice of Corporate America, N.Y. TIMES (Aug. 19, 2017), https://www.nytimes.com/2017/08/19/business/moral-voice-ceos.html [https://perma.cc/A59P-BH2Z]; Bullhorns for Humanity: The Rise of CEOs as Social Activists, KNOWLEDGE@WHARTON (June 6, 2019), https://knowledge.wharton.upenn.edu/article/the-rising-social-activists-ceos-and-their-employees/ [https://perma.cc/8BV-DV9]


99 See id. at 3.
B. Gender Pay Inequity

Companies also distribute power through pay, which is inextricably tied to ascendance up the corporate hierarchy.\textsuperscript{100} Notwithstanding the Equal Pay Act of 1963\textsuperscript{101} and the prohibition against pay discrimination in Title VII of the Civil Rights Act of 1964,\textsuperscript{102} women in the U.S. earned roughly 80 cents for every dollar earned by their male counterparts for similar work in 2018.\textsuperscript{103} Although the gender pay gap has narrowed since 1980, it has remained relatively stable over the past fifteen years. Given the current pace of change, a recent study concluded that it will take until 2059 for women to reach gender parity.\textsuperscript{104}


\textsuperscript{104} For women of color, the pace is even slower, with black women making 62 cents on the dollar and Hispanic women making 54 cents on the dollar. The Simple Truth About the Gender Pay Gap, Fall 2019 Update, AM. ASSN U. WOMEN (2019), https://ww3.aauw.org/aauw_check/files/2016/02/Simple-Truth-Update-2019_v2-
Crucially, these pay inequities persist as women change employers through the practice of “previous salary questions” where employers ask candidates what their current salary is as a benchmark for their salary offer. In addition, “pay secrecy” policies that prevent employees from sharing salary information obfuscate the very existence of a gendered pay gap.

C. Boilerplate Contractual Terms

Mandatory arbitration clauses and NDAs reinforce power imbalances by ensuring that sexual harassment remains shrouded in a penumbra of secrecy. Pre-dispute mandatory arbitration agreements require employees to pursue claims against their employers in an arbitration proceeding as opposed to in court. The ordinariness of these agreements in employment contracts in the U.S. has muffled their impact. An incredible sixty million workers, which is more than half of non-union private-sector employees, have contracted away their right to litigation.

In fact, mandatory arbitration agreements have become so ubiquitous that they are perceived as a necessary term of employment. This was not always the case. The Federal Arbitration Act (“FAA”) was enacted in 1920 and upheld by the U.S. Supreme Court in 1924. In the decades that followed the enactment of Title VII, however, the FAA’s applicability to the employment context remained unclear. It was not until 1991 in Gilmer v. Interstate/Johnson Lane Corp, an age discrimination case, that the Supreme Court held a mandatory
arbitration clause in an employment agreement to be enforceable.111 A decade later, in Circuit City v. Adams, the U.S. Supreme Court specifically held that the FAA applied to arbitration agreements in employment agreements.112 Since then, the rationale set forth in Gilmer and Circuit City has been extended to cases involving sexual harassment.113

Employment law scholars have long criticized mandatory arbitration agreements. These critiques broadly fall under two categories. The first has its roots in contract law and argues that the unequal bargaining power and lack of leverage between employees and employers render these contracts unenforceable “contracts of adhesion.”114 The second critique is built on the many empirical studies demonstrating that employees fare worse in arbitration than in litigation.115 The concerns with mandatory arbitration are amplified in the context of Title VII violations, particularly with regard to sexual harassment claims. That moral underpinning is evident in President Barack Obama’s 2014 Executive Order 13673, Fair Pay and Safe Workplaces,116 which required federal contractors to provide paycheck transparency and banned forced arbitration clauses for sexual harassment, sexual assault or discrimination claims. Yet, its effect was short-lived, because on March 27, 2017, President Donald Trump issued Executive Order 13738, which revoked the Fair Pay and Safe Workplaces Order.117

Similar to mandatory arbitration agreements, NDAs have protected companies from bearing the full reputational cost of sexual

117 See Blake Emerson, The Claims of Official Reason: Administrative Guidance on Social Inclusion, 128 YALE L.J. 2122, 2128 (2019). As of the time of this publication it is unclear whether President Biden will issue an executive order addressing fair pay and safe workplaces.
harassment. These agreements are commonly added to settlement terms and prevent the victim and accused from disclosing the facts and allegations pertaining to the sexual harassment. To be fair, these agreements may serve some laudable goals, including protecting the privacy of the victim. In practice, however, the #MeToo movement revealed the troubling way that NDAs have operated to silence victims and protect repeat offenders.

IV. KEY STAKEHOLDERS CONVERGE ON CORPORATE CULTURE

Gone are the days when the board of directors and executives were comfortably insulated from external accountability. Today, an expansive and increasingly vocal number of stakeholders influence corporate decision-making. So much so that companies often struggle

---


119 Employment law scholars have also criticized NDAs because they can exploit the power imbalance between employer and the employee. See generally Hoffman & Lampmann, supra note 118, at 165 (discussing the power and informational imbalances that stem from NDAs).


121 For the past century, corporate law has grappled with the extent to which stakeholders should influence corporate decision-making. See A. A. Berle, Jr., Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049, 1049 (1931) (“It is the thesis of this essay that all powers granted to a corporation or to the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.”); E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1143, 1148 (1932) (arguing that the corporation has a “social service as well as a profit-making function”). For a more contemporary version of this debate, see Leo E. Strine, Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 WAKE FOREST L. REV. 761, 793 (2015); Martin Lipton, Karessa L. Cain & Kathleen C. Iannone, Wachtell Lipton Discusses Stakeholder Governance and the Fiduciary Duties of Directors, COLUM. L. SCH. BLUE SKY BLOG (Sept. 3 2019), https://dshuesky.law.columbia.edu/2019/09/03/wachtell-lipton-discusses-stakeholder-governance-and-the-fiduciary-duties-of-directors/ [https://perma.cc/Y9A2-F346]. The business community is also embracing a different articulation of corporate purpose. See Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’ BUSINESS ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/9F6K-7Q9W].
to mediate among discordant stakeholder demands. As this Part explores, when it comes to addressing the risk of sexual harassment, these stakeholders are united in their desire for companies to focus on corporate culture.

A. The Investment Community

1. The Big Three

It was the shift to indexed investments that propelled institutional investors to the very top of the investment food chain. The “Big Three” asset managers — BlackRock, State Street, and Vanguard — collectively comprise the “Titans of Wall Street.” By some estimates, they could end up controlling over half our capital markets by 2024, but even today their power is formidable. As a group, the Big Three is the largest shareholder in 40% of all U.S. listed companies and the largest shareholder in 90% of companies in the S&P 500.

---


125 See Fisch et al., supra note 123, at 20.

Before turning to the specific reforms that these titans are seeking, it is important to understand how passive investors flex their power. While in the past communication between shareholders and the companies they invested in took place during quarterly earnings calls and annual meetings where proxy fights would be waged, today investors are backing up their public statements with year-round private engagement with corporate executives and, increasingly, board members. This engagement, which defines a new era of corporate governance, occurs behind closed doors and represents the investors’ soft power to persuade companies to change voluntarily. When soft power fails, investors ratchet up the pressure in more public ways by filing shareholder proposals and voting against individual directors.

As the examples below demonstrate, the focus of these investors on “corporate culture” is palpable. With some exceptions, the specific reforms they seek have little to do with sexual harassment compliance programs, nor are these investors much concerned with the inner workings of human resources or compliance departments. Rather, institutional investors are bringing their demands into the boardroom and asking directors to oversee a “corporate culture” in which sexual harassment is no longer permitted to thrive.

State Street, for instance, made “corporate culture” its chief engagement priority in 2019, arguing that a “flawed corporate culture has resulted in high-profile cases of excessive risk-taking or unethical behaviors that negatively impact long-term performance.” One key way that State Street is addressing companies with flawed corporate cultures is through board diversity. On International Women’s Day in 2017, State Street unveiled its iconic “Fearless Girl” statue in front of...
the charging bull on Wall Street. The “Fearless Girl” aptly symbolizes the power imbalance that State Street was no longer willing to tolerate, and it called on companies to add more women to their boards. Predictably, the campaign was both celebrated and criticized. Some critics called it “corporate feminism,” while others referred to it as “a marketing coup.” Following a heated debate on social media and the public opposition of the Charging Bull’s artist, the statue was ultimately moved to its current permanent home near the New York Stock Exchange. While State Street’s campaign caused quite a stir, it was evidently not a publicity stunt. In 2017 State Street kept its word and fearlessly voted against 400 companies with all-male boards.

State Street has stepped up its efforts in tandem with the growing momentum of the #MeToo movement’s growing force. In 2019, State Street announced that it would vote against all the members of a company’s nominating committee beginning in 2020 if the company failed to add at least one woman to its board. As Rakhi Kumar, who led ESG (environmental, social, and governance) investment at State Street, recently warned, State Street has every intention of voting against board members who choose not to address their male-dominated boards — “We want them to know that we’re watching. You have another year to be quiet, after which there are consequences to not engaging with us.”

Although State Street’s focus began with board diversity, it has expanded to addressing power differentials more broadly. As State Street’s 2018-19 Investment Stewardship report acknowledges:

132 Id.
133 Id.
134 Id.
136 Id.
In 2018, we observed that social issues such as gender diversity, pay equality, wage strategies, sexual harassment in the workplace and worker retraining are rising in prominence as emerging ESG issues facing companies. Overseeing and mitigating these risks are the next frontier of challenges facing boards.\(^\text{137}\)

While State Street’s efforts have perhaps been more visible, but BlackRock and Vanguard have also been focused on board gender diversity. In 2019, BlackRock identified “governance, including your company’s approach to board diversity,” as its first engagement priority.\(^\text{138}\) In its 2019 Investment Stewardship Annual Report, BlackRock confirmed that, during the 2019 proxy season, it voted against fifty-two directors at Russell 1000 companies that had fewer than two women on their boards.\(^\text{139}\) Moreover, BlackRock’s 2019 proxy voting guidelines state that it expects U.S. public companies to have at least two female directors, and may vote against nominating committee members when BlackRock believes a company has inadequately accounted for diversity in its board composition.\(^\text{140}\)

BlackRock has also moved beyond board diversity. Starting in 2018, it formally identified human capital management (“HCM”) as one of its engagement priorities and noted that it would engage with boards on:

- Oversight of policies meant to protect employees (e.g., whistleblowing, codes of conduct, EEO policies) and the level of reporting the board receives from management to assess their implementation
- Process to oversee that the many components of a company’s HCM strategy align themselves to create a healthy culture and prevent unwanted behaviors
- Reporting to the board on the integration of HCM risks into risk management processes


\(^{139}\) Id.

\(^{140}\) See id.
2021] Sex, Power, and Corporate Governance 1941

- Current board and employee composition as it relates to diversity
- Consideration of linking HCM performance to executive compensation to promote board accountability
- Board member visits to establishments or factories to independently assess the culture and operations of the company.¹⁴¹

BlackRock maintained its focus on HCM as a key engagement priority in 2019. For Vanguard, too, board diversity is one of its two key engagement priorities for 2019.¹⁴² Yet Vanguard went even further and became the only one of the Big Three to tie its own executive compensation metrics to improving diversity at all levels of the corporate hierarchy.¹⁴³ In addition to these efforts at public companies, today’s investors are digging much deeper to ascertain the culture of fund portfolio management firms, such as by searching social media accounts for potential sexual harassment risks.¹⁴⁴

2. Pension Funds

In direct response to the #MeToo movement, the largest pension funds in California came together to launch the Trustees United Principles, which explicitly links lack of diversity and “power imbalances” to an increased risk of sexual harassment.¹⁴⁵ On January 19, 2019, the Trustees announced that, “Institutional Investor Trustees Representing $635 Billion in Assets Launch Principles Addressing Sexual Harassment and Workplace Misconduct.”¹⁴⁶ The Principles

¹⁴¹ See id. at 20 (emphasis added).
¹⁴⁶ Institutional Investor Trustees Representing $635 Billion in Assets Launch Principles Addressing Sexual Harassment and Workplace Misconduct, TRS. UNITED (Jan. 14, 2019),
begin by emphasizing the billions of dollars of shareholder value lost as a result of recent #MeToo scandals, as well as by shifting social norms — “There’s clearly an inflection point in our society where we’re saying we’re no longer going to tolerate this behavior, and that’s an important signal to investors.”\footnote{BLOOMBERG, California Pension Trustees Call For Disclosures of #MeToo Costs, L.A. TIMES (Jan. 14, 2019, 4:35 PM), https://www.latimes.com/business/la-fi-calpers-calstrs-metoo-20190114-story.html [https://perma.cc/FZ9A-BMN7].}

The Principles are notable for their focus on engaging directors and top management on addressing power differentials. Principle 1 begins by asking directors to “publicly share due diligence processes used to respond to sexual harassment and violence complaints filed by all employees . . . and subcontracted workers.”\footnote{See id.} While this principle addresses compliance, the demand for board oversight of sexual harassment policies has traditionally been managed by human resources departments, which is a notable shift.\footnote{See id.} Principle 2 blames contractual clauses, such as NDAs and forced arbitration clauses, for perpetuating harassment.\footnote{Id.} Principle 3 addresses diversity “at all levels” and correlates an increase in diversity to the ability “to be more attuned to the risks associated with harassment, misconduct, and discrimination.”\footnote{Id.} With respect to board diversity, in particular, these investors assert that “[d]iverse boards which reflect the racial and gender composition of a company’s workforce can help to create organizational cultures that prevent sexual harassment and related risks from materializing.”\footnote{Id.} Notably, Principle 4 explicitly refers to power imbalances, a term which the Trustees debated in the drafting process.\footnote{See infra Appendix A: Interview Participants, Interview with Anne Simpson, Managing Investment Director, Board Governance & Sustainability, CalPERS.} The Trustees who ultimately prevailed believed that it was important to explicitly call out “power imbalances” as a red flag for the risk of increased harassment.\footnote{Id.}
3. Proxy Advisors

In response to #MeToo, Institutional Shareholder Services ("ISS") and Glass Lewis, the two largest proxy advisors, have been more focused on both diversity and gender pay equity. In their 2019 Proxy Voting Guidelines both announced that they would recommend voting against nominating committee chairs on boards with no women directors. While ISS changed its approach to using gender diversity as a factor for vote recommendations on the heels of the #MeToo movement, Glass Lewis has been more explicit in linking #MeToo to its vote recommendations on diversity and the gender pay gap. As Courteney Keatinge, the Senior Director of ESG at Glass Lewis recently explained:

We've seen a number of high-profile instances of companies where sexual harassment allegations have caused significant disruptions to their operations. Accordingly, we've seen more investor engagement on issues related to employee diversity resulted in companies starting to provide more disclosure on issues related to human capital management, including how they're addressing allegations of misconduct, ensuring gender pay equity and promoting women and minorities throughout their ranks.

Proxy advisors have also moved beyond diversity to address other power imbalances. One illustrative example is ISS's recent recommendation to vote in favor of requiring a company to prepare a report on the risks associated with using mandatory arbitration in cases


159 See infra Appendix A, Interview Participants, Interview with Courteney Keatinge, Senior Director, Environmental, Social & Governance Research, Glass Lewis & Co.
of sexual harassment.\footnote{See Alistair Gray & Anna Nicolaou, US Companies Face Shareholder Votes Over \#MeToo Concerns, FIN. TIMES (Apr. 29, 2019), https://www.ft.com/content/d37e8638-6882-11e9-9ade-98bf1d35a056 [https://perma.cc/SD9H-DH7V].} This illustrates that proxy advisors are explicitly linking power imbalances to an increased risk of sexual harassment.

4. Shareholder Activists

Shareholder proposals, used by investors to encourage governance reforms at companies are a “pillar of corporate governance.”\footnote{Sanford Lewis, Analysis and Recommendations on Shareholder Proposal Decision-Making Under the SEC No-Action Process, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 26, 2018), https://corpgov.law.harvard.edu/2018/07/26/analysis-and-recommendations-on-shareholder-proposal-decision-making-under-the-sec-no-action-process/ [https://perma.cc/PT2P-GHHW]; see also Ronald J. Gilson & Jeffrey N. Gordon, The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work, 31 J. APPLIED CORP. FIN. 8 (2019) (arguing that shareholder activists address the corporate governance “vacuum” brought about by diversified investors because they “tee-up” issues and act as “information intermediaries” to flag important issues).} Investors have long used them to address excessive executive compensation and the election of independent directors.\footnote{Sanford Lewis, Analysis and Recommendations on Shareholder Proposal Decision-Making Under the SEC No-Action Process, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 26, 2018), https://corpgov.law.harvard.edu/2018/07/26/analysis-and-recommendations-on-shareholder-proposal-decision-making-under-the-sec-no-action-process/ [https://perma.cc/PT2P-GHHW]; see also Ronald J. Gilson & Jeffrey N. Gordon, The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work, 31 J. APPLIED CORP. FIN. 8 (2019) (arguing that shareholder activists address the corporate governance “vacuum” brought about by diversified investors because they “tee-up” issues and act as “information intermediaries” to flag important issues).} Today they are also a favorite tool among investors who want to encourage reforms on ESG issues.\footnote{See, e.g., CAM HOANG, GARY TYGESSON & VIOLET RICHARDSON, DORSEY, SHAREHOLDER PROPOSALS: STRATEGIES AND TACTICS 16 (2017), https://www.dorsey.com/newsresources/events/videos/2016/10/-/media/0ee87bda7cc84b59824d6c786cf39b5.ashx [https://perma.cc/X483-2UJ5].} The number of shareholder proposals on ESG topics has more than doubled over the past decade.\footnote{See Reali & Garcia, supra note 163.} Although shareholder proposals rarely receive a majority vote, the mere filing of these proposals can impact a company’s reputation, making them particularly potent in the \#MeToo era.\footnote{See Reali & Garcia, supra note 163.} The number of shareholder proposals addressing diversity and
the gender pay gap has increased over the past two years. While just one of the proposals went to a vote and received 15.1% support, shareholders are withdrawing them more frequently because companies are agreeing to engage or make changes. Importantly, proposals relating to gender pay equity had the highest withdrawal rate of any category in 2018. As one law firm publication recently noted, “[t]he withdrawal rate is unsurprising given the impact of the #MeToo movement and the public attention on workplace culture this year.”

Arjuna Capital and Trillium Asset Management have collectively filed the highest number of shareholder proposals asking companies to disclose both their diversity metrics and their gender pay gap. In justifying their proposals, both investors have linked power imbalances to an increased risk of sexual harassment. Arjuna Capital has been at the forefront of shareholder activism related to gender pay disparities. Calling for more transparency, it led a successful campaign, which pressured iconic tech giants including Apple, eBay, Intel, Apple, Amazon, Expedia, Microsoft, and Adobe, to disclose their gender pay disparity. Off the heels of its success, it moved on to nine financial services companies, convincing Citi to become the first U.S. bank to voluntarily disclose that its gender pay gap is 29%. Six more followed Citi’s lead, including American Express, Bank of America, Bank of New York Mellon, Citigroup, JPMorgan, Mastercard, and Wells Fargo.

why votes of 10% or 20% support can make an impact. You’re actually looking for a collaboration and transition.” (internal quotations omitted)).


167 See, e.g., id. ("The proposal, which also urged Nike to consider company culture and diversity metrics in evaluating the performance of senior executives, was withdrawn upon Nike’s commitment to consider Trillium’s request and to meet quarterly to discuss the results.").


171 See id.

172 See id.
Arjuna Capital’s managing director Natasha Lamb has explicitly tied power differentials to sexual harassment risk — “When women hold the lower paying jobs and in turn have less power in the organization . . . that imbalance breeds an unhealthy culture. The symptoms of that are the power dynamics around sexual harassment.”¹⁷³ Trillium Asset Management concurs, and filed the first proposal which specifically mentions this link.¹⁷⁴ Trillium has withdrawn its proposal because Nike has committed to engage.¹⁷⁵

5. Shareholder Plaintiffs

With #MeToo revelations triggering double-digit stock price plunges, some investors have turned to filing derivative suits.¹⁷⁶ These shareholders have alleged that directors and officers breached their fiduciary duties under state law by failing to monitor the risk of sexual harassment, or violated federal securities law by failing to disclose such risks.¹⁷⁷ This trend is igniting a discussion among corporate law scholars, Director and Officer (“D&O”) insurance experts, and board consultants on the viability of these claims.¹⁷⁸ While those issues remain important and unresolved, a new and unexplored phenomenon is


¹⁷⁵ Id.

¹⁷⁶ See, e.g., Hemel & Lund, supra note 37 (discussing recent shareholder derivative actions filed against directors and officers for failure to prevent and disclose sexual harassment).

¹⁷⁷ See id. at 1583.

playing out in the background. As elucidated in Appendix B, a close analysis of the pleadings in these lawsuits reveals that shareholders are increasingly rooting their allegations in “corporate culture.” Today, shareholders are blaming boards for failing to monitor, prevent, or disclose a “culture of sexual harassment” or “boys’ club culture.” This marks a clear departure from the traditional shareholder focus on adequate compliance, training, and reporting systems and is yet another power example of a shift from an era of compliance to an era of culture.

As of the time of this writing, there have been fourteen derivative actions brought against directors and officers arising out of the failure to monitor or disclose the risk of sexual harassment. The first four pre-dated the #MeToo movement and were brought against directors and officers of ICN Pharmaceuticals in 2001, American Apparel in 2011, Hewlett-Packard in 2012, and CTPartners in 2015. Out of the four complaints filed prior to the #MeToo movement, CTPartners is the only one that mentions “culture of sexual harassment” or even draws a link between a male-dominated culture and the risk of sexual harassment. Before the #MeToo movement, the phrase “culture of sexual harassment” had rarely made its way into shareholder plaintiff parlance.

Yet it has gained prominence recently. For example, the derivative complaint against the directors and officers of Twenty-First Century Fox following the revelations about sexual harassment by Roger Ailes and Bill O’Reilly begins: “This case arises from the systematic, decades-long culture of sexual harassment . . . .” The substantive allegations in the complaint appear under the heading, “The Culture of

---

179 See infra Appendix B.
180 See Hemel & Lund, supra note 37, at 1589.
185 See infra Appendix B.
187 Id. at 2.
Sexual Harassment at Fox News” and the phrase “culture of sexual harassment” or “toxic culture” appears in the complaint thirty-four times. The shareholders further alleged that the board breached its fiduciary duties, including its duty of oversight, by failing to “recognize and address the culture of sexual harassment at Fox News.”

This focus on culture continued to gain momentum in 2018, beginning with the shareholders of Signet Jewelers who filed a derivative action against the board which alleged that directors and officers violated federal securities law by failing to disclose both fraud and “a culture of rampant sexual harassment.” The Signet Complaint referred to culture seventy-four times and further emphasized that “culture” was “especially important to investors in Signet stock . . . because the Company’s principal product, bridal and other jewelry, was primarily purchased for women.” Also in 2018, shareholders of Nike filed a derivative action alleging that the board violated its fiduciary duties. The Nike complaint begins with a similar focus on culture: “This case arises from Nike’s systematic ‘boys’ club’ culture, which resulted in the ‘bullying, sexual harassment, and gender discrimination of the Company’s female employees.’” Nike expands the board’s duty further from a “culture of harassment” to a “boys’ club culture” on the grounds that it threatened Nike’s brand “which was purportedly cultivated in a culture of empowerment.” The shareholder plaintiffs in Nike were also the first to explicitly link the board’s lack of focus on diversity to its failure to monitor the risk of sexual harassment:

Had the Board made any reasonable inquiries — whether with members of the management knowledgeable on the issue of diversity and culture or with the Company’s third-party vendor retained to operate NIKE’s AlertLine — the Board would have discovered a huge gender disparity in the number of female employees within the executive ranks.

188 See id. at 11.
189 See generally id. at 1-76.
190 Id. at 49.
192 Id. at 61.
193 See Stein Complaint, supra note 14, at 4.
194 See id.
195 See id. at 5, 28.
196 Id. at 36.
This trend appears to be gaining momentum. Shareholders of Alphabet have also filed a derivative action alleging that the board violated its fiduciary duties by failing to focus on the gender imbalance at Alphabet: 197 “Alphabet is a male-dominated company with a male-dominated culture, like the tech industry at large . . . for years, Alphabet’s management has fostered a ‘brogrammer’ culture, where women are sexually harassed and valued less than their male counterparts.” 198

Similarly, the Lululemon shareholder derivative complaint 199 also faults the board for condoning a “boys’ club” culture and alleges that “[t]his case arises from Lululemon’s systematic ‘boys’ club’ culture, which resulted in bullying, sexual favoritism, and gender discrimination.” 200

The growing focus on corporate culture is evident even in subsequent amendments of the same complaint. 201 While the original complaint against CBS, for instance, refers to culture just once, the most recently amended complaint uses the term forty times. 202 Of the ten shareholder derivative lawsuits that have been filed following #MeToo, only two, Liberty Tax 203 and National Beverage, 204 do not explicitly refer to the board’s failure to prevent a male-dominated corporate culture. 205 As noted above, even courts are recognizing the salience of #MeToo. In a recent victory for plaintiffs in the CBS case, the court reasoned: “The context of #MeToo . . . is pertinent because . . . [the movement] changed the risks to a company of having a CEO with an unsavory past.” 206

---

198 Id. at 3.
200 Id. at 2.
205 See infra Appendix B.
B. Employees

The relationship between the employer and employee is evolving. For a growing number of employees today, work is far more than just a place to collect a paycheck. Rather, work has become a place to seek moral fulfillment and purpose. There are a number of factors that could be contributing to this rising culture of “workism.” As recent surveys confirm, employees’ faith in their employers “to do what is right” eclipses their faith in government, the media, or even Non-Governmental Organizations (“NGOs”).

Many CEOs are responding to this calling, embracing their new role as “the moral voice of corporate America.” Counterintuitively, even shareholders are championing this rising employee voice and warning that “workers, not just shareholders, can and will have a greater say in defining a company’s purpose, priorities, and even the specifics of its business.” The potential scope of this worker power is being pushed to new limits for the U.S., with shareholder proposals and presidential candidates advocating for employee representation on the board of directors.

---


208 See id. (discussing relevant factors including social media, student debt, the welfare system, and the “widening of the workist gap”).


210 Gelles, supra note 97.


The #MeToo movement erupted against this shifting dynamic. Thus, it is not surprising that employees are leveraging their growing voice to address unethical behaviors by senior executives at iconic companies like Google, McDonald’s, Uber, Amazon, and Nike. Some critics question the efficacy of this worker activism, pointing to employees’ relative lack of bargaining power compared to investors, the board, and management. While it is true that many of these employees’ demands remain unanswered, employees at many companies have, at a minimum, exposed and in many instances forced companies to address a number of power imbalances. As detailed in the case studies of these companies in Part V below, the governance reforms that followed this employee activism are far-reaching. Employee activism is also emboldening other key stakeholders including investors and regulators, who are pointing to it as a means of legitimizing their own demands for governance reforms.

C. Lawmakers

In addition to the self-regulation and voluntary action by companies, the #MeToo movement has spurred a wave of new legislation. While lawmakers are still interested in compliance-related reforms, their focus has shifted towards addressing the power imbalances described in Part III.

At the federal level, in December of 2017, Congress addressed #MeToo in Section 13307 of the Tax Cuts and Jobs Act, which precludes tax deductions for settlement payments which are subject to an NDA and relate to sexual harassment. Also in December of 2017, Senator Kirsten Gillibrand introduced The Ending Forced Arbitration of Sexual Harassment Act, which would prohibit predispute agreements in cases

---

213 See Tom C.W. Lin, Incorporating Social Activism, 98 B.U. L. Rev. 1535, 1535, 1546-47 (2018) (“Corporations . . . are at the forefront of some of the most contentious and important social issues of our time.”).

214 See, e.g., Tippett, supra note 118, at 255-58 (discussing proposed legislation in California, New York, and Pennsylvania); see also Murray, supra note 53, at 875 (“Thus, while #MeToo is not the first iteration of private actors seeking to regulate in furtherance of a new normative agenda, it is perhaps distinct in its desire — and need — to engage the state in an ongoing dialogue about regulating appropriate sexual conduct.”).

215 See Murray, supra note 53, at 867.

of sexual harassment. More recently, on June 5, 2018, former Senator Kamala D. Harris and Senator Lisa Murkowski introduced the Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (“EMPOWER”) Act. Its announcement makes clear that it was drafted in direct response to the #MeToo movement and seeks to address power imbalances: “Ultimately, there is a monopoly of power in workplace harassment — those who control a paycheck, or a reputation, or a promotion have the power to perpetrate harassment, to protect harassers, and to silence victims.”

To address this “monopoly of power” the Act purposes several reforms, including ending the use of non-disparagement and NDAs in employment agreements. With respect to mandatory disclosure, another bill is focused on requiring the disclosure of “human capital management.”

State and local legislatures are not standing by idly — a recent study estimates that over 200 new bills have been passed since #MeToo. For example, six states have either enacted or are considering legislation mandating or encouraging more women on boards. There are also seventeen new state-wide bans and twenty local bans that prohibit employers from asking about salary history, and there is a growing number of laws that ban or limit mandatory arbitration and NDAs in cases of sexual harassment. With respect to board diversity mandates

---

220 H.R. 1521 § 103(a)(1).
225 See Sternlight, supra note 114, at 206-07.
in particular, these laws introduce a new normative agenda for corporate law and reflect an “unprecedented effort by a state to extend its corporate law rules to address matters of societal rather than purely economic concerns.”

D. Regulatory Monitors

1. The EEOC

Created by Title VII, the EEOC is the federal agency that employers primarily look to for guidance on how to protect against workplace discrimination, including sexual harassment. Recently, even the EEOC acknowledged the limitations of sexual harassment training programs given that they are focused on preventing legal liability rather than harassment. In an effort to address the root cause of sexual harassment, in June 2016, the EEOC published the Select Task Force on the Study of Harassment in the Workplace. Why did the EEOC’s focus shift from compliance to culture? One of the primary reasons may be the influence of social science academics. The EEOC recognized that the task force group was traditionally “heavy on lawyers” and they “deliberately fashioned an interdisciplinary approach that considered the social science on harassment in the workplace.” Because the focus was on prevention rather than training, the report was not confined to the legal definition of workplace harassment. Rather, it included examination of conduct and behaviors that were not “legally actionable,” but if “left unchecked, may set the stage for unlawful


227 See generally Rory Van Loo, Regulatory Monitors: Policing Firms in the Compliance Era, 119 COLUM. L. REV. 369, 374 (2019) (discussing the role of regulatory monitors); see also generally Michael Z. Green, Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation, 105 DICK. L. REV. 305, 320-21 (2001) (describing the much stronger authority for the EEOC envisioned in the committee version of the bills and the opposition that limited the agency’s authority).


229 See supra Part I.B.

230 See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, supra note 59, at ii.

231 Id. at iii.
harassment.”232 Of the identified risk factors for harassment in the workplace, one third directly relate to power differentials and imbalance, and rely explicitly on the social science theories described in Part II.233

The first risk factor that the EEOC identifies is a “homogenous workforce” that reflects a “historic lack of diversity in the workplace.”234 The EEOC recommends that employers address this risk through an “increase in diversity of all levels of the workforce.”235 The report found that there is greater likelihood of harassment in “workforces in which some employees are perceived to be particularly valuable to the employer.”236 The EEOC encapsulated this risk: “In short, superstar status can be a breeding ground for harassment.”237 Even worse, the superstar status may shield the high-value employee from oversight and the “behavior of such individuals may go on outside the view of anyone with the authority to stop it.”238 The report also identified workplaces with significant power disparities as a risk factor,239 explaining that, “[l]ow-status workers may be particularly susceptible to harassment, as high-status workers may feel emboldened to exploit them.”240 Today, in addition to compliance efforts, the EEOC advises employers on how to improve their workplace culture by addressing power differentials.241

2. The SEC

In response to investor feedback, the Securities and Exchange Commission ("SEC") is considering whether to amend Regulation S-K to require mandatory disclosure of human capital management which would encompass diversity and inclusion, gender pay gap, and culture.242 This marks a shift in the SEC’s traditionally conservative

232 Id. at iv.
233 See id. at 25-30.
234 Id. app. C at 84.
235 Id.
236 Id. at 27.
237 See id. at 24.
238 Id. at 27.
239 Id. at 28.
240 Id.
241 Id. app. C at 86.
view of the materiality of ESG disclosure.\textsuperscript{243} The change in the SEC’s approach was prompted by The Human Capital Management Coalition (“HCMC”), comprised of investors with a combined U.S. $3 trillion in assets.\textsuperscript{244} On July 6, 2017, HCMC submitted a rulemaking petition to the SEC to require increased disclosure on nine human capital topics on the grounds that “skillful management of human capital is associated with better corporate performance, including better risk mitigation.”\textsuperscript{245} The SEC’s proposal appears to rely on the fact that “a number of commenters asserted that companies with poor management of human capital may face operational, legal, and reputational risks . . . .”\textsuperscript{246}

\textbf{E. Insurance Brokers and Underwriters}

The swelling tide of #MeToo claims and lawsuits has even permeated insurance underwriting processes. Employment Practices Liability (“EPL”) insurance typically covers harassment, discrimination and retaliation claims. D&O insurance may cover securities and other shareholder claims arising out of a #MeToo-type event. As a consequence of large #MeToo settlement payouts and defense costs, insurers that issue both types of coverage are growing wary.

Richard S. Betterley, an insurance industry expert, has tracked EPL insurance policy trends since 1991 when that coverage started to become widespread.\textsuperscript{247} In 2018 and 2019, he conducted interviews with twenty-one of the largest insurers to assess whether the #MeToo movement was impacting their underwriting.\textsuperscript{248} According to the


\textsuperscript{245} Id.

\textsuperscript{246} See id. at 21.

\textsuperscript{247} See infra Appendix A: Interview Participants, Interview with Richard Betterley, Insurance Expert.

\textsuperscript{248} See RICHARD S. BETTERLEY, BETTERLEY RISK CONSULTANTS, INC., EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2019: A STIFFENING MARKET - #MeToo ONLY PART OF THE REASON 2, 5 (2019) [hereinafter 2019 Survey] (“Our takeaway . . . is that most insurers are much further into implementing underwriting . . . due to the wave of allegations.”); RICHARD S. BETTERLEY, BETTERLEY RISK CONSULTANTS, INC., EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2018: SEXUAL HARASSMENT CLAIMS CONCERNS CONTINUE — INSURERS RESPOND 3 (2018) [hereinafter 2018 Survey] (“For our survey, we focus most on the most prominent insurers writing the most business or those that offer some unique product or service.”); RICHARD S. BETTERLEY,
interviews in 2018, Betterley concluded that insurers were “paying close attention” to #MeToo risks, albeit still in “early stages of implementing underwriting or pricing changes.” In 2019, that scrutiny increased, with one insurer asking about “board oversight” of #MeToo risk and another requiring the disclosure of “confidential settlement agreements” in excess of $500,000. Betterley expects this trend to continue.

That #MeToo has made its way into the underwriting process isn’t all too surprising — at its core, insurance underwriting is all about assessing and pricing risk. But the specific questions that underwriters are asking today reveal that their focus has expanded beyond legal compliance to encompass culture. For the first time, underwriters are “taking a closer look at the culture of the organization,” which includes “pay equity questionnaire[s]” and diversity metrics. According to Betterley, the #MeToo movement marks a clear departure from the “check the box” approach that insurers previously favored.

Given that insurance is a blunt instrument, there is also increased scrutiny of certain industries including “[e]ntertainment, [m]edia, [e]ducation, and high profile executives.” Some insurers are requiring higher self-insured retentions in certain industries, and others are going so far as to exclude entire industries. Even in the current insurance market where competition is fierce, there has been an increase in the number of “prohibited insureds,” from 127 in 2017 to 141 in 2019.

Insurance brokers are weighing in too. Woodruff Sawyer, for example, suggests amending executive compensation agreements to address large payouts for executives and improving diversity because “[i]t is harder to defend a company accused of allowing sexual harassment (or bias) to exist or even flourish if you have no women in

---


249 Betterley, 2018 Survey, supra note 248, at 4-5.
251 See Betterley, 2018 Survey, supra note 248, at 5-6.
252 See id. at 5.
253 See infra Appendix A: Interview Participants, Interview with Richard Betterley, Insurance Expert.
254 Betterley, 2018 Survey, supra note 248, at 8.
255 Id. at 9.
256 Id. at 28.
executive leadership.” Coverage attorneys who advise on D&O coverage are warning that “D&O insurers are now looking at ways to assess the ‘tone at the top’ of an organization.” Corporate counsel in the technology industry have also confirmed that in 2018 D&O carriers began asking about diversity and gender pay gap metrics. As Rob Chesnut, Chief Ethics Officer of Airbnb recently noted, “[I]t’s a significant part of the discussion.”

F. Lawfirms and Board Advisors

Law firms are also narrowing in on the board’s role to oversee corporate culture. Wachtell Lipton has been issuing a steady drumbeat of advice warning companies that “[c]apitalism is at an inflection point” and advocating for a “new paradigm” in which boards oversee “corporate equality.” This so-called corporate equality encompasses “sexual harassment, corporate culture, gender pay equity, and gender diversity.” Wachtell warns that “the cultural context of the current #MeToo movement” makes ignoring shareholder proposals on corporate equality issues far too risky. Another example is Hogan Lovells, which advises boards to address the risk of #MeToo by “avoiding a toxic culture” and outlines the following specific steps, each of which seek to correct power differentials: diversifying the C-Suite, eliminating pre-arbitration clauses in employment agreements;

257 See infra Appendix A: Interview Participants, Interview with Priya Cherian Huskins, Woodruff Sawyer; see also Priya Cherian Huskins, #MeToo and the Boardroom, WOODRUFF SAWYER (June 27, 2018), https://woodruffsawyer.com/do-notebook/me-too-boardroom/ [https://perma.cc/NV25-GDC4].


259 See infra Appendix A: Interview Participants, Interview with Rob Chesnut, Chief Ethics Officer, Airbnb, Interview with Brian Savage, Corporate Counsel, Airbnb.

260 See infra Appendix A: Interview Participants, Interview with Rob Chesnut, Chief Ethics Officer, Airbnb, Interview with Brian Savage, Corporate Counsel, Airbnb.


262 See id.

263 See Katz & McIntosh, supra note 166.

264 Id.

265 Id.

266 Id.
broadening the scope of clawback policies in the wake of #MeToo by adding provisions triggering clawbacks in the event of sexual harassment or misconduct; expanding the application of the clawback provisions to all C-Suite executives; and expanding the definition of cause in employment contracts to include sexual harassment.267

Crucially, this law firm advice is not confined to the occasional client alert. A growing number of law firms are creating entire practice groups focused on corporate culture. For example, Covington & Burling LLP recently launched its “Cultural Reviews and Investigations Practice Group” and warns its clients that “the revelation of more nuanced cultural problems within an organization ha[s] the potential to give rise to significant litigation or reputational risk.”268 These novel practice groups are staffed with cross-functional teams of lawyers with expertise in employment law, corporate governance, and white-collar investigations.269 The issues that these teams tackle go beyond compliance with the law. Through “cultural audits,” these outside counsel attempt to help companies transform their corporate culture to mitigate against both legal and reputational risks, including those that arise out of sexual harassment claims.270

Marking a departure from “the era of compliance,” the target of this advice is corporate directors, not the human resources or compliance departments. This is reflected by the dizzying number of board consultants and crisis management firms, from the National Association of Corporate Directors (“NACD”) to Edelman, that are advising boards on how to dutifully fulfill the new expectation to oversee corporate culture.271 These consultants are imploring boards to oversee the risk of


268 Cultural Reviews and Investigations, supra note 15.

269 See infra Appendix A: Interview Participants, Interview with Carolyn Rashby, Of Counsel, Covington & Burling LLP.

270 Infra Appendix A: Interview Participants, Interview with Carolyn Rashby, Of Counsel, Covington & Burling LLP.

a “boys’ club” culture in the same way as they would treat any other disruptive business risk, such as cybersecurity.272

V. THE ERA OF CULTURE: ADDRESSING SEXUAL HARASSMENT BY EMPOWERING WOMEN

The preceding Part took account of the growing number of stakeholders asking corporate boards to address the risk of sexual harassment through “corporate culture” by addressing power differentials. The next obvious question is whether these pleas are actually and meaningfully being heard and acted upon. This Part takes aim at the view that corporate boards are merely paying lip service to pacify stakeholders. It begins by offering case studies of governance reforms at a number of companies that have emerged from #MeToo crises. To demonstrate that these changes are not unique to firms that have weathered public scrutiny, it goes on to examine some initial knock-on effects across the broader market.

A. Case Studies

1. Uber

On February 19, 2017, former Uber employee Susan Fowler forever altered the company’s course by publishing a blog post about her “very, very strange” year at Uber.273 The viral post uncovered how Uber’s management shrugged off complaints of sexual harassment.274 The most disturbing account involved Fowler’s direct supervisor, who propositioned her for sex and was not reprimanded because of his status as “a high performer.”275 At least implicitly, Fowler linked Uber’s culture of sexual harassment to its gender disparity, “[o]n my last day at Uber, I calculated the percentage of women who were still in the org. Out of over 150 engineers in the SRE teams, only 3% were women.”276

Fowler’s post came at an inopportune time for Uber, just weeks after the #DeleteUber campaign was causing Uber to lose hundreds of

272 Hays, supra note 271.
273 See Fowler, supra note 9.
274 See id.
275 Id.
276 Id.
thousands of users. Perhaps in an attempt to boost morale, Uber’s founder and CEO Travis Kalanick responded the next day with three promises to employees. First, Uber had retained the law firm of Covington & Burling to conduct a “workplace culture” investigation led by former U.S. Attorney General Eric Holder. Covington would look beyond Fowler’s allegations to “diversity and inclusion at Uber more broadly.” Second, senior female leaders at Uber, including board member Arianna Huffington and newly appointed head of human resources Liane Hornsey, would embark on a listening tour to elicit feedback from female employees. Third, Uber would finally publish a diversity report, something that it had resisted. Kalanick’s response appeared to acknowledge the link between the lack of gender diversity at Uber and the risk of sexual harassment.

In March 2017, Uber issued its first Diversity & Inclusion Report, revealing the lack of gender diversity at Uber, albeit at a rate consistent with the rest of the technology industry. Two months later, Uber brought on Frances Frei as a Senior Vice President of Leadership and

---


281 See id. at 9.

282 See id. at 7.

Frei was a telling choice. A professor at Harvard Business School and an expert in gender and diversity, she was tasked with helping to transform the culture at Uber. Frei began by surfacing problems through “feedback sessions” with 9,000 Uber employees. Meanwhile, Covington attorneys were also busy uncovering the full extent of Uber’s underbelly through interviews with over 200 employees and the review of over three million documents. This internal investigation culminated in the “Holder Report,” the recommendations of which the board agreed to adopt in full.

While the entirety of the Holder Report remains confidential, Uber published thirteen pages of recommendations on June 13, 2017. The recommendations seek corporate governance changes and operational reforms, a surprising number of which are focused on increasing gender diversity and achieving gender pay equality. Concerning changes in senior leadership, for instance, the Holder Report recommends that Uber include diverse candidates or candidates who can: focus on diversity and inclusion in the search for its new CEO; utilize performance metrics tied to diversity; and elevate the stature of Uber’s chief diversity officer to the C-suite with a direct reporting line to the CEO or Chief Operating Officer (“COO”). Concerning diversity and inclusion enhancements, the Holder Report recommends that Uber undertake several reforms including establishing an employee diversity advisory board; regularly publishing diversity statistics; targeting

---


289 Id. at 1.
diverse sources of talent; utilizing blind resume review; adopting a version of the “Rooney Rule,” whereby women and underrepresented populations must be considered for each position; recognizing managers for their diversity efforts; reviewing benefits offerings to make them gender-neutral; conducting unconscious bias review; and addressing pay equity. Thus, the Holder Report made a direct connection between corporate culture, power differentials, and unwanted behavior.

Uber’s new CEO, Dara Khosrowshahi, took the reins on August 30, 2017, and has led Uber’s transformation, beginning with broadcasting the company’s new motto — “Do the right thing, period.” As noted above, one of the Holder Report’s key recommendations was that Uber’s global head of diversity, Bernard C. Coleman III, be elevated to a more senior position. But Khosrowshahi opted to hire Bo Young Lee, a woman as its first Chief Diversity and Inclusion Officer. Reflecting the importance of diversity to Khosrowshahi, this was his third executive hire at Uber. Following Lee’s hire, Uber chose to set the “audacious” goal of making Uber the “most diverse, equitable, and inclusive workplace on the planet.”

Of course, Uber had to transform its culture as part of the grooming process for its initial public offering (“IPO”). It listed its cultural woes as a risk factor it its long-awaited IPO: “[o]ur workplace culture and forward-leaning approach created significant operational and cultural challenges that have in the past harmed, and may in the future continue to harm, our business results and financial condition.” Nevertheless, Uber has made progress towards addressing gender inequity. According to its most recent diversity report, the total number of female employees grew to 42.3% from 2018 to 2019, reflecting a 2.9% increase in women

---

290 Id. at 6-8, 12.
292 THE HOLDER REPORT, supra note 280, at 2.

2. Signet Jewelers

mandatory annual meetings which were a “boozy, no-spoouses-allowed sex-fest.” To make matters worse, CEO Mark Light allegedly not only condoned, but actively participated, in this toxic culture.

When the markets opened the next day, Signet’s stock price fell nearly 13%, its largest one-day drop in eight years. Shareholders didn’t wait long to file a securities fraud lawsuit.

Light’s thirty-five-year long tenure at the company ended on July 17, 2017, when he resigned “for health reasons.” By August, the board of directors had replaced Light with the company’s first female CEO, Virginia Drosos. A key pillar of Drosos’ turnaround plan, known as “The Path to Brilliance,” is transforming the company’s culture through achieving gender parity, and she has made impressive headway. While a male-dominated board had traditionally led Signet, today it is one of the few boards to have achieved gender parity. And Signet’s C-suite is now female-led, with six of the nine positions held by women. Drosos hasn’t stopped at Signet Jewelers. The company recently announced that it is reviewing

---

303 Id.
304 Id.
305 See Signet Jewelers Complaint, supra note 191, at 47; Harwell, Hundreds Allege Sex Harassment, supra note 302.
311 Drosos’s efforts have won her recent accolades, including selection into the exclusive 2019 and 2020 Bloomberg Gender Equality Index. See Press Release, Signet Jewelers, supra note 310.
its global supply chain to “ensure that it maintains a supply chain that respects and empowers women at all levels.”

3. 21st Century Fox

Beginning in 2016, The New York Times published a series of articles exposing repeated claims of sexual harassment by the chairman and CEO of 21st Century Fox Roger Ailes and Fox host Bill O’Reilly. After repeated stock valuation drops, shareholders brought a derivative action and alleged that defendants breached their fiduciary duties by failing to address the culture of sexual harassment. On November 20, 2017, Fox settled the matter the same day it was filed for $90 million — one of the largest settlement amounts in a derivative lawsuit to date. The non-monetary terms of the settlement, which got little attention, seek to address power differentials by requiring Fox to establish a “Workplace Professionalism and Inclusion Council.” That Council, formally announced on November 20, 2017, was established to advise Fox News on “workplace behavior, and further recruitment and advancement of women and minorities.”

It is telling that all of the Council’s members are women with expertise in advancing women, not human resources. Moreover, the


314 Murdoch Complaint, supra note 186, at 2, 7.


318 See Twenty-First Century Fox, Inc., Current Report (Form 8-K) (Nov. 28, 2017); Steel, supra note 316.
Council was authorized by and has the ear of the board of directors. As a result, the board cannot deny knowledge of any “red flags” because the Council is required to provide written and public reports to the board’s Nominating and Corporate Governance Committee.\footnote{19} To date, the Council has produced three reports to the board, each of which reveals that Fox News is increasing gender and racial diversity at different management levels throughout the organization. When Fox News CEO Paul Rittenberg retired, the network opted to hire its first-ever woman CEO, Suzanne Scott.\footnote{20}

4. Wynn Resorts

Among the most powerful men brought down by #MeToo is Steve Wynn, the seventy-five-year-old billionaire and chairman and CEO of Wynn Resorts.\footnote{21} On January 26, 2018, The Wall Street Journal published an article recounting allegations against Wynn of sexual misconduct and rape spanning decades, prompting an immediate 10% decline in Wynn’s stock valuation. By February 6, 2018, Wynn had resigned as chairman and CEO. The very next day, shareholders filed a derivative lawsuit accusing the board of directors of disregarding a sustained pattern of sexual harassment and egregious misconduct by Steve Wynn.\footnote{22} Class actions by victims were also soon to follow.\footnote{23}

This prompted investors to seek a shakeup of the board. Before the allegations, Wynn’s board was comprised of ten directors, only one of whom was a woman.\footnote{24} In a move that Wynn’s new CEO called a “turning point” for the company, Wynn added three women as

\footnote{19} See 21st Century Fox Establishes the Fox News Workplace Professionalism and Inclusion Council, supra note 317.


independent directors, which included Betsy Atkins, Dee Dee Myers, and Wendy Webb. The new Wynn board has nine members, and four of them are women, achieving near gender parity. The new Wynn board also added an executive-level position and named Corrine Clement as vice president of a new Culture and Community Department. Importantly, this new department includes a Women’s Leadership Forum, which is designed to close the gender gap in management and create equal pay. The forum has board oversight including participation by the four Wynn female directors who hold “regular town halls, events, and fireside chats to promote engagement and advancement of the female employee base.”

5. Google

On October 25, 2018, The New York Times published a story, which exposed the $90 million “hero’s farewell” that the company bid to Andrew Rubin, the creator of the Android accused of rampant sexual misconduct. The internal backlash was swift. Days later, 20,000 Google employees representing almost a quarter of Google’s global workforce walked out from over 65% of Google offices around the world.

The “Google Walkout” was accompanied by a demand for: (1) “[a]n end to [f]orced [a]rbitration in cases of harassment and discrimination”; (2) “[a] commitment to end pay and opportunity inequity”; (3) “[a] publicly disclosed sexual harassment transparency report”; (4) “[a]
clear, uniform, globally inclusive process for reporting sexual misconduct”; (5) a promotion of “the Chief Diversity Officer to answer directly to the CEO and make recommendations directly to the Board of Directors”; and (6) the appointment of “an employee representative to the Board.”

Almost immediately, Google’s CEO agreed to some of the demands, including abandoning mandatory arbitration and increasing the company’s efforts to improve its gender diversity. Google has not yet acquiesced on the remaining governance reforms, and they seem rather unlikely, but the employees are nevertheless persisting in their demands.

6. McDonald’s

McDonald’s CEO Steve Easterbrook’s recent firing captured headlines in November 2019 and reflects how resolute some boards have become in holding executives accountable. Easterbrook’s removal is extraordinary because it arose in response to a consensual relationship with an employee. A far cry from the boards which allowed unscrupulous and even illegal behavior by star executives to go

---


331 Sundar Pichai, A Note to Our Employees, GOOGLE (Nov. 8, 2018), https://www.blog.google/inside-google/company-announcements/note-our-employees/ [https://perma.cc/8KY4-EL8V].

332 See Google Walkout For Real Change (@GoogleWalkout), TWITTER (Nov. 8, 2018, 2:10 PM), https://twitter.com/GoogleWalkout/status/1060655853789949953 [https://perma.cc/55TH-9ZMF].


unchecked for years, the McDonald’s board removed Easterbrook just three weeks after learning about the relationship. With quarterly profits as the traditional yardstick by which CEOs are measured, Easterbrook’s ouster was even more surprising given the company’s strong market position.

Easterbrook’s removal could have been a very public way for the McDonald’s board to deflect the increasing scrutiny that the company is facing for sexual harassment in its franchises. From McDonald’s employees who filed complaints with the EEOC, to an employee walkout in ten cities, the company has been in the spotlight. Regardless of the board’s motives, the firing of a CEO is perhaps the most drastic measure a board can take under any circumstances.

Even before removing Easterbrook, McDonald’s had turned its focus to gender diversity. On International Women’s Day in 2019, McDonald’s launched the “Better Together: Gender Balance and Diversity strategy” and committed to “[improving] the representation of women at all levels, achieve gender equality in rewards and career advancement, and champion the impact of women on the business” by 2023. Concerning mandatory arbitration, McDonald’s has also recently won accolades from shareholder activists. While the use of mandatory arbitration remains opaque to investors, due to shareholder pressure, McDonald’s disclosed that it does not require it as a condition of employment, but seeks these agreements in “limited circumstances” and subject to board oversight. While shareholders applauded this

335 See id.
337 David Crary, Some McDonald’s Workers Vote to Strike Over Sex Harassment, ASSOCIATED PRESS (Sept. 12, 2018), https://www.apnews.com/0f70d30d6bfcf49bba9eb58cb9109184 [https://perma.cc/2RK8-2ZSB].
340 Id.
“new level of transparency,” they also urged McDonald’s to completely eliminate the use of mandatory arbitration and NDAs.\textsuperscript{341}

B. The Knock-on Effects of the #MeToo Movement\textsuperscript{342}

1. Board Gender Diversity Is Reaching New Milestones

Advocates of board gender diversity celebrated many triumphs in 2019. In the S&P 500, Copart — the last hold-out with an all-male board — added its first female director.\textsuperscript{343} In the Russell 3000 women surpassed the 20% of board seats, marking a new milestone.\textsuperscript{344} As the chart below elucidates, the pace of reform has stepped-up after the #MeToo movement, with women representing nearly 45% of new directors in 2019, an almost two-fold increase since 2016.\textsuperscript{345}

\textsuperscript{341} See id.

\textsuperscript{342} The arguments in this subpart are enhanced by a preliminary review of a dataset of the SEC filings for the Russell 3000 provided by Intelligize, a data provider. See \textit{Intelligize}, www.intelligize.com (last visited Jan. 4, 2020) [https://perma.cc/7CCL-H7HJ]; see also infra Appendices A-D.


\textsuperscript{345} See \textit{Papadopoulos}, supra note 88.
The growing pressure from both regulators and shareholders discussed in Part V suggests that this trend is likely to continue.\textsuperscript{346} With almost 700 companies in the Russell 3000 subject to California’s new gender diversity mandate, the regulatory pressure is acute.\textsuperscript{347} Even if this regulation is short-lived given the pending challenges to its constitutionality,\textsuperscript{348} pressure from investors remains strong. According to ISS, 36% of nominating committee chairs of companies with all-male boards received less than 80% of the votes cast in 2019, compared to just 20% of the nomination committee chairs of all-male boards in 2018.\textsuperscript{349} Investors on the vanguard of this movement are beginning to point their pitchforks at companies with just one female director. While still rare, in 2019 there was a 4% increase in nominating committee

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{unprecedented_proportion_new_directors_are_women.png}
\caption{Unprecedented Proportion of New Directors are Women
percentage of new directorships filled by women}
\end{figure}

\textsuperscript{346} See supra Parts IV.A, IV.D.


chairs of boards with just one woman who received less than 80% of votes cast. The first month of 2020 drew more cheers from board diversity advocates. For companies that plan to go public, Goldman Sachs' CEO unveiled an ultimatum at Davos 2020 and stated, "[w]e're not going to take a company public unless there's at least one diverse board candidate, with a focus on women." In 2021, Goldman will ramp that number up to two.

While board gender diversity is increasing at an encouraging pace, the top position in the C-Suite, the CEO, is still overwhelmingly male. Just seventy women in the S&P 500 have ever held the position of CEO since 2000. Even more discouraging is the fact that 2018 saw a decline to twenty-two female CEOs. The Fortune 500 tells a slightly more optimistic story. In 2019, thirty-three companies in the Fortune 500 have female CEOs, which is the highest number ever and a significant increase from 2018 with twenty-four women CEOs. Nevertheless, that still represents a meager 6.6%. There has also been little progress with respect to gender diversity in the C-Suite. According to ISS, in 2018, only 9% of C-suite positions were held by women.

Notwithstanding these numbers, multiple studies have shown a correlation between board gender diversity and the gender diversity of the CEO and C-Suite, suggesting that we may be on the precipice of

351 Id.
352 Id.
356 Id.
357 Id.
Given that board gender diversity is a recent phenomenon, however, it may be too soon to reap its benefits in the C-Suite. 360

2. Boards Are Amending Their Committee Charters to Signal Oversight of Culture

Boards influence corporate culture by “picking the CEO and through their influence on specific policies like incentive compensation, hiring, firing, and promotion decisions.” 361 One of the most potent tools that boards have is the ability to set compensation, and therein lies a promising signal of their willingness to address sexual harassment. From compensation committee charters to the specific terms of employment agreements, boards are beginning to make meaningful reforms.

Executive Committee Compensation Charters: As board advisors are noting, “[m]ore and more, the compensation committee is focusing time and attention on issues beyond the determination of compensation for C-suite executives, such as succession planning, corporate culture,
and diversity and inclusion.” To signal this broader ambit, compensation committees are not only amending their charters but changing their committee names to reflect their oversight of cultural issues. According to a recent study, nearly 40% of the S&P 500 currently refer to the committee responsible for executive compensation oversight as something in addition to compensation, such as “Compensation and Talent Management Committee,” or “Culture and Compensation Committee.” This shift appears to be accelerating — twenty-six companies changed their committee name over the past four years, as compared to eleven from 2012 to 2015. According to another study, “nearly 20% of the 1400 US public companies analyzed have formally expanded the purview of their board compensation committees to incorporate some aspect of leadership and talent.”

As detailed in Appendix D, our early-stage analysis of the charters for the compensation committee for issuers in the Russell 3000 provides a glimpse into how companies are tying “culture” to “diversity” and inclusion for the first time. Before 2016, the word “culture” was rarely used. The pre-2016 charters which did refer to culture did so in the context of ethical compliance with legal mandates, which was likely in response to the financial crisis. After 2016, boards revised executive committee charters to add the word “culture” in the context of “diversity and inclusion,” signaling the newfound importance of diversity to the board.

---


363 See id.


365 Id.

366 Van Putten et al., supra note 362.

367 See infra Appendix D: Textual Analysis of Board Compensation Committee Charters.

368 See infra Appendix D: Textual Analysis of Board Compensation Committee Charters.

369 See, e.g., infra Appendix D: Textual Analysis of Board Compensation Committee Charters.

370 See infra Appendix D: Textual Analysis of Board Compensation Committee Charters. While this Article focuses on the compensation committee, a more robust textual analysis of board charters for the Audit, Compensation, and Nominating
CEO Departures & Searches: The board’s expanded focus on corporate culture is consistent with how boards are responding to executive misconduct. For the first time in 2018, ethical lapses eclipsed financial performance or conflicts with the board as being the leading cause of leadership dismissals among the world’s 2,500 largest public companies. According to PwC, which has been conducting the survey for the past nineteen years, this rise is in part attributable to “new pressures for accountability about sexual harassment and sexual assault brought about by the rise of the ‘Me Too’ movement, and the increasing propensity of boards of directors to adopt a zero-tolerance stance toward executive misconduct.”

We can observe a similar story playing out in CEO succession in the S&P 500, in which #MeToo related incidents accounted for five of the twelve “non-voluntary departures” in 2018. At first blush, that seems like a minuscule number, but in 2013-2017, just one CEO succession was based on ethical lapses. This trend appears to be increasing across industries according to a recent survey which found that 2019 had the most CEO departures on record, even higher than in 2008 during the financial crisis. The authors of the report attribute this increase in part to the #MeToo movement. Not all CEO ousters relate to sexual harassment; Intel Corp. and McDonalds are recent examples of the committees is currently underway and the subject of a follow-on empirical article. That analysis has also uncovered an increase in bespoke committees to address corporate culture using a variety of names including “culture and compliance,” “human capital” and other variations.


Tonello, supra note 354.

Id.

See 2019 Year-End CEO Report: 160 CEOs out in December, Highest Annual, Quarterly Totals on Record, CHALLENGER, GRAY & CHRISTMAS, INC. (2019), http://www.challengergray.com/press/press-releases/2019-year-end-ceo-report-160-ceos-out-december-highest-annual-quarterly-totals [https://perma.cc/3WHN-LTUW]. “Challenger tracks CEO changes at companies that have been in business for at least two years” and have at least ten employees. Id.
board’s willingness to take decisive action when CEOs have violated corporate policies, even in the context of consensual relationships.377

Notwithstanding these examples, perhaps the reason why we are not seeing more CEO removals lies in compensation agreements, which make it challenging for boards to remove the top executive. As the next section details, here, too, the sands are shifting.

3. Boards Are Amending Executive Compensation Agreements to Explicitly Address Sexual Harassment and Reward Diversity and Inclusion

According to employment lawyers and executive compensation consultants, the #MeToo movement has caused companies to contemplate changes to their executive compensation agreements.378 A handful of companies have already made these changes, which fall into four categories: (1) the addition of “sexual harassment” within the definition of cause for termination; (2) the addition of sexual harassment as a “trigger” to allow the clawback of compensation paid; (3) the addition of a representation & warranty to address prior misconduct; and (4) the inclusion of diversity and inclusion as a metric for assessing executive bonuses. This section briefly outlines each of these changes.379

The Definition of Cause: Though extremely rare, to account for the risk of harassment, some companies, are explicitly adding “sexual harassment” to the definition of cause.380 Based on a preliminary review of the termination for cause definitions for executive employment agreements in the Russell 3000, only twenty-five issuers explicitly refer to “sexual harassment” as a triggering cause for the

379 See infra Appendix C: Sample of Amendments to Executive Compensation Agreements.
removal of an executive. Furthermore, as employment lawyers explain, the cause definition is likely being modified in more nuanced ways. For example, companies may simply reference violations of corporate codes of conduct or other “shadow governance documents” which can be easily amended.

In a high-profile example of how the cause clause operates in practice, the CBS board relied on the following definition of cause in Leslie Moonves’s 2017 executive employment agreement to remove him as CEO and deny him the $120 million in severance that he would have otherwise been entitled to under the agreement. Moonves’s agreement had the common “material adverse impact” language “provided that such violation has a material adverse effect on the Company.” Given the significant hit to CBS’s stock price following two New Yorker articles exposing Moonves’s sexual harassment, the CBS board was able to safely take the position that his violation adversely affected the company. Moonves, however, has not gone quietly. His compensation agreement also permitted him to appeal the board’s determination in a binding and confidential arbitration proceeding. The Moonves example illustrates how the “material adverse effect” language can tie the board’s hands, which will likely become a point of negotiation between boards and CEOs in the future.

---


382 See Utz, supra note 380, at 1-2.


The Expansion of Clawback Provisions: As required since 2002 by the Sarbanes-Oxley Act, companies may require executives to return the money they were already paid if they have engaged in specified types of wrongdoing that resulted in a financial restatement.\(^{387}\) The #MeToo movement has ignited a renewed focus on clauses that clawback earned compensation or forfeit future benefits due to misconduct in situations beyond financial restatement.\(^{388}\) Companies attempting to rehabilitate their culture post-crisis, such as Wells Fargo and Equifax, have also recently expanded their clawback policies.\(^{389}\) Verizon also recently expanded its clawback provision to allow the board to clawback compensation for “misconduct that results in significant reputational or financial harm to Verizon.”\(^{390}\) Proxy advisor Glass Lewis has emphasized that, “in the midst of the #MeToo movement, issues related to clawback policies are incredibly relevant to companies and their shareholders.”\(^{391}\) Following its #MeToo crisis, Intel expanded its clawback policy to include behavior that violates its internal policies or constitutes cause as defined in each employment letter.\(^{392}\) While anecdotal, employment lawyers are also reporting that the #MeToo


\(^{389}\) See EQUIFAX INC., NOTICE OF 2019 ANNUAL MEETING AND PROXY STATEMENT 11, 48 (2019), https://investor.equifax.com/-/media/Files/E/Equifax-IR/Annual%20Reports/2019-proxy-statement-web.pdf [https://perma.cc/6L82-TQ6U] (listing one event that triggers clawback action as “[m]isconduct resulting in significant financial and/or reputational harm and the employee either engaged in the misconduct or failed to fulfill his or her supervisory responsibility to prevent another employee from engaging in such misconduct”); WELLS FARGO & CO., PROXY STATEMENT 97 (2019), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2019-proxy-statement.pdf [https://perma.cc/WC4Y-R2XC].


movement has caused companies to add a clawback clause for sexual harassment.393

Given that the #MeToo movement is still underway, and clawing back executive compensation is a significant reform which requires negotiations with powerful CEOs, these changes are still occurring at the margins. As one executive compensation expert explained, “[b]oards are still in the contemplation phase and we haven’t yet seen a wholesale shift to broader clawback policies, but conversations are definitely occurring.”394 But there appears to be a growing momentum behind the broader adoption of clawback policies.

Representations & Warranties: Employment lawyers are also reporting that companies are seeking a representation or warranty by the executive that they have not engaged in misconduct that would violate sexual harassment policies.395 Notably, these agreements cover behavior that occurred at a prior employer and for which the current employer would have no legal liability. Moreover, even before the CEO applicant is considered, there is an increase in “social due diligence,” including more robust background checks and research into social media archives.396

Diversity & Inclusion Targets in Executive Compensation Agreements: In addition to these “sticks,” companies are using carrots to incentivize employers to make diversity and inclusion a priority. Beginning in 2017, Microsoft linked 50% of its executive’s cash incentives to strategic performance goals that include diversity and


396 See Lublin, supra note 32.
inclusion as a metric.\textsuperscript{397} At Intel, diversity determines 50% of its executives' annual cash incentives.\textsuperscript{398} As discussed above, pursuant to “the Holder Report,” Uber recently announced that it is linking executive pay to diversity and inclusion metrics for its top executives.\textsuperscript{399}

4. Companies Are Adding #MeToo Inspired Representations and Warranties into Mergers and Acquisitions Agreements

The #MeToo movement has also triggered a fundamental change in how companies navigate mergers and acquisitions through the incorporation of a representation and warranty referred to as the “Weinstein clause.”\textsuperscript{400} The “Weinstein clause,” also known as a “#MeToo rep,” effectively functions as a guarantee that no allegations of sexual harassment or sexual misconduct have been made against any current or former officer of the target company, and the company has not entered into any settlement agreements related to allegations of


\textsuperscript{399} See THE HOLDER REPORT, supra note 280, at 2.

Sexual harassment or sexual misconduct. The earliest example of a Weinstein clause appears to have surfaced in a March 2018 merger agreement between SJW Group and Connecticut Water Services which states:

[t]o the [k]nowledge of SJW, in the last five years, no allegations of sexual harassment have been made to SJW against any individual in his or her capacity as (i) an officer of SJW, (ii) a member of the SJW board or (iii) an employee of SJW or any SJW [s]ubsidiary at a level of [v]ice [p]resident or above.

M&A agreements have long included representations and warranties. Prior to the #MeToo movement, however, these representations were narrowly tailored to protect against legal liability. After #MeToo, buyers began seeking assurances that go far beyond compliance with the law to capture “allegations” of sexual harassment. Importantly, these deals include a “look back” that covers activity ranging from two years to ten years which extends beyond the statute of limitations for sexual harassment claims. In 2018, there were thirty-nine deals filed with #MeToo reps and in 2019, as of December 10, there were eighty-five deals filed, including an appearance of the provision in mega-deals such as Salesforce’s $15.3-billion acquisition of Tableau.

---


404 See Jaeger, supra note 402; see also Windemuth, supra note 400, at 488.

405 See Jaeger, supra note 402.


407 Windemuth, supra note 400, at 499 (finding the number of M&A deals with #MeToo reps in 2018); see also Burnett, supra note 406 (finding the number of M&A deals with #MeToo reps from January 2019 through June 17, 2019). To find the remaining number of #MeToo reps for 2019, our researchers collected publicly filed instances of the provision from June 17, 2019 through December 10, 2019 which included the mega-deal Salesforce acquisition of Tableau. See Salesforce.com, Inc., Current Report (Form 8-K) (June 9, 2019), https://www.sec.gov/Archives/edgar/data/1108524/000119312519169276/d764344d8k.htm [https://perma.cc/PGN2-EEWL]. Two
While it is likely that many buyers can obtain representation and warranty insurance (“RWI”) for these “#MeToo reps,” brokers are warning that the due diligence done by the buyer, including an inquiry into “the company’s culture” will dictate the availability of insurance.\footnote{See Emily Maier, Can You Insure Against the “Weinstein Clause” in M&A Deals?, \textit{Woodruff Sawyer} (Oct. 8, 2018), https://woodruffswayer.com/mergers-acquisitions/insure-against-weinstein-clause-ma-deals/ [https://perma.cc/SG2E-8UBT]; see also Jeffrey Chapman, Jonathan Whalen & Benjamin Bodurian, \textit{Representations and Warranties Insurance in M&A Transactions}, \textit{Harv. L. Sch. F. on Corp. Governance} (Dec. 11, 2017), https://corpgov.law.harvard.edu/2017/12/11/representations-and-warranties-insurance-in-ma-transactions/ [https://perma.cc/ASUA-AWLA].} That is because insurance is intended to cover risks that are “genuinely unknown or not revealed by a good diligence process.”\footnote{Maier, supra note 408.} This focus by underwriters on corporate culture, discussed more fully in Part IV, means that corporate culture is a business risk.\footnote{See id.}

5. The Venture Capital (“VC”) Community Is Increasing Its Due Diligence for “Cultural Risk” in Private Equity Deals

Caldbeck left the firm and investors pulled their funds, causing the firm’s swift collapse.414

The shifting cultural norms about sexual harassment in the venture capital community were reflected in the immediate condemnation that Caldbeck received from leaders in Silicon Valley. The most prominent example was Reid Hoffman, founder of LinkedIn, who felt he needed to “immediately” respond in a post entitled “The Human Rights of Women.”415 In that post, Reid zeroed in on the “power relationship” underlying female entrepreneurs and venture capitalists on whose funding they depend and urged investors to adopt the #DecencyPledge, which asks venture capitalists to be mindful of this power dynamic and implores Limited Partners on whose funding venture capitalists depend to have a “zero tolerance” and pull their funding from VCs who exhibit misconduct.416

While the public cry for a #DecencyPledge is laudable, it is obviously nonbinding. But the investor community hasn’t stopped at empty words. In direct response to Caldbeck and other #MeToo revelations, the Institutional Limited Partners Association (“ILPA”), which funds venture capitalists, updated its guidelines to include a section on diversity and inclusion.417 These new guidelines include six new due diligence questionnaires, including a “team diversity template” to require disclosure of gender and racial diversity metrics across the organizational hierarchy.418

While they do not enjoy the bargaining power that limited partners have, female entrepreneurs are also taking it upon themselves to devise

---

416 Id.
contractual innovations to address the risk of sexual harassment.\footnote{See Noguchi, supra note 411.} A recent contractual innovation, the “Candor Clause,” was created by a female founder Elizabeth Giorgi after being sexually harassed by an investor.\footnote{Id.} Other female founders are creating and championing the use of similar clauses including a “morality clause” which allows for the removal of a director in response to a “#MeToo event.”\footnote{See infra Appendix A: Interview Participants, Interview with Susan Mac Cormac, Partner, Morrison & Foerster LLP.} Given how broadly worded these provisions are, their enforceability is uncertain. But recent interviews with corporate lawyers who work on these deals underscore a heightened awareness of cultural issues and “social due diligence” in the venture capital community.\footnote{See infra Appendix A: Interview Participants, Interview with Susan Mac Cormac, Partner, Morrison & Foerster LLP.}

6. Boards Are Addressing Pay Equity Through Pay Transparency

Since the #MeToo movement, there has been a renewed interest in pay equity. After decades of stagnation, scholars have recently noted that pay equity “is gaining spectacular momentum.”\footnote{See Lobel, supra note 33, at 1, 3 (providing a hopeful outlook of recent state laws which reflect “a shift from a command-and-control approach to ongoing private-public collaborative efforts — which can better ensure continuous checks and safeguards and incentivize employers to self-audit, assess, and establish beyond compliance practice”); Salary History Bans, supra note 224.} This increased focus has led to a dizzying number of new state and local laws addressing pay equity.\footnote{See Kristin Wong, Want to Close the Pay Gap? Pay Transparency Will Help. N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html [https://perma.cc/2PHD-KKJ3].} Even in jurisdictions which have yet to act, companies are taking it upon themselves — often in response to investor and employee pressure — to voluntarily address pay equity, beginning with pay transparency.\footnote{See Kristin Wong, Want to Close the Pay Gap? Pay Transparency Will Help. N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html [https://perma.cc/2PHD-KKJ3].} Recent high profile examples include Starbucks, which announced that it reached 100% gender and
racial pay equity.426 Starbucks’ leadership prompted the Employers for Pay Equity Initiative,427 a consortium of thirty-six (and growing) U.S. employers who have committed to doing the same.

7. Companies Are Abandoning Mandatory Arbitration of Sexual Harassment and Misconduct Claims

As discussed above, the focus on removing mandatory arbitration and NDAs for cases of sexual harassment is increasing on the legislative front across jurisdictions.428 In addition to mounting regulatory pressure, companies are self-regulating and abandoning NDAs and mandatory arbitration. This self-regulation is being driven by a fear of reputational risk, fueled by several grassroots efforts launched by high profile “silence breakers.” NBC Universal also announced that it was releasing former employees from NDAs, becoming the first major network to do so.429 Along similar lines, Gretchen Carlon launched “Lift Our Voices,” a non-profit which is calling on Fox News, Bloomberg, and other companies to release victims of sexual harassment from NDAs.430 Lift Our Voices recently touted Wells Fargo which ended mandatory arbitration for sexual harassment cases on February 12,


2020, as a recent victory. Yet another campaign, “Force the Issue,” is focused on ending mandatory arbitration, and pressures companies by publishing a running list of companies which have mandatory arbitration. Its recent victories include Capital One Financial Group and Fox Corporation, both of which have recently abandoned mandatory arbitration.

CONCLUSION

As Melvin Eisenberg argued more than two decades ago, “Changes in the belief-systems of corporate actors cause shifts in norms. These shifts, in turn, are translated into the fabric of corporate institutions and corporate law.” Despite the widespread attention that the #MeToo movement has received from scholars, policymakers, and the media, there has not been a focus on how it is being translated into corporate governance. This Article fills that gap by providing a comprehensive framework for understanding how the #MeToo movement is transforming key stakeholders’ demand and, in turn, the inner workings of companies. While it is too early to verify, this framework offers an optimistic perspective on an era of corporate governance that is rooted in culture and can therefore mitigate, rather than mask, the risk of sexual harassment.

---


433 Eisenberg, supra note 55, at 1292.
## APPENDIX A: INTERVIEW PARTICIPANTS

<table>
<thead>
<tr>
<th>Participant Name &amp; Title</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Verity Chegar, Vice President, ESG Strategist, <em>BlackRock</em></td>
<td>12/25/19</td>
</tr>
<tr>
<td>Rob Chesnut, Chief Ethics Officer, <em>Airbnb</em></td>
<td>10/11/19</td>
</tr>
<tr>
<td>Keir Gumbs, Associate General Counsel, <em>Uber</em></td>
<td>12/11/19</td>
</tr>
<tr>
<td>Priya Huskins, Partner &amp; Senior Vice President, <em>Woodruff-Sawyer</em></td>
<td>8/12/19</td>
</tr>
<tr>
<td>Courteney Keatinge, Senior Director, ESG Research, <em>Glass Lewis</em></td>
<td>4/22/18</td>
</tr>
<tr>
<td>Susan Mac Cormac, Partner, <em>Morrison &amp; Foerster LLP</em></td>
<td>1/15/19</td>
</tr>
<tr>
<td>Carolyn Rashby, Of Counsel, <em>Covington &amp; Burling LLP</em></td>
<td>12/5/19</td>
</tr>
<tr>
<td>Brian Savage, Corporate Counsel, <em>Airbnb</em></td>
<td>1/21/19</td>
</tr>
<tr>
<td>Anne Simpson, Managing Investment Director, Board Governance &amp; Sustainability, <em>CalPERS</em></td>
<td>10/11/19</td>
</tr>
<tr>
<td>Tim Youmans, Lead-North America, <em>EOS at Federated Hermes</em></td>
<td>8/18/19</td>
</tr>
</tbody>
</table>
APPENDIX B: TEXTUAL ANALYSIS OF DERIVATIVE COMPLAINTS

Figure 1.

<table>
<thead>
<tr>
<th>Number of Times &quot;Culture&quot; Appears</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICN: 1/19/2000</td>
</tr>
<tr>
<td>HP: 8/3/2012</td>
</tr>
<tr>
<td>American Apparel: 2/15/2013</td>
</tr>
<tr>
<td>HP: 9/9/2013</td>
</tr>
<tr>
<td>CTPartners: 2/27/2015</td>
</tr>
<tr>
<td>CTPartners: 6/15/2015</td>
</tr>
<tr>
<td>Signet Jewelers: 9/29/2017</td>
</tr>
<tr>
<td>Twenty-First Century Fox: 11/20/2017</td>
</tr>
<tr>
<td>Liberty Tax: 12/11/2017</td>
</tr>
<tr>
<td>Wynn Resorts Ferris v. Wynn: 2/20/2018</td>
</tr>
<tr>
<td>Wynn Resorts DiNapoli v. Wynn: 2/22/2018</td>
</tr>
<tr>
<td>Signet Jewelers: 3/22/2018</td>
</tr>
<tr>
<td>Wynn Resorts In re: 3/23/2018</td>
</tr>
<tr>
<td>Liberty Tax: 6/12/2018</td>
</tr>
<tr>
<td>National Beverage: 7/17/2018</td>
</tr>
<tr>
<td>CBS: 8/27/2018</td>
</tr>
<tr>
<td>Papa John’s: 8/30/2018</td>
</tr>
<tr>
<td>Nike: 8/31/2019</td>
</tr>
<tr>
<td>National Beverage: 11/2/2018</td>
</tr>
<tr>
<td>Lululemon: 11/28/2018</td>
</tr>
<tr>
<td>Alphabet: 1/9/2019</td>
</tr>
<tr>
<td>CBS: 2/13/2019</td>
</tr>
<tr>
<td>Papa John’s: 2/19/2019</td>
</tr>
<tr>
<td>Wynn Resorts Ferris v. Wynn: 3/1/2019</td>
</tr>
<tr>
<td>Alphabet: 8/16/2019</td>
</tr>
</tbody>
</table>
Figure 2.

<table>
<thead>
<tr>
<th>Source</th>
<th>Number of Times</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICN: 1/19/2000</td>
<td>0</td>
</tr>
<tr>
<td>American Apparel: 4/29/2011</td>
<td>0</td>
</tr>
<tr>
<td>HP: 8/3/2012</td>
<td>0</td>
</tr>
<tr>
<td>American Apparel: 2/15/2013</td>
<td>0</td>
</tr>
<tr>
<td>HP: 9/9/2013</td>
<td>0</td>
</tr>
<tr>
<td>CTPartners: 2/27/2015</td>
<td>0</td>
</tr>
<tr>
<td>CTPartners: 6/15/2015</td>
<td>0</td>
</tr>
<tr>
<td>Signet Jewelers: 9/29/2017</td>
<td>36</td>
</tr>
<tr>
<td>Twenty-First Century Fox: 11/20/2017</td>
<td>3</td>
</tr>
<tr>
<td>Liberty Tax: 12/11/2017</td>
<td>0</td>
</tr>
<tr>
<td>Wynn Resorts Ferris v. Wynn: 2/20/2018</td>
<td>0</td>
</tr>
<tr>
<td>Wynn Resorts DiNapoli v. Wynn: 2/22/2018</td>
<td>0</td>
</tr>
<tr>
<td>Wynn Resorts In re: 3/23/2018</td>
<td>0</td>
</tr>
<tr>
<td>Liberty Tax: 6/12/2018</td>
<td>0</td>
</tr>
<tr>
<td>National Beverage: 7/17/2018</td>
<td>0</td>
</tr>
<tr>
<td>CBS: 8/27/2018</td>
<td>0</td>
</tr>
<tr>
<td>Papa John’s: 8/30/2018</td>
<td>0</td>
</tr>
<tr>
<td>Nike: 8/31/2018</td>
<td>17</td>
</tr>
<tr>
<td>National Beverage: 11/2/2018</td>
<td>0</td>
</tr>
<tr>
<td>Lululemon: 11/28/2018</td>
<td>0</td>
</tr>
<tr>
<td>Alphabet: 1/9/2019</td>
<td>36</td>
</tr>
<tr>
<td>CBS: 2/13/2019</td>
<td>1</td>
</tr>
<tr>
<td>Papa John’s: 2/19/2019</td>
<td>14</td>
</tr>
<tr>
<td>Wynn Resorts Ferris v. Wynn: 3/1/2019</td>
<td>0</td>
</tr>
<tr>
<td>Alphabet: 8/16/2019</td>
<td>42</td>
</tr>
</tbody>
</table>
Figure 3.

<table>
<thead>
<tr>
<th>Source</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICN: 1/19/2001</td>
<td>0</td>
</tr>
<tr>
<td>American Apparel: 4/29/2011</td>
<td>0</td>
</tr>
<tr>
<td>HP: 8/3/2012</td>
<td>0</td>
</tr>
<tr>
<td>American Apparel: 2/15/2013</td>
<td>0</td>
</tr>
<tr>
<td>HP: 9/9/2013</td>
<td>0</td>
</tr>
<tr>
<td>CTPartners: 2/27/2015</td>
<td>0</td>
</tr>
<tr>
<td>CTPartners: 6/15/2015</td>
<td>0</td>
</tr>
<tr>
<td>Signet Jewelers: 9/29/2011</td>
<td>61</td>
</tr>
<tr>
<td>Twenty-First Century Fox: 11/20/2017</td>
<td>23</td>
</tr>
<tr>
<td>Liberty Tax: 12/11/2017</td>
<td>0</td>
</tr>
<tr>
<td>Wynn Resorts Ferris v. Wynn: 2/20/2018</td>
<td>0</td>
</tr>
<tr>
<td>Wynn Resorts DiNapoli v. Wynn: 2/22/2018</td>
<td>1</td>
</tr>
<tr>
<td>Signet Jewelers: 3/22/2018</td>
<td>66</td>
</tr>
<tr>
<td>Wynn Resorts In re: 3/23/2018</td>
<td>2</td>
</tr>
<tr>
<td>Liberty Tax: 6/12/2018</td>
<td>0</td>
</tr>
<tr>
<td>National Beverage: 7/17/2018</td>
<td>0</td>
</tr>
<tr>
<td>CBS: 8/27/2018</td>
<td>1</td>
</tr>
<tr>
<td>Papa John’s: 8/30/2018</td>
<td>0</td>
</tr>
<tr>
<td>Nike: 8/31/2018</td>
<td>10</td>
</tr>
<tr>
<td>National Beverage: 11/2/2018</td>
<td>0</td>
</tr>
<tr>
<td>Lululemon: 11/28/2018</td>
<td>0</td>
</tr>
<tr>
<td>Alphabet: 1/9/2019</td>
<td>3</td>
</tr>
<tr>
<td>CBS: 2/13/2019</td>
<td>23</td>
</tr>
<tr>
<td>Papa John’s: 2/19/2019</td>
<td>4</td>
</tr>
<tr>
<td>Wynn Resorts Ferris v. Wynn: 3/1/2019</td>
<td>2</td>
</tr>
<tr>
<td>Alphabet: 8/16/2019</td>
<td>7</td>
</tr>
</tbody>
</table>
Table of Derivative Complaints Referenced in Figures 1-3

<table>
<thead>
<tr>
<th>Date</th>
<th>Company</th>
<th>Complaint</th>
<th>Mentions of ‘Culture’</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/19/01</td>
<td>ICN</td>
<td>White v. Panic (<em>Panic I</em>), 793 A.2d 356, 358-59 (Del. Ch. 2000), <em>aff’d</em>, 783 A.2d 543 (Del. 2001).</td>
<td>0</td>
</tr>
<tr>
<td>Date</td>
<td>Company/Party</td>
<td>Description</td>
<td>Page</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Date</td>
<td>Company</td>
<td>Description</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>8/31/18</td>
<td>Nike</td>
<td>Stein v. Knight, No. 18CV38553 (Or. Cir. Ct. Aug. 31, 2018).</td>
<td>23</td>
</tr>
<tr>
<td>Date</td>
<td>Company</td>
<td>Description</td>
<td>Pages</td>
</tr>
<tr>
<td>----------</td>
<td>---------------</td>
<td>-------------------------------------------------------------------------------------------------------</td>
<td>-------</td>
</tr>
</tbody>
</table>
## APPENDIX C: SAMPLE OF AMENDMENTS TO EXECUTIVE COMPENSATION AGREEMENTS

<table>
<thead>
<tr>
<th>Date Amended</th>
<th>Type</th>
<th>Company</th>
<th>Language</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>4/24/19</td>
<td>Cause Clause</td>
<td>Endo Health Solutions</td>
<td>“(vi) any material breach by Executive of a Company policy related to sexual or other types of harassment or abusive conduct, which breach is injurious to the Company or its employees, or (vii) the continued material breach by Executive of this Agreement.”</td>
<td>Endo Health Solutions, Executive Employment Agreement (Form 8-K) 6 (Apr. 24, 2019), <a href="https://www.sec.gov/Archives/edgar/data/1593034/000159303419000011/ex101paulcampanelliemployee.htm">https://www.sec.gov/Archives/edgar/data/1593034/000159303419000011/ex101paulcampanelliemployee.htm</a>.</td>
</tr>
<tr>
<td>3/12/19</td>
<td>Representation or Warranty of the Executive</td>
<td>Regal Beloit Corporation</td>
<td>“The Executive represents and warrants to the Company that, to the best of his knowledge and belief: (c) The Executive has not been the subject of any complaint or allegation regarding his sexual harassment, his sexual misconduct . . . in any prior employment situation.”</td>
<td>Regal Beloit Corp., Executive Employment Agreement (Form 8-K) 7 (Mar. 12, 2019), <a href="https://www.sec.gov/Archives/edgar/data/0000082811/000008281190000020/rbc-8k3x14x19ex101.htm">https://www.sec.gov/Archives/edgar/data/0000082811/000008281190000020/rbc-8k3x14x19ex101.htm</a>.</td>
</tr>
<tr>
<td>11/29/17</td>
<td>Diversity &amp; Inclusion Targets in Executive Compensation Agreements</td>
<td>Microsoft</td>
<td>“50% of our Named Executives' fiscal year 2017 annual cash incentives were determined based on subjective scoring of their performance against . . . strategic indicators in three performance categories” including,</td>
<td>MICROSOFT CORP., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 2017, at 39 (2017), <a href="https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddefl4a.htm#toc461626">https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddefl4a.htm#toc461626</a>.</td>
</tr>
<tr>
<td>Date</td>
<td>Source</td>
<td>Text</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| 4/9/19     | Diversity & Inclusion Targets within Executive Employment Agreement and in Accordance with Executive Compensation Bonus Plan Uber | “Annual Cash Bonus. For each calendar year, you will be eligible to participate in the Uber Technologies, Inc. Executive Bonus Plan (the ‘Bonus Plan’), under which you may receive an annual cash bonus (the ‘Bonus’). The target amount of your Bonus (the ‘Target Cash Bonus’) will be determined by the Compensation Committee. The actual amount of any Bonus, and your entitlement to the Bonus, will be subject to the terms of the Bonus Plan.”)

“(j) ‘Performance Criteria’ means the performance criteria upon which the Performance Goals for a particular Performance Period are based, which may include any of the following: . . . workforce diversity . . .”


3/16/19     | Wells Fargo                                                            | “Misconduct that has or might reasonably be expected to cause reputation or other harm to our Company or any conduct that constitutes ‘cause,’ . . .”

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Source</th>
</tr>
</thead>
</table>
APPENDIX D: TEXTUAL ANALYSIS OF BOARD COMPENSATION COMMITTEE CHARTERS

Figure 1.