THE DIRECTOR DUTY OF CARE IN QATAR

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In this age of globalization, cross-border investment and intense competition for capital, comparative corporate governance is an increasingly important topic. This Article examines and analyzes the duty of care for directors of publicly-traded companies, comparing Qatari law with Delaware law. It finds that Qatari law on the duty of care is deficient in several respects. Under current Qatari law, directors are liable for duty of care violations for "mistaken" business decisions. Neither gross negligence nor something more than mere negligence is required. Moreover, Qatari law makes these duties non-exculpatory. Thus, in comparison with Delaware, Qatari director obligations are riskier to directors in terms of personal liability and may discourage the most qualified people from becoming directors. Qatar would greatly benefit from modifications to its duty of care law. Specifically, Qatar should enact a business judgment rule ("BJR") which is vital to creating a balanced risk-taking environment. Qatar's Companies Law should be amended to include the BJR and should articulate the misconduct necessary to rebut the BJR. The threshold of such conduct should be gross negligence or a business decision for which there is no rational basis. Mere mistake or negligence alone should not be sufficient to impose liability. In addition, Qatar should consider allowing shareholders to approve exculpatory clauses which would insulate directors from liability for duty of care violations based upon conduct where there is no bad faith, self-interest or disloyalty. Doing so would encourage companies to hire the most qualified directors and would encourage the prudent risk-taking that is the hallmark of the world's most successful corporations.

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INTRODUCTION

In this age of globalization, cross-border investment in stock markets, and intense competition for capital, comparative corporate governance is an increasingly important topic for governments, international financial institutions, practicing attorneys, scholars, and students. This Article analyzes the duty of care for directors of publicly-traded companies, comparing Qatari law with that of Delaware.

Qatar, once a pearl fishing mecca, has become—relatively quickly—a wealthy, strategically located country in the Persian Gulf that hosts an extensive United States military presence.[1] Indeed, the once-classified

1. *See* CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL31718, QATAR: BACKGROUND AND U.S. RELATIONS 1 (2014) ("In 2003, the U.S. Combat Air Operations Center for the

United States Combined Air and Space Operations Center, the American military command center for the Persian Gulf, is located in Qatar.[2] In recent years, United States-Qatar relations have grown increasingly close notwithstanding policy differences with respect to terrorism and "issues related to regional security, human rights, political reform, and labor conditions."[3] Therefore, studying Qatari law to the end of improving Qatari corporate governance is particularly salient. A stable, economically strong Qatar serves American interests.

Of Qatar's current population of approximately two million people, roughly fifteen percent are Qatari citizens.[4] The remainder of Qatar's residents are foreign nationals and immigrant laborers.[5] In recent years, Qatar has benefitted from strong financial growth and the modernization of its economy and infrastructure[6] which were proximately caused by its emergence as a global leader in energy production—particularly natural gas liquids.[7] Qatar's sovereign wealth fund, which invests much of Qatar's

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Middle East moved from Prince Sultan Airbase in Saudi Arabia to Qatar's Al Udeid airbase southwest of Doha, the Qatari capital.").

2. *See* Thom Shanker, *Hagel Lifts Veil on Major Military Center in Qatar*, N.Y. TIMES (Dec. 11, 2013), http://www.nytimes.com/2013/12/12/world/middleeast/hagel-lifts-veil-on-major-military-center-in-qatar.html?_r=0 ("The highly classified American facility, officially called the Combined Air and Space Operations Center, coordinated all of the attack and surveillance missions for the wars in Iraq and Afghanistan—and would be equally critical if an American president decided that only bombs and missiles could halt Iran's nuclear ambitions. It hosts liaison officers from 30 allies in Europe and the Persian Gulf.").

3. *See* BLANCHARD, *supra* note 1, at 17.

4. *Id.* at 1.

5. *Id.*

6. *See* Ibrahim Ibrahim & Frank Harrigan, *Qatar's Economy: Past, Present and Future*, QSCIENCE CONNECT, Sept. 17, 2012, at 1, 2 ("Qatar's economic ascent of recent years has few parallels . . . Since 2000, Qatar has grown faster than any other economy, and it now ranks among the top flight of countries in terms of its income per capita. Growth in oil and gas revenues has afforded higher living standards and rising consumer spending among Qataris. But a significant portion of hydrocarbon income has been saved, and the debts accumulated in the 1990s, as Qatar invested in its hydrocarbon's industry, have now been largely amortized. Qatar's generous surpluses have funded a range of investments. To meet the needs of a growing economy and larger population, Qatar has spent prodigiously on expanding and upgrading economic and social infrastructure.").

7. *Id.* ("Qatar is now the largest exporter of LNG and GTLs in the world, with a supply chain that spans the globe. Downstream, Qatar is building new industries from scratch, such as polyethylene, which add value to its low-cost feedstock. And though gas has now taken over the reins, oil continues to make a significant contribution to exports and to fiscal revenues. Qatar is now reliably serving global energy markets").

budgetary surplus, manages approximately $256 billion in assets[8] and has acquired both stakes in large companies and trophy real estate assets.[9]

However, Qatari ambition is not limited to carbon-based wealth; rather, Qatar's leadership envisions a diversified knowledge-based economy.[10] Recognizing the disadvantage of excessive reliance on crude oil and natural gas, Qatar established Qatar National Vision 2030, a program that aims to transform Qatar from a hydrocarbon-reliant economy into a diversified, knowledge-based economy attractive to global investors.[11] Doing so would attract global financial institutions including banks, insurance companies, and investment houses to conduct business in Qatar, thereby fostering its goals of diversification away from a carbon-

8. *See Fund Rankings*, SOVEREIGN WEALTH FUND INST., http://www.swfinstitute.org/fund-rankings/ (last visited Nov. 8, 2015); Shai Bernstein et al., *The Investment Strategies of Sovereign Wealth Funds* (Nat'l Bureau of Econ. Research, Working Paper No. 14861, 2009).

9. Qatari financial aspirations are already evident when examining the Qatari sovereign wealth fund ("SWF"). The cash infusion from the export of energy products has enriched and empowered Qatar's sovereign wealth fund which has been active in deploying its immense capital into a variety of diversified investments. *See* Camilla Hall et al., *Qatar: What's Next for the World's Most Aggressive Deal Hunter*, FIN. TIMES (July 4, 2013), http://www.ft.com/intl/cms/s/2/dc99ef1e-de45-11e2-9b47-00144feab7de.html#slide0. For further reading, see generally George Kratsas & Jon Truby, *Regulating Sovereign Wealth Funds to Avoid Investment Protectionism*, 1 J. FIN. REG. 95 (2015); Joel Slawotsky, *Sovereign Wealth Funds as Emerging Financial Superpowers*, 40 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 1239 (2009).

10. This is the overriding objective of the Qatar National Vision 2030. *See generally* GEN. SECRETARIAT FOR DEV. & PLANNING, QATAR NATIONAL VISION 2030 (2008), http://www.mdps.gov.qa/portal/page/portal/gsdp_en/qatar_national_vision/qnv_2030_document/QNV2030_English_v2.pdf [hereinafter QATAR NATIONAL VISION 2030]. This can also be seen in the Qatar National Development Strategy 2011-2016. *See generally* GEN. SECRETARIAT FOR DEV. & PLANNING, QATAR NATIONAL DEVELOPMENT STRATEGY 2011-2016 (2011), www.gsdp.gov.qa/www1_docs/NDS_EN.pdf. Huge investments in education has been the hallmark of Qatari governmental policy in recent years. *See, e.g.*, *Qatar Education City*, TEN EDUC., http://education.theemiratesnetwork.com/zones/qatar_education_city.php (last visited Nov. 8, 2015) (noting that Qatar is home to campuses of leading global academic institutions such as Georgetown, Weill-Cornell Medical College, Carnegie Mellon, Northwestern and others). Qatar University has also experienced tremendous growth and a dramatic increase in programming is expected in the near term. *See Our History*, QATAR UNIV., http://www.qu.edu.qa/theuniversity/history.php (last visited Nov. 9, 2015). In addition, Qatar is pioneering research-based publishing with impressive forays into legal, medical, educational, through Bloomsbury Qatar Foundation. *See* QSCIENCE.COM, http://www.qscience.com/ (last visited Nov. 9, 2015).

11. *See generally* QATAR NATIONAL VISION 2030, *supra* note 10.

based economy.[12] Qatar thus aims to become not only a regional financial hub, but an important world financial center.[13]

To realize this goal, Qatar must develop its equity markets[14] so as to encourage both domestic and international investment.[15] Indeed, recognizing the need to attract domestic capital and FDI, the National Vision places special emphasis on encouraging vibrant equity markets to "diversify the country's economy[,] . . . guaranteeing a stable and sustainable business environment, . . . helping increase competition, attracting more investments, and stimulating growth."[16] The Qatari government has recognized that "a strong financial sector is critical to supporting the Government's efforts to create jobs and encourage investment in a diversified economy."[17] To advance these goals, Qatar has encouraged trading on the Qatar Stock Exchange ("Qatar Exchange") by embracing better transparency and disclosure rules.[18] The value of Qatar

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12. The wisdom of diversifying Qatar's economy has become self-evident with the plunge in energy prices that occurred in 2014-2015. *See* Mark Shenk & Rebecca Penty, *The Commodity Currency Plunge Is Making the Oil Crash Even Worse*, BLOOMBERG BUS. (Aug. 18, 2015), http://www.bloomberg.com/news/articles/2015-08-17/oil-bull-agony-prolonged-as-commodity-currency-drop-extends-glut (noting a 60 percent plunge in prices from June 2014 to August 2015).

13. *See* Ibrahim & Harrigan, *supra* note 6, at 17 ("Despite difficult conditions in the global financial economy, Qatar's financial sector will continue to expand and support growth in the wider economy. The Qatar Financial Centre Authority is actively promoting development of asset management, captive insurance and re-insurance businesses.").

14. *Id.* ("Qatar Exchange, the country's stock exchange, is launching new trading platforms. A 'junior bourse' will soon open to provide better access to equity finance for smaller businesses. Secondary trading of government paper and issuance of securities of longer maturity will support the development of a domestic corporate debt market and sukuk (Islamic financial bonds). The commercial banking sector, both conventional and Islamic, is expected to enjoy healthy growth in its retail business, and will have the opportunity to participate in the funding of a substantive pipeline of capital projects."). For further reading see Karim Ginena & Jon Truby, *Deutsche Bank and the Use of Promises in Islamic Finance Contracts*, 7 VA. L. & BUS. REV. 619 (2013).

15. The Qatari Companies Law of 2002 prohibits non-Qataris from being shareholders in shareholding companies. *See* Law No. 5 of 2002 (Commercial Companies Law), art. 67 [hereinafter Commercial Companies Law]. However, this Article has been overruled by Law No. 13 of 2000 (Foreign Investment Law) [hereinafter Qatar Investment Law] regulating the investment of foreign capital in economic activities which permits non-Qataris to own 25% (or more if the articles of association permits) of shares in Qatar Exchange listed public shareholding companies. *See* Alex Brightman, *Issues to Consider When Doing Business in Qatar*, K&L GATES LLP 4 (2014), http://www.klconstructionlawblog.com/files/2014/10/Construction-group-lunchtime-presentation-Doing.pdf.

16. *Strategic Plan for Financial Sector Regulation*, QATAR FIN. CTR. REGULATORY AUTH., http://www.qfcra.com/en-us/publications/Strategic_Plan/index70e3.html?page=challenges-and-opportunities (last visited Nov. 7, 2015).

17. *Id.*

18. *See, e.g.*, *Reminder: Daily Disclosure of Major Shareholders Who Own 5% or More of the Listed Company's Capital*, QATAR STOCK EXCH. (Nov. 18, 2014), http://www.qe.com.qa/pps/qe/qe+english+portal/Pages/Details/Display%20Information%20Details?InfoID=17670&ImgURL=undefi

Exchange has grown impressively—the market capitalization in November 2015 was approximately $154 billion.[19] The fact that Qatar has been upgraded from "frontier market" to "emerging market" status illustrates the tectonic shifts underway in the Gulf nation.[20]

However, to the end of achieving its goals, there is an additional avenue Qatar should consider: reforming corporate governance. The efficient governance of large companies is needed to ensure a properly functioning economy and encourage the free movement of capital.

Numerous studies have documented the importance of corporate governance for access to financing, cost of capital, valuation, and performance using various methodologies. The research demonstrates that better corporate governance leads to higher returns on equity and more efficient capital markets. The law and finance literature underscores the important role of institutions aimed at contractual and legal enforcement. The research brings out the positive relationship between institutional features and the development of financial markets, relative corporate sector valuations, the efficiency of investment allocation, and economic growth across countries.[21] Conversely, a low level of corporate governance will damage the ability to attract FDI and deter development of markets by discouraging investors. [22]

Not surprisingly, a low level of governance can cause significant long-term damage to national economic performance by enabling lackluster management and poor overall economic performance. Japan's "lost decades" experience provides a compelling example of the urgent need to examine and improve Qatari corporate governance. The Japanese economy, once a paragon of strength, has been under-performing for almost twenty-

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ned (requiring disclosure from owners of 5% or more of the shares of a publicly traded company). This rule is similar to the United States disclosure rule 13(d) mandating disclosure from 5% owners. *See* Securities Exchange Act of, 15 U.S.C. § 78m(d) (2012) (necessitating a public disclosure upon ownership of 5 percent of a public company's shares).

19. *See Qatar SE,* ZAWYA, https://www.zawya.com/middle-east/financial-markets/qatar/ (last visited Nov. 28, 2015) (noting the market capitalization of Qatar Exchange).

20. *See* Nikhil Lohade, *Expectations Mixed as MSCI Reclassifies UAE, Qatar as Emerging Markets*, WALL ST. J. (May 15, 2014), http://blogs.wsj.com/middleeast/2014/05/15/expectations-mixed-as-msci-reclassifies-uae-qatar-as-emerging-markets/ ("Index compiler MSCI Inc. MSCI +0.34% upgraded the United Arab Emirates and Qatar to emerging market status, from frontier, as part of its semi-annual index review announcement late Wednesday – unlocking hundreds of millions of dollars in potential global investments for the two Persian Gulf states.").

21. *Id.*

22. Avinash Dixit, *Governance, Development, and Foreign Direct Investment* 1 (Max Weber Programme Lecture No. 2012/01, 2012) ("[F]oreign firms have reason to be more fearful about the protection of their property rights and contracts by host country governments and courts than do domestic investors, who have better access to the political processes of the host country.").

five years.[23] Though Japan once had the world's second-largest economy and threatened to overtake the United States' lead, it has lagged behind China since 2001.[24] Even now, Japan's economic performance continues to decline—today, it is not substantially greater than India's.[25]

Serious governance deficiencies weakened Japan's economy, contributing to its inability to attract sufficient capital.[26] The Japanese government has acknowledged poor governance as a proximate cause of the country's economic under-performance.[27] Japan is now desperately trying to improve its corporate governance by "implementing new corporate governance and investor stewardship codes as part of Prime Minister Shinzo Abe's 'third arrow' of economic reforms to boost growth. . . . The code is part of Prime Minister Shinzo Abe's reforms to boost Japan's competitiveness, which include a new corporate governance code set to take effect in June requiring companies to be more responsive to shareholders."[28] For example, Japan has recently started a new code that will call on firms to name two new independent directors.[29]

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23. *See* Christopher Whalen, *Is Japan's Economy Headed for Collapse?*, NAT'L INTEREST (Sept. 6, 2012), http://nationalinterest.org/feature/japans-economy-headed-collapse-11217 ("Japan was once known as the land of the rising sun, but more recently it has become known as one of the worst-managed economies in the world. The lost decade of the 1980s has extended into lost decades, with subpar economic growth and a declining population among the list of accomplishments. Most economists measure Japan's malaise in the realm of public finance. Japan has the worst public balance sheet in the world. The total public debt in Japan equals more than 200 percent of GDP. From 50 percent in 1980, the country's total public debt as a percentage of GDP has quadrupled and will reach 227 percent by the end of next year, according to Japan's Ministry of Finance.").

24. Roland Gribben, *China Overtakes Japan to Become World's Second-Biggest Economy*, TELEGRAPH (Aug. 17, 2010), http://www.telegraph.co.uk/finance/economics/7948638/China-overtakes-Japan-to-become-worlds-second-biggest-economy.html.

25. *See* Joel Slawotsky, *Sustainable Capitalism: Revelations From the Japanese Model*, 63 HASTINGS L.J. 10, 17 (2012).

26. *See* Nathaniel Parish Flannery, *Problems at Olympus a Sign of Investor Risk at Major Japanese Companies*, FORBES (Oct. 25, 2011), http://www.forbes.com/sites/nathanielparishflannery/2011/10/25/a-setting-sunrecent-scandal-at-olympus-a-sign-of-deeper-governance-issues-at-japanese-companies/ ("Last year, Japan's economy was eclipsed by China's. The country's corporate culture is in in need of a serious overhaul.").

27. *See* Andrea Wong & Isabel Reynolds, *Abe Calls for More Governance Progress in Japan*, BLOOMBERG BUS. (Sept. 29, 2015), http://www.bloomberg.com/news/articles/2015-09-29/abe-calls-for-more-corporate-governance-progress-in-japan (noting that Prime Minister Abe is calling for dramatic corporate governance reform to lift Japan out of its economic malaise).

28. *See* Gregory Elders, *Japan's Corporate Governance Overhaul*, BLOOMBERG BUS. (Apr. 10, 2015), http://www.bloomberg.com/professional/blog/japans-corporate-governance-overhaul/.

29. *See* Tom Redmond & Tatako Taniguchi, *Herro Gives Japan Governance 2 Out of 10 Despite Abe Efforts*, BLOOMBERG BUS. (May 26, 2015), http://www.bloomberg.com/news/articles/2015-05-26/herro-gives-japan-inc-2-10-for-governance-despite-abe-overhaul.

Currently, Qatari governance is not highly ranked. Compared to its Gulf Cooperation Council ("GCC") peers,[30] Qatar ranks poorly on a number of governance metrics. With regard to overall ranking for corporate governance, Qatar ranks behind Oman, Kuwait, United Arab Emirates, and Bahrain.[31] Qatar also tends to score at the end of all three corporate governance categories (transparency, accountability, and responsibility).[32]

Given Qatar's goal of increasing business development within the country and transforming itself into a financial hub, improved corporate governance is vital. Because director conduct is a predominant component of corporate governance, this Article focuses on director duties in shareholding companies.[33] Specifically, this Article examines the Qatari director duty of care through the lens of Delaware law[34] and provides suggestions for improving Qatari corporate governance by developing the law surrounding director duties.[35] Part I discusses the current state of the

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30. THE COOPERATION COUNCIL FOR THE ARAB STATES OF THE GULF, http://www.gcc-sg.org/eng/index.html (last visited Nov. 9, 2015). The GCC members include: Qatar, Saudi Arabia, Kuwait, Oman, Bahrain and the U.A.E. *GCC Member States*, THE COOPERATION COUNCIL FOR THE ARAB STATES OF THE GULF, http://www.gcc-sg.org/eng/indexc64c.html?action=GCC (last visited Nov. 9, 2015).

31. Nabil Baydoun et al., *Corporate Governance in Five Arabian Gulf Countries* 10 (paper presented at the Sixth Asia Pac. Interdisciplinary Research in Accounting Conference, Sydney, Australia, July 11–13, 2010), http://apira2010.econ.usyd.edu.au/conference_proceedings/APIRA-2010-281-Willet-Corporate-governance-in-five-Arabian-gulf-countries.pdf.

32. *Id.* at 11.

33. There are several business organizations in Qatar: joint company, limited partnership company, particular partnership company, shareholding company, equities partnership company and limited liability company. *See* Commercial Companies Law, *supra* note 15, art. 4. The Companies Law sets out the various legal requirements and obligations of each type of business structure.

34. Delaware is the preeminent jurisdiction providing "global standards" for proper director conduct. It is therefore uniquely qualified to base an analysis and provide suggestions for Qatari law corporate governance. *See* Tom Hals, *Delaware Court Upholds Perelman-M&F Ruling, May Alter Buyouts*, REUTERS (Mar. 14, 2014), http://www.reuters.com/article/2014/03/14/mfworldwide-macandrews-ruling-idUSL2N0MB1BP20140314 (noting that the Supreme Court of Delaware's law governs the majority of U.S. companies); Noam Noked, *2013 Delaware Decisions and What They Mean for 2014,* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 20, 2014), http://corpgov.law.harvard.edu/2014/02/20/2013-delaware-decisions-and-what-they-mean-for2014/ ("Delaware has long been known as the corporate capital of the world. It is the state of incorporation for 64 percent of the Fortune 500 and more than half of all companies whose securities trade on the NYSE, Nasdaq and other exchanges. Its preeminence in business law started with its corporate code—the Delaware General Corporation Law—and has been enhanced by business law innovations that have led to the creation of many new business entities designed to meet the expanding needs of corporate and financial America."); Jeffrey Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1523 (2007) ("Delaware's standards were important because of the number of large public firms incorporated there and because of Delaware's leadership role in the fashioning of fiduciary duty law.").

35. The focus of this Article is on shareholder companies since these entities represent the major business enterprises in Qatar and comprise the major businesses listed for trading on Qatar Exchange.

Qatari economy before providing an overview of corporate governance. Part II reviews the basic differences between governance systems. Part III details Qatari law on director fiduciary obligations. A review of Delaware law on director duties—focusing specifically on the director's duty of care—is discussed in Part IV. Part V contains suggestions for improving the current Qatari law with respect to the director duty of care.

I. QATAR'S CURRENT FINANCIAL SUCCESS AND FUTURE AMBITIONS

For almost ten years Qatar has generated around a third of all liquefied natural gas ("LNG"), making it the world's largest producer.[36] Japan, for example, buys virtually all of its gas and oil products from Qatar.[37] Qatar is also a major supplier to South Korea, Singapore, the United States, the United Kingdom, Spain, and Germany.[38] The largest single LNG producer is Qatargas,[39] a Qatari company.[40] Qatargas has been the world's leading LNG exporter since 2006.[41] Qatar is also at the forefront of gas-to-liquids ("GTL") production, and the country is home to the world's largest GTL facility.[42] More than half of Qatar's GDP is generated by the oil and natural gas industry.[43]

Qatar's GDP of $211 billion is distributed amongst a small population of just over two million residents, only approximately 400,000 of whom are nationals. Not surprisingly, Qatar has the world's highest per capita GDP at over $93,000.[44] This wealth is concentrated among Qatari nationals. Salaries and state benefits for Qatari nationals are generous, while there is a

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36. *Qatar*, U.S. ENERGY INFO. ADMIN. (Oct. 20, 2015), http://www.eia.gov/beta/international/analysis_includes/countries_long/Qatar/qatar.pdf [hereinafter US EIA].

37. *UK Warned Over Dependence on Qatar Gas*, FIN. TIMES (Jan. 15, 2012), http://www.ft.com/cms/s/0/c403bec6-3f63-11e1-ad6a-00144feab49a.html?ft_site=falcon&desktop=true#axzz3jLT9Metl.

38. QATAR STAT. AUTH., QATAR ECONOMICS STATISTICS AT A GLANCE 12 (2012), https://www.yumpu.com/en/document/view/25616022/qatar-economic-statistics-at-a-glance-qatar-statistics-authority-.

39. *About Us*, QATARGAS, https://www.qatargas.com/English/Pages/default.aspx (last visited Nov. 9, 2015).

40. *Id.* ("Qatargas, established in 1984, pioneered the Liquefied Natural Gas (LNG) Industry in Qatar. Today, Qatargas is the largest LNG producing company in the world, with an annual LNG production capacity of 42 million tonnes per annum (MTA).").

41. US EIA, *supra* note 36, at 1.

42. *The World's Largest Gas-to-Liquids Plant is Now Fully Online*, SHELL GLOBAL, http://www.shell.com/global/aboutshell/major-projects-2/pearl/largest-gtl-plant.html (last visited Nov. 28, 2015).

43. *Qatar Facts and Figures*, ORG. OF THE PETROLEUM EXP. COUNTRIES, http://www.opec.org/opec_web/en/about_us/168.htm (last visited Nov. 28, 2015).

44. *Data: Qatar*, WORLD BANK, http://data.worldbank.org/country/qatar (last visited Nov. 28, 2015).

ninety-eight percent pay gap between nationals and non-nationals.[45] However, income distribution is uneven even among nationals with the wealthiest nationals receiving thirteen times the income of the poorest.[46]

Utilizing its tremendous wealth, the Qatari Government has made large investments in the last few decades in infrastructure projects, research, and other non-energy dependent areas,[47] with the goal of building a sustainable and self-reliant economy on the foundation of a skilled workforce.[48] Education has become a priority— indeed, over four percent of GDP has been spent on education annually since 2013.[49] The following section details the economic boom enjoyed by Qatar. The section also describes Qatar's plans for constructing a diversified knowledge-based economy.

A. An Energy-Based Economic Boom

Economic statistics illustrate a fast-growing Qatari economy,[50] highly ranked in terms of growth rates, GDP, per capita GDP, and other benchmarks.[51] Indeed, Qatar's per capita GDP exceeds $100,000 at Purchasing Power Parity exchange rates[52] and has been consistently ranked

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45. Andy Sambridge, *98% Gap in Pay of Qatari Nationals, Expats – Survey*, ARABIAN BUS. (Sept. 30, 2011), http://www.arabianbusiness.com/98-gap-in-pay-of-qatari-nationals-expats-survey-422930.html.

46. *Income Equality*, ECONOMIST (Apr. 20, 2011), http://www.economist.com/node/18587127.

47. One of its budgetary aims is to be able to fully finance the budget from non-hydrocarbon revenues by 2020. IMF, *Qatar: Selected Issues*, Country Report (Jan. 2012), http://www.imf.org/external/pubs/ft/scr/2012/cr1219.pdf. *See also* Jon Truby, *Fiscal Tools for Inclusion of GCC States in the Global Environmental Programme: Focus Upon New Vehicle Imports*, *in* GREEN TAXATION AND ENVIRONMENTAL SUSTAINABILITY 144 (Larry Kreiser et al. eds., 2012). For further information on its priorities in research, see QATAR NAT'L RESEARCH FUND, QATAR NATIONAL RESEARCH STRATEGY (2012), http://qfrd.org/QNRS_2012/QNRS_2012.pdf.

48. *See* QATAR NATIONAL VISION 2030, *supra* note 10.

49. *Qatar Spent $6bn on Education*, GULF TIMES, (Jan. 27, 2013) http://www.gulf-times.com/qatar/178/details/339950/qatar-spent-$6bn-on-education.

50. *See Qatar*, PRICEWATERHOUSECOOPERS [PWC], http://www.pwc.com/m1/en/about-us/qatar.html (last visited Nov. 28, 2015) ("Qatar has enjoyed significant economic growth with real GDP increasing by 10.7% per annum since 2008.").

51. *See* Ibrahim & Harrigan, *supra* note 6, at 1, 11 ("From 2000 and 2011, Qatar's real GDP expanded at an annual average rate of 13.1%. Much of this expansion occurred from 2004 to 2011, when GDP growth averaged 15.9% a year. Globally, Qatar's economic growth has been without parallel, outstripping even that of China. When expressed in units of purchasing power, GDP per capita in Qatar in 2010 ranked first globally among 182 countries. . . . Other yardsticks of economic performance are equally impressive. Qatar has consistently posted large fiscal and current account surpluses, often exceeding 10% of GDP. Its total saving has averaged 56% of GDP and investment around 33% over the same period. In recent years, Qatar has been investing 10% of GDP on economic and social infrastructure.").

52. STEPHEN ANDERSON, PWC, QATAR ECONOMY WATCH 1 (2015), http://www.pwc.co.uk/assets/pdf/qatar-economy-watch-january2015.pdf.

number one for several years.[53] Current Qatari GDP stands at approximately $200 billion with an annual growth rate of over five percent.[54]

In a recent global study of per capita net worth millionaires Qatar ranked number one; a stunning seventeen percent of the population enjoyed a net worth in excess of $1,000,000.[55] This is thanks, in part, to strong stock and equity performances, high government expenditures benefitting local businesses, high spending on nationals' salaries and benefits, a light tax regime, and regulations guaranteeing nationals ownership rights in national businesses and land.[56] The exploitation of vast hydrocarbon wealth has also contributed to Qatar's economic boom.[57] Proven oil reserves in excess of twenty-five billion barrels should enable continued output at current levels for about fifty-seven years.[58] Qatar's proven reserves of natural gas exceed twenty-five trillion cubic meters, about thirteen percent of the world total.[59]

The growth in Qatar's natural gas production, particularly since 2000, has also increased Qatar's total liquids production because lease condensates, natural gas plant liquids, and other petroleum liquids are a significant (and valuable) byproduct of natural gas production.[60] As discussed above, the successful exportation of LNG and other energy products has produced a tremendous windfall for the nation.[61] However, as described in the next section, Qatar has begun the long process of diversifying its economy.

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53. *Data: GDP Per Capita, PPP (Current International $)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD (last visited Nov. 28, 2015).

54. *The World Factbook: Qatar*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html (last visited Nov. 29, 2015) [hereinafter *Qatar Factbook*].

55. *See* THE BOS. CONSULTING GRP., GLOBAL WEALTH 2014: RIDING A WAVE OF GROWTH 7 (2014), http://www.bcg.com.cn/export/sites/default/en/files/publications/reports_pdf/ BCG_Riding_a_Wave_of_Growth_Jun_2014.pdf (ranking Qatar in first place; other highly ranked nations include: Switzerland (#2); Kuwait (#5); Israel (#8); Saudi Arabia (#13) and Canada (#15)).

56. *See* CLYDE & CO, DOING BUSINESS IN QATAR: AN OVERVIEW 1, 3, http://www.qbbf.com/downloads/Doing%20Business%20in%20Qatar%20%28LR%29.pdf (stating that Qatari nationals must own 51% of companies registered under Qatari law, and foreigners cannot buy land in most parts of the country).

57. OPEC, ANNUAL STATISTICAL BULLETIN 17 (2015), http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2015.pd.

58. *See Qatar Factbook*, *supra* note 54.

59. *Id.*

60. *International Energy Data and Analysis: Qatar*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/countries/cab.cfm?fips=QA (last visited Nov. 28, 2015).

61. Qatar frequently reports a high budget surplus, even during a time of low energy prices. *Budget Surplus at Over QR100bn in Jan 2015*, PENINSULA (Mar. 11, 2015), http://thepeninsulaqatar.com/business/qatar-business/326289/budget-surplus-at-over-qr100bn-in-jan-2015.

B. Qatari Ambitions: Diversification Into Finance

Qatar is an emirate whose hereditary leadership works with an appointed council empowered by its Constitution to vote on legislative matters.[62] The Permanent Constitution protects various freedoms and organizes both the legislative and judicial systems.[63] The Government owns the national energy company Qatar Petroleum which, either directly or through its subsidiaries, enters into profit sharing agreements with international energy companies to exploit Qatari hydrocarbon reserves.[64] The country's stability and high peace rating[65] have attracted foreign investors. Qatari corporate law seeks to encourage FDI while promoting the interests of nationals because nationals must own a minimum of fifty-one percent of all companies that are not registered in the Qatar Financial Centre.[66]

Qatar's leadership has determined that over-reliance on energy exports is not in the country's long-term interest and has, therefore, planned to develop a sustainable, diversified economy underpinned by a skilled, educated workforce.[67] This transformative process is underway, and one of its central tenets is that the wealth generated by energy exports be used to develop non-energy sectors, thereby diversifying the economy.[68] Qatar's national goals include establishing:

> [a] stimulating business climate capable of attracting foreign funds and technologies and of encouraging national investments. . . . A knowledge-based economy characterized by innovation; entrepreneurship; excellence in education; a world-class infrastructural backbone; the efficient delivery of public services; and transparent and accountable government.[69]

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62. PERMANENT CONSTITUTION OF THE STATE OF QATAR Aug. 30, 2004, art. 61.

63. *The Constitution*, HUKOOMI: QATAR E-GOVERNMENT, http://portal.www.gov.qa/wps/portal/ (follow "The Constitution" under "About Qatar" category) (last visited Nov. 28, 2015).

64. QATAR PETROLEUM, https://www.qp.com.qa/en/Pages/Home.aspx (last visited Nov. 28, 2015).

65. *See 2015 Global Peace Index*, VISION OF HUMANITY, http://www.visionofhumanity.org/#/page/indexes/global-peace-index (finding that Qatar ranks as the most peaceful country in the region) (last visited Nov. 28, 2015).

66. QATAR FIN. CTR., www.qfc.qa (last visited Nov. 28, 2015).

67. *See* QATAR NATIONAL VISION 2030, *supra* note 10 ("A diversified economy that gradually reduces its dependence on hydrocarbon industries, enhances the role of the private sector. . . .").

68. *See* STEPHEN ANDERSON, PwC, QATAR ECONOMY WATCH 2 (2015), http://www.pwc.co.uk/assets/pdf/qatar-economy-watch-january2015.pdf (finding that from 2008 through 2013, Qatar's government revenue from non-hydrocarbon sources increased by 12% per annum).

69. *Id.*

Consistent with this approach, Qatar National Vision 2030 recognizes that the country's progress can no longer rest on the exploitation of its natural resources.[70] Instead, Qatar's National Vision 2030 articulates the Qatari government's plan to transform Qatar's economy into one that is global and knowledge-based by establishing advanced educational and health systems. Further the Qatari government has directed the investment of substantial resources in such systems.[71] Educational facilities such as Education City are host to leading global academic institutions in order to achieve the Qatar National Vision 2030.[72] In furtherance of the 2030 Vision, the state-sponsored Qatar University has significantly expanded and is graduating a growing cadre of leaders in areas including energy, arts, sciences, business, economics, law and engineering.[73] Qatar is also a pioneer in publishing research journals in medicine, law, education and business.[74]

Vibrant capital markets, which are crucial for a healthy economy, are a cornerstone of Qatar's ambitions. Indeed, developing the Qatari financial sector is regarded as critical to achieving the ambitious National Vision. The financial sector not only guides economic resources towards projects with high economic and social return, but also provides the funding needed for sustainable economic development through either the Qatari banking system or the Qatari capital market.[75]Accordingly, Qatar has modernized its national stock market, Qatar Exchange.[76] The Qatar Exchange—representing the largest private sector businesses in Qatar—had a market

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70. QATAR NATIONAL VISION 2030, *supra* note 10.

71. MINISTRY OF INFO. & COMMC'N TECH. QATAR, TRANSFORMING THE STATE OF QATAR TOWARD A KNOWLEDGE BASE ECONOMY 1, http://www.mdps.gov.qa/portal/page/portal/gsdp_en/media_center/news_listing/manage_missilanous_files/ictQATAR.pdf.

72. *See* Alan Weber, *Linking Education to Creating a Knowledge Society: Qatar's Investment in the Education Sector*, *in* HANDBOOK OF RESEARCH ON HIGHER EDUCATION IN THE MENA REGION: POLICY AND PRACTICE 52 (Neeta Baporikar ed., 2014).

73. *See* JOY S. MOINI ET AL., RAND-QATAR POL'Y INST., THE REFORM OF QATAR UNIVERSITY, at xiii (2009), http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG796.pdf.

74. Qatar Foundation's journals publish peer-reviewed research articles. *See* QSCIENCE.COM, http://www.qscience.com (last visited Nov. 28, 2015) ("QScience.com is [an] innovative and collaborative, peer-reviewed, online publishing platform . . . ."); Jon M. Truby, *Foreword From the Editor-in-Chief*, INT'L REV. L., Apr. 27, 2012, at 1, 1 (discussing the peer-reviewing processes that the journal uses to evaluate submissions).

75. *Chairman's Message*, QATAR FIN. MKTS. AUTH. [QFMA], http://www.qfma.org.qa/English/CeoMessage.aspx?id=40 (last visited Nov. 20, 2015).

76. *See, e.g.*, *Reminder: Daily Disclosure of Major Shareholders Who Own, 5% or More of the Listed Company's Capital*, QATAR STOCK EXCH. (Nov. 18, 2014), http://www.qe.com.qa/pps/qe/qe+english+portal/Pages/Details/Display%20Information%20Details/?InfoID=17670&ImgURL= (discussing the planned implementation of a rule requiring disclosure of shareholders who own more than 5% of the company's listed capital).

capitalization of approximately $155 billion as of late November 2015.[77] The companies listed for trading represented a wide array of leading business enterprises including: construction, financial services, insurance and industrial.[78] To promote stock market growth and increase liquidity, Qatar has embraced a relatively progressive approach to opening up its financial markets.[79] For example, Qatar has enacted laws allowing foreign investors[80] and foreign legal persons to hold an increasingly higher percentage of shares.[81] The expansion of the potential shareholder base allows foreigners to own up to forty-nine percent of a listed company in contrast with the former limit of twenty-five percent.[82] The Qatar Financial Centre Authority was established to promote the development of the financial services industry.[83] The fact that Qatar was the first Gulf nation

77. *See* QATAR STOCK EXCH., https://www.zawya.com/middle-east/financial-markets/qatar/ (last visited Nov. 28, 2015) (displaying market capitalization of Qatar Exchange).

78. *See* QATAR STOCK EXCH., OWNERSHIP PERCENTAGES FOR LISTED COMPANIES (2016), http://www.qe.com.qa/pps/qe/qe+english+portal/Pages/Market+Statistics/Statistical+Reports (listing companies by business sector).

79. *See, e.g.*, *infra* note 81 (noting the percentage of permissible non-Qatari ownership potential was raised from 25% to 49%).

80. "Foreign investors" are defined as "Non-Qatari nationals, Natural or Juridical." Qatar Investment Law, *supra* note 15, art. 1.

81. Qatar Exchange has encouraged foreign ownership. *See* Robert Tuttle, *Qatar Ups 'Efforts' to Raise Foreign Caps Before MSCI Decision*, BLOOMBERG BUS. (June 5, 2013), http://www.bloomberg.com/news/2013-06-05/qatar-ups-efforts-to-raise-foreign-caps-before-msci-decision.html ("Qatar said it's making 'extensive efforts' to raise foreign ownership limits of companies on its bourse, a week before MSCI Inc. decides whether to upgrade the nation to emerging market status."). In 2014, Qatar exchange raised foreign ownership limits from 25% to 49%. Hadeel al Sayegh, *Qatar Lifts Foreign Ownership Limits on Shares Ahead of MSCI Upgrade*, NATIONAL (May 27, 2014), http://www.thenational.ae/business/industry-insights/markets/qatar-lifts-foreign-ownership-limits-on-shares-ahead-of-msci-upgrade.

82. *2014 Investment Climate Statement – Qatar*, U.S. DEP'T OF STATE (June 2014) http://www.state.gov/e/eb/rls/othr/ics/2014/230858.htm. Moreover, "[f]oreign investors are generally not allowed to participate in initial public offerings (IPO), though exceptions are occasionally made on a case-by-case basis (primarily for other GCC nationals)." *Id.* This exclusion, applicable to non-Qataris, will prevent the expansion of the shareholder base to its full potential. Moreover, treating non-Qatari GCC nationals as Qataris is potentially problematic. The treatment of GCC nationals essentially makes these investors "Qatari" and thus exempt from the 49% restriction as well as vests these investors with the ability to participate in IPOs. Inasmuch as Qatar has signed BITs with non-GCC members which generally contain most favored nation status clauses as well as anti-discrimination obligations, such treatment may violate an international investment treaty. *See, e.g.*, Agreement Between the Belgium-Luxembourg Economic Union and the Government of the State of Qatar on the Reciprocal Promotion and Protection of Investments, art. 4, Nov. 6, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/404 (prohibiting each contracting state from giving better treatment to citizens of a third state). Thus, the rule allowing non-Qatari GCC nationals to be treated more favorably may implicate Qatar's international investment treaty obligations.

83. *See Partner Profiles: Qatar Financial Centre Authority*, DOING BUS. IN QATAR, http://www.qatar.doingbusinessguide.co.uk/partner-profiles/qfca/ (last visited Nov. 20, 2015) (noting that

with Chinese yuan clearing abilities is a testimony to the expansion of its financial sector.[84]

If Qatar is to succeed in becoming a major center of finance, banking, and investment, a stable and reliable legal system is essential. Qatar cannot become a successful financial center unless investors have confidence that Qatari companies will act to maximize profits. A high level of corporate governance is linked to healthy capital markets, an ability to attract and retain FDI, and generally superior economic performance.[85] Accordingly, an important part of Qatar's vision is the attraction of international investors to Qatari capital markets by "enhancing the regulatory entities and increasing the coordination and cooperation among them in order to create an integrated regulatory and supervisory model that helps to enhance competition and attract more local and foreign investments."[86]

II. CORPORATE GOVERNANCE

Good corporate governance of publicly traded entities is a pillar of modern economies, having taken on increased significance in light of globalization and recent economic crises. Corporate governance is a broad topic covering numerous aspects of how companies operate including the role and composition of the board of directors, special committees, monitoring management, independent directors, transparency and disclosure requirements, control mechanisms, minority shareholder rights, the role of non-shareholder stakeholders, and other relevant areas. According to the Organization for Economic Cooperation and Develop-ment ("OECD") corporate governance:

> involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring.[87]

QFCA is actively involved in promoting development of asset management, captive insurance and re-insurance businesses).

84. *Qatar to Become First Middle East Clearing Hub for China's Yuan*, REUTERS (Nov. 4, 2014), http://www.reuters.com/article/2014/11/04/china-offshore-yuan-idUSL4N0SU3KV20141104.

85. RONALD J. GIBSON, TRANSPARENCY, CORPORATE GOVERNANCE AND CAPITAL MARKETS 12 (2000), http://www.oecd.org/corporate/ca/corporategovernanceprinciples/1921785.pdf.

86. *Chairman's Message*, *supra* note 75.

87. OECD, OECD PRINCIPLES OF CORPORATE GOVERNANCE 11 (1999).

Corporate governance is a lynchpin of superior economic performance, and a high level of governance delivers better company performance and shareholder-value.[88] Directors lead a company, and accordingly, director conduct and liability forms a substantial part of corporate governance.

A. Corporate Governance Model: Shareholder Primacy or Stakeholder

Whether the corporate governance system is focused primarily on shareholder-value or stakeholder interests substantially impacts the fiduciary obligations of directors. In a shareholder profits-centric jurisdiction, the director's duties are primarily owed to the company and its shareholders. In contrast, in a stakeholder system, directors are obligated to consider (or, at least, have discretion to take into account) the interests of stakeholders other than shareholders. These other stakeholders include, among others, the community, society, employees, suppliers, ethics, and the environment. The following sub-sections discuss these competing models.[89]

1. Shareholder-Centric

In the United States, corporate governance is concerned with the fiduciary relationship between management (directors, officers, and senior managers) and the shareholders primarily (though not exclusively) in the context of conflicts of interest.[90] The divergent interests of management and the shareholders tend to manifest themselves in three—sometimes overlapping—management agency conflicts. First, managers may be involved in shirking conflicts, concentrating on activities that will enrich management personally rather than spending time on corporate profits.[91]

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88. *See* STIJN CLAESSENS & BURCIN YUTOGLU, CORPORATE GOVERNANCE AND DEVELOPMENT—AN UPDATE 20 (2012), http://www.ifc.org/wps/wcm/connect/518e9e804a70d9ed942ad6e6e3180238/Focus10_CG%26Development.pdf?MOD=AJPERES ("Better corporate governance can also add value by improving firm performance through more efficieint management, better asset allocation, better labor policies, and other efficiency improvements."); *see also* MARIA MAHER ET AL., OECD, CORPORATE GOVERNANCE: EFFECTS ON FIRM PERFORMANCE AND ECONOMIC GROWTH 31 (1999), http://www.oecd.org/sti/ind/2090569.pdf (citing empirical evidence that corporate governance correlates positively for industrial competitiveness of OECD countries).

89. For a fuller discussion of the shareholder versus stakeholder models of corporate governance see Joel Slawotsky, *Hedge Fund Activism in an Age of Global Collaboration and Financial Innovation*, 35 REVIEW OF BANKING AND FINANCE LAW (forthcoming 2016).

90. The United States and other nations that have a dispersed shareholder base are primarily entangled with management agency conflicts.

91. *See* Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L REV. 1461, 1471 (1989) ("All agents have a potential interest in working at a slack pace and in avoiding the effort and discomfort involved in adapting to changed circumstances, such as the emergence of new technologies.").

Second, managers may take part in looting conflicts, procuring for themselves salaries and benefits not commensurate with their work or the financial success of the company.[92] Third, and finally, managers may engage in positional conflicts by seeking to entrench themselves by ensuring that they cannot easily be replaced.[93] Notably, these conflicts are enumerated in the introduction to the Qatar Exchange Code.[94]

The case of Simon-World-Wide, a publicly traded company in the United States, illustrates these conflicts. A major shareholder alleged that the directors and officers were engaged in all three conflicts vis-à-vis the company and its shareholders. In a regulatory filing, the majority shareholder sent a letter to the company's directors outlining the conflicts of interest between the company's managers and directors and the shareholders.[95] The letter alleged that the directors (1) had failed to hold a shareholders' meeting for four years (positional conflicts), (2) were being paid exorbitant salaries in light of the business's failure to earn any income (looting conflicts), and (3) were not in fact working at their offices (shirking conflicts).[96]

United States corporate governance is focused on addressing and deterring these conflicts. Lawsuits are frequently filed in American courts alleging that a company's managers were engaged in one or more of these conflicts of interest, which clash with the shareholder-value mantra of United States corporate governance.[97] Delaware courts have adopted

92. *Id.* ("All agents have a potential interest in diverting the principal's assets to their own use . . . .").

93. *Id.* at 1471–72 ("[T]op corporate managers have the power to give expression to still a third potential divergence of interest: an interest in maintaining and enhancing their positions even at the shareholders' expense.").

94. QFMA, TRANSLATION OF THE CORPORATE GOVERNANCE CODE FOR COMPANIES LISTED IN MARKETS REGULATED BY THE QATAR FINANCIAL MARKETS AUTHORITY 5 (2009) [hereinafter QFMA CORPORATE GOVERNANCE CODE].

95. *Information to be Included in Statements Filed Pursuant to Rule 13d-1(a) and Amendments Thereto Filed Pursuant to Rule 13d-2(a)*, SECS. & EXCH. COMM'N, 11–12 (May 11, 2006), http://www.sec.gov/Archives/edgar/data/864264/000092189506001187/0000921895-06-001187.txt.

96. *Id.*

97. *See, e.g.*, *In re* The Walt Disney Co. Derivative Litigation, 825 A.2d 275 (Del. Ch. 2003). The claims were the executive engaged in: shirking conflicts, *id.* at 283, looting conflicts (continuing to obtain a large salary while shirking) and positional conflicts, *id.* at 284. While the defendant executives ultimately prevailed, the examples of divergent interests remain viable exemplars of potential conflicts. *See In re* The Walt Disney Co. Derivative Litigation, 906 A.2d 27 (Del. 2006); *see also* Emon Reiser, *Office Depot-Staples Deal 'Fraught With Conflict of Interest,' Complaint Alleges*, SOUTH FLA. BUS. J. (Apr. 6, 2015), http://www.bizjournals.com/southflorida/news/2015/04/06/office-depot-staples-deal-fraught-with-conflict-of.html ("Office Depot executives may not have negotiated the best sale price for the company . . . ."); Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014) (adjudicating allegations of directors engaging in conflicts of interest with shareholders).

standards, discussed below, for evaluating alleged conflicts of interest between management and shareholders.[98]

Pursuant to the shareholder-value approach, shareholders—as owners of the business—are entitled to have the business run solely for their benefit.[99] Accordingly, the directors are obligated to conduct the company's affairs with the objective of maximizing the shareholder's profits.[100] The rationale is that the shareholders are not only owners, but also risk-bearers. Because shareholders risked their capital and created a firm and employment opportunities,[101] the argument goes, they deserve to reap the rewards of their efforts. This theme is central to judicial opinions in the United States that take the shareholder-value approach to evaluating director conduct. Thus, under Delaware law, it is the responsibility of the directors to maximize shareholder-value as opposed to looking out for the interests of other stakeholders.[102]

The United States is historically not alone in its shareholder-value focus. The United Kingdom, Australia, and Canada were also traditionally considered shareholder-value countries. However, in recent years, the trend in these other historically shareholder-centric nations has been to mitigate the focus on profits in what has been referred to as "enlightened shareholder value." Even some American political[103] and business leaders

98. *See* Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law,* 66 FLA. L. REV. 389, 393 (2014) ("Delaware is the state where the majority of the largest U.S. companies are incorporated, and its corporate law often serves as the authority that other U.S. states and countries look to when developing their own statutory and case law.") (footnotes omitted).

99. *See e.g.*, Revlon v. MacAndrews & Forbes, 506 A.2d 173, 182 (Del. 1986) ("Although such considerations [of non-stockholder corporate constituencies and interests] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

100. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (recognizing "the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders"); Paramount Commc'ns v. Time, 571 A.2d 1140 (Del. 1989) (same).

101. *See* Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July–Aug. 2012, at 49, 49 ("Without shareholders who are willing to take risks that a bank or a bondholder would not, these companies might remain stuck in low gear or never even get moving. The investors who provide this cash are usually granted clout commensurate with their contribution.").

102. *See, e.g.*, *Revlon*, 506 A.2d at 185 (finding director misconduct in failing to seek highest price available); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345–46 (Del. 1987) (upholding directors' defensive measures such as a large dividend distribution and a new standstill agreement to thwart activist investor since shares were valued more than the offer).

103. *See* Joel Slawotsky, *Sustainable Capitalism: Revelations from the Japanese Model*, 63 HASTINGS L.J. VOIR DIRE 10, 10 (2012) ("Critics of America's shareholder-centric model allege that it is archaic and a failure, and they believe that the American version of capitalism must undergo a dramatic shift toward a stakeholder-based model emulating other nations . . . . President Obama recently

have begun to advocate this model.[104] The United Kingdom has led the "enlightened shareholder" trend.[105] Pursuant to this model, "corporations should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests."[106] This approach is codified in the United Kingdom by the landmark Companies Act 2006, which represents a key shift away from the shareholder-value model towards a stakeholder model.[107]

Pursuant to the Companies Act 2006, directors are to manage the company in the "best interests" of the business.[108] The phrase "best interests" arguably gestures toward a middle ground between the pure shareholder and stakeholder models.[109] This middle ground is also referred to as "sustainable capitalism."[110] The fiduciary obligations of UK directors were thus broadened to encompass interests other than shareholders. UK directors are now obligated to act to promote the "success of the company,"

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echoed the 'sustainable capitalism' theme by calling for major changes that would enhance the interests of other stakeholders in order to construct an economy 'built to last.'").

104. *See* James Surowiecki, *A Fair Day's Wage*, NEW YORKER (Feb. 9, 2015), http://www.newyorker.com/magazine/2015/02/09/fair-days-wage (quoting AETNA's CEO Mark Bertolini as stating that "[c]ompanies are not just money-making machines" and that with respect to pay raises, "[f]or the good of the social order, these are the kinds of investments we [corporations] should be willing to make.").

105. Sarah Kiarie, *At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?*, 17 INT'L COMPANY & COM. L. REV. 329, 340 (2006).

106. David Millon, *Enlightened Shareholder Value, Social Responsibility and the Redefinition of Corporate Purpose Without Law*, *in* CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 68, 68 (P.M. Vasudev et al. eds., 2012).

107. Andrew Keay, *The Duty to Promote the Success of the Company: Is It Fit for Purpose in a Post-Financial Crisis World?*, *in* DIRECTORS' DUTIES AND SHAREHOLDER LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS 50, 53 (Joan Laughrey ed., 2013); *see generally* Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 CORP. GOVERNANCE: AN INT'L REV. 147 (comparing the U.K. corporate governance system to the U.S. system)

108. *See* John Lowry, *Codifying the Corporate Opportunity Doctrine: The (UK) Companies Act 2006*, INT'L REV. L. Apr. 30, 2012, at 1, 9 n.63.

109. *See* Cynthia A. Williams et al., *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L. J. 493, 500 (2005) ("[A] British corporate governance system that embodies a concept of enlightened shareholder value may be emerging to occupy a unique third position between the American shareholder wealth-maximizing position and the continental stakeholder model.").

110. *See, e.g.*, Al Gore et al., *A Manifesto for Sustainable Capitalism*, WALL ST. J., Dec. 14, 2011, at A21 ("Before the crisis and since, we and others have called for a more responsible form of capitalism, what we call sustainable capitalism: a framework that seeks to maximize long-term economic value by reforming markets to address real needs while integrating environmental, social and governance (ESG) metrics throughout the decision-making process.").

which envisions taking into account a varied list of stakeholders including: employees, suppliers, customers, environmental concerns, the community and reputational business conduct.[111]

UK law clearly imposes upon directors a heightened need to consider these "other interests" in the boardroom. Court rulings in the United Kingdom have made clear that directors who fail to account for other stakeholders when making business decisions expose themselves to civil liability.[112] One court stated, "the directors are under a fiduciary duty to the company to have regard to, inter alia, the interests of members and employees."[113] The stakeholder model has also made significant advances in traditionally shareholder-value nations such as Canada.[114]

2. Stakeholder Model

The stakeholder-value model is popular in the European Union and Japan, and is growing globally.[115] Under this model, the company is

111. Companies Act 2006 c. 46 § 172 (UK).

112. *See* Lowry, *supra* note 108, at 10 (discussing a U.K. case in which a director of a corporation was found liable for not acting in the best interest of "claimants" in the company).

113. Dawson Int'l Plc v. Coats Paton Plc [1989] BCLC 233, 240.

114. In BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, ¶ 81, the Canadian Supreme Court ruled that directors must balance various stakeholder interests "in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen." (emphasis added). The court in fact stated: "In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions." *Id.* ¶ 40. *See also* Peoples Department Stores Inc. (Trustee of) v. Wise. [2004] 3 S.C.R. 461, ¶ 42 ("We accept as an accurate statement of law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.").

115. *See* Slawotsky, *supra* note 25, at 11 (noting "the stakeholder model—which elevates the interests of stakeholders over shareholder profits—as practiced in many EU nations and Japan"); Corrine M. Fiesel, *Fiduciary Duties of Directors, Corporate Governance and the End of Shareholder Primacy, in* CORPORATE GOVERNANCE AND SECURITIES REGULATION IN THE 21ST CENTURY 61, 78 (Poonam Puri & Jeffrey Larsen eds., 2004) ("Over 30 U.S. states now have legislation permitting corporate directors to consider interests of other groups, in addition to shareholders, in their decision-making."). However, the profits-centric approach is also making inroads into historically stakeholder-centric jurisdictions e.g., Inger Marie Hagen, *Employee-Elected Directors on Company Boards: Stakeholder Representatives or the Voice of Labor?, in* RETHINKING CORPORATE GOVERNANCE: FROM SHAREHOLDER VALUE TO STAKEHOLDER VALUE 121, 123 (Roger Blanpain ed., 2011) ("One of the major questions (at least before the financial crisis) was whether the European model of Corporate Governance would convert into the Anglo-American shareholder-based model, or rather, how long this would take."). Norway serves as an example of this of this transition: It has traditionally been viewed as one of the representatives of the European stakeholder model. *Id.* at 121. However, Norway's state owned SWF is shifting its traditional corporate social responsibility based activism towards a broadening scope of activism to include shareholder-value. The Norwegian SWF is therefore moving towards a profits-centric shareholder value activism. *See* Ruth Sullivan, *Norwegian Wealth Fund Set to Raise Bar on Governance*, FIN. TIMES (Sept. 1, 2013), http://www.ft.com/intl/cms/s/0/ea0ede56-0fc9-

considered a nexus of "unwritten" contracts between various constituencies with an interest in the business. These contracts determine the various stakeholders' rights and obligations.[116] In terms of corporate governance and company law, directors must make decisions taking into account the interests of these various "constituents" who effectively have "rights" in the company. The stakeholders include creditors, employees, suppliers, customers, and the society at large.

Under a stakeholder-value model, maximizing profits or shareholders returns are not the only goals of a business. Instead, other interests play a role in corporate decision making, including the interests of employees, consumers, suppliers, the environment, the local community, and the wider global audience. Under the stakeholder theory, director conduct that considers non-shareholders may not constitute a breach of fiduciary duty because directors are permitted to take into account and possibly favor non-shareholders. Therefore, the stakeholder model alters the liability landscape in comparison to the shareholder-value model. For example, in Delaware, directors owe *Revlon* duties once the sale of a corporation has been decided.[117] *Revlon* duties mandate that the directors obtain the best price possible, notwithstanding other considerations.[118]

However, in a stakeholder jurisdiction, directors in a sale situation may consider the impact of the transaction on other constituencies. For example, if a proposed transaction will result in mass layoffs, directors in stakeholder nations may be empowered to block the transaction. These directors could exercise their business judgment and accept a lower offer if the lower offer will not eliminate jobs. Similarly, directors could block a transaction that would result in environmental degradation or adversely

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11e3-99e0-00144feabdc0.html#axzz2zs3qenxh; *see also Investor Muscle,* FIN. TIMES (Aug 8, 2013), http://www.ft.com/intl/cms/s/0/8eeb7524-002f-11e3-9c40-00144feab7de.html#axzz2zs3qenxh. For a fuller discussion of SWFs and activism, see generally, Joel Slawotsky, *Incipient Activism of Sovereign Wealth Funds: Impact on U.S. Securities Law*s, 2015 QATAR UNIVERSITY INTERNATIONAL REVIEW OF LAW (2015), http://www.qscience.com/doi/pdf/10.5339/irl.2015.swf.8.

116. Xin Denga et al., *Corporate Social Responsibility and Stakeholder Value Maximization: Evidence from Mergers*, 110 J. FIN. ECON. 87, 88 (2013).

117. Revlon v. MacAndrews & Forbes, 506 A.2d 173, 182 (Del. 1986) ("The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit . . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.").

118. *See id.* at 185 ("[W]e must conclude that under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment, and followed a course that ended the auction for Revlon, absent court intervention, to the ultimate detriment of its shareholders.").

affect the interests of customers, suppliers, or other stakeholders under the banner of enlightened shareholder-value. The potential permutations represent a daunting challenge in balancing stakeholder interests. Ultimately, the stakeholder model is distinguishable from the shareholder-value where, for example, directors are obligated by *Revlon* to achieve the maximum price for shareholders regardless of other considerations.

B. Qatari Corporate Governance

A crucial question is whether Qatar is a shareholder-value jurisdiction or a stakeholder jurisdiction. Depending upon the model, certain conduct may or may not be "mistaken," "negligent," or otherwise violate a director's fiduciary duties.

1. Is Qatar Shareholder or Stakeholder?

Qatar's model of corporate governance is more closely aligned to a shareholder value model although other stakeholders are ostensibly considered. The preamble of the Qatar Exchange Code ("the Code") cites to OECD best practices on corporate governance, which state that governance encompasses the rights and obligations of the various participants in a business including shareholders and "other stakeholders."[119] The Code states, "The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the Board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs."[120] The Code defines stakeholders as, "[e]very person (legal or natural) having an interest in the Company including for example shareholders, employees, creditors, clients, customers, suppliers and investors."[121]

However, the Code references "other stakeholders" in only two sections other than the definitions section. The first discusses communication with other stakeholders but does not articulate or recommend any specific director obligations to these "other stake-

119. QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, at 4.

120. *Id*. This description is nearly identical to—and is clearly based upon—the OECD definition. "The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation—such as the board, managers, shareholders and other stakeholders—and lays out the rules and procedures for decision-making." OECD GLOSSARY OF STATISTICAL TERMS, https://stats.oecd.org/glossary/detail.asp?ID=6778 (last visited February 12, 2016).

121. QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, at 12.

holders."[122] Moreover, the reference only lists shareholders, managers, and employees as "other stakeholders" and does not mention any other constituencies.[123] The second reference states, "The rights of Stakeholders are to be respected."[124] This reference, also, lists only shareholders, managers and employees as stakeholders, leaving out other potential stakeholders.[125] Moreover, the recommendation to respect managers and employees as stakeholders is linked to overall shareholder-value. The consideration of managers and employees is limited to merit-based compensation and does not include whether employees should be terminated.[126] The Code states that each company should have a compensation system that rewards good performance of other stakeholders, managers and employees to enhance company value. [127] The only apparent "other stakeholders" referenced as parties "having rights" presumably sufficient that directors can take their interests into the boardroom are "employees and management." Non-company stakeholders such as customers, suppliers, and the local community or environment are not included.[128] Thus, the reference to "respecting other stakeholders" does not translate into a stakeholder model of governance.

It is also noteworthy that the potential conflicts of interest listed by the Code are the management agency conflicts between directors and shareholders commonly found in the United States shareholder-centric system.[129] This also militates towards finding Qatar a shareholder-value jurisdiction. This conclusion is re-enforced by the fact that Qatar's Companies Law makes no reference to stakeholders. Unlike the UK's Companies Act, there are no articulated constituents that directors can or must take into account. Qatar's governance model is thus more closely aligned with the United States shareholder-value model.

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122. *Id.* art. 12.1 ("[T]he Board Secretary shall also be in charge of ensuring timely access to information and coordination among the Board Members as well as between the Board and the other stakeholders in the company including shareholders, management, and employees.").

123. *Id.*

124. *Id.* art. 29.1.

125. *Id.*

126. *Id.* art. 29.3 ("The Board shall develop a remuneration policy and packages that provide incentive for the employees and management of the Company to always perform in the best interests of the Company. This policy should take into consideration the long term performance of the Company.").

127. *Id.*

128. *Id.*

129. *See supra* note 97 and accompanying text; *see also* QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, at 5.

2. Enforcement Mechanism

There are two sources of law regarding director fiduciary duties in Qatar, both of which are mentioned briefly above. The first source, the Companies Law, is explicitly enforceable through litigation. The second source, the Code, consists of recommendations, which are not technically enforceable in court, but require listed entities to "voluntarily comply" or explain in a public filing why the company has failed to comply.[130] The Code is therefore "soft-law" and is based on "comply[ing] or explain[ing] the reason for non-compliance."[131] In this regard, the listing rules are similar to the United Kingdom's corporate governance code.[132] Though the "comply or explain" approach is the hallmark of corporate governance in the European Union,[133] and has been widely imitated by other jurisdictions, the doctrine has also been criticized.[134]

The next section will discuss "hard" and "soft" law relating to director obligations in Qatar for shareholding companies. The section will focus on the parameters of the responsibilities of Qatari directors and discuss aspects involving the duty of care which should be amended.

130. Pursuant to Art. 30 of the Code, publicly traded companies are required to file a corporate governance report that includes compliance with the Code's governance guidelines. QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, art. 30. Under Art. 2.2, companies are required to comply, or explain the reason for non-compliance with the Code's governance recommendations. *Id.* art. 2.2.

131. *Id.*

132. *See* FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 4 (2014), https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.aspx ("The 'comply or explain' approach is the trademark of corporate governance in the UK. It has been in operation since the Code's beginnings and is the foundation of its flexibility. It is strongly supported by both companies and shareholders and has been widely admired and imitated internationally.")

133. For an example of the comply and explain approach, see Council Directive 2006/46/EC, art. 46a, 2006 O.J. (L 224).

134. *See* Petra Inwinkl et al., *The Comply-or-Explain Principle: Stakeholders' Views on How to Improve the "Explain" Approach,* 12 INT'L J. DISCLOSURE & GOVERNANCE 210, 210 (2015) ("An increasing number of studies provide evidence that corporate governance statements disclosed on European stock markets lack quality, mainly in terms of the explanations they include when the companies do not comply with code provisions."); Konstantinos Sergakis, *EU Corporate Governance: A New Supervisory Mechanism for the 'Comply or Explain' Principle?*, 10 EUR. COMPANY & FIN. L. REV. 394, 394 (2013). ("[T]he 'comply or explain' principle upon which the European framework has embarked seems to present, in its current dimension, a series of problems regarding its effectiveness.").

III. QATARI LAW AND QSE RULES: THE HARD AND SOFT LEGAL PILLARS THAT SHAPE DIRECTOR OBLIGATIONS FOR SHAREHOLDING COMPANIES

This Article focuses on one type of business entity: shareholding companies that trade on the Qatar Exchange.[135] Companies that trade on the Qatar Exchange are generally the large and influential private-sector businesses, including financial, insurance, construction, real estate, and industrial companies.[136] There are two primary sources of law that define the extent and contours of director obligations in Qatar for shareholding companies: the Companies Law and the Qatar Exchange Code.

A. The Companies Law

Considered "hard" law, the Companies Law of 2002 outlines the obligations of directors in Qatari shareholding companies.[137] Directors have two independent duties. First, they are obligated to act loyally to the company. Acts of disloyalty are strictly forbidden.[138] Second, by making clear that directors have non-exculpatory liability for "mistakes" resulting in damages to the company or its shareholders, the Companies Law imposes a non-delegable or indemnifiable obligation of due care on the directors.[139]

1. The Duty of Loyalty

The Companies Law prohibits directors from engaging in conduct that raises questions regarding loyalty such as participating in competing businesses, engaging in self-interested transactions, obtaining cash loans from the company, or exploiting insider information. This duty of loyalty exists vis-à-vis both the company and its shareholders.[140]

In addition, directors are not allowed to engage in business transactions with the company because they would be on both sides of such

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135. This business was selected as it represents the most likely business organization that foreigners would choose to invest in and represent the largest and most influential companies in Qatar.

136. *See Website Links of QE Listed Companies*, QATAR STOCK EXCH., http://www.qe.com.qa/pps/PortalTemplates/complinks/CompaniesPopupUrl.htm (last visited Nov. 28, 2015) (providing the names and links to the websites of companies listed on the Qatar Exchange).

137. *See generally* Commercial Companies Law, *supra* note 15. As noted *supra* note 35, we are focusing only on shareholding companies although the Companies Law also promulgates regulations for a variety of other business organizations.

138. Commercial Companies Law, *supra* note 15, arts. 107–10 (prohibiting various conflicts of interest, including insider trading).

139. *E.g.*, *id.* arts. 112–16, 125, 300.

140. *Id.* art. 107.

transactions.[141] Moreover, the CEO and directors are precluded from "any direct or indirect interest in the contracts, projects, undertakings made on account of the company"[142] and from taking out cash loans from the company.[143] Insider trading is also strictly prohibited.[144] The Companies Law prohibits the CEO and any director from making use of knowledge and information acquired in his capacity as a director or company employee to attain the advancement of his personal interests or those of his relatives.[145] Violation of the duty of loyalty will result in joint and several liability for a director.[146] No director may be exculpated by internal company rules.[147]

2. Due Care

In addition to prohibiting disloyal conduct, the Companies Law mandates that directors act with due care, and makes directors liable for "mistakes." The due care requirement is imposed by two sources. The first is Article 103 which mandates that the directors meet at least every two months.[148] The second source is Article 112 which provides both that the directors are jointly responsible for managerial mistakes and that any company provision obviating such liability is null and void.[149] By imposing joint liability on directors who make mistakes and by making that liability non-exculpatory, the law incentivizes Qatari directors to act with great caution.

Notably, the term "mistake" is not defined. Because the notion of a mistake is obviously fact dependent, the potential liability is far-reaching and possibly draconian. The directors of a Qatari shareholding company are liable for damages for "mistakes," i.e., negligence.[150] All directors are liable except those directors who objected.[151]

141. *Id.* art. 108.

142. *Id.*

143. *Id.* art. 109.

144. *Id.* art. 110.

145. *Id.*

146. *See id.* art. 112 ("The board chairman and the members will be collectively responsible for compensating the company, shareholders and others for the damage resulted from deceit or bad use of authority or the violation to the provisions of this law or the statute of the company and any mistake in the management. Any term in contrary will be null and void.").

147. *Id.*

148. *Id.* art. 103.

149. *Id.* art. 112.

150. The definition of negligence or examples of the same do not appear.

151. Commercial Companies Law, *supra* note 15, art. 113.

The fact that ordinary negligence is actionable in Qatar is in marked contrast with Delaware law, which does not impose liability for routine mistakes or ordinary negligence. In fact, Delaware law protects directors who make mistakes through the application of the business judgment rule ("BJR"). The BJR presumes that directors acted with due care, loyalty and good faith.[152]

Furthermore, under Qatari law, the company is vested with the authority to file a damages suit. If the company fails to do so, injured shareholders can opt to file a claim themselves.[153] Pursuant to the Companies Law, the company can file suit alleging director misconduct for mistakes that result in damages on behalf of the shareholders within five years from the mistake.[154]

Another significant difference between Qatari and Delaware law is that the Companies Law explicitly makes this potential liability for damages not voidable. According to the Companies Law, any provision in the internal laws of the company that purports to prevent a shareholder from filing suit is "null and void."[155] This Law clearly prohibits an exculpatory clause and obviates the potential for indemnification by the company.[156] In contrast, under Delaware law, directors can be indemnified or benefit from exculpatory clauses for violations of due care.[157]

B. QSE Listing Rules

The second pillar of director regulation in Qatar is the Code, which is soft law.[158] The Qatar Financial Market Authority (QFMA) introduced the Corporate Governance Code in 2009.[159] The Code applies to all corporations whose shares are listed on the Qatar Exchange.[160] As with the

152. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.").

153. Commercial Companies Law, *supra* note 15, art. 115.

154. *Id.* art. 114.

155. *Id.* art. 115.

156. As a possible alternative, Director and Officer Liability insurance is available for Qatari directors. *See generally BusinessGuard Directors and Officers Liability Insurance*, Am. Fin. Grp. [AIG], http://www.aig.com.qa/business/products/financial-lines/directors-officers-liability (last visited Nov. 12, 2015).

157. *See infra* Part V.C. However, Delaware prohibits such exoneration or indemnification in cases of bad faith or disloyalty. *See infra* note 223 and accompanying text.

158. *See generally* QFMA CORPORATE GOVERNANCE CODE, *supra* note 94. The Corporate Governance Code of Qatar "comprises principles and practices to improve the quality of governance." *Id.* at 4.

159. *Id.*

160. *Id.* art. 2.1.

New York Stock Exchange, NASDAQ, and the London Stock Exchange, the privilege of being listed on the Qatar Exchange is conditioned on following the rules of the exchange.[161]

At the outset, the Code describes the risks of substandard corporate governance and specifically enumerates the classic agency conflicts of looting and shirking.[162] Like the Companies Law, the Code also enumerates the fiduciary duties of directors in Qatar. The Code states that a director "owes the Company the fiduciary duties of care, loyalty and compliance with the rules set out in related laws and regulations including this Code and the Board Charter."[163] In addition, the Code mandates that Directors conduct their activities "in good faith, with due diligence and care, and in the best interests of the Company and all shareholders"[164] and "act effectively to fulfill their responsibilities towards the Company."[165]

In requiring directors to "act effectively," the Code does not articulate specific conduct such as consulting with experts, and engaging in due diligence. One problem with both the Companies Law and the Code is that neither articulates a test for identifying the sort of "mistakes" that would expose a director to liability for regular negligence. Moreover, the Code is voluntary and Code's enforcement is relegated to the "comply or disclose" model which has been subject to a fair amount of critique.[166]

The Code also includes a definition of loyalty and states: "Board Members owe a Duty of Loyalty to the Company and its Shareholders. This fiduciary duty requires Board Members to subordinate their personal interests to the interests of the Company and its Shareholders and at all times act in good faith."[167] In addition, the Code states that directors (and friends and family) should not enter into self-dealing transactions with the

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161. *See generally New York Stock Exchange Listing Requirements*, N.Y. STOCK EXCH., http://nysemanual.nyse.com/LCM/Sections/ (last visited Nov. 22, 2015); NASDAQ, INITIAL LISTING GUIDE (2015), https://listingcenter.nasdaq.com/assets/initialguide.pdf; LONDON STOCK EXCH., MAIN MARKET: A GUIDE TO LISTING ON LONDON STOCK EXCHANGE (2010), http://www.londonstockexchange.com/companies-and-advisors/main-market/documents/brochures/gudetolisting.pdf.

162. *See* QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, at 5 ("[B]oard members have more control and information about the plans and operations of the company than ordinary Shareholders. The possession of more control and more information generates opportunities for using such control and information for obtaining personal benefits at the expense of Shareholders. And so such asymmetries expose the Shareholders to high risks of shirking and lax performance by Board members and Executive Managers; as well as using information and power for personal benefits at the expense of Shareholders.")

163. *Id.* art. 6.1.

164. *Id.* art. 6.2.

165. *Id.* art. 6.3.

166. *See generally* Inwinkl et al., *supra* note 134.

167. QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, Annex 2, ¶ 3.2.1.

company, compete with the financial interests of the company,[168] exploit for their own interests a corporate opportunity (unless declined by the company), obtain loans on a preferential basis, engage in insider trading, or otherwise act contrary to law.[169] Furthermore, directors must disclose conflicts of interest and decline to vote on matters that present such conflicts.

In summary, there are two major differences between Qatari law and Delaware law. First, under Qatari "hard" law (the Companies Law), directors are liable for a mistake. Mistake is not defined and can encompass a virtually unlimited variety of negligence. In addition, the Companies Law prohibits directors from benefitting from exculpatory clauses.

IV. DELAWARE LAW

The remaining question is whether Qatar's legal framework governing directors is optimal. Numerous opinions have been issued in Delaware and a series of standards have been developed for evaluating director conduct.[170] Therefore, Delaware law is useful in examining Qatari law.

In a fascinating article, Curtis Milhaupt describes how Japan has integrated Delaware judicial opinions into its own law.[171] Milhaupt notes

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168. *Id.*, Annex 2, ¶ 3.2.2(1–2). It should be noted that the phrase "this paragraph does not prohibit a concerned party from owning less than 10% of a listed company or instances where the conflict is disclosed and expressly approved in accordance with the law, rules or regulations" dilutes this aspect of the Corporate Governance Code. *See id.*

169. *Id.*, Annex 2, ¶ 3.2.2(6–7).

170. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014) (noting that in controlling owner transactions a special committee of disinterested directors and a majority approval of minority shareholders will avoid entire fairness scrutiny); Schoon v. Smith, 953 A.2d 196, 206 (Del. 2008) (recognizing that directors have a duty of loyalty precluding their appearing on both sides of a transaction or deriving a unique benefit not received by ordinary shareholders); Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("[A] director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest."); Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) ("An underlying premise for the imposition of fiduciary duties is a separation of legal control from beneficial ownership."); Revlon v. MacAndrews & Forbes, 506 A.2d 173 (Del. 1986) (emphasizing that directors are obligated to maximize shareholder-value); *see* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (noting that directors must be fully informed prior to making a decision and gross negligence removes the protection of the business judgement rule); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985) (holding that an enhanced scrutiny standard will be utilized when the potential of conflicts of interest exists, for example in defending against a takeover); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) ("There is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company."); Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983) (holding that the entire fairness standard looks at the price and procedure in arriving at a deal in evaluating director conduct).

171. *See generally* Curtis Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171 (2005).

that Japanese corporate governance has relied upon certain aspects of Delaware law, specifically in the context of defensive measures against takeovers.[172] According to Milhaupt, a focus group of Japanese scholars concluded that Delaware law provides a "superior means" of advancing corporate governance.[173] Their "objective was to identify the best standard by which to distinguish corporate value-enhancing from value-destroying bids."[174] After examining takeover law from the US, UK, and EU, "Delaware takeover doctrine emerged . . . as the superior means of accomplishing that objective."[175] Subsequently, a "version of the Revlon rule is reflected in the [Japanese] Takeover Guidelines, which emphasize directors' fiduciary duty to evaluate competing proposals and to refrain from implementing defensive measures that deprive shareholders of the opportunity to consider competing proposals."[176]

Since Delaware law is a global authority, often providing guidance "to courts in other jurisdictions in establishing their own [] law,"[177] we analyze Qatari law through the lens of Delaware law. Accordingly, the following discussion of the director duty of care and the business judgment rule will focus on Delaware law. In reviewing the decisions of directors in the context of the duty of care, Delaware courts use the BJR. The BJR is a rebuttable presumption that in the absence of potential or actual conflicts of interests the directors acted in good faith and in the interests of the corporation and its shareholders in handling the affairs of the business. The principle acts to protect directors from personal liability if they acted loyally and in good faith, with due care and within their authority. The BJR standard is deferential to the directors, and a court will not second guess the director's business decision even if it is subsequently found to be negligent.[178] The BJR is accordingly of critical importance to directors as it

172. *Id.* at 2196.

173. *Id.* at 2196 n.82 (emphasis added).

174. *Id.*

175. *Id.*

176. *Id.*

177. *See* Nadelle Grossman, *Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform*, 12 FORDHAM J. CORP. & FIN. L. 393, 397 (2007).

178. Only conduct that constitutes an uninformed decision will invalidate the BJR. For example, say an energy company decides to buy existing oil fields paying the seller a price based upon a financial analysis that crude will trade at $100 per barrel over the next five years. The directors engaged with economic experts and obtained several investment banks opinions that opined oil would average at least $100 per barrel for the next five years. However, soon after the transaction, the global economy enters a recession and the price of oil plunges to $50 a barrel. The profitability of the fields collapse, the company suffers losses and cuts the dividend. The decision to buy the fields now appears to have been a bad business decision. While the decision to pay based on $100 a barrel crude was a mistake, the BJR

absolves them of liability for the "wrong" decision. A court employing the BJR and finding no reason to overcome the defense will dismiss litigation against the directors.[179]

However, the BJR presumption can be overcome if director misconduct is shown. The party alleging that the BJR ought not apply bears a heavy burden.[180] If the plaintiff can demonstrate that the action of the directors was, at a minimum, grossly negligent,[181] or was made without any rational basis,[182] the BJR is not applicable and the director may be held personally liable.

The question of director liability for a lack of care and due diligence was illustrated in the landmark case *Smith v. Van Gorkom,* where the Delaware Supreme Court held that directors must adequately inform themselves of the facts before acting and that failure to do so obviates the BJR.[183] In *Van Gorkom*, the directors approved the transaction based upon the CEO's verbal presentation, without being provided any written material on the proposed deal, and failed to consult outside investment banking experts or any independent legal opinions.[184] The court found that because the directors failed to educate themselves about the proposed transaction, the directors had failed to reach an informed opinion.[185] Thus, the court noted that the directors who voted in favor of the transaction under those circumstances were, at a minimum, grossly negligent.[186] The court emphasized that due care mandated that the directors make an *informed* decision. Therefore, the court held the directors could not avail themselves

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will protect the decision since the directors engaged with experts and exercised due diligence in reaching what was an informed business decision.

179. *See, e.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014) (utilizing the BJR to dismiss the suit).

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

181. Alternatively, courts use a "no rational reason" test. *See Kahn*, 88 A.3d at 654 (Del. 2014) ("Under that [BJR] standard, the claims against the Defendants must be dismissed unless no rational person could have believed that the merger was favorable to MFW's minority stockholders.").

182. *Id.*

183. 488 A.2d 858, 872 (Del.1985).

184. *Id.* at 869.

185. *See id.* at 877 (noting the failure to obtain expert opinions: "Here, the issue is whether the directors informed themselves as to all information that was reasonably available to them. Had they done so, they would have learned of the source and derivation of the $55 price and could not reasonably have relied thereupon in good faith").

186. *See id.* at 874 ("The directors (1) did not adequately inform themselves as to Van Gorkom's role in forcing the 'sale' of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the 'sale' of the Company upon two hours' consideration, without prior notice, and without the exigency of a crisis or emergency.").

of the BJR. The court ultimately held that the directors failed to fulfill their duty of care and found them personally liable.[187]

Kahn v. M&F Worldwide provides another method of rebutting the BJR.[188] In *Kahn*, the court noted, "[W]here business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'"[189] The case, one of first impression, dealt with the appropriate standard of review for a transaction between a controlling owner and the company if both a special committee reviews and approves the deal and a majority of the minority shareholders approve the transaction. The court held that under such circumstances, the BJR was the correct standard (as opposed to entire fairness).[190]

The definition of due care contained in the Code mirrors the benchmarks applied in *Van Gorkom*.[191] The Code states that directors must act in good faith and exercise due care and diligence. Directors are charged with acting in the best interests of the company, on an informed basis, after consultation with experts when applicable, and should be informed and be able to monitor the company.[192]

Following the *Van Gorkom* ruling, directors were concerned that they would face personal liability for business decisions and potential personal financial loss.[193] As a result, Delaware (and many other states), enacted a law empowering shareholders to approve exculpatory clauses protecting directors from certain lawsuits. [194]

Delaware law permits the limitation of directors' personal liability for monetary damages for breaches of the duty of care.[195] Specifically, DEL. CODE ANN Section 102(b)(7) allows company shareholders to include a clause in a corporation's charter precluding the personal liability of a director for a breach of fiduciary duty.[196] However, the limitation on

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187. This ruling spurred the enactment of exculpatory clauses, which absolve directors for certain forms of conduct. Such clauses are discussed *infra* text and notes 202–06.

188. 88 A.3d 635, 646 (Del. 2014).

189. *Id.* at 654 n.41 (quoting *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 74 (Del. 2006).

190. See *infra* text and notes 214–18 (discussing the entire fairness standard).

191. *See generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

192. QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, Annex 2, ¶ 3.1.2.

193. *See* Bernard S. Sharfman, *The Enduring Legacy of Smith v. Van Gorkom*, 33 DEL. J. CORP. L. 287, 289 (2008) (noting that after *Van Gorkom*, the Delaware legislature enacted a law that permitted corporation shareholders to protect directors from such liability and that 98% of surveyed Fortune 500 companies has adopted exculpatory provisions).

194. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2009).

195. *Id.*

196. *Id.*

personal liability may not eliminate liability: (1) for "any breach of the director's duty of loyalty," (2) "for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law," or (3) "for any transaction from which the director derived an improper personal benefit."[197] Therefore, such exculpatory clauses cannot be invoked in situations where the directors acted disloyally, in bad faith or in furtherance of self-interest.[198] Notwithstanding these limitations, exculpatory clauses are highly beneficial to directors and obviate liability for duty of care violations.[199]

In addition, Delaware courts will not apply the BJR in certain contexts. Where potential or actual conflicts of interest are present, other more stringent standards are applicable. For example, when directors enact anti-takeover measures, the Delaware courts will utilize the "enhanced scrutiny" standard to address "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."[200] In *Ivanhoe Partners v. Newmont Mining*,[201] the Delaware Supreme Court stated that courts must evaluate director conduct taking into account the potential positional conflict of interest by requiring the directors to establish (1) "that the threatened takeover posed a danger to corporate policy and effectiveness, and [(2)] that the defensive measures adopted are reasonable in relation to the threat posed."[202] The target directors must satisfy these prerequisites by showing good faith and reasonable investigation before they can enjoy the presumptions afforded by the business judgment rule. Delaware law thus "plac[es] upon the directors the burden of proving that they have not acted solely or primarily out of a desire to perpetuate themselves in office."[203] Similar duties—known as Revlon duties—are imposed in a change of control situation.[204] As noted above, *Revlon* requires that when a control change is inevitable or

197. *Id.*

198. *See* Emerald Partners v. Berlin, 787 A.2d 85, 92 (Del. 2001).

199. *See In re* Cornerstone Therapeutics Inc., Stockholder Litig., 115 A.3d 1173, 1179–80 (Del. 2015) (finding company independent directors can invoke exculpatory clauses and are entitled to dismissal of duty of care claims). Of course, shareholders can benefit as well by providing discretion to directors to act as long as they do so in good faith. *See also* Prod. Res. Grp. v. NCT Grp., 863 A.2d 772, 777 (Del. Ch. 2004) (finding exculpatory clauses "encourage directors to undertake risky, but potentially value-maximizing, business strategies, so long as they do so in good faith.").

200. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

201. 535 A.2d 1334 (Del. 1987).

202. *Id.* at 1341 (citing *Unocal*, 493 A.2d at 954).

203. *Id.*

204. *See* Revlon v. MacAndrews & Forbes, 506 A.2d 173, 185 (Del. 1986) (finding director misconduct in failing to seek highest price available).

the decision has been made to sell the company, the directors are charged with obtaining the highest price for the shareholders.[205]

Another standard applied by Delaware courts is known as entire fairness. The standard is triggered when actual conflicts of interest arise—for example, when directors stand on both sides of a transaction or when a controlling shareholder[206] is engaged in a transaction with the company.[207] Pursuant to this standard, the court will evaluate the conduct to ensure the shareholders were treated with entire fairness with regard to both process and price.[208] The test is taken together as a whole and not broken up or bifurcated. In a recent case, the Delaware Supreme Court updated this standard so that when both (1) a truly independent committee negotiates and approves a transaction and (2) the deal is approved by an informed vote of the majority of the minority shareholders, the court will use the BJR instead of entire fairness.[209]

V. EXAMINING QATARI LAW THROUGH A DELAWARE LENS

The next section discusses several proposals for the development of corporate law in Qatar. These proposals are specific to the due care context where no actual conflicts have arisen and in the absence of bad faith or disloyalty.[210] We believe that these suggestions balance the need to redress truly errant director decision-making and simultaneously remove liability for merely negligent conduct, thereby facillitating the retention of the best directors.

Directors play a decisive role in publicly-traded companies. Attracting qualified individuals may be difficult if directors face significant personal liability for business decisions. Lawsuits alleging director misconduct, while currently unheard of in Qatar, may be actualized in the coming years. As the Qatari economy diversifies and the shareholder base widens, shareholders will begin to challenge director decisions. Moreover, as economic activity picks up, so will director decision-making. In Delaware,

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205. *Id.* at 184.

206. A shareholder does not have to be a majority owner to be a controlling owner. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113 (Del.1994).

207. For example, selling a subsidiary to the company, *see generally* Americas Mining v. Therault, 51 A.3d 1213 (Del. 2012), or going private, *see generally* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

208. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

209. *Kahn*, 88 A.3d at 645.

210. Enhanced scrutiny and entire fairness are applicable in certain contexts where actual or potential conflicts exist. Our discussion only focuses on standard business making decisions and due care. We point out that in other situations such as takeovers, defensive measure taking and going private transactions.

courts review almost every major transaction because in almost all cases a shareholder lawsuit is filed.[211] If shareholder suits increase in Qatar and directors are personally liable for simple mistakes, it will hinder a company's ability to obtain and retain the best directors. No corporation can be a success unless led by competent and energetic officers and directors. Such individuals would be unwilling to serve if exposed to the broad range of potential liability and legal costs inherent in such service despite the most scrupulous regard for the interests of stockholders.[212]

Unless Qatar's current regime is reformed, attracting and retaining top talent will be difficult because liability for "mistake" is currently open-ended and undefined. It is therefore crucial for Qatar to implement superior corporate governance to encourage the most talented directors to lead publicly traded companies. As noted earlier, an academic study of five GCC nations found Qatari governance at the lower end. Qatar would benefit from improved governance and a known stable business law environment in two ways. First, such an environment would certainly encourage foreign investors (and domestic ones) to invest their capital in Qatar. Second, it would assist in attracting and retaining the most highly qualified individuals to serve as Qatari directors.

Delaware provides substantially more protection for directors regarding liability for decision making. In contrast to Qatar, which allows for director liability for "mere mistake," the risk of personal liability for Delaware directors (presuming no bad faith or disloyalty) is low. Delaware courts strictly apply the business judgment rule, and the Delaware legislature has enacted additional defenses—the "three legged stool" of exculpatory clauses, insurance and indemnification rights.[213]

Therefore, there is a need to update Qatari law so that Qatari directors are not faced with immense personal liability for merely negligent decisions. The next sub-sections make three proposals to enhance Qatari corporate governance.

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211. Hals, *supra* note 34.

212. Hermelin v. K-V Harm. Co., 54 A.3d 1093, 1094 (Del. Ch. 2012).

213. Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L. J. 797, 819 (2001) (citation omitted).

A. The Need for a Qatari Business Judgment Rule

The BJR can be found in one form or another in many advanced legal systems besides the United States.[214] The doctrine's absence from Qatar is significant. Qatar needs a BJR for two reasons. First, the BJR allows for reasonable risk taking and directors need to have peace of mind that reasonable decisions that turn out to be mistakes will not automatically lead to liability. Without such an incentive, Qatari directors will likely be overly cautious and concerned about taking justified entrepreneurial risks. Excessive anxiety over business decision making is not ideal. Particularly in today's fast-paced globalized marketplace, extreme caution and reluctance to act may disadvantage a business.[215] In other words, "it is very much in the interest of shareholders that the law not create incentives for overly cautious corporate decisions."[216] Yet, director discretion cannot be open-ended and limitless. In Delaware, the BJR can be overcome by demonstrating either disloyalty, bad faith or conduct constituting more than "mere negligence."[217] Another method of rebutting the BJR is the "no rational purpose" test.[218] Thus, a BJR aligns the directors' risk liability with shareholders' need for companies to engage in reasonable risk taking.

The second factor militating in favor of a Qatari BJR is that without one directors will be deterred from serving on boards. As detailed above, there is no Qatari provision for indemnification and no exculpatory clauses are permitted. The personal liability risk of directors—absent a BJR—is therefore draconian.[219] Moreover, jurisdictions such as Delaware not only have a BJR but also permit exculpatory clauses and companies often provide indemnification and Director & Officer liability insurance. Excessive personal liability risk will restrain directors from reasonable risk-taking and will raise insurance and indemnification costs.[220] In Qatar, the absence of exculpatory clauses militates strongly in favor of a BJR.

214. Randy, J. Holland, *Delaware's Business Judgement Rule: International Variations,* THE GLOBAL DELAWARE BLOG (Apr. 9, 2015), http://global.blogs.delaware.gov/2015/04/09/delawares-business-judgment-rule-international-variations/.

215. Leo Herzel & Leo Katz, *The Business of Judging Business Judgment*, 41 BUS. LAW. 1187, 1189 (1986).

216. Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982).

217. *See infra* Section V.B.

218. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014) ("[W]here business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose.") (internal quotation marks and citation omitted).

219. Only the extent of D&O insurance alleviates the risk of extensive personal liability.

220. Langevoort, *supra* note 213, at 818.

B. Imposing Liability for Conduct other than Mere Mistake/Negligence

In addition to enacting a BJR, Qatari law should define what conduct is sufficient to rebut the BJR defense and under what circumstances the BJR is not applicable. Qatari law should define "mistake," i.e., negligence, and specify what level of "mistake" is sufficient to overcome the BJR. The benchmark should, at a minimum, include grossly negligent conduct like the uninformed business decision that formed the basis of the *Van Gorkom* ruling.[221] An additional method of overcoming the BJR would be a business decision "having no rational purpose."[222] Regardless of the standard, the law should make clear that directors will not be held personally liable for routine mistakes and must articulate a criterion to guide courts in evaluating duty of care violation claims.

C. Companies Should Be Empowered to Allow Exculpatory Clauses

In Delaware, companies are empowered to amend the articles of incorporation to permit shareholders to approve corporate exculpatory clauses. Such provisions are not applicable when the misconduct was tainted by bad faith, disloyalty or self-interest.[223] Exculpatory clauses provide a defense for directors and plaintiffs cannot file suits when a mere duty of care violation is alleged.[224] Thus, under Delaware law, director conduct that is merely reckless, but not consciously or intentionally so, can be exculpated by a section 102(b)(7).[225] Exculpatory clauses help attract the best directors and "encourage[s] directors to undertake risky, but potentially value-maximizing, business strategies, so long as they do so in good faith."[226]

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221. This would back up the definition in the Corporate Governance Code. According to the Code, "A Board Member must take reasonable steps to be fully aware of all relevant issues, including engaging in due diligence, such as consulting outside independent experts when appropriate, and to make informed and independent decisions when voting on Company matters. In addition to the obligation to be informed on Company decisions and matters, the duty of care also requires Board members to take reasonable steps to monitor the Company's management and finances." QFMA CORPORATE GOVERNANCE CODE, *supra* note 94, Annex 2, ¶ 3.1.2.

222. *E.g.*, *Kahn*, 88 A.3d at 654.

223. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2009).

224. Note that exculpatory clauses in Delaware only apply to directors not corporate officers (unless they serve as directors as well and the alleged misconduct was in the capacity of director). *Id.*

225. *Id.*; *see* In re Cornerstone Therapeutics, Inc., Stockholder Litig., 115 A.3d 1173, 1175–76 (Del. 2015) ("A plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct—be it *Revlon, Unocal,* the entire fairness standard, or the business judgment rule.").

226. *See* Prod. Res. Grp. v. NCT Grp., 863 A.2d 772, 777 (Del. Ch. 2004).

The BJR provides yet another safeguard against personal financial liability and fortify the BJR. In contrast, Qatar's Companies Law leaves no room for an exculpatory clause and allows suits for ordinary mistakes. To both attract top directors, as well as encourage prudent risk-taking, Qatar should consider embracing exculpatory clauses. This would mean adopting a rule permitting shareholders to include a clause in a corporation's charter eliminating the possibility that a director could be held personally liable to shareholders for the breach of fiduciary obligations exempting liability for: "any breach of the director's duty of loyalty . . . for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law . . . and for any transaction from which the director derived an improper personal benefit."[227]

The three suggestions outlined above are designed to empower Qatari directors to act without undue concern about potential personal financial liability. This would facilitate the emboldened entrepreneurial conduct needed to successfully compete in a global business climate. However, the freedom would not be unlimited; directors would have the responsibility to act in an informed and knowledgeable manner, and in the best interests of the company and its shareholders.

CONCLUSION

Qatar has embarked on an ambitious plan to diversify and build a knowledge-based economy to gain financial prominence. An integral component of this far-reaching effort is the creation of strong capital markets that will attract both domestic and foreign investment. Corporate governance plays an essential role in attracting and retaining capital. Important corporate governance questions focus on the fiduciary duties of directors, namely, the extent of those obligations, and to whom the duties are owed.

The question of whether governance is stakeholder-centric or shareholder-centric is crucial in evaluating these questions. In the United States, directors owe obligations to the corporation and its owners—the shareholders. In Europe and Japan, the focus on stakeholders other than shareholders empowers boards (or obligates them) to take into account various interests such as the community, customers and suppliers. While some introductory language references other stakeholders, nothing in the Companies Law or Code in Qatar specifically empowers directors to embrace stakeholder interests. Moreover, the conflicts listed in the Code resemble the conflicts common in the United States. The Qatari model thus

227. § 102(b)(7).

mirrors the United States governance structure. Therefore, a comparison with the leading jurisdiction in the United States—Delaware—is called for in analyzing the fiduciary duties of Qatari directors.

Pursuant to Qatari law, directors are liable for duty of care violations for mistaken business decisions. Qatari law makes these duties non-delegable and non-exculpatory. In comparison with Delaware, Qatari director obligations are potentially riskier to directors in terms of personal liability. Unlike Delaware, Qatari directors are liable for mere negligence.

Qatar would benefit from a modification of the current legal architecture regulating director conduct and liability for duty of care violations. Qatar should enact a business judgment rule because such a rule is vital to creating a balanced risk taking environment. The Companies Law should be amended and should define the conduct which will rebut the BJR. This trigger can be conduct constituting gross negligence or a decision for which there is no rational basis. Mere mistake or negligence alone should not suffice to impose liability. In addition, Qatar should consider allowing shareholders to approve exculpatory clauses which would insulate directors from liability for duty of care violations based upon conduct where there is no bad faith, self-interest or disloyalty. Doing so would encourage companies to hire the most qualified directors and would encourage the prudent risk-taking that is the hallmark of the world's most successful corporations.