
Sex, Power, and Corporate Governance

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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.

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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.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.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.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.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.⁶ Legal boilerplate also provided employers with cover.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.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

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).

³ See *infra* Part I.A.

⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

⁵ See, e.g., LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016) [hereinafter *WORKING LAW*] ("[E]mployers 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?").

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).

⁷ See *infra* Part III.C.

⁸ See *infra* Part III.C.

CBS to Google began to fill headlines.⁹ 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.¹⁰ 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,¹¹ it uncovers that a paradigm shift from compliance to corporate culture has in fact already occurred.¹²

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.¹³ 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

⁹ See, e.g., Rachel Abrams & Edmund Lee, *Les Moonves Obstructed Investigation into Misconduct Claims, Report Says*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/business/media/les-moonves-cbs-report.html> [<https://perma.cc/ZBJ4-KEFE>] (discussing the sexual misconduct allegations against CBS chief executive, Les Moonves); Jennifer Blakely, *My Time at Google and After*, MEDIUM (Aug. 28, 2019), <https://medium.com/@jennifer.blakely/my-time-at-google-and-after-b0af688ec3ab> [<https://perma.cc/8FAS-585V>] (detailing an employee’s experience with sexual misconduct while working at Google); Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct> [<https://perma.cc/6XK4-T4JE>] (“During Moonves’s tenure, men at CBS News who were accused of sexual misconduct were promoted, even as the company paid settlements to women with complaints.”); Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN J. FOWLER BLOG (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber> [<https://perma.cc/ML5C-EC2Z>] (detailing an employee’s experience with sexual harassment while working at Uber); Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the ‘Father of Android,’* N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html> [<https://perma.cc/3ZMW-5LTG>] (discussing allegations of sexual misconduct against the creator of Android mobile software, Andy Rubin).

¹⁰ Jonah Engel Bromwich, *‘The Silence Breakers’ Named Time’s Person of the Year for 2017*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html> [<https://perma.cc/6BDD-7K2N>].

¹¹ See *infra* Appendix A: Interview Participants.

¹² See *infra* Part IV.

¹³ Cyrus Taraporevala, *2019 Proxy Letter — Aligning Corporate Culture with Long-Term Strategy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 15, 2019), <https://corpgov.law.harvard.edu/2019/01/15/2019-proxy-letter-aligning-corporate-culture-with-long-term-strategy/> [<https://perma.cc/8KKT-PAXM>].

a business risk.¹⁴ Prominent law firms like Covington & Burling have created practice areas to conduct “cultural audits.”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.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.”¹⁷ Even insurance underwriters, whose business depends on predicting risk, have begun to assess “corporate culture” in their underwriting process.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.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.²⁰ Other legal scholars reject that

¹⁴ Complaint at 22, 30, *Stein v. Knight*, No. 18CV38553 (Or. Cir. Ct. Aug. 31, 2018) [hereinafter *Stein Complaint*]; David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/> [https://perma.cc/U9U6-MHY7].

¹⁵ See *Cultural Reviews and Investigations*, COVINGTON, <https://www.cov.com/en/practices-and-industries/practices/litigation-and-investigations/white-collar-defense-and-investigations/cultural-reviews-and-investigations> (last visited Feb. 19, 2020) [https://perma.cc/64WU-XUAB].

¹⁶ See *infra* Appendix B: Textual Analysis of Shareholder Derivative Complaints.

¹⁷ *Constr. Laborers Pension Tr. for S. Cal. v. CBS Corp.*, 433 F. Supp. 3d 515, 530 (S.D.N.Y. 2020).

¹⁸ See *infra* Part IV.E.

¹⁹ See *infra* Part IV.

²⁰ Compare, e.g., VIVIAN HUNT, SARA PRINCE, SUNDIATU DIXON-FYLE & LAREINA YEE, MCKINSEY & CO., *DELIVERING THROUGH DIVERSITY* (2018), https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx [https://perma.cc/D5SD-W6XN] (reporting on research which showed a correlation between greater proportions of women in leadership positions at large companies and financial performance), and Vijay Eswaran, *The Business Case for Diversity in the Workplace Is Now Overwhelming*, WORLD. ECON. F. (Apr. 29, 2019), <https://www.weforum.org/>

premise altogether and argue that gender diversity is warranted by social justice, irrespective of financial upside.²¹ 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.²² 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.²³ 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.²⁴ 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.²⁵ The first change, which is the easiest to observe, is the identity of power-holders as boards become more gender diverse.²⁶ The way that power is

agenda/2019/04/business-case-for-diversity-in-the-workplace/ [https://perma.cc/6NLV-6X79] (all arguing a business case in favor of gender diversity within the workplace), and Stephen Turban, Dan Wu & Letian (LT) Zhang, *Research: When Gender Diversity Makes Firms More Productive*, HARV. BUS. R. (Feb. 11, 2019), https://hbr.org/2019/02/research-when-gender-diversity-makes-firms-more-productive (last visited Feb. 19, 2020) [https://perma.cc/N338-XH7U] (finding that gender diversity related to more productive companies in cultures where gender diversity is believed to be important), with *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE@WHARTON (May 18, 2017), https://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/ [https://perma.cc/9K2L-78D5] [hereinafter KNOWLEDGE@WHARTON] (“Rigorous, peer-reviewed studies suggest that companies do not perform better when they have women on the board. Nor do they perform worse.”).

²¹ See KNOWLEDGE@WHARTON, *supra* note 20 (“Women should be appointed to boards for reasons of gender equality, but not because gender diversity on boards leads to improvements in company performance.”).

²² See *infra* Part II.

²³ See *infra* Part V.A.

²⁴ See *infra* Part V.A.

²⁵ See *infra* Part V.B.

²⁶ See *infra* Part V.B. While outside the scope of this paper, in 2020 the business and investment community and lawmakers began to focus more on racial diversity as well. For example, in December of 2020 the Nasdaq Stock Market asked the Securities and Exchange Commission (“SEC”) for authority to adopt new listing rules aimed at increasing board gender and racial diversity. Andrew Ross Sorkin, Jason Karaian,

negotiated between the Chief Executive Officer (“CEO”) and the board is also shifting.²⁷ Boards are signaling their increased scrutiny of CEO misconduct by amending executive compensation agreements to explicitly include sexual harassment as a cause for termination.²⁸ In addition to these “sticks,” boards are using “carrots” by tying diversity metrics to executive compensation.²⁹ Board compensation committees are also amending their charters to explicitly address their oversight of corporate culture, which is tethered to diversity and inclusion.³⁰

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.³¹ While more opaque, even the private equity world is increasing its “social due diligence” before funding new ventures.³² Change is underway in the context of pay equity as well, with more companies conducting equal pay audits and addressing the gender pay gap.³³ Finally, an increasing number of companies are abandoning mandatory arbitration and NDAs, whether voluntarily or through regulation.³⁴ Taken together, these changes

Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *Nasdaq Pushes for Diversity in the Boardroom*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/business/dealbook/nasdaq-diversity-boards.html> [<https://perma.cc/U323-LPUE>]. In December of 2020, California became the first state in the nation to require companies listed or headquartered in California to have at least one board member from an underrepresented community on their board. See Jennifer B. Rubin, *California Seeks to Expand Its Board Diversity Mandate*, NAT’L L. REV. (Sept. 9, 2020), <https://www.natlawreview.com/article/california-seeks-to-expand-its-board-diversity-mandate> [<https://perma.cc/FS9K-R8CJ>].

²⁷ See *infra* Part V.B.

²⁸ See *infra* Part V.B.

²⁹ See *infra* Part V.B.

³⁰ See *infra* Part V.B.

³¹ See *infra* Part V.B. See generally Grace Maral Burnett, *Analysis: #MeToo Reps Becoming M&A Market Standard*, BLOOMBERG L. (June 25, 2019, 10:18 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-metoo-reps-becoming-m-a-market-standard> [<https://perma.cc/N8GC-HQVS>] (describing the use of “#MeToo Reps” in the language of M&A contracts).

³² See *infra* Part V.B; see also Joann S. Lublin, *Sexual-Harassment Scandals Are Reshaping CEO Searches*, WALL ST. J. (Dec. 27, 2017, 5:30 AM ET), <https://www.wsj.com/articles/sexual-harassment-scandals-are-reshaping-ceo-searches-1514370600> [<https://perma.cc/28Q2-DQST>].

³³ See *infra* Part V.B. See generally Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547 (2020) (discussing the history of the gender pay gap and offering a hopeful assessment of new legal reforms).

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

religion.³⁵ 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.³⁶

In the mid-1970s, feminist scholars had begun to define sexual harassment as sex discrimination.³⁷ In 1979, Catharine A. MacKinnon published the *Sexual Harassment of Working Women*, which influenced The Equal Employment Opportunity Commission's ("EEOC")³⁸ decision to advise employers to "take all steps necessary to prevent sexual harassment from occurring," which invariably included training programs.³⁹ 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 1986.⁴⁰ However, the Court failed to address when an employer could be held liable.⁴¹ 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.⁴² After *Meritor*, companies began to rely on their compliance programs in

³⁵ 42 U.S.C. § 2000e-2 (2018).

³⁶ See Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1211-12 (2007) [hereinafter *How to Stop Harassment*]; see also Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 965 (1998).

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).

⁴⁰ EDELMAN, *WORKING LAW*, *supra* note 5, at 61; see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-65 (1986).

⁴¹ See *id.* at 76-77.

⁴² See *id.* at 72-73; EDELMAN, *WORKING LAW*, *supra* note 5, at 202.

court filings.⁴³ As a 1986 article aptly summarized, “[c]ompany confusion and concern have spurred a growth industry in training videos, seminars and consultants.”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.⁴⁵

Although training and compliance programs became more prevalent during the 1980s and 1990s, the Supreme Court’s 1998 decision in the companion cases *Faragher v. Boca Raton* and *Burlington v. Ellerth*⁴⁶ have been credited for spurring their rapid proliferation.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.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 *Faragher- Ellerth* defense.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.”⁵⁰

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

⁴³ See EDELMAN, WORKING LAW, *supra* note 5, at 165-66.

⁴⁴ Dobbin & Kelley, *How to Stop Harassment*, *supra* note 36, at 1216.

⁴⁵ See *id.* at 1220.

⁴⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765-66 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

⁴⁷ See EDELMAN, WORKING LAW, *supra* note 5, at 207.

⁴⁸ *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 806-07.

⁴⁹ For a discussion of the *Faragher- Ellerth* defense, see EDELMAN, 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, *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).

⁵⁰ See Ellen McLaughlin & Carol Merchasin, *Training Becomes Important Step to Avoid Liability*, NAT’L L.J. (Jan. 29, 2001), https://www.seyfarth.com/dir_docs/publications/AttorneyPubs/McLaughlin.pdf [<https://perma.cc/CZ4R-SDUK>].

corporate pockets from the reach of victims.⁵¹ 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.”⁵² 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.⁵³ 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.⁵⁴ Corporate

⁵¹ See EDELMAN, WORKING LAW, *supra* note 5, at 98-99; Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July-Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/2ENT-J5ET>]; Lauren B. Edelman, *How HR and Judges Made It Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), <https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court> [<https://perma.cc/UWK9-9458>]. While compliance is particularly ill-suited for addressing the risk of sexual harassment, I have written elsewhere on how internal stakeholders can effectively leverage compliance programs to surface information to the board. See Stavros Gadinis & Amelia Miazard, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2147 (2019).

⁵² EDELMAN, WORKING LAW, *supra* note 5, at 12.

⁵³ LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 2-4 (1975); see Lauren B. Edelman & Shauhin A. Talesh, *To Comply or Not to Comply – that Isn’t the Question: How Organizations Construct the Meaning of Compliance*, in EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 103 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011); see also Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 833 (2019) (describing how “the #MeToo movement enlists private entities as agents of reform to both challenge — and ultimately replace — extant norms of sexual conduct”). See generally Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 37-39 (2019) (explaining the advantages of #MeToo’s extralegal procedures over traditional legal procedures). On the relationship between the #MeToo movement and the interpretation of current law on sexual harassment, see Catharine A. MacKinnon, *Where #MeToo Came From, and Where It’s Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/> [<https://perma.cc/432W-JYAB>].

⁵⁴ See, e.g., Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2751 (2014) (explaining how “demosprudence represents a philosophical commitment to the lawmaking force of meaningful participatory democracy”); Ro’ee Levy & Martin Mattsson, *The Effects of Social Movements: Evidence from #MeToo 25* (July 22, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496903 [<https://perma.cc/V9JB-XSU9>] (an empirical study which shows that “the MeToo movement had a substantial, persistent effect on the propensity to report sexual crimes”).

governance scholars have also recognized how social norms can influence the inner workings of companies.⁵⁵ 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.”⁵⁶

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,”⁵⁷ 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.”⁵⁸ 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.”⁵⁹

⁵⁵ See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1796-97 (2001); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1292 (1999). See generally Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (focusing on how Delaware courts influence corporate law rules and standards are generated and communicated to officers and directors); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1621 (2001) (examining recent developments in the theory of the firm and on the “law and norms” literature); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001) (exploring social norms and shaming sanctions in the corporate context).

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).

⁵⁷ EDELMAN, WORKING LAW, *supra* note 5, at 160-61.

⁵⁸ *Id.* at 3.

⁵⁹ U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at v (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [<https://perma.cc/UZQ6-WGA4>].

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.⁶⁰ Start-ups have begun to capitalize on this, parading newly-minted programs that feature more sophisticated technology.⁶¹ And consultants are busy peddling this growing suite of programs, which promise to achieve results through immersive experiences and more focus on bystander intervention.⁶² 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.⁶³

⁶⁰ E.g., Substitute S.B. 3, Pub. Act 19-16, 2019 Gen. Assemb., 2019 Sess. (Conn. 2019); S.B. 1111, Pub. Act 19-93, 2019 Gen. Assemb., 2019 Sess. (Conn. 2019) (which together constitute the *Time's Up Act*); H.B. 360, 149th Gen. Assemb., 2019 Sess. (Del. 2019); S.B. 1829, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); S.B. 1343, 2018 Leg., 2018 Sess. (Cal. 2018).

⁶¹ Examples include Vantage Point, which leverages virtual reality technology to “gamify” the experience and Spot, which allows reporting to be anonymous through a “chat-bot.” See SPOT, <https://talktospot.com/> (last visited Jan. 1, 2021) [<https://perma.cc/6TDA-WRK8>]; VANTAGE POINT, <https://www.tryvantagepoint.com/> (last visited Jan. 7, 2021) [<https://perma.cc/U9F9-6EBB>]; see also Gerry Smith, *Demand for Anti-Harassment Training Videos Surges in #MeToo Era*, BLOOMBERG (Mar. 13, 2018, 3:00 AM PDT), <https://www.bloomberg.com/news/articles/2018-03-13/better-call-hr-demand-for-training-videos-surges-in-metoo-era> [<https://perma.cc/R27S-JSL4>].

⁶² See Eddie Kim, *The Makers of Sexual Harassment Training Videos Say Business Is Booming After #MeToo*, MEL (Sept. 17, 2018), <https://melmagazine.com/en-us/story/the-makers-of-sexual-harassment-training-videos-say-business-is-booming-after-metoo> [<https://perma.cc/TJ7J-U3QJ>].

⁶³ There is robust social science and organizational theory literature on the impact of power on behavior, which this Article does not aim to review. See Dacher Keltner, *Sex, Power, and the Systems That Enable Men Like Harvey Weinstein*, HARV. BUS. REV. (Oct. 13, 2017), <https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein> [<https://perma.cc/5YWL-AVBR>].

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 Dépret & 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. 1450 (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).

⁶⁷ Mary Bennett, *Loss of Empathy: The “Me” Culture that Leads to the #MeToo Culture*, NAVEX GLOBAL RISK & COMPLIANCE MATTERS BLOG (June 12, 2018), <https://www.navexglobal.com/blog/article/loss-of-empathy-the-me-culture-that-leads-to-the-metoo-culture/> [https://perma.cc/7738-2TVA].

⁶⁸ DACHER KELTNER, *THE POWER PARADOX: HOW WE GAIN AND LOSE INFLUENCE* 102 (2016) [hereinafter *THE POWER PARADOX*].

⁶⁹ Dacher Keltner, *The Power Paradox*, GREATER GOOD SCI. CTR. (Dec. 1, 2007), https://greatergood.berkeley.edu/article/item/power_paradox [https://perma.cc/W864-UL6R].

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.⁷⁰ Power-holders also tend to display incivility and disrespect.⁷¹ Social psychologists have found that “people who feel powerful think and act fundamentally differently than people who feel less powerful.”⁷²

Wielding power also leads to “narratives of exceptionalism,” which makes abuses of power acceptable and even rational to the perpetrators.⁷³ Psychologists have found that making an individual feel uninhibited in relation to others breeds inappropriate behaviors like harassment.⁷⁴ 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”⁷⁵ in which powerful individuals are more likely to expect sexual interest, misread social cues, and make unwanted advances towards subordinates.⁷⁶

Other organizational theorists⁷⁷ 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)).

⁷³ *See* Tost, *supra* note 64, at 30 (first citing Cameron Anderson & Adam D. Galinsky, *Power, Optimism, and Risk Taking*, 36 *EUR. J. SOC. PSYCHOL.* 511 (2006)); Cameron Anderson et al., *The Personal Sense of Power*, 80 *J. PERSONALITY* 313 (2012).

⁷⁴ *See* Keltner, *THE POWER PARADOX*, *supra* note 68, at 130.

⁷⁵ Jonathan W. Kunstman & Jon K. Maner, *Sexual Overperception: Power, Mating Motives, and Biases in Social Judgment*, 100 *J. PERSONALITY & SOC. PSYCHOL.* 1, 2 (2010).

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.* 85 (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.”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.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.”⁸⁰ According to Schultz, sex segregation breeds sexism, which creates a hierarchy between men and women.⁸¹ Other theorists agree that sexism depends upon a valuation of masculine norms or characteristics and a devaluation of feminine norms.⁸² Thus, “targeting only sexual misconduct without addressing deeper institutional dynamics has serious shortcomings that risk undermining the broader quest for gender equality.”⁸³

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

⁷⁸ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. 17, 19 (2018) [hereinafter *Open Statement*].

⁷⁹ See, e.g., CATHARINE A. MACKINNON, 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, *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, *Reconceptualizing, Again*, *supra* note 6, at 49 (discussing the elimination of sex segregation as a necessary step to end harassment).

⁸⁰ Schultz, *Reconceptualizing, Again*, *supra* note 6, at 49.

⁸¹ See *id.* at 24.

⁸² See Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 648 (2007); Jennifer L. Berdahl, Marianne Cooper, Peter Glick, Robert W. Livingston & Joan C. Williams, *Work as a Masculinity Contest*, 74 J. SOC. ISSUES 422, 424-25 (2018). Sexism may also involve the pressure for men and women to adhere to stereotypical gender roles. See Kathryn Abrams, *New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1209 (1998) (citing Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1043-46 (1987)).

⁸³ See Schultz, *Open Statement*, *supra* note 78, at 44-45.

⁸⁴ See Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 155-56 (2007).

in sexual harassment.⁸⁵ Specifically, “women who work in places that are predominantly male report more instances of sexual harassment than women in more gender-balanced workplaces.”⁸⁶ 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.”⁸⁷

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 PERVADE 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.⁸⁸ Despite an enduring debate in corporate law about how much power the board of directors wields vis-

⁸⁵ Tamara Penix Sbraga & William O’Donohue, *Sexual Harassment*, 11 ANN. REV. SEX RES. 258, 265 (2000).

⁸⁶ *Id.* (citing Barbara A. Gutek et al., *Predicting Social-Sexual Behavior at Work: A Contact Hypothesis*, 33 ACAD. MGMT. 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)).

⁸⁸ See KOSMAS PAPADOPOULOS, ISS, U.S. BOARD DIVERSITY TRENDS IN 2019, at 1 (2019), <https://www.issgovernance.com/library/2019-us-board-diversity-trends/> [https://perma.cc/B269-TEUY].

à-vis management and investors, boards have formal oversight of corporate activity under Delaware Law.⁸⁹ The board's functions fall broadly under two categories, decision-making and risk monitoring or oversight.⁹⁰ Perhaps most importantly, boards hire, fire, and manage the CEO, a function which is magnified in times of crisis.⁹¹ 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.⁹² Norway leads the world with 42% of directorships held by women.⁹³ To be fair, Norway's relatively high percentage can be explained by its board diversity quota.⁹⁴ Still, the low percentage of women directors in

⁸⁹ See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . ."); see also Melvin Aron Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CALIF. L. REV. 375, 376 (1975); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 383 (2018) (discussing shareholders' limited "ability to constrain board actions"). But see Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0: An Introduction*, 74 BUS. L. 351, 353 (2019) (calling into question the power of the board by arguing that boards today are comprised of "thinly informed, under-resourced, and boundedly motivated" directors).

⁹⁰ *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (explaining that "[l]egally the board itself [is] required to authorize the most significant corporate acts or transactions: mergers, changes in capital structure, fundamental changes in business, appointment and compensation of the CEO, etc." and in the board's supervisory function, the board monitors those assigned to carry out its decisions); see Frank Partnoy, *Corporations and Human Life*, 40 SEATTLE U. L. REV. 399, 400 n.4 (2017) ("Many corporate law academics and practitioners divide the analysis of corporate law into two separate concepts: board decision-making and oversight.").

⁹¹ See John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191, 1198-1202 (2020) (discussing the increased role of the board in compliance as a result of corporate crises such as Enron and Wells Fargo, but concluding that "compliance is more often overlooked, rather than overseen, by boards").

⁹² Amit Batish, *Equilar Gender Diversity Index: Q3 2017*, EQUILAR (Nov. 8, 2017), <https://www.equilar.com/reports/52-gender-diversity-index-q3-2017> [<https://perma.cc/8FZK-WQ3T>] (providing data for the Russell 3000 index).

⁹³ KOSMAS PAPADOPOULOS, ROBERT KALB, ANGELICA VALDERRAMA & THOMAS BALOG, ISS, U.S. BOARD STUDY: BOARD DIVERSITY REVIEW 5 (2018), <https://www.issgovernance.com/file/publications/us-board-diversity-study.pdf> [<https://perma.cc/B9RA-GYE3>]; see also EGON ZEHNDER, 2020 GLOBAL DIVERSITY TRACKER: WHO'S REALLY ON BOARD? 22 (2020), <https://www.egonzehnder.com/global-board-diversity-tracker> [<https://perma.cc/6PU9-GYCQ>]; Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors—A Global Snapshot*, 37 J. CORP. L. 793, 803 (2012).

⁹⁴ AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 3 (2015) (discussing quotas for multiple countries); see

U.S. companies is surprising, particularly given the investment community's persistent claim that board diversity increases firm value.⁹⁵ As Part V describes, change is undeniably afoot as board diversity advocates celebrate numerous recent milestones.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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.⁹⁹

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 DEL. 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/8BVA-DV9J>].

⁹⁸ KOSMAS PAPADOPOULOS, ISS, *WOMEN IN THE C-SUITE: THE NEXT FRONTIER IN GENDER* (2018), <https://www.issgovernance.com/library/women-in-the-c-suite-the-next-frontier-in-gender-diversity/> [<https://perma.cc/P4J6-5C6K>].

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.¹⁰⁰ Notwithstanding the Equal Pay Act of 1963¹⁰¹ and the prohibition against pay discrimination in Title VII of the Civil Rights Act of 1964,¹⁰² women in the U.S. earned roughly 80 cents for every dollar earned by their male counterparts for similar work in 2018.¹⁰³ 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.¹⁰⁴

¹⁰⁰ See Ryan A. Smith, *Money, Benefits, and Power: A Test of the Glass Ceiling and Glass Escalator Hypotheses*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 149 (2012), <https://journals.sagepub.com/doi/full/10.1177/0002716211422038> [<https://perma.cc/KWQ5-ZEMS>] (exploring the intersection of racial and gender diversity to wage inequality). *But see* Zhen Zeng, *The Myth of the Glass Ceiling: Evidence from a Stock-Flow Analysis of Authority Attainment*, 40 SOC. SCI. RES. 312, 312 (2010) (arguing that disparities do not necessarily increase with movement up the authority hierarchy as the glass ceiling hypothesis implies). *See generally* David Anderson, Margrét V. Bjarnadóttir, Cristian Dezso & David Gaddis Ross, *Why Companies' Attempts to Close the Gender Pay Gap Often Fail*, HARV. BUS. REV. (Jan. 21, 2019), <https://hbr.org/2019/01/why-companies-attempts-to-close-the-gender-pay-gap-often-fail> [<https://perma.cc/6Y44-G8CJ>] (discussing approaches to minimizing the pay gap).

¹⁰¹ U.S. EQUAL EMP. OPPORTUNITY COMM'N, EQUAL PAY ACT OF 1963 AND LILLY LEDBETTER FAIR PAY ACT OF 2009 (2014) https://www.eeoc.gov/eeoc/publications/brochure-equal_pay_and_ledbetter_act.cfm (last visited Jan. 12, 2021) [<https://perma.cc/59SN-SFEE>].

¹⁰² 42 U.S.C. § 2000e-2 (2018).

¹⁰³ According to a Pew Research Center analysis of median hourly earnings for workers in the United States, in 2017, women earned 82% of what men earned. *See* Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, But Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 9, 2018), <http://leametz.pbworks.com/l/Gender%20pay%20gap%20has%20narrowed%2C%20but%20changed%20little%20in%20past%20decade.pdf> [<https://perma.cc/AXY5-PZZ2>]. The U.S. Census Bureau cites 80 cents on the dollar. Mary Leisenring, *Women Still Have to Work Three Months Longer to Equal What Men Earned in a Year*, U.S. CENSUS BUREAU (Mar. 31, 2020), <https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html> [<https://perma.cc/S9RG-B3AM>]. While there is a renewed debate on the gender pay gap and precisely how to calculate it, there is widespread agreement that the gender pay gap exists and is pervasive. For a literature review, see Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789 (2017); Lobel, *supra* note 33, at 5-9 (describing the gap as “sticky”); Katie Meara, Francesco Pastore & Allan Webster, *The Gender Pay Gap in the USA: A Matching Study*, 33 J. POPULATION ECON. 271 (2019).

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. ASS'N 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.¹⁰⁵ In addition, “pay secrecy” policies that prevent employees from sharing salary information obfuscate the very existence of a gendered pay gap.¹⁰⁶

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.¹⁰⁷ The ordinariness of these agreements in employment contracts in the U.S. has muffled their impact.¹⁰⁸ An incredible sixty million workers, which is more than half of non-union private-sector employees, have contracted away their right to litigation.¹⁰⁹

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 1924.¹¹⁰ 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

002.pdf [<https://perma.cc/9M6B-PNKY>]; Laura Bates, *Women Can’t Wait Until 2059 for Equal Pay*, TIME (Apr. 11, 2016 12:32 PM EDT), <https://time.com/4286884/women-cant-wait-for-equal-pay/> [<https://perma.cc/724E-LJRC>].

¹⁰⁵ See Lobel, *supra* note 33, at 22.

¹⁰⁶ *Id.* at 39.

¹⁰⁷ See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2014) (explaining how arbitration is used as a “substitute for adjudication”).

¹⁰⁸ ALEXANDER J.S. COLVIN, ECON. POL’Y INST., *THE GROWING USE OF MANDATORY ARBITRATION* 7 (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf> [<https://perma.cc/KVY4-7JEF>]; IMRE S. SZALAI & JOHN D. WESSEL, EMP. RIGHTS ADVOCACY INST. FOR LAW & POLICY, *THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA’S TOP 100 COMPANIES* (2018), <http://employeeightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf> [<https://perma.cc/VT66-RAFS>].

¹⁰⁹ See COLVIN, *supra* note 108, at 5.

¹¹⁰ *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 118 (1924).

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

¹¹¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

¹¹² *Circuit City Stores v. Adams*, 532 U.S. 105, 109 (2001).

¹¹³ See Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo and Time’s Up-Inspired Action Against the Federal Arbitration Act*, 87 *FORDHAM L. REV.* 2653, 2661-66 (2019).

¹¹⁴ See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 *HARV. C.R.-C.L. L. REV.* 155, 178 (2019).

¹¹⁵ See, e.g., Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, *MICROSOFT BLOG* (Dec. 19, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/> [<https://perma.cc/94QQ-WYBS>] (discussing Microsoft’s endorsement of a senate bill that addresses sexual harassment).

¹¹⁶ Exec. Order No. 13673, Fair Pay and Safe Workplaces. 79 *Fed. Reg.* 45309 (July 31, 2014).

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.¹¹⁸ 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.¹¹⁹ To be fair, these agreements may serve some laudable goals, including protecting the privacy of the victim.¹²⁰ 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.¹²¹ So much so that companies often struggle

¹¹⁸ See David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U.L. REV. 165, 220 (2019); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 234 (2018).

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).

¹²⁰ Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 77 (2018), <https://www.stanfordlawreview.org/online/targeting-repeat-offender-ndas/> [https://perma.cc/E2R3-L69W].

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. 1145, 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://clsbluesky.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.¹²² 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.¹²³ The “Big Three” asset managers — BlackRock, State Street, and Vanguard — collectively comprise the “Titans of Wall Street.”¹²⁴ By some estimates, they could end up controlling over half our capital markets by 2024, but even today their power is formidable.¹²⁵ 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 500.¹²⁶

¹²² See Flore Bridoux, Nicole Stofberg & Deanne Den, *Stakeholders’ Responses to CSR Tradeoffs: When Other-Orientation and Trust Trump Material Self-Interest*, 6 FRONTIERS PSYCHOL. 1 (2015) (discussing how stakeholders react to tradeoffs among stakeholder groups). See generally Scott J. Reynolds, Frank C. Schultz & David R. Hekman, *Stakeholder Theory and Managerial Decision-Making: Constraints and Implications of Balancing Stakeholder Interests*, 64 J. BUS. ETHICS 285 (2006) (finding that “indivisible resources and unequal levels of stakeholder saliency constrain managers’ efforts to balance stakeholder interests”); Deborah E. Rupp, Jyoti Ganapathi, Ruth V. Aguilera & Cynthia A. Williams, *Employee Reactions to Corporate Social Responsibility: An Organizational Justice Framework*, 27 J. ORGAN. BEHAV. 537 (2006) (addressing the “CSR” tradeoffs that managers must make in response to competing stakeholder interests).

¹²³ See Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), <https://hbr.org/2019/05/the-investor-revolution> [<https://perma.cc/S2BA-4HL7>]; Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 19-20 (2019).

¹²⁴ See Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 100-01 (2017); Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 299 (2017); see also Frank Partnoy, *Are Index Funds Evil?*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/are-index-funds-evil/534183/> [<https://perma.cc/E7B5-Q2QA>].

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

¹²⁶ See Sean J. Griffith & Dorothy S. Lund, *Conflicted Shareholder Voting in the Age of Intermediated Capitalism* 4 (Nov. 12, 2018) (unpublished manuscript), https://ecgi.global/sites/default/files/working_papers/documents/griffithlundconflictedsha

Before turning to the specific reforms that these titans are seeking, it is important to understand how passive investors flex their power.¹²⁷ 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.¹²⁸

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."¹²⁹ 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

reholdervotinginageofintermediatedcapitalismnov122018.pdf [https://perma.cc/8YCM-UN9Q].

¹²⁷ For a discussion of engagement on ESG issues, see Stavros Gadinis & Amelia Miazad, *Sustainability in Corporate Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 24, 2019), <https://corpgov.law.harvard.edu/2019/09/24/sustainability-in-corporate-law/> [https://perma.cc/ABC4-2G EK] (arguing that engagement has become a defining feature of corporate governance in our era.); Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 832-34; F. William McNabb III, *Getting to Know You: The Case for Significant Shareholder Engagement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 24, 2015), <https://corpgov.law.harvard.edu/2015/06/24/getting-to-know-you-the-case-for-significant-shareholder-engagement/> [https://perma.cc/SD5K-TV44]; Andreas G.F. Hoepner, Ioannis Oikonomou, Zacharias Sautner, Laura T. Starks & Xiao Y. Zhou, *ESG Shareholder Engagement and Downside Risk 1* (Apr. 2020) (unpublished manuscript), <https://ssrn.com/abstract=2874252> [https://perma.cc/K6X3-QKUR] (finding that engagement on ESG issues by directors, including diversity, reduces downside risk).

¹²⁸ See Gadinis & Miazad, *supra* note 51.

¹²⁹ See Taraporevala, *supra* note 13.

the charging bull on Wall Street.¹³⁰ 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.¹³¹ Predictably, the campaign was both celebrated and criticized. Some critics called it “corporate feminism,” while others referred to it as “a marketing coup.”¹³² 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.¹³³ 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.¹³⁴

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.¹³⁵ 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.”¹³⁶

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:

¹³⁰ See Nel-Olivia Waga, *International Women’s Day 2017: Wall Street Meets ‘The Fearless Girl,’* FORBES (Mar. 7, 2017, 5:27 PM EST), <https://www.forbes.com/sites/neloliviawaga/2017/03/07/international-womens-day-2017-wall-street-meets-the-fearless-girl/?sh=2d0d6b5535b1> [https://perma.cc/YK2N-BQ6Y].

¹³¹ See Sandra E. Garcia, ‘Fearless Girl’ Statue Finds a New Home: At the New York Stock Exchange, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/nyregion/fearless-girl-statue-stock-exchange-.html> [https://perma.cc/AB8K-J8RQ].

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Justin Baer, *State Street Votes Against 400 Companies Citing Gender Diversity*, WALL ST. J. (July 25, 2017, 8:38 PM ET), <https://www.wsj.com/articles/state-street-votes-against-400-companies-citing-gender-diversity-1501029490> [https://perma.cc/HAST-FUWM].

¹³⁵ Andrea Vittorio & Jeff Green, *State Street to Vote Against More Directors at Male-Only Boards*, BLOOMBERG (Sept. 27, 2018, 6:00 AM PDT), <https://www.bloomberg.com/news/articles/2018-09-27/state-street-to-vote-against-more-directors-at-male-only-boards> [https://perma.cc/GW5X-WVCG].

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.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.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.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.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**

¹³⁷ STEWARDSHIP REPORT 2018-19, STATE ST. GLOBAL ADVISORS 3 (2019), <https://www.ssga.com/library-content/products/esg/annual-asset-stewardship-report-2018-19.pdf> [<https://perma.cc/JR9D-ZL6P>].

¹³⁸ Larry Fink, *Purpose & Profit*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 23, 2019), <https://corpgov.law.harvard.edu/2019/01/23/purpose-profit/> [<https://perma.cc/H6MA-5UFG>]; see BLACKROCK, 2019 INVESTMENT STEWARDSHIP ANNUAL REPORT 12 (2019), <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2019.pdf> [<https://perma.cc/VJ46-QPUR>].

¹³⁹ *Id.*

¹⁴⁰ *See id.*

- **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).

¹⁴² VANGUARD, INVESTMENT STEWARDSHIP 2019 ANNUAL REPORT 18 (2019), https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf [<https://perma.cc/6DA8-5RWJ>].

¹⁴³ David Ricketts & Chris Newlands, *Vanguard and Fidelity Link Pay to Gender Diversity Targets*, FINANCIAL NEWS (Dec. 11, 2018, 3:24 PM), <https://www.fnlondon.com/articles/vanguard-and-fidelity-tie-pay-to-female-representation-20181210> [<https://perma.cc/ZJ5R-LR5M>].

¹⁴⁴ See James Langton, *Sexual Harassment a Due-Diligence Issue*, INVESTMENT EXEC. (Dec. 6, 2019), <https://www.investmentexecutive.com/news/research-and-markets/sexual-harassment-a-due-diligence-issue/> [<https://perma.cc/CB33-ZRFE>].

¹⁴⁵ *Trustees United for Long-Term Value*, TRS. UNITED (2020), <https://www.trusteesunited.com/> [<https://perma.cc/2ABU-SEVL>].

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.”¹⁴⁷

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.”¹⁴⁸ 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.¹⁴⁹ Principle 2 blames contractual clauses, such as NDAs and forced arbitration clauses, for perpetuating harassment.¹⁵⁰ 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.”¹⁵¹ 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.”¹⁵² Notably, Principle 4 explicitly refers to power imbalances, a term which the Trustees debated in the drafting process.¹⁵³ 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.¹⁵⁴

<https://www.trusteesunited.com/Home/News> [<https://perma.cc/BAX4-QYAU>] [hereinafter *Institutional Investor*].

¹⁴⁷ 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>].

¹⁴⁸ TRS. UNITED, *Institutional Investor*, *supra* note 146.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See infra* Appendix A: Interview Participants, Interview with Anne Simpson, Managing Investment Director, Board Governance & Sustainability, CalPERS.

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.¹⁵⁵ In their 2019 Proxy Voting Guidelines both announced that they would recommend voting against nominating committee chairs on boards with no women directors.¹⁵⁶ While ISS changed its approach to using gender diversity as a factor for vote recommendations on the heels of the #MeToo movement,¹⁵⁷ Glass Lewis has been more explicit in linking #MeToo to its vote recommendations on diversity and the gender pay gap.¹⁵⁸ 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.¹⁵⁹

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

¹⁵⁵ ISS and Glass Lewis Policy Updates for the 2020 Proxy Season, SIDLEY (Nov. 18, 2019), <https://www.sidley.com/en/insights/newsupdates/2019/11/iss-and-glass-lewis-policy-updates-for-the-2020-proxy-season> [https://perma.cc/SZT2-Y9DR].

¹⁵⁶ ISS, AMERICAS PROXY VOTING GUIDELINES UPDATES FOR 2021: BENCHMARK POLICY CHANGES FOR U.S., CANADA, AND LATIN AMERICA 5 (2020), <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf> [https://perma.cc/45V8-QMPA].

¹⁵⁷ See Bradley Keoun, *All-Male Boards Could Face New Pressure from Shareholder Adviser ISS*, STREET (Sept. 19, 2018, 12:16 PM EDT), <https://www.thestreet.com/investing/all-male-boards-could-face-new-pressure-from-shareholder-adviser-iss-14716455> [https://perma.cc/8LRQ-J98Z].

¹⁵⁸ See MARTIN MORTELL, GLASS LEWIS, 2018 PROXY SEASON PREVIEW – UNITED STATES 5 (2018), <https://www.glasslewis.com/wp-content/uploads/2018/03/2018-Proxy-Season-Preview-US.pdf> [https://perma.cc/D7XC-WRP6].

¹⁵⁹ See *infra* Appendix A, Interview Participants, Interview with Courteney Keatinge, Senior Director, Environmental, Social & Governance Research, Glass Lewis & Co.

of sexual harassment.¹⁶⁰ 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.”¹⁶¹ Investors have long used them to address excessive executive compensation and the election of independent directors.¹⁶² Today they are also a favorite tool among investors who want to encourage reforms on ESG issues.¹⁶³ The number of shareholder proposals on ESG topics has more than doubled over the past decade.¹⁶⁴ 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.¹⁶⁵ The number of shareholder proposals addressing diversity and

¹⁶⁰ See Alistair Gray & Anna Nicolaou, *US Companies Face Shareholder Votes Over #MeToo Concerns*, FIN. TIMES (Apr. 29, 2019), <https://www.ft.com/content/d37e8638-6882-11e9-9adc-98bf1d35a056> [<https://perma.cc/SD9H-DH7V>].

¹⁶¹ 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).

¹⁶² 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/0ee87bda7cc84b59824d6c786cff39b5.ashx> [<https://perma.cc/X483-2UU5>].

¹⁶³ See Erwin Eding & Bert Sholtens, *Corporate Social Responsibility and Shareholder Proposals*, 24 CORP. SOC. RESP. ENVTL. MGMT. 648, 648 (2017); James E. Langston, *Shareholder Activism in 2020: New Risks and Opportunities for Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 24, 2020), <https://corpgov.law.harvard.edu/2020/01/24/shareholder-activism-in-2020-new-risks-and-opportunities-for-boards/> [<https://perma.cc/W4BD-DBVK>]; Peter Reali & Anthony Garcia, *Proxy Season Rising Demand for Board Oversight of ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 11, 2019), <https://corpgov.law.harvard.edu/2019/09/11/proxy-season-rising-demand-for-board-oversight-of-esg/> [<https://perma.cc/XC8N-YFUL>].

¹⁶⁴ See Reali & Garcia, *supra* note 163.

¹⁶⁵ See Ian Croce, *Proxy Season Data Show Big Increase in Accommodation*, PENSIONS & INVS. (Sept. 2, 2019, 12:00 AM), <https://www.pionline.com/esg/proxy-season-data-show-big-increase-accommodation> [<https://perma.cc/5JSQ-SXZY>] (“The goal of a resolution is to influence a given company to change its policy and actions . . . That’s

the gender pay gap has increased over the past two years.¹⁶⁶ 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.¹⁶⁷ Importantly, proposals relating to gender pay equity had the highest withdrawal rate of any category in 2018.¹⁶⁸ 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.”¹⁶⁹

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.¹⁷⁰ 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%.¹⁷¹ Six more followed Citi’s lead, including American Express, Bank of America, Bank of New York Mellon, Citigroup, JPMorgan, Mastercard, and Wells Fargo.¹⁷²

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

¹⁶⁶ See David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/> [https://perma.cc/3LWS-CPRP].

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.”).

¹⁶⁸ *Id.*; see NATASHA LAMB & MICHAEL PASSOFF, GENDER PAY SCORECARD 6 (2d ed. 2019), <https://arjuna-capital.com/wp-content/uploads/2019/04/Gender-Pay-Scorecard-2019.pdf> [https://perma.cc/E5KC-L9KP].

¹⁶⁹ SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW 9 (2018), <https://pcg.law.harvard.edu/wp-content/uploads/2018/03/a1-2018-Proxy-Season-Review.pdf> [https://perma.cc/D8FK-AQ23].

¹⁷⁰ See Press Release, Natasha Lamb, Managing Partner, Arjuna Capital, 12 U.S. Banks and Tech Giants Targeted with “Median Gender Pay Gap” Shareholder Proposal (Feb. 13, 2019), <http://arjuna-capital.com/news/press-release-12-u-s-banks-and-tech-giants-targeted-with-median-gender-pay-gap-shareholder-proposal/> [https://perma.cc/9PG8-Y42Q].

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

¹⁷³ Sarah Barry James, *From Hollywood to Wall Street, Investors Confront Sexual Misconduct Risk*, S&P GLOBAL (Mar. 6, 2018, 1:41 PM ET), <https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=43771908&cdid=A-43771908-13093> [<https://perma.cc/5G6E-ZP9V>].

¹⁷⁴ See Matthew Kish, *Nike Agrees to Work with Investment Firm on Diversity Efforts*, PORTLAND BUS. J. (Sept. 20, 2018, 3:57 PM EDT), <https://www.bizjournals.com/portland/news/2018/09/20/nike-agrees-to-work-with-investment-firm-on.html>. [<https://perma.cc/6RSN-9KM7>].

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.

¹⁷⁸ See, e.g., *id.* at 1641-58 (discussing the potential for successful shareholder actions against corporations and corporate fiduciaries following revelations of sexual misconduct); see also Kevin M. LaCroix, *Alphabet Board Hit with Derivative Suits over Alleged Sexual Misconduct at Google*, D&O DIARY (Jan. 13, 2019), <https://www.dandodiary.com/2019/01/articles/director-and-officer-liability/alphabet-board-hit-derivative-suits-alleged-sexual-misconduct-google/> [<https://perma.cc/D7HQ-X74L>]; Kevin M. LaCroix, *Nike Board Hit with Sexual Misconduct-Related Derivative Suit*, D&O DIARY (Oct. 30, 2019), <https://www.dandodiary.com/2018/10/articles/director-and-officer-liability/nike-board-hit-sexual-misconduct-related-derivative-suit/> [<https://perma.cc/QY5H-EMKY>]; Kevin M. LaCroix, *Yet Another D&O Claim Arising out of Revelations of Sexual Misconduct*, D&O DIARY (Aug. 30, 2018), <https://www.dandodiary.com/2018/08/articles/securities-litigation/yet-another-claim-arising-revelations-sexual-misconduct/> [<https://perma.cc/S5SD-FAUS>].

playing out in the background. As elucidated in Appendix B,¹⁷⁹ 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.¹⁸⁰ The first four pre-dated the #MeToo movement and were brought against directors and officers of ICN Pharmaceuticals in 2001,¹⁸¹ American Apparel in 2011,¹⁸² Hewlett-Packard in 2012,¹⁸³ and CTPartners in 2015.¹⁸⁴ 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.¹⁸⁵ 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’Reilly¹⁸⁶ begins: “This case arises from the systematic, decades-long culture of sexual harassment”¹⁸⁷ 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.

¹⁸¹ See *White v. Panic* (Panic I), 793 A.2d 356, 358-59 (Del. Ch. 2000), *aff’d*, 783 A.2d 543 (Del. 2001).

¹⁸² See *In re Am. Apparel, Inc. S’holder Derivative Litig.*, No. CV 10-06352, 2014 WL 10212865, at *1, (C.D. Cal. July 28, 2014).

¹⁸³ See Second Amended Complaint at 1-7, *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, No. 12-CV-04115 (N.D. Cal. Sept. 9, 2013); Complaint at 2-4, *Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.*, No. 12-CV-04115 (N.D. Cal. Aug. 3, 2012).

¹⁸⁴ See Amended Complaint at 1-6, *Lopez v. CTPartners Exec. Search Inc.*, No. 15-cv-01476 (S.D.N.Y. June 15, 2015); Complaint at 1-4, *Zinno v. CTPartners Exec. Search Inc.*, No. 15-cv-01476 (S.D.N.Y. Feb. 27, 2015).

¹⁸⁵ See *infra* Appendix B.

¹⁸⁶ See Verified Derivative Complaint at 1-7, *City of Monroe Emps.’ Ret. Sys. v. Murdoch*, No. 2017-0833 (Del. Ch. Nov. 20, 2017) [hereinafter *Murdoch Complaint*].

¹⁸⁷ *Id.* at 2.

Sexual Harassment at Fox News”¹⁸⁸ and the phrase “culture of sexual harassment” or “toxic culture” appears in the complaint *thirty-four times*.¹⁸⁹ 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.”¹⁹⁰

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.”¹⁹¹ 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.”¹⁹² Also in 2018, shareholders of Nike filed a derivative action alleging that the board violated its fiduciary duties.¹⁹³ 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.”¹⁹⁴ 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.”¹⁹⁵ 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.¹⁹⁶

¹⁸⁸ See *id.* at 11.

¹⁸⁹ See generally *id.* at 1-76.

¹⁹⁰ *Id.* at 49.

¹⁹¹ See Fifth Amended Class Action Complaint at 61, *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728 (S.D.N.Y. Mar. 22, 2018) [hereinafter Signet Jewelers Complaint].

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 complaint¹⁹⁹ 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 Tax²⁰³ 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

¹⁹⁷ Verified Stockholder Derivative Complaint at 1, N. Cal. Pipe Trades Pension Plan v. Hennessey, No. 19-CIV-00149 (Cal. Super. Ct. Jan. 9, 2019).

¹⁹⁸ *Id.* at 3.

¹⁹⁹ Verified Stockholder Derivative Complaint, Shabbouei v. Potdevin, No. 2018-0847 (Del. Ch. 2020).

²⁰⁰ *Id.* at 2.

²⁰¹ See Class Action Complaint at 16, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Aug. 27, 2018).

²⁰² Amended Complaint at 1-70, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Feb. 11, 2019).

²⁰³ Verified Stockholder Derivative Complaint, Asbestos Workers’ Phila. Pension Fund *ex rel.* Liberty Tax, Inc. v. Hewitt, No. 2017-0883 (Del. Ch. Dec. 11, 2017).

²⁰⁴ Class Action Complaint, Luczak v. Nat’l Beverage Corp., No. 0:18-cv-61631-KMM (S.D. Fla. July 17, 2018).

²⁰⁵ See *infra* Appendix B.

²⁰⁶ Constr. Laborers Pension Tr. for S. Cal. v. CBS Corp., 433 F. Supp. 3d 515, 548 (S.D.N.Y. 2020) (emphasis added).

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.²⁰⁷ There are a number of factors that could be contributing to this rising culture of “workism.”²⁰⁸ 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”).²⁰⁹

Many CEOs are responding to this calling, embracing their new role as “the moral voice of corporate America.”²¹⁰ 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.”²¹¹ 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.²¹²

²⁰⁷ Derek Thompson, *Workism Is Making Americans Miserable*, ATLANTIC (Feb. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441> [<https://perma.cc/49DR-NE2K>].

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

²⁰⁹ See *2019 Edelman Trust Barometer Reveals “My Employer” Is the Most Trusted Institution*, EDELMAN (Jan. 20, 2019), <https://www.edelman.com/news-awards/2019-edelman-trust-barometer-reveals-my-employer-most-trusted-institution> [<https://perma.cc/56QT-CQVL>].

²¹⁰ Gelles, *supra* note 97.

²¹¹ See Larry Fink, *Larry Fink’s 2019 Letter to CEOs: Profit & Purpose*, BLACKROCK, <https://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter> (last visited Dec. 30, 2020) [<https://perma.cc/6KYE-K539>].

²¹² See Todd Bishop & Monica Nickelsburg, *An Employee on Microsoft’s Board? Shareholder Proposal Floats Concept, Board Calls it “Unnecessary,”* GEEKWIRE (Oct. 16, 2019, 4:48 PM), <https://www.geekwire.com/2019/employee-microsofts-board-shareholder-proposal-floats-concept-board-calls-unnecessary/> [<https://perma.cc/ZJP9-3B7Y>]; see also Leo E. Strine Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America’s Future* 4-8 (Univ. of Pa. Law Sch. Inst. for Law. & Econ., Research Paper No. 19-39, 2019), <https://ssrn.com/abstract=3461924> [<https://perma.cc/9WSM-C3SW>] (proposing corporate reforms to promote fairness). See generally Ewan McGaughey, *Democracy in America at Work: The History of Labor’s Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697 (2019) (arguing for co-determination and worker representation on boards in America).

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.²¹³ 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.²¹⁴ While lawmakers are still interested in compliance-related reforms, their focus has shifted towards addressing the power imbalances described in Part III.²¹⁵

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.²¹⁶ 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., Tippet, *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.

²¹⁶ *Certain Payments Related to Sexual Harassment and Sexual Abuse*, IRS, <https://www.irs.gov/newsroom/certain-payments-related-to-sexual-harassment-and-sexual-abuse> (last updated Jan. 22, 2021) [<https://perma.cc/FM6Z-DFF3>].

of sexual harassment.²¹⁷ 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.²¹⁸ 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.”²¹⁹

To address this “monopoly of power” the Act purposes several reforms, including ending the use of non-disparagement and NDAs in employment agreements.²²⁰ With respect to mandatory disclosure, another bill is focused on requiring the disclosure of “human capital management.”²²¹

State and local legislatures are not standing by idly — a recent study estimates that over 200 new bills have been passed since #MeToo.²²² For example, six states have either enacted or are considering legislation mandating or encouraging more women on boards.²²³ There are also seventeen new state-wide bans and twenty local bans that prohibit employers from asking about salary history,²²⁴ and there is a growing number of laws that ban or limit mandatory arbitration and NDAs in cases of sexual harassment.²²⁵ With respect to board diversity mandates

²¹⁷ Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. § 402(a) (2017).

²¹⁸ EMPOWER Act, H.R. 1521, 116th Cong. (2019).

²¹⁹ REP. LOIS FRANKEL, THE EMPOWER ACT 1 (2018), https://frankel.house.gov/uploadedfiles/empower_act_-_summary.pdf [<https://perma.cc/TNJ5-4AC2>] (emphasis added).

²²⁰ H.R. 1521 § 103(a)(1).

²²¹ Workforce Investment Disclosure Act of 2020, H.R. 5930 116th Cong. (2020).

²²² Press Release, Nat’l Women’s Law Ctr., Fifteen States Have Passed New Laws Protecting Workers from Sexual Harassment in Wake of #MeToo, NWLC Report Reveals (July 25, 2019), <https://nwlc.org/press-releases/fifteen-states-have-passed-new-laws-protecting-workers-from-sexual-harassment-in-wake-of-metoo-nwlc-report-reveals/> [<https://perma.cc/TV9R-SNPS>].

²²³ See Felix von Meyerinck, Alexandra Niessen-Ruenzi, Markus Schmid & Steven Davidoff Solomon, *As California Goes, So Goes the Nation? Board Gender Quotas and the Legislation of Non-Economic Values* 18-19 (Univ. of St. Gallen Sch. of Fin., Working Paper No. 1904, 2020), <https://ssrn.com/abstract=3303798> [<https://perma.cc/CX4C-AY4Q>].

²²⁴ *Salary History Bans*, HR DIVE, <https://www.hrdiver.com/news/salary-history-ban-states-list/516662/> (last updated Aug. 7, 2020) [<https://perma.cc/S86K-MH47>] (offering a running list of states and localities that have outlawed pay history questions).

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.”²²⁶

D. Regulatory Monitors²²⁷

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.²²⁸ Recently, even the EEOC acknowledged the limitations of sexual harassment training programs given that they are focused on preventing legal liability rather than harassment.²²⁹ 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*.²³⁰ 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.”²³¹ 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

²²⁶ Jill Fisch & Steven Davidoff Solomon, *Centros, California’s “Women on Boards” Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493, 512 (2019). More recently and in light of the movement against racial injustice, California has passed a bill requiring racial diversity on boards. Assemb. B. 979, 2020 Leg., Reg. Sess. (Cal. 2020).

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).

²²⁸ *Timeline of Important EEOC Events*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/timeline-important-eeoc-events> (last visited Feb. 14, 2021) [<https://perma.cc/7HMB-RP76>].

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.

²⁴² *See* Press Release, U.S. Sec. & Exch. Comm’n, SEC Proposes to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 8, 2019), <https://www.sec.gov/news/press-release/2019-148> [<https://perma.cc/4A4A-XZK8>].

view of the materiality of ESG disclosure.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.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."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"²⁴⁶

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.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.²⁴⁸ According to the

²⁴³ See Preston Brewer, *Analysis: Tracking SEC's Evolving Approach to ESG Disclosures*, BLOOMBERG LAW (Nov. 4, 2019, 3:39 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-tracking-secs-evolving-approach-to-esg-disclosures> [<https://perma.cc/BQ68-VHX5>].

²⁴⁴ See Letter from the Human Capital Management Coalition, to William Hinman, Dir., Sec. & Exch. Comm'n Div. Corp. Fin. 1 (July 6, 2017), <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf> [<https://perma.cc/WT6D-H9LY>].

²⁴⁵ *Id.*

²⁴⁶ See *id.* at 21.

²⁴⁷ See *infra* Appendix A: Interview Participants, Interview with Richard Betterley, Insurance Expert.

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.”²⁴⁹ 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 \$500,000.²⁵⁰ Betterley expects this trend to continue.²⁵¹

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.²⁵² According to Betterley, the #MeToo movement marks a clear departure from the “check the box” approach that insurers previously favored.²⁵³

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.”²⁵⁴ Some insurers are requiring higher self-insured retentions in certain industries, and others are going so far as to exclude entire industries.²⁵⁵ 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 2019.²⁵⁶

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

BETTERLEY RISK CONSULTANTS, INC., EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2017: SEXUAL HARASSMENT CLAIMS CONCERNS CONTINUE — INSURERS RESPOND (2017).

²⁴⁹ BETTERLEY, 2018 SURVEY, *supra* note 248, at 4-5.

²⁵⁰ See BETTERLEY, 2019 SURVEY, *supra* note 248, at 6.

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.”²⁵⁷ 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.”²⁵⁸ Corporate counsel in the technology industry have also confirmed that in 2018 D&O carriers began asking about diversity and gender pay gap metrics.²⁵⁹ As Rob Chesnut, Chief Ethics Officer of Airbnb recently noted, “[f]ive years ago, culture, diversity, and integrity didn’t come up in meetings. Now, it’s a significant part of the discussion.”²⁶⁰

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”²⁶¹ and advocating for a “new paradigm”²⁶² in which boards oversee “corporate equality.”²⁶³ This so-called corporate equality encompasses “sexual harassment, corporate culture, gender pay equity, and gender diversity.”²⁶⁴ Wachtell warns that “the cultural context of the current #MeToo movement”²⁶⁵ makes ignoring shareholder proposals on corporate equality issues far too risky.²⁶⁶ 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 Cheria Huskins, Woodruff Sawyer; see also Priya Cheria Huskins, *#MeToo and the Boardroom*, WOODRUFF SAWYER (June 27, 2018), <https://woodrufflaw.com/do-notebook/me-too-boardroom/> [<https://perma.cc/NV25-GDC4>].

²⁵⁸ See Kelly Bryant Thorig, Pamela S. Palmer & Susan K. Lessack, *#MeToo: Is Your Company Covered?*, TROUTMAN PEPPER (Nov. 1, 2018), <https://www.pepperlaw.com/publications/metoo-is-your-company-covered-2018-11-27/> [<https://perma.cc/ZM5A-KWWE>].

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.

²⁶¹ See Martin Lipton, *It’s Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/> [<https://perma.cc/53TM-2FJH>].

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

²⁶⁷ Amy Bowerman Freed & J. Nicholas Hoover, *Avoiding a Toxic Culture: 10 Changes Companies Can Make Now to Address #MeToo*, C-SUITE: AN EQUILAR PUBL'N (July 30, 2019), https://csuite.equilar.com/issue_30_summer_2019/avoiding_a_toxic_culture.html [<https://perma.cc/JG2K-ZRGM>]; see also *#MeToo Movement's Impact on Nondisclosure Agreements or Clauses Covering Sexual Harassment*, HOGAN LOVELLS (Apr. 9, 2018), <https://www.hoganlovells.com/en/publications/metoo-movements-impact-on-nondisclosure-agreements-or-clauses-covering-sexual-harassment> [<https://perma.cc/5LC4-E5ZB>].

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.

²⁷¹ See Laurie Hays, *The Board, CEO Misconduct, and Corporate Culture*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 12, 2019), <https://corpgov.law.harvard.edu/2019/01/12/the-board-ceo-misconduct-and-corporate-culture/> [<https://perma.cc/2SAM-QLBQ>]; Jose R. Rodriguez & Susan M. Angele, *Sharpening Risk Oversight in the #MeToo Era*, KPMG (2018), <https://boardleadership.kpmg.us/relevant-topics/articles/2018/sharpening->

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

risk-oversight-in-the-me-too-era.html [https://perma.cc/2S4V-BH25] (advising that “the audit committee should add a #MeToo lens to its role in assisting the board in monitoring compliance”).

²⁷² Hays, *supra* note 271.

²⁷³ See Fowler, *supra* note 9.

²⁷⁴ See *id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

thousands of users.²⁷⁷ Perhaps in an attempt to boost morale, Uber's founder and CEO Travis Kalanick responded the next day with three promises to employees.²⁷⁸ 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.²⁷⁹ Covington would look beyond Fowler's allegations to "diversity and inclusion at Uber more broadly."²⁸⁰ 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.²⁸¹ Third, Uber would finally publish a diversity report, something that it had resisted.²⁸² 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.²⁸³ Two months later, Uber brought on Frances Frei as a Senior Vice President of Leadership and

²⁷⁷ See Mike Isaac, *What You Need to Know About #DeleteUber*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/business/delete-uber.html> [<https://perma.cc/59YZ-C8X5>]; Faiz Siddiqui, *#DeleteUber Will Have Lasting Fallout for Ride-Hailing App, Study Says*, WASH. POST (May 15, 2017, 9:01 PM PDT), <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/05/16/deleteuber-will-have-lasting-fallout-for-ride-hailing-app-study-says/> [<https://perma.cc/8H4H-3WFL>]. See generally MIKE ISAAC, *SUPER PUMPED: THE BATTLE FOR UBER* 96-97 (2019) (discussing the rise of Uber and stating that Uber customers using the app approximately 2.7 times became customers for life).

²⁷⁸ Sam Shead, *Uber CEO Launches 'Urgent Investigation' and Sends Company-Wide Memo After Former Engineer Alleges Sexual Harassment*, BUS. INSIDER (Feb. 20, 2017, 3:22 PM), <https://www.businessinsider.com/uber-ceo-travis-kalanick-pledges-urgent-investigation-sexual-harassment-after-susan-fowler-blog-post-2017-2> [<https://perma.cc/494E-Q59N>].

²⁷⁹ See Craig Timberg & Elizabeth Dwoskin, *Uber Fires 20 Employees as Part of Harassment Investigation*, WASH. POST (June 6, 2017, 1:57 PM), <https://www.washingtonpost.com/news/the-switch/wp/2017/06/06/uber-fires-more-than-20-employees-as-part-of-sexual-harassment-investigation/> [<https://perma.cc/GRP5-2YMS>].

²⁸⁰ COVINGTON & BURLINGTON, *RECOMMENDATIONS TO SPECIAL COMMITTEE OF THE UBER BOARD OF DIRECTORS 1* (2017), <https://www.scribd.com/document/351184653/Covington-Recommendations-Uber> [<https://perma.cc/9KQV-QPDT>] [hereinafter THE HOLDER REPORT].

²⁸¹ See *id.* at 9.

²⁸² See *id.* at 7.

²⁸³ Carolyn Said, *Uber's First Diversity Report Shows Male, White, Asian Dominance*, SF GATE (Mar. 28, 2017), <https://www.sfgate.com/business/article/Uber-s-first-diversity-report-shows-male-11033515.php> (last updated Mar. 29, 2017, 7:23 AM) [<https://perma.cc/PV65-5786>].

Strategy.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶ This internal investigation culminated in the “Holder Report,” the recommendations of which the board agreed to adopt in full.²⁸⁷

While the entirety of the Holder Report remains confidential, Uber published thirteen pages of recommendations on June 13, 2017.²⁸⁸ 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”).²⁸⁹ 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

²⁸⁴ Polina Marinova, *Uber Hires Harvard Professor to Help Embattled CEO Be a Better Leader*, FORTUNE (June 5, 2017, 3:52 PM PDT), <https://fortune.com/2017/06/05/uber-hires-harvard-leadership/> [https://perma.cc/6SGU-HUSG].

²⁸⁵ See Oliver Staley & Alison Griswold, *Uber Has Fired 20 Employees After Investigating Hundreds of Misconduct Allegations*, QUARTZ (June 6, 2017), <https://qz.com/999977/by-firing-20-employees-uber-is-finally-getting-serious-about-fixing-its-culture/> [https://perma.cc/DW5W-JJBF].

²⁸⁶ THE HOLDER REPORT, *supra* note 280, at *Introduction*; see also Polina Marinova, *10 Things You Need to Know from Eric Holder’s Uber Report*, FORTUNE (June 13, 2017, 11:09 AM PDT), <http://fortune.com/2017/06/13/uber-internal-investigation-results-public/> [https://perma.cc/WME3-ZVS6]; Oliver Staley, *The Official Recommendations for Reforming Uber Describe the Perfect Modern Company*, QUARTZ (June 14, 2017), <https://qz.com/1005316/eric-holders-recommendations-for-uberdescribe-the-perfect-moderncompany/> [https://perma.cc/T3SD-8YSS].

²⁸⁷ Letter from Benchmark to Uber Employees (Aug. 14, 2017), <https://online.wsj.com/public/resources/documents/BenchmarkUberLetter08142017.pdf> [https://perma.cc/VTG4-L355]; see also Kevin Kelleher, *Benchmark Pens Open Letter to Win Over Uber Employees*, VENTUREBEAT (Aug. 14, 2017), <https://venturebeat.com/2017/08/14/benchmark-pens-open-letter-to-win-over-uber-employees/> [https://perma.cc/M2C6-MS8G].

²⁸⁸ See THE HOLDER REPORT, *supra* note 280, at 1-13.

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.²⁹⁰ 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.”²⁹¹ 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.²⁹² But Khosrowshahi opted to hire Bo Young Lee, a woman as its first Chief Diversity and Inclusion Officer.²⁹³ Reflecting the importance of diversity to Khosrowshahi, this was his *third* executive hire at Uber.²⁹⁴ Following Lee’s hire, Uber chose to set the “audacious” goal of making Uber the “most diverse, equitable, and inclusive workplace on the planet.”²⁹⁵

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 in 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.”²⁹⁶ 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.

²⁹¹ See Sheelah Kolhatkar, *At Uber, A New C.E.O. Shifts Gears*, *NEW YORKER* (Mar. 30, 2018), <https://www.newyorker.com/magazine/2018/04/09/at-uber-a-new-ceo-shifts-gears/> [https://perma.cc/YYJ9-DLWY].

²⁹² THE HOLDER REPORT, *supra* note 280, at 2.

²⁹³ Greg Bensinger, *Uber Hires Chief Diversity Officer*, *WALL ST. J.* (Jan. 23, 2018, 5:13 PM EST), <https://www.wsj.com/articles/uber-hires-chief-diversity-officer-1516745625> [https://perma.cc/89U5-H6JJ].

²⁹⁴ Kirsten Korosec, *Meet Uber’s First Diversity Officer*, *FORTUNE* (Jan. 23, 2018 4:29 PM PST), <https://fortune.com/2018/01/23/uber-first-chief-diversity-officer/> [https://perma.cc/RE2G-3WCC].

²⁹⁵ Bo Young Lee, *Uber’s 2019 Diversity Report*, *UBER* (July 15, 2019), <https://www.uber.com/newsroom/2019-diversity-report/> [https://perma.cc/FW7W-QNQT].

²⁹⁶ Uber Technologies, Inc., Registration Statement Under the Securities Act of 1933 (Form S-1) (Apr. 11, 2019).

globally across functions. A more hopeful sign is reflected in leadership roles, however, where the global representation of women grew by 7.1%. Uber has also joined the small but growing number of companies tying executive compensation to diversity targets.²⁹⁷ By 2022, the compensation of several senior executives will be tied to increasing gender and racial diversity at Uber.²⁹⁸ And Uber has also eliminated forced arbitration agreements for not only employees, but also riders and drivers who make sexual assault or harassment claims.²⁹⁹ Finally, in a move that is singular to Uber, it recently published a safety transparency report with raw data for all sexual harassment and assault on its platform, as it braced for the eventual hit to Uber's stock price.³⁰⁰

2. Signet Jewelers

On March 18, 2008, employees of Sterling Jewelers filed a lawsuit accusing the company of discriminatory pay and promotion practices.³⁰¹ In 2013, thousands of employees submitted declarations in a private arbitration that were under seal. When the documents became public, *The Washington Post* brought to light the rampant culture of sexual harassment and misconduct at Signet Jewelers.³⁰² The story described a culture teeming with sexual misconduct, including corporate "scouting parties" to find attractive female employees and

²⁹⁷ Shannon Bond, *Uber Ties Executive Bonuses to Diversity Targets*, FIN. TIMES (July 15, 2019), <https://www.ft.com/content/9a6fed76-a6b9-11e9-984c-fac8325aaa04> [<https://perma.cc/9XGS-PQP8>].

²⁹⁸ Morgan Fecto, *Uber Sets Diversity Goals, Ties Executive Compensation to D&I Success*, HR DIVE (July 17, 2019), <https://www.hrdiver.com/news/uber-sets-diversity-goals-ties-executive-compensation-to-di-success/558935/> [<https://perma.cc/L672-D4TV>]; Lee, *supra* note 295.

²⁹⁹ Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html> [<https://perma.cc/Q5VK-RJQ5>].

³⁰⁰ UBER, 2017–2018 US SAFETY REPORT 10 (2019), https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf [<https://perma.cc/72S2-QX8V>]; see also Connor Smith, *If Uber Thought Its Safety Report Would Help Its Reputation, Wall Street Didn't Buy It*, NASDAQ (Dec. 6, 2019, 10:09 AM EST), <https://www.nasdaq.com/articles/if-uber-thought-its-safety-report-would-help-its-reputation-wall-street-didnt-buy-it-2019> [<https://perma.cc/F4UZ-BC36>].

³⁰¹ *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 115 (2d Cir. 2011).

³⁰² Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, WASH. POST (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html [<https://perma.cc/J27L-NAA4>] [hereinafter *Hundreds Allege Sex Harassment*].

mandatory annual meetings which were a “boozy, no-spouses-allowed sex-fest.”³⁰³ To make matters worse, CEO Mark Light allegedly not only condoned, but actively participated, in this toxic culture.³⁰⁴

When the markets opened the next day, Signet’s stock price fell nearly 13%, its largest one-day drop in eight years.³⁰⁵ Shareholders didn’t wait long to file a securities fraud lawsuit.³⁰⁶ Light’s thirty-five-year long tenure at the company ended on July 17, 2017, when he resigned “for health reasons.”³⁰⁷ By August, the board of directors had replaced Light with the company’s first female CEO, Virginia Drosos.³⁰⁸ 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.³⁰⁹ While a male-dominated board had traditionally led Signet, today it is one of the few boards to have achieved gender parity.³¹⁰ And Signet’s C-suite is now female-led, with six of the nine positions held by women.³¹¹ 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.

³⁰⁶ See Signet Jewelers Complaint, *supra* note 191, at 186-91; Press Release, Robbins Geller Rudman & Dowd LLP, Robbins Geller Rudman & Dowd LLP Files Class Action Suit Against Signet Jewelers Limited (Mar. 29, 2017), <https://markets.businessinsider.com/news/stocks/robbins-geller-rudman-dowd-llp-files-class-action-suit-against-signet-jewelers-limited-1001879395> [<https://perma.cc/5E3P-XPRW>].

³⁰⁷ Press Release, Signet Jewelers, Signet Jewelers Appoints Virginia “Gina” C. Drosos as CEO (July 17, 2017), <https://www.businesswire.com/news/home/20170717005510/en/Signet-Jewelers-Appoints-Virginia-%E2%80%9CGina%E2%80%9D-C> [<https://perma.cc/AFS5-8T3T>]; Drew Harwell, *Signet Jewelers CEO at the Center of a Gender Discrimination Case, Retires*, SAN DIEGO UNION-TRIB. (July 17, 2017, 9:04 AM), <https://www.sandiegouniontribune.com/business/ct-signet-jewelers-ceo-retires-20170717-story.html> [<https://perma.cc/RM2V-LQKY>].

³⁰⁸ Press Release, Signet Jewelers, *supra* note 307.

³⁰⁹ See Anne Burdakin, *Signet Jewelers Finally Regains Some Sparkle*, NASDAQ (Dec. 14, 2019, 12:05 PM EST), <https://www.nasdaq.com/articles/signet-jewelers-finally-regains-some-sparkle-2019-12-14> [<https://perma.cc/3EGP-QKZH>].

³¹⁰ Press Release, Signet Jewelers, Signet Jewelers Included in 2020 Bloomberg Gender-Equality Index (Jan. 22, 2020), <https://www.bloomberg.com/press-releases/2020-01-22/signet-jewelers-included-in-2020-bloomberg-gender-equality-index> [<https://perma.cc/5STG-KZCK>]; see *Executive Officers – Signet Leadership Team*, SIGNET JEWELERS, <https://www.signetjewelers.com/investors/corporate-governance/executive-officers/default.aspx> (last visited Feb. 3, 2020) [<https://perma.cc/D4S8-7H7W>].

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.”³¹²

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.³¹³ 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.³¹⁴ 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.³¹⁵ 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.”³¹⁶ 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.”³¹⁷

It is telling that all of the Council’s members are women with expertise in advancing women, not human resources.³¹⁸ Moreover, the

³¹² *Signet Jewelers CEO Emphasizes Female Empowerment in the Jewelry Supply Chain at U.S. Department of State*, BUS. WIRE (Aug. 8, 2019, 12:41 PM EDT), <https://www.businesswire.com/news/home/20190808005656/en/Signet-Jewelers-CEO-Emphasizes-Female-Empowerment-Jewelry> [<https://perma.cc/93RZ-9KSQ>].

³¹³ Emily Steel & Michael S. Schmidt, *More Trouble at Fox News: Ailes Faces New Sexual Claims and O’Reilly Loses Two Advertisers*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/business/media/fox-news-roger-ailes-harassment-suit.html> [<https://perma.cc/7WTU-V3UF>].

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

³¹⁵ Kevin LaCroix, *Massive Derivative Suit Settlement for Alleged Management Failure to Prevent Sexual Misconduct*, D&O DIARY (Nov. 21, 2017), <https://www.dandodiary.com/2017/11/articles/shareholders-derivative-litigation/massive-derivative-suit-settlement-alleged-management-failure-prevent-sexual-misconduct/> [<https://perma.cc/LH6V-WV5M>].

³¹⁶ Emily Steel, *Fox Establishes Workplace Culture Panel After Harassment Scandal*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/business/media/fox-news-sexual-harassment.html> [<https://perma.cc/C9UP-9TSZ>]; see *Stipulation & Agreement of Settlement, Compromise, & Release at 21-22*, *City of Monroe Emps.’ Ret. Sys. v. Murdoch*, No. 2017-0833 (Del. Ch. Nov. 20, 2017).

³¹⁷ *21st Century Fox Establishes the Fox News Workplace Professionalism and Inclusion Council*, BUS. WIRE (Nov. 20, 2017, 2:54 PM EST), <https://www.businesswire.com/news/home/20171120006042/en/21st-Century-Fox-Establishes-the-Fox-News-Workplace-Professionalism-and-Inclusion-Council> [<https://perma.cc/Z7WZ-D7PB>].

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.³¹⁹ 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.³²⁰

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.³²¹ 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.³²² Class actions by victims were also soon to follow.³²³

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.³²⁴ In a move that Wynn’s new CEO called a “turning point” for the company, Wynn added three women as

³¹⁹ See *21st Century Fox Establishes the Fox News Workplace Professionalism and Inclusion Council*, *supra* note 317.

³²⁰ Emily Steel & Michael M. Grynbaum, *Suzanne Scott Named First Female Chief Executive of Fox News*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/business/media/fox-news-suzanne-scott.html> [https://perma.cc/ZP52-PQW4].

³²¹ See Matthew Goldstein, Tiffany Hsu & Kenneth P. Vogel, *Stephen Wynn, Casino Mogul, Accused of Decades of Sexual Misconduct*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/business/steve-wynn-sexual-misconduct-claims.html> [https://perma.cc/92FS-EH5A].

³²² Verified Stockholder Derivative Complaint at 15, 23, Norfolk Cty. Ret. Sys. v. Wynn, No. A-18-769062-B (8th Cir. Feb. 6, 2018).

³²³ Jackie Valley, *USA: Female Employees File Sexual Harassment Lawsuits Against Wynn Resorts*, BUS. & HUMAN RIGHTS RES. CTR. (Oct. 2, 2019), <https://www.business-humanrights.org/en/usa-female-employees-file-sexual-harassment-lawsuits-against-wynn-resorts> [https://perma.cc/VJQ7-L6GP].

³²⁴ See WYNN RESORTS, LTD., NOTICE OF 2017 ANNUAL MEETING AND PROXY STATEMENT 4 (2017), https://www.sec.gov/Archives/edgar/data/1174922/000119312517077750/d326174ddef14a.htm#toc326174_8 [https://perma.cc/EM94-XQQ4].

independent directors, which included Betsy Atkins, Dee Dee Myers, and Wendy Webb.³²⁵ Today, Wynn's board has nine members, and four of them are women, achieving near gender parity.³²⁶ 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."³²⁷

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.³²⁸ 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.³²⁹

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]

³²⁵ Aaron Smith, *Wynn Resorts Appoints 3 Women to Board in a 'Turning Point,'* CNN BUS. (Apr. 18, 2018, 7:13 PM ET), <https://money.cnn.com/2018/04/18/news/companies/wynn-women-board-of-directors/index.html> [https://perma.cc/BRK5-BLC4].

³²⁶ See *Board Members*, WYNN RESORTS, <https://wynnresortslimited.gcs-web.com/corporate-governance/board-of-directors> (last visited Feb 1, 2020) [https://perma.cc/GKU4-YDFK].

³²⁷ Eve Tahmincioglu, *Directors & Boards / The Aftermath of #MeToo Allegations Against Wynn Resorts CEOs*, BETSY ATKINS (Aug. 21, 2018), <https://betsyatkins.com/directors-boards-the-aftermath-of-metoo-allegations-against-wynn-resorts-ceos/> [https://perma.cc/Q47E-WYYD].

³²⁸ Wakabayashi & Benner, *supra* note 9; see also Daisuke Wakabayashi, Erin Griffith, Amie Tsang & Kate Conger, *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [https://perma.cc/J3J2-3PXW].

³²⁹ See Nick Statt, *Over 20,000 Google Employees Participated in Yesterday's Mass Walkout*, VERGE (Nov. 2, 2018, 8:25 PM EDT), <https://www.theverge.com/2018/11/2/18057716/google-walkout-20-thousand-employees-ceo-sundar-pichai-meeting> [https://perma.cc/2T6S-DSZF].

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.”³³⁰

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.³³¹ Google has not yet acquiesced on the remaining governance reforms, and they seem rather unlikely, but the employees are nevertheless persisting in their demands.³³²

6. McDonald’s

McDonalds’ CEO Steve Easterbrook’s recent firing captured headlines in November 2019 and reflects how resolute some boards have become in holding executives accountable.³³³ Easterbrook’s removal is extraordinary because it arose in response to a consensual relationship with an employee.³³⁴ A far cry from the boards which allowed unscrupulous and even illegal behavior by star executives to go

³³⁰ Claire Stapleton, Tanuja Gupta, Meredith Whittaker, Celie O’Neil-Hart, Stephanie Parker, Erica Anderson & Amr Gaber, *We’re the Organizers of the Google Walkout. Here Are Our Demands*, CUT (Nov. 1, 2018), <https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html> [<https://perma.cc/MKH4-2L94>].

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>].

³³³ See David Yaffe-Bellany, *McDonalds Fires C.E.O. Steve Easterbrook After Relationship with Employee*, N.Y. TIMES (Nov. 3, 2019), <https://www.nytimes.com/2019/11/03/business/mcdonalds-ceo-fired-steve-easterbrook.html> [<https://perma.cc/Y3GW-2LXJ>]. The day after Easterbrook departed, David Fairhurst, McDonald’s Chief People Officer also left the company and has since been replaced by Melissa Kersey. Leslie Patton & Josh Eidelson, *McDonald’s CEO Had to Go in Era of Zero Tolerance Policy*, BLOOMBERG (Nov. 4, 2019, 9:00 AM PST), <https://www.bloomberg.com/news/articles/2019-11-04/mcdonald-s-chief-people-officer-david-fairhurst-leaves> [<https://perma.cc/5CTG-P3AY>].

³³⁴ See Heather Haddon & Suzanne Vranica, *McDonald’s Started Investigation of CEO’s Relationship with Employee Three Weeks Ago*, WALL ST. J., <https://www.wsj.com/articles/mcdonalds-started-investigation-of-ceos-relationship-with-employee-three-weeks-ago-11573241506> (last updated Nov. 8, 2019, 3:11 PM ET) [<https://perma.cc/VU5V-M4CG>] (“Relationship led to Steve Easterbrook’s firing by burger giant[.]”).

unchecked for years, the McDonald's board removed Easterbrook just *three weeks* after learning about the relationship.³³⁵ 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.³³⁶

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.³³⁷ 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 2023.³³⁸ Concerning mandatory arbitration, McDonald's has also recently won accolades from shareholder activists.³³⁹ 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.³⁴⁰ While shareholders applauded this

³³⁵ See *id.*

³³⁶ Daniel Strauss, *Here's What 5 Wall Street Firms Are Saying About the Shocking Departure of McDonald's CEO — and What It Means for the Company's Future*, MKTS. INSIDER (Nov. 4, 2019, 5:16 PM), <https://markets.businessinsider.com/news/stocks/mcdonalds-ceo-firing-wall-street-analysts-commentary-2019-11-1028656420> [<https://perma.cc/N62U-82Z8>].

³³⁷ David Crary, *Some McDonald's Workers Vote to Strike Over Sex Harassment*, ASSOCIATED PRESS (Sept. 12, 2018), <https://www.apnews.com/0f70d30d6bcf49bba9eb58cb91f09184> [<https://perma.cc/2RK8-2ZSB>].

³³⁸ *McDonald's Launches Push for Gender Balance and Diversity*, MCDONALD'S (Mar. 8, 2019), <https://news.mcdonalds.com/stories/our-people-details/gender-balance-strategy-2019> [<https://perma.cc/6KRN-QX32>].

³³⁹ See, e.g., Clean Yield Asset Management, *McDonald's Raises the Level of Transparency on Forced Arbitration Policies for All Companies*, CSRWIRE (Apr. 16, 2019), https://www.csrwire.com/press_releases/41884-McDonald-s-Raises-the-Level-of-Transparency-on-Forced-Arbitration-Policies-for-All-Companies [<https://perma.cc/H2YZ-LGCH>].

³⁴⁰ *Id.*

“new level of transparency,” they also urged McDonald’s to completely eliminate the use of mandatory arbitration and NDAs.³⁴¹

B. *The Knock-on Effects of the #MeToo Movement*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.³⁴³ In the Russell 3000 women surpassed the 20% of board seats, marking a new milestone.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 2016.³⁴⁵

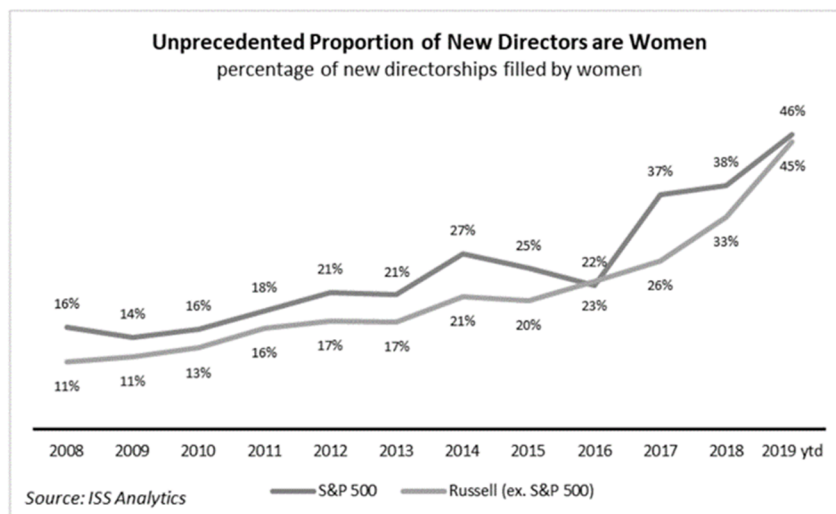
³⁴¹ See *id.*

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 INTELLIGIZE, www.intelligize.com (last visited Jan. 4, 2020) [<https://perma.cc/7CCL-H7HJ>]; see also *infra* Appendices A-D.

³⁴³ Vanessa Fuhrmans, *The Last All-Male Board on the S&P 500 Is No Longer*, WALL ST. J. (July 24, 2019, 5:20 PM ET), <https://www.wsj.com/articles/the-last-all-male-board-on-the-s-p-500-is-no-longer-11564003203> [<https://perma.cc/A829-AH2Z>].

³⁴⁴ Amit Batish & Ryan Lau, *Equilar Q2 2019 Gender Diversity Index: Russell 3000 Boards Surpass 20% Female Representation*, EQUILAR (Sept. 11, 2019), <https://www.equilar.com/reports/67-q2-2019-equilar-gender-diversity-index.html> [<https://perma.cc/HV79-DZUK>]; Rachel Feintzeig, *Women’s Share of Board Seats Rises to 20%*, WALL ST. J., https://www.wsj.com/articles/womens-share-of-board-seats-rises-to-20-11568194200?mod=hp_featst_pos1 (last updated Sept. 11, 2019, 6:23 PM ET) [<https://perma.cc/K4DE-3GU8>].

³⁴⁵ See PAPAPOULOS, *supra* note 88.



The growing pressure from both regulators and shareholders discussed in Part V suggests that this trend is likely to continue.³⁴⁶ With almost 700 companies in the Russell 3000 subject to California's new gender diversity mandate, the regulatory pressure is acute.³⁴⁷ Even if this regulation is short-lived given the pending challenges to its constitutionality,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 2018.³⁴⁹ 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

³⁴⁶ See *supra* Parts IV.A, IV.D.

³⁴⁷ See Jennifer Kristen Lee, Andrew D. Ledbetter & Rachel M. Paris, *California Mandates Female Board Directors for Publicly Held Companies*, DLA PIPER (Oct. 1, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/10/california-governor-signs-bill-mandating-female-board-directors/> [https://perma.cc/KJA3-52GF], for a discussion of the impact of this legislation on the stock price of companies.

³⁴⁸ See Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826 1* (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791 [https://perma.cc/D8DY-5B8P] (arguing that SB 826 violates the internal affairs doctrine).

³⁴⁹ Betty Moy Huber & Paula H. Simpkins, *Women Board Seats in Russell 3000 Pass the 20% Mark*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 5, 2019), <https://corpgov.law.harvard.edu/2019/10/05/women-board-seats-in-russell-3000-pass-the-20-mark/> [https://perma.cc/QR23-X4GH].

chairs of boards with just one woman who received less than 80% of votes cast.³⁵⁰ 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."³⁵¹ In 2021, Goldman will ramp that number up to two.³⁵²

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 2000.³⁵³ Even more discouraging is the fact that 2018 saw a *decline* to twenty-two female CEOs.³⁵⁴ The Fortune 500 tells a slightly more optimistic story.³⁵⁵ 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.³⁵⁶ Nevertheless, that still represents a meager 6.6%.³⁵⁷ 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.³⁵⁸

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

³⁵⁰ *Id.*

³⁵¹ *Goldman's Playbook for More Diverse Corporate Boards*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/business/dealbook/goldman-diversity-boardroom.html> [<https://perma.cc/UCU9-J4UG>].

³⁵² *Id.*

³⁵³ Iman Ghosh, *All the S&P 500 Women CEOs in One Timeline (2000-2019)*, VISUAL CAPITALIST (Sept. 17, 2019), <https://www.visualcapitalist.com/all-the-sp500-women-ceos-in-one-timeline-2000-2019/> [<https://perma.cc/4N9Y-XWR9>].

³⁵⁴ Matteo Tonello, *CEO Succession Practices: 2019 Edition*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 16, 2019), <https://corpgov.law.harvard.edu/2019/12/16/ceo-succession-practices-2019-edition/> [<https://perma.cc/5TM2-7GTS>].

³⁵⁵ See Claire Zillman, *The Fortune 500 Has More Female CEOs Than Ever Before*, FORTUNE (May 16, 2019, 3:30 AM PDT), <https://fortune.com/2019/05/16/fortune-500-female-ceos/> [<https://perma.cc/QB2W-C5D9>].

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ Subodh Mishra, *Women in the C-Suite: The Next Frontier in Gender Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 13, 2018), <https://corpgov.law.harvard.edu/2018/08/13/women-in-the-c-suite-the-next-frontier-in-gender-diversity/> [<https://perma.cc/UEJ8-FWTD>].

change.³⁵⁹ 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,

³⁵⁹ See, e.g., Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES* 171, 176 (Ronald J. Burke & Mary C. Mattis eds., 2000) (concluding that boards with more women are less inclined to let CEOs dominate the agenda and are more inclined to engage in “power sharing,” thus diminishing the power of the CEO over board decision-making); Diana Bilimoria, *The Relationship Between Women Corporate Directors and Women Corporate Officers*, 18 J. MANAGERIAL ISSUES 47 (2006), <http://www.jstor.org/stable/40604524> [<https://perma.cc/V3B7-A7UG>] (finding 25% or more female executives was positively correlated with the number of female directors, and that the presence of “influential” women on the board was the most important factor for increasing the likelihood that a female CEO would be appointed). See generally Richard Levick, *#MeToo After Moonves: What Should Companies Be Doing?*, FORBES (Sept. 17, 2018, 3:35 PM EDT), <https://www.forbes.com/sites/richardlevick/2018/09/17/metoo-after-moonves-what-should-companies-be-doing/#2e9dfbe21007> [<https://perma.cc/NMU7-3BCK>] (discussing whether companies adding women on executive boards will change company culture).

³⁶⁰ Another recent trend is the small but growing number of companies that are beginning to create new executive level positions, such as Chief Diversity Officer. See TINA SHAH PAIKEDAY, HARSONAL SACHAR & ALIX STUART, RUSSELL REYNOLDS ASSOCS., *A LEADER’S GUIDE: FINDING AND KEEPING YOUR NEXT CHIEF DIVERSITY OFFICER 2* (2018), <https://www.russellreynolds.com/en/Insights/thought-leadership/Documents/A%20Leaders%20Guide%20to%20Finding%20and%20Keeping%20Your%20Next%20Chief%20Diversity%20Officer.pdf> [<https://perma.cc/4FHP-5SB7>].

³⁶¹ John R. Graham, Jillian Grennan, Campbell R. Harvey & Shivaram Rajgopal, *Corporate Culture: The Interview Evidence 2* (Duke I&E Research Paper No. 2016-42, Columbia Bus. Sch. Research Paper No. 16-70, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842823 [<https://perma.cc/FGD5-KCXC>].

and diversity and inclusion.”³⁶² 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.³⁶³ 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.”³⁶⁴ 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 2015.³⁶⁵ 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.”³⁶⁶

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.³⁶⁷ Before 2016, the word “culture” was rarely used.³⁶⁸ The pre-2016 charters³⁶⁹ 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.³⁷⁰

³⁶² Steve Van Putten, David Bixby & Jan Koors, *The Compensation Committee Agenda for 2019*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 1, 2019), <https://corpgov.law.harvard.edu/2019/05/01/the-compensation-committee-agenda-for-2019/> [https://perma.cc/MD4S-MX32].

³⁶³ *See id.*

³⁶⁴ Robert Newbury, Don Delves & Ryan Resch, *Compensation Committees & Human Capital Management*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 27, 2019), <https://corpgov.law.harvard.edu/2019/08/27/compensation-committees-human-capital-management/> [https://perma.cc/GB9U-999D].

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.³⁷¹ 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."³⁷²

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 2018.³⁷³ At first blush, that seems like a minuscule number, but in 2013-2017, just one CEO succession was based on ethical lapses.³⁷⁴ 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.³⁷⁵ The authors of the report attribute this increase in part to the #MeToo movement.³⁷⁶ 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.

³⁷¹ *2018 CEO Success Study: Succeeding the Long-Serving Legend in the Corner Office*, PWC (2019), https://www.strategyand.pwc.com/gx/en/insights/ceo-success.html?utm_campaign=sbpwc&utm_medium=site&utm_source=articletext [https://perma.cc/N6BB-7PEQ].

³⁷² Per-Ola Karlsson, Martha Turner & Peter Gassmann, *Succeeding the Long-Serving Legend in the Corner Office*, STRATEGY+BUSINESS (May 15, 2019), <https://www.strategy-business.com/article/Succeeding-the-long-serving-legend-in-the-corner-office?gko=90171> [https://perma.cc/K573-39WX].

³⁷³ Tonello, *supra* note 354.

³⁷⁴ *Id.*

³⁷⁵ 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.*

³⁷⁶ *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

³⁷⁷ Vanessa Fuhrmans & Rachel Feintzeig, *Scrutiny of CEOs' Personal Lives Rises in #MeToo Era*, WALL ST. J. (June 21, 2018), <https://www.wsj.com/articles/scrutiny-of-ceos-personal-lives-rises-in-metoo-era-1529608172> [<https://perma.cc/6KEC-4WCJ>].

³⁷⁸ Jenna McGregor, *How #MeToo Is Reshaping Employment Contracts for Executives*, WASH. POST (Oct. 31, 2018), <https://www.washingtonpost.com/business/2018/10/31/how-metoo-is-reshaping-employment-contracts-executives/> [<https://perma.cc/NW8W-E2MF>]; Christine Powell, *4 Ways #MeToo Is Affecting Executive Compensation*, LAW360 (Apr. 9, 2018, 5:49 PM EDT), <https://www.law360.com/articles/1022482/4-ways-metoo-is-affecting-executive-compensation> [<https://perma.cc/W3XP-DUBL>].

³⁷⁹ See *infra* Appendix C: Sample of Amendments to Executive Compensation Agreements.

³⁸⁰ JOHN L. UTZ, #METOO, CLAWBACKS AND EXECUTIVE COMPENSATION IN 2019 – HAS ANYTHING CHANGED? 1 (June 20, 2019), <http://www.utzlattan.com/wp-content/uploads/2019/06/MeToo-Clawbacks-and-Executive-Compensation-in-2019-Has-Anything-Changed.pdf> [<https://perma.cc/9ZVJ-XA3Y>].

removal of an executive.³⁸¹ Furthermore, as employment lawyers explain, the cause definition is likely being modified in more nuanced ways.³⁸² For example, companies may simply reference violations of corporate codes of conduct or other “shadow governance documents” which can be easily amended.³⁸³

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.”³⁸⁴ 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.³⁸⁵ 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.³⁸⁶ 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.

³⁸¹ This is based on a preliminary review of executive compensation agreements contained in a dataset provided by Intelligize, a data provider. See INTELLIGIZE, www.intelligize.com (last visited Jan. 4, 2020) [<https://perma.cc/7CCL-H7HJ>]. But see Rachel S. Arnow-Richman, James Hicks & Steven Davidoff Solomon, Anticipating Harassment: MeToo and the Changing Norms of Executive Contracts 28 (Mar. 1, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787232 [<https://perma.cc/23SJ-C>] (An empirical study of CEO contracts which finds that “Explicit inclusions of harassment or discrimination as grounds for cause” have increased “by more than eight percentage points in the post-MeToo period.”).

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

³⁸³ See Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097, 1097, 1100-01 (2020) (providing the first literature review of documents that govern corporate decision-making beyond charters and bylaws and describing sexual harassment policies as “shadow governance” documents).

³⁸⁴ CBS Corp., Executive Employment Agreement (Exhibit 10(a)) 23 (May 19, 2017), https://www.sec.gov/Archives/edgar/data/813828/000081382817000031/cbs_ex10a-063017.htm [<https://perma.cc/2LBK-CD9T>].

³⁸⁵ See Edmund Lee & Rachel Abrams, *CBS Says Les Moonves Will Not Receive \$120 Million Severance*, N.Y. TIMES (Dec. 17 2018), <https://www.nytimes.com/2018/12/17/business/media/les-moonves-cbs-severance.html> [<https://perma.cc/X8FC-RR4M>].

³⁸⁶ See Joe Flint, *Leslie Moonves to Fight CBS Decision to Withhold \$120 Million Severance*, WALL ST. J. (Jan. 17, 2019, 1:34 PM ET), <https://www.wsj.com/articles/leslie-moonves-to-fight-cbs-decision-to-withhold-120-million-severance-11547737633> [<https://perma.cc/DB23-8BDB>].

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

³⁸⁷ See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 304, 116 Stat. 745 (2002); see also UTZ, *supra* note 380, at 2.

³⁸⁸ See *supra* Part V.B.i. See generally MERIDIAN COMP. PARTNERS, 2018 CORPORATE GOVERNANCE & INCENTIVE DESIGN SURVEY 25 (2018), <https://www.meridiancp.com/wp-content/uploads/Meridian-2018-Governance-and-Design-Survey-1.pdf> [<https://perma.cc/GR57-8GXW>] (providing data regarding clawback triggers and what is covered by clawbacks).

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/6L82-7QU6>] (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>].

³⁹⁰ VERIZON COMMUNICATIONS INC., PROXY STATEMENT PURSUANT TO SECTION 14(A) (2019), <https://www.sec.gov/Archives/edgar/data/732712/000119312519078250/d613466ddef14a.htm> [<https://perma.cc/JK7Z-CSWH>] (emphasis added); see also Alphabet Inc., Notice of Exempt Solicitation (Voluntary Submission) (May 2019), https://www.sec.gov/Archives/edgar/data/1414734/000141473419000007/alphabetshltr.htm#_edn1 [<https://perma.cc/E5RG-E8KN>].

³⁹¹ GLASS LEWIS, 2018 SEASON REVIEW: U.S. SHAREHOLDER PROPOSALS 13 (Max Darrow, Courtney Keatinge & Dimitri Zagoroff eds., 2018), http://www.glasslewis.com/wp-content/uploads/2018/10/2018_SHP_Review.pdf [<https://perma.cc/XAH8-5RD8>].

³⁹² See INTEL CORP., 2019 PROXY STATEMENT 92 (2019), https://s21.q4cdn.com/600692695/files/doc_financials/2018/Annual/2019-Proxy.pdf [<https://perma.cc/B88H-Y6WK>].

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

³⁹³ See JONATHAN M. OCKER, JUSTIN KRAWITZ & BENJAMIN T. GIBBS, PILLSBURY LAW, THE STATE OF PLAY ON CLAWBACKS AND FORFEITURES BASED ON MISCONDUCT 2 (2019), <https://www.pillsburylaw.com/print/content/25587/state-of-play-on-clawbacks-and-forfeitures-based-on-misconduct.pdf> [<https://perma.cc/P7EU-864X>] (discussing a recent survey showing that some large technology companies have policies that include clawbacks for breaches of restrictive covenants and detrimental activity); WAYNE N. OUTTEN & CODY YORKE, OUTTEN & GOLDEN LLP, RECENT TRENDS IN EXECUTIVE COMPENSATION IN THE UNITED STATES, SIXTH TRANSATLANTIC CONFERENCE 5-6 (2019), <https://www.outtengolden.com/sites/default/files/pdf/2020-02/recent-trends-executive-compensation-united-states-2020-02-05.pdf> [<https://perma.cc/39WZ-K4NF>].

³⁹⁴ Anders Melin, *Corporate America Weighs New Clawback Policies for #MeToo Sins*, BLOOMBERG (Oct. 9, 2018, 5:00 AM PDT), <https://www.bloomberg.com/news/articles/2018-10-09/corporate-america-weighs-new-clawback-policies-for-metoo-sins> [<https://perma.cc/A8L6-V446>].

³⁹⁵ See Regal Beloit Corp., Key Executive Employment and Severance Agreement (Exhibit 10.23) (Oct. 26, 2016) <https://www.sec.gov/Archives/edgar/data/82811/000008281117000017/exhibit10232016123110k.htm> [<https://perma.cc/C6LW-ASWK>].

³⁹⁶ See Lublin, *supra* note 32.

inclusion as a metric.³⁹⁷ At Intel, diversity determines 50% of its executives' annual cash incentives.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.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."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

³⁹⁷ See MICROSOFT CORP., NOTICE OF ANNUAL SHAREHOLDERS MEETING AND PROXY STATEMENT 2017, at 39 (2017), https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddef14a.htm#toc461626_38c [<https://perma.cc/8MKD-9QY9>] (stating under the header, "Qualitative performance categories," "50% of our Named Executives' fiscal year 2017 annual cash incentives were determined based on subjective scoring of their performance against financial, operational, and strategic indicators in three performance categories," including, "organizational diversity and inclusion"); Deb Lifshy, *Diversity Goals in Executive Compensation Plans*, PEARL MYER ADVISOR BLOG (July 2019), <https://www.pearlmyer.com/blog/diversity-goals-in-executive-compensation-plans> [<https://perma.cc/Q7WS-UEZC>].

³⁹⁸ See INTEL CORP., 2018 PROXY STATEMENT NOTICE OF ANNUAL SHAREHOLDERS' MEETING 66 (2018), https://www.sec.gov/Archives/edgar/data/50863/000119312518107675/d498273ddef14a.htm#toc498273_36 [<https://perma.cc/RR9D-XLNS>].

³⁹⁹ See THE HOLDER REPORT, *supra* note 280, at 2.

⁴⁰⁰ See Anna Windemuth, *The #MeToo Movement Migrates to M&A Boilerplate*, 129 YALE L.J. 488, 491 (2019) (describing the "Weinstein Clause" as a "tactical industry response to reduced tolerance for misconduct"); Nabila Ahmed, *Wall Street is Adding a New 'Weinstein Clause' Before Making Deals*, BLOOMBERG (Aug. 1, 2018, 8:59 PM), <https://www.bloombergquint.com/business/-weinstein-clause-creeps-into-deals-as-wary-buyers-look-to-cover> [<https://perma.cc/8BGD-6SR3>]. For a discussion on the distinctions between representations and warranties see, for example, Sean J. Griffith, *Deal Insurance: Representation & Warranty Insurance in Mergers & Acquisitions*, 104 U. MINN. L. REV. 1839 (2020); see also John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice*, in RESEARCH HANDBOOK ON MERGERS & ACQUISITIONS 36, 38-39 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) ("M&A contracts do not typically distinguish between them, but include them together without identification.").

sexual harassment or sexual misconduct.⁴⁰¹ 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:⁴⁰²

[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.⁴⁰³

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.⁴⁰⁴ After #MeToo, buyers began seeking assurances that go far beyond compliance with the law to capture “allegations” of sexual harassment.⁴⁰⁵ 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.⁴⁰⁶ 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.⁴⁰⁷

⁴⁰¹ See Phil Brown, *For Your Consideration: “The Weinstein Clause,”* INTELLIGIZE (Aug. 16, 2018), <https://www.intelligize.com/for-your-consideration-the-weinstein-clause/> [https://perma.cc/WAU9-YPJ2].

⁴⁰² Jaclyn Jaeger, *The ‘Weinstein Clause’: M&A Deals in the #MeToo Era*, COMPLIANCE WEEK (Oct. 12, 2018, 6:45 AM), <https://www.complianceweek.com/the-weinstein-clause-manda-deals-in-the-metoo-era/2113.article> [https://perma.cc/PH42-8GKC].

⁴⁰³ SJW GRP., HYDRO SUB, INC., & CONN. WATER SERV., INC., AGREEMENT AND PLAN OF MERGER 20 (Exhibit 2.1) (Mar. 14, 2018), <https://www.sec.gov/Archives/edgar/data/766829/000119312518083275/d517078dex21.htm> [https://perma.cc/576R-4EE9].

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

⁴⁰⁵ See Jaeger, *supra* note 402.

⁴⁰⁶ Grace Maral Burnett, *Analysis: #MeToo Reps Becoming M&A Market Standard*, BLOOMBERG (June 25, 2019, 10:18 AM), <https://news.bloomberglaw.com/bloomberglaw-analysis/analysis-metoo-reps-becoming-m-a-market-standard> [https://perma.cc/LQ5E-MLC8].

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.⁴⁰⁸ That is because insurance is intended to cover risks that are “genuinely unknown or not revealed by a good diligence process.”⁴⁰⁹ This focus by underwriters on corporate culture, discussed more fully in Part IV, means that corporate culture is a business risk.⁴¹⁰

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

Silicon Valley’s venture capital industry is famous for its male-dominated and sexist culture — 85% of partners at venture capital firms are men and 71% have no female partner at all.⁴¹¹ But even that community has reached an inflection point.⁴¹² Binary Capital is a case in point. In June 2017, the firm was brought down days after *The New York Times* revealed that its founder and CEO Justin Caldbeck was accused of habitually sexually harassing entrepreneurs.⁴¹³ Days later,

other recent mega-deals, WellCare-Centene and WorldPay-Fidelity, feature identical terms. Burnett, *supra* note 406.

⁴⁰⁸ See Emily Maier, *Can You Insure Against the “Weinstein Clause” in M&A Deals?*, WOODRUFF SAWYER (Oct. 8, 2018), <https://woodrufflaw.com/mergers-acquisitions/insure-against-weinstein-clause-ma-deals/> [<https://perma.cc/SG2E-8UBT>]; see also Jeffrey Chapman, Jonathan Whalen & Benjamin Bodurian, *Representations and Warranties Insurance in M&A Transactions*, 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/A5UA-AWLA>].

⁴⁰⁹ Maier, *supra* note 408.

⁴¹⁰ See *id.*

⁴¹¹ NVCA-DELOITTE, NVCA-DELOITTE HUMAN CAPITAL SURVEY 5-6 (2d ed. 2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-audit-egc-nvca-human-capital-survey-2018.pdf> [<https://perma.cc/24DG-AZK6>]; Yuki Noguchi, *Investor’s Naked Selfies Ignite #MeToo Moment: Female Founder Fights Back*, NPR (Jan. 6, 2020, 4:36 PM ET), <https://www.npr.org/2020/01/06/793134459/investors-naked-selfie-ignites-metoo-moment-female-founder-fights-back> [<https://perma.cc/R2PV-8RUQ>].

⁴¹² See Michael J. Coren, *Sexism Is Alive and Well in Silicon Valley, but Life for Female Founders Is Changing*, QUARTZ (July 12, 2017), <https://qz.com/1026422/sexism-in-silicon-valley-is-alive-and-well-but-life-for-female-founders-is-already-changing-2/> [<https://perma.cc/W38U-9LMZ>].

⁴¹³ See Katie Benner, *Women in Start-Up World Speak Up About Harassment*, N.Y. TIMES (July 4, 2017), <https://www.nytimes.com/2017/07/04/insider/technology-sexual-harassment.html> [<https://perma.cc/J4WF-AVMD>].

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

⁴¹⁴ Emily Chang & Sarah McBride, *Binary Capital's Jonathan Teo Offers to Resign from Venture Firm*, BLOOMBERG (June 27, 2017, 5:03 PM PDT), <https://www.bloomberg.com/news/articles/2017-06-28/binary-said-to-shut-down-latest-fund-after-co-founder-misconduct> [<https://perma.cc/6B5N-JUTD>].

⁴¹⁵ Reid Hoffman, *The Human Rights of Women Entrepreneurs*, LINKEDIN (June 23, 2017), <https://www.linkedin.com/pulse/human-rights-women-entrepreneurs-reid-hoffman/> [<https://perma.cc/2KN6-94NA>].

⁴¹⁶ *Id.*

⁴¹⁷ See Kalliope Gourntis, *Reputational Risk in the #MeToo Era*, PRIVATE EQUITY INT'L (June 27, 2018), <https://www.privateequityinternational.com/reputational-risk-metoo-era/> [<https://perma.cc/Q9LJ-SWD7>]; ILPA, *ILPA Publishes Diversity and Inclusion Resources for the Private Equity Industry*, GLOBENEWSWIRE (Sept. 24, 2018, 7:00 AM ET), <https://www.globenewswire.com/news-release/2018/09/24/1574794/0/en/ILPA-Publishes-Diversity-and-Inclusion-Resources-for-the-Private-Equity-Industry.html> [<https://perma.cc/VWV3-MSET>].

⁴¹⁸ See INSTITUTIONAL LTD. P'SHIP ASS'N, *DUE DILIGENCE QUESTIONNAIRE apps. A-E* (Sept. 2018), https://ilpa.org/wp-content/uploads/2018/09/ILPA_Due_Diligence_Questionnaire_v1.2.pdf [<https://perma.cc/B3JU-9W5Y>].

contractual innovations to address the risk of sexual harassment.⁴¹⁹ A recent contractual innovation, the “Candor Clause,” was created by a female founder Elizabeth Giorgi after being sexually harassed by an investor.⁴²⁰ 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.”⁴²¹ 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.⁴²²

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.”⁴²³ This increased focus has led to a dizzying number of new state and local laws addressing pay equity.⁴²⁴ 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.⁴²⁵ Recent high profile examples include Starbucks, which announced that it reached 100% gender and

⁴¹⁹ See Noguchi, *supra* note 411.

⁴²⁰ *Id.*

⁴²¹ Anne Stych & Brian Rinker, *Serena Ventures, Bumble Fund Tech Company with MeToo ‘Morality Clause,’* BIZWOMEN (Dec. 13, 2019, 8:13 AM EST), <https://www.bizjournals.com/bizwomen/news/latest-news/2019/12/serena-ventures-bumble-fund-tech-company-with.html?page=all> [<https://perma.cc/KS7G-9FV8>]; *Alice’s Morality Clause*, HELLO ALICE BLOG (Jan. 12, 2020), <https://blog.helloalice.com/alices-morality-clause/> [<https://perma.cc/D3EF-ZNBP>]; see also Melinda Gates, *What #MeToo Meant For Venture Capitalists*, REFINERY29 (Nov. 14, 2018, 8:30 AM), <https://www.refinery29.com/en-us/melinda-gates-vc-venture-capital-metoo> [<https://perma.cc/T3RH-XDWJ>].

⁴²² See *infra* Appendix A: Interview Participants, Interview with Susan Mac Cormac, Partner, Morrison & Foerster LLP.

⁴²³ See *infra* Appendix A: Interview Participants, Interview with Susan Mac Cormac, Partner, Morrison & Foerster LLP.

⁴²⁴ 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.

⁴²⁵ 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>].

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 Carlson 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,

⁴²⁶ See Jeff Green, *Starbucks Discloses Gender and Racial Pay Gap: There Isn't One*, BLOOMBERG (Dec. 4, 2019, 8:33 AM), <https://www.bloomberg.com/news/articles/2019-12-04/starbucks-discloses-gender-and-racial-pay-gap-there-isn-t-one> [<https://perma.cc/U4J6-VBB9>]. *But see* Kim Elsesser, *Is Starbucks' Gender and Racial Pay Gap Really Zero?*, FORBES (Dec. 6, 2019, 2:43 PM EST), <https://www.forbes.com/sites/kimelsesser/2019/12/06/is-starbucks-gender-and-racial-pay-gap-really-zero/#68829cdc5178> [<https://perma.cc/TZZ9-AGCY>].

⁴²⁷ See EMPLOYERS FOR PAY EQUITY, <http://www.employersforpayequity.com/> (last visited Feb. 13, 2020) [<https://perma.cc/T3VF-PMS6>].

⁴²⁸ See, e.g., Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 135 (2018), https://www.yalelawjournal.org/pdf/Mizrahi_9ssdtmny.pdf [<https://perma.cc/V8D2-48VS>] (discussing how California has introduced and passed legislation that targets mandatory arbitration and non-disclosure agreements).

⁴²⁹ Elana Lyn Gross, *NBCUniversal Releases Former Employees from Nondisclosure Agreements, Spurring the Conversation*, FORBES (Nov. 4, 2019, 5:02 PM EST), <https://www.forbes.com/sites/elanagross/2019/11/04/nbcuniversal-releases-former-employees-from-nondisclosure-agreements-spurring-the-conversation/#ebb482d4c6d5> [<https://perma.cc/E8X2-CFL4>].

⁴³⁰ See Gretchen Carlson, Opinion, *Fox News, I Want My Voice Back*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/opinion/gretchen-carlson-bombshell-movie.html> [<https://perma.cc/D6VQ-EYR5>]; see also *In the News*, LIFT OUR VOICES, <https://liftourvoices.org/in-the-news/> (last visited Dec. 30, 2020) [<https://perma.cc/2HDG-NK75>].

2020, as a recent victory.⁴³¹ 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.⁴³²

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.”⁴³³ 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.

⁴³¹ See Carlson, *supra* note 430; David Galloreese, *Zero Tolerance for Sexual Harassment*, WELLS FARGO STORIES (Feb. 12, 2020), <https://stories.wf.com/zero-tolerance-sexual-harassment/> [https://perma.cc/27SJ-YBKE].

⁴³² See *Force the Issue*, <https://forcetheissue.org/> (last visited Feb. 13, 2020) [https://perma.cc/9C42-YC2R].

⁴³³ Eisenberg, *supra* note 55, at 1292.

APPENDIX A: INTERVIEW PARTICIPANTS

Participant Name & Title	Date
Richard Betterley, Insurance Expert, <i>The Betterley Report</i>	12/17/19
Verity Chegar, Vice President, ESG Strategist, <i>BlackRock</i>	12/25/19
Rob Chesnut, Chief Ethics Officer, <i>Airbnb</i>	10/11/19
Keir Gumbs, Associate General Counsel, <i>Uber</i>	12/11/19
Priya Huskins, Partner & Senior Vice President, <i>Woodruff-Sawyer</i>	8/12/19
Courteney Keatinge, Senior Director, ESG Research, <i>Glass Lewis</i>	4/22/18
Susan Mac Cormac, Partner, <i>Morrison & Foerster LLP</i>	1/15/19
Carolyn Rashby, Of Counsel, <i>Covington & Burling LLP</i>	12/5/19
Brian Savage, Corporate Counsel, <i>Airbnb</i>	1/21/19
Anne Simpson, Managing Investment Director, Board Governance & Sustainability, <i>CalPERS</i>	10/11/19
Tim Youmans, Lead-North America, <i>EOS at Federated Hermes</i>	8/18/19

APPENDIX B: TEXTUAL ANALYSIS OF DERIVATIVE COMPLAINTS

Figure 1.

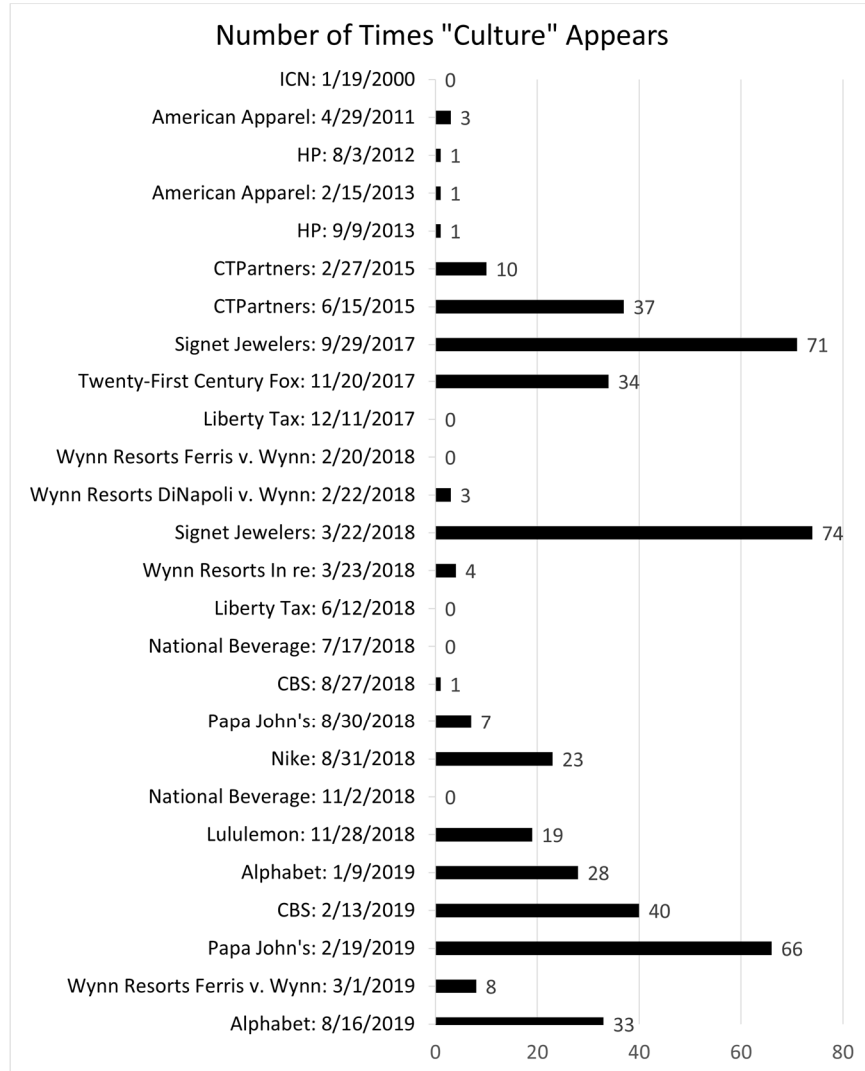


Figure 2.

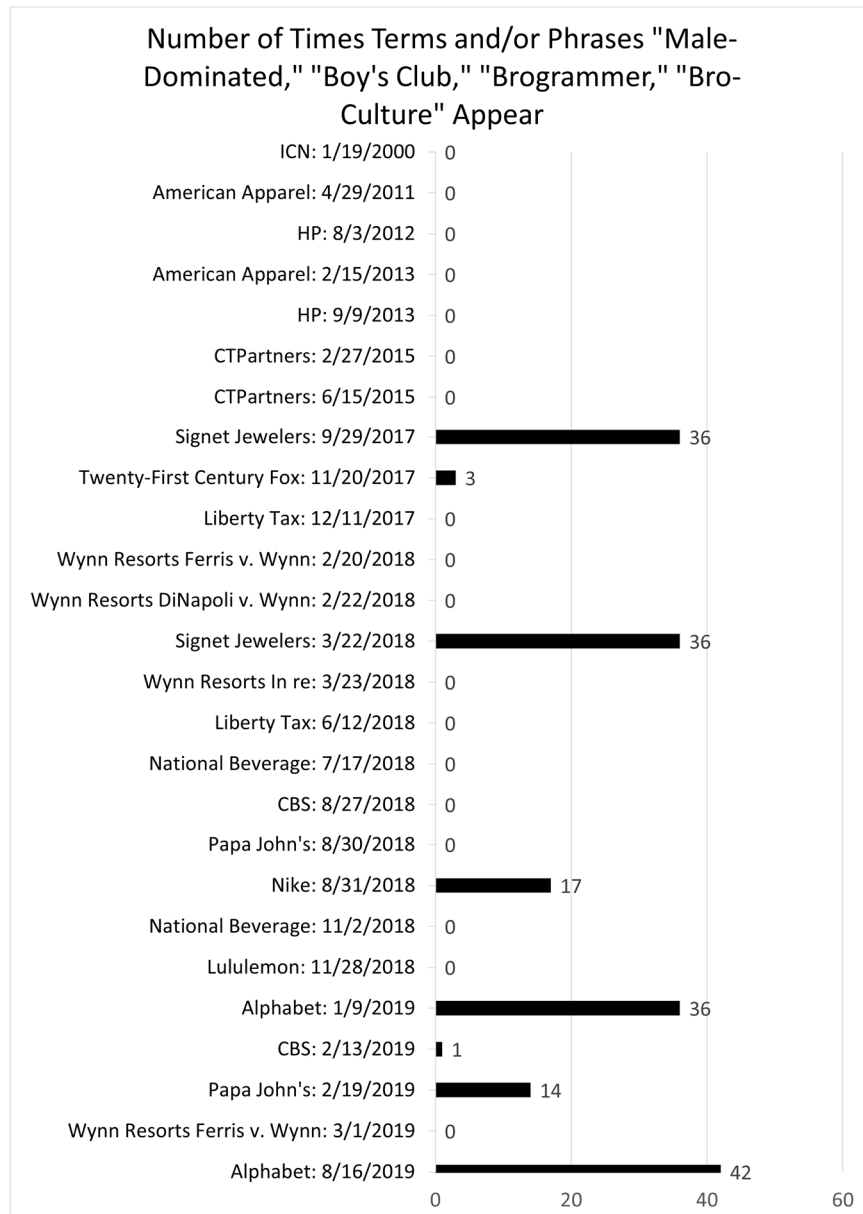


Figure 3.

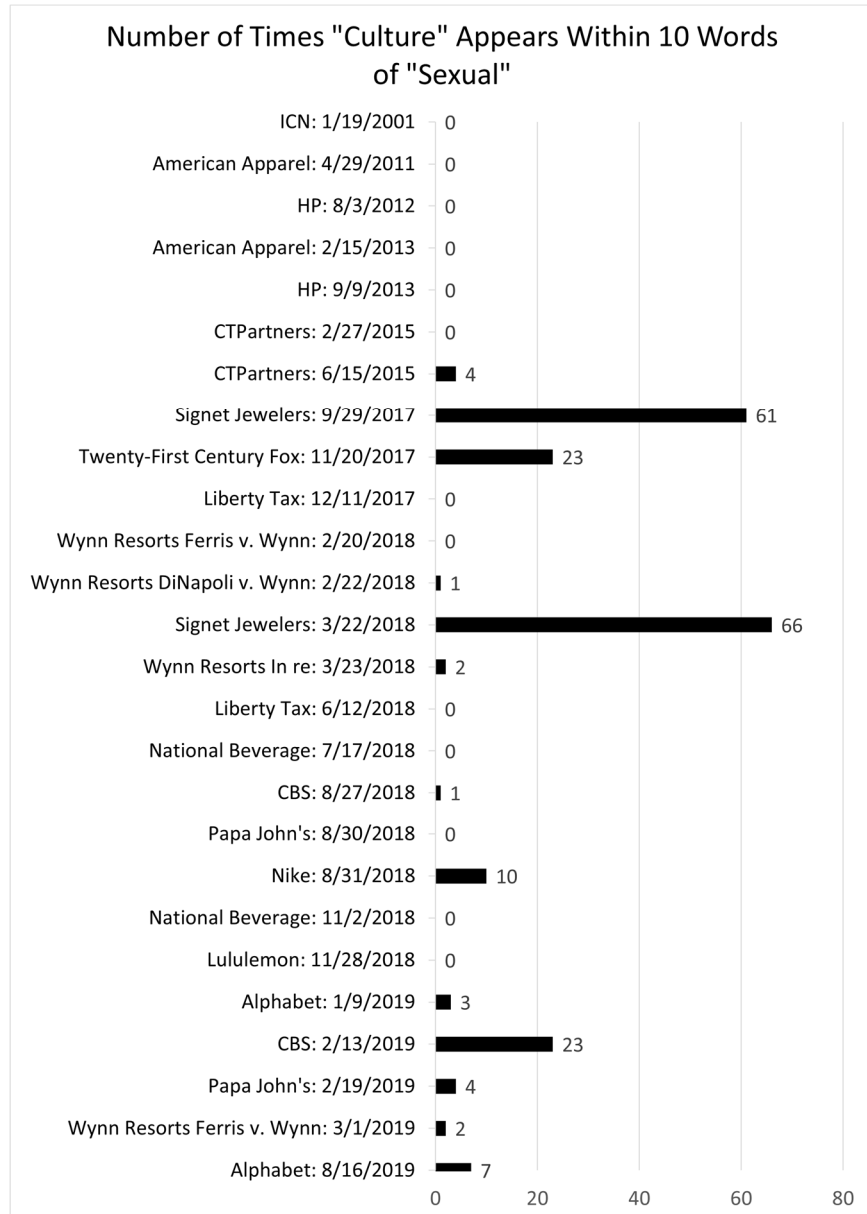


Table of Derivative Complaints Referenced in Figures 1-3

Date	Company	Complaint	Mentions of 'Culture'
1/19/01	ICN	White v. Panic (<i>Panic I</i>), 793 A.2d 356, 358-59 (Del. Ch. 2000), <i>aff'd</i> , 783 A.2d 543 (Del. 2001).	0
4/29/11	American Apparel	<i>In re Am. Apparel S'holder Derivative Litig.</i> , No. CV-10-6352 (C.D. Cal. Apr. 29, 2011).	3
8/3/12	HP	Complaint, Cement & Concrete Workers Dist. Council Pension Fund, et al. v. Hewlett Packard Co., et al., No. 12-CV-04115 (N.D. Cal. Aug. 3, 2012).	1
2/15/13	American Apparel	Second Amended Class Action Complaint for Violation of Federal Securities Laws, <i>In re Am. Apparel S'holder Derivative Litig.</i> , No. CV-10-6352 (C.D. Cal. Feb. 15, 2013).	1
9/9/13	HP/Hurd	Complaint, Cement & Concrete Workers District Council Pension Fund, et al. v. Hewlett Packard Co., et al., No. 12-CV-04115 (N.D. Cal. Aug. 3, 2012).	1
2/27/15	CTPartners	Complaint, Zinno v. CTPartners Exec. Search Inc., No. 15-1476 (S.D.N.Y. Feb. 25, 2015).	10

6/15/15	CTPartners	Amended Complaint, Lopez v. CTPartners Exec. Search Inc., No. 15-1476 (S.D.N.Y. June 15, 2015).	37
9/29/17	Signet Jewelers	<i>In re</i> Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728 (S.D.N.Y. Nov. 29, 2017).	71
11/20/17	Twenty-First Century Fox	Verified Derivative Complaint at 1-2, City of Monroe Emps.' Ret. Sys. v. Murdoch, No. 2017-0833 (Del. Ch. Nov. 20, 2017).	34
12/11/17	Liberty Tax	Verified Stockholder Derivative Complaint at 1, Asbestos Workers' Phila. Pension Fund <i>ex rel.</i> Liberty Tax v. Hewitt, No. 2017-0883 (Del. Ch. filed Dec. 11, 2017).	0
2/20/18	Wynn Resorts	Class Action Complaint, John V. Ferris, et al. v. Wynn Resorts Limited, et al. 18-CV-00479 (Nev. Dist. Ct. filed Feb. 20, 2018).	0
2/22/18	Wynn Resorts	Verified Stockholder Derivative Complaint at 5, DiNapoli <i>ex rel.</i> Wynn Resorts Ltd. v. Wynn, No. A-18-770013-B (Nev. Dist. Ct. Feb. 22, 2018).	3
3/22/18	Signet Jewelers	Fifth Amended Class Action Complaint for Violations of the Federal Securities Laws, <i>In re</i> Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-	74

		06728 (S.D.N.Y. filed Mar. 22, 2018).	
3/23/18	Wynn Resorts	<i>In re</i> Wynn Resorts, Ltd. Derivative Litigation, No. 2:18-CV-00293 (D. Nev. filed Mar. 23, 2018).	4
6/12/18	Liberty Tax	Amended Verified Stockholder Derivative Complaint, Asbestos Workers' Phila. Pension Fund <i>ex rel.</i> Liberty Tax v. Hewitt, No. 2017-0883 (Del. Ch. Dec. 11, 2017).	0
7/17/18	National Beverage	Class Action Complaint, Luczak v. Nat'l Beverage Corp., No. 0:18-cv-61631 (S.D. Fl. July 17, 2018).	0
8/27/18	CBS	Class Action Complaint, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Aug. 27, 2018).	1
8/30/18	Papa John's	Class Action Complaint, Danker v. Papa John's Int'l, Inc., No. 1:18-cv-07927 (S.D.N.Y. Aug. 30, 2018).	7
8/31/18	Nike	Stein v. Knight, No. 18CV38553 (Or. Cir. Ct. Aug. 31, 2018).	23
11/2/18	National Beverage	Consolidated Amended Class Action Complaint, Luczak v. Nat'l Beverage Corp., No. 0:18-cv-61631 (S.D. Fl. Nov. 2, 2018).	0

11/28/18	Lululemon	Shabbouei v. Potdevin, No. 2018-0847 (Del. Ch. Filed Nov. 28, 2018).	19
1/9/19	Alphabet	Verified Stockholder Derivative Complaint, <i>In re</i> Alphabet Shareholder Derivative Litigation, Case No. 19CV341522, (Cal. Super. Ct. Jan. 1, 2019). The case was originally filed as LR Trust, et. al. v. Larry Page, et al., and related actions.	28
2/13/19	CBS	Amended Class Action Complaint, Samit v. CBS Corp., No. 1:18-cv-07796 (S.D.N.Y. Feb. 13, 2019).	40
2/19/19	Papa John's	Amended Class Action Complaint, Danker v. Papa John's Int'l, Inc., No. 1:18-cv-07927 (S.D.N.Y. Feb. 19, 2019).	66
3/1/19	Wynn Resorts	Amended Class Action Complaint, John V. Ferris, et al. v. Wynn Resorts Limited, et al. 18-CV-00479 (Nev. Dist. Ct. Mar. 1, 2019).	8

APPENDIX C: SAMPLE OF AMENDMENTS TO EXECUTIVE COMPENSATION AGREEMENTS

Date Amended	Type	Company	Language	Source
4/24/19	Cause Clause	Endo Health Solutions	“(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.”	Endo Health Solutions, Executive Employment Agreement (Form 8-K) 6 (Apr. 24, 2019), https://www.sec.gov/Archives/edgar/data/1593034/000159303419000011/ex101paulcampanelliemployee.htm .
3/12/19	Representation or Warranty of the Executive	Regal Beloit Corporation	“The Executive represents and warrants to the Company that, to the best of his knowledge and belief: (e) The Executive has not been the subject of any complaint or allegation regarding his sexual harassment, his sexual misconduct . . . in any prior employment situation.”	Regal Beloit Corp., Executive Employment Agreement (Form 8-K) 7 (Mar. 12, 2019), https://www.sec.gov/Archives/edgar/data/0000082811/000008281119000020/rbc-8k3x14x19ex101.htm .
11/29/17	Diversity & Inclusion Targets in Executive Compensation Agreements	Microsoft	“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,	MICROSOFT CORP., NOTICE OF ANNUAL SHAREHOLDERS MEETING AND PROXY STATEMENT 2017, at 39 (2017), https://www.sec.gov/Archives/edgar/data/789019/000119312517310951/d461626ddef14a.htm#toc461626 .

			“Organizational diversity and inclusion.”	
4/9/19	Diversity & Inclusion Targets within Executive Employment Agreement and in Accordance with Executive Compensation Bonus Plan	Uber	<p>“b. 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.”</p> <p>“(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 . . .”</p>	Uber Technologies, Inc., Executive Employment Agreement (Form 8-K) 2 (Apr. 9, 2019), https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752dex1028.htm . Uber Technologies, Inc., Executive Bonus Plan (Form S-1) 2 (Apr. 11, 2019), https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752dex107.htm .
3/16/19	Expanded Clawback Provisions in accordance with Executive Employment Agreements	Wells Fargo	<p>“Misconduct that has or might reasonably be expected to cause reputation or other harm to our Company or any conduct that constitutes ‘cause,’ . . .”</p>	WELLS FARGO & CO., 2019 PROXY STATEMENT 97 (March 16, 2019), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2019-proxy-statement.pdf .

11/20/17	Expanded Clawback Provisions within Executive Employment Agreement	Everest Re Group Ltd.	<p>“Termination and Clawback. Notwithstanding anything in this Agreement to the contrary, if the Executive engages in material willful misconduct in respect of his obligations hereunder, including, but not limited to, fraudulent misconduct, during the term of this Agreement or during the period in which he is otherwise entitled to receive payments hereunder following his termination of employment, then (i) the Executive shall be required to repay to the Company any incentive compensation (including equity awards) paid to the Executive during the period in which he engaged in such misconduct, as determined by a majority of the Board of Directors of Group in its sole discretion.”</p>	<p>Everest Re Group Ltd., Executive Employment Agreement (Form 8-K) 6 (Nov. 20, 2017), https://www.sec.gov/Archives/edgar/data/0001095073/000109507317000053/adde ssoagreement.htm.</p>
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APPENDIX D: TEXTUAL ANALYSIS OF BOARD COMPENSATION COMMITTEE CHARTERS

Figure 1.

