Shadow Governance

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Corporations have something to say about some of the most important social and economic issues of our time—and one way they say it is through shadow governance. This Article spotlights a group of influential corporate policies comprising what we call "shadow governance." These non-charter, non-bylaw governance documents express a corporation's commitment to and process on issues as wide-ranging as campaign finance, environmental sustainability, and sexual harassment, but are largely overlooked by scholars and practitioners alike. This Article addresses that gap, revealing how shadow governance documents influence corporate decision-making and corporate behavior.

This Article makes two contributions to the literature. First, it presents a descriptive account of the scope of shadow governance in the modern U.S. corporation. It analyzes a hand-collected dataset of shadow governance documents from companies listed in the Standard & Poor's 1500 (S&P 1500) to show the array of and variation in shadow governance documents. Second, this Article uses original interviews with directors and general counsels to show how shadow governance documents influence corporate decision-making. Among other things, these documents set the board's annual agenda, define the metes and bounds of boards' and committees' responsibilities, and memorialize the corporation's values. These are all exceptionally

DOI: https://doi.org/10.15779/Z385D8NF8J.

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** Professor of Law, University of Virginia School of Law. We are grateful for helpful comments and conversations with Afra Afsharipour, Jared Ellias, Jill Fisch, Brian Galle, Tom Haley, Rob Jackson, Matthew Jennejohn, Kobi Kastiel, Jeremy McClane, Hillary Sale, Steven Davidoff Solomon, Eric Talley and the participants at the 2019 American Law and Economics Association Annual Meeting, the 2019 Conference on Empirical Legal Studies, the 2019 Association of American Law Schools Annual Meeting, the 2019 National Business Law Scholars Conference, the 2019 Corporate and Securities Litigation Workshop, the Rethinking the Shareholder Franchise Conference at the University of Wisconsin Law School, the BYU 2019 Winter Deals Conference, the UC Davis Faculty Workshop, and the UC Hastings Workshop on Law, Business and Economics. Thanks also to our excellent research assistants, Katie Gresham, Rebecca Hart, James Kardatzke, Christopher Larmour Kardatzke, Gabrielle Kiefer, Ally Nelson, and Madison Roemer.

important corporate functions that are relegated to shadow governance documents, where shareholders and other corporate outsiders have little ability to effect change.

This Article's exploration of shadow governance documents is both theoretically and practically important. Shadow governance documents are not just poorly understood—they are also largely overlooked by scholars and practitioners. This Article's account has the potential to open a new field for scholarly research and to provide new strategies for those who wish to influence corporate behavior.

INTRODUCTION

Three years after its involvement in the landmark U.S. Supreme Court case that recognized a for-profit corporation's claim of religious belief,[1] arts-and-crafts retailer Hobby Lobby made the news again. This time, the United States sued Hobby Lobby in a federal court in the Eastern District of New York, alleging that Hobby Lobby smuggled thousands of ancient artifacts into the United States.[2] As part of its settlement with the U.S. government, Hobby Lobby agreed to return the artifacts, pay a fine, and "adopt internal policies to better govern its importation of cultural items . . . ."[3]

A quick search of company websites shows that internal policies covering a breadth of governance functions, from importation policies like Hobby Lobby's to CEO succession-planning policies, are common. Moreover, companies' disclosure of these policies is both voluminous and detailed.[4] But what is the point of these policies? Do they influence corporate behavior, and, if so, how? Both the scholarly literature and practitioners' literature is surprisingly thin on information about these non-charter, non-bylaw governance documents. This Article seeks to address this gap and spotlight how these "shadow governance documents" set the corporate agenda and steer decision-making. In doing so, this Article also unveils a new area for corporate research and action. For generations, scholars and practitioners alike have focused on charters and bylaws as the primary tools used to influence corporate behavior.[5] This Article shows that shadow governance, too, is a powerful avenue for influence.

A corporation comes into existence with the filing of a charter: the corporation's birth certificate.[6] This document outlines the most basic

1. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689–91 (2014) (holding that corporate persons had protected rights to freedom of religion under the First Amendment and Religious Freedom Restoration Act of 1993, and the U.S. Department of Health and Human Services requirement on corporations to provide health insurance coverage for contraception violated the religious beliefs of Hobby Lobby's owners).

2. Complaint at 8–9, United States v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets, No. 17-3980 (E.D.N.Y. July 5, 2017).

3. Alan Feuer, *Hobby Lobby Agrees to Forfeit 5,500 Artifacts Smuggled Out of Iraq*, N.Y. TIMES (July 5, 2017), https://www.nytimes.com/2017/07/05/nyregion/hobby-lobby-artifacts-smuggle-iraq.html [https://perma.cc/6ZL8-DMF5] (reporting on Hobby Lobby's asset forfeiture case and its settlement with the U.S. government, which included the adoption of internal policies).

4. Appendix A provides a detailed list of the types of shadow governance documents that companies adopt, and the frequency with which companies adopt them. However, even a brief review of company websites provides plentiful examples. *See, e.g.*, *Export and Import Policies*, MONSANTO, https://monsanto.com/company/governance/export-import-policies/ [http://perma.cc/KYM8-LTUE] (describing Monsanto's policies regarding export and import); *Political Engagement Policy in the United States*, COCA COLA CO., https://www.coca-colacompany.com/policies-and-practices/political-engagement-in-the-united-states [https://perma.cc/MX36-GGAY] (describing Coca Cola's policy regarding political contributions, lobbying, public policy alignment, and legal compliance and management oversight).

5. *See infra* Part I.A (providing an overview of bylaws and charters).

6. Sometimes called the articles of incorporation or certificate of incorporation, a charter is the legal document that establishes the corporation within the state of incorporation, thereby choosing the

information about the corporation, including its name and state of incorporation. After the charter is filed, corporate leadership drafts and adopts the corporation's bylaws—an internal document that provides more details about how a corporation is run.[7] This document might describe how many committees the board of directors has and may outline general committee responsibilities.[8]

If these details sound sparse, it is because they are. Together, the charter and bylaws of Facebook, a company worth over half a trillion dollars,[9] run a mere twenty-four pages.[10] These twenty-four pages provide very few details about how to run the world's largest social media conglomerate, and they say next to nothing about how the company makes decisions, what principles guide those decisions, and what values the company espouses. Instead, those details can be found in Facebook's six shadow governance documents, which are disclosed on the company's website, and concern issues as wide-ranging as the process for dealing with conflicts of interest and corporate opportunities and the company's policies on sexual harassment, and as granular as retirement ages for board directors.[11] And Facebook is by no means special—shadow governance is present in other companies, perhaps even more extensively. McDonald's, for instance, discloses twenty shadow governance documents,[12]and the average large company discloses more than ten.[13]

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laws that will govern the corporation. A charter generally must contain the name of the corporation, the address of the corporation's office, the nature of the corporation's business, the corporation's stock authorization and par value, and the names and addresses of the incorporator or incorporators. *See* DEL. CODE ANN. tit. 8, § 102 (West 2015).

7. For a discussion of corporate bylaws, see DEL. CODE ANN. tit. 8, § 109(b) (West 2015) and MODEL BUS. CORP. ACT § 2.06(b) (AM. BAR ASS'N 2016) (both discussing the substance of bylaws, as well as the process of adopting and amending bylaws).

8. *See* DEL. CODE ANN. tit. 8, § 109(b) (West 2015); MODEL BUS. CORP. ACT § 2.06(b) (AM. BAR ASS'N 2016).

9. As of May 22, 2020, the market capitalization of Facebook was $669.28 billion. *See Facebook Market Cap 2009–2020 (FB)*, MACROTRENDS (2020), https://www.macrotrends.net/stocks/charts/FB/facebook/market-cap [https://perma.cc/DH7P-Q5D6].

10. *See* Facebook's Restated Certificate of Incorporation (May 22, 2012), https://s21.q4cdn.com/399680738/files/doc_downloads/governance_documents/FB_CertificateOfIncorporation.pdf [https://perma.cc/XHA3-HPS2]; Facebook's Amended and Restated Bylaws (April 21, 2012), https://s21.q4cdn.com/399680738/files/doc_downloads/governance_documents/FB_Bylaws.pdf [https://perma.cc/R2YT-WXL4].

11. Companies disclose many of their shadow governance documents on investor relation sections of their websites. *See, e.g.*, *Investor Relations*, FACEBOOK, https://investor.fb.com/home/default.aspx [https://perma.cc/22WP-T4CA].

12. *McDonald's Corporation Corporate Governance Principles*, MCDONALD'S (May 23, 2019), https://corporate.mcdonalds.com/content/dam/gwscorp/corporate-governance-content/governance-principles-policies-and-guidelines/CORPORATE_GOVERNANCE_PRINCIPLES_2019.pdf [https://perma.cc/DN4R-4TXH] [hereinafter McDonald's Governance Principles 2019].

13. *See infra* Appendix B (noting that companies in the top quartile by market capitalization disclose an average of 10.95 documents, while the bottom quartile disclose an average of 8.4 documents).

Despite its prevalence, relatively little is known about shadow governance. Instead, most major debates about corporate governance, and the long-standing push and pull between management, shareholders, and regulators, have been fought on charter and bylaw grounds.[14]

Managers, for instance, use charters and bylaws to maintain their power and insulate themselves from outside influence, as well as to advance the corporate interest.[15] In the mergers and acquisitions context, managers amended charters—introducing staggered boards and the dramatically named poison pill—to fend off hostile takeovers.[16] To help corporations reduce their tax liabilities, lawyers devised a way for corporations to reincorporate into tax-

14. Among the recent high-profile fights are the issues of dual class shares, passive investors voting rights, and proxy access. For a discussion of the agency costs generated by dual-class structures with small-minority controllers, see Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019); Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 137–38 (1987) (claiming that dual-class stock facilitates long-term planning); Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 565–67 (2016) (arguing that it could be value enhancing to provide a talented founder with a lock on control, as it enables that founder to freely implement her strategy and utilize her skills to produce superior returns). For a discussion of passive investors, see Lucian A. Bebchuk et al., *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89 (2017); Jill E. Fisch et al., *The New Titans of Wall Street: A Theoretical Framework for Passive Investors* (European Corp. Governance Inst., Law Working Paper No. 414/2018, 2019) (reviewing the competing views). For a discussion of the proxy access debate, see Am. Fed'n of State Cty. Mun. Emps. v. Am. Int'l Grp., 462 F.3d 121 (2d Cir. 2006); Bo Becker et al., *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable's Challenge*, 56 J.L. & ECON. 127 (2013); Stephen T. Giove et al., *Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 19, 2018), https://corpgov.law.harvard.edu/2018/10/19/proxy-access-proposals-2/ [https://perma.cc/PFY2-77DP].

15. *See generally* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007) [hereinafter Bebchuk, *Shareholder Franchise*] (discussing the uneven playing field in director elections and the power of management in controlling it); Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409 (2005) [hereinafter Bebchuk & Cohen, *The Costs*] (discussing how boards insulate themselves from shareholders and the associated costs); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) (advocating for more shareholder access to the election system of directors); Lucian Arye Bebchuk, *The Case for Shareholder Access: A Response to the Business Roundtable*, 55 CASE W. RES. L. REV. 557 (2005) (supporting increased shareholder access to corporate elections); Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003). *But see, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012) (discussing how shareholder primacy theory is harmful); Stephen M. Bainbridge, Responses, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1744–51 (2006); William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 653–54, 657–59 (2010) (discussing problems created by increase in shareholder power and rise of short-term investors).

16. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011); Carmody v. Toll Bros., 723 A.2d 1180 (Del. Ch. 1998); Yakov Amihud et al., *Settling the Staggered Board Debate*, 166 U. PA. L. REV. 1475 (2018) (addressing the debate over the efficacy of staggered boards and ultimately determining that the effect of staggered boards is firm dependent); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549 (2014) (questioning the role of state law in authorizing poison pills).

advantageous jurisdictions.[17] And more recently, to fend off multi-jurisdiction shareholder suits, most large companies have adopted bylaw provisions limiting the jurisdictions in which shareholders can sue them.[18]

Corporate outsiders have focused their efforts on charters and bylaws when trying to influence change. Major players, including hedge fund activists,[19] proxy

17. *See* Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807 (2015) (discussing the process by which corporations reincorporate outside of United States jurisdictions to reduce their corporate tax rates); Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649 (2015) (discussing the effect of corporate inversions on the United States' traditional advantage as a global regulatory competitor).

18. Several years ago, for instance, Chevron adopted a "forum selection clause" in its bylaws, stating that all shareholder suits would need to be filed in Delaware unless Chevron consented to alternate jurisdiction. At the time, shareholders often filed similar suits in multiple jurisdictions, which increased defense costs for corporations. Chevron's amendment caused a storm of controversy among practitioners and scholars alike. Shortly after the Delaware Supreme Court found the amendment valid, however, the majority of U.S. public companies adopted forum selection bylaws, thereby dramatically reducing the number of shareholder suits filed. *See* Chevron Corp., Current Report (Form 8-K), at 2 (Sept. 29, 2010) [hereinafter Chevron's Form 8-K] ("[U]nless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. The amendment further provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the foregoing provision."); *see also* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 631 (2018) (documenting the dramatic decrease in number of merger-related lawsuits after the widespread adoption of forum selection bylaws); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012) (documenting the increase in forum selection clauses); Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts,"* 93 WASH. L. REV. 265 (2018) (analyzing the emerging use of forum selection clauses and critiquing their treatment under contract law).

19. Hedge funds are activist investors who accumulate large but non-controlling stakes in target companies in order to bring about change in the company's strategic, operational, or financial activity, often while threatening to nominate their representatives to the board. For a detailed definition, see Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1734–36 (2008); Bebchuk, *Shareholder Franchise*, *supra* note 15 (discussing impediments to replacing boards even when shareholder dissatisfaction is high); Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1087 (2015) [hereinafter Bebchuk, *Hedge Fund Activism*] (highlighting the recent increase in shareholder activism and creating a debate as to whether such activism is more beneficial or harmful); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1024 (2007) (noting how hedge funds have become critical players in corporate governance and control).

advisory firms,[20] and institutional investors,[21] have tried to change corporate structures almost exclusively through charter modifications that promote what they believe to be better governance.[22]

Undeniably, charters and bylaws are important avenues for change. Left unseen, however, is the role that shadow governance plays in shaping corporate behavior and influencing corporate change. A few shareholders and proxy advisors have begun to recognize the reality that key social and governance issues are decided outside the sphere of charters and bylaws, and to push companies to adopt certain shadow governance documents[23] or shine a light on certain corners of their shadow governance.[24]

Nonbinding shareholder proposals have been one such instrument for change. In 2016, for example, a group of nuns bought shares of rifle makers Sturm Ruger & Co. and American Outdoor Brands and filed shareholder proposals asking those companies to research the production of safer guns.[25] Groups have also used shareholder proposals (and the ensuing settlements) to

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20. Proxy advisory firms are paramount in influencing shareholder votes. *See* Ike Brannon & Jared Whitley, *Corporate Governance Oversight and Proxy Advisory Firms*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 17, 2018), https://corpgov.law.harvard.edu/2018/09/17/corporate-governance-oversight-and-proxy-advisory-firms/ [https://perma.cc/MEP4-YF9F] (discussing the importance of proxy advisors). Institutional Shareholder Services Inc. (ISS) and Glass Lewis are the two largest and most influential proxy advisory firms. For a review of the literature, see Stephen Choi et al., *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869 (2010) (measuring the influence of proxy advisors on shareholder votes); Asaf Eckstein & Sharon Hannes, *A Long/Short Incentive Scheme for Proxy Advisory Firms*, 53 WAKE FOREST L. REV. 787, 793–98 (2018) (describing the increasing power of proxy advisors).

21. The increasing involvement of activist hedge funds and the emergence of proxy advisory firms have also stimulated the activism conducted by the traditional institutions, leading to an overall increase in the number of shareholders willing to take on an active role in the governance of the corporation. *See* Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315 (2008) (documenting the developing role of public pension funds); David Gelles & Michael J. de la Merced, *New Alliances in Battle for Corporate Control*, N.Y. TIMES (Mar. 18, 2014), http://dealbook.nytimes.com/2014/03/18/new-alliances-in-battle-for-corporate-control/?_php=true&_type=blogs&_r=0 [https://perma.cc/QA6Y-LGQ7]; Matteo Tonello, *Global Trends in Board-Shareholder Engagement*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 25, 2013), http://blogs.law.harvard.edu/corpgov/2013/10/25/global-trends-in-board-shareholder-engagement/ [https://perma.cc/RJ9C-E6NV].

22. Harvard Law School's Shareholder Rights Project is one such project. Through this law school clinic, students and professors worked to influence corporate governance at public companies, by declassifying corporate boards. *See* Shareholder Rights Project, HARV. L. SCH., https://hls.harvard.edu/academics/curriculum/catalog/index.html?o=64841 [https://perma.cc/D52M-6EE9].

23. *See* Giove et. al, *supra* note 14 (discussing proxy access proposals).

24. *See, e.g.*, Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262 (2016) (showing that many corporate disclosures about campaign finance are made as the result of negotiated private settlements with shareholders).

25. Liz Moyer, *Activist Nuns See Momentum Building for Their Fight Against Gun Makers After Florida School Shooting*, CNBC (Feb. 28, 2018), https://www.cnbc.com/2018/02/28/activist-nuns-see-momentum-building-for-their-fight-against-gun-makers.html [https://perma.cc/AU38-2A9U].

motivate greater disclosures about corporate campaign spending.[26] In 2013, for instance, shareholders of oil and gas giant Hess Corporation (Hess) advanced a proposal that would require Hess to provide semiannual reporting on all corporate funds and assets used for political spending.[27] When the proposal failed, shareholders tried again in 2014—and this time, Hess decided to voluntarily disclose this information.[28]

Shadow governance matters. Viewing the corporate tug-of-war between management and shareholders solely through the lens of charter and bylaw provisions is useful, but is also too simplistic a view of the corporation. Corporate governance covers a much broader ecosystem: it includes many policies, practices, and documents beyond charters and bylaws. Moreover, unlike the charters and bylaws—where shareholders hold formal powers in the shaping of the governance arrangements[29]—shadow governance documents are controlled by management alone, with no formal power afforded to shareholders.[30] An understanding of the existence and scope of shadow

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26. Haan, *supra* note 24.

27. Hess Corp., Proxy Statement, at 83 (Schedule 14A) (March 21, 2013) ("Resolved, that the shareholders of Hess Corporation ("Hess" or "Company") hereby request that the Company provide a report, updated semiannually, disclosing the Company's: 1. Policies and procedures for making, with corporate funds or assets, contributions and expenditures (direct or indirect) to (a) participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, or (b) influence the general public, or any segment thereof, with respect to an election or referendum. 2. Monetary and non-monetary contributions and expenditures (direct and indirect) used in the manner described in section 1 above, including: a. The identity of the recipient as well as the amount paid to each; and b. The title(s) of the person(s) in the Company responsible for decision-making.").

28. *See Political Disclosure and Accountability—Hess Corporation (2014)*, TRILLIUM ASSET MGMT., http://www.trilliuminvest.com/shareholder-proposal/political-disclosure-and-accountability-hess-corporation-2014/ [https://perma.cc/G8UC-9EJE]. Hess shareholders have also submitted repeated proposals sponsored by As You Sow requesting that Hess conduct a carbon asset report regarding the "company's goals and plans to address global concerns regarding fossil fuels and their contribution to climate change." Hess Corp., Proxy Statement (Schedule 14A), at 59 (Mar. 27, 2014); 2017 Proxy Memo, *Hess Shareholder Resolution Report on Carbon Asset Risk*, AS YOU SOW (2017), https://archive.asyousow.org/wp-content/uploads/2017/04/Hess-Proxy-Memo-2017-Carbon-Asset-Risk.pdf [https://perma.cc/32TW-XXYC]; 2016 Proxy Memo, *Hess Shareholder Resolution Report on Carbon Asset Risk*, AS YOU SOW (2016), https://static1.squarespace.com/static/59a706d4f5e2319b70240ef9/t/5a67d1bae4966b18b684b4ec/1516753339499/Hess-Proxy-Memo-2016.pdf [https://perma.cc/XF98-LKS8]. Though none of these resolutions have passed, they received increasing support between 2014 and 2017. Shareholder Resolutions Filed by As You Sow, https://archive.asyousow.org/our-work/current-resolutions/?program=&ays_year=&initiative=&company=hess&keyword= [https://perma.cc/75YX-R2C8].

29. DEL. CODE ANN. tit. 8, § 242(b)(1) (West 2014) (providing for a shareholder vote on amendments to the charter); *id.* § 109(a) (West 2015) (providing that shareholders have the right to "adopt, amend or repeal bylaws").

30. *See* WEIL, GOTSHAL & MANGES LLP PUBLIC CO. ADVISORY GROUP, REQUIREMENTS FOR PUBLIC COMPANY BOARDS, 17 (2015), https://www.weil.com/~/media/files/pdfs/150154_pcag_board_requirements_chart_2015_v21.pdf [https://perma.cc/9M2J-DRM3] (discussing the requirement for public companies regarding their corporate governance practices); PATRICK SCHULTHEIS & JEANA KIM, WILSON SONSINI GOODRICH & ROSATI, CORPORATE GOVERNANCE REQUIREMENTS 3 (2017),

governance documents is therefore a crucial first step toward developing better, more complete theories of governance and of the relationship between managers and shareholders. It also carries important practical considerations for shareholders and management alike.

This Article proceeds as follows. Part I provides a rich and textured overview—the literature's first—on shadow governance. To do so, this Article uses hand-collected data from website disclosures made by 1,500 major, publicly traded American companies.[31] This data shows the breadth and depth of shadow governance. Shadow governance documents cover a breathtakingly diverse range of issues, from core governance issues, like succession planning, to quirky ones, like policies governing luxury expenditures. Part II fleshes out this empirical data with interviews with general counsels and board members. In particular, Part II asks whether these voluminous policies actually do anything—and it shows that they do. In fact, directors and general counsels take shadow governance documents seriously: these documents set board procedures and the boundaries of acceptable behavior, and are used as cure-alls for corporate goals ranging from shareholder settlements to marketing. At the same time, however, directors and general counsels can be surprisingly ad hoc when adopting and modifying these documents, and shareholders have exceptionally little input into what these documents say and how they are used. Part III discusses theoretical and practical implications. Theoretically, this Article represents the first comprehensive foray into a mostly ignored, but incredibly important, aspect of the corporate governance literature. It opens the door to a new and exciting line of scholarly inquiry, including future inquiries about other sources of shadow governance influence beyond the scope of the documents discussed here. Practically, it illuminates a new strategy of influence for corporate managers and outsiders, who often stand on opposite ends of corporate governance.

I.
SHADOW GOVERNANCE DOCUMENTS

Put simply, a shadow governance document is any non-charter, non-bylaw document that speaks to issues of corporate governance. This definition intentionally casts a wide net. Others have written about discrete elements of

https://www.wsgr.com/PDFs/corporate-governance.pdf [https://perma.cc/TE58-FMMX] (discussing the kinds of board obligations and required documents that nonetheless indicate no need for shareholder input).

31. This Article gathers data from companies listed in Standard & Poor's 1500 list (the S&P 1500). The S&P U.S. Indices are a family of equity indices designed to measure the market performance of U.S. stocks trading on U.S. exchanges. The family is composed of a wide range of indices based on size, sector, and style. The indices are weighted by float-adjusted market capitalization and require unadjusted company market capitalization of U.S. $6.1 billion or more for the S&P 500, $1.6 billion to $6.8 billion for the S&P MidCap 400, and $450 million to $2.1 billion for the S&P SmallCap 600. Together these three indices comprise the S&P 1500. *See S&P Composite 1500*, S&P DOW JONES INDICES, https://us.spindices.com/indices/equity/sp-composite-1500 [https://perma.cc/W24E-WGZ4].

shadow governance, including campaign finance disclosures and policies adopted as part of litigation settlements in shareholder suits.[32] To date, however, there has been no study that attempts to understand the broad sweep of these documents. This Article is a first foray into this widely overlooked area of governance.

Casting such a wide net is important. Shadow governance documents can influence the way management and corporations behave, but shareholders have little say, systematically, in the content of these documents and even less ability to enforce them. A core problem—if not *the* core problem—of the corporate form is the agency problem: that is, shareholders own the corporation, but delegate day-to-day running of their corporation to hired mangers.[33] Statutes,[34] regulations,[35] state laws,[36] shareholder activism,[37] and an enormous scholarly

32. Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1815–16 (2010) (discussing corporate governance policies adopted by corporations as part of settlements in shareholder litigations, and calling such settlements a new type of shareholder activism); Haan, *supra* note 24.

33. In their book *The Modern Corporation and Private Property*—widely regarded as the catalyst for the entire modern literature on corporate law and governance—Adolf Berle and Gardiner Means identified the separation of ownership and control as the primary problem facing corporations. The tension between shareholder and management interests is called the agency (or principal-agent) problem, and is understood as one of corporate law's most important issues. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY 3–118 (1991).

34. *See, e.g.*, Sarbanes-Oxley Act (SOX) of 2002, 15 U.S.C. §§ 7201–02. (West 2016). SOX mandated the creation of an audit committee of the board, which that has greater powers and many more responsibilities than ever before, such as working with external auditors of internal controls. More recently, the Dodd-Frank Act also addressed several governance aspects. *See* Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 12 U.S.C.) (July 21, 2010). For a review of the main provisions of the Dodd-Frank Act, see H. COMM. ON FIN. SERVS., BRIEF SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, https://www.dpc.senate.gov/pdf/wall_street_reform_summary.pdf [https://perma.cc/4TSF-9GQ5]. For a critical review of the Act, see, for example, Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 Minn. L. Rev. 1779 (2011); Hillary A. Sale, *Public Governance,* 81 GEO. WASH. L. REV. 1012 (describing the emerging role of "public governance" in the corporate governance landscape).

35. *See* ZABIHOLLAH REZAEE, CORPORATE GOVERNANCE POST–SARBANES-OXLEY: REGULATIONS, REQUIREMENTS, AND INTEGRATED PROCESSES (2007) (detailing the role of SEC regulations in improving corporate governance); David F. Larcker et al., *The Market Reaction to Corporate Governance Regulation,* 101 J. FIN. ECON. 431 (2011) (detailing several SEC regulations and the market reaction to them).

36. State law fiduciary duties are a mechanism to reduce the agency problems. Managers of corporations are, by statute, required to disclose conflicts of interest, to eschew corporate opportunities, and to approach business decisions with due care. Stanley A. Kaplan, *Fiduciary Responsibility in the Management of the Corporation*, 31 BUS. LAW. 883, 887–888 (1976) (describing the primary duties of corporate managers in managing the affairs of a corporation).

37. *See, e.g.*, Bebchuk, *Hedge Fund Activism*, *supra* note 19 (highlighting the recent increase in shareholder activism and creating a debate as to whether such activism is more beneficial or harmful); Kahan & Rock, *supra* note 19, at 1024 (noting how hedge funds have become critical players in corporate governance and control); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism,* 79 GEO. L.J. 445 (1991) (exploring the logic of collective action, the shifting dynamics of institutional structure, and the divergence between principals and agents to understand the changes in the distribution of shareholdings and increase in shareholder activism).

literature in law and many related fields have all risen in response to this problem.[38] If shadow governance documents were small in scope, the imbalance created by their importance to management, on the one hand, and shareholders' lack of involvement, on the other, would be less of a concern. It is the fact that these documents cover so much ground, combined with the fact that shareholders have so little say, that makes them both interesting and important.

The remainder of this Part proceeds as follows. Part I.A begins with a brief overview of two core governance documents: charters and bylaws. For generations, charters and bylaws have been the battlefield for a tug-of-war between shareholders and management. Part I.B describes the broad categories of shadow governance documents, ranging from committee charters required for companies listed on the New York Stock Exchange to environmental, social, and governance policies that may have resulted from negotiated settlements with individual stakeholders, both within and outside of the context of litigation. Part I.C presents descriptive statistics showing the most and least common types of shadow governance documents, as well as patterns of disclosure within certain types of companies. Of particular interest is the fact that, although listing rules and securities regulations require companies to adopt and disclose certain shadow governance documents, a substantial proportion of companies do not make these disclosures on their websites. Part I.D briefly describes the methodology used to obtain this data. All of this sets the stage for Part II, which shows the importance of these documents through interview data.

A. Core Governance Documents: Charter and Bylaws

For generations, corporate governance battles have been fought on charter and bylaw grounds—and that is no surprise, as charters and bylaws are a corporation's core governance documents. To form a corporation, an individual files a charter with one of the fifty states. Once approved by a state, the corporation comes into existence.[39] The first action taken by a newly formed corporation's board of directors is often to adopt bylaws—a document that contains the internal rules of a corporation such as the rights of shareholders, directors, and officers, and when and how their powers can be exercised.[40]

38. *See, e.g.*, William Q. Judge et al., *What Are the Correlates of Interdisciplinary Research Impact? The Case of Corporate Governance Research*, 11 ACAD. MGMT. LEARNING & EDUC. 82, 88 (2012) (stating that the field of corporate governance is arguably one of the most interdisciplinary fields of study in the social sciences today, with active research conducted by social scientists in management, finance, economics, accounting, sociology, political science, and legal studies).

39. MODEL BUS. CORP. ACT § 2.03(a) (AM. BAR ASS'N 2016) ("[C]orporate existence begins when the articles of incorporation are filed."); *see also* DEL. CODE ANN. tit. 8, § 103 (West 2014) (providing that in Delaware, a corporation is formed once the charter is executed by the Secretary of State).

40. *See* DEL. CODE ANN. tit. 8, § 109(b) (West 2015); MODEL BUS. CORP. ACT § 2.06(b) (AM. BAR ASS'N 2016).

Both management and shareholders utilize charters and bylaws to exert influence and restrict each other's control of the corporation. Managers, for example, use charter and bylaw provisions to consolidate (and greatly reduce) shareholder lawsuits,[41] scale back the fiduciary duties that state laws impose on directors,[42] provide insurance coverage for directors sued for fiduciary duty violations,[43] and make it hard for outsiders to launch hostile takeovers.[44] Shareholders, too, have attempted to make change through charters and bylaws. In recent years, for instance, shareholders have attempted to declassify boards through charter and bylaw amendments.[45]

But charters and bylaws are not a neutral battlefield—the scales are tipped heavily in favor of management.[46] For example, charter amendments require a shareholder vote.[47] But shareholder-proposed charter amendments may never make it to a vote at all, because the board of directors has the *exclusive* right to determine whether those amendments will be advanced to a full shareholder vote.[48] As a result, board-of-director-proposed amendments will always be advanced to a shareholder vote, while shareholder-proposed amendments may not be.[49] Even when shareholders vote on a proposed amendment, the board of directors has various tools to erode shareholder intent. For example, the board of directors has carte blanche to tweak the specific terms of the proposal to favor

41. *See supra* note 18 and accompanying text (describing the process by which management introduced forum selection provisions into corporate bylaws, significantly reduced the number of shareholder lawsuits against companies).

42. Corporations pushed the boundaries on how much they could excuse their directors and officers from fiduciary duties. In particular, Delaware corporate law authorizes companies to waive director liability for breaches of duty of care. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2014); *see also In re* Caremark Int'l, Inc., 698 A.2d 959, 971 (Del. Ch. 1996) ("Generally where a claim of directorial liability for corporate loss is predicated upon ignorance of liability creating activities within the corporation . . . only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition of liability."); Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271 (2014) (discussing the trend towards increasing obstacles to the enforcement of fiduciary duties). Delaware law also allows corporations to buy their directors and officers insurance against fiduciary duty suits. *See* DEL. CODE ANN. tit. 8, § 145 (West 2011).

43. *See* DEL. CODE ANN. tit. 8, § 145(d) (West 2011).

44. *See supra* note 16 and accompanying text (describing management's adoption of poison pill provisions and staggered boards as a way to fend off hostile takeovers).

45. *See supra* note 22 and accompanying text (discussing Harvard Law School's project, through which students work to declassify public company boards through shareholder proposals).

46. *See, e.g.*, Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1047 (2019) (noting that disclosure is meant to reduce information asymmetries and reduce fraud, both within the entity and for the public—but that achieving those purposes requires directors to effectively manage disclosure).

47. *See* DEL. CODE ANN. tit. 8, § 242(b)(1) (West 2014).

48. Geeyoung Min, *Shareholder Voice in Corporate Charter Amendments*, 43 J. CORP. L. 289, 291 (2018) (discussing the procedural hurdles to effective shareholder voice in the context of charter amendments).

49. *Id.* at 317.

management interests[50] or to condition the approval of one proposal with the approval of a second proposal (a practice called, rather innocuously, "bundling").[51] The result is that a shareholder-proposed amendment can be adopted through a management proposal that effectively eviscerates the power of the shareholder-proposed amendment.

In 2013, Apple faced a shareholder proposal proposing a new class of preferred shares, "iPref," which would essentially distribute cash to shareholders. Apple thwarted the proposal, in part, by bundling it with four unrelated issues on which shareholders could not vote separately.[52]

Moreover, numerous hurdles stand in the way of shareholders proposing amendments at all. For one thing, there is cost: proposing and whipping votes for a charter or bylaw amendment is time-consuming and expensive, and the average shareholder lacks the means to undertake the task.[53] Even when a shareholder has the means to propose an amendment, practical limitations such as substance,[54] length restrictions,[55] and authority[56] dissuade shareholders from actually proposing an amendment.[57] Finally, even amendments put to a shareholder vote face an information problem: many shareholders simply lack sufficient information to evaluate a proposal or even vote on a proposal at all.[58] Shadow governance documents, however, provide a new opportunity for shareholders to influence governance—and some shareholders have used them for just that.

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50. *Id.* at 289. Management can also submit a competing proposal that if considered to be substantively similar proposal may allow the company to not include the original shareholder proposal, even if some of the term in the proposal are different. *See* Hillary Sullivan, Note, *The Exclusion of Duplicative Proposals Under Rule 14a-8(I)(11)*, 93 DENV. L. REV. ONLINE 315 (2016).

51. *See generally* Lucian A. Bebchuk & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549 (2010) (conducting an empirical analysis of the use of bundling to obtain shareholder approval).

52. *See* Heidi Moore, *David Einhorn Wins Battle to Make Apple Change Shareholder Vote Options*, GUARDIAN (Feb. 22, 2013) https://www.theguardian.com/technology/2013/feb/22/david-einhorn-apple-shareholder-vote-options [https://perma.cc/4YLU-RBRK].

53. *See* Bebchuk, *Shareholder Franchise*, *supra* note 15, at 688–89 (discussing the challenges that shareholders face); Lucian Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010) [hereinafter Bebchuk & Hirst, *Private Ordering*].

54. Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 221–24 (2005) (discussing substantive issues with shareholder-initiated bylaw proposal).

55. Bebchuk & Hirst, *Private Ordering*, *supra* note 53, at 341 (remarking that Rule 14a-8 imposes a 500-word limit on the text of a proposed bylaw and its supporting statement).

56. *Id.* at 347.

57. *Id.* at 345–46. *But see* Bernard S. Sharfman, *What Shareholder Proposals on Proxy Access Tell Us About its Value*, 34 YALE J. REG. ONLINE 1 (2016) (arguing that the costs of submitting proposals are too low).

58. Min, *supra* note 48 (discussing shareholder voting on proposals).

B. Shadow Governance Documents

Shadow governance documents run the gamut from required committee charters to idiosyncratic policies adopted by only a few companies. This Section describes some broad categories of these documents.

1. Committee charters

Boards of directors are commonly organized into committees, to which the board delegates some of its responsibilities. Companies that list their stock on the New York Stock Exchange (NYSE) or on the NASDAQ Stock Market (NASDAQ) are required by those exchanges to have three committees: the audit,[59] compensation,[60] and nominating/governance committees.[61] In addition, NYSE and NASDAQ listing rules require companies to have charters describing committee responsibilities.[62]

It is no surprise, then, that committee charters for the audit, compensation, and nominating/governance committees are among the most commonly disclosed shadow governance documents: over 90 percent of S&P 1500 companies disclose these committee charters.[63] It is surprising that this disclosure rate is not 100 percent, because listing rules require not only formation

59. NYSE Inc., Listed Company Manual § 303A.06 (2018), https://nyseguide.srorules.com/listed-company-manual/document?searchId=345555262&treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-68 [https://perma.cc/6884-5P99] [hereinafter NYSE Listed Company Manual]; Nasdaq Inc., Listing Rules, R. 5605(c)(2) (2018), http://nasdaq.cchwallstreet.com [https://perma.cc/39RG-PKHL] [hereinafter Nasdaq Listing Rules] (requiring that listed companies have audit committees comprised entirely of independent directors).

60. NYSE Listed Company Manual, *supra* note 59, § 303A.05(a); Nasdaq Listing Rules, *supra* note 59, R. 5605(d)(2)(A) (requiring that listed companies have compensation committees comprised entirely of independent directors).

61. NYSE Listed Company Manual, *supra* note 59, § 303A.04(a) (requiring that listed companies have nominating/governance committees comprised entirely of independent directors); Nasdaq Listing Rules, *supra* note 59, R. 5605(e) (noting that a nominating committee must have only independent directors, or if no such committee exists, the committee's function can be executed by a majority of the board's independent directors).

62. NYSE Listed Company Manual, *supra* note 59, § 303A.07(b) and Nasdaq Listing Rules, *supra* note 59, R. 5605(c)(1) (audit committee charter requirements); NYSE Listed Company Manual, *supra* note 59, § 303A.05(b) and Nasdaq Listing Rules, *supra* note 59, R. 5605(d)(1) (compensation committee charter requirements); NYSE Listed Company Manual, *supra* note 59, § 303A.04(b) and Nasdaq Listing Rules, *supra* note 59, R. 5605(e)(2) (nominating/corporate governance committee charter requirements); *see also* David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE 396 (2010); Idalene F. Kesner, *Directors' Characteristics and Committee Membership: An Investigation of Type, Occupation, Tenure, and Gender*, 31 ACAD. MGMT. J. 66 (1988); April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275 (1998); Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145 (2019); Yaron Nili, *The "New Insiders": Rethinking Independent Directors' Tenure*, 68 HASTINGS L.J. 97 (2016).

63. Appendix A provides more detailed information about the varieties of shadow governance documents disclosed, and the rates at which they are disclosed.

of committees and adoption of charters, but also *disclosure* of those charters. Nearly 4.8 percent of companies did not disclose audit committee charters, nearly 6.8 percent did not disclose compensation committee charters, and 8.5 percent did not disclose nominating/governance committee charters.[64] The NYSE, for instance, requires disclosures of audit committee charters on a company's website.[65] The Securities and Exchange Commission (SEC)'s Regulation S-K[66] also requires disclosure of the audit committee charter, either on the company's website or in triannual proxy statements.[67] The NYSE requires website disclosure for the nominating/governance committee charter,[68] and Regulation S-K requires website or proxy statement disclosure for all three types of committee charters.[69]

There are several possible explanations for this less-than-perfect disclosure. First, companies may simply not be aware of the relevant adoption and disclosure requirements. Interview participants repeatedly described an ad hoc process for the adoption and disclosure of new shadow governance documents. Our interviewees described themselves, fellow directors, outside counsel, and the company's general counsel staff as variously being in charge of finding, drafting, and pushing for the adoption of new documents.[70] Given the ad hoc adoption process, it is unsurprising that adoption and disclosure of certain documents may slip through the cracks. Second, companies may know of their disclosure obligations, but simply fall out of compliance. Third, some companies may disclose the charters in their proxy materials but not on their websites, mistakenly believing that this level of disclosure is sufficiently compliant. It is not clear what, if any, real consequences a company may face for lack of compliance.[71] One of this Article's authors highlighted the lack of enforcement of director independence disclosures and the lack of real consequences to companies that violate disclosure rules.[72] Therefore, if lack of compliance simply results in notice and an opportunity to correct, companies may pay very little attention to the regulatory and stock exchange requirements.

Nonetheless, this lack of compliance is curious. The requirements to disclose committee charters come from several different sources, including,

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64. *See infra* Appendix A.

65. NYSE Listed Company Manual, *supra* note 59, § 303A.07(b)(iii)(H).

66. SEC Regulation S-K under the US Securities Act of 1933 outlines SEC reporting and filing requirements.

67. SEC Regulation S-K Item 407, 17 C.F.R. § 229.407(d)(3)(i) (2019); *see* WEIL, GOTSHAL & MANGES LLP, *supra* note 30, at 9.

68. NYSE Listed Company Manual, *supra* note 59, § 303A.04.

69. *See* SEC Regulation S-K Item 407, 17 C.F.R. § 229.407 (2019) (prescribing necessary disclosures required of public companies, including the substance and form of disclosures).

70. See *infra* Part II.D.

71. *See* Yaron Nili, *Out of Sight, Out of Mind: The Case for Improving Director Independence Disclosure*, 43 J. CORP. L. 35, 63 (2017) (discussing the lack of enforcement of disclosure violations by companies).

72. *Id.*

variously, regulators and listing requirements. Furthermore, all of the companies in the dataset are publicly listed, and companies do not take themselves public without legal guidance: they always go public under the advice of outside counsel.[73] In the process of going public, counsel should advise companies to adopt these policies and advise them of ongoing disclosure requirements.

2. Governance guidelines

The second-most disclosed shadow governance documents are governance guidelines. Corporations variously call these "corporate governance guidelines," "governance principles," "governance policies," or something similar. In general, these documents appear to be an extension of the bylaws: they elaborate on the issues involving board composition and process.[74]

The corporate governance principles document for the McDonald's Corporation, for example, provides a bullet point list of the board's roles and responsibilities, discusses the size of the board, and details the qualifications/selection of board candidates, succession, and compensation.[75] It is about ten pages long and covers issues that conventional wisdom might expect to find in the bylaws, such as the board's role and directors' term, tenure, and qualifications.

Of the S&P 1500 companies, 87.1 percent disclosed some sort of corporate governance guidelines document.[76] This high level of disclosure is unsurprising: the NYSE requires listed companies to adopt corporate governance guidelines.[77] The NYSE also outlines topics such guidelines should address, namely: director qualification standards, director responsibilities, director access to management,

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73. Telephone Interview with Director III (Nov. 6, 2018); *see also* Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1580–82 (2002) (discussing the importance of legal counsel to IPO decisions); David F. Larcker & Brian Tayan, *Scaling Up: The Implementation of Corporate Governance in Pre-IPO Companies*, STANFORD UNIVERSITY CLOSER LOOK SERIES: TOPICS, ISSUES AND CONTROVERSIES IN CORPORATE GOVERNANCE, at 1, 3 (2018), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-2018-scaling-up-the-implementation-of-corporate-governance-in-pre-ipo-companies.pdf [https://perma.cc/R385-Z642] (detailing the hiring of internal general counsel and noting most companies only hire an internal general counsel two years prior to an IPO to help supervise outside counsel, but that some rely on the outside counsel exclusively even after the IPO).

74. *See* WEIL, GOTSHAL & MANGES LLP, *supra* note 30, at 17–18; Armand Picou & Michael J. Rubach, *Does Good Governance Matter to Institutional Investors? Evidence from the Enactment of Corporate Governance Guidelines*, 65 J. BUS. ETHICS 55, 55 (2006) ("Corporate governance guidelines are lists of practices indicating how the board of directors will attempt to oversee the management of the firm and carry out its responsibilities to the firms' suppliers of capital.").

75. *McDonald's Corporation Corporate Governance Principles*, MCDONALD'S (Mar. 23, 2017) https://corporate.mcdonalds.com/content/dam/gwscorp/corporate-governance-content/governance-principles-policies-and-guidelines/CORPORATE_GOVERNANCE_PRINCIPLES_March_23_2017.pdf [http://perma.cc/5GBP-VZJM] [hereinafter McDonald's Governance Principles 2017].

76. *See infra* Appendix A.

77. *See* SCHULTHEIS & KIM, *supra* note 30, at 10 (describing the issues that corporate governance guidelines should address).

director compensation, director continuing education and orientation, management succession, and annual board performance evaluation,[78] all of which are addressed in the document of McDonald's.[79]

Although NASDAQ does not require companies to adopt or disclose governance guidelines,[80] the fact that these guidelines are often integrated with charters and bylaws may account for the high level of disclosure.

In the contract theory literature, other scholars (and one of us) discuss the difference between "integrated" and "modular" systems of contracts.[81] In short, modular systems (a term borrowed from architecture and computer science) are those in which the individual parts are relatively self-contained and do not rely on each other much to work. The relationship between corporate governance guidelines, on the one hand, and charter and bylaws, on the other, is one of opposites: both are highly integrated, which means they refer to each other and rely on each other to work.

In particular, corporate governance guidelines often refer to the charter and bylaws. This suggests that governance guidelines are elaborating on charter and bylaw provisions, rather than introducing new guidelines entirely. For example, part of the corporate governance guidelines of McDonald's notes that, with regard to the size of the board, "[t]he Board itself determines its size within the range of 11 to 24 members required by the Company's Certificate of Incorporations and By-Laws."[82] Thereafter, the document goes on to add nuance that is not in the bylaws by noting that "[t]he Board believes that, at this time, the desirable number of Directors is between 11 and 15." It further notes how vacancies are to be filled, how the board should be structured, how often that structure should be reviewed, and what considerations should go into a review of its structure.[83] This integrated structure suggests that companies may choose to disclose corporate governance guidelines, even if not required to, simply out of a desire to provide complete information about the issues addressed in required-disclosure documents, such as charters and bylaws.

78. NYSE Listed Company Manual, *supra* note 59, § 303A.09.

79. *See* McDonald's Governance Principles 2017, *supra* note 75.

80. *See* WEIL GOTSHAL & MANGES LLP, *supra* note 30, at 18 (noting that NASDAQ does not require the adoption of corporate governance guidelines).

81. *See* Cathy Hwang & Matthew Jennejohn, *Deal Structure*, 113 NW. U. L. REV. 279, 299–307 (2018) (defining related contracts and contract provisions as "highly integrated" if they rely on references to each other to makes sense and noting that, in contrast, modular provisions are ones that can be switched out easily, and that do not rely on other parts of the contract or contractual system to make sense); Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403, 1417–26 (2016) [hereinafter Hwang, *Unbundled Bargains*] (discussing the difference between modular and integrated contractual systems in the group of contracts that document a mergers and acquisitions deal).

82. *See* McDonald's Governance Principles 2017, *supra* note 75, § 4.

83. *Id.*

3. *Codes of conduct*

Another oft-disclosed shadow governance document is the code of conduct. This document is sometimes called an "ethics policy."

Unique among the most frequently disclosed shadow governance documents, this document is required by the Sarbanes-Oxley Act of 2002,[84] rather than only SEC regulation or listing rules. In the early 2000s, accounting irregularities tanked oil and gas giant Enron, and ushered forth Sarbanes-Oxley, which set forth reforms aimed at improving corporate disclosures.[85] Sarbanes-Oxley Section 406 requires that companies disclose whether or not they have adopted codes of conduct, and if they have not, to explain why they have not done so.[86]

Perhaps because codes of conduct came into prominence post-Enron, they are aimed at policing the conduct of the principal executive officer and the principal financial officers. Codes of conduct generally contain provisions aimed at promoting ethical and honest conduct, complying with rules and regulations, producing fair and honest disclosures, reporting internal violations, and promoting accountability.[87]

In addition to Sarbanes-Oxley's comply or explain requirements,[88] the NYSE and NASDAQ both have additional requirements for listed companies. The NYSE requires that companies adopt codes of conduct, specifies what should be included in these documents, and requires website disclosure and disclosure in proxy statements or annual reports.[89] NASDAQ also requires adoption of a code of conduct, and for that code to be publicly available.[90]

Unsurprisingly, then, codes of conduct are widely disclosed: 86.6 percent of the companies in the S&P 1500 disclose a code of conduct. It is surprising, however, that 13.4 percent of companies do not disclose. In future research, it may be worth investigating whether this number is a result of non-website disclosure that complies with Sarbanes-Oxley and listing requirements (e.g.,

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84. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 406, (codified as amended at 15 U.S.C. § 7264 (2018)).

85. Zabihollah Rezaee et al., *Improving Corporate Governance: The Role of Audit Committee Disclosures*, 18 MANAGERIAL AUDITING J. 530 (2003) (describing the history of modern corporate disclosure after the Enron scandal).

86. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 406, (codified as amended at 15 U.S.C. § 7264 (2018)).

87. WEIL GOTSHAL & MANGES LLP, *supra* note 30, at 17–18.

88. *See generally* Luca Enriques, *Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms*, 38 WAKE FOREST L. REV. 911 (2003); Iain MacNeil & Xiao Li, *"Comply or Explain": Market Discipline and Non-Compliance with the Combined Code*, 14 CORP. GOVERNANCE 486 (2006) (describing the comply or explain framework); Annaleen Steeno, Note, *Corporate Governance: Economic Analysis of a "Comply or Explain" Approach*, 11 STAN. J.L. BUS. & FIN. 387, 408 (2006) (discussing the comply and explain framework and its benefits and restrictions).

89. WEIL GOTSHAL & MANGES LLP, *supra* note 30, at 7, 18.

90. *Id.* at 17.

disclosure in a periodic securities disclosure, but not on the company's website), a decision by a company to explain rather than comply, or non-compliance.

4. *Non-required committee charters*

Beyond the audit, compensation, and nominating/governance committees, often termed as the three key committees, companies may establish various other board committees. Some are permanent, such as the risk committee, and some are ad-hoc committees, such as a special litigation committee.[91] In the context of committee charters, except for disclosures of the audit, compensation, and nominating/governance committee charters, which are required, disclosure of other board committees drops precipitously. The next-most disclosed board committee charter is the charter for the risk committee, which is disclosed by 18.8 percent of companies. The executive committee charter is disclosed by 11.1 percent of companies, and the charter for the science, technology, and research committee is disclosed by 8 percent of companies. Numerous committee charters are disclosed by 5 percent or less of companies.[92]

On average, these disclosure rates are low, but not particularly surprising. For example, many companies appear to form committees (and disclose related charters) that are very industry-specific: among the less-disclosed committee charters are the nuclear review committee charter (disclosed by 1.1 percent of companies) and the agricultural advisory committee charter (disclosed by 0.3 percent of companies).[93] Because these committees seem highly industry-specific, it is not a surprise that most companies would not have these committees or committee charters.

In addition, some board committees are ad hoc, and may not adopt charters or feel that they need to disclose charters. These committees may include the acquisition committee (charter disclosed by 0.5 percent of companies) and the special litigation committee (charter disclosed by 0.4 percent of companies).[94] Finally, because these committee charters are not required by regulations or listing requirements, many companies may simply choose not to disclose them. Information gleaned from interview participants also supports this hypothesis: numerous participants reported using an ad hoc process to determine whether to disclose a non-required shadow governance document, such as a judgment call by the general counsel, a board member, or in consultation with outside

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91. *See* Charles W. Murdock, *Corporate Governance—The Role of Special Litigation Committees*, 68 WASH. L. REV. 79 (1993) (providing an overview of the special litigation committee); Minor Myers, *The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation*, 84 IND. L.J. 1309, 1320 (2009) (studying the current operation of special litigation committees and finding that committees pursue claims ten percent of the time, settle thirty percent of the time, and seek dismissal sixty percent of the time).

92. *See infra* Appendix A.

93. *See infra* Appendix A.

94. *See infra* Appendix A.

counsel.[95] In other words, there may be many committees that have no charters, and numerous charters that are not disclosed, and both the decision not to have a committee and the decision not to have a charter may be reflected in these low disclosure percentages.

5. Non-required additional disclosures

Rates of disclosure of non-required policies are substantially lower than of required policies. For example, while over 85 percent of companies disclose codes of conduct and corporate governance guidelines,[96] the next most common non-required disclosure is a human rights/environmental statement (disclosed by 19.8 percent of companies),[97] followed by variations on the code of conduct (disclosed by over 10 percent of companies),[98] a political participation policy (disclosed by 13.7 percent of companies),[99] and anti-corruption policies (disclosed by 12.6 percent of companies).[100] The vast majority of policies are disclosed at a rate below 5 percent, with some of the lower-disclosure policies including very specific policies such as a luxury expenditure policy (disclosed by 1.9 percent of companies), entertainment and gift policy (disclosed by 0.4 percent of companies), and a market relationships policy (disclosed by 0.1 percent—only one company).[101]

A few of the more often disclosed but non-required policies stand out. Human rights and environmental policies, for instance, are disclosed by nearly 20 percent of companies, but are not required disclosures by any regulator or listing rule.[102] However, a closer read of these policies reveals that they often include policies relating to conflict minerals—that is, the mining of certain minerals in certain conflict-ridden areas of the world. In 2010, as part of the Dodd-Frank Wall Street Reform Act, the SEC adopted a conflict minerals rule,[103] under which companies were required to disclose to their investors whether their products contained tantalum, tin, tungsten, or gold mined from the Democratic Republic of Congo.[104] Companies were required to make these disclosures in a separate filing, but smaller disclosure obligations were also inserted into other places, such as the rules governing annual reports.[105] In addition, some companies were subject to audits and additional reporting requirements,

95. *See, e.g.*, Telephone Interview with Director IV (Nov. 8, 2018).

96. *See infra* Appendix A.

97. *See infra* Appendix A.

98. *See infra* Appendix A.

99. *See infra* Appendix A.

100. *See infra* Appendix A.

101. *See infra* Appendix A.

102. *See* WEIL GOTSHAL & MANGES LLP, *supra* note 30, at 18 (discussing the range of documents that are required to be disclosed).

103. Conflict Minerals Final Rule, 17 C.F.R. §§ 240, 249(b) (2019).

104. *See generally* Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. 129 (2016).

105. 15 U.S.C. §§ 78m, 78o(d) (2018).

including the preparation of a conflict minerals report.[106] Although the conflict minerals rule did not specifically require companies to adopt a policy, it seems plausible that some companies may have adopted conflict minerals policies (or human rights and environmental policies that encompass conflict minerals policies) simply because they are already reporting on these issues in other filings.

Political participation policies are also disclosed by a substantial proportion of companies, even though they are not required.[107] These policies often describe, for example, the company's advocacy and lobbying activities and political spending, and perhaps their policies on employee participation.[108] Sarah Haan has previously explained why these policies are so common: they are often the result of shareholder proposal settlements, in which individual shareholders negotiate privately with corporations to make disclosures about certain issues.[109] In particular, she notes that political participation disclosures predominate—in 2016, for example, they were far and away the most common social and environmental shareholder proposal.[110] Given Haan's data, it is not a surprise that political participation policies are disclosed at a relatively high rate, even though they are not required.

Finally, some of the low-disclosure policies are also worth discussing. For example, Regulation FD (Fair Disclosure) policies[111] are disclosed at a very low level (disclosed by 0.3 percent of companies).[112] In some cases, however, those policies may have been folded in with insider trading policies (disclosed by 12.6 percent of companies),[113] although some companies, such as Duke Energy, do have both policies.[114]

The variations on codes of conduct are also noteworthy. As discussed previously, many companies have adopted and disclosed codes of conduct governing the behavior of senior executives and senior financial officers.[115]

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106. *See* ERNST & YOUNG, CONFLICT MINERALS 4 (2012), https://www.ey.com/Publication/vwLUAssets/EY_CnflictMinerals/$FILE/EY_ConflictMinerals.pdf. [https://perma.cc/FTX9-4XA6].

107. *See* WEIL GOTSHAL & MANGES LLP, *supra* note 30, at 18 (discussing the range of documents that are required to be disclosed).

108. *See, e.g.*, *Our Political Involvement*, CLOROX CO., https://www.thecloroxcompany.com/corporate-responsibility/stakeholder-engagement/our-political-involvement/ [https://perma.cc/3GFH-854C].

109. Haan, *supra* note 24, at 280 (showing that many corporate disclosures about campaign finance are made as the result of negotiated private settlements with shareholders).

110. *Id.*

111. Regulation FD (Fair Disclosure) is an SEC rule that prevents public companies from selectively disclosing previously non-public information to large investors first, instead requiring simultaneous disclosure in most cases. Regulation FD, 17 C.F.R. § 243.100 (2011).

112. *See infra* Appendix A.

113. *See infra* Appendix A.

114. CODE OF BUSINESS ETHICS, DUKE ENERGY (2016), https://www.duke-energy.com//_/media/pdfs/our-company/cobe-booklet.pdf. [https://perma.cc/7JW9-3XXS].

115. *See supra* Part I.B.3.

Several companies have also adopted *additional* codes of conduct. Variously called executive, business, or finance codes of conduct, these miscellaneous policies also address issues of ethical conduct among executives. Of note, however, is that some companies, such as Amgen, have adopted several types of these codes of conduct,[116] while many others have adopted only one.[117] Thus, some of these varieties of codes of conduct may have low disclosure rates, but may not suggest that companies have not adopted their substance—it is possible that companies have simply combined several codes of conduct into one document. Further research is needed to determine the content similarity between the various codes of conduct.

C. Patterns and Commonalities

This Section presents some patterns and commonalities that arise from observing the dataset as a whole.

1. Volume of disclosure

Companies vary greatly in the number of shadow governance documents they disclose. The most aggressive discloser is pharmaceutical company Amgen, which discloses twenty-three shadow governance documents.[118] The next-most aggressive discloser is McDonald's, with twenty shadow governance documents.[119] More than twenty companies, however, disclose nothing—Tootsie Roll Industries, for instance, discloses zero shadow governance documents.[120]

In general, larger companies, as measured by market capitalization, tend to disclose more shadow governance documents. The companies in the top quartile by market capitalization disclose an average of 10.95 documents, while the bottom quartile disclose an average of 8.4 documents.[121] An interview participant also described this phenomenon anecdotally, noting that larger companies were often more organized, had larger general counsels' offices or more experienced board members, and therefore were better equipped to adopt and disclose more shadow governance documents.[122]

Companies that have more gender-diverse boards also tend to have more documents.[123] This result aligns with studies showing that women tend to

116. *Investors*, AMGEN, http://investors.amgen.com/phoenix.zhtml?c=61656&p=irol-IRHome [https://perma.cc/P4NX-TGQ8].

117. *See infra* Appendix A.

118. *See infra* Appendix A.

119. McDonald's Governance Principles 2019, *supra* note 12.

120. *Company: Financials*, TOOTSIE ROLL INDUS., http://tootsie.com/financials/ [https://perma.cc/KTA6-468S]; .

121. *See infra* Appendix B.

122. Telephone Interview with Director *supra* note 73.

123. Since the variables in question each have plausibly non-additive origins (and thus are expected to be non-normal) in addition to using "Pearson" correlations we also conducted Spearman

prioritize organized decision-making and deliberation.[124] It also comports with this Article's qualitative findings, in which interview participants reported that individual directors, especially new ones who are more likely to add diversity to boards, often drove the adoption of new shadow governance documents or amendments of existing ones.[125]

Companies with more directors also tend to have more shadow documents.[126] Surprisingly, however, companies with the highest numbers of board members tended to have lower than average shadow governance documents.[127]

2. *Clusters of policy adoption*

There is some evidence to suggest that shadow governance documents are sometimes adopted in pairs or sets—or at least, some documents are more likely to be disclosed when other documents are disclosed, too. For example, there is a 38% correlation between companies that disclose a director compensation policy and a board evaluation policy, and an 18% correlation between those that adopt a director compensation policy and a director qualifications policy. Because these documents seem to focus on board qualifications and evaluations of the board and its members, it is not particularly surprising that these policies are often disclosed as a set.

There are also other clusters of policy adoption. For example, corporations that have a human rights or environmental policy are also likely to have a whistleblower policy, a third-party code of conduct policy, a UK tax transparency policy, and corporate governance guidelines—all policies that reflect an emphasis on company conduct. However, this set of policies seems to reduce likelihood of disclosure of the board conduct-related set of policies described above.[128]

Based on this data, it appears that companies choose to disclose a particular type or set of policies. The rationales behind those disclosures, however, may vary. Some companies may have conduct policies but choose not to disclose them. Some policies or sets of policies may be disclosed to answer specific investor requests, or to meet the company's specific marketing or compliance

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and Kendall statistics for rank correlations. Under all metrics gender diversity on boards is positively correlated to the number of shadow governance documents (statistically significant at the 1% level).

124. *See e.g.*, MCKINSEY & CO., WOMEN MATTER 2: FEMALE LEADERSHIP, A COMPETITIVE EDGE FOR THE FUTURE, https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Organization/Our%20Insights/Women%20matter/Women_matter_oct2008_english.ashx [https://perma.cc/H7K9-8ED9].

125. *See infra* Part I.B.3.

126. *See infra* Appendix B.

127. *See infra* Appendix B.

128. *See infra* Appendix B. For each document i, we measured the correlation with document j≠i. The results are included in matrix document on file with the Authors. For the description of board conduct-related policies, see *supra* Part I.B.3.

needs. In other cases, disclosed documents are supplemental to each other, so disclosure of one piece may not make much sense without disclosure of related pieces.

3. *Content similarity*

In addition to an analysis of shadow governance in general, this Article undertook a more detailed analysis of just one type of shadow governance document: the audit committee charter. Audit committee charters were chosen because they are the most commonly adopted type of shadow governance document: 95.2 percent of companies have adopted and disclosed an audit committee chair on their websites. To do so, we calculated the Levenshtein distances[129] of every audit committee charter of the S&P 100 companies from every other audit committee charter. Then using k-means,[130] we parceled the documents into clusters with the distances as the feature matrix. Lastly, using principle component analysis we visualized the clusters in a 2-D space.[131]

The textual analysis determined that audit committee charters across S&P 1500 companies are substantially similar. In particular, audit committee charters were clustered around eight "nodes" of similarity.[132] This clustering is not surprising. Interview participants, for instance, indicated that they often used templates from other companies when adopting new shadow governance documents.[133] In some cases, companies adopted new documents based on what was used by parent or related companies.[134] In other cases, companies adopted new documents when others in the industry adopted them, or when new directors, who had served on other boards, suggested that they be adopted. Either

129. The Levenshtein distance (or edit distance) between two strings is the minimal number of insertions, deletions, and substitutions of one character for another that will transform one string into the other. *See* Zhan Su et al., *Plagiarism Detection Using the Levenshtein Distance and Smith-Waterman Algorithm*, The 3rd International Conference on Innovative Computing Information and Control (June 18, 2008) https://ieeexplore.ieee.org/abstract/document/4603758) [https://perma.cc/2XDN-2B6K]. For further details on the various textual analysis methods, see Rada Mihalcea et al., *Corpus-Based and Knowledge-Based Measures of Text Semantic Similarity*, 6 AM. ASS'N ARTIFICIAL INTELLIGENCE 775 (2006), http://www.aaai.org/Papers/AAAI/2006/AAAI06-123.pdf [https://perma.cc/F6M4-LKU8]; *see also* Dekang Lin, *An Information-Theoretic Definition of Similarity*, 98 INT'L CONF. ON MACHINE LEARNING 296, 296–304 (1998), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.55.1832&rep=rep1&type=pdf [https://perma.cc/56GZ-JLLL].

130. K-means puts items into clusters that have means closer to the item's value than the means of the other clusters. In this case, it signifies that the average distance of a company's documents from each particular document is closer to the mean distance of its cluster than the mean distance of all the other clusters. For further details, see Anil K. Jain, *Data Clustering: 50 Years Beyond K-means*, 31 PATTERN RECOGNITION LETTERS 651, 656 (2010) (stating that even though K-means was first proposed over 50 years ago, it is still one of the most widely used algorithms for clustering and that ease of implementation, simplicity, efficiency, and empirical success are the main reasons for its popularity).

131. *See infra* Appendix C.

132. *See infra* Appendix C.

133. See *infra* Part II.C (describing path dependency in the policy adoption and revision process).

134. See *infra* Part II.C.

way, interview participants suggested a high level of path dependency, which may account for the lack of textual dissimilarity.

D. Methodology

The data presented here represents an original dataset that was hand-collected in the summer and fall of 2018. A team of researchers visited the websites of each of the companies listed in the S&P 1500 and downloaded and read each of the publicly available shadow governance documents that these companies disclosed. In total, this process yielded over 12,000 individual shadow governance documents.

In this initial dataset, shadow governance documents were sorted primarily by title, and, when possible, also by subject matter as determined by closer readings of the documents. As much as possible, policies that were substantively similar were coded as the same type of policy. This initial dataset was used to generate descriptive information—for example, information about which policies were most often adopted, and which were less commonly adopted.

Then, part of this dataset, the data on audit committee charters, was analyzed textually to determine similarities and differences in drafting and content among documents covering similar subject matter. Future plans for this dataset include more thorough analysis of individual groups of documents.

An important caveat about this dataset: except for a few required committee charters and a few individual settlements with shareholders, companies have wide latitude in deciding what shadow governance documents to disclose publicly. As a result, this dataset is necessarily incomplete: some companies may have adopted, but not disclosed, certain shadow governance documents.

Appendix A provides a full list of shadow governance documents adopted by companies. Appendix B provides data on the volume of documents by company, and Appendix C provides further information about the textual analysis of audit committee charters.

II.
INFLUENCE FROM THE SHADOWS

Much of the corporate law literature has focused on charters and bylaws—and they are undeniably important. In fact, many corporate law battles—dealing with issues as important as how directors are elected,[135] how shareholders can

135. Scholars have long debated the virtue and wisdom of a so-called "staggered" or "classified" board—that is, a board that is separated into different classes, so that only a fraction of the board is up for reelection any given year. The decision whether to classify or declassify boards is usually outlined in the company charter or bylaws. *See, e.g.*, DEL. CODE ANN. tit. 8 § 141(d) (West 2017); Bebchuk & Cohen, *The Costs*, *supra* note 15 (finding that staggered boards can reduce firm value); Lucian Bebchuk et al., *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157, 162–63 (2013) (summarizing Harvard Law School's Shareholder Rights Project efforts to declassify boards); Bebchuk & Hirst, *Private Ordering*, *supra* note 53 (arguing for the declassification of boards); Jill E. Fisch,

vote,[136] proxy access,[137] and how much personal liability directors, officers, and executives take on[138]—have all been fought on charter and bylaw grounds. These documents both maintain the power of corporate management, and are seen by outsiders as a way to influence corporate change. This focus, however, has caused scholars and practitioners alike to overlook shadow governance documents.

Governance by Contract: The Implications for Corporate Bylaws, 106 CALIF. L. REV. 373 (2018) (suggesting that boards have disproportionate power over shareholders); Richard Koppes et al., *Corporate Governance Out of Focus: The Debate over Classified Boards*, 54 BUS. LAW. 1023 (1999) (arguing that classified boards can be a part of good corporate governance). In the last few years, Harvard Law School spearheaded a charter-centered board declassification campaign. As a result, a former SEC commission and a then-sitting SEC commissioner wrote a paper suggesting that Harvard's project violated federal securities laws. In the weeks that ensued, a spirited debate about declassification via charter amendments, and the proper role of academics in influencing real-world governance, unfolded on the pages of the Harvard Corporate Governance Blog. Amihud et al., *supra* note 16 (weighing in on the staggered board debate); Andrew Ross Sorkin, *An Unusual Boardroom Battle, in Academia*, N.Y. TIMES, Jan. 6, 2015, at B1 (outlining the scholarly debate); Lucian A. Bebchuk & Scott Hirst, eds., *The Harvard Law School Proxy Access Roundtable* (John M. Olin Ctr. on Law, Econ. & Bus., Discussion Paper No. 661, 2010) [hereinafter Bebchuk & Hirst, *Proxy Access Roundtable*] (proceedings of the Proxy Access Roundtable held by Harvard Law School bringing together prominent participants into the debate); Daniel Gallagher & Joseph Grundfest, *Did Harvard Violate Federal Securities Law? The Campaign Against Classified Boards of Directors* (Rock Ctr. for Corp. Governance at Stan. Univ., Working Paper No. 199, 2014) (alleging that Harvard's declassification campaign may have violated securities laws).

136. Charters and bylaws have also been the battleground for shareholder voting issues. Traditionally, most corporations have a "one share, one vote" voting model—that is, each share of stock is entitled to one vote. DEL. CODE ANN. tit. 8, § 212(a) (West 2019) (describing Delaware's default voting rule as each share of stock entitling its owner to vote once). More recently, however, companies have used charter provisions to deviate from this model by creating multiple classes of shares. Company founders generally retain shares that each hold more than one vote, while the public buys shares with fewer votes or no votes. As a result, founders continue to control their companies through outsized voting rights. *See* DEL. CODE ANN. tit. 8, § 151(a) (West 2017); Lucian Arye Bebchuk et al., *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 295, 305–314 (Randall K. Morck ed., 2000) (discussing the agency costs of dual-class share ownership); Charles Elson & Craig Ferrere, *Unequal Voting and the Business Judgment Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (April 7, 2018), https://corpgov.law.harvard.edu/2018/04/07/unequal-voting-and-the-business-judgment-rule/ [https://perma.cc/TAM8-CMA2] (describing the unequal voting between corporate managers, on the one hand, and shareholders of publicly held shares, on the other).

137. Proxy access bylaws enable shareholders to nominate directors—who will be listed on the ballot form in the proxy materials mailed to all shareholders—to run against a company's selected slate of directors. Instead of submitting a competing proxy with the associated costs that come with it, shareholders are allowed to use the company's ballot to nominate their own candidates. Giove et al., *supra* note 14; Andrew Ledbetter et al., *Proxy Access Update—Current Status and Outlook*, BLOOMBERG L. (May 22, 2017), https://www.bna.com/proxy-access-updatecurrent-n73014451365/ [https://perma.cc/PHG2-RYM4].

138. Directors owe fiduciary duties of care and loyalty to corporations—but often rely on bylaws to provide indemnification from liability if they breach their duties. Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017) (empirically describing the prevalence of corporate opportunity waivers to directors and officers and the normative implications).

Shadow governance documents are undeniably voluminous—but are they important? And how do they shape corporate behavior, if at all? This Section presents data from original interviews with directors and general counsels to reveal the importance of shadow governance documents. In addition to establishing their importance, these interviews also shed light on the specifics of how these documents are used—how they are adopted and modified, and how they guide behavior.

Compared to core governance documents, shadow governance documents often provide clearer directives and more specific information. They often set the board agenda, dictating things from meeting dates to the substantive issues to be discussed at each meeting. They also fill gaps where the corporate charter or bylaws may be silent or non-specific. The broad landscape of shadow governance documents represents both a hugely understudied part of corporate governance law, and an avenue of enormous practical import. This sets the stage for Part III, which discusses the practical and theoretical implications of shadow governance.

A. The importance of shadow governance documents

Participants uniformly reported that they take shadow governance documents seriously and that these documents inform the conduct of directors. One public company director, for example, described shadow governance documents as "a war plan and a commitment to [stakeholders] that this is what we're doing, [that] we take our jobs seriously enough."[139] Another director noted that "I think [these documents] are very important and I personally think it's important to keep them updated and current . . . . It's important . . . to have full clarity around about roles and responsibilities and to have something to refer back to when questions come up."[140]

In general, participants described two ways that shadow governance documents influenced the board: substantively and procedurally.

In terms of substance, shadow governance documents may serve as guidelines for board meetings, as rules governing board and committee powers, and even as references for internal dispute resolution. Participants substantively described shadow governance documents as documents that guide board conversations about risks and policies and determine "how the board is being updated [by managers]."[141] One director noted, for example, that:

> We [the full board] had a good discussion about term limits for directors, either age limit or tenure limits. We had a discussion about whether we should explicitly put in a term limit of 15 years, or age limits . . . . Ultimately, we changed the criteria of what the nom-gov [nomination and governance] committee will consider in terms of what

139. Telephone Interview with Director I (Oct. 18, 2018).
140. Telephone Interview with Director VI (Jan. 1, 2019).
141. *Id.*

> [qualifications] it will recommend for board members [who] stand for reelection.[142]

Shadow governance documents also appear to serve as guidelines that define the boundaries of what boards and committees can do. One director described shadow governance documents as "rules of the road."[143] That director went on to clarify, however, that the rules offered significant latitude and "you could change what you want to do."[144]

Interestingly, boards also, at times, use other companies' charters to adjudicate internal disputes regarding authority and responsibility. As one director indicated, "they are used as a way to resolve authority issues by looking at how other companies resolved [them] [*sic*]."[145]

In terms of process, several participants also noted that committee charters played an important role in setting the annual board calendar. One director, for instance, noted that "each of the committees uses its calendar by quarter to assure an allocation of everything in the committee charter. Literally, [the board] has a quarter-by-quarter board meeting calendar. It is the month of May, we need to do this."[146] Another director described something similar: "We have a board calendar with quarterly tasks."[147] One director gave the example that:

> [F]or the audit committee chairman who is doing their best to comply with Sarbanes-Oxley or whatever it is, if you have a good solid charter for that committee, that . . . essentially almost creates an agenda and a checklist. [It creates] an ability for the committee to give the proper attention and in the proper way, and establish[es] a record of appropriate attention.[148]

B. "Stickiness"

One interesting finding is that companies clearly view shadow governance documents as "sticky"—that is, although boards and companies often have the power to modify documents unilaterally, they choose not to.

In interviews, we asked interview participants to try to think of situations where the board or a committee of the board wanted to take an action that was contrary to something written in a shadow governance document. We also asked them to think about situations where their peers, perhaps at other companies, had discussed similar situations. In this line of questioning, we also discussed the fact that, in most cases, it appeared that shadow governance documents could be modified unilaterally by the board, committee, or company, so it is possible to modify the document just to allow one particular action.

142. *Id.*
143. Telephone Interview with Director V (Nov. 8, 2019).
144. *Id.*
145. Telephone Interview with Director 12 (Sept. 23, 2019).
146. Telephone Interview with Director I, *supra* note 139.
147. Telephone Interview with Director III, *supra* note 73.
148. Telephone Interview with Director V, *supra* note 143.

Interview participants reported that the board would not take actions that were not allowed by shadow governance documents, even though the documents were either non-binding or could be changed unilaterally or at a moment's notice to allow for the action.[149] In particular, documents that were disclosed publicly seemed to become even stickier than undisclosed documents. One director indicated, for example, that the board absolutely considers public reaction to changes in policies and will avoid changes if the board members anticipate a significant backlash.[150]

C. *Path dependency in policy adoption and revision*

We also asked interview participants how their boards adopted new shadow governance documents and revised existing ones.

In discussing how they adopted new documents, interview participants generally reported path dependency. For example, one participant described adopting shadow governance documents for a newly public company:

> We were a subsidiary of a public company. In many cases, as I recall, the process was primarily driven . . . by outside lawyers . . . . Generally, they were pulling what our public company parent had in various committee charters, and we were also looking at various other people in the industry and pulling down what was publicly available.[151]

Another interview participant described a similar adoption and revision process, but focused on how horizontal directorship influenced content: "We're owned by a private equity firm, so many on our board are on boards of other companies. So they have a lot of experience with things having gone right or wrong, so they have access to best practices [and] bring that to the table."[152] Across the board, interview participants described the process of adopting new shadow governance documents as one guided by precedent—from parent companies, from outside counsel, or from companies in similar industries.

The process for reviewing existing shadow governance documents was mixed. Some interview participants reported no regular review or revision:

> There hasn't been a regular cycle [for review]. When I was chair of nom-gov of one board, it was [an opportunity] to refresh. We have made changes since then, but through the general counsel, or we had another lawyer [on the board] who's an expert who has recommended changes. It's driven more by change, [such as] outside issues and pressures. We have not managed an annual review.[153]

149. *See* Telephone Interview with Director XII (Sept. 5, 2019) (discussing the stickiness of shadow governance documents notwithstanding the fact that "shareholder vote is not needed on operational issues or strategy issues").

150. Telephone Interview with Director IX (Sept. 5, 2019).

151. *Id.*

152. Telephone Interview with Participant VIII (Aug. 6, 2019).

153. Telephone Interview with Director VI, *supra* note 140.

Some interview participants, however, reported a much more robust annual review process. One participant who had served both as a general counsel and as a board member on smaller subsidiary companies, for instance, reported: "I ran the corporate calendar . . . . We updated [shadow governance documents] on an annual basis and sometimes even more than that. The last few years I was there, it was always on the agenda, at least once a year."[154] Another reported an annual review of all committee charters. The chair of the committee may ask the general counsel for updates in best practices, and may also consult with outside experts—for example, an audit committee's charter might be reviewed by external auditors.[155] At that time, the committee also reviews "sub-charters with work plans that need to be approved."[156]

Only one director described modifying shadow governance documents in response to real-time changes in best practices or investor demands.[157] For companies that regularly update existing policies, a scheduled annual review seems to be the norm, suggesting that best practices and responses to outside pressures may diffuse into shadow governance documents on a scheduled basis rather than in real time.

D. Disclosure Differentiation

Interviews also revealed that companies vary in how much shadow governance information they decide to disclose to the public, and on what basis they make those determinations. This finding suggested that this study's data set of publicly disclosed shadow governance documents, while robust, is certainly incomplete—companies certainly have and use more shadow governance documents than they disclose publicly.

Some companies have restrictive disclosure policies for certain committee charters. One board chose not to disclose a special committee that had been formed "to discuss shareholder demands and litigation."[158] A director noted, "we had a lot of productive discussion about whether to disclose the committee. We had a good discussion about what should go into the proxy . . . . We decided not to disclose. We erred on the side of very limited to no disclosure [of the committee's existence]."[159] Another director noted that, specifically with shadow governance documents that were not committee charters—such as documents "about how you want to conduct yourself. What do you want to say about your policy and approach to activist investors?"[160]— were sometimes not disclosed.

154. Telephone Interview with Director IV, *supra* note 94.
155. Telephone Interview with Director I, *supra* note 138.
156. *Id.*
157. Telephone Interview with Director III, *supra* note 73.
158. Telephone Interview with Director VI, *supra* note 140.
159. *Id.*
160. Telephone Interview with Director V, *supra* note 95.

Another noted that companies she was involved in made disclosure decisions with a view toward producing reports to shareholders, such as policies on corporate social responsibility. They also reported standing committee charters but not ad hoc committee charters. When asked what differentiated committee charters from sub-committee charters, she noted that "[w]e do not feel [that sub-committee charters are] materially important to an investor to hold or sell our stock—it's process-driven."[161] She did note that in companies she worked with, disclosure decisions were "driven by SEC requirements for disclosure."[162]

One director also noted that disclosure decisions are sometimes "based on the size of the company and the resources that you have," and that he found that smaller companies disclosed only what was required.[163] In contrast, larger companies disclosed additional information "half trying to create an image of the company."[164] In general, he noted that companies were "much more thoughtful the bigger you get, because you have a larger shareholder base and shareholders looking at different things."[165]

Another director mentioned that proxy advisors played a role in what companies chose to disclose. He gave as an example the fact the proxy advisor Institutional Shareholder Services (ISS) gave companies an "environmental score," and "to give you that score, they will only look at stuff that's on your website."[166] As a result, the company posted environmental policies, as well as other policies that ISS used to develop various metrics, because "we are looking at what we need to post on the website to raise our scores."[167]

E. Influence of proxy advisors

Several directors discussed the role of proxy advisors in shaping shadow governance. Proxy advisors—most notably ISS and Glass, Lewis & Co. (Glass Lewis)—provide information to shareholders about corporate governance.[168] In that last decade or so, proxy advisors have played a significant role in shaping the landscape of American corporate governance,[169]including, as reported by interview participants, shadow governance.

161. Telephone Interview with Director I, *supra* note 139.
162. *Id.*
163. Telephone Interview with Director III, *supra* note 73
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Company Overview*, GLASS LEWIS, http://www.glasslewis.com/company-overview/ [https://perma.cc/SEG9-98VR]; *About ISS*, ISS (last visited Jan. 25, 2019), https://www.issgovernance.com/about/about-iss/ [https://perma.cc/65NV-EE6X].
169. Choi et al., *supra* note 20 (discussing the rise in power of proxy advisors); Eckstein & Hannes, *supra* note 20, at 8–13 (2018) (describing the increasing power of proxy advisors); Allan L. McCall & David F. Larcker, *Researchers: The Power of Proxy Advisory Firms*, INSIGHTS BY STAN. BUS. (Jan. 13, 2014), https://www.gsb.stanford.edu/insights/researchers-power-proxy-advisory-firms

As noted above, one way proxy advisors influence governance is by rating companies along various metrics, including, for example, issuing an Environmental, Social and Governance QualityScore.[170] Because these scores are often issued based only on publicly available information, a desire to gain a high score motivates companies to disclose relevant policies on their website, rather than to keep them private.[171] As one director noted, disclosure:

> [C]omes from in-house governance experts. Particularly the larger ones that have in-house departments, you get feedback from them. Day-to-day investors calling up or even investors really probably isn't driving the focus on this. It's more the ISSes and Glass Lewises and the really large investors with in-house depts that raise concerns in [a] particular area.[172]

Another director noted that "ISS and others can and will ask questions and they can and do go back to whatever is in the public domain and they are capable of finding out what changed and what those documents said previously. Our awareness of that is keen and constant."[173]

Proxy advisor involvement, however, affects more than disclosure—it also affects the kinds and content of shadow governance documents that companies adopt. One director noted that "we're increasingly in an environment where there's a lot of criticism and scrutiny around the board process . . . . ISS, Glass Lewis, and the public, those people are looking at [shadow governance documents] as evidence of rigor and scrutiny, and for clarification on issues like risk and compensation."[174] One director elaborated that both proxy advisors and other outside stakeholders relied on shadow governance documents for information: "Not just them [proxy advisors], the EEOC, the comptroller of New York, a lot of shareholders would like to know your diversity data."[175]

F. Methodology

A few brief notes about methodology are helpful here. The findings in Part II are informed by interviews with directors and general counsels of large public and private companies. To identify interview subjects, we used a snowball sampling technique, where we asked interview subjects to assist us in identifying and recruiting future subjects. The major downside of snowball sampling is that

[https://perma.cc/B8AU-R6ZC] (considering how much the increasing power of proxy advisors benefit shareholders).

170. The ISS QualityScore uses a numeric, decile-based score that indicates a company's governance risk across Governance, Environmental & Social pillars. For a full description see *ESG Ratings & Rankings*, ISS, https://www.issgovernance.com/esg/rankings [https://perma.cc/FRW9-C2Q5].

171. Telephone Interview with Director III, *supra* note 73.

172. *Id.*

173. Telephone Interview with Director V, *supra* note 143.

174. Telephone Interview with Director VI, *supra* note 140.

175. Telephone Interview with Director I, *supra* note 139

it is hard to obtain an unbiased sample. However, this technique helped us gain access to executives who are often disinclined to participate in this kind of research without a personal connection to us, our institutions, or a prior interview subject. Because of the challenges associated with using snowball sampling, we consider these interviews to be supplemental to the quantitative data.

Another concern with the interview methodology in general is that interview participants do not have a strong incentive to tell us that their companies do *not* take shadow governance issues seriously. In an effort to encourage candid responses, we promised anonymity to all of our interview participants and have encouraged them to find instances where documents had little effect.

Appendix D contains more information about interview participants.

III. IMPLICATIONS FOR THEORY AND PRACTICE

This Section discusses the theoretical and practical implications of shadow governance. It builds on a rich literature in corporate law, and especially the literatures on corporate governance and the relationship between shareholders and management.[176] This research, however, is necessarily incomplete, because it has mostly overlooked the importance of shadow governance documents to the governance ecosystem of the corporation. This Article's previous Sections showed the vast array and scope of non-charter, non-bylaw governance documents. Together, they comprise a system of shadow governance that directors, officers, and general counsels describe as important in numerous ways.

This Section describes the implications of recognizing those shadow governance documents as part of the corporate governance landscape. Part III.A describes theoretical implications: how this gap in governance understanding came to be, and how shadow governance affects important scholarly debates on agency theory, the shareholder-management relationship, and corporate governance. Part III.B shifts to practical implications and discusses the role of shadow governance documents in advancing the agendas of activist shareholders, institutional investors, and companies themselves. It also explores the practical issues associated with selective disclosure of shadow governance documents and lack of formal avenues for shareholder input on shadow governance.

A. Expanding the Theoretical Scope of Governance

An understanding of shadow governance is essential to understanding fundamental questions of corporate governance. Shadow governance represents an entire area of the corporate governance ecosystem that has been underexplored by scholars. Studying these documents has the potential to infuse

176. *See supra* Part I.A.

fresh life into old debates of governance and scholarly literature, which have thus far focused on charters and bylaws.

The balance of power between shareholders and management is perhaps the most important—and certainly the most debated—issue in corporate law.[177] Corporations are distinguished from other corporate forms by the separation of ownership and control: shareholders, who own the corporation, do not play a role in the day-to-day control of the corporation. Instead, hired guns—managers—run the corporation on behalf of shareholders.[178]

This bifurcation creates a classic agency problem, wherein the incentives of the managers are not always aligned with those of the shareholders. For example, it is well understood that managers might prefer to maximize their own compensation at the expense of shareholders' best interests, which are, generally, to maximize value to shareholders themselves.[179] In their recent *Atlantic* article, for example, Frank Partnoy and Steven Davidoff Solomon memorably describe their brief stint as activist shareholders during which they tried to influence the oversized management compensation of a public company: "[The company's] revenue in 2014 was miniscule for a public company; just $52 million. Profits were just $5.2 million. Meanwhile, the managers were feasting: Bielli, the CEO, made $2.7 million in 2014; his CFO and second-in-command, Allen Lyda, made $1.2 million."[180]

A variety of mechanisms have been devised to curb managers' self-interest. Among those are statutory and common law fiduciary duties, which dictate, for example, that managers must use due care in making decisions on behalf of the corporation.[181] But outside of law, a variety of semi-private, semi-contractual mechanisms also influence the relationship between shareholders and managers. Incentive-aligning compensation structures, such as stock options, are one well-understood way: managers are paid in part-ownership of the company, so that their financial fate is tied to that of the company.[182]

177. *See supra* Part I.A.

178. *See supra* Part I.A.

179. *See* Frank Partnoy & Steven Davidoff Solomon, *Frank and Steven's Excellent Corporate-Raiding Adventure*, ATLANTIC (May 2017), https://www.theatlantic.com/magazine/archive/2017/05/frank-and-stevens-excellent-corporate-raiding-adventure/521436/ [https://perma.cc/4SL3-MZUX] (noting the tension between shareholding owners and company managers).

180. *Id.*

181. *See, e.g.*, Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839, 851 (Del. Ch. 2012) (noting that under the LLC Act, "fiduciaries owe the fiduciary duties of loyalty and care").

182. But despite the good intentions, options have been widely criticized in academic literature. *See* Janice Kay McClendon, *Bringing the Bulls to Bear: Regulating Executive Compensation to Realign Management and Shareholders' Interests and Promote Corporate Long-Term Productivity*, 39 WAKE FOREST L. REV. 971 (2004) (arguing that traditional equity incentives for managers do not adequately align management's and shareholders' interests); *see also* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 3 (2004) (arguing that executives' pay is not adequately correlated with their true performance, enabling them to benefit from industry success rather than their own work).

Organizational documents like charters and bylaws, however, are perhaps the most important battleground for the push and pull between shareholders and managers.[183] As described in Part I.A, charters can be used to entrench management, often through specific provisions that are meant to defend against hostile takeovers, or through director voting structures that make it hard for shareholders to control boards.[184] Bylaw provisions, too, have been used to limit managers' liability for misbehavior,[185] increase the costs of litigation,[186] reduce incentives for managers to behave prudently,[187] and restrict the jurisdictions in which shareholders can file suits against managers.[188] In many cases,

183. *See supra* Part I.A.

184. *See* Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA L. REV. 585, 597–601 (2017) (providing a review of the strong opposition to dual-class structures); David J. Berger, *Dual-Class Stock and Private Ordering: A System That Works*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 24, 2017), https://corpgov.law.harvard.edu/2017/05/24/dual-class-stock-and-private-ordering-a-system-that-works/ [https://perma.cc/4DL6-XVF9] ("For some companies, dual-class stock is both necessary and appropriate to respond to the corporate governance misalignment that exists in our capital markets today."). For a discussion of the agency costs generated by dual-class structures with small-minority controllers, see Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019).

185. Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1666–67 (2016) [hereinafter Fisch, *The New Governance*] ("Since the *Boilermakers* decision, the popularity of exclusive forum bylaws has increased dramatically. As of August 2014, 746 U.S. public companies had adopted them. Of the midstream adoptions, more than 60% were adopted without a shareholder vote."). *See generally* Ann M. Lipton, *Limiting Litigation Through Corporate Governance Documents*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 176 (Sean Griffith et al. eds, 2018).

186. Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1 (2015) (examining fee-shifting in shareholder litigation, arguing that current practices are unsound from the perspective of both doctrine and public policy, and arguing that the fee-shifting bylaws recently enacted in response to the problem of excessive shareholder litigation fare no better).

187. Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1085 (2006) (noting that virtually all companies now utilize D&O insurance to ensure that managers are not personally liable, and neither corporate law nor securities law places limitations on the scope of D&O insurance); Bernard Black et al., *Legal Liability of Directors and Company Officials Part 2: Court Procedures, Indemnification and Insurance, and Administrative and Criminal Liability*, 2008 COLUM. BUS. L. REV. 1, 66 (2008) ("Public corporations routinely commit to advance legal expenses through bylaw provisions and contracts with individual directors and officers. The courts have been generous in interpreting these provisions to protect directors and officers."). Bylaws have also been used to limit shareholders ability to bring liability suits. *See* Holly J. Gregory, *The State of Corporate Governance for 2015*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 30, 2015), https://corpgov.law.harvard.edu/2015/01/30/the-state-of-corporate-governance-for-2015/ [https://perma.cc/46PZ-2PKN] ("[T]he Delaware courts have upheld, at least as a general matter, the statutory and contractual validity of board-adopted bylaws that seek to limit the forum for intra-corporate litigation. In addition, the Delaware Supreme Court has upheld—in the context of a non-stock corporation—the statutory and contractual validity of bylaws that allocate all or a portion of the cost of intra-corporate litigation to the losing party.").

188. Chevron's Form 8-K, *supra* note 18 (discussing Chevron's forum selection clause in its bylaws); *see also* FedEx Corp., Current Report (Form 8-K), at 2 (Mar. 14, 2011) (disclosing FedEx's forum selection clause in its bylaws). Both Chevron's and FedEx's forum selection clauses were upheld in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.2d 934 (Del. Ch. 2013). In 2015,

shareholders have fought back, at times winning small—or large—concessions in charters and bylaws that limit managerial power.[189]

However, this focus on charters and bylaws skews the reality because it artificially narrows the scope of corporate governance and shareholder influence. This Article's survey of shadow governance documents shows that corporations have a variety of other mechanisms beyond charters and bylaws for setting and articulating their agendas.[190] Moreover, these shadow governance documents, once adopted, are taken seriously, as they represent a real and tangible way to shape corporations, boards, and managers.

From a theoretical perspective, this is important for several reasons. It suggests that the conventional understanding of governance needs to be expanded. Failure to account for the full scope of the governance ecosystem creates major problems for theory and research, the most pressing of which is that it hinders the understanding of a corporation's agenda and its plans for execution.

For instance, social and political agendas, such as campaign finance disclosures and environmental declarations, often metastasize in shadow governance documents rather than in the corporation's bylaws.[191] Even non-social agendas, such as those relating to core governance issues (director qualifications, stock options, and conflicts of interests) are often developed and defined in shadow governance documents.[192] These documents sometimes

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the Delaware legislature revised the DGCL to expressly allow for forum selection bylaws, but mandated that the exclusive forum provision must include Delaware. DEL. CODE ANN. tit. 8, §§ 115, 109(b) (West 2015). For a discussion of these amendments, see Fisch, *The New Governance*, *supra* note 184, at 1669–70.

189. *See, e.g.*, Carmody v. Toll Bros., 723 A.2d 1180 (Del. Ch. 1998) (forbidding "dead hand" poison pills which restrict redemption to incumbent directors who adopted the plan or their designated successors). Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578 (2018) (holding that external claims cannot be regulated by a corporation's forum selection bylaws). *But see Boilermakers*, 73 A.2d 934 (upholding a forum selection provision, but limiting this to claims relating to internal affairs); *see also* Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 15.

190. *See supra* Part II.A (noting the use of shadow governance documents in anti-gun violence activism).

191. *See* Moyer, *supra* note 25.

192. *See, e.g.*, *Director Selection Process*, MCDONALD'S (Nov. 30, 2016), https://corporate.mcdonalds.com/content/dam/gwscorp/corporate-governance-content/governance-principles-policies-and-guidelines/DIRECTOR_SELECTION_PROCESS_NOVEMBER_2016.pdf [https://perma.cc/TED6-YW6K] (describing certain considerations for evaluating board director candidates); *Director Stock Ownership Guidelines*, MCDONALD'S (July 26, 2007), https://corporate.mcdonalds.com/content/dam/gwscorp/corporate-governance-content/governance-principles-policies-and-guidelines/DIRECTOR_STOCK_OWNERSHIP_GUIDELINES_July_26_2007.pdf [https://perma.cc/S4HQ-AUNK] (regarding stock ownership for directors); *Executive Stock Ownership and Retention Policy*, MCDONALD'S (Oct. 2015), https://corporate.mcdonalds.com/content/dam/gwscorp/corporate-governance-content/governance-principles-policies-and-guidelines/Stock_Ownership_and_Retention_Policy.pdf [https://perma.cc/2UR8-ZEPP] (describing details of the management stock ownership program).

provide clarification of issues discussed in charters and bylaws, but just as often represent the corporation's *only* discussion of those items.[193]

Overlooking shadow governance documents also obscures the true division of powers between managers and shareholders, which presents problems both for shareholders trying to assess the corporation's governance's checks on management and for researchers trying to measure change in that push and pull relationship. For example, in the 1980s and 1990s, it was relatively easy to track the increase in takeover defenses that corporations used, as these defenses were often articulated in core organizational documents.[194] In modern governance, however, numerous parts of the manager/shareholder relationship are hidden in shadow governance documents. Shareholders, for instance, have been successful in forcing some corporate disclosure around campaign spending.[195] Campaign finance guidelines are paradigmatic shadow governance documents. However, precisely because shadow governance has been overshadowed by the charter and bylaw focus, an examination of only charters and bylaws overlooks this shareholder success.

An understanding of the existence and scope of shadow governance documents is an important first step toward developing better, more complete theories of governance and the relationship between managers and shareholders.

Differences in how corporations disclose their shadow governance documents further exacerbate existing theoretical problems. Interview participants repeatedly reported that disclosure is selective. It is sometimes guided or dictated by reporting requirements or by influential outside stakeholders, such as proxy advisors, but there is no industry-wide principle for what needs to be disclosed.[196] The non-uniform disclosure presents a major problem for the development of theory. Specifically, even if researchers wanted to include shadow governance in their measurements of corporate change, it would currently be impossible to obtain all the data points necessary, since so many are undisclosed.

An examination of only charters and bylaws over the last several decades suggests that the balance of power has shifted toward management and away from shareholders, but has swung back towards shareholders in recent years.[197] Nevertheless, that examination is necessarily incomplete: without examining

193. *See, e.g.*, *Governance Principles, Policies & Guidelines*, MCDONALD'S, https://corporate.mcdonalds.com/corpmcd/investors-relations/governance-principle-policies-and-guidelines.html [https://perma.cc/N2R3-KFAJ] (providing specific details such as board role, composition, and director requirements).

194. *See supra* note 16 and accompanying text (describing anti-takeover strategies such as management's adoption of poison pill provisions and staggered boards).

195. Ciara Torres-Spelliscy et al., *Running the D.C. Circuit Gauntlet on Cost-Benefit Analysis After* Citizens United*: Empirical Evidence from Sarbanes-Oxley and the JOBS Act*, 9 DUKE J. CONST. L. & PUB. POL'Y 135, 141–43 (2014).

196. *See supra* Part II.E.

197. *See, e.g.*, Sharfman, *supra* note 57 (empirically analyzing shareholder proposals on proxy access).

shadow governance documents, it is largely impossible to tell how the tides have actually shifted between shareholders and managers. As shadow governance documents have become more common, scholars and practitioners need to take a more holistic approach to studying what influences corporate governance.

It is worth noting that shadow governance documents are not the only type of documents that affect governance in ways unseen to shareholders and the public. Other documents, though not primarily focused on the governance of the corporation, may also have a shadow governance effect as an ancillary byproduct. Debt indentures, for instance, can also have serious effects on governance.[198]

When companies borrow money from creditors, creditors often impose various limitations on the types of actions that companies can take without creditor approval.[199] Provisions in debt indentures—called covenants—are the mechanism by which these limitations are made. Typical covenants may restrict investment by the borrower, limit the borrower's management's ability to make certain capital expenditures,[200] and prohibit the borrower from entering into major transactions, such as a merger or acquisition, without the creditor's prior approval.[201]

Delta Airlines is an example of one such firm whose management is significantly impacted by various negative covenants included in its credit agreement. Delta's loan agreement with JPMorgan Chase Bank restricts the company's ability to enter into a merger, make certain payments and investments, and enter into a business "materially different from those conducted by [the Company] on the Closing Date [of the credit agreement]."[202] The agreement even sets limits on the company's cash flow, requiring company leadership to ensure that the aggregate amount of the company's liquidity never drops below $2 billion at any time.

Additionally, debt indentures consistently impose disclosure requirements on firms. This is another means by which they shape managerial decision-making. In order to track a firm's compliance with the terms of a debt agreement,

198. *See* George G. Triantis & Ronald J. Daniels, *The Role of Debt in Interactive Corporate Governance*, 83 CALIF. L. REV. 1073 (1995) (identifying ways in which lenders can influence corporate governance by reducing managerial slack).

199. *See* Frederick Tung, *Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance*, 57 UCLA L. REV. 115 (2009) (analyzing the many points in time at which private lenders influence corporate decision-making).

200. *Id.* at 137; *see also* Credit Guaranty Agreement, among Delta Airlines, Inc. and JPMorgan Chase Bank § 6.07 (Aug. 24, 2015), https://www.sec.gov/Archives/edgar/data/27904/000002790415000013/dal9302015ex101.htm#s7A0DEA2FD2203941E4253952CD1E4793 [https://perma.cc/B8AM-24R7] (prohibiting borrower from "mak[ing] any Restricted Payment . . . or mak[ing] any Investments" subject to certain exceptions).

201. Tung, *supra* note 198, at 138.

202. Credit Guaranty Agreement among Delta Airlines, Inc. and JPMorgan Chase Bank, *supra* note 199.

lenders often require firms to regularly furnish financial and operating reports.[203] Firms ordinarily must disclose this information more frequently, and in more detail, than they otherwise would with scheduled public disclosures.[204] For instance, pursuant to the credit agreement between AmerisourceBergen Corporation (AmerisourceBergen) and Wells Fargo Bank, AmerisourceBergen must disclose to the bank within fifty days after each of the first three fiscal quarters an unaudited balance sheet, statement of operations, and cash flow, in addition to promptly furnishing any other documentation reasonably requested by the bank.[205] The additional disclosure requirements imposed by lenders likely have the effect of keeping management in check and on track to meet the firm's financial goals and deadlines.

In some ways, a debt indenture can be more binding on a company than even its own charter, because a debt indenture is policed by a third party and requires that party's consent for any modifications or exceptions.[206]

Other influential third-party agreements, or governance structures that bring in influential third parties, can also contribute to shadow governance. One interview participant, for instance, described a corporate structure in which most of a company's shares are held in trust, and the trust is voted on by a member of management who also serves on the board of directors.[207] In the highly symbiotic management relationship described, it would not be a surprise if the primary documents relating to the organization of the trust—which may or may not even mention the company—can have a serious effect on the company's governance.

It is also worth noting that shadow governance, despite the negative connotations of its name, is not necessarily negative. As with all things, whether shadow governance is a good or bad thing depends on one's perspective—and, in this case, it also depends on *why* a shadow governance is relegated to the shadows. In previous work, one of us described why, in mergers and acquisitions, contract drafters used ancillary agreements instead of putting all of the deal's provisions into one large document.[208] In short, having multiple documents—each dealing with a small part of the project—allows contract drafters to engage multiple simultaneous workstreams, leading to more efficient contracting and the ability to shunt parts of the deal into specialist workstreams.[209] In the context of bankruptcy, a similar concept exists:

203. Tung, *supra* note 198, at 123.

204. *Id.*

205. Term Credit Agreement among AmerisourceBergen Corporation and Wells Fargo Bank § 5.01(c), (e)-(f) (Oct. 31, 2018), https://www.sec.gov/Archives/edgar/data/1140859/000114085918000046/exhibit102termcreditagreem.htm [https://perma.cc/C6PG-YUCN].

206. *See generally* Triantis & Daniels, *supra* note 197; Tung, *supra* note 198.

207. Telephone Interview with Director VII (Feb. 1, 2019).

208. Hwang, *Unbundled Bargains*, *supra* note 81.

209. *Id.* at 1417.

corporations sometimes partition their assets into various related entities, in order to be able to tailor enforcement against those entities in a more efficient way.[210]

In the context of drafting corporate governance documents, a similar phenomenon may be occurring. Corporations may wish to cabin audit committee work from compensation committee work, and thus adopt separate, modular documents to describe the work of those committees. Similarly, corporations may wish to provide more elaboration on corporate governance guidelines, but may prefer not to do so in the charter or bylaws, which are relatively hard to amend. Of course, this latter explanation—the desire to cabin some guidelines into relatively easy-to-amend documents—hints at the problem this Article has already discussed: that is, shadow governance documents are sometimes used as a way to shut out shareholder influence from governance, which can be troubling.

The analysis of shadow governance in this Article, while sweeping in scope, merely scratches the surface of the world of shadow governance. Certainly, website-disclosed governance-related documents, such as committee charters and various strategy and commitment statements, play a role in shaping governance. But, as the name suggests, shadow governance is not well-understood and is hard to pin down—so it is reasonable to expect that numerous other documents, including debt indentures, trust-related documents, and documents not easily found on websites, might also contribute substantially to governance. Moreover, like shadow governance documents, these documents, too, might contribute to the lopsided nature of the management/shareholder relationship, and may serve to make it harder for corporate outsiders to influence, systematically, the actions of the corporation.

B. Putting Shadow Governance to Work

Scholars are not the only ones who have overlooked shadow governance. In practice, too, shareholders and managers have not paid enough attention to shadow governance. Uncovering the breadth of shadow governance documents has immediate and potentially far-reaching practical implications, for both shareholders and management.

For shareholders, among the most important considerations is whether and how shareholders can affect and change governance through shadow governance documents, rather than through charter and bylaw amendments. Directors and general counsels report no uniform way for adopting shadow governance documents. At the initial public offering stage, a set of new documents is

210. Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 124 YALE L.J. 2680, 2685 (2015) (arguing that firms partition assets across multiple dimensions to allow selective enforcement in the case of a default, thereby reducing monitoring and enforcement costs and ultimately the cost of capital).

adopted, often by consulting parent companies.[211] Thereafter, changes are ad hoc, or slowly diffused if a director happens to have expertise in the area or if a general counsel recommends it.[212] Occasionally, a shareholder inquiry or litigation with a shareholder results in the adoption, on an ad hoc basis, of a particular policy.[213]

Additionally, companies at times will respond to shareholder precatory resolutions, like those focused on environmental, social, and governance issues,[214] by adopting new internal guidelines or by modifying existing shadow governance documents. Nothing in this adoption process, however, suggests that shareholders have a clear and systematic way to force corporations to adopt new policies and ancillary governance documents, or to influence directly the way that corporations adopt new policies. In contrast, shareholders have a clear process through which they can influence charter and bylaw changes. By statute, for instance, Delaware shareholders can propose bylaw changes, and shareholders need to vote to approve charter amendments.[215]

Practically, then, the question arises: how can shareholders influence shadow governance adoption? Thus far, the only proven methods are through litigation (and subsequent settlement),[216] through lobbying,[217] or through precatory proposals that ask the board to adopt such policies.[218] One potential way to open the door for shareholder participation in the governance sausage-making process is for shareholders to vote a change into the corporate charter that would specifically allow, or require, shareholder participation in shadow governance. Of course, this presents obvious line-drawing problems: what counts as a shadow governance document? What does not? What level of involvement is appropriate? And how should management decide between different shareholder voices?

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211. *See* Trevor S. Norwitz, *Accountability Does Not Require Constant Vulnerability: A Simple But Necessary Update to the Delaware General Corporation Law*, 41 DEL. J. CORP. L. 105, 109 (2016).

212. *See supra* Part II.D.

213. Erickson, *supra* note 32, at 1815–16 (2010); Haan, *supra* note 24, at 296–97.

214. *See* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647 (2016); Subodh Mishra, *An Overview of U.S. Shareholder Proposal Filings*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 28, 2018), https://corpgov.law.harvard.edu/2018/02/28/an-overview-of-u-s-shareholder-proposal-filings/ [https://perma.cc/PG7F-5EWX].

215. DEL. CODE ANN. tit. 8, §§ 109, 242 (West 2014); *see also* Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 3–4 (2018) (highlighting Allegran's bylaw that required shareholders to disclose all of its and its associates or affiliates trading history before calling a special meeting and HopFed Bancorp's adoption of a bylaw restricting any director candidate from association with any entity that has been subject to any kind of investigation or consent order form a regulatory agency, including the SEC).

216. *See generally* Haan, *supra* note 24.

217. *See generally* Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. FIN. ECON. 275 (2000) (discussing institutional and activist investors as an avenue for shareholders to lobby for change at firms).

218. Bebchuk & Hirst, *Private Ordering*, *supra* note 53, at 344–50.

More importantly, shadow governance also raises questions about the right level of shareholder participation in shadow governance. In previous work, one of us argued that more technical issues in a business deal are often shunted off into related ancillary agreements, rather than being kept in the main agreement itself.[219] Although an exploration of why certain issues end up in shadow governance documents rather than in organizational documents is outside of the scope of this paper, it is certainly possible that lower shareholder participation in shadow governance documents helps companies run more efficiently.

A thread that runs through Delaware jurisprudence is that shareholders should be directly involved only in *major* corporate decisions. For example, even some major merger and acquisition transactions do not require shareholder votes. Asset sales that do not involve "all or substantially all" of a corporation's assets do not require a shareholder vote. Nor do stock purchases that meet certain requirements regarding whether the stock purchase is major change for the purchaser. It is quite possible—and worthy of further exploration—that shareholder involvement in all aspects of governance, including the technical issues that are in shadow governance documents, may create more transaction costs than is worthwhile.

Yet, while giving shareholders the ability to micromanage a corporation is not necessarily a desirable outcome, shadow governance overlaps with other areas where Delaware courts, and academic discourse, find that shareholder input is appropriate.[220] In particular, shareholders have had success advocating for more input into corporate procedure and corporate governance—and the ability to see, influence, and vote on shadow governance documents certainly seems to fall into the procedure and governance category.

Critically, shadow governance documents have one major flaw that charters and bylaws do not have. Charter and bylaw amendments are regularly disclosed to shareholders and can be modified or repealed by shareholders.[221] In contrast, because shadow governance documents are inconsistently disclosed, and because there is no formal mechanism by which shareholders can influence them, shareholders have very little say in them. Not only are shareholders unable to formally modify or repeal shadow governance documents, but they also might

219. Hwang, *Unbundled Bargains*, *supra* note 81 (discussing the fact that a desire to delegate parts of the deal to specialist attorneys causes M&A attorneys to "unbundle" their deal making—that is, to document one deal through numerous related agreements, rather than one agreement).

220. *See, e.g.*, Blasius Indus. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988) (holding a board's unilateral decision to adopt a defensive measure touching upon issues of control that purposefully disenfranchised its shareholders is impermissible without compelling justification); Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 15; Bebchuk, *Shareholder Franchise*, *supra* note 15; John H. Matheson & Brent A. Olson, *Corporate Law and the Longterm Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313 (1992) (advocating for increased corporate reception to shareholder input); Bebchuk & Hirst, *Proxy Access Roundtable*, *supra* note 135.

221. DEL. CODE ANN. tit. 8, § 242 (West 2014) (providing for a shareholder vote on amendments to the charter); *id.* § 109 (West 2015) (providing that shareholders have the right to "adopt, amend or repeal bylaws").

not even know that these documents exist—even though these documents appear to be influential.

Requiring companies to disclose shadow governance documents, while continuing to limit shareholder participation, might be one step in the right direction. Disclosure can be mandated by the SEC,[222] listing rules,[223] or by shareholder modification to charters or bylaws.

One benefit of this proposal is that it aligns with the current regulatory climate, which favors greater volume of disclosure to shareholders.[224] In addition, it allows shareholders to at least *see* what their companies are involved in, and to have the ability to divest or try to influence policies. At the same time, limiting shareholders' ability to modify these documents also allows scholars and practitioners more time to understand whether shareholder involvement in these policies is practicable or efficient.

Of course, this proposal also has some problems, including line-drawing challenges: what is a shadow governance document, and what level of disclosure makes sense? There are also deeper problems. For instance, what purpose does disclosure serve if shareholders are unable to make changes based on what they learn? Moreover, as one of us has underscored in previous work,[225] companies have been skirting their current disclosure obligations in various ways. Through lack of compliance, questionable interpretation, and strategic camouflaging, even the current disclosure obligations are not always met.[226] For disclosure of shadow governance documents to achieve its goals, clear rules and strong enforcement would be prerequisites—but even with existing disclosure

222. *See, e.g.*, Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 Seattle U. L. Rev. 599, 605–08 (2013) (reviewing the role of disclosure under the federal securities laws).

223. *See, e.g.*, Steven Huddart et al., *Disclosure Requirements and Stock Exchange Listing Choice in an International Context*, 26 J. ACCT. & ECON. 237, 237–39 (1999) (reviewing stock exchange's listing requirements and their disclosure mandate).

224. In response to Enron, the Great Recession, and other recent events that have disrupted investor confidence, the SEC has placed a greater emphasis on company disclosures. *Disclosure Effectiveness: Companies Embrace the Call to Action*, FINANCIAL EXECUTIVES RESEARCH FOUNDATION & ERNST & YOUNG, 2 (2015) https://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-report/$FILE/EY-disclosure-effectiveness-report.pdf [https://perma.cc/W6MP-TT3U] (referencing a similar publication published in 2014); E. Lynn Grayson & Patricia L. Boye-Williams, *SEC Disclosure Obligations: Increasing Scrutiny on Environmental Liabilities and Climate Change Impacts*, ENVTL. ISSUES IN BUS. TRANSACTIONS, https://jenner.com/system/assets/publications/1696/original/Environmental_Issues_in_Bus_Trans_Chapter_15_SEC_Disclosure.pdf?1319628667 [https://perma.cc/S2WC-5ZH3]; Suzanne Beaudette Murray & Phong Tran, *Companies Facing Increasing Scrutiny over Environmental-Related Disclosures*, HAYNESBOONE (Apr. 20, 2016), http://www.haynesboone.com/alerts/companies-facing-increasing-scrutiny-over-environmental [https://perma.cc/95VA-8HUS]. For a more skeptical view of disclosure, see Davidoff & Hill, *supra* note 221 (arguing that disclosure is ineffective in preventing another financial crisis, and that disclosure is largely a political solution to deeper problems).

225. *See* Nili, *supra* note 71; Yaron Nili, *Successor CEOs*, 99 B.U. L. REV. 787, 803–04 (2019) (finding that companies did not meet disclosure requirements regarding chair independence in many cases); Yaron Nili, *Horizontal Directors*, 114 NW. U. L. REV. 1179, 1221–24 (2020) (finding that some companies did not provide required director experience disclosures to investors).

226. *See generally* Nili, *supra* note 71.

requirements, rules are hard to come by, and enforcement is sometimes inconsistent. Finally, a proposal like this would need to engage with existing discussions regarding what the volume of disclosure is,[227] whether this volume of disclosure is useful to shareholders, and whether it puts an undue burden on corporations.

For management, understanding shadow governance is also critically important. One theme that emerged from interviews is that companies are inconsistent in how they adopt and modify shadow governance documents. In particular, companies with smaller general counsel offices tended to pay less attention to shadow governance. Shadow governance documents can be both a sword and a shield: while shareholders can use them to spur corporate change, management's adoption and adherence to the shadow governance documents common to their industries may also be used as a guard against liability.

It is also important to consider which shadow governance documents are worth adopting and disclosing. For example, multiple directors noted that they adopted—and disclosed—certain policies in part to satisfy proxy advisors, which rate companies based on information that is often gleaned from these policies.[228] For companies that are somewhat behind the curve in adopting these policies, shadow governance may be an under-utilized governance tool—or at least an underutilized tool for publicity.

Finally, shareholder activists may also want to direct some attention to shadow governance documents. As campaigns by activists become more prevalent[229] and target larger companies,[230] activists give more attention to the governance attributes of corporations. From director tenure to executive compensation and political spending, activists are utilizing what they perceive as governance deficiencies as part of their campaign against incumbent management teams.[231] Shining light on the shadow governance of the corporation could augment activists' case against some companies, while in

227. *See supra* note 223 and accompanying text.

228. *See* Telephone Interview with Director III, *supra* note 73; *see also supra* Part II.E.

229. *See* Cara Lombardo, *Activist Investors Turn Up Heat in Drive for Returns*, WALL STREET J. (July 12, 2018), https://www.wsj.com/articles/activist-investors-turn-up-heat-in-drive-for-returns-1531434346 [https://perma.cc/H37H-H3U3].

230. Brendan McDermid, *When Activist Investors Strike: How Corporate Raiders Hit Apple, Microsoft and McDonald's*, TELEGRAPH (May 19, 2017), https://www.telegraph.co.uk/business/2017/05/19/activist-investors-strike-corporate-raiders-hit-apple-microsoft/ [https://perma.cc/Z2ZP-UFR8].

231. *See* Barrett J. Brunsman, *P&G Executive Compensation Targeted by Activist Investor*, PHILA. BUS. J. (Sept. 18, 2017), https://www.bizjournals.com/cincinnati/news/2017/09/18/p-g-executive-compensation-targeted-by-activist.html [https://perma.cc/SSW9-P3YG] (noting that Trian Fund Management waged proxy battle by suggesting that senior leadership team is paid too much—specifically over $220 million in total compensation during last five years); Kenneth Hilario, *Activist Investor Daniel Loeb Files with SEC in Latest Move to Replace Campbell's Entire Board*, PHILA. BUS. J. (Oct. 1, 2018), https://www.bizjournals.com/philadelphia/news/2018/10/01/loeb-third-points-proxy-sec-replace-campbell-board.html [https://perma.cc/82ZP-5AKX] (including proxy letter Third Point activist investor sent to Campbell shareholders on Sept. 28).

other cases it may allow management to deflect some of these attacks by reference to existing policies.

CONCLUSION

This Article spotlights, for the first time, the role of shadow governance documents in influencing corporate governance. Scholars and practitioners have long focused on core organizational documents—charters and bylaws—to understand the push and pull between management and shareholder power, and to understand corporate decision-making. However, much of this discussion has overlooked the growing array of shadow governance documents.

Through a hand-collected set of these shadow governance documents and interviews with general counsels and directors, this Article portrays the breadth and depth of influence these documents have on corporate governance. Shadow governance documents set the board's agenda, both procedurally and substantively, and can have profound effects on decision-making. This Article, which represents a first foray into this completely overlooked area of governance, has the potential to spark conversation among scholars and provide practical solutions for management and shareholders alike.

APPENDIX A: FULL LIST OF SHADOW GOVERNANCE DOCUMENTS

Document	**% of Companies**	**Number of Companies**
Audit and Financial Committee Charter	95.2%	1415
Compensation/HR Committee Charter	93.2%	1386
Nominating and Corporate Governance Committee Charter	91.5%	1361
Corporate Governance Guidelines/Governance Principles	87.1%	1295
Business Code of Conduct Policy	86.6%	1288
Human Rights/Environment Statement (Conflict Minerals, etc.)	19.8%	295
Finance Code of Conduct	19.6%	291
Risk Committee Charter	18.8%	279
Executive Code of Ethics/Conduct Policy	14.8%	220
Political Participation	13.7%	204
Anti-Corruption/Money Laundering/Insider Trading Policy	12.6%	1 87
Whistleblower Policy	12.5%	186
Director Independence	11.2%	166
Executive Committee Charter	11.1%	165
Related Party Transactions Policy	8.5%	126
Science/Technology/Research Committee Charter	8.0%	119
Non-Director Stock Ownership Guidelines	6.2%	92
Business Practice/Strategy Committee Charter	6.1%	91
Director/Chairperson Responsibilities	5.6%	84

United Kingdom Tax Transparency Statement	5.4%	80
Director Orientation and Continuing Education	5.1%	76
Safety and Quality Committee Charter	4.2%	63
Procedure for Complaints Regarding Accounting	3.8%	57
Corporate Responsibility and Compliance Committee Charter	3.5%	52
Directorship Qualifications Outline	3.5%	52
Third Party Code of Conduct	3.0%	45
Public Responsibility Committee Charter	2.7%	40
Diversity and Inclusion	2.2%	32
Ethics & Compliance Program	2.0%	29
Luxury Expenditure Policy	1.9%	28
Independent Auditor Services	1.8%	27
Director and Executive Officer Stock Ownership	1.7%	26
Stockholder Communication	1.5%	23
Procedures for Communication with the Board of Directors	1.5%	22
Compensation Recovery Policy	1.3%	20
Poison Pill Policy	1.3%	20
Privacy Policy	1.3%	19
Public Policy Committee Charter	1.2%	18
Director Conflicts of Interest Guidelines	1.1%	17
Nuclear Review Committee Charter	1.1%	17
Service members Civil Relief Act	1.1%	17
California Transparency in Supply Chains	0.9%	14
Intellectual Property Rights	0.8%	12
Director Compensation	0.7%	10
Employee Code of Conduct	0.6%	9
Board Confidentiality Policy	0.6%	9
Nomination of Directors	0.5%	8
Acquisition Committee Charter	0.5%	8
Infrastructure and Investment Committee Charter	0.5%	7
Shareholder Recommendations of Director Candidates	0.4%	6
Corporate Development Committee Charter	0.4%	6
Social Media Guidelines	0.4%	6
Entertainment and Gift Policy Statement	0.4%	6
Special Litigation Committee Charter	0.4%	6
Regulation FD Policy	0.3%	5
Lead Independent Director Charter	0.3%	5
Operations and Reserves Committee Charter	0.3%	5
Agriculture Advisory Committee Charter	0.3%	5
Corporate Citizenship	0.2%	3
Cybersecurity/Security Committee Charter	0.2%	3
Director Resignation Policy	0.2%	3
Ethics and Culture Committee Charter	0.2%	3
Market Regulation Oversight Committee Charter	0.2%	3

Disclosure Policy/Committee Charter	0.1%	2
Equity-Based Compensation Awards	0.1%	2
Equity Award Committee Charter	0.1%	2
Leadership Structure	0.1%	2
Succession Plan	0.1%	2
Director Education Policy	0.1%	2
Policy on Pre-Approval of Audit and Non-Audit Services	0.1%	1
Evaluations of the Board	0.1%	1
Executive Compensation Committee Charter	0.1%	1
Anti-Harassment Policy	0.1%	1
Severance Policy	0.1%	1
Global Tax Policy	0.1%	1
Gender Pay Report	0.1%	1
Dividend Committee Charter	0.1%	1
Hiring Policy for Employees of Outside Auditor	0.1%	1
Special Programs Committee Charter	0.1%	1
Market Relationships Policy	0.1%	1
Capital Allocation Policy	0.1%	1
Committee for Excellence Charter	0.1%	1
Clinical Performance Committee Charter	0.1%	1
Clearing House Oversight Committee Charter	0.1%	1
Stock Committee Charter	0.1%	1
Tenure Policy	0.1%	1
Real Estate Committee Charter	0.1%	1

APPENDIX B: VOLUME OF DISCLOSURE

Table 1: Volume of Disclosure by Market Cap Quartiles

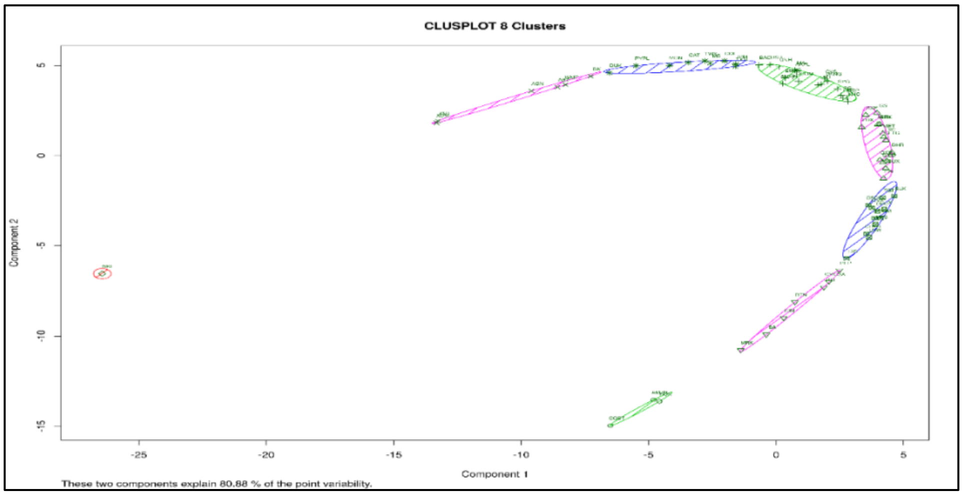
Market Cap Quartile	Mean Document Count
Top Quartile (highest market cap)	10.95
Second Quartile	8.79
Third Quartile	8.45
Bottom Quartile	8.40

Table 2: Volume of Disclosure by Board Size		
Board Size	Mean # of Documents	N
4	4.00	2
5	7.16	19
6	7.86	36
7	7.84	76
8	8.59	138
9	8.87	186
10	8.87	209
11	9.23	184
12	9.62	157
13	10.13	122
14	10.45	71
15	10.14	49
16	10.75	20
17	11.14	21
18	9.57	7
19	9.50	2
20	10.33	3

APPENDIX C: TEXTUAL ANALYSIS OF AUDIT COMMITTEE CHARTERS

Using textual analysis, we identified eight nodes around which the content of audit committee charters clustered. They are presented visually below in Figure 1. Each group has more commonality in content with its group members than with other groups. For instance, Exxon Mobil Corporation and Proctor and Gamble belong to one group, and have relative similarity, while Nike and UPS belong to a different group. Nike and UPS have more common with each other than, and less in common with, Exxon and Proctor and Gamble.

Figure 1. Content similarity



The following table shows the mean and standard error of each cluster. Cluster 5 has no standard error because there is only one company in the cluster.

Figure 2. Cluster Summary Statistics[232]

Cluster	Mean	Standard Error
Cluster 1	0.648680085181016	0.0222231439039459
Cluster 2	0.662466515632626	0.0279042066817432
Cluster 3	0.77945248573638	0.0327160523330032
Cluster 4	1.04823650171455	0.0586270867995623
Cluster 5	1.39490412026135	NA
Cluster 6	0.481816065741727	0.213158024617121
Cluster 7	0.587859060723576	0.01641981896568
Cluster 8	0.899731219561867	0.0415080660642797

232. For cluster analysis, we use k-means, which classifies items into clusters that have means closer to the item's value than the means of the other clusters. In this case, it signifies that the average distance of a company's documents from each particular document is closer to the mean distance of its cluster than the mean distance of all the other clusters.

APPENDIX D: INTERVIEW PARTICIPANTS

Participant	Date Interviewed	Experience
1	October 18, 2018	Extensive public company board experience, including serving as chair of audit, compensation, and nominating/governance committees.
2	November 5, 2018	Decades of experience as public company general counsel; served on various board committees; chair of non-profit board and member of several non-profit boards.
3	November 6, 2018	Director of three public companies; general counsel of several public companies.
4	November 8, 2018	General counsel of public company for approximately twenty years.
5	November 8, 2018	Fifteen years of experience serving on two public company boards.
6	January 9, 2019	Served on five public company boards in various capacities.
7	February 1, 2019	Served on a private board of a major family-owned company.
8	August 6, 2019	General counsel of formerly public (now private) company.
9	September 5, 2019	Director on six or seven large public boards and was a public company CFO.
10	September 5, 2019	Director on six public boards as chair of the board, presiding director, audit chair and comp committee chair. Currently on two public boards.
11	September 19, 2019	Director and former CEO with over twenty years of experience on public company and other company boards; served on audit, nomination/governance, and several special committees.
12	September 23, 2019	Executive in large public company and a director in several large cap public companies.