

CORPORATE GOVERNANCE GUIDELINES: HOW TO IMPROVE DISCLOSURE AND PROMOTE BETTER CORPORATE GOVERNANCE IN PUBLIC COMPANIES

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ABSTRACT

If you are a shareholder of a public corporation, you may think it would be easy to find basic information about your shareholder rights, such as whether shareholders have the right to call special stockholder meetings. You would probably assume that the information would be disclosed in the company's "Corporate Governance Guidelines," (CGGs) which, according to a New York Stock Exchange (NYSE) rule, must be posted on the company's website for shareholder review. But, as this article shows, companies are not required to disclose information about shareholder rights in their corporate governance guidelines, and most companies have chosen not to provide this information voluntarily. CGGs, therefore, have largely failed in their goals of promoting informed investors and improving the ability of shareholders to monitor board performance.

Although clearly an important part of a public company's corporate governance, CGGs have not been given serious scholarly attention. This is the first article to address that deficiency. The article reviews and analyzes the CGGs of the fifty largest public companies in the United States. I discovered that CGGs generally do not disclose information on today's most important corporate governance issues: those relating to shareholder rights and environment and social issues (ESG). The NYSE rule is stuck in the corporate governance environment of 2003, when the rule was adopted. It is time for the NYSE to revisit its rule to improve the effectiveness of CGGs.

Specifically, I recommend that listed companies should be required to provide more information on policies relating to shareholder rights and ESG. In addition, I recommend that the NYSE should adopt a new approach to CGG disclosure. Rather than simply requiring listed companies to disclose their corporate governance practices, the NYSE should require companies to disclose whether they have adopted a particular corporate governance policy and if they have not, why not. The increased disclosure and the new "disclose or explain" approach will ensure that shareholders are better informed and will lead to improved corporate governance at public companies.

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INTRODUCTION

If you are a shareholder of a public corporation, you may think it would be easy to find basic information about your shareholder rights, such as whether shareholders have the right to call special stockholder meetings. You would probably assume that the information would be disclosed in the company's "Corporate Governance Guidelines," (CGGs) which, according to a New York Stock Exchange (NYSE) rule, must be posted on the company's website for shareholder review. But, as this article shows, companies are not required to disclose

information about shareholder rights in their corporate governance guidelines, and most companies have chosen not to provide this information voluntarily. CGGs, therefore, have largely failed in their goals of promoting informed investors and improving the ability of shareholders to monitor board performance.

CGGs are a relatively recent addition to the corporate governance framework of public companies. In 2003, in response to accounting scandals perpetrated by several large public companies, the NYSE instituted several rules to improve the corporate governance practices of companies listed on the NYSE.¹ As part of that initiative, the NYSE directed listed companies to adopt CGGs and to post their CGGs on their company websites.² Under these NYSE rules, companies are required to disclose in CGGs information on seven specific corporate governance topics.³ For example, the NYSE requires listed companies to disclose whether the board has a policy addressing director attendance at board meetings.⁴ The NYSE hoped that requiring disclosure of corporate governance practices would lead to improved corporate governance.⁵

Although clearly an important part of a public company's corporate governance, CGGs have not been given serious scholarly attention. This is the first article to address that deficiency. The article reviews and analyzes the CGGs of the fifty largest public companies in the United States. I discovered that CGGs generally failed to disclose information on today's most important corporate governance issues.⁶ For example, over the last ten years, activist shareholders and institutional investors have demanded more of a voice in company decisions.⁷ In addition, boards now face new and difficult questions relating to environmental and social issues, including diversity and inclusion—an area commonly referred to as “ESG,” “corporate social responsibility,” or “sustainability.”⁸ Moreover, boards are under increasing pressure to manage the corporation to benefit all corporate stakeholders, not just corporate stockholders.⁹ Although these are incredibly important corporate governance issues, CGGs are typically silent on these topics.

1. See *infra* Part III.B.1.

2. See *infra* Part II.B.2.a.

3. See *infra* Part III.A.

4. See *id.*

5. See *infra* Part III.B.2.a.

6. See *infra* Part IV.

7. See, e.g., Martin Lipton et al., *Dealing with Activist Hedge Funds and Other Activist Investors*, WACHTELL, LIPTON, ROSEN & KATZ (Oct. 5, 2021), <https://www.wlrk.com/web-docs/wlrknew/ClientMemos/WLRK/WLRK.27870.21.pdf> [<https://perma.cc/8D8R-ST3N>].

8. See *infra* Part II.A.3.

9. See *infra* Part II.A.3.

Corporate governance challenges faced by public company boards today have changed dramatically since the NYSE rule was adopted in 2003. It is time for the NYSE to revisit its rule to improve the effectiveness of CGGs. Specifically, I recommend that the rule should be amended to require listed companies to provide more information on policies relating to shareholder rights and ESG. In addition, I recommend that the NYSE should adopt a new approach to CGG disclosure. Rather than simply requiring listed companies to disclose their corporate governance practices, the NYSE should require companies to disclose whether they have adopted a particular corporate governance policy and if they have not, why not.

Part I of this article provides a brief overview of corporate governance. It identifies the goals of “good” corporate governance. It also discusses the sources of corporate governance law, including state corporate law, the federal securities laws, stock exchange listing standards, best practices, and proxy voting guidelines. Part I also reviews the pros and cons of the four main approaches to corporate governance regulation: mandatory regulation, “comply or explain,” required disclosure, and “disclose or explain.”

Part II presents a thorough discussion and analysis of the rule that requires companies to adopt CGGs: Section 303A.09 of the NYSE Listed Company Manual. It also explores the history of the rule’s adoption by the NYSE and identifies the goals of the rule.

Part III presents an analysis of the CGGs of the fifty largest U.S. public companies. The survey revealed that there is great variation in several of the seven corporate governance topics mandated by the NYSE. It also revealed that all public companies include additional information in their CGGs, but that the “voluntary” content largely consisted of corporate governance information that public companies are already required to disclose in their proxy statements. Most importantly, analysis also showed that most CGGs do not disclose information on basic corporate governance practices relating to shareholder rights—such as voting rights—or to ESG policies.

Part IV recommends that the NYSE should amend its rule in two ways. First, listed companies should be required to disclose more information. Specifically, companies should be required to disclose the following information in their CGGs: (1) basic information on the company’s approach to shareholder rights; (2) basic information about the company’s ESG policies; and (3) a statement of corporate purpose (*i.e.*, whether the board is managing the company for the benefit of stockholders or stakeholders). Companies should also be required to disclose any deviations from the corporate governance practices set forth in their CGGs.

Second, listed companies should be required to do more than simply disclose their corporate governance policies in their CGGs. Instead, the NYSE should adopt a “disclose or explain” approach. For example, under the current rule, companies are required to disclose whether they limit the number of additional boards a company director may serve on.¹⁰ If they do not have a policy, they are not required to explain that decision.¹¹ Under my recommendation, if a company has not adopted a so-called “overboarding” policy, it would be required to explain why it has not. The increased disclosure and the “disclose or explain” approach will ensure that shareholders are better informed and will lead to improved corporate governance at public companies.

I. CORPORATE GOVERNANCE

A. *The Goals of “Good” Corporate Governance*

A commonly used definition of “corporate governance” is “the system by which companies are directed and controlled.”¹² Traditionally, companies have adopted “good” corporate governance practices to ensure that company management works on behalf of shareholders and to ensure that the board can carry out its oversight responsibilities. More recently, good corporate governance practices have been put in place to ensure that the board addresses the environmental and social factors that could fundamentally impact the company’s performance. This is referred to as “corporate social responsibility,” “sustainability,” or “environment, social, and governance (ESG).”¹³

1. *Traditional Goals of Corporate Governance: Reducing the Agency Problem*

Historically, the goal of corporate governance has been to reduce the agency problem that exists in public corporations.¹⁴ Agency theory

10. NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.09 (2020), <https://nyseguide.srorules.com/listed-company-manual> [<https://perma.cc/K7NC-M3V5>] [hereinafter NYSE MANUAL].

11. *Id.*

12. COMM. ON FIN. ASPECTS OF CORP. GOVERNANCE, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, 1992, § 2.5 (UK), <https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf> [<https://perma.cc/4S57-HRA9>] [hereinafter Financial Aspects of Corporate Governance Report].

13. As most practitioners and scholars have done, this article uses the term “ESG” to refer to these issues. *See, e.g.*, Sara K. Orr, *Corporate Sustainability*, LEXIS NEXIS PRAC. GUIDANCE 1 (2020), <https://www.lw.com/thoughtLeadership/corporate-sustainability-practical-guidance> [<https://perma.cc/8CQJ-YL9T>] (noting that the author will be using the terms ESG, sustainability, and corporate social responsibility interchangeably).

14. *See* DAVID LARCKER & BRIAN TAYAN, CORPORATE GOVERNANCE MATTERS 4 (2d ed.) (stating that “[t]o lessen agency costs, some type of control or monitoring system is put in place in the organization. That system of checks and balances is called corporate governance”).

recognizes that agents and principals have different interests that may lead an agent to prefer itself at the expense of its principal.¹⁵ In the corporate context, the managers are the agents, and the shareholders are the principals. Because the managers—the board of directors and the officers—are not necessarily the owners of the corporation, there is a danger that management will fail to work in the best interests of the shareholders.¹⁶ Management might shirk in their duties, leading to a reduction in stock price.¹⁷ Or management might seek to enrich themselves by paying themselves excessive compensation or by engaging in unfair self-dealing transactions with the corporation.¹⁸

Monitoring is one way to reduce the agency problem. Thus, good corporate governance practices try to strengthen the *shareholder's* ability to monitor the board and hold the board accountable for its actions. Monitoring raises the following types of corporate governance questions: How should the board of directors be nominated? Should all directors stand for re-election every year? What vote should be required for directors to be elected? Should shareholders be able to use the company's proxy materials to nominate directors? Should shareholders approve executive compensation packages? These corporate governance issues are often referred to collectively as "shareholder rights."

Similarly, good corporate governance practices have focused on strengthening the *board's* ability to monitor corporate officers, especially the Chief Executive Officer. Related corporate governance questions include: Should boards be comprised of "independent" directors? How should director "independence" be defined? Should the positions of CEO and Chairperson of the Board be held by the same person? Should directors meet without the CEO being present?

Another common way to reduce the agency problem is to align the interests of the agent with the principal. For corporations, executive compensation is the primary way to align the interests of management with shareholders.¹⁹ Thus, good corporate governance dictates that executives should be paid at least partly in stock and that their compensation should be tied to corporate performance (*i.e.*, pay-for-performance). Related corporate governance practices include the adoption

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

16. *Id.*

17. Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 276-77 (1998).

18. Lucian A. Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71, 72-73 (2003).

19. *Id.*

of stock ownership guidelines and policies prohibiting management from hedging their company stock.²⁰

2. *Traditional Goal of Corporate Governance: Improving Effectiveness of Board Oversight*

Good corporate governance practices have also been adopted to ensure that the board of a public company is able to effectively exercise its oversight responsibilities. The board of a public company has vast responsibilities.²¹ For the board to meet its responsibilities, the board must be comprised of qualified directors with the right mix of knowledge and skills who are able to devote sufficient time to their duties. The directors must have a clear understanding of the board's oversight functions, and to perform those functions, the board must be informed and engaged.²² This raises questions such as: What is the appropriate size of the board of directors? How can board committees be used most effectively? How can the board ensure that it has the necessary information it needs to monitor the business? How often should the board meet? Should there be term-limits on director service? What should be done about an underperforming director?

3. *Recent Goal of Corporate of Governance: Promoting ESG*

Today, one of the most important areas of corporate governance is ESG: environmental, social, and governance factors that could fundamentally impact business performance. As one prominent corporate law firm recently advised:

[Boards should] be aware that ESG and sustainability have become major mainstream governance topics that encompass a wide range of issues, such as climate change and other environmental risks; systemic financial stability; diversity; human capital management (e.g., employee working conditions, wages, training, retraining healthcare and retirement); supply chains; and consumer and product safety. . . .²³

ESG is founded on the insight that investors require more than traditional financial metrics to make investment decisions.²⁴ These

20. See Lucian A. Bebchuck & Jesse M. Fried, *Paying for Long-Term Performance*, 158 U. PA. L. REV. 1915, 1956-57 (2010).

21. See DEL. CODE ANN. tit. 8, § 141(a) (2020). For a good description of the responsibilities of the board, see Report of the Task Force of the ABA Section of Business Law Corporate Governance Committee on Delineation of Governance Roles and Responsibilities, 65 BUS. LAW. 107, 122-23 (2009).

22. *Id.* at 124-25.

23. Martin Lipton & Carmen X.W. Lu, *Spotlight on Boards*, WACHTELL, LIPTON, ROSEN & KATZ 2 (July 17, 2020), <https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.27031.20.pdf> [<https://perma.cc/Y79F-L8Q5>].

24. Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018, 10:09 AM), <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=2d900>

investors recognize that ESG factors present short and long-term risks to the overall health of a business.²⁵ If boards fail to manage these environment and social risks, the business will be harmed. For example, if the board of an automobile manufacturer does not respond to the risk of climate change by moving company production from gas cars to electric vehicles (EVs), the company's sales will eventually be negatively impacted as consumer tastes and emissions standards lead to increased demand for EVs.

ESG has become an important corporate governance issue because large institutional investors and influential market participants have made it a priority. For example, in January 2020, BlackRock, the world's largest asset manager, sent out its now famous²⁶ investor letter boldly stating that "sustainability should be our new standard for investing."²⁷ In addition to BlackRock, other institutional investors such as Goldman Sachs and Fidelity Investments have also issued proxy voting guidelines²⁸ taking strong stances on ESG.²⁹

Due to the demands of these institutional investors and market professionals—who own or control large percentages of the stock of public companies³⁰—good corporate governance now requires boards to prioritize ESG. Sometimes, good corporate governance practices require boards to make changes to their behavior relating to ESG. For example, boards are increasingly called upon to adopt diversity initiatives for their corporations.³¹

39f1695 [<https://perma.cc/D2EY-YX8A>] ("ESG factors cover a wide spectrum of issues that traditionally are not part of financial analysis, yet may have financial relevance.").

25. Cf. Witold Henisz et al., *Five Ways that ESG Creates Value*, MCKINSEY Q. (Nov. 14, 2019), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value> [<https://perma.cc/3FKC-ZQHK>] (comparing weak and strong ESG policies and the impact weak policies have on business).

26. See, e.g., Rob Kaplan, *What Larry Fink Got Right (and Wrong) in His 2020 Investor Letter*, FORBES (Jan. 24, 2020, 8:54 AM), <https://www.forbes.com/sites/robkaplan/2020/01/24/what-larry-fink-got-right-and-wrong-in-his-2020-investor-letter/?sh=5cb8ebf92055> [(describing the letter as "represent[ing] a seismic shift in the way mainstream finance is starting to think about climate change and investing").

27. Larry Fink, *Sustainability as BlackRock's New Standard for Investing*, BLACKROCK (Jan. 2020), <https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter> [<https://perma.cc/KN2R-JWCD>].

28. "Proxy voting guidelines" disclose how an institutional investor will vote their proxies on a variety of issues, including director elections, bylaw amendments, and ESG proposals. For additional discussion of proxy voting guidelines, see *infra* Part II.B.5.

29. Rani Doyle, *ESG Initiatives Rapidly Advance in 2020; Institutional Investors Issue Updated Proxy Voting Policies*, ABA BUS. L. TODAY: MONTH-IN-BRIEF SECS. LAW [<https://perma.cc/FY93-BSRA>] (Feb. 2020), <https://businesslawtoday.org/month-in-brief/february-brief-securities-law-2020/> [<https://perma.cc/H9P8-M4F8>] (highlighting recent pro-ESG disclosure measures taken by institutional investors).

30. The three largest index fund managers—BlackRock, Vanguard, and State Street Global Advisors—collectively hold approximately 20% of S&P 500 companies. Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 736 (2019).

31. Jeff Green & Saijel Kishan, *Shareholders are Pushing Companies to Make Good on Diversity Promises*, L.A. TIMES (June 6, 2021, 4:56 PM),

Usually, however, good corporate governance practices focus on disclosure and increased transparency of ESG. Although many investors want information about how boards are addressing ESG, companies are not required by law to disclose it.³² Therefore, many powerful institutional investors and market professionals have demanded that companies provide ESG disclosure so that they can determine if the boards are adequately addressing ESG. For example, in its proxy voting guidelines, BlackRock states that it “expects” companies to make certain ESG disclosures—often termed “Sustainability Reports”—and states that those reports will be used by BlackRock to evaluate the boards.³³ If boards are not effectively addressing ESG issues, BlackRock promises that the directors will be held accountable.³⁴

Certain shareholders, such as religious organizations, labor unions, and socially responsible investment funds, have also used the shareholder proposal process³⁵ to publicly request companies to provide more information on company ESG practices.³⁶ These shareholders

<https://www.latimes.com/business/story/2021-06-06/ibm-corporate-diversity> [https://perma.cc/J46J-NUYX]. Diversity initiatives began as means to comply with anti-discrimination laws. Rohini Anand & Mary-Frances Winters, *A Retrospective View of Corporate Diversity Training from 1964 to the Present*, 7 ACAD. OF MGMT. LEARNING & EDUC. 356, 357-58 (2008). However, changes in the demographics of the marketplace and employment pools fueled the creation of diversity initiatives for strategic purposes. Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE. & L. 75, 84-86 (2012). Moreover, studies have indicated that companies with ethnically diverse and gender diverse boards, management, and employees are more innovative and have better financial results than less diverse companies. See MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 3-5 (May 2020), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf?shouldIndex=false> [https://perma.cc/G69P-27YW].

32. The SEC has been under pressure to require public companies to disclose ESG information in mandatory reports. Recently, the SEC’s Investor Advisory Committee recommended that the SEC start the process to add ESG disclosure to the disclosure items required to be included in mandatory reports. See RECOMMENDATION OF THE SEC INVESTOR ADVISORY COMMITTEE RELATING TO ESG DISCLOSURE, U.S. SECS. & EXCH. COMM’N 1 (May 21, 2020), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf> [https://perma.cc/E3T9-EVWM].

33. BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR U.S. SECURITIES 13, 16 (Jan. 2022), <https://www.blackrock.com/corporate/literature/factsheet/blk-responsible-investment-guidelines-us.pdf> [https://perma.cc/G6LP-S5K3].

34. *Id.* at 4.

35. The federal proxy rules provide the shareholders of a public company with the opportunity to vote on proposals made by other company shareholders. See 17 C.F.R. § 240.14a-8 (2021) (originally passed as Rule 14a-8 in the Securities Exchange Act of 1934). Under the shareholder proposal rules, public companies are generally required to include in the company’s proxy materials a shareholder’s proposal that asks the board to provide reports to shareholders. *Id.* If the proposal receives the support of stockholders holding a majority of shares, the proposal will become a formal request by the shareholders. However, as it is simply a “request” or “recommendation,” the board is legally permitted to ignore the stockholder request. See *id.*

36. SULLIVAN & CROMWELL LLP, 2021 PROXY SEASON REVIEW: PART 1 RULE 14A-8 SHAREHOLDER PROPOSALS 3-5 (July 27, 2021), <https://www.sullcrom.com/files/upload>

typically request the company to provide a report on issues such as gender pay equity, lobbying, and sustainability.³⁷ Until recently, proposals that address environmental and social issues have not been approved by stockholders.³⁸ However, in the last few years, they have begun to receive increased shareholder support, with some gaining majority approval.³⁹

ESG disclosures are evaluated by third party proxy advisory services. For example, in 2018, Institutional Shareholder Services, Inc., the world's leading proxy advisory firm, launched its "Environmental & Social QualityScore," which evaluates the quality of ESG disclosures made by public companies.⁴⁰ Other ESG specialty companies, such as Sustainalytics, also grade companies on their ESG disclosures.⁴¹ All of these pressures have caused most public companies to "voluntarily" disclose some type of ESG information to investors, often in "Sustainability Reports" posted on corporate websites.⁴²

ESG is associated with the recent movement away from a "shareholder primacy" theory to a "stakeholder primacy" theory of the purpose of the corporation.⁴³ According to the shareholder primacy theory,

/sc-publication-2021-Proxy-Season-Review-Part-1-Rule14a-8.pdf [https://perma.cc/Z3CA-LGSJ].

37. *Id.* at 10, 12, 22.

38. See Randall S. Thomas & James F. Cotter, *Shareholder Support, Board Response, and Market Reaction*, 13 J. CORP. FIN. 368, 389 (2007) (finding that "corporate governance proposals receive significant shareholder voting support, while social responsibility proposals get much lower levels of shareholder votes cast in their favor").

39. See GLASS LEWIS, 2020 PROXY SEASON REVIEW: SHAREHOLDER PROPOSALS 18-19 (2020), <https://www.glasslewis.com/wp-content/uploads/2020/09/2020-Proxy-Season-Review-Shareholder-Proposals.pdf> [https://perma.cc/9C5C-445M].

40. See *Environmental, Social, and Governance QualityScores to be Reflected in ISS Proxy Research Reports*, INSTITUTIONAL SHAREHOLDER SERVS. (Feb. 5, 2018), <https://www.issgovernance.com/iss-announces-launch-of-environmental-social-qualityscore-corporate-profiling-solution/> [https://perma.cc/WX9C-F69N].

41. JOHN HILL, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING: A BALANCED ANALYSIS OF THE THEORY AND PRACTICE OF A SUSTAINABLE PORTFOLIO 177-79 (2020).

42. For example, according to a recent study, 90% of companies on the S&P 500 index issued Sustainability (or Corporate Responsibility) Reports in 2019. GOVERNANCE & ACCOUNTABILITY INST., FLASH REPORT: TRENDS ON THE SUSTAINABILITY REPORTING PRACTICES OF S&P 500 INDEX COMPANIES 3 (2020), <https://www.ga-institute.com/research-reports/flash-reports/2020-sp-500-flash-report.html> [https://perma.cc/4695-4KE3].

43. The shareholder primacy versus stakeholder primacy argument can be traced to 1931, when the Harvard Law Review published two highly influential articles that debated the purpose of the corporation. Adolf Berle argued that corporations existed "only for the ratable benefit" of the stockholders. Adolf Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931). He was answered by Merrick Dodd, who argued that corporations have a "social service as well as a profit-making function." E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932). The debate continues to this day—and is beyond the scope of this article. For a good summary of the historical views of corporate purpose, see David J. Berger, *Reconsidering Shareholder Primacy in an Era of Corporate Purpose*, 74 BUS. LAW. 659 (2019). See also Lynn A. Stout, *On the Rise of Shareholder Primacy: Signs of its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169 (2013).

the purpose of the corporation is clear: to create wealth for the corporation's shareholders.⁴⁴ The board and management have no responsibility to any other corporate stakeholder, such as the company's employees, nor do they have to be concerned about any negative effects on society caused by corporate actions. On the other hand, proponents of the stakeholder primacy theory argue that the responsibilities of the corporation extend beyond the shareholders to other important contributors to the firm's success, including employees, customers, suppliers, and creditors.⁴⁵

The trend towards stakeholder primacy reached an important landmark in 2019, when the Business Roundtable—an influential non-profit association with a membership consisting of the CEOs of over 180 of the largest U.S. corporations—issued its “Statement on the Purpose of a Corporation.”⁴⁶ Overturning a previous policy statement grounded on shareholder primacy, the signing CEOs stated that they “share[d] a fundamental commitment to all of our stakeholders.”⁴⁷ Thus, in addition to committing to achieve long-term value for their shareholders, the CEOs specifically promised to fairly compensate their employees, to deal fairly with their suppliers, to support their communities, and to protect the environment.⁴⁸

B. *The Sources of Corporate Governance Law*

Corporate governance does not appear in a single body of law. Instead, the “law”⁴⁹ of corporate governance is created by a variety of statutes, rules, principles, and practices drawn from state corporate law, the federal securities laws, stock exchange listing rules, best practices identified by academic and non-academic organizations, and proxy voting guidelines issued by institutional investors and proxy advisory firms.

44. Milton Friedman, *The Social Responsibility of the Business is to Increase its Profits*, N.Y. TIMES MAG. 33 (Sept. 13, 1970) (arguing that “in his capacity as a corporate executive, the manager is the agent of the individuals who own the corporation . . . and his primary responsibility is to them”).

45. Virginia Harper Ho, “Enlightened Shareholder Value”: *Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 71-74 (2010).

46. BUS. ROUNDTABLE, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2019.pdf> [<https://perma.cc/RYR2-8WRV>].

47. *See id.*

48. *Id.*

49. Although I use the word “law,” corporate governance is not entirely, or even mostly, law. As discussed in more detail below, much of corporate governance consists of practices voluntarily adopted by a company. There are very few mandatory rules. *See infra* Part II.C.5.

1. State Corporate Law

Corporate governance is defined as “the system by which companies are directed and controlled,”⁵⁰ and state corporate law created that system. State corporation statutes established the three corporate actors—the board of directors, the officers, and the shareholders—and define their roles and how they relate to each other.⁵¹ In addition, state courts create and impose fiduciary duties on corporate directors and officers.⁵² Delaware, the state of incorporation for a majority of the largest companies in the United States, is the most important state for corporate law.⁵³ However, state corporate law is not the most important source of corporate governance law.⁵⁴

2. Federal Securities Laws

Historically, Congress was not seen as having the authority to regulate corporate governance through the federal securities laws.⁵⁵ There was a traditional division of responsibility between state and federal law, with state corporate law regulating corporate conduct and the federal securities laws regulating disclosure.⁵⁶ Thus, for example, state corporate law establishes whether shareholders have voting rights,⁵⁷ while the federal securities laws require public companies to provide disclosure in proxy statements to those shareholders so that they can vote on an informed basis.⁵⁸

50. See *supra* text accompanying note 12.

51. CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 149 (8th ed. 2017) (stating that “[a]s defined by corporations statutes, the archetypical corporation separates ownership and management functions into three specialized roles: directors, officers, and shareholders”).

52. For example, in *Stone v. Ritter*, 911 A.2d 362, 369-70 (2006), the Delaware Supreme Court confirmed that a director’s fiduciary duties include oversight responsibilities.

53. Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135, 135 (2004) (discussing Delaware’s “dominance” in corporate law).

54. As one leading treatise states, “[w]hen it comes to corporate governance, state corporation statutes take a backseat to the listing requirements of the New York Stock Exchange (NYSE) and Nasdaq as well as to conventions, perceptions, and trends that are equally normative.” JAMES D. COX & THOMAS HAZEN, 2 TREATISE ON THE LAW OF CORPORATIONS §9.3 (3d ed.).

55. See Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 82-86 (2005) (explaining the SEC’s lack of authority to regulate the “internal affairs” of a corporation).

56. See, e.g., J. Robert Brown Jr., *Corporate Governance, the Securities and Exchange Commission, and the Limits of Disclosure*, 57 CATH. U. L. REV. 45, 46 (2007) (recognizing and discussing this “neat dichotomy”).

57. For example, Delaware law provides that shareholders elect directors, approve amendments to the certificate of incorporation, and approve statutory mergers. DEL. CODE ANN. tit. 8, §§ 216, 242, 251 (2020).

58. Securities Act of 1933 Rule 14a-3, 17 C.F.R. § 240.14a-3 (2020) (requiring all solicitations of proxy to be accompanied or preceded by a proxy statement).

However, the SEC has used its disclosure authority to significantly impact corporate governance. SEC rules require public companies to make disclosures in their proxy statements about a wide variety of corporate governance practices. Specifically, Item 407⁵⁹ of Regulation S-K requires companies to disclose:

- Information about the company's standards of "independence" and independent directors;⁶⁰
- Information about the number of board meetings held during the year, as well as director attendance at those board meetings;⁶¹
- Policies relating to director attendance at annual shareholders meetings;⁶²
- Information about the company's Audit, Compensation, and Nominating Committees;⁶³
- Whether the company has a process for facilitating shareholder communications with the board;⁶⁴
- Policies on board leadership, including the selection of the Chairman of the Board;⁶⁵
- Policies describing the role of board and risk oversight;⁶⁶ and

59. Regulation S-K Item 407, 17 C.F.R. § 229.407 (2020).

60. § 229.407(a).

61. § 229.407(b).

62. *Id.*

63. § 229.407(c)-(e). Among other things, Item 407(c) requires the company to disclose the following in its proxy statement:

[W]hether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy[.]

§ 229.407(c)(2)(vi).

64. § 229.407(f).

65. § 229.407(h). Specifically, Item 407(h) requires companies to "[b]riefly describe the leadership structure of the [company's] board, such as whether the same person serves as both principal executive officer and chairman of the board, or whether two individuals serve in those positions." *Id.* If the Chairman of the Board and the CEO are the same person, the company must "disclose whether [it] has a lead independent director and what specific role the lead independent director plays in the leadership of the board." *Id.* Finally, the company is required to disclose "why the [company] has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the [company]." *Id.* In the adopting release, the SEC specifically states that this disclosure item is not intended to influence the company's choice of leadership structure. *See* Proxy Disclosure Enhancements, Securities Act Release No. 33-9089, at 43, 74 Fed. Reg. 683345 (Dec. 23, 2009).

66. Specifically, Item 407(h) requires companies to disclose "the extent of the board's role in the risk oversight of the [company], such as how the board administers its oversight function, and the effect that this has on the board's leadership structure." § 229.407(h).

- Whether the company has adopted rules prohibiting management and the board from hedging company stock.⁶⁷

In addition, the SEC requires public companies to disclose whether they have adopted a code of ethics for their senior officers.⁶⁸

Legally, these rules are disclosure rules. Accordingly, public companies can adopt whatever corporate governance practices they want, so long as they are disclosed in the proxy statements. However, disclosure rules can also lead companies to change their behavior, and the SEC was quick to recognize that it could, in effect, regulate behavior by promulgating disclosure rules.⁶⁹ As Professor Roberta Karmel—the first woman to serve as an SEC Commissioner—noted, “the SEC has had a tendency to use disclosure requirements for their prophylactic effect of regulating corporate conduct.”⁷⁰

The SEC sometimes amps up its approach to corporate governance disclosure rules. For example, as part of the required audit committee disclosure, the SEC requires companies to disclose in their proxy statements whether their audit committee has a “financial expert,” *and if not, why not*.⁷¹ Similarly, the SEC requires companies to disclose in their proxy statements whether they have a process for stockholders to communicate with the board, *and if not, why not*.⁷² Companies are free to not have a financial expert on their audit committees, and are free to not have a process for stockholders to communicate with the board, but it would be difficult for a company to advance a compelling reason to support those decisions. Therefore, not surprisingly, public companies generally ensure that they have financial experts on their audit committees and that they institute stockholder communication processes.⁷³ While these types of disclosure rules do not regulate conduct or require corporations to adopt specific corporate governance

67. § 229.407(i).

68. Regulation S-K Item 406, 17 C.F.R. § 229.406 (2020).

69. For a good discussion of the SEC’s attempts to regulate behavior through disclosure rules, see generally Brown, *supra* note 56, at 60-73.

70. Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 S.M.U L. REV. 325, 338 (2001).

71. Regulation S-K Item 407(d)(5)(i)(C), 17 C.F.R. § 229.407(d)(5)(i)(C) (2020). For additional discussion of this “disclose or explain” approach to disclosure rules, see *infra* Part II.C.4.

72. Regulation S-K Item 407(f)(1), 17 C.F.R. § 229.407(f)(1) (2020). For additional discussion of this “disclose or explain” approach to disclosure rules, see *infra* Part II.C.4.

73. See Julie H. Daum & Thomas J. Neff, *Spencer Stuart Governance Letter*, FREE LIBRARY (Jan. 1, 2005), <https://www.thefreelibrary.com/SSBI.%20key%20trends%20drive%20board%20composition;%20The%20latest%20Spencer%20Stuart...-a0129967683> [https://perma.cc/LUX2-BXWZ] (reporting Spencer Stuart Board Index 2004 annual survey results showing that in the year following the rule, 91% of boards identified at least one financial expert, compared to 21% the previous year).

practices, the SEC seems to use them to encourage companies to adopt certain corporate governance practices.⁷⁴

Arguably, the SEC no longer has to rely on disclosure rules to regulate corporate governance practices. Beginning with the Sarbanes-Oxley Act of 2002 (SOX),⁷⁵ the SEC was expressly authorized to regulate certain aspects of corporate governance.⁷⁶ In addition, the Dodd-Frank Act of 2010 included several corporate governance provisions, such as the “say on pay” rule, which requires public companies to provide shareholders with an advisory vote on executive compensation.⁷⁷

3. *Stock Exchange Listing Standards*

For public companies, stock exchange listing standards provide additional significant regulation of corporate governance. Stock exchanges assumed this role because the SEC was not certain that it had the authority to regulate corporate conduct.⁷⁸ The SEC therefore looked to the stock exchanges—with their private listing standards—to step in and regulate the corporate governance of public companies.⁷⁹

Both the New York Stock Exchange⁸⁰ and Nasdaq⁸¹ require listed companies to comply with their corporate governance standards. Most of the listing standards affirmatively regulate corporate behavior. For example, the NYSE Listed Company Manual:

74. There are several other examples of these types of disclosure rules. For example, a public company must disclose whether it has a nominating and compensation committees, and if not, why not. Regulation S-K Item 407(c)(1) & (e)(1), 17 C.F.R. § 229.407(c)(1) & (e)(1). In addition, it must disclose whether its nominating committee has a policy regarding the consideration of director candidates nominated by stockholders, and if not, why not. § 229.407(c)(2)(iii). It must also disclose whether it has a policy restricting hedging activities in company securities, and if not, why not. § 229.407(i)(4). A public company must also disclose whether it has adopted a code of ethics, and if not, why not. Regulation S-K Item 406, 17 C.F.R. § 229.406 (2020).

75. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

76. For example, SOX requires that the audit committee—and not the board of directors as a whole—must be responsible for the external auditing process. Sarbanes-Oxley Act § 301. Congress also determined that only independent directors could serve on the audit committee. *Id.* In other words, it is federal law, and not state law, that regulates audit committee service.

77. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010). Section 951 of the Dodd-Frank Act added Section 14A to the Securities Exchange Act of 1934. *Id.*

78. *See supra* Part II.B.2.

79. *See* Karmel, *supra* note 70, at 339-46 (providing an excellent summary of the role played by stock exchanges in regulating corporate governance); *see also* Karessa Cain, *Survey: New Efforts to Strengthen Corporate Governance: Why Use SRO Listing Standards?*, 2003 COLUM. BUS. L. REV. 619 (discussing the benefits and drawbacks of using stock exchange listing standards to regulate corporate governance).

80. NYSE MANUAL, *supra* note 10, at § 303A.00.

81. NASDAQ STOCK MARKET RULEBOOK § 5600 (2009), <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%205600%20Series>. The Nasdaq corporate governance standards are similar, although not identical, to the NYSE corporate governance standards. *See id.*

- Requires boards to be comprised of a majority of independent directors;⁸²
- Sets forth a definition of “independence;”⁸³
- Requires outside directors to meet regularly in executive session without the presence of management;⁸⁴
- Requires companies to have audit, compensation, and nominating/corporate governance committees comprised entirely of independent directors;⁸⁵
- Imposes additional requirements on audit committee members, including a more stringent definition of “independence” and the requirement that all members be “financially literate;”⁸⁶ and
- Requires shareholder approval of executive compensation plans.⁸⁷

In addition, the NYSE listing standards include two disclosure rules. For example, the NYSE Listed Company Manual:

- Requires boards to adopt and post “Corporate Governance Guidelines;”⁸⁸
- Requires boards to adopt and post a “Code of Business Conduct and Ethics.”⁸⁹

Each year, the CEO of each listed company is required to certify to the NYSE that he or she is not aware of any violation of these corporate governance standards,⁹⁰ and the company must file a “Written Attestation” with the NYSE.⁹¹ Although it is not very likely that the NYSE would suspend trading in a company’s stock or de-list a company for failure to meet its corporate governance standards, failure to comply with the NYSE corporate governance standards can lead to a public reprimand letter.⁹²

4. *Best Practices*

Corporate governance choices made by public corporations are strongly influenced by what are often termed “best practices.” As one

82. NYSE MANUAL, *supra* note 10, at § 303A.01.

83. *Id.* at § 303A.02.

84. *Id.* at § 303A.03.

85. *Id.* at § 303A.04-06.

86. *Id.* at § 303A.07.

87. *Id.* at § 303A.08.

88. *Id.* at § 303A.09. For additional discussion of CGGs, see *infra* Part IV.

89. NYSE MANUAL, *supra* note 10, at § 303A.10.

90. *Id.* at § 303A.12(a).

91. *Id.* at § 303A.12(c). See *NYSE Domestic Company Corporate Governance Affirmation*, NYSE, https://www.nyse.com/publicdocs/nyse/regulation/nyse/NYSE_Domestic_Company_Initial-Annual_Written_Affirmation_303A.pdf [<https://perma.cc/P6NL-ZLQ3>].

92. NYSE Manual, *supra* note 10, at § 303A.13.

corporate governance expert noted, “[t]here are no universally agreed-upon standards that determine good governance.”⁹³ However, several organizations seeking to improve corporate governance practices have issued recommendations that have proven to be highly influential. One of the most influential set of recommendations can be found in the Cadbury Report⁹⁴ and its *Code of Best Practice* issued in 1992.⁹⁵ Some of the recommendations included separating the Chairman role from the CEO position and creating an audit committee made up of independent directors.⁹⁶

Several business groups have also issued their own versions of best practices. For example, the Business Roundtable published its *Principles of Corporate Governance* in 2016.⁹⁷ In 2018, approximately twenty high-profile CEOs—including Warren Buffett—published *Commonsense Principles of Corporate Governance 2.0*.⁹⁸

5. Proxy Voting Guidelines

Finally, proxy voting guidelines issued by institutional investors and proxy advisory firms pressure public companies to adopt the corporate governance practices set forth in the guidelines. As BlackRock—one of the world’s largest institutional investors—states, its proxy voting guidelines “share our view about corporate governance issues generally, and provide insight into how we typically approach issues that commonly arise on corporate ballots, as well as our expectations of boards of directors.”⁹⁹ Because institutional investors own significant amounts of stock of most public companies, their voting guidelines are extremely influential.

93. LARCKER & TAYAN, *supra* note 14, at 57.

94. The Cadbury Report is the informal title given to the report of the Committee on the Financial Aspects of Corporate Governance, which was established by the U.K. Financial Reporting Council and the London Stock Exchange, to address the failures of several public companies. See FINANCIAL ASPECTS OF CORPORATE GOVERNANCE REPORT, *supra* note 12, at § 2.1-2.2. The Chairman of the committee was Sir Adrian Cadbury. *Id.* at Preface.

95. *Id.* at § 3. Several years later, in 1999, the Organisation for Economic Cooperation and Development (OECD) published another influential set of best practices, *Principles of Corporate Governance*, which were updated in partnership with the G20 in 2015. See OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 1-3 (2015), <https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1598535467&id=id&accname=guest&checksum=C30733CB7ECC8D6996C09A0C56EAC4AB> [<https://perma.cc/U8LS-DMBD>].

96. FINANCIAL ASPECTS OF CORPORATE GOVERNANCE REPORT, *supra* note 12, at § 4.9, 4.35.

97. BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE (2016), <https://s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf>.

98. See COMMONSENSE PRINCIPLES OF CORPORATE GOVERNANCE 2.0 (Oct. 18, 2018), <https://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf> [<https://perma.cc/S4KN-AW6D>].

99. BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: CORPORATE GOVERNANCE AND PROXY VOTING GUIDELINES FOR U.S. SECURITIES 3 (Jan. 2020), <https://www.sec.gov/Archives/edgar/data/835948/000119312520282052/d48412dex99uscorpgov.htm> [<https://perma.cc/ZZW2-KVHJ>].

Proxy voting guidelines are also issued by proxy advisory firms, such as Institutional Shareholder Services¹⁰⁰ and Glass Lewis.¹⁰¹ Because of the power of these proxy advisory firms,¹⁰² their guidelines are also highly influential sources of corporate governance for public companies.

C. Approaches to Corporate Governance Regulation

As discussed above,¹⁰³ a public company's corporate governance is drawn from a combination of statutes, rules, principles, and practices drawn from state corporate law, the federal securities laws, stock exchange listing rules, best practices, and proxy voting guidelines. Some of this is mandatory; some is voluntary. Some rules regulate conduct; other rules require disclosure. Putting it all together, there are five different approaches to corporate governance regulation: (1) mandatory regulation; (2) comply or explain; (3) required disclosure; (4) disclose or explain; and (5) voluntary with no required disclosure. Each approach offers some advantages and disadvantages, focusing on considerations of board flexibility, shareholder protection, and cost.

1. Mandatory Regulation

Mandatory regulation means that the corporation is legally required to adopt (or is legally prohibited from adopting) a particular governance feature. An example of mandatory regulation is the NYSE rule that requires the boards of listed companies to be comprised of at least a majority of independent directors.¹⁰⁴ The mandatory approach is attractive because it ensures that corporations are complying with certain minimum corporate governance standards that the regulator has determined will protect the interests of the shareholders.¹⁰⁵

100. See INSTITUTIONAL SHAREHOLDER SERVS., UNITED STATES PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS (Dec. 13, 2021), <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf> [<https://perma.cc/9C43-BSG7>].

101. See GLASS LEWIS, AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE UNITED STATES (2020), https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf [<https://perma.cc/3W76-GT8G>].

102. As the SEC recently recognized, "proxy voting advice businesses have become uniquely situated in today's market to influence, and in many cases directly execute, [institutional] investors' voting decisions." Exemptions from the Proxy Rules for Proxy Voting Advice, Securities Exchange Act Release No. 34-8937, at 8 (July 22, 2020) (internal citations omitted).

103. See *supra* note 49 and accompanying text.

104. NYSE MANUAL, *supra* note 10, at § 303A.01.

105. See Kerry Shannon Burke, *Regulating Corporate Governance Through the Market: Comparing Approaches of the United States, Canada and the United Kingdom*, 27 J. CORP. L. 341, 356 (2002). In addition, mandatory rules might be especially beneficial for markets in developing countries. As Professor Troy Paredes argues, while mandatory rules may be too restrictive in well-developed markets, such as the United States, they can help hold managers accountable in countries that lack the institutions for the market to do so. Troy A.

The downside of the mandatory approach is that it eliminates¹⁰⁶ the flexibility of the board to choose some aspects of its own corporate governance structure. For example, a company might have compelling reasons to depart from the mandatory rule, but it would not be allowed to do so. No governance model will fit the needs of every business, and a “one-size-fits-all” approach for corporate governance deprives managers of the ability to make decisions appropriate for an individual company.¹⁰⁷ Moreover, a mandatory model of corporate governance does not allow corporations to develop more efficient governance standards that will evolve over time.¹⁰⁸ This may restrict companies from experimenting and achieving optimal governance practices.¹⁰⁹ Additionally, a mandatory approach to corporate governance may impose significant costs that particularly harm smaller companies.¹¹⁰ Finally, the nature of mandatory regulation may lead to more “box-ticking” and to fewer practices that make a real impact on improving corporate governance.¹¹¹

2. *Comply or Explain*

The comply or explain approach addresses many of these concerns. Under this approach, a regulator issues uniform corporate governance standards, and companies have a choice: they can either comply with those standards or not.¹¹² However, if they choose not to comply, they must explain their decision not to comply.¹¹³

Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055, 1059 (2004).

106. Although it is common to say that a mandatory approach to corporate governance “eliminates” flexibility, the approach does leave some opportunities for boards to make corporate governance choices. For example, the NYSE rules leave some definitions ambiguous, which allows for companies to interpret them and apply them as they see fit. *See, e.g.*, NYSE MANUAL, *supra* note 10, at § 303A.02 (requiring the board to determine whether a director is “independent” and suggesting the board has substantial judgment in making independence determinations).

107. *See* Burke, *supra* note 105, at 357 (noting that “no governance model suits the needs of every listed company”); Paredes, *supra* note 105, at 1077-78 (stating that “[i]f all companies were the same, a mandatory ‘one-size-fits-all’ approach might make sense. The reality, though, is that companies have different business needs, different corporate cultures and ways of doing things, and different people and personalities, all of which are subject to change”).

108. *See* Paredes, *supra* note 105, at 1129.

109. *See id.*

110. *See* Annalee Steeno, Note, *Corporate Governance: Economic Analysis of a “Comply or Explain” Approach*, 11 STAN. J.L. BUS. & FIN. 387, 387-88 (2006).

111. *See* Sridhar Arcot et al., *Corporate Governance in the UK: Is the Comply or Explain Approach Working?*, 30 INT'L REV. L. & ECON. 193, 193 (2010).

112. For a good discussion of the comply or explain approach, see *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 BUS. LAW. 1487, 1490 (2002).

113. *Id.*

The comply or explain approach has been adopted by the London Stock Exchange,¹¹⁴ as well as by countries throughout the European Union.¹¹⁵ Thus, for example, according to the UK Corporate Governance Code,¹¹⁶ the positions of chairperson of the board and CEO cannot be held by the same person.¹¹⁷ A company listed on the London Stock Exchange must either comply with the provision or explain in its annual report why it has chosen not to separate the roles. The UK Corporate Governance Code provides some guidance as to what kind of explanation is expected:

An alternative to complying with a Provision may be justified in particular circumstances based on a range of factors, including the size, complexity, history and ownership structure of a company. Explanations should set out the background, provide a clear rationale for the action the company is taking, and explain the impact that the action has had. Where a departure from a Provision is intended to be limited in time, the explanation should indicate when the company expects to conform to the Provision.¹¹⁸

There are several advantages to the comply or explain approach. First, unlike the mandatory approach, it offers companies flexibility in their corporate governance decisions.¹¹⁹ Furthermore, as one commentator has noted, this approach “encourages companies to adopt the spirit of the Code, rather than the letter.”¹²⁰ In addition, because

114. Each listed company incorporated in the United Kingdom must include in its annual financial report:

[A] statement as to whether the listed company has:

(a) complied throughout the accounting period with all relevant provisions set out in the UK Corporate Governance Code; or

(b) not complied throughout the accounting period with all relevant provisions set out in the UK Corporate Governance Code and if so, setting out:

(i) those provisions, if any it has not complied with;

(ii) in the case of provisions whose requirements are of a continuing nature, the period within which, if any, it did not comply with some or all of those provisions; and

(iii) the company’s reasons for non-compliance[.]

FINANCIAL CONDUCT AUTHORITY HANDBOOK LR 9.8.6(6)R (2021) (emphasis removed).

115. See INT’L FIN. CORP., A GUIDE TO CORPORATE GOVERNANCE PRACTICES IN THE EUROPEAN UNION 3-5 (2015), https://www.ifc.org/wps/wcm/connect/506d49a2-3763-4fe4-a783-5d58e37b8906/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES&CVID=kNmxttG [<https://perma.cc/S2KK-TPKC>] (summarizing the “comply or explain” approaches adopted by EU countries).

116. FIN. REPORTING COUNCIL, UK CORPORATE GOVERNANCE CODE (2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> [<https://perma.cc/V5XD-XA4L>].

117. Provision 9 states: “The roles of chair and chief executive should not be exercised by the same individual. A chief executive should not become chair of the same company.” *Id.* at 6.

118. *Id.* at 2.

119. See Arcot et al., *supra* note 111.

120. *Id.*

companies can decide to either comply with the uniform governance standard or create a provision that more appropriately fits their needs, this type of corporate governance is adaptable to both current and changing business practices.¹²¹ The comply or explain approach may also work better for smaller companies, as it allows for them to deviate from the recommendations so long as they have sufficient reasons for non-compliance.¹²²

In addition, the comply or explain approach protects investors. The “opt out” nature of the “comply or explain” approach encourages companies to adhere to the default uniform set of corporate governance standards.¹²³ Research has shown that the overall compliance is “quite high” in systems using comply or explain codes.¹²⁴ This means that most companies choose to go along with the uniform corporate governance standards, which have been drafted to protect investors. For the companies that do not go along with the uniform corporate governance practices, the “explain” requirement will theoretically allow investors to decide whether a company’s non-compliance was made in good faith. It also provides transparency to shareholders, who can then more effectively monitor management.

However, the comply or explain approach does have several disadvantages.¹²⁵ The most serious problems arise when companies choose not to comply with the corporate governance requirements.¹²⁶ The comply or explain approach rests on the assumption that non-complying companies will provide meaningful explanations of their decisions to depart from the uniform standards. Unfortunately, commentators have observed that some non-complying companies provide insufficient explanations of their deviations.¹²⁷ Explanations for non-compliance may lack specificity.¹²⁸ In addition, some non-complying companies have not included any explanation at all, suggesting that they are

121. See Steeno, *supra* note 110, at 402.

122. See *id.*

123. See Arcot et al., *supra* note 111.

124. See Virginia Harper Ho, “Comply or Explain” and the Future of Nonfinancial Reporting, 21 LEWIS & CLARK L. REV. 317, 334 (2017). See also Arcot et al., *supra* note 111, at 193.

125. In addition to the disadvantages noted in the text, “comply or explain” may not be the best approach to corporate governance in countries with less developed markets and/or countries that lack the shareholder-oriented foundation for corporate law. See Ho, *supra* note 124, at 332. As previously stated, mandatory regulation may be more appropriate form of corporate governance for these types of markets.

126. See Arcot et al., *supra* note 111.

127. See *id.* at 193-94.

128. See *id.*; Ho, *supra* note 124, at 332; Shuangge Wen, *Less is More—A Critical View of Further EU Action Towards a Harmonized Corporate Governance Framework in the Wake of the Crisis*, 12 WASH. U. GLOBAL STUD. L. REV. 41, 74 (2013).

not using the comply or explain approach to improve their corporate governance.¹²⁹

Finally, there are costs associated with the explanation requirement. The expense of explaining non-compliance may cause some companies to reject deviations from the uniform standard even when non-compliance would be better for the company.¹³⁰ A commentator has suggested that companies may not provide meaningful explanations for their deviations because of the cost, and “those costs will rise with the number of explanations that are needed if the code itself is a poor fit for most companies.”¹³¹

3. *Required Disclosure*

The third approach to corporate governance regulation is requiring companies to disclose their corporate governance practices. Under this approach, a company’s corporate governance structure is not restricted by mandatory rules or by uniform corporate governance guidelines. Instead, the company can freely adopt whatever corporate governance practices it chooses. However, the company is required to disclose its choices. As described above,¹³² this is largely the approach of the federal securities laws. And, as discussed in more detail below,¹³³ this is the approach the NYSE took with CGGs. Listed companies can choose whatever corporate governance practices they want, but they are required to disclose them in their CGGs.

The required disclosure approach has several advantages. First, and most obviously, the voluntary approach allows complete flexibility; each company can select the corporate governance structure that works best for it.

Second, requiring disclosure helps assure that investors are adequately informed about the corporate governance practices adopted by the company’s board. Significant informational asymmetry exists regarding a company’s corporate governance practices—the board has full knowledge of the company’s approach to corporate governance, while shareholders have more limited knowledge. Requiring disclosure of the company’s corporate governance practices reduces that asymmetry and leads to a better-informed stockholder. This in turn can lead to more effective monitoring of management by stockholders.¹³⁴

129. See Arcot et al., *supra* note 111; Wen, *supra* note 128, at 74.

130. See Ho, *supra* note 124, at 332.

131. See *id.*

132. See *supra* Part II.B.2.

133. See *infra* Part III.B.2.b.

134. See Burke, *supra* note 105, at 357 (stating that disclosure of a company’s corporate governance practices and other material information “enables active shareholders to monitor management’s behavior and to exert pressure on directors and officers, when necessary, to change faulty governance structures”).

In addition, because corporate governance choices will be made public, required disclosure may cause directors and officers to consider their governance decisions more thoroughly.¹³⁵

Finally, requiring disclosure often leads to the adoption of better corporate governance practices.¹³⁶ As Justice Brandeis famously stated, “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹³⁷ Presumably, most companies would not want to disclose poor corporate governance practices. In effect, the disclosure requirement operates as a shaming mechanism. It also gives institutional investors the information they need to more effectively monitor company management. Therefore, disclosure encourages boards to adopt good corporate governance practices.

Unfortunately, required disclosure, while encouraging good corporate governance, does not ensure it. Because there are no rules regulating the governance practices themselves, voluntary corporate governance—even with required disclosure—does not prohibit companies from adopting poor corporate governance practices. Additionally, this approach makes it more difficult to compare the corporate governance practices between and among companies.¹³⁸

4. *Disclose or Explain*

The fourth approach to corporate governance regulation is a combination of the required disclosure approach and the comply or explain approach. Under this disclose or explain approach, companies are required to disclose that they follow a specific corporate governance practice, and if not, why not. As discussed above,¹³⁹ the SEC has used this approach regarding several corporate governance disclosures that are required to appear in the company’s proxy statement. The “disclose or explain” approach differs from the SEC’s traditional approach to corporate governance, which is required disclosure.¹⁴⁰

A simple example demonstrates the difference between the approaches. Following Enron, Congress called upon the SEC to

135. See Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1344 (1996) (quoting Professor Louis Loss’s statement that “[p]eople who are forced to undress in public will presumably pay some attention to their figures”).

136. See, e.g., Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 115 (1999) (stating that “the main social benefit of required disclosure is its influence on corporate governance”).

137. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

138. This is particularly true in the international context because there are so many differences in corporate governance structures between countries and this “would suggest that the efficient level of required disclosure for firms of one country is not necessarily the same as the efficient level for firms of another country.” Fox, *supra* note 136, at 127.

139. See *supra* Part II.B.2.

140. See *supra* Part II.B.2.

promulgate rules regarding the composition of audit committees, and, specifically, whether audit committees should have at least one “financial expert.”¹⁴¹ If the SEC had adopted a mandatory regulation, the rule may have been something like this:

Each public company *is required* to have at least one financial expert serving on its audit committee.

On the other hand, if the SEC had adopted a comply or explain approach, the rule may have been something like this:

Each company must *state whether it is compliance* with the SEC rule requiring that each public company must have at least one financial expert serving on its audit committee. *If it is not, the company must explain why not.*

If the SEC had followed its traditional approach (*i.e.*, required disclosure), the rule may have looked like this:

Each public company must *disclose* whether it has a financial expert serving on its audit committee.

Instead, the SEC adopted a rule requiring that:

Each company must *disclose* whether it has a financial expert serving on its audit committee. *If it does not, the company must explain why not.*¹⁴²

In other words, the SEC married the philosophy underlying the comply or explain approach to its traditional required disclosure approach.¹⁴³

141. Sarbanes-Oxley Act of 2002, Section 407, Pub. L. No. 107-204, 116 Stat. 789 (directing the SEC to “issue rules . . . to require each issuer . . . to disclose whether or not, and if not, the reasons therefor, the audit committee of that issuer is comprised of at least 1 member who is financial expert, as such term is defined by the Commission”).

142. The rule adopted by the SEC reads as follows:

(5) Audit committee financial expert. (i)(A) Disclose that the registrant’s board of directors has determined that the registrant either:

(1) Has at least one audit committee financial expert serving on its audit committee; or

(2) Does not have an audit committee financial expert serving on its audit committee.

(B) If the registrant provides the disclosure required by paragraph (d)(5)(i)(A)(1) of this Item, it must disclose the name of the audit committee financial expert and whether that person is independent, as independence for audit committee members is defined in the listing standards applicable to the listed issuer.

(C) If the registrant provides the disclosure required by paragraph (d)(5)(i)(A)(2) of this Item, it must explain why it does not have an audit committee financial expert.

Regulation S-K Item 407(d)(5), 17 C.F.R. § 229.407(d)(5) (2020).

143. The reasons for this change in approach to disclosure are unclear. The genesis appears to be the Sarbanes-Oxley Act, which first used the “disclose or explain” approach. Specifically, Sarbanes-Oxley Section 406(a) states that:

This disclose or explain approach provides several benefits over the required disclosure approach. First, requiring the company to provide an explanation for its decision not to adopt a specific corporate governance practice provides more information to investors. More importantly, this approach is likely to be more effective in encouraging companies to adopt certain corporate governance practices. The obligation to explain a decision not to comply sends a clear message to public companies and investors that the regulator has determined that the adoption of a specific corporate practice is the preferred approach. While companies are free to ignore this message, they might find it difficult to provide a satisfactory explanation. For example, how could a public company legitimately explain that it chose not to include a financial expert on its audit committee? As discussed above,¹⁴⁴ the disclose or explain approach is likely to lead to better corporate governance practices at public companies.

5. *Voluntary with No Required Disclosure*

The final approach to corporate governance is no regulation at all. Under this approach, companies would be free to adopt any corporate governance practices they prefer and would not be required to disclose them. A completely voluntary approach to corporate governance allows for even more freedom for boards to make decisions appropriate for their business than any of the previously discussed approaches. It completely rejects a “one-size-fits-all” model and offers the most flexibility to the board. Additionally, it aligns more with free market ideals than the other models by giving investors the power through their investment decisions to accept or reject a company’s corporate governance practices.¹⁴⁵ Moreover, proponents of the voluntary approach argue that investors will not be harmed because the market—including institutional investors and proxy advisory firms—will incentivize boards

Commission shall issue rules to require each issuer, together with periodic reports required pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934, to disclose whether or not, *and if not, the reason therefor*, such issuer has adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions.

Sarbanes-Oxley Act of 2002, § 406(a), Pub. L. No. 107-204, 116 Stat. 789 (emphasis added). Similar language is used in Section 407(a), which addresses the audit committee financial expert. Since the requirement to provide an explanation is included in the statute, the SEC had no choice but to include that language in their rules. *Id.* at § 407(a). However, neither the legislative history of Sections 406 and 407 of the Sarbanes-Oxley Act, nor the applicable SEC releases, explain why the “disclose or explain” approach was used.

144. See *supra* Part II.C.4.

145. See Paredes, *supra* note 105, at 1130.

to adopt best practices and disclose them to signal to their shareholders their commitment to good corporate governance.¹⁴⁶

However, because there are no mandatory corporate governance rules, there is a danger that companies will adopt poor governance practices, which could harm investors. This harm is more likely to occur under a purely voluntary approach because companies are not required to disclose their governance practices. Proponents of this approach argue that companies will voluntarily report their governance practices to signal their good corporate governance practices and because the markets will demand it.¹⁴⁷ However, disclosure might not occur. And even if it does, voluntary disclosure has its own drawbacks. The absence of uniform disclosure rules makes it difficult to compare information between and among companies. Additionally, the timing and quality of any voluntary reporting can be inconsistent.¹⁴⁸

*D. A Public Company's Key Corporate Governance Documents:
The Certificate of Incorporation, Bylaws, and
Corporate Governance Guidelines*

As discussed above,¹⁴⁹ the rules of corporate governance are not found in one place. The corporate governance system is created by a variety of statutes, rules, principles, and practices drawn from state corporate law, the federal securities laws, stock exchange listing rules, best practices, and proxy voting guidelines.¹⁵⁰ These rules apply to *all* public companies, and an understanding of them is certainly necessary to assess a company's approach to corporate governance. However, to understand and analyze a *particular* public company's governance practices more information is needed. Specifically, three key corporate documents must be reviewed: the company's certificate of incorporation, bylaws, and corporate governance guidelines.

A company's certificate of incorporation can include numerous provisions that impact the governance of the corporation. For example, the certificate of incorporation can create dual-class stock,¹⁵¹ can create a staggered or classified board of directors,¹⁵² can eliminate the right of shareholders to act by written consent,¹⁵³ and can require supermajority votes for effective stockholder action.¹⁵⁴ Similarly, provisions in

146. See Anita Indira Anand, *An Analysis of Enabling v. Mandatory Corporate Governance: Structures Post-Sarbanes-Oxley*, 31 DEL. J. CORP. L. 229, 235-37 (2006).

147. *Id.*

148. See Ho, *supra* note 124, at 327.

149. See *supra* note 49 and accompanying text.

150. See *supra* Part II.B.

151. DEL. CODE ANN. tit. 8, § 212(a) (2020).

152. *Id.* § 141(d).

153. *Id.* § 228.

154. *Id.* § 216(2).

the bylaws can also impact the governance of the corporation. For example, the bylaws can permit shareholders to nominate directors and obtain access to the company's proxy materials, can allow shareholders to call special meetings,¹⁵⁵ and can provide for majority, as opposed to plurality, voting for director elections.¹⁵⁶

Although the certificate of incorporation and bylaws provide important information about a company's corporate governance practices, they do not provide a complete picture. This is because the purpose of these documents is not to disclose the company's corporate governance choices to investors. Instead, most of these corporate governance provisions are included in the certificate of incorporation or bylaws to enable the company to depart from a statutory default rule found in the relevant corporate code. For example, Delaware General Corporation Law Section 216 states that directors will be elected by plurality vote, unless otherwise provided in the company's certificate of incorporation or bylaws.¹⁵⁷ To opt-out of the default rule, the company's organizational documents must include the appropriate language. So how can stockholders learn about the board's corporate governance choices? By reviewing the company's corporate governance guidelines.

II. CORPORATE GOVERNANCE GUIDELINES AND SECTION 303A.09 OF THE NYSE LISTED COMPANY MANUAL

Corporate governance guidelines set forth the board's policies on how it intends to manage the corporation. Public corporations have adopted CGGs because Section 303A.09¹⁵⁸ of the New York Stock Exchange Listed Company Manual¹⁵⁹ requires boards of listed companies to disclose them as a condition to listing on the exchange.

A. CGGs and Section 303A.09 of the NYSE Listed Company Manual

Section 303A.09 is a relatively short provision. Specifically, it states that "[l]isted companies must adopt and disclose corporate governance guidelines."¹⁶⁰ Section 303A.09 sets forth the following seven topics that must be "addressed" in the CGGs:

155. *Id.* § 211(d).

156. *Id.* § 216(3).

157. *See id.*

158. NYSE MANUAL, *supra* note 10.

159. Nasdaq does not require listed companies to adopt CGGs, although many companies listed on Nasdaq have voluntarily adopted them to signal good corporate governance. *See PERKINS COIE, THE IPO HANDBOOK: A GUIDE FOR ENTREPRENEURS, EXECUTIVES, DIRECTORS AND PRIVATE INVESTORS* 134 (2d ed. 2016), <https://www.perkinscoie.com/images/content/1/6/v2/163138/Perkins-Coie-LLP-Brochure-IPO-Guide-eBlue.pdf> [<https://perma.cc/5UCA-QV87>].

160. NYSE MANUAL, *supra* note 10.

Director qualification standards. These standards should, at minimum, reflect the independence requirements set forth in Sections 303A.01 and 303A.02. Companies may also address other substantive qualification requirements, including policies limiting the number of boards on which a director may sit, and director tenure, retirement and succession.

Director responsibilities. These responsibilities should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.

Director access to management and, as necessary and appropriate, independent advisors.

Director compensation. Director compensation guidelines should include general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate). The board should be aware that questions as to directors' independence may be raised when directors' fees and emoluments exceed what is customary. Similar concerns may be raised when the listed company makes substantial charitable contributions to organizations in which a director is affiliated, or enters into consulting contracts with (or provides other indirect forms of compensation to) a director. The board should critically evaluate each of these matters when determining the form and amount of director compensation, and the independence of a director.

Director orientation and continuing education.

Management succession. Succession planning should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO.

Annual performance evaluation of the board. The board should conduct a self-evaluation at least annually to determine whether it and its committees are functioning effectively.¹⁶¹

The NYSE decided to regulate these corporate governance topics through required disclosure.¹⁶² In other words, although companies are required to adopt CGGs, the substance of the seven corporate governance practices is up to the board. For example, Section 303A.09 requires each corporation to address annual board performance evaluations in the company's CGGs.¹⁶³ If the board is evaluated each year, the CGGs would disclose that information. If the board is not evaluated each year, the CGGs would disclose that information. If the board is not evaluated each year, the board does not have to explain why not. Therefore, Section 303A.09 is not a disclose or explain approach.

161. *Id.*

162. For additional discussion of the "required disclosure" approach to regulating corporate governance, see *supra* Part II.C.3.

163. See NYSE MANUAL, *supra* note 10.

Section 303A.09 is a relatively recent provision; it was adopted in 2003.¹⁶⁴ Why? What motivated the NYSE to require listed companies to adopt CGGs?

B. The History and Purpose of NYSE Listed Company Manual Section 303A.09

1. The Genesis of Section 303A.09

Section 303A.09 of the NYSE Listed Company Manual was a direct response to the accounting fraud¹⁶⁵ that led to the bankruptcy of Enron Corporation—at that time one of the largest companies in the United States¹⁶⁶—in December 2001.¹⁶⁷ Following the collapse, the Enron board was widely criticized for failing to prevent Enron management from engaging in the misconduct.¹⁶⁸ In particular, directors were faulted for permitting management to engage in self-dealing transactions.¹⁶⁹ Directors were chastised for their lack of independence and for being too cozy with management.¹⁷⁰ Questions were raised as to the amount of time directors had dedicated to their board responsibilities,¹⁷¹ as well as the board's failure to understand the company's business.¹⁷²

The scandal led to the passage of the Sarbanes-Oxley Act of 2002, which focused on improving the accuracy of a public company's financial statements.¹⁷³ It also led the changes in stock exchange listing standards. In February 2002, then-SEC Chairman Harvey Pitt requested U.S. stock exchanges to review their listing standards to determine whether their corporate governance standards could be

164. NASD and NYSE Rulemaking: Relating to Corporate Governance, Exchange Act Release No. 34-48745, 68 Fed. Reg. 64154 (Nov. 4, 2003).

165. William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 62 TUL. L. REV. 1275, 1342-48 (2002) (explaining three accounting failures leading to Enron's collapse).

166. *Id.* at 1276.

167. *See infra* notes 174-175 and accompanying text.

168. *See, e.g.*, THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE, S. REP. 107-70 (2002) (prepared by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs).

169. *See, e.g.*, WILLIAM C. POWERS, JR. ET AL., REPORT OF INVESTIGATION BY THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. 148 (2002), <https://www.sec.gov/Archives/edgar/data/1024401/000090951802000089/big.txt> [<https://perma.cc/FWB8-72RH>] (stating that “[o]versight of the related-party transactions by Enron's Board of Directors and Management failed for many reasons”).

170. *See* THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE, *supra* note 168, at 51-55.

171. *Id.* at 9 (noting that the Enron board met only five times a year, and each board meeting lasted between one and two hours).

172. WILLIAM C. POWERS, JR. ET AL., *supra* note 169, at 23 (noting that “many [board] members did not understand those transactions--the economic rationale, the consequences, and the risks”).

173. Pub. L. 107-204, 116 Stat. 745 (2002).

improved.¹⁷⁴ In response, the NYSE created the Corporate Accountability and Listing Standards Committee (the “NYSE Committee”) to conduct the requested review.¹⁷⁵

2. *The NYSE Corporate Accountability and Listing Standards Committee Report*

(a) *The NYSE Committee Report: In General*

In June 2002, the NYSE Committee issued a report (the “NYSE Committee Report”) that contained thirteen recommendations, including the recommendation that listed companies should draft and disclose CGGs.¹⁷⁶ According to the NYSE Committee, the thirteen recommendations had two goals. First, they were “designed to further the ability of honest and well-intentioned directors, officers and employees to perform their functions effectively.”¹⁷⁷ And, second, they would “allow shareholders to more easily and efficiently monitor the performance of companies and directors in order to reduce instances of lax and unethical behavior.”¹⁷⁸

Among the recommendations were a series of mandatory corporate governance provisions. Not surprisingly, these mandatory provisions addressed many of the most egregious problems in Enron’s corporate governance.¹⁷⁹ Thus, among other things, the NYSE Committee concluded that: boards of listed companies should be required to be comprised of a majority of independent¹⁸⁰ directors;¹⁸¹ that directors of listed companies should be required to meet in regular executive sessions without company management,¹⁸² and that listed companies should be required to have a nominating/corporate governance

174. See SECS. & EXCH. COMM’N, *Pitt Seeks Review of Corporate Governance, Conduct Codes* (Feb. 13, 2002), <https://www.sec.gov/news/press/2002-23.txt> [<https://perma.cc/EE2P-H3PP>].

175. N.Y. STOCK EXCH. CORP. ACCOUNTABILITY AND LISTING STANDARDS COMM., REPORT AND RECOMMENDATIONS 6-24 (2002), <https://www.iasplus.com/en/binary/resource/nyse-govf.pdf> [<https://perma.cc/HX2M-QYXS>] [hereinafter NYSE COMMITTEE REPORT]. The NYSE Corporate Accountability and Listing Standards Committee was co-chaired by Gerald M. Levin, H. Carl McCall, and Leon Panetta. *Id.* at I.

176. *Id.* at 6-24.

177. *Id.* at 1.

178. *Id.*

179. See *supra* notes 167-171 and accompanying text.

180. NYSE COMMITTEE REPORT, *supra* note 175, at 6-8 (the NYSE Committee Report recommended a test to determine “independence”); see also NYSE MANUAL, *supra* note 10, at § 303A.02.

181. NYSE COMMITTEE REPORT, *supra* note 175, at 6; see also NYSE MANUAL, *supra* note 10, at § 303A.01.

182. NYSE COMMITTEE REPORT, *supra* note 175, at 8; see also NYSE MANUAL, *supra* note 10, at § 303A.03.

committee¹⁸³ and a compensation committee,¹⁸⁴ each comprised entirely of independent directors.

The NYSE Committee also recommended that listed companies should be required to adopt a Code of Business Conduct and Ethics that would apply to company directors, officers, and employees.¹⁸⁵ According to the NYSE Report, each listed company's Code of Business Conduct and Ethics would be required to prohibit directors, officers, and employees from engaging in conflicts of interests with the company.¹⁸⁶ The committee also concluded that any waivers of the code for directors or executive officers should be publicly disclosed.¹⁸⁷

Although these mandatory provisions addressed some of the corporate governance concerns raised by the Enron debacle, they did not address all of them. Instead, the NYSE Committee chose to regulate these areas of corporate governance through required disclosure via a new disclosure document: CGGs.

(b) The NYSE Committee Report: Corporate Governance Guidelines

Recommendation 9 of the NYSE Committee Report simply states: “[r]equire listed companies to adopt and disclose their corporate governance guidelines.”¹⁸⁸ Thus, rather than imposing mandatory rules requiring (or prohibiting) certain corporate governance practices, the NYSE Committee concluded that listed companies should adopt “guidelines” that would disclose each company's policies on the following seven corporate governance subjects: (1) director qualifications; (2) director responsibilities; (3) director access to management and independent advisors; (4) director compensation; (5) director orientation and continuing education; (6) management succession; and (7) annual performance evaluation of the board.¹⁸⁹

The NYSE Committee Report includes very little discussion supporting its recommendation that listed companies should be required to adopt and disclose CGGs. In fact, the NYSE Committee Report contains only two short statements explaining its recommendation. First, the committee prefaced its recommendation by noting that “[n]o single

183. NYSE COMMITTEE REPORT, *supra* note 175, at 9; *see also* NYSE MANUAL, *supra* note 10, at § 303A.04.

184. NYSE COMMITTEE REPORT, *supra* note 175, at 10-11; *see also* NYSE MANUAL, *supra* note 10, at § 303A.05.

185. NYSE COMMITTEE REPORT, *supra* note 175, at 20; *see also* NYSE MANUAL, *supra* note 10, at § 303A.10.

186. NYSE COMMITTEE REPORT, *supra* note 175, at 20; *see also* NYSE MANUAL, *supra* note 10, at § 303A.10.

187. NYSE COMMITTEE REPORT, *supra* note 175, at 20.

188. *Id.* at 18.

189. *Id.* at 19-20.

set of guidelines would be appropriate for every company.”¹⁹⁰ Second, the committee stated that “[m]aking this information publicly available should promote better investor understanding of the company’s policies and procedures, as well as more conscientious adherence to them by directors and management.”¹⁹¹

In addition, the NYSE Committee did not explain its decision to adopt a required disclosure approach over the more rigorous “comply or explain” approach to regulation. This is surprising, especially because several of the twenty experts¹⁹² who provided comments to the NYSE Committee Report advocated for a “comply or explain” approach.¹⁹³ In addition, other influential groups, including the ABA Committee on Federal Regulation of Securities, had called on the NYSE to adopt a “comply or explain” approach.¹⁹⁴ Finally, in response to the same corporate scandals, the London Stock Exchange had adopted the “comply or explain” approach.¹⁹⁵ Yet the committee did not even mention the “comply or explain” approach in its report.¹⁹⁶

By rejecting the “comply or explain” approach, the NYSE Committee chose a relatively weak approach to regulating corporate governance.¹⁹⁷ In the absence of regulatory history, it is impossible to know for certain what motivated this decision. However, the NYSE Committee, and the NYSE itself, might have favored the weaker required disclosure approach out of concern that a more demanding approach to regulation would send public companies to competing stock exchanges such as Nasdaq.¹⁹⁸ Requiring companies to disclose CGGs would help the NYSE keep its reputation as a leader in promoting good corporate

190. *Id.* at 18.

191. *Id.* at 19.

192. The NYSE Committee Report includes a 144-page appendix containing written comments made by 20 individuals or organizations—including important voices in the corporate governance debate such as Institutional Shareholder Services, the Business Roundtable, the Council of Institutional Investors, the AFL-CIO, and TIAA-CREF. *Id.* at A-1 to A-3.

193. For statements recommending a comply or explain approach, see NYSE COMMITTEE REPORT, *supra* note 175, at A-82 (Recommendations for Improving Corporate Governance Presented to the New York Stock Exchange by the Institute of Internal Auditors); *id.* at A-90 (Recommendations from the National Association of Corporate Directors); *id.* at A-103 (Statement Submitted by TIAA-CREF); *id.* at A-112 (Statement Submitted by the American Association of Individual Investors); *id.* at A-136 (Statement Submitted by Ira Millstein) (including a “Proposal for Legislation relating to Voluntary Corporate Governance Standards and Disclosure on a ‘Comply or Explain’ Basis” made to the Senate Committee on Banking, Housing and Urban Affairs).

194. See *Special Study on Market Structure, Listing Standards and Corporate Governance*, *supra* note 112, at 1493-96. The Committee on Federal Regulation of Securities had proposed a “comply or explain” approach to the NYSE in March 2002.

195. See *supra* note 114 and accompanying text.

196. See NYSE COMMITTEE REPORT, *supra* note 175, at 1.

197. See *supra* Part II.C.3.

198. See Cain, *supra* note 79, at 630-40 (describing the marketplace for exchanges and how one’s position in this market may impact how listing standards are tailored).

governance,¹⁹⁹ but the ease of meeting the requirement would not frighten companies away from listing on the NYSE.

This conclusion seems to be supported by the tepid response exhibited by the legal and business communities, who did not seem to be particularly interested in, or concerned about, the new obligation that would require listed companies to adopt and disclose CGGs. While the NYSE Committee Report as a whole received significant attention from the legal and business communities when it was issued in 2002,²⁰⁰ there was very little attention paid to its recommendation regarding CGGs. Most of the discussion surrounding the NYSE Committee Report involved the NYSE's definition of "independence."²⁰¹ If CGGs were mentioned at all, the discussions were generally descriptive.²⁰²

3. NYSE's Adoption of Section 303A.09

The SEC approved the NYSE rule change in November 2003.²⁰³ The NYSE Report's CGG proposal was adopted as recommended into new Section 303A.09.²⁰⁴ The SEC release contains no discussion or analysis of Section 303A.09.²⁰⁵

Section 303A.09 has been amended twice to address the disclosure requirement. Specifically, in 2004, Section 303A.09 was amended to require listed companies to inform their shareholders that CGGs were posted on the corporate website in its proxy statement, rather than in its annual report.²⁰⁶ In 2009, the provision was amended so that listed companies were no longer required to inform shareholders that they

199. For example, the NYSE states on its website that it "has long recognized the role of good corporate governance in protecting shareholder value and, in turn, the capital markets." NYSE, *Corporate Governance Guide*, <https://www.nyse.com/cgguide#:~:text=The%20New%20York%20Stock%20Exchange,long%2Dterm%20relationships%20with%20investors> [https://perma.cc/VJ5J-SN45].

200. See, e.g., Riva D. Atlas, *Big Board Issues Its Ideas on Corporate Governance*, N.Y. TIMES, June 7, 2002, at C-4; Joann S. Lublin, *NYSE Considers Rules to Boost Power of Boards*, WALL ST. J., June 3, 2002, at A-2.

201. See, e.g., Jillian M. Lutzky, *Analysis of the Proposed NYSE Corporate Governance and Audit Committee Listing Requirements*, 2 DEPAUL BUS. & COM. L.J. 99, 103 (2003) (analyzing the enhanced definition of "independence" for members of the audit committee).

202. See, e.g., *NYSE Approves New Corporate Governance Rules*, SHEARMAN & STERLING 1, 3 (Aug. 2, 2002), https://www.shearman.com/~/media/Files/NewsInsights/Publications/2002/08/NYSE-Approves-New-Corporate-Governance-Rules/Files/Download-PDF-NYSE-Approves-New-Corporate-Governance_/FileAttachment/CF_080202_2.pdf [https://perma.cc/56QX-EHKQ].

203. NASD and NYSE Rulemaking: Relating to Corporate Governance, Exchange Act Release No. 34-48745, 68 Fed. Reg. 64154 (Nov. 4, 2003).

204. *Id.*

205. *See id.*

206. *See* Order Granting Approval of Proposed Rule Change by the New York Stock Exchange, Inc. and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 2 and 3 Thereto to Amend Section 303A of the NYSE Listed Company Manual Relating to Corporate Governance, Exchange Act Release 34-50625, 69 Fed. Reg. 65,006 (Nov. 9, 2004).

could obtain a print copy of the CGGs upon request from the company.²⁰⁷ There have been no substantive amendments to Section 303A.09 since its adoption in 2003.

III. ANALYSIS OF CGGs OF THE FIFTY LARGEST U.S. PUBLIC COMPANIES

A company's CGGs are one of the most important sources of information regarding a public company's corporate governance practices, but neither scholars nor practicing attorneys have studied what information is included in CGGs. Presumably, companies include information on the topics required by the NYSE, but what is the quality of information? Is it boilerplate information, or more meaningful? Do public companies tend to disclose—and adopt—the same corporate governance practices? Do public companies disclose more information in their CGGs than is required by the NYSE? If so, what information? What corporate governance practices are not disclosed in CGGs? This section answers these questions by reviewing and analyzing the CGGs of the fifty largest U.S. public companies. I reviewed the CGGs of the fifty largest U.S. companies as set forth on the Fortune 500 list for 2020.²⁰⁸ Because three companies in the top fifty are not typical public companies, I replaced them with the next three largest public companies. Specifically, Fannie Mae (#24) and Freddie Mac (#41) are government-sponsored entities, and State Farm Insurance (#36) is a mutual organization owned by its members, rather than stockholders. I replaced them with PepsiCo (#51), Humana (#52), and Prudential Financial (#53). My findings are presented in six tables located in the appendix of this article.²⁰⁹

A. CGGs Come in All Shapes and Sizes

CGGs vary in length, with the shortest being four pages²¹⁰ and the longest coming in at 18 pages.²¹¹ Most CGGs are between seven and ten pages long, with about half of the reviewed CGGs falling within this range.²¹²

207. See Order Approving a Proposed Rule Change as Modified by Amendment No. 1 to Amend Certain Corporate Governance Requirements, Exchange Act Release 34-61067, 74 Fed. Reg. 63,808 (Dec. 4, 2009).

208. *Fortune 500*, FORTUNE, (<https://fortune.com/fortune500/2020/>) [<https://perma.cc/843S-RN6R>].

209. See *infra* Tables 1-6.

210. See *infra* Table 1. Two companies had four-page CGGs: Berkshire Hathaway and Comcast.

211. See *infra* Table 1. Procter & Gamble had the longest CGGs.

212. See *infra* Table 1.

*B. Most CGGs Begin by
Explaining the Purpose of CGGs*

Most CGGs begin with an introductory statement explaining the purpose of the company's CGGs.²¹³ The most common explanation is that the CGGs provide the "framework" for the company's corporate governance.²¹⁴ For example, Comcast's CGGs state that:

The Board of Directors . . . has adopted these corporate governance guidelines, which, in conjunction with the Company's certificate of incorporation, by-laws, and the charters of the committees of the Board, form the Company's general governance framework.²¹⁵

Most CGGs also emphasize that the CGGs are intended to promote effective corporate governance and are for the benefit of investors.²¹⁶ For example, the CGGs of Bank of America state that:

The Board of Directors . . . has formally adopted these guidelines to promote a high level of performance from the Board and management, to promote the interests of stockholders and to further the Company's commitment to best practices in corporate governance.²¹⁷

*C. While All of the Surveyed CGGs Addressed the Topics
Required by the NYSE, Companies Adopted Different
Corporate Governance Practices for Several of These Topics*

As discussed above,²¹⁸ Section 303A.09 of the NYSE Listed Company Manual requires CGGs to address seven subjects: director qualification standards, director responsibilities, director access to management and independent advisors, director compensation, director orientation and continuing education, management succession, and annual performance evaluation by the board.²¹⁹ Not surprisingly, the CGGs of all surveyed companies addressed these subjects. For some topics, listed companies adopted the same or very similar practices. However, for other topics, listed companies adopted different corporate governance practices.

213. See *infra* Table 1. Thirty companies included a preamble or introductory statement.

214. See *infra* Table 1. Sixteen of the thirty companies that provided an introductory statement used the word "framework" to describe their CGGs.

215. COMCAST CORP., CORPORATE GOVERNANCE GUIDELINES 1 (Dec. 11, 2019), <https://www.cmcsa.com/static-files/ae85fa0-63cb-41b1-aa61-026ffe8f55fc> [<https://perma.cc/9326-XBTL>].

216. See *infra* Table 1.

217. BANK OF AMERICA CORP., CORPORATE GOVERNANCE GUIDELINES 1 (Sept. 23, 2020), <https://investor.bankofamerica.com/corporate-governance/governance-library/corporate-governance-documents> [<https://perma.cc/9XFU-JV6R>].

218. See *supra* Part III.

219. NYSE MANUAL, *supra* note 10.

Director Qualification Standards.²²⁰ Most surveyed companies disclosed similar criteria for “director qualification standards.” The following description set forth in Microsoft’s CGGs is typical:

Characteristics expected of all directors include independence, integrity, high personal and professional ethics, sound business judgment, and the ability and willingness to commit sufficient time to the Board. In evaluating the suitability of individual Board members, the Board considers many factors, including general understanding of global business, sales and marketing, finance and other disciplines relevant to the success of a large publicly traded company; understanding of the Company’s business and technology; educational and professional background; personal accomplishment; and geographic, gender, age, and ethnic diversity.²²¹

It would be hard to find fault with these general criteria. Not surprisingly, most companies have adopted similar lists of director qualifications.²²²

As part of the determination of board qualifications, the NYSE also suggests that companies disclose any “policies limiting the number of boards on which a director may sit.”²²³ While most CGGs did contain “overboarding” provisions,²²⁴ the CGGs of a significant number of companies—eleven²²⁵—did not limit the number of additional boards their directors are permitted to sit on.²²⁶

The NYSE also suggests that listed companies should disclose any “director tenure, retirement and succession” policies.²²⁷ Although this suggestion was no doubt intended to nudge companies towards board refreshment, a review of the CGGs showed that an overwhelming majority of companies have not adopted term limits for directors. The CGGs of only five companies included term limits, which ranged from

220. *Id.*

221. MICROSOFT CORP., CORPORATE GOVERNANCE GUIDELINES 2 (July 1, 2020), <https://view.officeapps.live.com/op/view.aspx?src=https://c.s-microsoft.com/en-us/CMSFiles/Corporate%20Governance%20Guidelines.docx?version=7ab72942-2673-1b5d-906e-a7186b9511a1> [<https://perma.cc/AS48-FA7K>].

222. *See infra* Table 2.

223. NYSE MANUAL, *supra* note 10.

224. *See infra* Table 2. Most companies, however, limit directors to serving on a total of four or five public company boards. This policy appears to be designed to comply with the Proxy Voting Guidelines of Institutional Shareholder Services, which state that ISS will recommend voting against any director serving on more than five public company boards. INSTITUTIONAL SHAREHOLDER SERVS., UNITED STATES PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS 11 (Dec. 13, 2021), <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf>.

225. *See infra* Table 2. The eleven companies are Amazon, Berkshire-Hathaway, Citigroup, ExxonMobil, Facebook, Humana, IBM, Kroger, Marathon Petroleum, Phillips 66, and Walmart.

226. *See infra* Table 2. Some of these CGGs did not contain overboarding provisions, while other CGGs specifically stated that service on other boards would be considered on a case-by-case basis.

227. NYSE MANUAL, *supra* note 10.

twelve to twenty years, and those term limits may be waived by the board.²²⁸ Boards seem to be more accepting of retirement policies; most companies have adopted them, with the range of retirement age being between seventy-two and seventy-five.²²⁹ However, most companies also permitted the “required” retirement age to be waived by the board, which presumably undercuts the purpose of adopting a mandatory retirement age.²³⁰

Director Responsibilities.²³¹ The survey revealed that there were two different approaches to “director responsibilities” policies. About 60% of the surveyed companies adopted very general descriptions of the board’s responsibilities.²³² For example, Amazon’s CGGs simply state that: “[t]he Board of Directors is responsible for the control and direction of the Company. It represents and is accountable only to shareowners. The Board’s primary purpose is to build long-term shareowner value.”²³³ There is no other detail regarding the board’s responsibilities.

The remaining 40% of the surveyed companies have gone in a different direction. In addition to recognizing that the board is responsible for the general oversight of the business, these companies also identify specific board responsibilities.²³⁴ For example, Walmart’s CGGs state that:

The specific duties and responsibilities of the Board will include, among other things, overseeing the management of the business and affairs of the Company; selecting and recommending to shareholders appropriate candidates for election to the Board; reviewing and, where appropriate, approving the business plans, major strategies and financial objectives of the Company; evaluating Board processes and performance and the overall effectiveness of the Board; evaluating the performance of the Company and of senior management; requiring, approving and overseeing the implementation of the Company’s succession plans; overseeing the Company’s policies with respect to compliance with applicable laws and regulations and adopting policies of corporate conduct designed to assure compliance with applicable laws and regulations and to assure maintenance of necessary accounting, financial, and other controls; and showing, through its actions (including attendance and participation at Company leadership and associate meetings), its awareness that the Company’s long-term success depends upon its

228. See *infra* Table 2. The five companies are General Electric, Procter & Gamble, Target, Walmart, and Walt Disney.

229. *Id.*

230. *Id.*

231. NYSE MANUAL, *supra* note 10.

232. See *infra* Table 2.

233. AMAZON.COM, INC., GUIDELINES ON SIGNIFICANT CORPORATE GOVERNANCE ISSUES, <https://ir.aboutamazon.com/corporate-governance/documents-and-charters/guidelines-on-significant-corporate-governance-issues/default.aspx> [<https://perma.cc/WWG3-E79V>].

234. See *infra* Table 2.

strong relationship with its customers, associates, suppliers and the communities, including the global community, in which it operates.²³⁵

One important area of board responsibility was not addressed in approximately half of the surveyed CGGs: risk management.²³⁶

As part of a company's disclosure of "board responsibilities," the NYSE also asks companies to disclose the board's duties "with respect to attendance at board meetings and advance review of meeting materials."²³⁷ Almost all CGGs disclosed that directors were "expected" to attend board meetings,²³⁸ but only three²³⁹ stated that directors were "required" to attend board meetings. Similarly, almost all CGGs expressly stated that directors were "expected" to review meeting materials before the board meeting.²⁴⁰

Director Access to Management and Independent Advisors.²⁴¹ The CGGs of nearly all surveyed companies disclosed that the board had access to company management and independent advisors.²⁴²

Director Compensation.²⁴³ The NYSE states that CGGs should include "general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate)."²⁴⁴ Almost all of the surveyed CGGs disclosed that the Compensation Committee was responsible for reviewing board compensation guidelines and making recommendations regarding compensation.²⁴⁵ However, almost a third of surveyed CGGs did not disclose the company's principles for determining director compensation.²⁴⁶ Most of these companies did not include any compensation principles in their CGGs,²⁴⁷ while a few stated that their principles could be found in the Compensation Committee's Charter.²⁴⁸

235. WALMART, CORPORATE GOVERNANCE GUIDELINES 3 (Feb. 6, 2020), https://s2.q4cdn.com/056532643/files/doc_downloads/2020/02/Corporate-Governance-Guidelines-Feb-6-2020.pdf [<https://perma.cc/4RB6-55RQ>].

236. *See infra* Table 3.

237. NYSE MANUAL, *supra* note 10.

238. *See infra* Table 2.

239. The three companies are PepsiCo, Prudential, and Raytheon. *See infra* Table 2.

240. *See id.*

241. NYSE MANUAL, *supra* note 10.

242. *See infra* Table 2. Amazon is the only company that does not include this information. *See id.*

243. NYSE MANUAL, *supra* note 10.

244. *Id.*

245. *See infra* Table 2.

246. *Id.*

247. These companies were Alphabet, Amazon, Anthem, Apple, Citigroup, Comcast, FedEx, General Motors, Kroger, Phillips66, Target, Valero, and Wells Fargo. *See id.*

248. These companies were Cardinal Health, Centene, and CVS. *See id.*

When compensation principles were disclosed, they were extremely general.²⁴⁹ Four principles tended to appear in the CGGs of surveyed companies: compensation should be “fair” given the demands of the position, should be “competitive” with the compensation paid by similarly-situated companies, should align the interests of the board with stockholders, and should be easy for stockholders to understand.²⁵⁰ An example of this approach can be found in the CGGs of Dell Technologies, which state:

The Board believes that the amount of director compensation should be fair and competitive in relation to director compensation at other companies with businesses similar in size and scope to the Company’s businesses; the type of compensation should align director interests with the long-term interests of stockholders; and the structure of the compensation program should be simple, transparent and easy for stockholders to understand.²⁵¹

However, not all companies adopted all four of these principles. Approximately 20% of companies focused primarily on ensuring that board compensation was “competitive” with board compensation paid by peer companies.²⁵² For example, Walt Disney, Inc.’s CGGs state: “Compensation may be paid in the form of cash or equity interests in the Company or such other forms as the Board deems appropriate and shall be at levels that are consistent with those in effect for directors of similarly situated businesses.”²⁵³

Director Orientation and Continuing Education.²⁵⁴ The CGGs of nearly all surveyed companies indicated that they held director orientation programs for new directors.²⁵⁵

However, companies appear to have very different levels of commitment regarding continuing education programs for experienced directors. Approximately one-third of surveyed companies did not require any continuing education for directors.²⁵⁶ Most of these companies disclosed that continuing education is merely “encouraged.”²⁵⁷

249. *See id.*

250. *Id.*

251. DELL TECHS. INC., CORPORATE GOVERNANCE PRINCIPLES 6 (Sept. 25, 2020), <https://investors.delltechnologies.com/static-files/140c4cef-40b4-4455-b13d-3a60dc0435e5> [<https://perma.cc/BH25-C6KZ>].

252. These nine companies were AT&T, Cigna, Costco, Exxon, McKesson, MetLife, PepsiCo, Walgreens, and Walt Disney. *See infra* Table 2.

253. WALT DISNEY CO., CORPORATE GOVERNANCE GUIDELINES (Feb. 2020), <https://thewaltdisneycompany.com/app/uploads/2020/02/Corporate-Governance-Guidelines-2020.pdf> [<https://perma.cc/S899-78KB>].

254. NYSE MANUAL, *supra* note 10.

255. *See infra* Table 2. Amazon is the only company that did not include information about its director orientation program. *See id.*

256. *See id.*

257. The CGGs of thirteen companies state that continuing education is “encouraged”: Alphabet, Apple, Cardinal, Chevron, Cigna, Costco, CVS, Facebook, FedEx, General Motors,

In addition, the regularity and number of continuing education sessions varied by company. Most companies did not disclose how often their programs were offered.²⁵⁸ The companies that did disclose the scheduling of their programs generally used indeterminate language such as “from time to time,”²⁵⁹ “periodically,”²⁶⁰ “regularly,”²⁶¹ or “as appropriate.”²⁶² Only two companies provided definite offering times.²⁶³

Management Succession.²⁶⁴ All surveyed companies addressed management succession in their CGGs.²⁶⁵ Although the NYSE asks companies to disclose “policies regarding succession in the event of an emergency or the retirement of the CEO,”²⁶⁶ companies generally limited their disclosure to who was responsible for CEO succession planning; succession policies were not disclosed. In more than half of the surveyed CGGs, the board, as a whole or with the help of a committee, was charged with this responsibility.²⁶⁷ At the remaining companies, a board committee was authorized to oversee the planning process.²⁶⁸ Most CGGs stated that the board would discuss CEO succession planning on an annual basis.²⁶⁹

The role of the current CEO in management succession planning was not addressed in most CGGs.²⁷⁰ When the CEO’s role was discussed in CGGs, it was primarily described as a resource to the board to help them evaluate internal candidates as potential successors to the current CEO.²⁷¹ However, if the current CEO is in the room, directors might be impeded from having a free and open discussion about planning for the company’s next CEO. While that danger may appear

Lowe’s, Marathon, and Wells Fargo. Similarly, Comcast and JPMorgan Chase stated that continuing education is “desirable.” *See id.*

258. *See id.*

259. This language appears in the CGGs of ExxonMobil and Kroger. *See id.*

260. This language appears in the CGGs of AT&T, Dell Technologies, and IBM. *See id.*

261. This language appears in the CGGs of AmerisourceBergen Corporation and Microsoft. *See id.*

262. This language appears in the CGGs of Boeing and Humana. *See id.*

263. The CGGs of Bank of America state that it will hold continuing education for directors twice a year, and the CGGs of United Health Group state that it will hold them every two years. *See id.*

264. NYSE MANUAL, *supra* note 10.

265. *See infra* Table 2.

266. NYSE MANUAL, *supra* note 10.

267. *See infra* Table 2.

268. The most popular committee for management succession planning is the Compensation Committee. A handful of boards chose the Nominating/Corporate Governance Committee to oversee management succession planning. *See id.*

269. *Id.*

270. *Id.*

271. *Id.*

obvious, very few boards addressed it in their CGGs.²⁷² For example, Procter & Gamble's CGGs state:

At least once per year, the non-employee members of the Board will meet to review the performance and succession plan for the Company's Chief Executive Officer and executive continuity plans for other principal officers (the meetings may be separate).²⁷³

Board Annual Evaluation.²⁷⁴ The NYSE recommends that the board "should conduct a self-evaluation at least annually to determine whether it and its committees are functioning effectively."²⁷⁵ The CGGs of all surveyed companies disclosed that their boards were required to perform an annual self-assessment.²⁷⁶

D. All Public Companies Included More Information in Their CGGs Than the NYSE Requires, But the Content Largely Consisted of Corporate Governance Practices That Are Already Required to Be Disclosed in the Company's Proxy Statement

The CGGs of all surveyed public companies included more information about their corporate governance than required by the NYSE.²⁷⁷ However, almost all of this "voluntary" content consists of corporate governance practices that the SEC already requires to be disclosed in the company's proxy statement.²⁷⁸

272. See BERKSHIRE HATHAWAY INC., CORPORATE GOVERNANCE GUIDELINES 4, <https://www.berkshirehathaway.com/govern/corpgov.pdf> [<https://perma.cc/S9BL-K4LE>] (stating that the Board and "independent directors" regularly review management succession planning); JOHNSON & JOHNSON, PRINCIPLES OF CORPORATE GOVERNANCE 8 (Jan. 17, 2017), https://www.investor.jnj.com/_document/2018-principles-of-corporate-governance?id=00000161-a078-d89d-ad75-befa96510000 [<https://perma.cc/4P42-NTYD>] (stating that the Lead Independent Director "leads" CEO succession planning); JPMORGAN CHASE & CO., CORPORATE GOVERNANCE PRINCIPLES §1.4 (Jan. 2019), <https://www.jpmorganchase.com/about/governance/corporate-governance-principles> [<https://perma.cc/7YJZ-BEKR>] (stating the Lead Independent Director "guide[s]" board discussion of CEO succession planning); PROCTER & GAMBLE CO. BD. OF DIRECTORS, CORPORATE GOVERNANCE GUIDELINES 4 (June 11, 2019), https://assets.ctfassets.net/oggad6svuzkv/3glGmG4CHmI8gIa8wuaYU6/8e06938d9c8c547f852260390516b7dd/GUIDELINES_-_Corporate_Governance_2019-06-11_1_.pdf [<https://perma.cc/B6JV-XQJ6>] (stating that CEO succession is discussed by non-employee directors).

273. Procter & Gamble Co. Bd. of Directors, *supra* note 272.

274. NYSE MANUAL, *supra* note 10.

275. *Id.*

276. See *infra* Table 2.

277. Table 2 summarizes information that is required by the NYSE. See *infra* Table 2. Tables 3, 4, 5, and 6 summarize information that is not required by the NYSE. See *infra* Tables 3-6.

278. Table 3 summarizes information that is required to be disclosed in proxy statements. See *infra* Table 3.

As discussed above,²⁷⁹ Item 407 of Regulation S-K²⁸⁰ requires a series of corporate disclosures to be included in a company's proxy statement. Most companies include similar or identical disclosures in their CGGs:

Information on the Number of Board Meetings.²⁸¹ 60% of the surveyed companies included a provision in their CGGs disclosing the frequency of regular board meetings, with quarterly meetings being most popular.²⁸²

Policies Regarding Director Attendance at Shareholder Meetings.²⁸³ 80% of the surveyed companies disclosed a policy regarding director attendance at shareholder meetings, with most companies "expecting" or "encouraging" directors to attend.²⁸⁴

Information about the Audit, Compensation, and Nominating Committees.²⁸⁵ All of the surveyed companies provided general information about their audit, compensation, and nominating committees in their CGGs.²⁸⁶

Policy For Considering Diversity in Identifying Director Nominees.²⁸⁷ Most of the surveyed companies elaborated that they considered diversity when considering the composition of their board of directors.²⁸⁸

Process for Facilitating Shareholder Communication with the Board.²⁸⁹ Approximately two-thirds of the surveyed CGGs included information on how shareholders can communicate with the board.²⁹⁰

Policies Regarding Board Leadership: Process for Selecting the Chairman of the Board.²⁹¹ Approximately 75% of the surveyed companies set forth the company's process for selecting the Chairman of the Board and disclosed whether the CEO could also be the Chairman of the Board.²⁹² Most companies disclosed that they permitted the CEO to also serve as the Chairman of the Board.²⁹³

279. *See supra* Part II.B.2.

280. Regulation S-K Item 407, 17 C.F.R. § 229.407 (2020).

281. § 229.407(b)(1).

282. *See infra* Table 3.

283. § 229.407(b)(2).

284. *See infra* Table 3.

285. § 229.407(b)(3).

286. *See infra* Table 3.

287. § 229.407(e)(2)(vi).

288. *See infra* Table 3.

289. § 229.407(f).

290. *See infra* Table 3.

291. § 229.407(h).

292. *See infra* Table 3.

293. *Id.*

Policies Regarding Board Leadership: The Role of Lead Independent Director.²⁹⁴ Most of the surveyed CGGs described the role of the Lead Independent Director in the company.²⁹⁵

Policies Regarding the Role of the Board and Risk Oversight.²⁹⁶ Approximately half of the surveyed CGGs state whether the company has a policy regarding the role of board and risk management.²⁹⁷

Policies Limiting Hedging by Directors and Officers.²⁹⁸ Companies are required to disclose in their proxy statements whether they have adopted anti-hedging policies, and, if they have not, then they must disclose why not. Despite this proxy statement requirement, companies have generally not disclosed their hedging policies in their CGGs.²⁹⁹ The absence of anti-hedging policies in CGGs may be attributed to the fact that the SEC only recently adopted the hedging policy disclosure requirement.³⁰⁰

E. Most of the Voluntary Information Disclosed in CGGs is Related to the Board and the Conduct of Board Meetings

Most of the truly voluntary³⁰¹ information included in the CGGs is related to basic information about the structure of the board and the conduct of board meetings. For example, approximately 80% of the surveyed CGGs disclosed information about the size of the board.³⁰² Almost all companies disclosed information on who sets the board agenda—whether it is the Chair, the Lead Independent Director, or the board.³⁰³ Approximately 75% of the surveyed CGGs also expressly stated that materials would be distributed to directors in advance of board meetings.³⁰⁴ In addition, about half stated that the deliberations of the board were confidential.³⁰⁵ A significant number of companies

294. § 229.407(h).

295. See *infra* Table 3 (80% of the surveyed companies included information about the role of the LID).

296. § 229.407(h).

297. See *infra* Table 3.

298. § 229.407(i).

299. See *infra* Table 3 (Only about 20% of the boards included it in the CGGs).

300. See Disclosure of Hedging by Employees, Officers and Directors, Securities Act Release No. 33-10593, 84 Fed. Reg. 2402 (Feb. 6, 2019) (adding Item 407(i) to Regulation S-K).

301. By “truly voluntary,” I mean information that is not required to be disclosed in CGGs by the NYSE and is not required to be disclosed in a proxy statement by the SEC. For discussion of the information that is required by the NYSE, see *supra* Part III.A. For discussion of the information that is required by the SEC, see *supra* Part II.B.2.

302. See *infra* Table 4.

303. See *id.*

304. See *id.*

305. See *id.*

also provided information on how often the board meets in executive session.³⁰⁶ Finally, more than 60% of the surveyed CGGs included a statement expressly limiting the authority of the board to speak on behalf of the corporation.³⁰⁷

*F. Most CGGs Did Not Disclose Information on
Basic Corporate Governance Practices
Relating to Shareholder Rights*

While CGGs disclosed a fair amount of information relating to the board of directors, they did not disclose the same level of information regarding shareholder rights. For example, most companies did not include even most basic information on shareholder voting rights in their CGGs, such as “one share, one vote” provisions.³⁰⁸ That means that, after reading the CGGs, a shareholder of a company that issued dual class stock would not necessarily be aware that the founders of the company owned stock with super-voting rights.

Other information relating to shareholder rights that was generally not disclosed in CGGs includes: (1) whether the entire board is up for re-election each year or whether the corporation has a staggered board; (2) whether the stockholders can call special meetings; (3) whether the stockholders can act by written consent; (4) whether the company has a proxy access bylaw; and (5) whether shareholder voting is confidential.³⁰⁹

*G. Most Public Companies Did Not Disclose
ESG Information in Their CGGs*

Considering the increasingly important role played by ESG in corporate governance,³¹⁰ it may be surprising to learn that most CGGs contained little or no information regarding the company’s sustainability policies. For example, only five companies³¹¹ disclosed a general corporate social responsibility policy in their CGGs, such as this one:

The Company has a responsibility to the communities in which it operates, as well as to its shareholders. To allow appropriate Board review and input, management shall prepare and present to the Board a periodic review of the policies, practices and contributions made in

306. *See id.* (All but two companies included an executive session provision in their CGGs. Of the companies that did include the information, 70% stated that directors met in executive session in conjunction with regular board meetings, while the remaining 30% stated that board met in executive session “regularly” or “periodically.”).

307. *See id.*

308. *See infra* Table 6.

309. *See infra* Table 6.

310. *See supra* Part II.A.3.

311. *See infra* Table 5 (The companies are AmerisourceBergen, McKesson, Verizon, Walmart, and Walt Disney).

fulfillment of the Company's social responsibilities. In addition, management shall report annually on its diversity efforts and the results thereof.³¹²

Approximately one-third of the remaining companies referred to a "Corporate Social Responsibility Committee" or a similar committee but did not disclose their ESG policies in the CGGs.³¹³

One of the most important and challenging ESG issues facing today's public companies is diversity.³¹⁴ Almost all of the surveyed CGGs addressed improving the diversity of their board,³¹⁵ which is required to be disclosed in the company's proxy statement.³¹⁶ However, the CGGs were mostly silent on other types of diversity initiatives.³¹⁷ Only a handful of CGGs specifically provided that the board is responsible for overseeing efforts to promote diversity in the company's workforce.³¹⁸ And, only one corporation—Centene—included a diversity provision that goes beyond efforts to promote diversity in its workforce. Its CGGs state that:

For many years, Centene's unwavering purpose has propelled its efforts to transform the health of communities, one person at a time. Consistent with this purpose, diversity and inclusion are among the Company's highest priorities. The Board believes that investing in training, diversity, education, and community-improvement initiatives is important to attracting and retaining a talented workforce. The Company encourages its Board members, senior executives, and rank-and-file employees to become actively involved with organizations making a positive impact on communities. The Company's efforts include the intentional siting of service centers and other facilities in economically challenged locations such as Ferguson, Missouri as well as spending with, and mentorship of, diverse suppliers.³¹⁹

Nor do the CGGs of most companies address the impact of other stakeholders—such as employees, suppliers, customers, the community, and society—on the corporation's purpose and the board's responsibilities. Specifically, to whom or to what is the board responsible?

312. WALT DISNEY CO., GOVERNANCE GUIDELINES 11 (Feb. 2020), <https://thewaltdisney-company.com/app/uploads/2020/02/Corporate-Governance-Guidelines-2020.pdf> [<https://perma.cc/DK99-DZ59>] (scroll down to the section titled "Governing Documents" and click the pdf link titled "Corporate Governance Guidelines").

313. *See infra* Table 5.

314. *See supra* note 63 and accompanying text.

315. *See infra* Table 3.

316. *See supra* note 63 and accompanying text.

317. *See infra* Table 5.

318. *See id.* The CGGs of six companies—Centene, CVS Health, Intel, McKesson, Walmart, and Walt Disney—include this information. In addition, Kroger's CGGs disclose that a board committee is responsible for working to achieve diversity in its supply chain.

319. CENTENE CORP., CORPORATE GOVERNANCE GUIDELINES 2, https://investors.centene.com/_assets/_bcae85adec35497d777b5413744eb727/centene/db/1246/11354/file/2021.12.14_CNC_Corporate_Governance_Guidelines_508.pdf (last visited Jan. 5, 2022).

Does the board owe a duty solely to the shareholders of the corporation, or to all corporate stakeholders? As of December 1, 2021, the CEOs of thirty-eight of the fifty surveyed companies are signatories to the Business Roundtable's "Statement on the Purpose of the Corporation,"³²⁰ which rejected the shareholder primacy approach; however, only twelve³²¹ of the thirty-eight companies specifically addressed the board's responsibilities to stakeholders in their CGGs. Eleven of these CGGs tied stakeholder concerns to shareholder value.³²² For example, GM's CGGs recognize that the board's "core" responsibility is to the company and its shareholders and then provide that "[t]he Board recognizes that shareholders' long-term interests will be advanced by responsibly addressing the concerns of other stakeholders essential to the Company's success, including customers, employees, dealers, suppliers, government officials and the public at large."³²³

The twelfth company goes much further by explicitly stating that it is adopting a stakeholder primacy approach:

The Prudential board believes that the primary responsibility of directors is to oversee the affairs of the corporation for the benefit of the corporation's stakeholders, including shareholders, employees, customers and society, while day-to-day operation of the corporation is the responsibility of management. Consistent with the Corporation's multi-stakeholder framework, the board believes that directors should be accountable to shareholders, employees, suppliers, customers and society in evaluating the affairs of the corporation, aligned with the Corporation's purpose statement to solve the financial challenges of our changing world for all stakeholders, while creating sustainable long-term shareholder value.³²⁴

320. BUS. ROUNDTABLE, *supra* note 46. The thirty-eight companies are Amazon, AmerisourceBergen, Anthem, Apple, AT&T, Bank of America, Cardinal Health, Centene, Chevron, Cigna, Citigroup, Comcast, CVS Health, Dell Technologies, Exxon Mobil, FedEx, Ford Motor, General Motors, Home Depot, Humana, IBM, Intel, Johnson & Johnson, JPMorgan Chase, Marathon Petroleum, McKesson, MetLife, Microsoft, PepsiCo, Phillips 66, Procter & Gamble, Raytheon, Target, United Parcel Service, Walgreens Boots Alliance, Walmart, Walt Disney, and Wells Fargo. For additional discussion of the Business Roundtable's *Statement on the Purpose of a Corporation*, see *supra* text accompanying notes 46-48.

321. See *infra* Table 5. The twelve companies are AmerisourceBergen, Anthem, Boeing, Citigroup, General Electric, General Motors, Humana, McKesson, Microsoft, Prudential Financial, Raytheon, and UnitedHealth Group.

322. See *infra* Table 5. The eleven companies are AmerisourceBergen, Anthem, Boeing, Citigroup, General Electric, General Motors, Humana, McKesson, Microsoft, Raytheon, and UnitedHealth Group.

323. GENERAL MOTORS CO. BD. OF DIRECTORS, CORPORATE GOVERNANCE GUIDELINES 2 (Aug. 17, 2021), <https://investors.gm.com/static-files/c09a27f3-a30b-4f88-8888-dd7282766949>.

324. PRUDENTIAL FIN., CORPORATE GOVERNANCE PRINCIPLES AND PRACTICES 1, https://www.prudential.com/wps/wcm/connect/8667cda1-79c4-484b-9279-350c36369a87/Governance_Principles_and_Practices.pdf?MOD=AJPERES&CVID=nhJW2eg [<https://perma.cc/S2NU-9DUB>].

More than half of the surveyed CGGs, however, simply stated that the board has a duty to “the company,” to the “shareholders,” or to the “company and its shareholders,” without mentioning other stakeholders.³²⁵

H. Most CGGs Did Not Make Clear Whether the Board Is Bound by the Policies Set Forth in the CGGs

Most CGGs were silent on whether the board is bound by the policies set forth in the CGGs.³²⁶ Only nine of the surveyed CGGs contained statements expressly disclosing the non-binding nature of CGGs.³²⁷ For example, Alphabet’s CGGs stated that “[t]he Board intends that these guidelines serve as a flexible framework within which the Board may conduct its business, not as a set of binding legal obligations.”³²⁸

Moreover, only five companies’ CGGs affirmatively stated that the board can deviate from the disclosed CGGs.³²⁹ Walmart’s CGGs, for example, stated that “[t]he Board may, in its discretion, deviate from these Guidelines from time to time as the Board deems appropriate or as required by applicable laws and regulations.”³³⁰

I. CGGs Did Not Require the Company to Disclose if the Board Deviates from the Corporate Governance Practices Disclosed in the CGGs

Finally, almost none of the CGGs required the company to disclose if the board departs from the corporate practices disclosed in its CGGs.³³¹ In fact, only two companies’ CGGs expressly stated that the board was required to disclose any waiver of, or deviation from, the CGGs to the public.³³² For example, Citigroup’s CGGs state that “[t]he Board may amend these Corporate Governance Guidelines, or grant waivers in exceptional circumstances, provided that any such modification or waiver may not be a violation of any applicable law, rule or

325. See *infra* Table 5.

326. See *infra* Table 1.

327. See *infra* Table 1. The nine companies are Alphabet, Cigna, Intel, Kroger, PepsiCo, UnitedHealth Group, Walgreens Boots Alliance, Walmart, and Walt Disney.

328. ALPHABET, CORPORATE GOVERNANCE GUIDELINES § I (July 21, 2021), <https://abc.xyz/investor/other/corporate-governance-guidelines/> [<https://perma.cc/W8XP-6Q38>].

329. See *infra* Table 1. These five companies are Citigroup, Facebook, Intel, Lowe’s, and Walmart.

330. WALMART, CORPORATE GOVERNANCE GUIDELINES 1 (Feb. 6, 2020), https://s2.q4cdn.com/056532643/files/doc_downloads/2020/02/Corporate-Governance-Guidelines-Feb-6-2020.pdf [<https://perma.cc/RG3Q-LX2X>].

331. See *infra* Table 1.

332. See *infra* Table 1. The two companies are Citigroup and Facebook.

regulation and further provided that any such modification or waiver is appropriately disclosed.”³³³

IV. RECOMMENDATIONS

Section 303A.09³³⁴ has not been substantively amended since it was adopted in 2003.³³⁵ It is time for the NYSE to re-visit this provision to ensure that Section 303A.09 serves its purposes: (1) to allow shareholders to more effectively monitor the performance of companies and directors; (2) to promote better investor understanding of the company’s corporate governance practices; (3) to promote adherence to them by company management; and (4) to improve corporate governance practices at public companies.

A. *Section 303A.09 Should Be Amended to Ensure That Shareholders Are Better Informed and to Improve Corporate Governance at Public Companies*

1. *Companies Should Be Required to Include a New “Shareholder Rights” Section in Their CGGs*

Companies should be required to disclose information about basic shareholder rights in their CGGs. Section 303A.09 does not require this information to be disclosed in CGGs, and most companies do not voluntarily include it in their CGGs.³³⁶ To be fully informed about the company’s corporate governance, investors need to know more than just information about the board and board practices. Investors also need information about the policies and practices that impact their ability to exercise their rights as shareholders. Therefore, Section 303A.09 of the NYSE Listed Company Manual should be amended to require companies to include in their CGGs a new “Shareholder Rights” section with the following additional required disclosure topics:

- Whether the company’s common stock has equal voting rights;
- Whether the entire board stands for election at each annual meeting;
- Whether a majority vote is required to elect a nominee to the board of directors;
- Whether shareholders can call special meetings;

333. CITIGROUP, INC., CORPORATE GOVERNANCE GUIDELINES 12 (Jan. 21, 2021), <https://www.citigroup.com/citi/investor/data/corpgovguide.pdf?ieNocache=536> [<https://perma.cc/625C-JHSR>].

334. NYSE MANUAL, *supra* note 10.

335. *See supra* Part III.B.3.

336. *See supra* Part IV.F.

- Whether shareholders can act by written consent;
- Whether shareholders have access to the company's proxy; and
- Whether shareholder proxies are confidential.

Requiring companies to disclose this information will help shareholders more effectively monitor the board of directors. All of this basic information on shareholder rights relates to a shareholder's voting rights—which is the shareholder's primary means to monitor the board. Shareholders who know and understand their voting rights will be empowered to effectuate them. Therefore, armed with this information, shareholders will be better able to exercise their voting and monitoring functions.

Requiring information on shareholder rights to be included in CGGs may also reduce possible shareholder confusion about the company's corporate governance practices. Just because CGGs do not affirmatively state that the company has adopted a particular corporate governance practice does not necessarily mean that the company has not adopted that practice. It just means that the company did not disclose it in its CGGs. For example, Target's CGGs are silent on whether it requires a majority vote for director elections, whether its shareholders can call a special meeting, and whether its shareholders have access to the company's proxy.³³⁷ Yet, Target's shareholders actually have all of these rights.³³⁸ Unfortunately, a Target shareholder would not know this from reviewing the company's CGGs.

In addition, requiring a standalone section on "Shareholder Rights" information will make it easier for shareholders to compare corporate governance practices between and among companies. Comparability of information is a foundation of effective disclosure.³³⁹ Yet, currently, even if shareholder rights information is disclosed in CGGs, it is often located in different parts of the document.³⁴⁰ Investors have to

337. See *infra* Table 6.

338. Target requires a majority vote for director elections. See Articles of Amendment Adopting Amended and Restated Articles of Incorporation of Target Corporation, Article VI, TARGET (June 10, 2010), <https://investors.target.com/static-files/557ea6ff-8a1b-48e4-9f2b-498b4c0a40b3> [<https://perma.cc/H8M8-2A58>]. Target's bylaws authorize shareholders to call special meetings and provide access to Target's proxy. See Bylaws of Target Corporation, TARGET §§ 1.02, 2.10 (Mar. 27, 2020), <https://investors.target.com/static-files/236d34de-52ee-4d99-b3b4-9ac81c1f2ba4> [<https://perma.cc/GNT7-CJKD>].

339. Comparability of information is one of the cornerstones of the federal securities laws, which require companies to disclose the same types of information in the same order in their mandatory disclosure documents so that investors can easily compare company performances. The SEC has always placed great importance on ensuring comparability of information. See, e.g., Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 33-10064, at 41-45, 81 Fed. Reg. 23916 (Apr. 22, 2016) (discussing the importance of comparability in assessing a rules-based or principles-based system of disclosure).

340. For example, in UnitedHealth Group's CGGs, information about its shareholder rights is included in three different sections. The company's one share-one vote policy and

carefully review the entire document to find the information. Grouping information on shareholder rights in one place will make it easier for shareholders to find this important information and then compare it to the shareholder rights offered at other listed companies.

Finally, requiring companies to disclose basic information on shareholder rights in CGGs would presumably lead to better corporate governance practices relating to shareholder rights. As discussed above,³⁴¹ disclosure encourages companies to adopt better corporate governance practices. Presumably, companies with weaker shareholder rights provisions would not want to appear unfriendly to their shareholders. They would feel pressured to provide more substantial rights to their shareholders.

While my recommendation significantly promotes the NYSE's goals, it does not force companies to adopt "one size fits all" shareholder rights practices.³⁴² It merely continues the original "required disclosure" approach to corporate governance regulation that was adopted by the NYSE in 2003.³⁴³ Companies would not be required to adopt a particular shareholder rights practice; they would simply be required to disclose the practice in their CGGs.

Companies in opposition to this recommendation may assert that it is not necessary to include information relating to shareholder rights in their CGGs. They will point out this information can be derived from other company documents, such as the company's certificate of incorporation, bylaws, or committee charters. However, this information may not be easy to find, especially for individual investors. For example, assume that a shareholder wanted to know whether a company allowed shareholders to call a special meeting. If this information is not disclosed in the company's CGGs, the shareholder would be required to go through several steps to find the answer.

First, the shareholder would have to determine the default rule of the applicable state corporate code. In some states, shareholders have the right to call a special meeting unless that right is taken away in the company's certificate of incorporation or bylaws; in other states, shareholders do not have that right unless it is affirmatively granted to them in the company's certificate of incorporation or bylaws.³⁴⁴

its confidential voting policy is located in a "Shareholder Rights and Proxy Voting" section. However, information about annual election of directors is found in a "Role and Structure of the Board" section and information about majority voting for director elections was placed in a "Board Composition and Performance" section. See UNITEDHEALTH GROUP BD. OF DIRECTORS, PRINCIPLES OF GOVERNANCE 1-3 (Nov. 4, 2021), <https://www.unitedhealthgroup.com/content/dam/UHG/PDF/About/UNH-Principles-of-Governance.pdf> [<https://perma.cc/2X6C-HYLB>].

341. See *supra* Part II.C.3.

342. See *supra* Part II.B.2.b.

343. *Id.*

344. Different states have very different approaches to whether shareholders can call special meetings. For a good summary of the variations, see Emiliano M. Catan & Marcel

Second, the shareholder would have to find the company's organizational documents to determine if the company changed the default rule. Although many public companies post their certificates of incorporation and bylaws on their corporate websites, they are not required to do so. If they do not, a particularly sophisticated shareholder might know that these documents are posted as exhibits to SEC filings,³⁴⁵ but most individual shareholders would probably not be aware of this.

Once the shareholder located the correct organizational document, the shareholder would then have to review the legalese to determine whether shareholders can call special meetings. Why make it so difficult for shareholders to obtain basic information relating to their rights as shareholders? Requiring CGGs to include information about shareholder rights would help shareholders to become better informed about the company's corporate governance and improve their monitoring abilities, at no cost to the company.

Finally, opponents to this recommendation may argue that requiring companies to disclose shareholder rights information in their CGGs is unnecessary because institutional investors—who own most of the stock of public companies—are extremely knowledgeable about their rights as shareholders. They do not need the information to be disclosed in CGGs. While that is undoubtedly true, it ignores the information needs of individual investors. So much attention is paid to the “institutionalization” of stock ownership in public companies that the needs of individual investors can be overlooked.

The retail investment market is in fact very large. Approximately half of U.S. households own stock, either directly or through retirement accounts.³⁴⁶ Recently, the rapid growth in retail investing has been identified as a significant investment trend.³⁴⁷ Retail investors have more access now than ever before to financial information, investment education, and trading tools.³⁴⁸ Individual investors can now

Kahan, *The Never-Ending Quest for Shareholder Rights: Special Meetings and Written Consent*, 99 B.U. L. REV. 743, 783-84 (2019).

345. SEC Regulation S-K Item 601, 17 C.F.R. § 229.601(b)(3)(i)-(ii) (2020).

346. Kim Parker & Richard Fry, *More Than Half of U.S. Households Have Some Investment in the Stock Markets*, PEW RES. CTR. (March 25, 2020), <https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/> [<https://perma.cc/AZM9-64DN>] (finding that 14% of American families are directly invested in individual stocks).

347. See generally DELOITTE CTR. FOR FIN. SERVS., *THE RISE OF THE NEWLY EMPOWERED RETAIL INVESTORS*, DELOITTE (2021), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/financial-services/us-the-rise-of-newly-empowered-retail-investors-2021.pdf> [<https://perma.cc/EYT3-EBT9>].

348. FINRA INVESTOR EDUC. FOUND. & NORC U. CHI., *INVESTING 2020: NEW ACCOUNTS AND THE PEOPLE WHO OPENED THEM* 13-14 (Feb. 2021), https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf [<https://perma.cc/Y4Q6-BWF6>] (describing the different information sources used by retail investors).

manage their portfolios from their mobile devices.³⁴⁹ Many companies have also found ways to use technology to communicate with shareholders, which has increased retail voting participation rates.³⁵⁰ The information needs of retail investors should not be overlooked, and additional required disclosure on basic shareholder rights will promote a more informed investor base.

2. Companies Should Be Required to Include Basic Information About ESG in Their CGGs

In addition, listed companies should be required to include basic information about their environmental and social policies in their CGGs. As discussed above,³⁵¹ most companies do not currently disclose this important information in their CGGs. Amending Section 303A.09 to require disclosure of this information will update CGGs to reflect corporate governance issues that face public companies in the twenty-first century. Therefore, Section 303A.09 should be amended to require a company to disclose: (1) if it has policies addressing the company's approach to environmental and social issues and their effect on the long-term success of the company; (2) where those policies are disclosed; and (3) who is responsible for establishing the company's environmental and social policies and overseeing ESG risk management.

This recommendation is purposely measured. ESG disclosure is a complicated and controversial topic.³⁵² While investors have been vocal in demanding more ESG information, the SEC has been more cautious about requiring public companies to disclose what it has long considered to be "non-financial" disclosure. The SEC has been under mounting pressure to require public companies to disclose information on

349. Chris Perry, *How Technology and Next-Gen Investors are Driving the Democratization of Investing*, FORBES (Sept. 14, 2021), <https://www.forbes.com/sites/chris-perry/2021/09/14/how-technology-and-next-gen-investors-are-driving-the-democratization-of-investing/?sh=516cf10f2046> (noting the significance of smartphone apps such as Robinhood, Stash, and Acorn).

350. Rich Daly, *Small Investors are Bigger Than You Think*, FORBES (May 6, 2015), <https://www.forbes.com/sites/richdaly/2015/05/06/small-investors-are-bigger-than-you-think/?sh=376803336308> [<https://perma.cc/Q3KG-5HCA>].

351. See *supra* Part IV.G.

352. Professor Jill Fisch aptly summarized some of the reasons why ESG disclosure has been such a difficult problem to solve:

Apart from . . . political obstacles, however, there are concerns about the practicability of developing a workable structure for mandatory disclosure. Sustainability disclosures must be specific enough to provide investors and capital markets with meaningful and readily comparable information. At the same time, relevant sustainability issues vary substantially by issuer and industry, making a detailed line-item approach less feasible. The alternative, a principles-based approach, complicates policing the accuracy of issuer disclosures and risks producing low-quality or boilerplate disclosures.

Jill Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 928-29 (2020).

environmental and social issues as part of the integrated disclosure regime of the federal securities laws,³⁵³ and it is currently working on proposing new disclosure rules on board diversity, climate change, and human capital (including workforce diversity).³⁵⁴

As part of its work, the SEC will presumably have to choose between directly regulating disclosure through SEC rules or indirectly regulating disclosure through stock exchange listing rules.³⁵⁵ However, if the SEC chooses to use stock exchange listing standards to regulate ESG, CGGs would not be the appropriate vehicle for disclosure of ESG policies. ESG policies will likely be lengthy documents. Placing large amounts of information in CGGs will overwhelm the other information disclosed in CGGs. Therefore, it will be more appropriate to disclose ESG policies in separate documents that are made publicly available for shareholder review. This is the same disclosure approach the NYSE has taken with other important corporate governance policies, such as board committee charters³⁵⁶ and corporate codes of conduct.³⁵⁷ It is also the approach adopted by some non-U.S. exchanges, such as the Hong Kong Exchange and the Singapore Exchange, which require listed companies to disclose specified ESG information in reports.³⁵⁸

However, CGGs can still be used to help investors become better informed about ESG practices to a more limited and appropriate extent. Companies should be required to disclose whether they have adopted ESG policies and, if so, where the policies can be found. This approach does not require companies to adopt ESG policies; it merely requires them to post them on corporate websites. Because most public companies already post “Sustainability Reports” on their websites,³⁵⁹ this new disclosure item will not impose any additional costs or burdens on public companies, nor will it make the NYSE less attractive to public companies. It will, however, further the NYSE’s goal of helping shareholders become better informed about the corporate governance practices adopted by public companies.

In addition, listed companies should also be required to disclose who oversees ESG at the company: the board or a board committee such as a “Sustainability Committee” or “Public Policy Committee.”

353. See *id.* at 934-41 (for a good discussion of the history of ESG disclosure initiatives at the SEC).

354. SECS. & EXCH. COMM’N, *SEC Announces Annual Regulatory Agenda* (June 11, 2021), <https://www.sec.gov/news/press-release/2021-99> [<https://perma.cc/VJ8X-96V7>].

355. See *supra* Part II.B.3.

356. NYSE MANUAL, *supra* note 10, at § 303A.04-07 (requiring each listed company to post the charters of its Nominating, Audit, and Compensation Committees on the company’s website).

357. *Id.* at § 303A.10.

358. Jerry K.C. Koh & Victoria Leong, *The Rise of the Sustainability Reporting Megatrend: A Corporate Governance Perspective*, 18 BUS. L. INT’L 233, 237-44 (2017).

359. See *supra* note 42 and accompanying text.

Because environmental and social issues present short- and long-term challenges to the health of public companies,³⁶⁰ shareholders should be informed who is responsible for ESG oversight. The NYSE already requires listed companies to describe the responsibilities of their directors in their CGGs.³⁶¹ Requiring specific information about one of these responsibilities does not impose additional significant burdens to listed companies, and it may encourage boards to more carefully consider their duties with respect to social and environmental issues.³⁶²

3. *Companies Should Be Required to Include a Statement of Corporate Purpose in Their CGGs*

Companies should also be required to expressly state the purpose of the company in their CGGs. In other words, the board should be required to disclose whether the purpose of the corporation is to maximize shareholder wealth or provide benefits for all corporate stakeholders.

For shareholders, perhaps the most important corporate governance practice is the choice of the company's primary beneficiary. After all, many shareholders presumably invest in corporations because they believe the board is managing the company in the best interests of company stockholders. However, very few companies include this information in their CGGs.³⁶³ In the past, even without a disclosed policy, it was probably appropriate for investors to assume that the board was managing the company for the benefit of the shareholders.³⁶⁴ But with the growing influence of the stakeholder primacy approach, that is no longer the case. If a board has adopted a stakeholder primacy policy, the company should not be able to keep that information secret from their investors. It should be disclosed in the CGGs.

Moreover, the CEOs of many of the largest public companies have signed the Business Roundtable's Statement on the Purpose of the Corporation.³⁶⁵ It is unclear whether a CEO's agreement means that the company itself has adopted a stakeholder primacy approach. Investors may be confused about the legal effect of the CEO's action. To eliminate any confusion, the board should be required to disclose an official statement on the company's purpose in the company's CGGs.

4. *Companies Should Be Required to Report Deviations from Corporate Practices Set Forth in the CGGs*

360. See *supra* notes 24-25 and accompanying text.

361. NYSE MANUAL, *supra* note 10.

362. See *supra* text accompanying note 135.

363. See *supra* Part IV.F.

364. See *supra* text accompanying notes 43-48.

365. See *supra* text accompanying notes 46-48.

Finally, Section 303A.09 should be amended to require companies to report any deviations from the corporate practices set forth in their CGGs. Under the current NYSE rule, companies are not required to disclose departures from policies set forth in their CGGs,³⁶⁶ and most companies do not voluntarily commit to disclose this information.³⁶⁷ Given the stated purposes of Section 303A.09—to provide information about the company's corporate governance practices to shareholders and to encourage boards to adhere to their corporate governance policies³⁶⁸—it follows naturally that companies should be required to disclose departures from their CGGs.

First, if listed companies are not required to disclose that the board deviated from its CGGs, shareholders will not be aware that the company is no longer following the policies set forth in the CGGs. For example, assume that a company's CGGs state that board meeting agendas are set by the Lead Independent Director. The board then changes its policy to allow the non-independent Chairman of the board—who is also the CEO—to set the agenda. This represents a significant change to the company's corporate governance, but, unless the company disclosed it, the shareholders would not be aware of it. If the board is not following the published CGGs, the CGGs that are posted on websites are akin to false advertising. Investors could be misled, subverting the NYSE's stated goal of educating stockholders.

Second, if listed companies are not required to disclose that the board deviated from its CGGs, the board has no incentive to abide by the CGGs. The NYSE determined that requiring companies to disclose their corporate governance practices would encourage boards to follow their adopted corporate governance practices.³⁶⁹ But if boards can depart from them without disclosing the departure, where is the incentive?³⁷⁰

Opponents of this recommendation may argue that requiring disclosure of deviations from CGGs will negatively impact the board's flexibility to adopt corporate governance practices that are best for the company. But that is not the case. The board will still have the same authority to change its corporate governance policies whenever the directors want.³⁷¹ They will just have to disclose those changes, at little to no cost to the company.

366. NYSE MANUAL, *supra* note 10.

367. *See supra* Part IV.I.

368. *See supra* text accompanying note 191.

369. *Id.*

370. In addition, if companies are not required to disclose when boards depart from their CGGs, there is a danger that an unscrupulous board might purposely adopt CGGs with pro-investor provisions to tout its good corporate governance practices with no intention of abiding by them.

371. Obviously, boards do not have the authority to change corporate governance practices that are set forth in the company's certificate of incorporation and bylaws. For example, if the company's organizational documents require majority approval for directors to be

Opponents of this recommendation may also argue that requiring disclosure of deviations from CGGs is not necessary because shareholders should understand that guidelines, by their very nature, are not binding on boards. The term chosen by the NYSE to describe the company's corporate governance practices—"guidelines"—has a recognized legal meaning. By definition, a guideline is not mandatory.³⁷² Rather, a guideline sets forth principles that are intended to facilitate decisionmaking.³⁷³ Lawyers understand that guidelines are not binding, and that deviations from the guidelines are permissible.

However, shareholders are not necessarily lawyers, and they may be unaware that CGGs are not binding on the board.³⁷⁴ Do non-lawyers understand the difference between "guidelines" and "laws?" It would not appear so. A simple Google search for "are guidelines mandatory" returns numerous inconsistent responses as well as related questions, including "are guidelines enforceable" and "is a guideline a law." This indicates possible confusion regarding whether guidelines are binding. Although this confusion could be fixed by a simple statement in the CGGs that the CGGs are "flexible" or "non-binding," most CGGs do not include this warning.³⁷⁵

Given the purposes of Section 303A.09, the NYSE's decision to not require the disclosure of a board's departure from its CGGs is difficult to understand. The NYSE Committee Report does not contain any discussion of its decision,³⁷⁶ so it is impossible to know for certain what motivated the NYSE. However, it could be that, once again,³⁷⁷ the

elected, the board cannot unilaterally impose a different voting standard. The board would require shareholder approval to do so.

372. For example, Black's Law Dictionary defines "guideline" as "[a] practice that allows leeway in its interpretation." BLACK'S LAW DICTIONARY (2d ed.), <https://thelawdictionary.org/guideline/> [<https://perma.cc/H5JA-V9VZ>].

373. According to the Cambridge Dictionary, a "guideline" is "[i]nformation intended to advise people on how something should be done or what something should be." CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/guideline> [<https://perma.cc/Y8XM-PVJS>].

374. Possible confusion regarding the binding nature of CGGs may be exacerbated by the placement of the CGGs on the public company's website. They often appear side by side with the company's certificate of incorporation and bylaws—documents that are binding and legally enforceable—in the "Corporate Governance" section of the company's website. For example, Walmart's website includes a "Governance Documents" section, where its certificate of incorporation, bylaws, and CGGs are located. *See Governance Documents*, WALMART, <https://stock.walmart.com/investors/corporate-governance/governance-documents/> [<https://perma.cc/87N9-MVVB>]. This placement may lead some investors to conclude that CGGs, like the certificate of incorporation and bylaws, are binding on the board.

375. Only nine companies included this statement in their CGGs. These nine companies are Alphabet, Cigna, Intel, Kroger, PepsiCo, UnitedHealth Group, Walgreens, Walmart, and Walt Disney. *See infra* Table 1.

376. One commenter—the Corporate Library, a corporate governance research group—specifically requested that any waiver from policies set forth in the CGGs should be disclosed to shareholders, but the NYSE Committee did not address this comment in its report. *See NYSE COMMITTEE REPORT*, *supra* note 175, at A-49.

377. *See supra* text accompanying notes 197-199.

NYSE was concerned with adopting a listing standard that could be seen as too onerous by public companies.

This conclusion is supported by the very different approach the NYSE took with respect to the listing requirement concerning a company's code of conduct. As discussed above, the NYSE requires all listed companies to adopt a Code of Business Conduct and Ethics that, like CGGs, must be posted on the company's website.³⁷⁸ Unlike CGGs, however, the NYSE requires that waivers of the code of conduct must be promptly disclosed to company shareholders.³⁷⁹

Why would the NYSE require disclosures of deviations from one posted document, but not the other? There is no discussion or explanation in the NYSE Committee Report or the related SEC rules releases. In the NYSE Committee Report, the committee did address why waivers should be disclosed for Codes of Conduct. The report states that a disclosure requirement for waivers of Codes of Conduct should be implemented to "inhibit casual and perhaps questionable waivers, and should help assure that, when warranted, a waiver is accompanied by appropriate controls designed to protect the company."³⁸⁰ This reasoning appears equally attributable to CGGs, yet the NYSE did not to extend the requirement to CGGs.

The explanation is that the NYSE rule requiring disclosure of code of conduct waivers would not create any new burdens on listed companies. When the NYSE was considering its corporate governance rules, it was clear that Congress was planning to require public companies to disclose whether they had adopted a code of conduct³⁸¹ and to immediately disclose any waivers of the code of conduct.³⁸² The disclosure of waivers was viewed as particularly important by Congress because the Enron board had waived its own code of conduct on several occasions—without disclosure—to permit its Chief Financial Officer to engage in

378. See *supra* text accompanying notes 185-186.

379. According to the NYSE:

To the extent that a listed company's board or a board committee determines to grant any waiver of the code of business conduct and ethics for an executive officer or director, the waiver must be disclosed to shareholders within four business days of such determination. Disclosure must be made by distributing a press release, providing website disclosure, or by filing a current report on Form 8-K with the SEC.

NYSE MANUAL, *supra* note 10, at § 303A.10.

380. NYSE COMMITTEE REPORT, *supra* note 175, at 20.

381. Section 406(a) of the Sarbanes Oxley Act required the SEC to promulgate rules requiring public companies to disclose whether they had adopted a code of ethics, and, if not, why not. The SEC responded by adding new disclosure Item 406 to Regulation S-K. See 17 C.F.R. § 229.406 (2020).

382. Section 406(b) of the Sarbanes Oxley Act required the SEC to promulgate rules requiring public companies to promptly disclose any changes or waivers to their code of ethics. The SEC responded by adding a new triggering event to Form 8-K. See U.S. SECS. AND EXCH. COMM'N, OMB NO. 3235-0060, FORM 8-K, ITEM 5.05, AMENDMENTS TO THE REGISTRANT'S CODE OF ETHICS, OR WAIVER OF A PROVISION OF THE CODE OF ETHICS (2020), <https://www.sec.gov/files/form8-k.pdf>.

transactions that were at the heart of Enron's accounting irregularities.³⁸³ Because the federal securities laws would be requiring the disclosure of waivers, the NYSE would not be in danger of losing companies to competing stock exchanges, like Nasdaq, if they required the disclosure of waivers, too.

B. The NYSE Should Adopt the Disclose or Explain Approach for CGGs to Improve Corporate Governance at Public Companies

The NYSE should also adopt the disclose or explain approach for CGGs, which will improve corporate governance at public companies. As currently drafted, Section 303A.09 is based on a traditional required disclosure approach to corporate governance regulation.³⁸⁴ This approach encourages companies to adopt good corporate governance practices,³⁸⁵ but it may not be very effective in doing so. The survey of CGGs confirmed that listed companies often adopted different approaches to the corporate governance practices that are required to be disclosed in CGGs,³⁸⁶ and the approaches did not necessarily constitute good corporate governance. For example, Section 303A.09 requires companies to address continuing education for directors in their CGGs.³⁸⁷ Given the importance of this issue at the time Section 303A.09 was adopted,³⁸⁸ the NYSE may have envisioned that Section 303A.09 would lead listed companies to adopt mandatory continuing education for directors. However, as shown above,³⁸⁹ that did not occur. A review of the CGGs revealed that over 30% of companies do not mandate any type of continuing education for directors.³⁹⁰ That is not good corporate governance.

A disclose or explain approach, on the other hand, will be more likely to result in compliance with the regulator's standard.³⁹¹ To continue the example, if the disclose or explain approach were adopted by the NYSE, CGGs would have to disclose "whether directors are required to attend continuing education programs and if not, why not." While companies could still choose not to require directors to participate in continuing education, they would have to articulate reasons for this decision that would be acceptable to company shareholders. With

383. See *supra* text accompanying note 169. See generally Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253 (2004).

384. See *supra* Part III.B.2.b.

385. See *supra* text accompanying notes 136-137.

386. See *supra* Part IV.C.

387. NYSE MANUAL, *supra* note 10.

388. See *supra* text accompanying note 172.

389. *Id.*

390. See *infra* Table 2.

391. See *supra* Part II.C.4

a disclose or explain approach, listed companies would be more likely to mandate continuing education for their directors.

Adopting a disclose or explain approach would be an important step towards improving all corporate governance practices, and especially those relating to shareholder rights. Directors may be resistant to strengthening shareholder rights because these rights may provide shareholders with additional power to monitor corporate management and hold boards accountable for their actions. To encourage boards to improve shareholder rights, the NYSE should choose an approach that will be effective in causing companies to adopt stronger shareholder rights practices. Obviously, the most effective approaches would be mandatory regulation or comply or explain, but it is unlikely that the NYSE would adopt either approach.³⁹² The disclose or explain approach is a good compromise. As a disclosure rule, it still allows companies to adopt the practices that work best for them. Because it requires the company to explain its decision, shareholders will be become better informed. In addition, it will presumably lead to better corporate governance practices.

The disclose or explain approach requires a regulator to identify the corporate governance practices that companies should follow. For some corporate governance practices, it may be difficult to identify the preferred practice. For example, experts differ on whether the CEO and Chairman of the Board positions should be separated.³⁹³ However, for basic shareholder rights, there is general consensus on preferred practices. Specifically, shares of common stock should have equal voting rights.³⁹⁴ The entire board of directors should stand for re-election

392. Mandatory regulation would obviously lead to stronger shareholder rights in all listed companies. However, as a practical matter, it is unlikely that the NYSE would adopt a mandatory approach for shareholder rights, given that no other U.S. or foreign stock exchange has done so. It would place them in a difficult competitive position, especially vis-à-vis Nasdaq. Similarly, while the comply or explain approach has been adopted by numerous stock exchanges, the corporate governance standards adopted by those regulators address topics relating to the board and board conduct, not shareholder rights. *See supra* text accompanying notes 114-118. If the NYSE were to adopt a comply or explain approach to shareholder rights, they would be first stock exchange to do so. Once again, the NYSE is unlikely to take this step.

393. *See* LARCKER & TAYAN, *supra* note 14, at 113-16 (discussing the advantages and disadvantages of separating the CEO and Chair positions).

394. Dual class voting has been controversial since its creation. In fact, due to concerns that dual class stock was unfair to public shareholders, the NYSE initially banned all listed companies from issuing dual class stock. Currently, the NYSE allows companies to list dual class stock when they first go public but will not allow already listed companies to change to a dual class structure without shareholder approval. *See* NYSE MANUAL, *supra* note 10, at § 313.00. The dangers of dual class stock have been examined by many corporate governance experts. *See, e.g.*, Lucien Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585 (2017).

each year.³⁹⁵ Directors should be elected by majority vote.³⁹⁶ Shareholders should have the right to call special meetings or act by written consent.³⁹⁷ Companies should adopt reasonable proxy access provisions³⁹⁸ and assure confidential proxy voting.³⁹⁹

Therefore, if the NYSE adopts the disclose or explain approach, CGGs would be required to disclose the following information on shareholder rights:

- Whether the company's common stock has equal voting rights, and if not, why not;
- Whether the entire board stands for election at each annual meeting, and if not, why not;
- Whether a majority vote is required to elect a nominee to the board of directors, and if not, why not;
- Whether shareholders can call special meetings, and if not, why not;
- Whether shareholder can act by written consent, and if not, why not;
- Whether shareholders have access to the company's proxy, and if not, why not; and

395. For example, the *Commonsense Principles of Corporate Governance 2.0* recognize that “[r]equiring all directors to stand for election on an annual basis may help promote board accountability to shareholders.” COMMONSENSE PRINCIPLES OF CORPORATE GOVERNANCE 2.0, *supra* note 98, at 2.

396. Even the business-friendly Business Roundtable agrees that directors should be elected by majority vote. BUS. ROUNDTABLE, *supra* note 97, at 12 (stating that “[d]irectors should be elected by a majority vote”).

397. For example, the proxy voting guidelines of Institutional Shareholder Services, the powerful proxy advisory firm, evidence support for the right of shareholders to call special meetings and act by written consent. See INSTITUTIONAL SHAREHOLDER SERVS., UNITED STATES PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS, *supra* note 100, at 29. In addition, many large institutional investors have also pressured companies to grant these rights to shareholders. See, e.g., BLACKROCK, *supra* note 99, at 17. The Commonsense Principles agree that public companies should allow shareholders to call special meetings and act by written consent. See COMMONSENSE PRINCIPLES OF CORPORATE GOVERNANCE 2.0, *supra* note 98, at 7 (recognizing that “[w]ritten consent and special meeting provisions can be important mechanisms for shareholder action”).

398. For example, the influential Council of Institutional Investors has issued a statement on proxy access, stating that “[c]ompanies should provide access to management proxy materials for a long-term investor . . . to nominate less than a majority of the directors.” Council of Institutional Investors, *Proxy Access: Best Practices*, CII 2 (2015), https://www.cii.org/files/publications/misc/08_05_15_Best%20Practices%20-%20Proxy%20Access.pdf [<https://perma.cc/9P78-CF8S>].

399. The dangers of failing to protect the confidentiality of proxy voting have been well-documented. See, e.g., Carol Goforth, *Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late*, 43 AM. U. L. REV. 379, 460-63 (1994).

- Whether shareholder proxies are confidential, and if not, why not.

CONCLUSION

The goals underlying CGGs—promoting informed investors and improving the ability of shareholders to monitor board performance—are admirable. Unfortunately, a review of the information that is actually disclosed in CGGs shows that these goals are not being met. Therefore, I recommend that the NYSE amend its rule to require listed companies to provide more information on policies relating to shareholder rights and ESG and to change its regulatory approach from a simple disclosure approach to a disclose or explain approach. These changes will lead to better corporate governance at public companies.

Corporate Governance Guidelines Tables

Table 1: General Information in CGGs

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Table 3: Information in CGGs that is Required by SEC to be in Proxy Statements

Table 4: Information in CGGs About the Board and Board Practices

Table 5: Information in CGGs on Selected ESG Practices

Table 6: Information in CGGs on Shareholder Rights

Table 1: General Information in CGGs									
Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
Alphabet	11	DE	Nasdaq	7/18/2018	N/A	The Guidelines "provide a structure within which our directors and management can effectively pursue Alphabet's objectives for the benefit of its stockholders. The Board intends that these guidelines serve as a flexible framework within which the Board may conduct its business, not as a set of binding legal obligations. These guidelines should be interpreted in the context of all applicable laws, Alphabet's charter documents and other governing legal documents and Alphabet's policies."	"flexible"; "not a set of binding legal obligations"	No provision	Periodically
Amazon	2	DE	Nasdaq	Undated	N/A	No provision	No provision	No provision	No provision
Amerisource-Bergen	10	DE	NYSE	12/1/2019	9 pages	The Guidelines "along with the charters of the Board committees, provide the framework for the governance of AmerisourceBergen Corporation."	No provision	No provision	Annually
Anthem	29	IN	NYSE	5/21/2020	10 pages	No provision	No provision	No provision	Annually
Apple	4	CA	Nasdaq	2/12/18	5 pages	"The guidelines, in conjunction with the Corporation's articles of incorporation, bylaws, and the charters of the committees of the Board, form the framework of governance of the Corporation. The governance structure of the Corporation is designed to be a working structure for principled actions, effective decision-making and appropriate monitoring of both compliance and performance."	No provision	No provision	No provision
AT&T	9	DE	NYSE	2/1/2019	7 pages	The Board adopted Guidelines "to promote the functioning of the Board of Directors . . . and its Committees and to set forth a common set of	No provision	No provision	No provision

Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
						expectations as to how the Board should perform its functions.”			
Bank of America	25	DE	NYSE	1/29/2020	15 pages	The Board adopted the Guidelines “to promote a high level of performance from the Board and management, to promote the interests of stockholders and to further the Company’s commitment to best practices in corporate governance.”	No provision	No provision	No provision
Berkshire Hathaway	6	DE	NYSE	N/A	4 pages	The Board “adopted the following guidelines to promote the effective governance of the Company.”	No provision	No provision	“as it deems necessary or appropriate”
Boeing	40	DE	NYSE	6/22/2020	8 pages	The Board adopted the Guidelines to “to assist the Board in the exercise of its responsibilities and, along with Boeing’s Certificate of Incorporation and By-Laws and charters of the committees of the Board, provide an effective framework for Boeing’s governance.”	No provision	No provision	Periodically
Cardinal Health	16	OH	NYSE	11/7/2018	8 pages	No provision	No provision	No provision	Annually
Centene	42	DE	NYSE	N/A	5 pages	No provision	No provision	No provision	No provision
Chevron	15	DE	NYSE	9/25/2019	8 pages	The Guidelines “in conjunction with the Restated Certificate of Incorporation, By-Laws and Board Committee charters, form the framework for governance of the Corporation.”	No provision	No provision	Annually
Citigroup	31	DE	NYSE	1/16/2020	16 pages	No provision	No provision	“The Board may amend these Corporate Governance Guidelines, or grant waivers in exceptional circumstances, provided that any such modification or waiver may not be a violation of any applicable law, rule or regulation and further provided	No provision

Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
								that any such modification or waiver is appropriately disclosed."	
Cigna	13	DE	NYSE	7/24/2019	8 pages	"Together with the Corporation's articles of incorporation, bylaws and the Committee charters, the Guidelines establish a common set of expectations to assist the Board and its Committees in performing their duties and are intended to provide the governance framework for the conduct of the Board's business."	"not intended to create legally binding obligations"	No provision	Annually
Comcast	28	PA	Nasdaq	12/11/2019	4 pages	The Board adopted the Guidelines "which, in conjunction with the Company's articles of incorporation, bylaws and the charters of the committees of the Board, form the Company's general governance Framework."	No provision	No provision	No provision
Costco Wholesale	14	WA	Nasdaq	4/20/2019	11 pages	No provision	No provision	No provision	No provision
CVS Health	5	DE	NYSE	1/31/2020	15 pages	The Board "adopted these guidelines to promote a high level of performance from the Board and management, to promote the interests of stockholders and to further the Company's commitment to best practices in corporate governance."	No provision	No provision	Annually
Dell Technologies	34	DE	NYSE	9/25/2020	7 pages	The Board adopted the Guidelines "to provide an effective corporate governance framework for the Company, intending to reflect a set of core values that provide the foundation for	No provision	No provision	No provision

Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
						the Company's governance and management systems and its interactions with others."			
Exxon Mobil	3	NJ	NYSE	3/1/2020	N/A	The Board "adopted these guidelines to promote the effective functioning of the Board and its committees."	No provision	No provision	"when appropriate"
Facebook	46	DE	Nasdaq	5/12/2020	7 pages	The Board adopted the Guidelines "to reflect the Board's strong commitment to sound corporate governance practices and to encourage effective policy and decision making at both the Board and management level, with a view to enhancing long-term value for Facebook stockholders. These Corporate Governance Guidelines are intended to assist the Board in the exercise of its governance responsibilities and serve as a framework within which the Board may conduct its business. The company's governance structure is designed to be a working structure for principled actions, effective decision-making and appropriate monitoring of both compliance and performance."	No provision	"grant waivers in exceptional circumstances, provided that any such modification or waiver may not be a violation of any applicable law, rule or regulation, and, provided further, that any such modification or waiver is appropriately disclosed."	"from time to time"
FedEx	47	DE	NYSE	3/9/2020	12 pages	The Board "adopted these Guidelines to further its longstanding goal of providing effective governance of the Company's business and affairs for the long-term benefit of the	No provision	No provision	Periodically

Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
						Company's stockholders."			
Ford Motor	12	DE	NYSE	3/15/2019	6 pages	The Guidelines with committee charters "provide the framework for the governance of Ford Motor Company."	No provision	No provision	Annually
General Electric	33	NY	NYSE	2019	10 pages	The Guidelines "provide the framework for the governance of GE."	No provision	No provision	Annually
General Motors	18	DE	NYSE	8/8/2017	14 pages	The Guidelines were adopted "to promote the effective functioning of the Board and its committees and to set forth a common set of expectations as to how the Board should perform its functions. These Guidelines are in addition to, and should be interpreted in accordance with, any requirements imposed by federal or Delaware law, the New York Stock Exchange . . . and the Certificate of Incorporation and Bylaws of the Company, each as amended."	No provision	No provision	Periodically
Home Depot	26	DE	NYSE	8/22/2019	13 pages	No provision	No provision	No provision	No provision
Humana	52	DE	NYSE	8/26/2010	10 pages	No provision	No provision	No provision	No provision
IBM	38	NY	NYSE	1/29/2019	5 pages	No provision	No provision	No provision	No provision
Intel	45	DE	Nasdaq	11/13/2019	10 pages	No provision	"flexible guidelines for the effective functioning of the Board of Directors."	"The Board may amend, waive, suspend or repeal any of these Guidelines at any time, with or without public notice, as it determines necessary or appropriate, in the exercise of the Board's judgment or fiduciary duties."	Periodically
Johnson & Johnson	35	NJ	NYSE	2/13/2018	15 pages	No provision	No provision	No provision	Annually
JPMorgan Chase	17	DE	NYSE	1/1/2020	N/A	No provision	No provision	No provision	No provision

Table 1: General Information in CGGs									
Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
Kroger	23	OH	NYSE	3/9/2017	9 pages	"The following guidelines describe the Board's current practices, policies and processes for performing [its] functions."	"The Board believes these guidelines reflect a sound approach to the governance of the corporation. The guidelines should not be interpreted as by-laws or fixed rules to regulate conduct. Rather, they organize the Board's present consensus on significant corporate governance issues."	No provision	Regularly
Lowe's	44	NC	NYSE	1/31/2020	9 pages	No provision	No provision	"Guidelines may be amended, modified or waived by the Board of Directors."	No provision
Marathon Petroleum	22	DE	NYSE	4/29/2020	12 pages	No provision	No provision	No provision	No provision
McKesson	8	DE	NYSE	1/29/2020	9 pages	The Guidelines were adopted "to assist the Board in the exercise of its responsibilities. These Guidelines reflect the Board's commitment to monitor the effectiveness of policy-making and decision-making both at the Board and management level, and provide the framework for the governance of the Company."	No provision	No provision	"from time to time"
MetLife	48	DE	NYSE	4/28/2020	8 pages	No provision	No provision	No provision	Annually
Microsoft	21	WA	Nasdaq	7/1/2020	7 pages	The Board adopted the Guidelines to "to help it fulfill its responsibilities to shareholders. The policies in these guidelines assure that the Board has the authority and practices in place to review and evaluate the Company's business operations, and to make decisions that are independent of the Company's management."	No provision	No provision	As necessary

Table 1: General Information in CGGs									
Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
PepsiCo	51	NC	Nasdaq	7/11/2019	8 pages	"The Board of Directors of PepsiCo, Inc., acting on the recommendation of its Nominating and Corporate Governance Committee, has developed and adopted the following corporate governance guidelines to establish a common set of expectations to assist the Board and its Committees in performing their duties."	"Intended to serve as a flexible framework;" "not as a set of legally binding obligations"	No provision	Annually
Phillips 66	27	DE	NYSE	7/11/2018	7 pages	Board adopted the Guidelines as "a general framework to assist the Board in carrying out its responsibilities for the business and affairs of the Company to be managed by or under the direction of the Board."	No provision	No provision	Periodically
Procter & Gamble	50	OH	NYSE	6/11/2019	18 pages	No provision	No provision	No provision	When "appropriate"
Prudential Financial	53	NJ	NYSE	N/A	10 pages	No provision	No provision	No provision	No provision
Raytheon	39	DE	NYSE	11/14/2018	16 pages	No provision	No provision	No provision	Periodically
Target	37	MN	NYSE	3/20/2019	10 pages	No provision	No provision	No provision	No provision
United Parcel Service	43	DE	NYSE	11/7/2019	7 pages	No provision	No provision	No provision	No provision
United Health Group	7	DE	NYSE	11/8/2018	7 pages	"The Certificate of Incorporation and By-laws of UnitedHealth Group Incorporated . . . together with Delaware law, govern the Company. These principles of governance reflect the current views of the Company's Board of Directors . . . concerning philosophy, style and emphasis of governance."	"The Board views these principles as guidelines— . . . not rigid restraints—and believes they are evolutionary in nature."	No provision	Annually
Valero Energy	32	DE	NYSE	11/2/2016	8 pages	The Board adopted the Guidelines "to establish ethical governance standards for the Company. These Guidelines represent one component of Valero's governance program. Other documents that direct Valero's governance	No provision	No provision	No provision

Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
						affairs include Valero's certificate of incorporation, by-laws, Code of Business Conduct and Ethics, Code of Ethics for Senior Financial Officers, and the charters of its various Board committees."			
Verizon Communications	20	DE	NYSE	12/5/2019	10 pages	The Board adopted the Guidelines and the committee charters "to provide a framework for the functioning of the Board."	No provision	No provision	Periodically
Walgreens Boots Alliance	19	DE	Nasdaq	7/8/2020	13 pages	The Guidelines were adopted "to assist the Board in the exercise of its responsibilities on behalf of the Company and its stockholders. These Guidelines are intended to provide all applicable guidance as a component of the flexible framework within which the Board, assisted by Board committees, oversees and directs the affairs of the Company and are subject to modification from time to time by the Board as the Board may deem appropriate in the best interests of the Company and its stockholders or as required by applicable law and regulations."	"These Guidelines are not intended to create legally binding obligations, and should be interpreted in the context of all applicable laws, regulations and listing rules as well as the Company's Certificate of Incorporation, By-laws and other corporate governance documents."	No provision	Annually
Walmart	1	DE	NYSE	2/6/2020	8 pages	The Board adopted the Guidelines "to assist the Board in the exercise of its responsibilities to our shareholders and the Company. These Guidelines should be interpreted in the context of all applicable laws and the Company's Restated Certificate of Incorporation, Amended	"flexible"; "not legally binding"	"The Board may, in its discretion, deviate from these Guidelines from time to time as the Board deems appropriate or as required by applicable laws and regulations."	No provision

Table 1: General Information in CGGs									
Company Name	Rank	State of Incorporation	Stock Exchange	Date of CGGs	Page Length	States Purpose of Guidelines?	States Whether Guidelines Are Binding or Flexible?	States Whether Board May Waive Guidelines?	States When Guidelines Are Reviewed?
						and Restated Bylaws and other corporate governance documents. Therefore, these Guidelines are intended to serve as a flexible framework within which the Board may conduct its business and not as a set of legally binding obligations. The Board may, in its discretion, deviate from these Guidelines from time to time as the Board deems appropriate or as required by applicable laws and regulations."			
Walt Disney	49	DE	NYSE	2/1/2020	11 pages	No provision	"[F]lexible framework within which the Board, assisted by its Committees, directs the affairs of the Company. . . . [T]hey are not intended to establish their own legally binding obligations."	"[I]f the Board ascertains at any time that any of the Guidelines set forth herein are not in full force and effect, the Board shall take such action as it deems reasonably necessary to assure full compliance as promptly as practicable."	No provision
Wells Fargo	30	DE	NYSE	2/27/2018	13 pages	The Board adopted the Guidelines "to provide the framework for effective governance of the Board and the Company."	No provision	No provision	Annually

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description of Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Alphabet	Yes	General criteria	5 boards total	No term limits	No provision	Specific	"expected"; no provision re: advance review	Yes	Committee; no guidelines	Orientation: yes; Continuing: outside programs "encouraged"	Compensation Committee makes annual recommendation to Board	Yes
Amazon	Yes	General criteria	No provision	No provision	No provision	General	"reasonable efforts"; no provision re: advance review	No provision	Committee and Board decide; no guidelines	No provision	Board and Compensation Committee oversee succession planning, which is reviewed annually	Yes
Amerisource-Bergen	Yes	General criteria	4 boards total	No term limits	Offer to resign at 75	General	Yes; "expected to make every effort" to attend.	Yes	Committee; three goals (fair, align interests, transparent)	Orientation: Yes; Continuing: directors "shall regularly receive"	Board and Compensation Committee; Committee oversees succession planning	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description of Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Anthem	Yes	General criteria	4 boards total	No term limits	72, no waiver	General	"expected"; yes	Yes	Committee; no guidelines	Orientation: yes; Continuing: directors receive materials and briefings; "opportunity" to attend outside programs	Board oversees succession planning	Yes
Apple	Yes	General criteria	5 boards total	No term limits	75, no waiver	General	"expected"; yes	Yes	Committee; no guidelines	Orientation: yes; Continuing: "encouraged"	Board oversees succession planning on annual basis	"should"
AT&T	Yes	General criteria	5 boards total	No term limits	72, no waiver	General	"expected"; yes	Yes	Committee; similarly-situated companies	Orientation: yes; Continuing: "periodically"	Compensation Committee oversees succession planning; reports to Board annually	Yes
Bank of America	Yes	General criteria	4 boards total	No term limits	75, unless waived	Specific	"expected"; yes	Yes	Committee; "reasonable" and amount needed to attract and retain directors; alignment	Orientation: yes; Continuing: "twice a year"	Corporate Governance Committee oversees succession planning; reports to Board annually	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description: Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Berkshire Hathaway	Yes	General criteria	No provision	No term limits	Policy against mandatory retirement	General	"expected"; yes	Yes	Board; "fees should be of no consequence to any director serving the Company."	Orientation: yes; Continuing: no	The Board and the committees of non-management directors and independent directors regularly review succession planning	Yes
Boeing	Yes	General criteria	4 boards total	No provision	74, no waiver	Specific	"expected"; yes	Yes	Committee; fair; align in interests, and attract and retain directors	Orientation: yes; Continuing: provided "as appropriate"	The Board, in consultation with the Corporate Governance Committee, reviews succession planning annually	Yes
Cardinal Health	Yes	General criteria	5 boards total	No provision	75, no waiver	Specific	"expected"; yes	Yes	Committee; refers to policies in committee charter	Orientation: yes; Continuing: "encouraged"	Compensation Committee oversees succession planning	Yes
Centene	Yes	General criteria	4 boards total	No term limits	No provision	General	"expected"; yes	Yes	Committee; refers to policies in committee charter	Orientation: yes; Continuing: "invited"	Corporate Governance Committee makes annual report to Board	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description of Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Chevron	Yes	General criteria	5 boards total	No provision	74, no waiver	General	"expected"; yes	Yes	Committee; "competitive, links results and stockholder returns, and facilitates increased ownership of the Corporation's stock"	Orientation: yes; Continuing: "encouraged"	Board oversees succession planning	Yes
Cigna	Yes	General criteria	5 boards total	No term limits	72, unless waived	Specific	"regular" attendance; yes	Yes	Committee; "competitiveness and appropriateness of compensation levels and program design."	Orientation: yes; Continuing: "encouraged"	Board oversees succession planning	Yes
Citigroup	Yes	General criteria	No policy; individual determination	No term limits	72, unless waived	General	"expected"; yes	Yes	Committee and Board; no guidelines	Orientation: yes; Continuing: company "shall make available"	Governance Committee makes annual report to Board	Yes
Comcast	Yes	General criteria	5 boards total	No provision	72, no waiver	General	"expected"; yes	Yes	Committee; no guidelines	Orientation: yes; Continuing: "desirable"	Compensation Committee oversees succession planning; Board discusses at least annually	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description of Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Costco Wholesale	Yes	General criteria	4 boards total	No term limits	Policy against mandatory retirement	General	"expected"; yes	Yes	"Compensation for non-employee directors should be competitive and should encourage increased ownership of the Company's stock."	Orientation: yes; Continuing: "encouraged"	Board reviews succession planning with CEO annually	Yes
CVS Health	Yes	General criteria	5 boards total	No term limits	75, unless waived	General	"expected"; yes	Yes	Committee; refers to Committee Charter	Orientation: yes; Continuing: "encouraged"	Board reviews succession planning	Yes
Dell Technologies	Yes	General criteria	6 boards total	No term limits	72, no waiver	Specific	"expected"; yes	Yes	Committee; fair, competitive, align interests, transparent	Orientation: yes; Continuing: "periodically"	Board oversees succession planning	Yes
Exxon Mobil	Yes	Does not disclose	No provision	No term limits	72, unless waived	General	"make every effort" to attend board meetings; yes	Yes	Committee; "consistent with market practice, taking into account the size and scope of the Corporation's business and the responsibilities of its directors."	Orientation: yes; Continuing: "from time to time"	Board reviews succession planning at least annually	Yes
Facebook	Yes	General criteria	No provision	No term limits; tenure considered	No provision	General	"expected"; yes	Yes	Committee; time commitment, peers, consultant	Orientation: yes; Continuing: encouraged	Board oversees succession planning	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
FedEx	Yes	General criteria	4 boards total	No term limits	75, no waiver	General	"expected"; yes	Yes	Committee; no guidelines	Orientation; yes; Continuing: encouraged	Nominating Committee presents succession planning to Board annually	Yes
Ford Motor	Yes	General criteria	5 boards total	No provision	72, unless waived	General	"expected"; yes	Yes	Committee; fair, competitive, align interests, transparent	Orientation; yes; Continuing: "of-fered the opportunity"	Board oversees succession planning	Yes
General Electric	Yes	General criteria	4 boards total	15 year term limit, unless waived	75, unless waived	Specific	"expected"; yes	Yes	Yes; fair, align interests, transparent; plus specific policies	Orientation; yes; Continuing: "shall be provided"	Board approves plan recommended by Compensation Committee	Yes
General Motors	Yes	General criteria	5 boards total	No term limits	72	Specific	"expected"; yes	Yes	Committee; no guidelines	Orientation; yes; Continuing: encouraged	Board reviews and discusses succession planning at least annually	Yes
Home Depot	Yes	General criteria	4 boards total	No term limits	72, no waiver	General	"expected" to attend; yes	Yes	Committee; alignment of interests	Orientation; yes; Continuing: refers to program	Board and Compensation Committee review succession planning at least annually	Yes
Humana	Yes	General criteria	No policy; individual determination	No provision	No provision	Specific	"should make every effort"; yes	Yes	Committee; three goals (fair, align interests, transparent); consultant	Orientation; yes; Continuing: "as appropriate"	Board develops plan that is reviewed "periodically"	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
IBM	Yes	Does not disclose	No provision	No provision	72, unless waived	General	"expected"; yes	Yes	Committee; comparison of IBM's director compensation practices against the practices of the largest U.S. companies, alignment	Orientation: yes; Continuing: "periodically"	Board conducts annual review of succession planning	Yes
Intel	Yes	General criteria	4 boards total	No term limits/ 10 year tenure	72, no waiver	Specific	"expected"; yes	Yes	Committee; mix of cashing and equity	Orientation: yes; Continuing: refreshes program	Compensation Committee reviews succession planning with the Board annually	Yes
Johnson & Johnson	Yes	General criteria	5 boards total	No term limits	72, no waiver	General	"expected"; yes	Yes	Committee; fair, align interests, consistent with compensation philosophy for executives	Orientation: yes; Continuing: provides opportunity	Lead Independent Director "leads" the succession planning	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description of Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
JPMorgan Chase	Yes	General criteria	5 boards total	No term limits	72, unless waived	General	"appropriate" attendance; yes	Yes	Committee: "The Board believes it is desirable that a significant portion of overall director compensation be linked to JPMorgan Chase & Co. stock, and the Board's total compensation . . . includes not less than two-thirds stock-based Compensation."	Orientation: yes; Continuing: "desirable"	At least annually; Compensation Committee reviews plan for Board discussion "guide" by Lead Independent Director	Yes
Kroger	Yes	General criteria	No policy; directors must get approval	No term limits	72, unless waived	General	"best efforts to attend"; yes	Yes	Committee; no guidelines	Orientation: yes; Continuing: "from time to time"	Compensation Committee reviews succession planning	Yes
Lowe's	Yes	General criteria	4 boards total	No term limits	72, no waiver	General	"expected"; yes	Yes	Committee; attract qualified individuals, fair, competitive, alignment	Orientation: yes; Continuing: "encouraged"	Board considers succession planning at least annually	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Marathon Petroleum	Yes	General criteria	Does not endorse a specific limitation	No term limits	72, no waiver	General	"expected"; yes	Yes	Committee; attract qualified individuals, comparable, alignment	Orientation: yes; Continuing: "encouraged"	Board, with assistance of Compensation Committee, establishes succession policies	Yes
McKesson	Yes	General criteria	5 boards total	No term limits	75, unless waived	General	"expected to regularly attend"; yes	Yes	Committee; "reasonable and competitive"	Orientation: yes; Continuing: Company provides opportunities	Chair oversees, with CEO and head of HR, succession planning annually	Yes
MetLife	Yes	General criteria	4 boards total	No provision	72, no waiver	General	"expected"; yes	Yes	Committee; competitive	Orientation: yes; Continuing: company provides opportunities	Board considers succession planning annually	Yes
Microsoft	Yes	General criteria	4 boards total	No term limits/average tenure of 10 years	75	Specific	"expected"; yes	Yes	Committee; fair, competitive, alignment	Orientation: yes; Continuing: "regular"	Board, with CEO and head of HR, works on succession plan, which is reviewed annually	Yes
PepsiCo	Yes	General criteria	4 boards total	No term limits	72, no waiver	Specific	"required"; yes	Yes	Committee; reasonable, competitive	Orientation: yes; Continuing: "required"	Nominating Committee oversees planning; Board responsible for succession plan	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description of Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Phillips 66	Yes	General criteria	Does not endorse a specific limitation	No term limits	75, unless waived	General	"expected"; yes	Yes	Committee; no guidelines	Orientation: yes; Continuing: company provides opportunities	Nominating Committee oversees planning; makes annual report to Board	Yes
Procter & Gamble	Yes	General criteria	4 boards total	18 year term limit, unless waived	72, unless waived	Specific	"expected"; yes	Yes	Committee; fair, competitive, alignment	Orientation: yes; Continuing: Company provides opportunities	Non-employee directors discuss succession planning annually	Yes
Prudential Financial	Yes	General criteria	5 boards total	No term limits	74, no waiver	Specific	"required"; yes	Yes	Committee; competitive; alignment	Orientation: yes; Continuing: directors "shall participate" in briefing sessions	Board oversees succession planning	Yes, no specific provision, only mentioned in review of information flows to board members
Raytheon	Yes	General criteria	4 boards total	No term limits	74, no waiver	General	"required"; yes	Yes	Committee; attachment to CGGs [consistent with independence standards; median of peer group, alignment, fair]	Orientation: yes; Continuing: "access to programs"	Board oversees succession planning	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description of Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Target	Yes	General criteria	4 boards total	20 year term limit, unless waived	72, no waiver	No provision	No provision; no provision	Yes	Committee; no guidelines	Orientation: yes; Continuing: "expected"	Compensation Committee oversees succession planning; reviews with Board annually	Yes
United Parcel Service	Yes	General criteria	4 boards total	No provision	75, no waiver	General	No provision re: board attendance; yes	Yes	Yes; "meaningful in stock"; won't compromise independence	Orientation: yes; Continuing: refers to program	CEO, with assistance of Compensation Committee, recommends succession plan to Board	Yes
United Health Group	Yes	Does not disclose	4 boards total	No term limits	Policy against mandatory retirement	General	"should make every effort" to attend board meetings; yes	Yes	Committee: attract directors, "make appropriate recommendations to the Board in light of the responsibilities assumed and the director compensation of similarly situated companies and other relevant factors"	Orientation: yes; Continuing: "expected to receive board-related continuing education of an agreed-upon amount every two years."	Board reviews succession planning annually	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Valero Energy	Yes	General criteria	4 boards total	No term limits	75, no waiver	General	"expected"; yes	Yes	Committee; no guidelines	Orientation: yes; Continuing: Board will "consider" if warranted	Compensation Committee oversees succession planning; makes periodic reports to Board	Yes
Verizon Communications	Yes	General criteria	5 boards total	No term limits	Offer to resign at 72	General	"expected"; yes	Yes	Committee; "The Committee determines compensation based on a review of comparable companies, alignment with the interests of shareholders and the advice of independent advisors."	Orientation: yes; Continuing: company provides opportunities	Board reviews succession planning annually	Yes
Walgreens Boots Alliance	Yes	Does not disclose	4 boards total	No term limits	75, unless waived	Specific	"responsibility" to attend "absent unavoidable circumstance"; yes	Yes	Committee; "The amount and form of compensation is determined in the context of that which is customary for similarly-situated companies to pay directors."	Orientation: yes; Continuing: company provides opportunities	Compensation Committee makes annual recommendation to Board	Yes

Table 2: Information in CGGs that is Required by NYSE Section 303A.09

Company Name	Director Qualification Standards: Independence Requirements	Director Qualification Standards: Substantive Qualifications	Director Qualification Standards: Overboarding Policies	Director Qualification Standards: Term Limits/Tenure Policies	Director Qualification Standards: Retirement Policies	Description Director Responsibilities	Director Responsibilities: Attendance at Board Meetings and Advance Review of Meeting Materials	Director Access to Management and Independent Advisors	Director Compensation Guidelines	Director Orientation and Continuing Education	Management Succession Planning (CEO)	Annual Performance Evaluation by Board
Walmart	Yes	General criteria	No policy; directors should consult	12 year term limit	75, unless waived	Specific	"expected"; yes	Yes	Committee; "will consider, among other matters, that directors' independence may be jeopardized"	Orientation: yes; Continuing: "expected"	Compensation Committee makes annual report to Board	Yes
Walt Disney	Yes	General criteria	4 boards total	15 years, unless waived	No provision	Specific	"ensure attendance"; yes	Yes	Committee; consistent with similar companies; consultant	Orientation: yes; Continuing: company provides opportunities	Board meets with CEO to discuss succession plan annually	Yes
Wells Fargo	Yes	General criteria	4 boards total	No term limits	72, unless waived	Specific	"expected"; yes	Yes	Committee; no guidelines	Orientation: yes; Continuing: "encouraged"	Compensation Committee, with "full involvement" of Board, oversees planning	Yes

Table 3: Information in CGGs that is Required by SEC to be Included in Proxy Statements

Company Name	Includes Information on Board Committees?	Includes Policy on Director Attendance at S/H Meetings?	Addresses Diversity on Board?	States Policy on Separation of CEO/Chair?	Describes Role of LID?	Discloses Number of Required Board Meetings?	Discloses Process for Shareholder Communication with the Board?	Discloses Board's Role in Risk Oversight?	Discloses Anti-Hedging Policy?
Alphabet	Yes	Yes; "encouraged"	Yes	Policy: Chairman may not be employee, unless approved by 2/3 disinterested directors	No provision	4	Yes	Yes; the Board	No provision
Amazon	Yes	Yes; "reasonable efforts"	Yes	No provision	Yes	No provision	Yes	No provision	No provision
Ameri-source-Bergen	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	5	Yes	Yes; the Board	No provision
Anthem	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	4	Yes	Yes; the Board	No provision
Apple	Yes	Yes; "expected"	Yes	No policy: Board decides	No provision	4	No provision	No provision	No provision
AT&T	Yes	Yes; "expected"	Yes	No provision	Yes	Not specified: "frequently"	Yes	Yes; the Board	No provision
Bank of America	Yes	Yes; "expected"	Yes	No provision	Yes	No provision	Yes	Yes; the Board; also has Risk Committee	No provision
Berkshire Hathaway	Yes	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Boeing	Yes	Yes; "shall attend"	Yes	Policy: Chair must be independent	N/A	6	Yes	Yes; the Board	Yes; applies to directors and executive officers
Cardinal Health	Yes	Yes; "expected"	Yes	No policy: Board decides [currently appropriate to separate positions]	No provision	No provision	No provision	Yes; the Board	No provision
Centene	Yes	No provision	Yes	No provision	No provision	No provision	No provision	No provision	No provision
Chevron	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	No provision	Yes	Yes; the Board	No provision
Cigna	Yes	Yes; "encouraged"	Yes	No provision	No provision	No provision	Yes	Yes; the Board	No provision
Citigroup	Yes	Yes; "expected"	Yes	No provision	Yes	No provision	Yes	No provision; has Risk Management Committee	Yes; applies to directors and executive officers
Comcast	Yes	Yes; "required"	Yes	No provision	Yes	No provision	Yes	No provision	No provision

Table 3: Information in CGGs that is Required by SEC to be Included in Proxy Statements

Company Name	Includes Information on Board Committees?	Includes Policy on Director Attendance at S/H Meetings?	Addresses Diversity on Board?	States Policy on Separation of CEO/Chair?	Describes Role of LID?	Discloses Number of Required Board Meetings?	Discloses Process for Shareholder Communication with the Board?	Discloses Board's Role in Risk Oversight?	Discloses Anti-Hedging Policy?
Costco Wholesale	Yes	Yes; "encouraged"	Yes	No policy: Board decides	Yes	Quarterly	Yes	No provision	Yes; applies to directors and executive officers prohibited
CVS Health	Yes	Yes; "expected"	Yes	No policy: Board decides	No provision	4	Yes	No provision	No provision
Dell Technologies	Yes	No provision	Yes	No provision	No provision	Not specified: Board decides	No provision	Yes; the Board	No provision
Exxon Mobil	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	7	Yes	No provision	No provision
Facebook	Yes	Yes; "encouraged"	Yes	No policy: Board decides	Yes	4	Yes	No provision; has Audit and Risk Committee	No provision
FedEx	Yes	Yes; "expected"	Yes	Policy: bylaws provide that the Chairman of the Board shall be the Chief Executive Officer, unless the Board of Directors decides otherwise.	Yes	6	Yes	Yes; the Board	Yes; applies to directors, officers and employees
Ford Motor	Yes	Yes; "expected"	Yes	No provision	No provision [pre-siding director]	7	Yes	Yes; the Board	No provision
General Electric	Yes	Yes; "expected"	Yes	Policy: CEO "generally" serves as Chair	Yes	6	No provision	Yes; the Board	Yes; applies to directors and executive officers
General Motors	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	No provision	Yes	Yes; the Board	No provision
Home Depot	Yes	Yes; "expected"	Not in CGG— (RE: Policy on Consideration and Evaluation of Board Candidates)	No provision	Yes	4	Yes	No provision	No provision
Humana	Yes	Yes; "should make every effort"	Yes	No policy: Board decides	Yes	6	Yes	Yes; the Board	No provision
IBM	Yes	No provision	Yes	No provision	Yes	Not specified: Chair decides	No provision	No provision	No provision

Table 3: Information in CGGs that is Required by SEC to be Included in Proxy Statements

Company Name	Includes Information on Board Committees?	Includes Policy on Director Attendance at S/H Meetings?	Addresses Diversity on Board?	States Policy on Separation of CEO/Chair?	Describes Role of LID?	Discloses Number of Required Board Meetings?	Discloses Process for Shareholder Communication with the Board?	Discloses Board's Role in Risk Oversight?	Discloses Anti-Hedging Policy?
Intel	Yes	Yes; "expected"	Yes	Policy: roles should be separate	N/A	"every other month"	Yes	Yes; the Board	No provision
Johnson & Johnson	Yes	No provision	Yes	No policy: Governance Committee decides	Yes	Not specified: "as frequently as necessary to properly discharge their responsibilities"	Yes	No provision	No provision
JPMorgan Chase	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	No provision	Yes	No provision; has Risk Policy Committee	Yes; applies to directors
Kroger	Yes	No provision	Yes	Policy: "best interests" to have unified structure	Yes	No provision	Yes	Yes; the Board	No provision
Lowe's	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	Not specified	No provision	No provision	No provision
Marathon Petroleum	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	No provision	Yes	Yes; the Board	No provision
McKesson	Yes	Yes; "expected"	Yes	No policy: Board decides [currently appropriate to separate positions]	If LID appointed, will be disclosed	5	Yes	No provision	No provision
MetLife	Yes	Yes; "expected"	No provision	No provision	Yes	Not specified	No provision	No provision; has Risk Committee	No provision
Microsoft	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	Quarterly	Yes	Yes; the Board	Yes; applies to directors and executive officers
PepsiCo	Yes	No provision	Yes	No policy: Board decides	Yes	Not specified	Yes	Yes; the Board	Yes; applies to directors and executive officers
Phillips 66	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	No provision	No provision	Yes; the Board	Yes; applies to directors and executive officers

Table 3: Information in CGGs that is Required by SEC to be Included in Proxy Statements

Company Name	Includes Information on Board Committees?	Includes Policy on Director Attendance at S/H Meetings?	Addresses Diversity on Board?	States Policy on Separation of CEO/Chair?	Describes Role of LID?	Discloses Number of Required Board Meetings?	Discloses Process for Shareholder Communication with the Board?	Discloses Board's Role in Risk Oversight?	Discloses Anti-Hedging Policy?
Procter & Gamble	Yes	No provision	Yes	No policy: Board decides	Yes	6	No provision	Yes; the Board	No provision
Prudential Financial	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	Not specified: "Vary with circumstances"	No provision	No provision; has a Risk Committee	No provision
Raytheon	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	6	Yes	Yes; the Board	No provision
Target	Yes	Yes; "expected"	Yes	No policy: Governance Committee decides	Yes	Not specified: "regular meetings"	No provision	No provision; has a Risk & Compliance Committee	No provision
United Parcel Service	Yes	Yes; "board policy" for directors to attend	Yes	No policy: Board decides	Yes	Not specified	No provision	No provision; has a Risk Committee	No provision
United Health Group	Yes	No provision	Yes	Policy: roles should be separate	Yes	4	Yes	Yes; the Board	No provision
Valero Energy	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	Not specified: "as frequently as necessary"	Yes	No provision	Yes; applies to directors and officers
Verizon Communications	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	No provision	Yes	No provision	No provision
Walgreens Boots Alliance	Yes	Yes; "expected"	Yes	No policy: Board decides	Yes	Quarterly	Yes	Yes; the Board	No provision
Walmart	Yes	No provision	Yes	Policy: roles should be separate	Yes	4	No provision	No provision	No provision
Walt Disney	Yes	Yes; director has duty to attend	Yes	Policy: roles should be separate	Yes	5	Yes	Yes; the Board	No provision
Wells Fargo	Yes	Yes; "expected"	Yes	Policy: bylaws require Independent Chair	N/A	No provision	No provision	Yes; the Board; also has a Risk Committee	Yes; applies to directors and "team members"

Table 4: Information in CGGs on the Board and Board Procedures

Company Name	Provides for Advance Distribution of Materials to Board?	Discloses Method of Setting Board Meeting Agenda?	Provision Regarding Confidentiality of Board Proceedings?	States Who Speaks on Behalf of the Corporation?	Sets Forth Size of Board?	Discloses Number of Executive Sessions?
Alphabet	Yes	No provision	Yes	No provision	Includes range	Yes
Amazon	No provision	Yes	No provision	No provision	No provision	"periodically"
Amerisource-Bergen	Yes	Yes	No provision	Management	Includes range	Yes
Anthem	Yes	Yes	No provision	No provision	Includes range	Yes
Apple	Yes	Yes	No provision	Management	No provision	Yes
AT&T	Yes	Yes	Yes	Management	Includes range	Yes
Bank of America	Yes	Yes	Yes	Senior Management	Includes range	Yes
Berkshire Hathaway	No provision	Yes	No provision	No provision	Yes	"regularly"
Boeing	Yes	Yes	Yes	Management	Includes range	Yes
Cardinal Health	Yes	Yes	No provision	No provision	Includes range	"regularly"
Centene	Yes	Yes	No provision	Management	Includes range	Yes
Chevron	No provision	Yes	Yes	No provision	Refers to by-laws	Yes
Cigna	No provision	Yes	No provision	Management	No provision	"regularly"
Citigroup	Yes	Yes	No provision	Senior management	Includes range	Yes
Comcast	Yes	Yes	No provision	Management	No provision	No provision
Costco Wholesale	Yes	Yes	No provision	Management	No provision	Yes
CVS Health	Yes	Yes	Yes	Management	Includes range	"regularly"
Dell Technologies	Yes	Yes	No provision	Management	Includes range	"regularly"
Exxon Mobil	Yes	Yes	Yes	CEO	Includes range	Yes
Facebook	No provision	Yes	Yes	Prohibits directors from speaking	Set by board resolution	Yes
FedEx	No provision	Yes	Yes	Management	Includes range	Yes
Ford Motor	No provision	Yes	No provision	No provision	Includes range	Yes
General Electric	Yes	Yes	No provision	No provision	Includes range	Yes
General Motors	Yes	Yes	Yes	Management	Refers to by-laws	Yes
Home Depot	Yes	Yes	Yes	No provision	Includes range	Yes
Humana	No provision	Yes	No provision	No provision	Includes range	"regularly"
IBM	Yes	Yes	No provision	Management	Includes range	"regularly"
Intel	Yes	Yes	Refers to Code of Conduct	Management	Includes range	Yes
Johnson & Johnson	Yes	Yes	No provision	No provision	Includes range	Yes
JPMorgan Chase	Yes	Yes	Yes	Management	Includes range	Yes
Kroger	No provision	Yes	No provision	CEO and management	Includes range	Yes
Lowe's	Yes	Yes	Yes	Management, specifically the CEO	Includes range	No provision

Table 4: Information in CGGs on the Board and Board Procedures

Company Name	Provides for Advance Distribution of Materials to Board?	Discloses Method of Setting Board Meeting Agenda?	Provision Regarding Confidentiality of Board Proceedings?	States Who Speaks on Behalf of the Corporation?	Sets Forth Size of Board?	Discloses Number of Executive Sessions?
Marathon Petroleum	No provision	Yes	No provision	Management	Includes range	"regularly"
McKesson	Yes	Yes	No provision	Management	Includes range	"regularly"
MetLife	Yes	Yes	No provision	No provision	No provision	Yes
Microsoft	Yes	Yes	Yes; refers to Code of Conduct	"The Company"	Includes range	Yes
PepsiCo	No provision	Yes	No provision	No provision	No provision	"regularly"
Phillips 66	Yes	Yes	No provision	Management	Includes range	Yes
Procter & Gamble	Yes	Yes	Yes	No provision	Includes range	Yes
Prudential Financial	Yes	Yes	Yes	No provision	Includes range	Yes
Raytheon	No provision	Yes	Yes	Management	Includes range	"periodically"
Target	Yes	Yes	Yes	Management	Includes range	Yes
United Parcel Service	Yes	Yes	No provision	Management	Includes range	Yes
United Health Group	Yes	Yes	Yes	Refers to "Board of Directors Communication Policy"	No provision	Yes
Valero Energy	Yes	Yes	No provision	No provision	Includes range	Yes
Verizon Communications	Yes	Yes	Yes	No provision	Board will "periodically assess"	Yes
Walgreens Boots Alliance	Yes	Yes	Yes	CEO and management	Includes range	Yes
Walmart	Yes	Yes	Yes	Management	Includes range	Yes
Walt Disney	Yes	Yes	Yes; refers to Code of Conduct	No provision	Includes range	"regularly"
Wells Fargo	Yes	Yes	No provision	Management	No provision	"regularly"

Table 5: Information in CGGs on Selected ESG Topics				
Company Name	Addresses Diversity (other than on Board of Directors)?	Includes a General Corporate Social Responsibility/Sustainability Provision?	Addresses Political Spending or Lobbying?	States That Board Is Responsible to Shareholders and/or Other Stakeholders?
Alphabet	No provision	No provision	No provision	Board should act in the “best interests of Alphabet and its stockholders.”
Amazon	No provision	No provision	No provision	Board “represents and is accountable only to shareowners. The Board’s primary purpose is to build long-term shareowner value.”
Amer-source-Bergen	No provision	Yes; Board responsible for “ensuring processes are in place for maintaining the integrity of the Company – the integrity of the financial statements, the integrity of compliance with law and ethics, the integrity of relationships with customers and suppliers, and the integrity of relationships with stakeholders.”	No provision	“The directors are elected by the stockholders to oversee management and to assure that the long-term interests of the stockholders are being served. Both the Board and management recognize that the long-term interests of stockholders are advanced by responsibly addressing the concerns of other stakeholders and interested parties, including employees, customers, suppliers, ABC communities, government officials and the public at large.”
Anthem	No provision	No provision	Yes; “The Board, through the Governance Committee, reviews, at least annually, the Company’s political and lobbying strategy, contributions and activities and oversees compliance with the Company’s policies and procedures regarding political and lobbying contributions and activities.”	Board should act in the best interests of the Company and its shareholders. “Within this framework, the Board also considers the interests of other constituents such as members, associates, business partners and the communities in which the Company operates.”
Apple	No provision	No provision	No provision	Board “assures that the long-term interests of the shareholders are being served.”
AT&T	No provision	Refers to “Public Policy and Corporate Reputation Committee”	No provision	Board should act “in the best interests of the Company.”
Bank of America	No provision	Refers to “Corporate Governance, ESG, and Sustainability Committee”	Yes; “The Corporate Governance Committee annually reviews the Company’s report on its charitable giving and political contribution programs.”	Board should act on behalf of the Company.
Berkshire Hathaway	No provision	No provision	No provision	“The basic responsibility of the directors is to exercise their business judgment to act in what they reasonably believe to be in the best interests of the Company and its shareholders.”
Boeing	No provision	No provision	No provision	Board should act in the best interests of the Company and its shareholders. “The Board and the officers recognize that the long-term interests of the Company and its shareholders are advanced when they take into account the concerns of employees, customers, suppliers and communities.”

Table 5: Information in CGGs on Selected ESG Topics

Company Name	Addresses Diversity (other than on Board of Directors)?	Includes a General Corporate Social Responsibility/Sustainability Provision?	Addresses Political Spending or Lobbying?	States That Board Is Responsible to Shareholders and/or Other Stakeholders?
Cardinal Health	No provision	No provision	Yes; The Board, through the Nominating and Governance Committee, oversees the Company's policies and practices regarding political expenditures including an annual review of the Company's political contributions policy and corporate political contributions and trade association dues and payments.	Board should act in the best interests of the shareholders and the Company.
Centene	Yes; Specific section on "Commitment to Diversity and Inclusion"	No provision	No provision	Board should act "in the best interests of the Company and its shareholders."
Chevron	No provision	Refers to "Public Policy Committee"	No provision	No provision
Cigna	No provision	No provision	No provision	No provision
Citigroup	No provision	Refers to "Nomination, Corporate Governance and Public Affairs Committee"	No provision	Board should act "for the benefit of its stockholders, and to consider the interests of its diverse constituencies around the world, including its customers, employees, suppliers and local communities."
Comcast	No provision	No provision	No provision	No provision
Costco Wholesale	No provision	No provision	No provision	No provision
CVS Health	Yes; Specific section on "Diversity": "The Board shall periodically review the Company's efforts to promote diversity in its workforce."	No provision	No provision	Board should act "in the best interests of the Company."
Dell Technologies	No provision	No provision	No provision	Board should promote interests of stockholders.
Exxon Mobil	No provision	No provision	Refers to "Public Issues and Contributions Committee"	"The directors' fiduciary duty is to exercise their business judgment in the best interests of [the] shareholders."
Facebook	No provision	No provision	No provision	Board should act "with a view to enhancing long-term value for Facebook stockholders."
FedEx	No provision	No provision	No provision	Board should act benefit of the Company and its shareholders.
Ford Motor	No provision	Refers to has a "Sustainability and Innovation Committee"	No provision	Board should "enhance long-term value of the Company for its shareholders."
General Electric	No provision	Refers to a "Governance and Public Affairs Committee"	No provision	Board should act "to enhance the long-term value of the Company for its shareholders."; "Both the board of directors and management recognize that the long-term interests of shareholders are advanced by responsibly addressing the concerns of other stakeholders and interested parties including employees, recruits, customers, suppliers, GE communities, government officials and the public at large."

Table 5: Information in CGGs on Selected ESG Topics				
Company Name	Addresses Diversity (other than on Board of Directors)?	Includes a General Corporate Social Responsibility/Sustainability Provision?	Addresses Political Spending or Lobbying?	States That Board Is Responsible to Shareholders and/or Other Stakeholders?
General Motors	No provision	No provision	No provision	"The core responsibility of the directors is to exercise their business judgment to act in what they reasonably believe to be in the best interests of the Company and its shareholders."; "The Board recognizes that shareholders' long-term interests will be advanced by responsibly addressing the concerns of other stakeholders essential to the Company's success, including customers, employees, dealers, suppliers, government officials and the public at large."
Home Depot	No provision	No provision	No provision	Board should act in the best interest of the Company and its shareholders.
Humana	No provision	No provision	No provision	Board should act in the "best interests of Humana and its stockholders"; "ensuring processes are in place for maintaining the integrity of the Company; the integrity of the financial statements, the integrity of compliance with law and ethics, the integrity of relationships with customers and suppliers, and the integrity of relationships with other stakeholders."
IBM	No provision	No provision	No provision	No provision
Intel	Compensation Committee is responsible for initiatives and programs for "diversity and inclusion"	No provision	No provision	No provision
Johnson & Johnson	No provision	Refers to "Technology & Sustainability Committee"	No provision	"The fundamental responsibility of the Directors is to exercise their business judgment on matters of critical and long-term significance to the Company in furtherance of what they reasonably believe to be in the best interest of the Company, and therefore its shareholders."
JPMorgan Chase	No provision	Refers to "Public Responsibility Committee"	No provision	No provision
Kroger	Public Responsibilities Committee—"supplier Diversity"	Refers to "Public Responsibilities Committee"	Refers to "Public Responsibilities Committee"	The board should act in the best interests of the Company and shareholders.
Lowe's	No provision	No provision	No provision	No provision
Marathon Petroleum	No provision	Refers to "Sustainability Committee"	No provision	The board should act "for the benefit of stockholders."
McKesson	Yes; specific section "Corporate Social Responsibility and Compliance Oversight"; "The Board . . . shall periodically review . . . practices, including . . . diversity and inclusion."	Yes; "The Board and/or its committees shall periodically review the Company's corporate social responsibility practices, including environmental sustainability, pay equity and diversity and inclusion."	No provision	"The members of the Board are elected by the stockholders to oversee management for the benefit of the long-term interests of the stockholders of the Company."; "The Board's goal is to build long-term value for the Company's stockholders and to assure the vitality of the Company for its customers, employees and the other individuals and organizations that depend on the Company."

Table 5: Information in CGGs on Selected ESG Topics				
Company Name	Addresses Diversity (other than on Board of Directors)?	Includes a General Corporate Social Responsibility/Sustainability Provision?	Addresses Political Spending or Lobbying?	States That Board Is Responsible to Shareholders and/or Other Stakeholders?
MetLife	No provision	No provision	No provision	"Directors apply their business judgment to assure that the Company's executive officers manage in the best long-term interests of the Company and its shareholders."
Microsoft	No provision	Refers to "Regulatory and Public Policy Committee"	No provision	Board should act in the best interests of the shareholders; the Board "recognizes that the long-term interests of shareholders are advanced by responsibly addressing the concerns of other stakeholders including employees, customers, suppliers, government, and the public."
PepsiCo	No provision	Refers to "Public Policy and Sustainability Committees"	No provision	Board should act in the best interests of shareholders.
Phillips 66	No provision	Refers to "Public Policy Committee"	No provision	Board should act in the best interests of the Company and shareholders.
Procter & Gamble	No provision	Refers to "Governance & Public Responsibility Committee"	No provision	Board should act in the best interests of shareholders.
Prudential Financial	No provision	No provision	No provision	"The Prudential board believes that the primary responsibility of directors is to oversee the affairs of the corporation for the benefit of the corporation's stakeholders, including shareholders, employees, customers and society, while day-to-day operation of the corporation is the responsibility of management. Consistent with the Corporation's multi-stakeholder framework, the board believes that directors should be accountable to shareholders, employees, suppliers, customers and society in evaluating the affairs of the corporation, aligned with the Corporation's purpose statement to solve the financial challenges of our changing world for all stakeholders, while creating sustainable longterm shareholder value."
Raytheon	No provision	Refers to "Public Policy and Corporate Responsibility Committee"	No provision	Board should act in the best interests of Company and its shareholders; "The directors recognize that the long-term interests of the stockholders are advanced by responsibly addressing the concerns of other stakeholders and interested parties including employees, customers, suppliers, government officials and the public at large."
Target	No provision	No provision	No provision	No provision
United Parcel Service	No provision	No provision	No provision	No provision
United Health Group	No provision	Refers to "Public Policy Strategies and Responsibilities Committee"	No provision	"Both the Board and management recognize that the long-term interests for shareholders may be advanced by responsibly addressing the concerns of other stakeholders and interested parties including employees, customers, suppliers, communities, government officials and the public at large."

Table 5: Information in CGGs on Selected ESG Topics				
Company Name	Addresses Diversity (other than on Board of Directors)?	Includes a General Corporate Social Responsibility/Sustainability Provision?	Addresses Political Spending or Lobbying?	States That Board Is Responsible to Shareholders and/or Other Stakeholders?
Valero Energy	No provision	Refers to "Nominating/Governance and Public Policy Committee"	No provision	Board should act in the best interests of the Company.
Verizon Communications	No provision	"Directors should act fairly in any dealings with the Corporation's stakeholders, including customers, suppliers, competitors, employees and shareholders."	No provision	No provision
Walgreens Boots Alliance	No provision	No provision	No provision	Board is responsible for "enhancing long term value of the Company."
Walmart	Yes; "management will report to Board regarding . . . [management] diversity initiatives"	Yes; Board must show "its awareness that the Company's long-term success depends upon its strong relationship with its customers, associates, suppliers and the communities, including the global community, in which it operates."	No provision	"The basic responsibility of the directors is to exercise their business judgment to act in what they reasonably believe to be in the best interests of the shareholders and the Company."
Walt Disney	Yes; "management shall report annually on its diversity efforts and the results thereof"	Yes; "The Company has a responsibility to the communities in which it operates, as well as to its shareholders. To allow appropriate Board review and input, management shall prepare and present to the Board a periodic review of the policies, practices and contributions made in fulfillment of the Company's social responsibilities. In addition, management shall report annually on its diversity efforts and the results thereof."	No provision	"The responsibility of the Board of Directors is to supervise and direct the management of the Company in the interest and for the benefit of the Company's shareholders."
Wells Fargo	No provision	Has "Corporate Responsibility Committee"	No provision	No provision; states that its Investor Outreach Program "reflects the Board's commitment that its corporate governance policies and practices continue to evolve and reflect the insights and perspectives of the Company's many stakeholders."

Company Name	Discloses One Share One Vote Policy?	Discloses Vote Required for Board Elections?	Discloses Whether Entire Board is Elected Annually?	Discloses Whether Shareholders Can Call Special Meeting?	Discloses Whether Shareholders Can Act by Written Consent?	Discloses Whether Shareholders Have Access to the Company's Proxy?	Discloses Confidential Shareholder Voting Policy?	Discloses Board Policy Regarding Shareholder Proposals Receiving Majority Approval?
Alphabet	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Amazon	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
AmerisourceBergen	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision
Anthem	No provision	Yes; Majority Voting	Classified board	No provision	No provision	No provision	No provision	No provision
Apple	No provision	No provision	Yes	No provision	No provision	No provision	No provision	No provision
AT&T	No provision	No provision	Yes	No provision	No provision	No provision	No provision	No provision
Bank of America	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Berkshire Hathaway	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Boeing	No provision	No provision	Yes	No provision	No provision	No provision	No provision	No provision
Cardinal Health	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Centene	No provision	Yes; Majority Voting	Classified board	No provision	No provision	No provision	No provision	No provision
Chevron	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	Yes	Yes
Citigroup	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	Yes	No provision
Cigna	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Comcast	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Costco Wholesale	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
CVS Health	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	Yes	No provision
Dell Technologies	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Exxon Mobil	Yes	Yes; Majority Voting	Yes	Yes	Yes	Yes	Yes	Yes
Facebook	No provision	No provision	Yes	No provision	No provision	No provision	No provision	No provision
FedEx	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	Yes	No provision
Ford Motor	No provision	No provision	Yes	No provision	No provision	No provision	No provision	No provision
General Electric	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision
General Motors	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision

Table 6: Information in CGGs on Shareholder Rights								
Company Name	Discloses One Share One Vote Policy?	Discloses Vote Required for Board Elections?	Discloses Whether Entire Board is Elected Annually?	Discloses Whether Shareholders Can Call Special Meeting?	Discloses Whether Shareholders Can Act by Written Consent?	Discloses Whether Shareholders Have Access to the Company's Proxy?	Discloses Confidential Shareholder Voting Policy?	Discloses Board Policy Regarding Shareholder Proposals Receiving Majority Approval?
Home Depot	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision
Humana	No provision	No; refers to "Majority Vote" policy	No provision	No provision	No provision	No provision	No provision	No provision
IBM	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Intel	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Johnson & Johnson	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision
JPMorgan Chase	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	Yes	No provision
Kroger	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Lowe's	No provision	No provision	No provision	No provision	No provision	Yes	No provision	No provision
Marathon Petroleum	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
McKesson	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
MetLife	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Microsoft	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision
PepsiCo	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision
Phillips 66	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Procter & Gamble	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Prudential Financial	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Raytheon	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	No provision
Target	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
United Parcel Service	No provision	Yes; Majority Voting	Yes	No provision	No provision	No provision	No provision	No provision
United Health Group	Yes	Yes; Majority Voting	Yes	No provision	No provision	No provision	Yes	No provision
Valero Energy	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Verizon Communications	No provision	No provision	No provision	No provision	No provision	No provision	No provision	No provision
Walgreens Boots Alliance	No provision	Yes; Majority Voting	No provision	No provision	No provision	No provision	No provision	Yes

