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Fiduciary Duties and Corporate Climate Responsibility

*Cynthia A. Williams**

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* Senior Scholar, Osgoode Hall Law School, and Professor of Law *emerita*, the University of Illinois College of Law. An early draft of this Article was presented at the Vanderbilt Symposium in Honor of Professor Margaret Blair, November 6, 2020. I am grateful for that opportunity and for the thoughtful comments of Professor Don Langevoort and fellow Symposium participants. This work has been informed by policy work the Author has had the privilege to take forward as a board member and North American co-lead for the Commonwealth Climate and Law Initiative, http://www.ccli.ouce.ox.ac.uk, a collaboration between academics and practitioners in Australia, Canada, the U.K., and the United States. I particularly thank Sarah Barker, Ellie Mulholland, and Alex Cooper from CCLI for their contributions to my thinking about these matters. A companion piece with more of a focus on corporate governance is available at http://www.ccli.ubc.ca. All errors remain my own.

V. FIDUCIARY LAW AS PUBLIC LAW II: BEYOND THE NETHERLANDS? 1914
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INTRODUCTION

About fifteen years ago, I was honored to have been contacted by Professor Margaret Blair to discuss a phenomenon about which she was intrigued. That phenomenon was the proliferation of nongovernmental standards for corporate social and environmental responsibility and the related development of "third-party assurance" services to certify companies' compliance to those standards. Whether factories, farms, forests, mines, fishing boats, or handcraft workers, voluntary standards of responsible conduct existed, and a burgeoning industry of third-party assurance providers was developing. Professor Blair had become an advisory-board member of the Worldwide Responsible Apparel Production ("WRAP") initiative, which is now the "largest independent facility certification program in the world focused on apparel, footwear, and sewn products."[1] Through that experience, she was observing this developing complex of nongovernmental standard setting, inspection, assurance, and certification in action, and she wanted to examine it from an academic perspective. My work to that point had concentrated on the nongovernmental standard-setting aspect as evidence of corporate social responsibility ("CSR"), and "new governance" in action. So, Professor Blair's focus on inspection, assurance, and certification of those standards was new to me, and I enthusiastically accepted her invitation to start reading and discussing together what it might mean and why it might be interesting.

Early in our investigations we were joined by an extremely talented JSD student at the University of Illinois, Li-Wen Lin, who is now a professor at the Peter A. Allard School of Law of the University of British Columbia. Li-Wen brought highly developed intellectual capacity to the project, as well as language skills, being originally from Taiwan and thus able to read Chinese. She had also recently finished a superb paper on legal transplants, so our initial conception of the role of nongovernmental standard setting and assurance focused on it as a mechanism to import developed-country norms of responsible behavior into developing countries, such as China. Yet as our understanding of

1. *About*, WORLDWIDE RESPONSIBLE ACCREDITED PROD., https://wrapcompliance.org/about/ (last visited Sept. 28, 2021) [https://perma.cc/R8AX-KX5G] (formerly "Worldwide Responsible Apparel Production").

the importance of this complex of standard setting and assurance mechanisms ultimately developed, we began to recognize that the social and environmental standard setting was a specific instance of a larger phenomenon in global commerce, which was the standardization of processes and product specifications generally, through the auspices of the International Standards Organization ("ISO"). Thus, it was standardization that came to be a key component of our analysis, since it was standardization that ultimately connected to a deeper theoretical issue, which was Ronald Coase's theory of the firm and the "make or buy" question at the heart of his theory.[2]

Standardization, we argued, of both product specifications, through ISO, and of social and environmental process specifications, through both ISO and nongovernmental CSR standard setting, and then certification to those standards, "reduce a number of the costs of contracting that Coase identified with market transactions—undertaking negotiations, writing contracts, and settling disputes—and so allow moving transactions out of firms."[3] These processes allow "private ordering regimes to extend globally and beyond close-knit commercial communities" and "permit the development of trust necessary to sustain private ordering" where face-to-face transactions were not possible or would increase costs prohibitively.[4] Thus, we argued, these external mechanisms of assurance of the quality and product specifications to ISO standards, and as expanded to assurance that productive processes met developing social and environmental norms, both reduced the transaction costs of market transactions and replicated some of the benefits of managerial control over operations otherwise found within the firm.

Working together with Professor Blair (and with Li-Wen) was a real joy. Professor Blair's standards for the quality of intellectual work are impeccable. She is both extremely careful and creative, which are qualities not always found within one person. Moreover, her ability to

2. *See* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 404 (1937) ("The question always is, will it pay to bring an extra exchange transaction under the organising authority [of the firm].").

3. Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, *The Roles of Standardization, Certification, and Assurance Services in Global Commerce*, *in* CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE GOVERNANCE: THE CONTRIBUTION OF ECONOMIC THEORY AND RELATED DISCIPLINES 299, 317–18 (Lorenzo Sacconi, Margaret Blair, R. Edward Freeman & Alessandro Vercelli eds., 2011) [hereinafter Blair, *Roles*]. *See generally* Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 326 n.1 (2008) (discussing how standard setting and assurance could reduce the costs of contracting).

4. Blair, *Roles*, *supra* note 3, at 319.

connect facts with theory pushed our thinking forward in a way I thought—and think—was quite productive. Working together, we analyzed these external mechanisms that promote both the internal goals of the firm (e.g., high standards of quality for its products, cost containment, some degree of legal certainty) and, increasingly, could facilitate the firm's external goals of meeting social and environmental norms for production, while also reducing the burdens of operational control and reducing the risks of legal responsibility when things go wrong in the social or environmental realm by facilitating production in supply chains.

We argued that these private law initiatives, with nongovernmental standards, inspections, assurance, and certification, advanced public-law goals of social and environmental protection. But I see now that there is another, equally meritorious interpretation of this trend. What we had evaluated as a mechanism for companies to take responsibility for their social and environmental actions—the development of non-governmental standards and then third-party assurance—is also a mechanism that permitted companies to disclaim social responsibilities by facilitating the development of supply chains that often (although not always) are a barrier to accountability for harm.

As with any intellectual project, there were strands of thinking we were unable to develop at the time, and it is one of those strands I develop here. Corporate-law scholarship for decades has been occupied with agency costs and how to mitigate them.[5] But when I teach the basic business organizations class, starting with agency law and looking at the fiduciary duties of care, loyalty, and full disclosure of any agent to her principal, we explore both costs *and benefits* of agency relationships. I do so by introducing Ronald Coase's theory of the firm. Using an example close to most second-year law students' experience, that of buying a suit for interviews, I contrast Brooks Brothers establishing its own factories (the "make" decision) with Brooks Brothers using supply chains, contractors, and subcontractors (the "buy" decision) to produce its clothing. After discussing Coase's ideas on transaction-cost economics and managerial hierarchy, I then ask the students how law fits into the picture. How could the fiduciary duties of agents within a firm reduce transaction costs in the "make" decision versus the "buy" decision? The students can readily identify that these fiduciary duties within a firm would require the firm's agents not to shirk responsibilities, not to compete with the principal, not to steal

5. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

intellectual property, not to sell trade secrets, and to come forward with economically significant information, such as drops in the price of materials or competing businesses starting up, without being asked. Thus, within the firm, the fiduciary duties of agents can reduce transaction costs, since none of these important protections would need to be negotiated, as they would in market transactions, either on spot markets or within established supply-chain relationships. But, as the students also recognize, operating within the firm potentially increases the risks of liability due to the concept of *respondeat superior*, and so we are back to the advantages of supply chains, standardization, and the institutional arrangements that replicate managerial control.

But I remain intrigued with the benefits as well as the costs of agency relationships and in particular the possible power of fiduciary duties to be harnessed to advance the firm's social responsibilities. That is, can internal mechanisms of the firm, the private law (from a European perspective) fiduciary duties of agents, be used to advance external public law goals? Instead of outward standards of responsibility being brought into the firm through external mechanisms (i.e., voluntary standards development and third-party assurance), could the internal standards of agents' responsibilities to the firm, their fiduciary duties, be used to extend responsible action beyond the firm and through that mechanism actuate what many are calling for as the firm's social responsibilities?

In this paper, I take up this question by reference to a public law issue much in focus today, that of climate change. In Part I, I provide an extremely brief overview of the understanding of climate risk as a financial risk, connecting that overview to the question of why private law fiduciary duties might be engaged to address that risk. In Part II, I summarize the familiar territory of directors' and officers' fiduciary obligations, using Delaware law as the exemplar, and in Part III, I describe a more ambitious approach to directors' fiduciary obligations, a new idea by the Dutch academic and practitioner Jaap Winter of directors having "societal duties." In Part IV, concentrating on Delaware law, I develop some of the implications of these duties for directors' and officers' obligations to include climate change in their oversight, strategic direction of the company, and possible disclosure. Part V connects these discussions back to the question with which I began, that is, could the fiduciary duties of officers and directors be engaged to securely ground the company's duties to society generally, beyond climate change? I then briefly conclude the article.

Agency law is one of the oldest areas of law. Yet, as others have also recognized,[6] today, in light of significant rhetorical shifts in understanding of companies' purposes and officers' and directors' fiduciary, and possibly moral, obligations to address systemic issues like climate change, increasing economic inequality, and systemic racism, agency law can have new power. Agency costs have played a central role in many of the intellectual inquiries and traditions central to corporate law and finance. By this Article, I submit that agency law's benefits should start to have a coequal role.

I. CLIMATE CHANGE AS A FINANCIAL RISK

Climate change awareness is motivating governments around the world to agree to accelerate a transition to a low-carbon economy, seen most specifically in the global agreement by close to two hundred countries in Paris in December 2015, to limit the warming of the earth to "well under" 2° Celsius compared to the pre-industrial era and to "pursuing efforts" to limit warming to 1.5° Celsius.[7] In 2018, the Intergovernmental Panel on Climate Change ("IPCC") issued a special report on the implications of warming 1.5°C versus 2.0°C. It concluded that there are "robust differences" between warming of 1.5°C versus 2.0°C in temperature extremes, droughts, heavy precipitation events, floods, sea level rise, impacts on biodiversity and ecosystems, increases in ocean temperatures and acidity, including effects on marine diversity, fisheries, and marine ecosystems, negative effects on human health, on agricultural productivity, water stress, and economic

6. *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV (forthcoming 2022) (evaluating fiduciary duty law in Delaware as a source of an obligation for companies to incorporate equality, diversity, and inclusion more robustly into company practices); Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties*, 2020 UTAH L. REV. 313, 353–63 (2020) (discussing trends in climate litigation and how those trends may affect courts' interpretations of directors' duties to incorporate climate change); Edward J. Waitzer & Douglas Sarro, *Fiduciary Society Unleashed: The Road Ahead for the Financial Sector*, 69 BUS. LAW. 1081, 1115 (2014) (arguing that the financial sector is being pressured to better define and protect society and the public interest through an expanded concept of fiduciary duty).

7. Paris Agreement to the United Nations Convention on Climate Change art. 2, para. 1(a), Dec. 12, 2015, T.I.A.S. No. 16-1104 ("Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change[.]"). *See generally Paris Agreement: Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process/the-paris-agreement/status-of-ratification (last visited Aug. 13, 2021) [https://perma.cc/CH6W-KH2J] (the Paris Agreement entered into force on November 4, 2016 when countries representing fifty-five percent of global GHG emissions had ratified the Agreement; 160 countries had ratified the Agreement by August 2017).

growth.[8] The report identified both emissions and adaptation pathways that could limit warming to 1.5°C and, significant for this analysis, stated that "[p]artnerships involving non-state public and private actors, institutional investors, the banking system, civil society and scientific institutions would facilitate actions and responses consistent with limiting global warming to 1.5°C."[9] As the report also stated, government policy could support and facilitate the necessary investments in both emissions reductions and adaptation, which, if undertaken at scale, would also support achieving the United Nations' Sustainable Development Goals and global poverty reduction.[10]

The purely financial risks of continuing to rely on coal and fossil fuels as the basis for modern economies are increasingly well demonstrated. One particularly useful report was published in 2019 by Mercer, a consultant to institutional investors with over $10 trillion under management, analyzing the risks and opportunities from climate change and the transition to a low-carbon economy.[11] It evaluated the effects on various portfolios, such as a growth portfolio and a sustainable growth portfolio,[12] under three different scenarios: one showing a 2°C increase by 2100 in global average temperatures as compared to pre-industrial temperatures, which would require "aggressive" climate action; one a 3°C increase by 2100, which assumes "some climate action but not transformative"; and the third a 4°C increase by 2100, which is Mercer's estimate of the increases to be expected under today's business-as-usual pathway.[13] Mercer relied on data from Cambridge Econometrics that integrates "the treatment of economics, energy systems and the environment to capture linkages and feedbacks," in order to evaluate the effects of the different scenarios on its model portfolios.[14]

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8. MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, *in* SPECIAL REPORT: GLOBAL WARMING OF 1.5°C, 1, 8 (Valerie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf [https://perma.cc/2MM5-M3YU] ("An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.").

9. *Id.* at 23.

10. *Id.* at 19–21.

11. MERCER, INVESTING IN A TIME OF CLIMATE CHANGE: THE SEQUEL 11 (2019), https://info.mercer.com/rs/521-DEV-513/images/Climate-change-the-sequel-2019-full-report.pdf [https://perma.cc/6A6L-3NCB].

12. *Id.* at 75 fig.33.

13. *Id.* at 81–83.

14. *Id.* at 7.

Mercer's projections showed much stronger risks and opportunities at "an industry-sector level, with significant variation by scenario."[15] Under even the most optimistic scenario evaluated, which assumes the world takes "aggressive" action on climate and limits warming to 2°C by 2100, the potential effects on a long-term investor of holding oil, gas, and coal, or of not investing in equities using a sustainability theme, are eye-popping:[16]

Industry or Asset Class	% p.a. to 2030 in 2°C scenario	% cumulative to 2030 in 2°C scenario	% p.a. to 2050 in 2°C scenario	% cumulative to 2050
Coal	-7.1	-58.9	-8.9	-100.0 (by 2041)
Oil and gas	-4.5	-42.1	-8.9	-95.1
Renewables	+6.2	+105.9	+3.3	+177.9
Electric utilities	-4.1	-39.2	-3.3	-65.7
Developed market equities	0.0	-0.5	-0.2	-5.6
Emerging market equities	+0.2	+1.8	-0.1	-4.0
All world equities—sustainability themed	+1.6	+21.2	+0.9	+32.0
Infrastructure	+2.0	+26.4	+1.0	+39.4
Infrastructure-sustainability themed	+3.0	+42.3	+1.6	+67.1

In its executive summary, Mercer concluded that "[i]nvestors need to consider both climate-related mitigation and adaptation in an active way to develop climate resilience in their portfolios," not only for the financial and societal health of their beneficiaries but also in order

15. *Id.* at 10.
16. *Id.* at 10.

to meet their fiduciary duties.[17] Mercer's analysis suggests that any investor holding a business-as-usual, diversified equity portfolio that is not sustainability themed, and with significant oil, gas, and coal holdings, risks "undue loss," indeed catastrophic loss in some asset classes, starting to eventuate over the next eleven years. Given Mercer's analysis of the financial risks of investments in coal, oil and gas, or utilities relying on those energy sources, and other similar findings,[18] the materiality predicate for investment fiduciaries' obligations to evaluate these data as part of their fiduciary duties is established. But do similar conclusions follow for officers and directors? This Author's analysis suggests the answer to that question is yes.

This Article is not the place to detail the financial risks to operating companies and financial institutions of climate change; this Author and many others have done that elsewhere.[19] Yet it is perhaps sufficient to point out that generally, our collective understanding of climate change has evolved from construing it as a purely ethical or environmental externality to recognizing it as an issue that poses foreseeable financial risks and opportunities for U.S. companies and systemic risks to the financial system across short-, medium-, and long-term horizons.[20] Climate change remains an "enormous market failure"

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17. *Id.* at 6.

18. *See, e.g.*, MARK LEWIS, BNP PARIBAS ASSET MGMT., WELLS, WIRES, AND WHEELS...: EROCI AND THE TOUGH ROAD AHEAD FOR OIL 3 (2019), https://docfinder.bnpparibas-am.com/api/files/1094E5B9-2FAA-47A3-805D-EF65EAD09A7F [https://perma.cc/RY6Y-DBFY]. BNP Paribas calculates that the EROCI ("Energy Recovered on Capital Investment") of oil versus renewables for powering transportation over the next twenty-five years and finds that—compared with oil powering internal combustion engines—the combination of new solar or wind with electric vehicles will produce six to seven times the energy for powering light-duty vehicles. *Id.* Further, it finds that oil must be sold at about ten dollars per barrel in order for it to be cost competitive with solar and wind energy over the next twenty-five years. *Id.*

19. *See, e.g.*, SARAH BARKER & ELLIE MULHOLLAND, COMMONWEALTH CLIMATE & L. INITIATIVE, DIRECTORS' LIABILITY AND CLIMATE RISK: COMPARATIVE PAPER – AUSTRALIA, CANADA, SOUTH AFRICA, AND THE UNITED KINGDOM 7 (2019), https://ccli.ouce.ox.ac.uk/wp-content/uploads/2019/10/CCLI-Directors%E2%80%99-Liability-and-Climate-Risk-Comparative-Paper-October-2019-vFINAL.pdf [https://perma.cc/4F2S-YRQR]; SARAH BARKER, COMMONWEALTH CLIMATE & L. INITIATIVE, THE CLIMATE RISK REPORTING JOURNEY: A CORPORATE GOVERNANCE PRIMER 1 (2018), https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/11/CCLI-Climate-Risk-Reporting-Journey-vFINAL.pdf [https://perma.cc/HVZ3-TAT9]. These papers and other climate risk research are available at *Publications*, COMMONWEALTH CLIMATE & L. INITIATIVE (last visited Sept. 28, 2021), https://ccli.ouce.ox.ac.uk/publications/ [https://perma.cc/XZ9Y-TJJD]. *See also* Benjamin, *supra* note 6, at 319; Sarah Barker, *An Introduction to Directors' Duties in Relation to Stranded Asset Risks*, *in* STRANDED ASSETS AND THE ENVIRONMENT: RISKS, RESILIENCE AND OPPORTUNITIES 199, 235 (Ben Caldecott ed., 2018).

20. This assessment is shared by, for example, the U.S. Commodity Futures Trading Commission. *See* CLIMATE-RELATED MKT. RISK SUBCOMM., U.S. COMMODITY FUTURES TRADING COMM'N, MANAGING CLIMATE RISK IN THE US FINANCIAL SYSTEM, at ii (2020), https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-

due to the lack of appropriate, governmentally enforced incentives to reduce greenhouse gas emissions.[21] But even in the absence of a robust economy-wide carbon price, climate risks and impacts are being internalized on the balance sheets of U.S. corporations, directly and indirectly, through a changing climate and efforts to address climate change across three key pathways:

- *Physical risks* to both natural and built environments, from both acute catastrophic and gradual onset impacts;
- *Economic transition risks* arising from the transition towards a net-zero emissions economy and associated shifts in the regulatory, technological, and stakeholder landscape within which businesses operate; and
- *Litigation exposure* stemming from the attribution of climate change to a company's activities or the failure to manage the impacts of climate change on the business.[22]

First categorized as immediately above by then-Governor of the Bank of England Mark Carney in an influential speech to Lloyds of London entitled *Breaking the Tragedy of the Horizon*,[23] these risks are

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Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf [https://perma.cc/7E2W-LP77] [hereinafter CFTC REPORT]; *see also* NETWORK FOR GREENING THE FIN. SYS., THE MACROECONOMIC AND FINANCIAL STABILITY IMPACTS OF CLIMATE CHANGE 6 (2020), https://www.ngfs.net/sites/default/files/medias/documents/ngfs_research_priorities_final.pdf [https://perma.cc/RWM8-UUE3]; PATRICK BOLTON, MORGAN DESPRES, LUIZ AWAZU PERIERA DA SILVA, FRÉDÉRIC SAMAMA & ROMAIN SVARTZMAN, BANK FOR INT'L SETTLEMENT, THE GREEN SWAN: CENTRAL BANKING AND FINANCIAL STABILITY IN THE AGE OF CLIMATE CHANGE 65 (2020), https://www.bis.org/publ/othp31.pdf [https://perma.cc/A9DT-MCDB]; TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 8 fig.1 (2017), https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf [https://perma.cc/52GZ-99TB] [hereinafter TCFD REPORT].

21. CLIMATE-RELATED MKT. RISK SUBCOMM., *supra* note 20, at xix.

22. *See* PRUDENTIAL REGUL. AUTH., BANK OF ENG., THE IMPACT OF CLIMATE CHANGE ON THE UK INSURANCE SECTOR 64 (2015), https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/publication/impact-of-climate-change-on-the-uk-insurance-sector.pdf [https://perma.cc/6T67-FABJ].

23. Mark Carney, Governor, Bank of Eng., Speech at Lloyd's of London: Breaking the Tragedy of the Horizon – Climate Change and Financial Stability 3 (Sept. 29, 2015), https://www.bis.org/review/r151009a.pdf [https://perma.cc/KE2T-CT4A] (calling climate change a "tragedy of the horizon" because it requires policy responses and potential sacrifices today for benefits that will accrue after today's corporate leaders and politicians leave office). Soon after delivering this speech, then-Governor Carney persuaded the Financial Stability Board to put together a global consortium of investors, accountants, and company executives, known as the Task Force on Climate-related Financial Disclosures (TCFD), to develop a global, voluntary framework for evaluating and disclosing companies' financial risks from climate change. *About*, TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, https://www.fsb-tcfd.org/about/ (last visited Aug. 14, 2021) [https://perma.cc/UNS2-UZHL]. Established in December 2015 and chaired by Michael Bloomberg with special assistance from former SEC Chair Mary Schapiro, the TCFD seeks disclosure of companies' governance, strategy, risk management, targets, and metrics for

far reaching in breadth and magnitude across the economy, involve uncertain and extended time horizons, but are also foreseeable risks today for most industries. Climate risks are particularly acute for entities in sectors such as energy and natural resources, utilities, transport, real estate, infrastructure, agriculture, and financial services.[24] Exposure to climate risks extends to companies across almost every sector of the U.S. economy, however, with the Sustainable Accounting Standards Board ("SASB") identifying material climate-related financial impacts to U.S. companies operating in sixty-eight out of seventy-seven industries, potentially affecting eighty-nine percent of U.S. public equity market valuation.[25] The World Economic Forum's ("WEF") 2021 *Global Risks Report* identifies climate change related physical trends, governance failures, and environmental implications as among the five out of the top six risks to the global economy.[26]

Recent actions by the Biden Administration have put climate change financial risks into the spotlight, as President Biden has moved quickly to emphasize climate change as part of both U.S. foreign and domestic policy. On his first day in office, January 20, 2021, President Biden declared support for the Paris Climate Agreement and its threefold goals of "a safe global temperature, increased climate resilience, and financial flows aligned with a pathway toward low greenhouse gas emissions and climate-resilient development."[27] His climate change executive order on January 27, 2021, established a process to embed climate risk mitigation in every executive agency of the federal government, including establishing an interagency

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evaluating climate change risks and opportunities. *See* Letter from Commonwealth Climate & L. Initiative to the U.S. Sec. & Exch. Comm'n (June 13, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914495-244736.pdf [https://perma.cc/QJ8R-3CBZ]. *See generally* TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES (last visited Sept. 28, 2021), https://www.fsb-tcfd.org/ [https://perma.cc/3TFT-4C6N].

24. TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, *supra* note 20, at 16.

25. SUSTAINABILITY ACCT. STANDARDS BD., CLIMATE RISK TECH. BULL. 5 (2021), https://www.sasb.org/wp-content/uploads/2021/05/Climate-Risk-Technical-Bulletin2021-042821.pdf [https://perma.cc/2GLM-DSWZ]. The SASB has worked with investors and members of industry throughout the United States to develop targeted, industry-specific ESG disclosure standards. *See generally* SASB STANDARDS, https://www.sasb.org/ (last visited Sept. 28, 2021) [https://perma.cc/FN5K-FVQ9].

26. WORLD ECON. F., GLOBAL RISKS REPORT 14 fig.4 (16th ed. 2021), http://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2021.pdf [https://perma.cc/V5UE-BVBG].

27. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Presidential Statement on Acceptance of the Paris Agreement on Climate Change on Behalf of the United States, 2021 DAILY COMP. PRES. DOC. 49 (Jan. 20, 2021).

coordinating process and appointing both a foreign and domestic policy lead in newly established positions within the White House.[28]

Secretary of the Treasury Janet Yellen has demonstrated that climate change will be a priority by creating a hub within Treasury that will focus on financial system related risk posed by climate change and tax policy incentives to effect change.[29] In a speech on April 21, 2021, she vowed to build on President Biden's "whole-of-government" approach with a "whole-of-economy" approach.[30] One month later, President Biden issued an Executive Order on Climate Change Financial Risk, with responsibilities for Treasury, the Office of Management and Budget ("OMB"), and the Financial Stability Oversight Council ("FSOC") and its constituent agencies.[31] Among its significant aspects are initiatives to:

(1) require the development of a government-wide strategy to assess, measure, and disclose climate change financial risk across the federal government;
(2) request a financial analysis of the capital needed to move the U.S. economy to net-zero by 2050;
(3) require Treasury to work with FSOC and its constituent agencies to identify actions by regulated firms within each agency's remit to identify, measure, mitigate, and disclose climate change financial risks;
(4) identify financial risk from climate change within the insurance industry;
(5) identify actions that can be taken by the Department of Labor to protect pension savings and federal pension insurance from climate change financial risk; and
(6) identify how the federal government can incorporate climate change financial risk into its lending, risk underwriting, procurement, and budgeting.[32]

This executive order followed a new report by the International Energy Agency ("IEA") setting out a global roadmap of how to transition

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28. Exec. Order No. 14,008, 86 Fed. Reg. 7619.

29. *Yellen Says Would Appoint Senior Climate Official at Treasury*, REUTERS (Jan. 19, 2021, 12:26 PM), https://www.reuters.com/article/us-usa-biden-yellen-climate-idUSKBN29O2B3 [https://perma.cc/U72V-BKZQ].

30. Janet L. Yellen, Sec'y of the Treasury, Remarks to the Institute of International Finance (Apr. 21, 2021), https://home.treasury.gov/news/press-releases/jy0139 [https://perma.cc/2DJ5-MLMC].

31. Exec. Order No. 14,030, 86 Fed. Reg. 27971 (Feb. 1, 2021).

32. *Id.* The Securities and Exchange Commission is an independent agency, so not part of the President's executive order, but it, too, is taking a whole of agency approach to climate change, and is widely expected to promulgate new disclosure obligations on climate change. See text accompanying notes 148–149, infra.

to a net-zero energy system by 2050, including four hundred specific milestones for what needs to be done to meet that ambitious goal.[33] Significantly, the report recognizes that there can be no new oil and gas fields approved for development as of 2021, nor can there be any new coal mines or mine extensions.[34]

Each of these regulatory actions portend significant implications for companies in oil, gas, coal, finance generally, pensions, and insurance, as well as companies selling goods to the U.S. government, and for directors' and officers' fiduciary obligations in each of these industries. Adding the SASB conclusions that climate change is a material risk in sixty-eight of seventy-seven industries into the analysis, it is easy to conclude that companies across the U.S. economy have reason to incorporate climate change into their decisionmaking structures. Crucially, the magnitude of future financial risks depends in part on decisions taken today, which is why this analysis looks to the fiduciary obligations of officers and directors of U.S. companies for leverage.

II. FIDUCIARY LAW IN DELAWARE

As agents of the corporation and its shareholders, officers and directors in the United States have obligations to act consistently with duties of care, loyalty, and full disclosure. Generally speaking, the duty of care requires officers and directors to make lawful, reasonably informed decisions.[35] The duty of loyalty requires officers and directors to act in good faith, put the interests of the corporation above their own interests, and, in Delaware, exercise oversight regarding law compliance.[36] The duty of full disclosure encompasses an affirmative duty for agents to bring forward economically significant information to the principal and to communicate honestly in all "public or direct" communications with the corporation's shareholders.[37] These duties

33. STÉPHANIE BOUCKAERT ET AL., INT'L ENERGY AGENCY., NET ZERO BY 2050: A ROADMAP FOR THE GLOBAL ENERGY SECTOR 3 (Oct. 2021), https://www.iea.org/reports/net-zero-by-2050 [https://perma.cc/VJU2-MW3J].

34. *Id.* at 21.

35. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985).

36. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 62 (Del. 2006) (discussing good faith determinations); Stone v. Ritter, 911 A.2d 362, 372–73 (Del. 2006) (examining oversight duties regarding law compliance).

37. Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998):

> Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a*

will be described in somewhat more detail before analyzing theories of directors' and officers' fiduciary obligations to consider climate change carefully, honestly, and in good faith in their deliberations and decisionmaking.

A. The Duty of Care

Officers and directors are required by the duty of care to make decisions carefully in light of "all material information reasonably available to them."[38] One of the few cases in Delaware to have found directors potentially liable for breach of the duty of care, *Smith v. Van Gorkom*, was an extreme example of failing in this regard. The case concerned the board's decision to sell the company, Trans Union, without the board having previously agreed that it should explore a sale of the company, without a proper valuation study, and where the directors asked no questions when presented with the CFO's report in a hastily called board meeting that the price per share for selling the company was " 'in the range of fair price,' but 'at the beginning of the range.' "[39] In that case, the Delaware Supreme Court held that gross negligence in the procedure by which a decision is made is the standard of culpability in order to impose personal liability on members of the board for a breach of the duty of care.[40] On the record before it, the court concluded that the "Board of Directors did not reach an informed business judgment" where they

> (1) Did not adequately inform themselves as to Van Gorkom's [CEO] role in forcing the "sale" of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the "sale" of the Company upon two hours' consideration, without prior notice [of the agenda of the meeting], and without the exigency of a crisis or emergency.[41]

Arguably, according to that standard, in the climate change context a board may breach its duty of care where it totally fails to inform itself about the foreseeable and financially material climate risks relevant to its industry; or if it does consider emerging information and trends on climate change, is grossly negligent in the process of

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fortiori that when directors communicate publicly or directly with shareholders about corporate matters the *since qua non* of directors' fiduciary duty to shareholders is honesty.

38. *Van Gorkom*, 488 A.2d at 872 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

39. *Id.* at 869.

40. *Id.* at 873.

41. *Id.* at 874.

evaluating that information.[42] That said, boards of directors in the United States have powerful defenses against personal liability for breach of the duty of care. These defenses include the business judgment rule and the ability of companies in the United States to exculpate directors, but not officers, in their certificate of incorporation against liability for breach of the duty of care.[43]

1. The Business Judgment Rule

The business judgment rule is an evidentiary presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[44] Absent evidence of gross negligence in the procedure of making the decision, an unlawful decision, or bad faith, courts will not second-guess business decisions made by the board even where a decision has lost the company a material amount of money.[45] Given these limits to the business judgment rule, however, it will not protect directors where the evidentiary presumption is overcome by allegations, and ultimately proof, that (a) the process the board used to inform itself prior to making a decision was grossly negligent;[46] (b) the decision was unlawful;[47] (c) the decision was not made in good faith;[48] or (d) where unconsidered inaction is the basis of the loss, that is, where there is no business decision to protect.[49] This latter concept of "unconsidered inaction" has

42. *See, e.g.*, *id.* at 893 (holding that a business decision reached by a board of directors that was grossly negligent in the process of being informed of relevant considerations applicable to its decision to sell the company is not protected by the business judgment rule).

43. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2021).

44. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

45. *See, e.g.*, Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982); Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996).

46. *See Van Gorkom*, 488 A.2d at 872. A similar result would likely be had in Canada. *See, e.g.*, UPM-Kymmene Corpor. v. UPM-Kymmene Miramichi Inc., 2002 CanLII 49507, para. 156 (Can. Ont. S.C.) ("However, directors are only protected [by the business judgment rule] to the extent that their actions actually evidence their business judgment. The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions.").

47. *See, e.g.*, PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (AM. L. INST. 1994) (providing no business judgment rule protection for knowing violations of law); Miller v. Am. Tel. & Tel. Co., 507 F.2d 759, 763 (3d Cir. 1974) (holding the same).

48. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 62 (Del. 2006) (reviewing the standard for good faith determinations).

49. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 278 (Del. Ch. 2003). Directors' actions would not be protected by the business judgment rule if plaintiffs' allegations were proven at trial: "[P]laintiffs' new complaint suggests that the Disney directors failed to exercise *any* business judgement and failed to make *any* good faith attempt to fulfill their fiduciary

become important since 1996, at least in theory, as part of the board's *Caremark* duties to ensure that the corporation is taking law compliance seriously.[50] It will be discussed further below.

Moreover, the business judgment rule will not initially protect directors where a conflict-of-interest transaction or other breach of the duty of loyalty is alleged, although it can be reinstated in a duty of loyalty context by the board showing it took certain procedural steps to ensure that the transaction has not been affected by the underlying conflict of interest; or the directors' actions can be upheld by alleging, and ultimately proving, that the transaction is "entire[ly] fair."[51]

2. Exculpation

Soon after *Smith v. Van Gorkom* was decided in 1985, the Delaware legislature passed section 102(b)(7) to the Delaware General Corporation Law. This provision allows companies to eliminate or limit liability for members of the board for breaches of the duty of care by putting an "exculpation clause"[52] in the certificate of incorporation. Such a provision does not apply to protect officers, however, and nor can it exculpate members of the board for breach of the duty of loyalty, for acts or omissions not in good faith, for unlawful distributions, or for intentional violations of law.[53]

These limits to the protection of the business judgment rule and exculpation clauses under Delaware law inform the conclusion of this analysis: notwithstanding these protections, officers and directors may face potential fiduciary liability if they utterly fail to consider climate change as part of their decisionmaking and/or oversight. The most important of these limits to directors' protection are the requirements

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duties to Disney and its stockholders." *Id.* At trial, plaintiffs' allegations were not proven to the satisfaction of the Chancery Court, and that holding was upheld on appeal in an important opinion by the Delaware Supreme Court clarifying the meaning of "good faith." *In re* Walt Disney Co. Derivative Litig., 905 A.2d 27 (Del. 2006).

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

51. DEL. CODE ANN. tit. 8, § 144 (2021); *see also* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (discussing "entire fairness").

52. *See* § 102(b)(7). Section 102(b)(7) provides that the certificate of incorporation may include:

> A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title [unlawful distributions rendering the company insolvent]; or (iv) for any transaction from which the director derived an improper personal benefit.

53. *Id.*

for boards to exercise their power in "good faith" and taking account of their "duty of oversight," both now construed as subsidiary elements of the duty of loyalty. Conscious disregard of a known duty to act will not be protected because of these aspects of the duty of loyalty. These concepts will be discussed below, after setting out the general outlines of the duties of loyalty and full disclosure.

B. The Duty of Loyalty

1. General Duty of Loyalty Concepts

Generally, the duty of loyalty requires directors to act in good faith, lawfully, and in the best interest of the company. It is most typically at issue in conflict-of-interest situations, such as when a parent company engages in transactions with a subsidiary, or when one or more of the officers or directors are on both sides of a transaction. In any conflict-of-interest situation, the board may follow specific procedures to either reinstate business judgment rule protections or to show that a conflicted decision is entirely fair to the corporation.[54] In Delaware, so long as it is not a controlling shareholder transaction, the protections of the business judgment rule can be reinstated, by either independent directors approving the transaction or independent shareholders approving the transaction, given full disclosure of relevant facts about the conflict and the transaction.[55] In a controlling shareholder transaction, if a well-informed, independently advised special committee negotiates the terms of the transaction on behalf of the minority shareholders and that transaction is approved by both a majority of independent directors and a majority of the minority (non-conflicted) shareholders, business-judgment-rule review is reinstated.[56] A conflict-of-interest transaction can also be upheld as against duty of loyalty challenges if the board demonstrates that the transaction is "entirely fair" to the corporation and its shareholders, which is defined

54. *Weinberger*, 457 A.2d at 709 n.7, 710.

55. *See In re* Wheelabrator Techs., Inc. S'holders Litig., 663 A.2d 1194 (Del. Ch. 1995).

56. *See* Kahn v. M&F Worldwide Corp. (MFW), 88 A.3d 635 (Del. 2014). In *MFW*, the Delaware Supreme Court held that a merger between a controlling stockholder and its subsidiary, where conditioned on the "approval of both an independent, adequately-empowered Special Committee that fulfills its duty of care, and the uncoerced, informed vote of a majority of the minority stockholders" would be subject to the business judgment standard of review. *Id.* at 641. Under that standard of review, the defendants will prevail unless plaintiffs can prove that the transaction was nonetheless waste (no rational businessperson would agree to the transaction on its terms) or a gift.

as fair dealing and fair price.[57] Decisions that are not in good faith or that are unlawful are breaches of the duty of loyalty, and cannot be "freshened" by the above procedures.[58]

2. *Caremark* Claims

The Delaware Supreme Court has further held that "[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."[59] Originally construed as part of the duty of care in *Caremark*,[60] these "duty of oversight" (also called the "duty to monitor") claims are now held to be part of the duty of loyalty.[61] As such, these claims cannot be exculpated, and officers and directors cannot be indemnified for any personal liability.[62] Nor would claims raising oversight concerns properly be met with the protection of the business judgment rule unless the court finds that what is actually being challenged is the board's decision about how to conduct its business or its decision about appropriate levels of oversight.

Until recently, the duty of oversight has been rather narrowly applied. The Delaware courts draw a distinction between the board failing to ensure that the corporation institutes adequate compliance systems in order to prevent violations of positive law by a company's employees, which can give rise (in theory) to liability, versus its failing to act to prevent excessive business risk. Claims of the latter *Caremark* type, failures of the board to properly oversee business risk, have not yet survived motions to dismiss,[63] notwithstanding language in

57. *See Weinberger*, 457 A.2d at 710. Fair dealing examines how the transaction was "timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Id.* at 711. In any transaction between a controlling shareholder and its controlled entity, the Delaware courts will expect to see a special committee of the board of the controlled entity constituted with full authority to negotiate, and with independent legal and financial advisors. *See id.* at 709 n.7. Fair price "relates to the economic and financial considerations of the proposed" transaction. *Id.* at 711.

58. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006) (discussing good faith).

59. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (citation omitted).

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

61. *Stone*, 911 A.2d at 370.

62. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2021) (limits to exculpation); *id.* § 145(a)-(b) (company's power to indemnify its agents limited to actions in good faith, which is part of the duty of loyalty).

63. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 131 (Del. Ch. 2009); *In re* Goldman Sachs Grp., Inc. S'holder Litig., No. CIV.A.5215, 2011 WL 4826104 (Del. Ch. Oct. 12, 2011). Both of these cases arose out of the financial crisis of 2007–2008. In both cases, plaintiffs asserted that the board had failed in its duty to monitor business risks, given a "pay for performance" compensation system, *Goldman*, 2011 WL 4826104, at *15, or given activities in the

Caremark that could support such claims.[64] Yet, there are a number of subsidiary bodies of positive law that may create litigation or liability risk for boards that fail to consider climate change risk, as will be discussed below, particularly securities law, international human rights obligations, and general anti-fraud provisions of tort law. Failing to act in the face of duties to act in those contexts may arguably give rise to duty of loyalty liability for failing to provide oversight of the company's activities. Moreover, a 2019 Delaware Supreme Court opinion, *Marchand v. Barnhill*, has allowed a duty of oversight claim to go forward in a context where business risks, not just law compliance, were being ignored, giving some further insight into, and potentially extending, this line of fiduciary precedent.[65] These aspects of the duty of oversight will be further discussed below.[66]

C. Fiduciary Duty of Disclosure

For public-reporting companies in the United States, federal securities laws and regulations provide guidance for information that needs to be disclosed, and for the standards of accuracy expected regarding that information. But affirmative disclosure obligations are also part of any agent's fiduciary duties, requiring disclosure to the principal of economically significant information without being asked.[67]

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subprime market generally, *id.* at *22; *Citigroup*, 964 A.2d at 114–15. The defendants successfully moved to dismiss the duty to monitor claims in both cases, with the Chancery Court drawing the distinction discussed in the text. *Citigroup*, 964 A.2d at 135 n.96; *Goldman*, 2011 WL 4826104, at *22–24.

64. *Caremark*, 698 A.2d at 970:

> [I]t would, in my opinion, be a mistake to conclude . . . that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.

That the language of *Caremark* can support such "business risk" claims has been recognized by Prof. Stephen Bainbridge, who is quite critical of the decision and more recent expansions. *See* Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending it to ESG Oversight* (UCLA Sch. of L. & Econ. Rsch. Paper, Paper No. 21-10, 2021), https://ssrn.com/abstract=3899528 [https://perma.cc/963P-VTN9].

65. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

66. *See infra* Section IV.B.

67. *See* Malone v. Brincat, 722 A.2d 5 (Del. 1998) (discussing fiduciary duty of disclosure). The classic case regarding the importance of fiduciary disclosure in the United States is *Meinhard v. Salmon*, 249 N.Y. 458 (1928), in an opinion by then-Chief Justice of the New York Court of Appeals, later Justice of the U.S. Supreme Court, Benjamin Cardozo. Speaking of fiduciary relationships, Chief Justice Cardozo wrote that one with fiduciary obligations "is held to something

The leading case in Delaware is *Malone v. Brincat*, where the Delaware Supreme Court held that general fiduciary principles require honest disclosure:

> The shareholder constituents of a Delaware corporation are entitled to rely upon their elected directors to discharge their fiduciary duties at all times. Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty.[68]

While federal securities law generally preempts state securities law or causes of action based on state fiduciary duties of disclosure, this preemption does not apply in "the State in which the issuer is incorporated,"[69] referred to colloquially as "the Delaware carve-outs."[70] Moreover, *Malone v. Brincat* could become important in fiduciary litigation in privately held companies, which are becoming a more substantial part of the U.S. corporate market.[71]

III. FIDUCIARY LAW AS PUBLIC LAW I: THE DUTCH PROPOSAL OF A SOCIETAL DUTY

For operating companies, the fiduciary duty concept as set out above is primarily a procedural duty of the board and management to consider climate change risks and opportunities in strategy and oversight, with rather limited—but I will suggest growing—potential for fiduciary liability. Further progress on addressing climate change may require an interpretation of fiduciary obligations as either (1) a substantive duty to align the company's business strategy with transforming the economy to avoid a 1.5°C expected outcome ("Paris compliant"), or at the least (2) a duty to explain how the company's risk management and operational strategies are consistent with best

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stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id.* at 464.

68. 722 A.2d at 10.

69. Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 77p(d).

70. *Malone*, 722 A.2d at 13 (internal quotation marks omitted).

71. Professor Elisabeth de Fontenay has written about the decline of the public company in the United States, providing the following data: from 2001 to 2012, ninety-nine initial public offerings per year on average occurred in the United States, compared to 310 on average per year from 1980 to 2000. Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 454–55 (2017). Through 2017, the number of public firms fell from 8,025 in 1996 to 4,101 in 2017. *Id.* at 457. In these firms, affirmative disclosure obligations of management to the firm's shareholders would be based primarily on agency-law duties of the agent to disclose economically significant information to the principal, as in *Meinhard v. Salmon* or *Malone v. Brincat*.

scientific estimates of global conditions if we are living in a world that is, on average, 1.5°C hotter than preindustrial levels.

This conception of a substantive fiduciary duty to be Paris compliant is consistent with, and supported by, an ambitious proposal by a leading Dutch lawyer, company advisor, and academic, Jaap Winter. Winter proposes that company directors need to be understood to have a "duty of societal responsibility," which includes a duty to "act[ ] responsibly with a view to the interests of society" and a duty to "use[ ] investor, human, social and natural capital" responsibly.[72] Winter developed his theory in part as a response to what he perceives to be the limitations of stakeholder theories of existing Dutch corporate law.

Winter's concept was recently supported by twenty-five Dutch corporate law professors and lawyers in the leading Dutch daily financial newspaper, *Het Financieele Dagblad*, and is engendering an energetic discussion in the Netherlands.[73] Winter's concept can be used as an argument, in conjunction with others, such as Rockström's planetary boundaries[74] and Raworth's "doughnut economics," built on Rockström et al.,[75] to transform the understanding of directors' and managers' fiduciary duties from a procedural duty into substantive Paris compliance. Indeed, grounding substantive fiduciary duty obligations on Winter, Rockström et al., and Raworth suggests that "Paris compliant" as the standard for boards' fiduciary obligations is not an unrealistic ambition and is in fact not the maximum ambition those contributions would support. "Paris compliance" is at least intellectually justifiable, given the global community's agreement to that goal, even as it would need substantial argument and case law development in support. Again, the implications of this idea will be discussed below.

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72. Jaap Winter, Addressing the Crisis of the Modern Corporation: The Duty of Societal Responsibility of the Board 11 (Apr. 13, 2020) (unpublished manuscript), https://ssrn.com/abstract=3574681 [https://perma.cc/76Z5-BG28].

73. Gerard van Solinge, Jaap Winter, Matthijs de Jongh, Steven Hijink & Vino Timmerman, Opinion, *Maatschappelijk verantwoord besturen en toezichthouden, dat is het nieuwe normaal* [*Socially Responsible Management and Supervision, That is the New Normal*], HET FINANCIEELE DAGBLAD (May 23, 2020, 8:00 AM), https://fd.nl/opinie/1345474/maatschappelijk-verantwoord-besturen-en-toezichthouden-dat-is-het-nieuwe-normaal [https://perma.cc/DW2T-8Q93].

74. Johan Rockström et al., *A Safe Operating Space for Humanity*, 461 NATURE 472 (2009).

75. Kate Raworth, *A Safe and Just Space for Humanity: Can We Live Within the Doughnut?*, OXFAM INT'L (Feb. 13, 2012), https://www.oxfam.org/en/research/safe-and-just-space-humanity [https://perma.cc/7NLK-JQHY]. Raworth is a heterodox economist who now teaches at both the University of Oxford and the University of Cambridge. She has transformed the Oxfam paper into a book based on global discussions, including of the Sustainable Development Goals. *See* KATE RAWORTH, DOUGHNUT ECONOMICS (2017).

IV. IMPLICATIONS OF OFFICERS' AND DIRECTORS' FIDUCIARY DUTIES FOR CLIMATE CHANGE RESPONSIBILITIES

A. Duty of Care

As information about the risks of climate change improves and the attribution of the specific effects of individual companies' greenhouse gas emissions to climate change becomes clearer, officers and directors of all companies must carefully evaluate such information when making decisions. No cases have held this to date, but neither are we aware of any cases having yet been brought using this theory of liability. This conclusion follows from fundamental principles established in fiduciary duty of care cases, particularly as the physical, regulatory, and financial risks of climate change become clear.[76] When acting in the best interests of the company and its shareholders, officers and directors must consider the emerging science of climate change, must be aware of the changing physical environment and effects of climate change on business resources and infrastructure, and must carefully evaluate regulatory changes and countries' commitments in the Paris Agreement of 2015 when developing business strategies, forward-looking plans and commitments, and scenario analyses. This assertion is based on the general definition of the duty of care, which, according to Chancellor Allen in *Caremark*, asks as a "core element" concerning board decisions whether there was "a good faith effort [on the part of the board] to be informed and to exercise appropriate judgment."[77] This duty is evident as well in Canada, underscored in addition by its stakeholder orientation.[78]

One response to this argument in the United States is that the defenses to liability for breach of the duty of care are so strong that there is no realistic potential for personal liability for directors failing to exercise their duty of care as articulated here. At least three rejoinders to that response are possible.

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76. The Sustainability Accounting Standards Board ("SASB"), a voluntary initiative convening industry participants, investors, and accountants to develop standards for the disclosure of decision-relevant environmental, social, and governance information in the United States, has concluded that climate change is a material financial risk in sixty-eight of seventy-seven industries it examined. SUSTAINABILITY ACCT. STANDARDS BD., *supra* note 25, at 5.

77. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996) (emphasis omitted). *Caremark* was a duty of care case, although as stated above "*Caremark* obligations" are now understood as subsidiary elements of the duty of loyalty.

78. *See* JANIS SARA, COMMONWEALTH CLIMATE & L. INITIATIVE, FIDUCIARY OBLIGATIONS IN BUSINESS AND INVESTMENT: IMPLICATIONS OF CLIMATE CHANGE 6–9 (2018), https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/08/Janis-Sarra_Fiduciary-Obligation-in-Business-and-Investment.pdf [https://perma.cc/54HB-YG37] (discussing the duty of care in Canada).

First, corporate law in the United States draws a clear distinction between the required *standards of conduct* for directors to meet their standard of care and the *standards of liability.*[79] This distinction, instantiated through the business judgment rule, exists to protect directors' ability to make decisions based on a well-informed understanding of risks and benefits, which encourages thoughtful, entrepreneurial activity. It does not follow that any director's responsibility is simply: do not be "grossly negligent." As stated in the 2016 revisions of the Model Business Corporations Act ("MBCA") of the American Bar Association's Committee on Corporate Law, boards are required to be informed and to act with the requisite "care that a person in a like position would reasonably believe appropriate under similar circumstances" in their decisionmaking,[80] even if liability is not possible because of exculpation clauses or the business judgment rule.[81]

The commentary to the recently revised MBCA is useful in considering the duties of directors to be informed before making decisions. That commentary states:

> The phrase "becoming informed," in the context of the decision[ ]making function, refers to the process of gaining sufficient familiarity with the background facts and circumstances to make an informed judgment. Unless the circumstances would permit a

79. This distinction can most clearly be seen in the Model Business Corporation Act, which is an authoritative project of the American Bar Association's Committee on Corporate Law. *Compare* MODEL BUS. CORP. ACT § 8.30 (AM. BAR ASS'N 2016) (providing standards of conduct for directors), *with id.* § 8.31 (providing standards of liability for directors). Section 8.30 states, in part:

> (a) Each member of the board of directors, when discharging the duties of a director, shall act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation.
>
> (b) The members of the board of directors or a board committee, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

Delaware does not have a statute setting out the requirements of the duty of care. Rather, the law on the fiduciary duty of care in Delaware is developed by case law. Still, the implicit distinction between the standard of conduct expected of directors, and standards of liability, is evident in a number of Delaware decisions. In the *Disney* Delaware Supreme Court opinion, the court upheld the Chancery Court's determination that in evaluating Michael Ovitz's compensation package, which was the core aspect being challenged in the litigation, the compensation "committee's process did not fall below the level required for a proper exercise of due care, [though] it did fall short of what best practices would have counseled." *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 56 (Del. 2006). *Caremark* similarly evaluated all the reasons that directors should ensure a functioning information and reporting system, but then defined a liability standard much higher than best practice for determining oversight liability. *Caremark*, 698 A.2d at 968–70.

80. MODEL BUS. CORP. ACT § 8.30(b).

81. *See* D. Gordon Smith, *The New Business Judgement Rule*, *in* THE RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 83 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) (examining the limitations of director liability given the business judgment rule).

> reasonable director to conclude that he or she is already sufficiently informed, the standard of care requires every director to take steps to become informed about the background facts and circumstances before taking action on the matter at hand. . . . In addition to considering information and data on which a director is expressly entitled to rely under section 8.30(e) [officers and employees of the firm, lawyers, accountants, and other experts retained by the firm, other board committees], "becoming informed" can also involve consideration of information and data generated by other persons, for example, review of industry studies or research articles prepared by third parties. . . . There is no one way for "becoming informed," and both the method and measure—"how to" and "how much"—are matters of reasonable judgment for the director to exercise.[82]

Second, the business judgment rule does not protect unconsidered inaction.[83] That is, there must be a decision made before the business judgment rule is relevant. So, for instance, if a property and casualty or health insurance company had done no analysis or modeling of how climate change was changing its risk profiles, either for property damage from storms' increased frequency and strength or for morbidity from changes in disease patterns, arguably there could be liability for breach of the directors' duties of care if the company suffered material losses as a result (depending on the content of an exculpation clause in the company's certificate of incorporation).[84] A recent study of twenty-four U.S. oil and gas companies[85] found that their demand projections and capital expenditures ("CapEx") on exploration and production are not in line with agreements made by countries in Paris in December 2015 to work to limit global warming to "well below 2°C" compared to the preindustrial era, and "pursuing efforts to limit" it to 1.5°C.[86] Carbon Tracker, the U.N. Principles for

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82. MODEL BUS. CORP. ACT § 8.30(b) cmt. at 182–83.

83. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 278 (Del. Ch. 2003) (examining liability where directors "failed to exercise *any* business judgment and failed to make *any* good faith attempt to fulfill their fiduciary duties").

84. *See, e.g.*, MAX MESSERVY, CERES, INSURER CLIMATE RISK DISCLOSURE SURVEY REPORT & SCORECARD: 2016 FINDINGS & RECOMMENDATIONS (2016), https://www.ceres.org/resources/reports/insurer-climate-risk-disclosure-survey-report-scorecard?report=view [https://perma.cc/SA4G-WNJT]. Ceres is a leading U.S. sustainability nonprofit working with companies and investors. The cited report analyzes the disclosure of 148 insurance companies required by state law in six U.S. states to disclose information on climate governance, climate risk management, computer modeling of climate risk modeling, stakeholder engagement, and measuring and reducing their own GHG emissions. Ceres found that of 148 insurance companies writing over $1 billion in premiums, sixty-four percent had low or minimal quality disclosure on those factors.

85. DANIELLE FUGERE & ANDREW BEHAR, AS YOU SOW, 2020: A CLEAR VISION FOR PARIS COMPLIANT SHAREHOLDER ENGAGEMENT (2018), https://static1.squarespace.com/static/59a706d4f5e2319b70240ef9/t/5b928615575d1f6f95513a0e/1536329256160/2020-paris-compliant-shareholder-engagement_20180906.pdf [https://perma.cc/NHW8-H532].

86. Paris Agreement to the United Nations Convention on Climate Change art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104. The Paris Agreement entered into force on November 4, 2016, when countries representing fifty-five percent of global GHG emissions had ratified the Agreement. U.N.

Responsible Investment, and leading public institutional investors recently published a study of the value of "stranded assets," those "unburnable" assets that must stay in the ground if the goal of keeping global temperature increases to 2°C or less is to be met.[87] Evaluating the stated economic value of the assets in the ground of sixty-nine global oil and gas companies, the report concluded that "across the oil and gas industry $2.3 trillion of upstream projects—roughly a third of business as usual projects to 2025—are inconsistent with global commitments to limit climate change to a maximum 2°C."[88] A report issued in 2021 by the authoritative International Energy Agency ("IEA") sets out a scenario for how the world economy could transition to a net-zero energy system by 2050 consistent with the Paris Agreement goal of limiting global average warming to 1.5°C. This report set out four hundred specific milestones for what needs to be done to meet that ambitious goal.[89] Significantly, the report recognizes that there can be no new oil and gas fields approved for development as of 2021, and neither can there be any new coal mines or mine extensions, if the world is to meet the Paris goals.[90]

If an oil or gas company values its assets in the ground without any consideration of the possibility that some significant percentage of those assets will be "stranded," that company can be materially misstating its financial position and business risks pursuant to securities disclosure obligations, as has been asserted in litigation against ExxonMobil.[91] When securities law cases go forward, the directors are often sued for breach of fiduciary duty, typically oversight, for allowing material misstatements or omissions in the firm's public filings. The business judgment rule will not protect that kind of claim if the facts show unconsidered inaction or conscious disregard of a known duty to act.

FRAMEWORK CONVENTION ON CLIMATE CHANGE, *supra* note 7. By August 2021, 191 Parties to the Convention have ratified the Paris Agreement. *Id.*

87. JAMES LEATON & ANDREW GRANT, CARBON TRACKER INITIATIVE, 2 DEGREES OF SEPARATION: TRANSITION RISK FOR OIL AND GAS IN A LOW CARBON WORLD (2017), http://www.carbontracker.org/report/2-degrees-of-separation-transition-risk-for-oil-and-gas-in-a-low-carbon-world/ [https://perma.cc/H72Y-4E47].

88. *2 Degrees of Separation—Transition Risk for Oil and Gas in a Low Carbon World*, CARBON TRACKER INITIATIVE (June 20, 2017), https://carbontracker.org/reports/2-degrees-of-separation-transition-risk-for-oil-and-gas-in-a-low-carbon-world-2/ [https://perma.cc/G4G5-SEVK].

89. BOUCKAERT ET AL., *supra* note 33, at 19.

90. *Id.* at 21.

91. Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832 (N.D. Tex. 2018) (granting in part and denying in significant part Exxon's motion to dismiss securities fraud claims).

Most companies incorporated in Delaware will have exculpation clauses that protect directors from liability for breaches of the duty of care, so whether any individual company's directors would face personal liability would depend on that fact as well. Exculpation clauses cannot protect officers of the company, however, by the clear terms of the statute.[92] Moreover, at a certain point "unconsidered inaction" becomes "conscious disregard of a known duty to act," which is a non-exculpable duty of loyalty problem, so again the facts of any individual situation would need to be evaluated to determine if the unconsidered inaction was so serious as to be nonexculpable. Still, we conclude that "unconsidered inaction" presents a risk of personal liability, particularly to officers, where climate change has been entirely ignored.

Third, in today's world there are many other, stronger sources of pressure on directors and officers to think carefully about climate change risks and opportunities beyond potential liability risk. There has been a steady stream of investors and large investor coalitions putting pressure on companies to explain their long-term strategies and disclose their climate risks consistent with the Task Force on Climate-Related Financial Disclosures ("TCFD"), a global standard developed by investors, accounting firms, and companies.[93] BlackRock, the world's largest institutional investor, with over $9 trillion worth of assets under management in the first quarter of 2021,[94] has started to apply pressure to its portfolio companies to take climate risk seriously. Starting with its CEO Larry Fink's letter in January 2018 to every company in which it owns shares, BlackRock has been setting out increasingly specific expectations for climate leadership at the companies it owns.[95] The 2018 letter articulated a stakeholder concept of corporate obligations, stating that "[t]o prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society."[96] The letter stated that BlackRock expected greater clarity from companies about their long-term strategies in light of trends such as climate change:

> This statement of long-term strategy is essential to understanding a company's actions and policies, its preparation for potential challenges, and the context of its shorter-term decisions. Your company's strategy must articulate a path to achieve financial

92. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2021) (limiting the scope of exculpation clauses).

93. *See supra* note 21.

94. Christine Williamson, *BlackRock Tops $9 Trillion on Record Inflows*, PENSIONS & INVS. (Apr. 19, 2021), https://www.pionline.com/money-management/blackrock-tops-9-trillion-record-inflows [https://perma.cc/77CZ-SHQF].

95. *See* Larry Fink, *A Sense of Purpose: Larry Fink's 2018 Letter to CEOs*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter (last visited Nov. 3, 2021) [https://perma.cc/9L4Z-L9TN].

96. *Id.*

> performance. To sustain that performance, however, you must also understand the societal impact of your business as well as the ways that broad, structural trends—from slow wage growth to rising automation to climate change—affect your potential for growth.[97]

This letter followed a letter to each of its portfolio companies in December 2017 indicating its expectation that every company will have at least one climate competent board member; that it would expect companies in highly exposed industries—oil, gas, coal, and cement, for instance—to have an entire board of climate competent members; and that it expects disclosure according to TCFD.[98] By May 2021, BlackRock's support for climate competent board members led it to vote in favor of three of the four board members put forward by an upstart climate activist hedge fund, Engine No. 1, in a closely watched proxy contest at ExxonMobil, in which three of Engine No. 1's candidates were elected.[99]

Another one of many investor initiatives putting pressure on companies is ClimateAction 100+, in which institutional investors representing over $55 trillion of global invested capital are engaging with the "world's largest corporate greenhouse gas emitters" to "[improve their] climate change governance, cut[ ] emissions and strengthen[ ] climate-related financial disclosures."[100] The basis for their actions includes fiduciary duty law: "Investors are increasingly recognising their exposure to climate risks and their fiduciary duty to respond."[101]

These and other investors are increasingly voting to support shareholder proposals seeking better information from companies about how they are managing the transition to a low-carbon economy. On May 26, 2021, the same day that three of Engine No. 1's nominees were elected at ExxonMobil, 63.8 percent of ExxonMobil's investors supported a shareholder proposal seeking a report on its climate

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97. *Id.*

98. *See* Emily Chasan, *BlackRock Wields Its $6 Trillion Club to Combat Climate Risks*, BLOOMBERG, https://www.bloomberg.com/news/articles/2017-12-08/blackrock-wields-its-6-trillion-club-to-combat-climate-risks (last updated Dec. 11, 2017) [https://perma.cc/4UQU-FQWA] (discussing BlackRock's 2017 letter).

99. *See* Sarah McFarlane & Christopher M. Matthews, *Oil Giants Are Dealt Major Defeats on Climate Change as Pressures Intensify*, WALL ST. J. (May 26, 2021), https://www.wsj.com/articles/oil-giants-are-dealt-devastating-blows-on-climate-change-as-pressures-intensify-11622065455 [https://perma.cc/7KQU-Z7JJ] (stating that BlackRock had supported three of the four Engine No. 1 nominees).

100. *About Climate Action 100+*, CLIMATE ACTION 100+, http://www.climateaction.org/about/ (last visited Sept. 29, 2021) [https://perma.cc/9H99-ZNHP].

101. *The Business Case*, CLIMATE ACTION 100+, https://www.climateaction100.org/business-case/ (last visited Sept. 29, 2021) [https://perma.cc/8Q2W-5FK3].

lobbying.[102] Also that day at Chevron, 60.7 percent of investors voted for a proposal asking the company to reduce its Scope 3 emissions (those of the users of the product), which it plans to do by working with its most energy-intensive customers such as cement, manufacturing steel, transport, and utilities.[103] And, concluding the May 26 climate trifecta, on that same date the Royal Dutch Shell group was ordered by the district court in the Netherlands to reduce its greenhouse gas emissions forty-five percent by 2030, as compared to 2019 levels.[104]

Thus, we conclude, given these proxy results, votes on shareholder proposals, and growing risks of climate-related litigation,[105] we can expect directors to engage seriously with analyses of how climate change and regulatory efforts to address climate change will affect their businesses. Business-as-usual assumptions are highly risky as the world warms (see the Mercer analysis above), and as many states, cities, businesses, investors, and leaders increasingly recognize the existential risk that climate change poses to the world that has supported life in the stable Holocene era in which human life evolved and thrived.[106] This engagement in serious analysis is required by officers' and directors' fiduciary duty of care to the company and its

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102. Robert G. Eccles, *Here Comes the Sun for ExxonMobil's Shareholders*, FORBES (June 6, 2021), https://www.forbes.com/sites/bobeccles/2021/06/06/here-comes-the-sun-for-exxonmobils-shareholders/?sh=668fd1d93f75 [https://perma.cc/S3RT-W6MA].

103. *Id.* These were not the only stunning votes on climate-related shareholder proposals. Eighty percent of Phillips 66 investors voted for a proposal asking the company to set and publish emissions reduction targets, as did 60% of ConocoPhillips investors. *Id.* GE management supported a proposal asking it to report on progress to Net Zero, which then led to a 98% positive shareholder vote. *Id.*

104. Rb. Den Haag 26 mei 2021, JOR 2021, 208 m.nt. (Milieudefensie/Royal Dutch Shell PLC) (Neth). This opinion is discussed below in Section IV.C.2.a.

105. According to the 2020 Global Climate Litigation Report published by the U.N. Environment Program and produced in conjunction with the Sabin Center for Climate Change Law at Columbia University, by 2020 there are 1,550 climate change cases filed in thirty-nine countries, including the European Union, over 1,200 of them in the United States. MICHAEL BURGER & DANIEL J. METZGER, U.N. ENVIRONMENT PROGRAMME & COLUMBIA L. SCH. SABIN CTR. FOR CLIMATE CHANGE L., GLOBAL CLIMATE LITIGATION REPORT: 2020 STATUS REVIEW 4 (2020).

106. *See* Will Steffen et al., *Trajectories of the Earth System in the Anthropocene*, 115 PROC. NAT'L ACAD. SCIS. 8252 (2018). In this report, published by one of the most respected scientific organizations in the world, a global team of scientists evaluate the risk of the earth entering "Hothouse Earth" conditions, caused by current carbon-intensive socioeconomic processes creating self-reinforcing feedback systems such that the Earth crosses a planetary threshold that would stabilize the Earth's temperature. *Id.* at 8253. The authors conclude that currently we are on a Earth System pathway headed for Hothouse Earth temperatures, which will have devastating effects on the economy, political stability, and planet habitability. *Id.* at 8256. Further, the authors assert that the "challenge that humanity faces is to create a 'Stabilized Earth' pathway that steers the Earth System away from its current trajectory toward the threshold beyond which is Hothouse Earth." *Id.* at 8254. Such a Stabilized Earth pathway is still possible, but "the door to the Stabilized Earth pathway may be rapidly closing." *Id.* at 8258.

shareholders, notwithstanding the low risk of fiduciary liability based on that duty.

B. Duty of Loyalty: The Duty of Oversight

Perhaps the strongest basis for assertions of fiduciary liability against directors or officers of U.S. companies is where those parties have consciously disregarded climate change in their oversight of company activities, particularly where climate change risks have not been disclosed in companies' securities filings.[107] This type of claim would be based on officers' and directors' duty to ensure that companies have a functioning information and reporting system geared to good faith law compliance by employees of the company.[108] A claim of this sort, essentially climate linked, was brought against PG&E after its transmission lines sparked historic fires in California in 2017, given underlying drought conditions and hotter temperatures caused by climate change.[109] In recent litigation against the Wells Fargo board for its lack of oversight over intense pressure on employees to establish unauthorized customer accounts, and the resulting alleged securities fraud, the court in the Northern District of California held that the allegations were sufficient to state a claim of breach of fiduciary duty where it found that the facts, if proven, showed defendant directors and top officers were aware of illegal activity and failed to act.[110] This case was recently settled for $240 million and various corporate governance reforms.[111]

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107. It is likely that the largest and most sophisticated companies do not consciously disregard climate change in their forward planning or infrastructure development. As was revealed in a series of investigative reports published in the *Los Angeles Times* and *Inside Climate News* in 2015, and further detailed in reports and collections of documents developed by such organizations as the Union for Concerned Scientists and the Center for International Environmental Law, a number of American companies, such as ExxonMobil and Chevron, have accepted the reality of climate change for decades, including the contribution of their products to causing climate change. *See infra* notes 152–154 (discussing these reports). They have also been using the most sophisticated climate modeling in their forward planning, such as by reinforcing off-shore oil wells to take account of sea-level rise, and planning pipelines in Canada to take account of thawing permafrost. *See infra* note 152 (discussing Exxon's response to climate change).

108. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

109. *See* Verified S'holder Derivative Complaint & Demand for Jury Trial at 12, Trotter v. PG&E Corp., 18-cv-04698 (N.D. Cal. Dec. 20, 2018) (noting that "drought and wind" fueled the wildfires).

110. *In re* Wells Fargo & Co. S'holder Derivative Litig., 282 F. Supp. 3d 1074, 1107–09 (N.D. Cal. 2017).

111. *See* Priya Cherian Huskins, *Five Types of Derivative Suits with Massive Settlements*, WOODRUFF SAWYER (Oct. 13, 2020), https://woodruffsawyer.com/do-notebook/five-derivative-suits-types-massive-settlements/ [https://perma.cc/NE2E-5LAE].

Originally construed as an aspect of the duty of care in *Caremark*, ten years later in *Stone v. Ritter*, the Delaware Supreme Court upheld *Caremark* but held that it is an aspect of the duty of loyalty. Thus, under Delaware Supreme Court controlling precedent in *Stone v. Ritter*, duty of loyalty oversight liability can be established by showing

> (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.[112]

This standard of liability, still called a *Caremark* claim, gives rise to a number of possible avenues of inquiry and potential litigation and liability risks if a board fails to oversee climate risk. The underlying predicate for a successful *Caremark* claim, at least prior to the Delaware Supreme Court's 2019 opinion in *Marchand v. Barnhill*, discussed below, is a legal obligation in positive law outside of corporate law, which directors need to take some responsibility to know is being met.[113] The next two Parts of this Article will discuss duty of oversight precedent, and then discuss three sources of legal obligations that could support such a claim in the climate change context.

1. Recent Caselaw: Duty of Oversight

After Delaware promulgated section 102(b)(7) in 1986, allowing exculpation for duty of care cases, and only duty of care cases, plaintiffs began adding allegations that defendants had not acted in good faith to complaints to overcome the effects of broad exculpation clauses, which virtually every company incorporated in Delaware would have had soon after 1986. Then, after *Caremark* was decided by Chancellor Allen in 1996, plaintiffs also added allegations that the board had utterly failed to attempt to assure a reasonable information and reporting system, such as to constitute a lack of good faith.[114]

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112. *Stone*, 911 A.2d at 370 (citations omitted).

113. In *Stone v. Ritter* the legal obligations were federal anti-money-laundering regulations. *Id.* at 371. AmSouth Bancorporation paid $50 million in fines to settle federal investigations over its systemic failure to file Suspicious Activity Reports. *Id.* Plaintiffs then brought fiduciary duty litigation, claiming that the board had not provided sufficient oversight over the bank's anti-money laundering practices. *Id.* at 370. The directors were ultimately successful in dismissing the oversight claims. *Id.* at 372.

114. The original *Caremark* standard described the standard of liability in these terms: "Generally where a claim of directorial liability for corporate loss is predicated upon ignorance of

It has been clear from the start that the *Caremark* standard of liability is a difficult one to meet, however. Indeed, Chancellor Allen recognized it as such in *Caremark* itself, stating that "[t]he theory here advanced [breach of the duty of oversight] is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[115] And over two decades of experience have shown Chancellor Allen to have been prescient: until recently, there were very few decided cases where the courts have allowed these claims to survive the board's motion to dismiss.

Moreover, the Delaware courts have not permitted failure of oversight claims to proceed where the claim is that generalized business risks were not being properly monitored by the board, leading to financial losses. A number of such cases were brought against financial institutions in the aftermath of the financial crisis of 2007–2008, and were dismissed.[116] As long as a financial institution had a functioning risk committee at the board level, claims of a lack of risk oversight were dismissed.

As was recognized by the Chancery Court in *Citigroup*, where the allegation was "failure to properly monitor Citigroup's *business risk*" of subprime mortgage investments and structured financial products, oversight liability is inappropriate since what was actually being challenged were business decisions of the board and various management entities about how much oversight to provide.[117] Such a claim is properly evaluated as a straightforward duty of care claim, subject to the protections of the business judgment rule and the company's exculpation clause.[118] Yet the *Citigroup* court did leave open the possibility that "it may be possible for a plaintiff to meet the [*Caremark*] burden under some set of facts," even where the claim involves inadequate oversight of business risks, stating that "[a] plaintiff can show bad faith conduct by, for example, properly alleging particularized facts that show that a director *consciously* disregarded an obligation to be reasonably informed about the business and its

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liability creating activities within the corporation . . . only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability." *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

115. *Id.* at 967.

116. *See supra* note 64 and accompanying text. As discussed above, the language of *Caremark* can support oversight liability for a properly pleaded "business risk" case, but such a case has not been brought yet, apparently.

117. *In re* Citigroup S'holder Derivative Litig., 964 A.2d 106, 123 (Del. Ch. 2009).

118. *Id.* at 123–24.

risks or *consciously* disregarded the duty to monitor and oversee the business."[119]

In contrast, fiduciary oversight litigation went forward against AIG where it was alleged that the board failed to exercise oversight over widespread fraudulent or criminal conduct.[120] Oversight claims against the directors at Wells Fargo were also deemed sufficient to withstand a motion to dismiss, where the company's financial results were alleged to have been produced by fraudulent cross-selling (employees setting up multiple accounts without the customer's knowledge), and defendants were alleged to have either participated in the fraud or done nothing to stop it.[121] Wells Fargo and its directors and officers faced liability under section 10(b) and Rule 10b-5 of the 1934 Securities Exchange Act ("Exchange Act") (intentional misstatements or omissions based on inflated financial results); section 14(a) of the Exchange Act (proxy violations for statements about the strength of the company's internal controls); and fiduciary duty liability for failures of oversight.[122] Both AIG and Wells Fargo involved situations where the courts construed the facts to show that the defendant directors knew about the underlying fraudulent activities or materially misleading public securities filings, and failed to do anything effective to address the problems.

In a significant recent development, moreover, the Delaware Supreme Court in *Marchand* allowed a duty of oversight claim to go forward where serious quality problems with the firm's only product, ice cream, should have been known by the board, but weren't because of inadequate communication between management and the board and the lack of a reporting system on health and safety.[123] The company had no protocols for management to bring food safety issues or notices of regulatory deficiencies to the board, and the board had no committee to oversee health, safety, and sanitation controls and compliance.[124] The court found that these serious gaps showed an "utter failure" to assure

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119. *Id.* at 125.

120. *See In re* Am. Int'l Grp., 965 A.2d 763, 799 (Del. Ch. 2009), *aff'd*, 11 A.3d 228 (Del. 2011) (noting that the plaintiffs overcame "the difficulty of pleading a breach of the duty of loyalty based on a failure to monitor").

121. *See In re* Wells Fargo & Co. S'holder Derivative Litig., 282 F. Supp. 3d 1074, 1108 (N.D. Cal. 2017) (knowing of allegations of fraud and doing nothing demonstrates the predicate for a successful oversight fiduciary liability claim).

122. *Id.* at 1091; *see also* Rich ex rel. Fuqi Int'l, Inc. v. Yu Kwai Chong, 66 A.3d 963, 984 (Del. Ch. 2013) ("When faced with knowledge that the company controls are inadequate, the directors must *act*, i.e., they must prevent further wrongdoing from occurring. A conscious failure to act, in the face of a known duty, is a breach of the duty of loyalty.")

123. *See* Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019) (finding that the plaintiffs met the difficult standard for a duty of oversight claim).

124. *Id.* at 809.

an adequate information and reporting system existed, an act of "bad faith" in violation of the duty of loyalty.[125]

The facts of *Marchand* were extreme: from 2009 through 2013 the firm received multiple reports of serious safety and production deficiencies from federal and state inspectors in Alabama and Texas, where its facilities were located.[126] Indeed, the company's own testing in 2013 and 2014 showed multiple instances of listeria in multiple cities.[127] None of these problems were brought to the attention of the board. The board's first awareness of the problems occurred when three customers died from listeria, and the company was forced to recall all of its products, shut down its manufacturing, and lay off one-third of its staff. Yet, the potential doctrinal significance of *Marchand* goes beyond such extreme failures. Food safety is both a legal compliance issue and a key operational issue for a food production company. Members of the board of this ice cream manufacturer should have understood that food safety is "mission critical" to the company's success, and someone on the board should have asked questions about the topic or queried why it was not on the agenda in any board meeting.[128]

Applying this precedent to the question of board oversight of climate, we can conclude that if there are industries where companies face potential financial losses from climate change, such as insurance companies whose insured losses outstrip premiums and investments; coastline property companies with either weakening demand for built homes or increased costs for protecting the properties; energy companies with demand for some products collapsing (coal, for instance); utilities in drought-stressed states; or the utilities in Texas after unusual winter freezes in 2020–2021 caused huge price spikes for purchasing energy, and if no committee on the board has taken ownership of understanding those risks and reporting to the full board on at least an annual basis, an oversight claim could be successful.

Marchand may well signal a doctrinal development in oversight liability that both expands the scope of the doctrine to operational oversight over "mission critical" aspects of the business (such as food safety in that instance) and expresses higher expectations of board vigilance regarding such core operations. This conclusion is consistent with the fact that four subsequent oversight decisions have applied

125. *Id.* at 823–24.

126. *Id.* at 811–12.

127. *Id.* at 812.

128. *Id.* at 824 (stating that at the defendant ice cream company, food safety was "essential and mission critical"). The board minutes from the years in question showed no discussions about food safety. *Id.* at 812.

Marchand to reject motions to dismiss,[129] a pattern of success at the motion to dismiss stage that is quite different than the previous pattern.[130] Leading commentators such as Professor Steve Bainbridge and noted D&O specialist Kevin LaCroix have reached a similar conclusion: *Caremark* claims have been reinvigorated by *Marchand,* and can no longer be called "one of the most difficult claims on which to found liability," as stated by Chancellor Allen in *Caremark* itself.[131] Thus, *Marchand* may well provide scope for fiduciary liability if a board has never turned its collective attention to analyzing climate change risks to the company, its operations, its long-term strategy, or its disclosure.

2. Implications: Duty of Oversight

Assuming even a narrow interpretation of oversight duties, in which oversight claims need to be grounded on failures of the board to provide oversight of positive law obligations, and not business risk, at least three types of positive law obligations could undergird duty of oversight claims based on a board's utter failure to include climate change in its deliberations. This analysis sets aside the possibility that *Marchand* has expanded the oversight cause of action to include oversight of core operational aspects of a company's success.

a. International Human Rights

First, the United Nations Human Rights Council adopted the "protect, respect, and remedy" framework in June 2008 identifying obligations for states and business regarding human rights, and in June 2011 adopted implementation guidelines, including due diligence obligations for business.[132] Thus, it can be argued, human rights

129. *In re* Clovis Oncology Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188 (Del. Ch. Ct. Oct. 1, 2019) (failure of oversight of pharmaceutical company's research protocols); Hughes v. Xiaoming Hu, No. 2019-0112, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020) (failure of oversight over audited financial statements and internal accounting function); Teamsters Loc. 443 Health Servs. v. Chou, No. 2019-0816, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020) (failure of oversight over indirect subsidiary's criminal activities regarding handling of pharmaceutical injections); *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 392851 (Del. Ch. Sept. 7, 2021).

130. *Marchand*, 212 A.3d at 823 n.112 (describing six cases dismissing *Caremark* claims).

131. *See* Bainbridge, *supra* note 64, at 3–5 (discussing expansion of *Caremark* and commentators' views); Kevin M. LaCroix, *A "New Era" of Caremark Claims?*, The D&O Diary, (Jan. 20, 2021), https://www.dandodiary.com/2021/01/articles/director-and-officer-liability/a-new-era-of-caremark-claims/.

132. The framework identifies three pillars for human rights protection: a state duty to protect against human rights abuses by third parties, including business; companies' responsibilities to respect human rights; and greater access for victims to effective remedy, both judicial and nonjudicial. *Guiding Principles on Business and Human Rights: Implementing the United Nations*

violations are part of the liability risks that directors need to consider when overseeing law compliance systems, particularly for a company with global operations. Such law compliance systems would need to include assessing risks of human rights violations, including those violations that are climate related.[133] Ignoring any "red flags" in such due diligence gives rise to support a *Caremark* claim, as would utter failure to include human rights obligations within the company's information and reporting system. Such a *Caremark* claim is potentially viable in particular in the extractive industries, where international human rights violations by a company's security personnel in far-flung locations are an unfortunately common, and thus known, risk.

International human rights obligations may seem too far afield as a source of directors' climate change *Caremark* obligations, which may be true, still, in the United States. Just this term the U.S. Supreme Court reiterated its narrow interpretation of the Alien Torts Claims Act, which had often been the basis for subject matter jurisdiction in U.S. federal courts for international human rights claims being brought against companies.[134] Yet, this source of obligation is rapidly evolving. In its May 26, 2021, opinion ordering Royal Dutch Shell ("Shell") to cut its greenhouse gas emissions forty-five percent by 2030, compared to its 2019 emissions, the District Court in The Hague relied upon the U.N. Guiding Principles on Business and Human Rights ("UNGP"), and other soft-law obligations such as the U.N. Global Compact and the OECD Guideline for Multinational Enterprises to establish the standard of "due care" in what was essentially a tort-law claim against Royal Dutch Shell.[135] Thus, "when determining the Shell group's corporate policy, [Royal Dutch Shell] must observe the due care exercised in society."[136] That due care, the District Court concluded,

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"Protect, Respect and Remedy" Framework, UNITED NATIONS 1 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/8DS7-7JH6]

133. *See* Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75 (2005) (evaluating whether human rights obligations could support *Caremark* claims).

134. *See* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021) (reiterating that the Alien Torts Claims Act does not apply extraterritorially and that U.S. activities of a defendant corporation must be more than "general corporate activity" in the United States in order for these claims to be heard). In *Nestle*, the Court held that Nestle USA's activities in the United States financing its global operations, including those allegedly aiding and abetting the trafficking of children from Mali to work as child slaves in the Côte d'Ivoire (Ivory Coast), were insufficient under its precedent in *Kiobel v. Royal Dutch Shell Petroleum Co.*, 569 U.S. 108 (2013), to establish subject matter jurisdiction in U.S. courts. *Nestle*, 141 S. Ct. at 1937.

135. Rb. Den Haag 26 mei 2021, JOR 2021, 208 m.nt. (Milieudefensie/Royal Dutch Shell PLC) (Neth).

136. *Id.* ¶ 4.4.1.

using the language of the UNGP, was that "companies must respect human rights,"[137] which means "they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[138] It was on that basis that the court stated that the standard of care expected of Shell, as a standard applicable to "all businesses," is to adopt measures "to prevent, limit and, where necessary, address these [adverse human rights] impacts"[139] of climate change, requiring it to reduce its emissions by forty-five percent by 2030.[140]

The United Nations Office of the High Commissioner for Human Rights has determined that the following human rights are most affected by climate change: the rights to life, self-determination, development, food, water and sanitation, health, housing, education, and meaningful and informed participation.[141] Litigation bringing climate change claims against governments and companies on the basis of human rights obligations is proliferating around the globe,[142] including claims based on international human rights standards being used to establish the standard of care in tort cases, such as the *Milieudefensie* case against Shell.[143] Presumably the victory against Royal Dutch Shell at the district court level in the Netherlands will further motivate plaintiffs' attorneys and NGOs to explore international human rights standards as the standard of conduct in tort-law cases, even in the United States. The limits the U.S. Supreme

137. *Id.* ¶ 4.1.3.

138. *Id.* ¶ 4.4.15.

139. *Id.* Although the court stated that this is the standard of care expected of "all enterprises regardless of their size, sector, operational context, ownership and structure," it did suggest that meeting the responsibility for respecting human rights could vary as a result of the size of an enterprise and the severity of the consequences of its business. *Id.* ¶ 4.4.16. It stated that "much may be expected" of Shell, being a particularly large, global company in the "worldwide market of fossil fuels," with over 1,100 operating subsidiaries, operations in 160 countries, and being "responsible for significant CO2 emissions." *Id.*

140. *Id.* ¶ 4.1.4.

141. OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE 13–25 (2015), https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf [https://perma.cc/V549-2L8K] (submission to the 21st Conference of the Parties of the U.N. Framework Convention on Climate Change).

142. *See Climate Change Litigation Databases*, CLIMATECASECHART.COM, http://climatecasechart.com/climate-change-litigation/ (last visited Aug. 10, 2021) [https://perma.cc/MZX2-AEN3] (tracking cases).

143. International human rights obligations do not apply directly to private parties, but apply to states' obligations towards their citizens. In *Milieudefensie*, the court recognized this limitation but was explicit about using the international human rights soft-law instruments (named as such in the decision) to establish the "unwritten standard of due care" by which Shell's actions (i.e., continuing to explore for, extract, and sell fossil fuels) would be judged. *Milieudefensie*, ¶ 4.4.11. In the United States, the "unwritten standard of due care" is called the standard of care, as applied in tort-law cases.

Court recently reiterated in *Nestle* on the extraterritorial application of the Alien Torts Claims Act would obviously not apply to climate claims brought in the United States, against a U.S. company, claiming violations of international human rights standards as the standard of care, although we can still expect challenges to such a case.

b. Securities Law Disclosure Obligations

Second, public reporting companies in the United States have clear obligations to evaluate their climate-related risks and possibly disclose information about those risks pursuant to Item 303 of Regulation S-K, Management Discussion and Analysis.[144] Regulation S-K sets out detailed disclosure requirements for public companies for all of their public reporting documents: quarterly reports, annual reports, proxy statements, significant event reports, and so forth. Management Discussion and Analysis ("MD&A") seeks management's views of its financial results, as well as discussion of any known trends, events, or uncertainties that might have a material effect on the company's future financial results, assets, or liabilities. In 2010, the SEC issued guidance to companies to clarify their climate change related disclosure obligations pursuant to MD&A.[145] The SEC identified regulatory and legislative developments at a state, federal, and transnational level that could increase or decrease prices, such as cap-and-trade arrangements among various states and countries, or new fuel standards, as issues to be evaluated for disclosure.[146] It also discussed physical changes from climate change as similarly requiring analysis, such as increased frequency and intensity of storms having financial implications for insurance companies, and mortgage lenders, for instance.[147] While the specific facts at any individual company would need to be investigated, there could be "conscious disregard of a known duty to act" where the company's disclosure process does not include careful evaluation of climate change–related financial risks for potential inclusion in the company's MD&A, or even in notes to the financial statements.

Here, too, recent developments suggest that well-counselled boards will take care to incorporate their climate change risks into their disclosures and disclosure oversight. The SEC has responded to the

144. *See* 17 C.F.R. §§ 229.10–229.1016 (2021).

145. COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, U.S. SEC. & EXCH. COMM'N RELEASE NOS. 33-9106, 34-61469 & FR-82, 75 Fed. Reg. 6,290 (Feb. 8, 2010).

146. *Id.* at 6,290–91.

147. *Id.* at 6,291.

Biden Administration's "whole-of-government" approach to climate by adopting its own "all-agency" approach to climate change, announcing specific actions by the Division of Corporate Finance to enhance its evaluation of climate disclosures,[148] and requesting public input about what, if anything, the SEC should be doing to require more specific climate change and other ESG disclosures.[149] These initiatives will take time to produce specific obligations for companies and their officers and directors, but the direction of travel is clear: the SEC expects companies to evaluate their public disclosures with its 2010 Climate Guidance in focus. *Caremark* claims are included in approximately three-quarters of cases brought to challenge companies' public securities disclosure, either for misstatements of material facts or omissions to state material facts necessary to be stated so that other disclosures are not misleading (the "half-truth doctrine").[150] Both *Caremark* and federal securities liability risks for directors are best addressed, therefore, in the same way: careful consideration of climate change disclosure obligations, as shaped by the SEC in its 2010 guidance and as recommended by the Taskforce on Climate-Related Financial Disclosures, and incorporation of climate change in robust fashion into the company's climate governance arrangements.

c. Unsubstantiated or Deceptive Opinions

The third potential route to duty of oversight liability would be where officers and directors of oil, gas, coal, cement, or utilities companies either participated in, or allowed, deception about whether greenhouse gases caused by producing, extracting, or using their products contribute to climate change. Even under narrow interpretations of *Caremark* and *Stone v. Ritter,* directors have oversight duties to prevent fraud.[151] While again the specific facts would need to be developed at specific companies, a series of investigative reports published in the *Los Angeles Times* and *Inside*

148. *SEC Response to Climate Change and ESG Risks and Opportunities*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/sec-response-climate-and-esg-risks-and-opportunities (last visited Aug. 10, 2021) [https://perma.cc/V2FX-KVU9].

149. Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, U.S. SEC. & EXCH. COMM'N (March 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures [https://perma.cc/P626-2APV].

150. *See* Huskins, *supra* note 111.

151. *See* Rich ex rel. Fuqi Int'l., Inc. v. Yu Kwai Chong, 66 A.3d 963, 984 (Del. Ch. 2013) (duty to discover and remedy problems with internal financial controls); *In re* Wells Fargo & Co. S'holder Derivative Litig., 282 F. Supp. 3d 1074, 1107–09 (N.D. Cal. 2017) (granting in part and denying in part defendants' motion to dismiss, including denying motions to dismiss claims of breach of fiduciary duty—based on *Caremark* and *Stone v. Ritter* and premised on false statements to the capital markets).

Climate News in 2015 provided evidence that ExxonMobil has accepted the reality of climate change for decades, including that burning their products contributes to causing climate change.[152] ExxonMobil has also been using the most sophisticated climate modeling in their forward planning, such as by reinforcing off-shore oil wells to take account of sea-level rise or planning pipelines in Canada to take account of thawing permafrost.[153] At the same time, ExxonMobil has engaged with other energy companies, such as Chevron, ConocoPhillips, and Peabody Energy, in extensive public relations campaigns to sow doubt about the causes and consequences of climate change, aiming to shift public opinion—as they have—and delay effective regulatory responses to climate change.[154] This pattern of deception is one basis on which ExxonMobil has been sued by the Attorney General of Massachusetts in litigation that remains ongoing.[155] On June 22, 2021, ExxonMobil's

152. Editorial, *Exxon's Damaging Denial on Climate Change,* L.A. TIMES (Oct. 15, 2015), https://www.latimes.com/opinion/editorials/la-ed-exxon-climate-change-20151015-story.html [https://perma.cc/MQ6W-S6H9] (stating that "[a]ccording to reports in the Los Angeles Times and elsewhere, the oil company's scientists concluded in the 1970s, '80s and '90s that climate change was real, would transform the Earth's landscape and was driven by human activity—especially the burning of fossil fuels"); Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, *What Exxon Knew About the Earth's Melting Artic,* L.A. TIMES (Oct. 9, 2015), http://graphics.latimes.com/exxon-arctic/ [https://perma.cc/MQ6W-S6H9] (detailing a year-long investigation conducted in conjunction with the Columbia School of Journalism); Neela Banerjee, Lisa Song & David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago,* INSIDE CLIMATE NEWS (Sept. 16, 2015), https://insideclimatenews.org/news/16092015/exxons-own-research-confirmed-fossil-fuels-role-in-global-warming/ [https://perma.cc/E8EC-NV9K].

153. *See* Jerving et al., *supra* note 152 (discussing Exxon's response to climate change).

154. KATHY MULVEY & SETH SHULMAN, UNION OF CONCERNED SCIENTISTS, THE CLIMATE DECEPTION DOSSIERS: INTERNAL FOSSIL FUEL INDUSTRY MEMOS REVEAL DECADES OF CORPORATE DISINFORMATION 1–5 (July 2015), https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf [https://perma.cc/N88X-N7L4]. *See generally* NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 169–216 (2011) (discussing denial of global warming by U.S. fossil fuel companies).

155. ExxonMobil has brought a motion to dismiss based on a number of grounds, predominantly lack of personal jurisdiction (contending that all of the challenged statements were written in Texas and published in Texas and/or New York, with insufficient contacts with Massachusetts to satisfy due process requirements); failure to state a claim under the Massachusetts consumer protection statute on which the State Attorney General relies; and that the complaint is an effort to squash ExxonMobil's public participation and petitioning of government, a violation of statutes that prohibit strategic litigation against public participation (so called "anti-SLAPP" statutes). *Exxon Mobil Corporation Demonstrative Exhibit Used at March 12, 2021 Hearing on Motions to Dismiss,* MASS.GOV (Mar. 15, 2021), https://www.mass.gov/doc/march-15-2021-exxon-mobil-corporation-demonstrative-exhibit-used-at-march-12-2021-hearing-on-motions-to-dismiss/download [https://perma.cc/B87Z-3FXG]. A hearing on ExxonMobil's Motion to Dismiss was held on March 12, 2021. *Id.*

motions to dismiss the case were denied, so we can expect further discovery in that case, and possibly even a trial in the future.[156]

It is actionable fraud under section 10(b) of the Exchange Act, and Rule 10b-5, according to the U.S. Supreme Court, for companies to make statements about their opinions that either do not accurately express their actual opinions on a topic, or where facts in the company's possession do not support the expressed opinions.[157] This pattern of deception by many energy companies could not only present securities fraud liability risk, but could risk fiduciary duty of loyalty oversight liability. At the least, the 2015 publication of articles describing this pattern of deception by the *Los Angeles Times* would be a "red flag" that may require even current directors of oil, gas, coal, or other companies to investigate the public relations expenditures of their company, their public relations efforts and statements with respect to climate change, and to assure themselves that their current statements are not creating either securities fraud risk, fiduciary oversight liability, or even fiduciary duty of disclosure fraud risk as articulated in *Malone v. Brincat.*

V. FIDUCIARY LAW AS PUBLIC LAW II: BEYOND THE NETHERLANDS?

Each of the avenues for potential fiduciary litigation and liability discussed above would examine procedural aspects of directors' and officers' actions. Has the board put climate on the agenda? Has it engaged proper expert advice on the specific risks of climate change to the organization, has that advice been discussed at the board carefully, and have those risks been incorporated into decisionmaking on strategy, major transactions, oversight, and disclosure? Has the board thoroughly examined its public relations strategy for potential misstatements or omissions about the company's climate risks? These are the kinds of questions that are key procedural considerations under existing fiduciary law.

"Fiduciary duty" is an open-textured legal standard, however. Like other open-textured legal standards, such as the "reasonable" person for tort law analyses or "materiality" in securities law, changing contexts, facts, and developments outside the law will have effects on how courts evaluate these standards. The opinion by the district court

156. Memorandum of Decision & Order on Defendant's Motion to Dismiss Amended Complaint, Commonwealth v. Exxon Mobil Corp., No. 1984CV03333-BLS1 (Mass. Super. Ct. June 22, 2021); *see also Commonwealth v. Exxon Mobil Corp.*, CLIMATECASECHART.COM, http://climatecasechart.com/climate-change-litigation/case/commonwealth-v-exxon-mobil-corp/ (last visited Sept. 30, 2021) [https://perma.cc/GF27-4CGW].

157. Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 575 U.S. 175 (2015).

in The Hague ordering Shell to reduce its greenhouse gas emissions indicates this potential: it explicitly incorporated "soft law" human rights treaties and multilateral instruments into the tort-law standard of care that it applied to evaluate Shell's responsibilities. So, could corporate fiduciary duties be construed in a more substantive way, creating a duty on the part of the board to adopt a Paris-aligned business strategy, based on the changing contexts discussed throughout this Article? That at least seems plausible, to this Author, if the right strategic litigation is brought to clearly tee up the question of the board's substantive responsibilities regarding climate.

It is highly doubtful to this Author that a Delaware court would hold, today, that directors have a "societal duty," as argued by Jaap Winter, and certainly unlikely that a Delaware court would state any conclusion in those terms. Yet it is not unlikely to think that the concept of what boards and executive teams need to actually do to advance the interests of "the corporation and its shareholders," which is the object of the board's fiduciary obligations in Delaware,[158] is changing. These changes in boards' actions will require, in at least many instances, deeper consideration than today of the effects of corporate action on the climate, and actual decisions to adopt Paris-aligned strategies. This consideration, this Author argues, is a slice of Jaap Winter's "societal duty."[159]

As discussed above, social norms of what is responsible corporate conduct are changing.[160] Global, diversified investors

158. *See* Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (board's obligation is to act in "the best interests of the corporation and its shareholders"); Paramount Comms. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989))("[D]irectors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed [short-term or long-term] investment horizon."); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders."); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("While technically not trustees, corporate officers and directors stand in a fiduciary relation to the corporation and its shareholders.").

159. Winter's concept is broader than this "climate-aware substantive duty," since his concept would also require the board to consider the effects of its actions on all of society. In practice, the same argument that is being advanced here, using climate at the focal point, may work regarding other issues where social norms, regulators, investors, and courts are putting pressure on companies, and so the company's long-term success may require the board to consider broader stakeholders. Equality, diversity, and inclusion ("EDI") would seem to be another issue that is experiencing that confluence. See Brummer & Strine, supra 6, at 61 (discussing the board's *Caremark* duties to incorporate EDI considerations).

160. This Author has written extensively about developing trends of corporate responsibility and investors' interests in better environmental, social, and governance ("ESG") data. *See generally* Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance, in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Petition from Cynthia A. Williams, Osler Chair in Bus. L., Osgoode Hall L. Sch., and

increasingly expect companies to have a net-zero business plan; majority votes on shareholder resolutions seeking disclosure of the company's net-zero plans in this year's proxy season are harbingers of things to come as climate-aware shareholders increasingly are putting pressure on companies to have such plans and disclose details about them. Courts and litigators, too, are presenting new sources of litigation risk. In such a context, in a world being buffeted by weather extremes and changing regulatory demands, what a board needs to actually do to advance the best interests of the corporation and its shareholders is changing. To thrive long-term, companies will need to develop strategies that present a realistic hope of financial success, while also taking into account these pressures and disruptions. . Arguably that is a substantive duty, not merely procedural.

CONCLUSION

This Article has argued that the private fiduciary duties of directors and officers in American companies can operate to inculcate public social responsibilities into the firm, here with respect to climate change. This incorporation into the firm's strategy is not argued to require changing the purpose of the firm or incorporating a stakeholder perspective on the firm's responsibilities. Rather, as the social and environmental context in which firms operate changes, those corporate actions necessary to thrive financially also need to change.

Today, there is a broad scientific consensus about the reality and implications of climate change. That consensus is shared by financial regulators, investors, and many members of civil society, leading to pressures on company directors and officers to incorporate climate change into their strategies, oversight, and disclosure as an aspect of good management. Failure to do so may risk reputational and financial harm, but also fiduciary liability, as indicated by recent oversight cases in Delaware. Well-counselled boards will incorporate climate change risks as a defensive measure against far-reaching books and records requests and potential liability. Proactive boards will incorporate climate change opportunities to position their companies for success as the transition to a net-zero world accelerates.

Jill E. Fisch, Saul A. Fox Distinguished Professor of Bus. L., Univ. of Pennsylvania L. Sch., to Brent J. Fields, Secretary, U.S. Sec. & Exch. Comm'n (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https://perma.cc/TTV7-LJZN].

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