

BOARD GATEKEEPERS

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ABSTRACT

For the last decade, investors, scholars, and regulators have turned to independent directors in key leadership positions as a means to safeguard corporate boards' ability to serve as a robust check on management's power. As a result, a vast majority of public companies' boards are now led by an Independent Chair, or, alternatively, include a Lead Independent Director.

These ostensible outsiders—which this Article calls “board gatekeepers”—are meant to be even more empowered and detached from management compared to the rest of the board. This allows them to serve an independent gatekeeping function—a necessary guardrail against management's ability to exert undue control over the boardroom. But a closer look at board gatekeepers paints a concerning reality. Through a hand-collected dataset and interviews with directors and general counsels, this Article reveals, for the first time, that installing board gatekeepers is not the cure-all it seems. Instead, board gatekeepers are often deprived of the powers necessary to rebalance the boardroom dynamic and, in many cases, their own independence is questionable at best—and recognizing them as such has numerous theoretical and practical implications.

This Article makes two key contributions to the literature. First, using a first-of-its-kind, hand-collected, and coded dataset of 900 public companies, it exposes the unfettered discretion companies have in designating gatekeepers' independence and powers—revealing that many board gatekeepers are in fact gatekeepers in title only, lacking both the independence and powers that are critical to their role. Second, this Article uses the context of board gatekeepers to illuminate the inherent difficulty with relying on an abstract concept of independence, underscoring the importance of what it terms “functional

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independence.” Recognizing that companies with faux gatekeepers may pose specific governance concerns, this Article then offers several policy recommendations to ensure gatekeepers’ functional independence.

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INTRODUCTION

In September of 2016, news broke that employees at Wells Fargo had been moving customer funds into newly created fake accounts—without customer consent—in order to boost its sales figures.¹ For outsiders, the aftermath was shocking: regulators fined Wells Fargo \$3 billion and Wells Fargo fired 5,300 employees.²

But for the board of directors, the now-infamous scandal was more akin to watching a slow-moving freight train for years. The Office of the Comptroller of the Currency found that the Wells Fargo board had known about fudged sales numbers for *eleven years* before the scandal broke.³ And while four directors resigned in the aftermath of the scandal⁴ as a result of their lack of oversight, a central question remained: what had caused the board of a reputable, established, highly regulated enterprise to overlook a scandal in the making for over a decade? In other words, investors and regulators alike pondered: “[w]here were the Independent Directors?”⁵

Wells Fargo’s board, however, was not alone in its failure to act as an effective monitor. After software malfunctions tragically caused two Boeing 737 Max aircrafts to nosedive, shareholders and families of crash victims turned to the board of directors for answers.⁶ “There is something wrong with the Board,”

¹ Matt Egan, *5,300 Wells Fargo Employees Fired Over 2 Million Phony Accounts*, CNN BUS. (Sept. 9, 2016, 8 :08 AM), <https://money.cnn.com/2016/09/08/investing/wells-fargo-created-phony-accounts-bank-fees/index.html>.

² Press Release, U.S. Dep’t of Justice, *Wells Fargo Agrees to Pay \$3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts Without Customer Authorization* (Feb. 21, 2020), <https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices>; Egan, *supra* note 1.

³ OFF. OF ENTER. GOVERNANCE & THE OMBUDSMAN, OFF. OF THE COMPTROLLER OF THE CURRENCY, *ENTERPRISE GOVERNANCE SUPERVISION: LESSONS LEARNED REVIEW OF SUPERVISION OF SALES PRACTICES AT WELLS FARGO 5 (2017)* (“Since 2005, the bank’s Board received regular Audit & Security reports indicating the highest level of EthicsLine internal complaint cases . . . related to sales integrity violations.”); Danielle Ivory, *Wells Fargo’s Regulator Admits It Missed Red Flags*, N.Y. TIMES, Apr. 19, 2017, at B4.

⁴ Bradley Keoun, *Wells Fargo Directors Exiting After Federal Reserve Slams Governance*, THE ST. (Mar. 2, 2018), <https://www.thestreet.com/markets/corporate-governance/wells-fargo-directors-retire-after-federal-reserve-slams-governance-14508322>.

⁵ Priya Cheria Huskins, *Naming and Shaming: The Fed Publicly Admonishes Wells Fargo’s Former Lead Director*, WOODRUFF SAWYER (Apr. 24, 2018), <https://woodruffawyer.com/do-notebook/wells-fargo-director/>.

⁶ Douglas MacMillan, *For Boeing Board, 737 ‘Safety was Just a Given’*, WASH. POST, May 6, 2019, at

Fortune Magazine declared.⁷ The list goes on. After the Volkswagen emissions scandal,⁸ some noted that the “[p]roblems at Volkswagen [s]tart[ed] in the [b]oardroom.”⁹ Following the meteoric rise and catastrophic plummet of blood-testing startup Theranos, fingers again turned toward the board.¹⁰ When the Equifax data breach commanded headlines in 2017 and prompted a class action alleging in part that directors were responsible,¹¹ some noted that, “[i]t’s not a good day to be on the Equifax board.”¹²

These scandals illustrate the high stakes of the board’s role in corporate and executive oversight. The board of directors serves on behalf of the shareholders to ensure that the executive team is acting in the company’s best long-term interests.¹³ This now may also include the interests of other constituents, stakeholders, and society as a whole.¹⁴ Within this overarching mandate, one of the board’s most important roles is to “set up guardrails for the CEO”¹⁵—that is, protect shareholders (and stakeholders) from corporate malfeasance.

Regulators, investors, and courts look toward boards of directors to oversee and monitor the actions of management and the corporation.¹⁶ Because some

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⁷ Ellen Florian, *Governance Experts on Boeing: ‘There Is Something Wrong with the Board’*, FORTUNE (May 23, 2019), <https://fortune.com/2019/05/23/boeing-board-governance-experts/>.

⁸ *Volkswagen Emission Scandal—Lessons for Investors, Boards, Chief Legal Officers, and Compliance and Governance Professionals*, DIRS. & BDS., <https://www.directorsandboards.com/events/volkswagen-emission-scandal-lessons-investors-boards-chief-legal-officers-and-compliance-and> (last visited Aug. 10, 2022).

⁹ James B. Stewart, *Problems at Volkswagen Start in the Boardroom*, N.Y. TIMES (Sept. 24, 2015), <http://www.nytimes.com/2015/09/25/business/international/problems-at-volkswagen-start-in-the-boardroom.html>.

¹⁰ Neil Senturia, *Theranos is Cautionary Tale for Board of Directors*, SAN DIEGO UNION-TRIB. (Feb. 25, 2019), <https://www.sandiegouniontribune.com/business/economy/sd-fi-senturia-why-boards-of-directors-need-to-know-their-stuff-theranos-20190220-story.html> (“[O]ne [story line] is the board of directors and their total inability to understand the science . . . coupled with their complete unwillingness to confront Holmes with her deceit and an equal lack of courage to replace her.”).

¹¹ Spencer Mahoney, *Boards, Officers Face New Exposure in Data Breaches*, CCIG (Sept. 30, 2019), <https://thinkccig.com/data-breach-lawsuits/>.

¹² Anders Keitz, *Equifax Board Faces Scrutiny as Probes Mount Following Cyberattack*, THE ST. (Sept. 9, 2017), <https://www.thestreet.com/markets/corporate-governance/equifax-board-faces-scrutiny-following-cyberattack-14299086>.

¹³ See MacMillan, *supra* note 6.

¹⁴ *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy that Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <http://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>; Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, 2020 U. CHI. L. REV. ONLINE *1, *1 (2020).

¹⁵ MacMillan, *supra* note 6.

¹⁶ Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 182–83 (2020) (reviewing the prevailing long-standing view of the board as a monitoring board); see Eric J. Pan, *A Board’s Duty to Monitor*, 54 N.Y. L. SCH. L. REV. 717, 719 (2009).

directors are also high-level company employees,¹⁷ independent directors—directors who are not otherwise employed at the company—serve on boards in increasing numbers and are relied on to prevent self-dealing, scandal, and mismanagement.¹⁸ Indeed, investors, regulators,¹⁹ and scholars have focused on director independence as a key metric,²⁰ theorizing that independent directors serve as a better check on the managers they are meant to oversee.²¹

However, even more recently, investors have started to push boards to not only maintain a sufficient number of independent directors on their boards, but also to ensure that the power structure and dynamic in the boardroom is not tilted in a way that would hinder the ability of the board, as a group, to act independently of management.²² This push has focused on diluting the structural power the CEO has in the boardroom.²³ That power partly originates from the power that a CEO holds over directors through her control of information, of their prospects of renomination, and through her clout and behavioral biases.²⁴ It is also often magnified through the prevalent tradition of having the CEO also serve as the chair of the board,²⁵ further consolidating boardroom power around the CEO.

¹⁷ Paul H. Zalecki, *The Corporate Governance Roles of the Inside and the Outside Directors*, 24 U. TOL. L. REV. 831, 838–39 (1993).

¹⁸ *Id.*

¹⁹ The shift toward director independence has been further boosted by regulatory reforms in response to corporate scandals, including the Sarbanes-Oxley Act and the Dodd-Frank Act. See Yaron Nili, *Out of Sight, Out of Mind: The Case for Improving Director Independence Disclosure*, 43 J. CORP. L. 35, 39 (2017) [hereinafter *Out of Sight*]; see also Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1472–76, 1539 (2007).

²⁰ Edward S. Adams, *Corporate Governance After Enron and Global Crossing: Comparative Lessons for Cross-National Improvement*, 78 IND. L.J. 723, 732, 775–77 (2003); David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 69 (2003). See generally Gordon, *supra* note 19 (describing the role of boards of directors in mitigating agency problems); Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 583–84 (2010) (focusing on boards' broader duties in the context of a controlling shareholder); Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1281 (2017) (requiring boards of widely held companies to have a majority of independent directors); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994) (stating that “approval of the transaction by an independent committee of directors or . . . majority of minority shareholders shifts the burden” in fairness review from the interested party to the challenging party).

²¹ Kelli A. Alces, *Beyond the Board of Directors*, 46 WAKE FOREST L. REV. 783, 789 (2011); Rafel Crespi-Cladera & Bartolomé Pascual-Fuster, *Does the Independence of Independent Directors Matter?*, 28 J. CORP. FIN. 116, 116 (2014) (“[M]onitoring activity of the boardroom depends on the effectiveness of the independent members. This view . . . is in the spirit of regulations . . . , the final corporate governance rules of the New York Stock Exchange of 2009, and nearly all existing corporate governance codes or guidelines.”).

²² Kobi Kastiel & Yaron Nili, *“Captured Boards”: The Rise of “Super Directors” and the Case for a Board Suite*, 2017 WIS. L. REV. 19, 26 (2017) [hereinafter *Captured Boards*].

²³ *See id.*

²⁴ *See id.* at 26–28.

²⁵ *Id.* at 40.

Recognizing the imbalance in power between the management representative on the board and the independent directors, investors have begun asking boards to break that power through the introduction of two key independent leadership roles within the boardroom—an Independent Chair of the board and a Lead Independent Director (“LID”).²⁶ This Article terms these emerging leaders as “board gatekeepers.” In the corporate context, the term “gatekeepers” has developed to reflect the ability of outside professionals, such as lawyers and auditors, to monitor and curb corporate misconduct.²⁷ The LID and the Independent Chair are similarly meant to provide this corporate gatekeeping function *within* the boardroom, by serving as the “independent counter-balance to the [CEO]”²⁸ and by signaling, and ensuring, the existence of proper monitoring of management by the board.²⁹

The push by investors for internal gatekeepers has clearly made an impact. Today, most companies have either an Independent Chair or LID (or both) on their boards to bolster investors’ expectations of independence, or at least the appearance thereof.³⁰ In theory, this dramatic shift in the composition of boards, and the emergence of board gatekeepers—who provide a second layer of protection to the independence of the board—should have cemented board independence in what one can term its *functional* form: the ability to serve the crucial gatekeeping role that has been demanded of it.³¹

However, herein lies the puzzle. Despite the significant rise in the percentage of independent directors on companies’ boards³² and the emergence of the independent board gatekeepers—who are meant to “guard the guards”—the overall ability of boards to effectively monitor management may not have shifted as much as companies’ self-proclamations suggested and as investors

²⁶ Marion Plouhinec, *The Role of the Lead Independent Director*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 25, 2018), <https://corpgov.law.harvard.edu/2018/11/25/the-role-of-the-lead-independent-director/> [hereinafter *Role of LID*].

²⁷ A rich literature in corporate law has addressed the emerging role of accountants, lawyers, and bankers as gatekeepers. See, e.g., Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 917–18, 917 nn.5 & 7 (1998); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 302, 309 (2004); Frank Partnoy, *Strict Liability for Gatekeepers: A Reply to Professor Coffee*, 84 B.U. L. REV. 365, 365, 368 (2004); Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 54–55 (2003); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 54 (1986); Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 491 (2001); Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1592–93 (2010) (reviewing the literature on gatekeepers). For a more detailed discussion, see *infra* Section I.B.

²⁸ *Role of LID*, *supra* note 26.

²⁹ See *id.*

³⁰ See discussion *infra* Sections II.A, II.B.

³¹ See Gordon, *supra* note 19, at 1473; *Captured Boards*, *supra* note 22, at 26.

³² See Gordon, *supra* note 19, at 1473.

may have assumed. The recent lineup of corporate scandals so vividly illustrates as much.

Indeed, both the Wells Fargo board and the Boeing board included an LID who was meant to serve as gatekeeper.³³ But, as the Wells Fargo and Boeing scandals demonstrate, having a designated LID does not necessarily effectuate true independence.³⁴ In fact, the Federal Reserve has placed direct blame on Wells Fargo's LID, stating in a letter to him that "[he] did not appear to lead the independent directors in pressing firm management for more information and action, even after [he was] aware of the seriousness of the problems,"³⁵ and that "[a] lead independent director is appointed to . . . provide an alternative view of, and (when necessary) check on, executive directors of the board and the management of the firm. Your performance in that role is an example of ineffective oversight . . ." ³⁶ Similarly, in the year of the first crash, Boeing faced a shareholder proposal advocating for an Independent Chair of the board and alleging that "Boeing shareholders need the enhanced oversight of an independent board chairman because our Lead Director, Kenneth Duberstein, had 20-years of long-tenure which can make him a lap dog Lead Director."³⁷

How can one reconcile the parade of recent scandals—and the ensuing surprise of regulators and investors—with the emergence of the new board gatekeepers on which they have relied? This Article is the first to provide a detailed and critical account of the emergence of board gatekeepers and, in doing so, it shows that these failures may not be so puzzling once one looks beyond the mere façade of the boardroom.

Using a first-of-its-kind hand-collected and hand-coded dataset of board gatekeepers' independence and powers in 900 publicly traded companies, this Article shifts the focus to the *functional* independence of board gatekeepers, and shows that board gatekeepers' failures could be explained, at least in part, by their lack of functional independence. Indeed, in many cases, gatekeepers that have been purported to be independent are tightly connected to the companies which they serve in ways that cast doubt on their *willingness* to truly act

³³ WELLS FARGO & CO., PROXY STATEMENT 104 (2011); THE BOEING CO., 2018 ANNUAL MEETING OF SHAREHOLDERS 12–13 (2018).

³⁴ Abby Adlerman & Kaitlin Quistgaard, *Leadership Matters: What Boards Can Learn from the Wells Fargo Calamity*, BOARDSPAN, <https://work.boardspace.com/users/0/library/leadership-matters-what-boards-can-learn-from-the-wells-fargo-calamity> (last visited May 21, 2022).

³⁵ Press Release, Bd. of Governors of the Fed. Rsv. Sys., Accountability as Lead Independent Director of Wells Fargo & Company Board of Directors (Feb. 2, 2018), <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a3.pdf>.

³⁶ *Id.*

³⁷ THE BOEING CO., *supra* note 33, at 54.

independently.

But it is not only the willingness to act that might curtail board gatekeepers' effectiveness. It is also about the *powers* at their disposal. Indeed, the sharp divide between the ceremonial presence of independent gatekeepers and their functional independence extends beyond concerns regarding their own personal independence, as manifested in their willingness to act. It also centers around the lack of concrete tools at their disposal to exert independent monitoring, even if they so desired. This Article provides the first empirical analysis of the powers given to LIDs and Independent Chairs of boards, finding that in many cases, these crucial gatekeepers are granted nothing but a mere title rather than substantive powers. This second facet of functional independence brings to the spotlight the concerns regarding gatekeepers' *power* to truly act independently even if they are *willing*.

The concern regarding explicit powers is further affirmed through a series of original interviews with directors and general counsels, including LIDs, who identified the concrete ways through which enumerated gatekeepers' powers can affect the board.³⁸ Enumerated powers were seen as particularly important for preventing discord in the board because they empower the LID to take actions, even when potential discord may arise, and set clear expectations for both the board and investors.³⁹

Equally important, the powers given to board gatekeepers are imperative not only in allowing gatekeepers to exert independence *ex ante*, but also in providing a central mechanism of *accountability ex post*, allowing regulators and investors to specifically point to a lack of action by these gatekeepers, despite the ability to do so. This was the case in the Wells Fargo scandal, where regulators pointed to the LID's lack of inquiry and lack of demand for additional information despite the specific powers that were given to the LID in the firm's Corporate Governance Guidelines.⁴⁰

Finally, it also does not help that board gatekeepers are predominantly white men, and that gender and racially diverse directors are shunned from these leadership roles in many companies.⁴¹ Out of the 900 companies sampled, only

³⁸ See discussion *infra* Part II.

³⁹ See discussion *infra* Part II.

⁴⁰ Press Release, Bd. of Governors of the Fed. Rsrv. Sys., *supra* note 35.

⁴¹ DELOITTE & ALL. FOR BD. DIVERSITY, MISSING PIECES REPORT: THE BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON *FORTUNE* 500 BOARDS 6–7 (6th ed. 2021), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/missing-pieces-fortune-500-board-diversity-study-6th-edition-report.pdf>. According to a study conducted by the Alliance of Board Diversity and the consulting firm Deloitte, in 2020, 82.6% of Fortune 500 directors were white and 61.7%

six companies had a female serving as Independent Chair and only 6% of all LIDs included within this analysis were female.⁴² Recent studies have shown that more diverse boards generally make better decisions and are more apt to prevent misconduct.⁴³ This lack of diversity may further hinder gatekeepers' functional independence.

Recognizing the gap between board gatekeepers' ceremonial and functional independence, this Article proceeds to argue that the blind championing of board gatekeepers by investors and companies alike may not only undermine the credibility of director independence, but may also render it counterproductive altogether. Therefore, this Article posits it is important to safeguard gatekeepers' functional independence through a combination of heightened independence standards, improved disclosures, and the grant of specific and common enumerated powers.

This Article proceeds as follows. Part I provides information on the current structure and importance of the board of directors, including the increased focus on board independence. It also highlights the gatekeeping function of boards and the emergence of board gatekeepers as a means to ensure it. Part II provides an empirical analysis of board gatekeepers' independence by using hand-collected data of all S&P 500 companies, as well as a random sample of 200 mid-cap S&P 600 companies and 200 small-cap Russell 3000 companies. The data reveals significant concerns regarding the personal independence of gatekeepers as well as their power to exert independent monitoring. Part II also provides qualitative data on the importance of gatekeepers through original interviews with directors and general counsels, including LIDs. Finally, Part III explores the ramifications of the current reliance on board gatekeepers in name only, and concludes by exploring several modifications to restore the integrity of that "independence" title.

were white males. *Id.* at 17. In fact, 87% of Fortune 500 companies have a board chair who is a white male and, of the companies that have an LID, 77.1% are white males. *Id.* at 26.

⁴² See discussion *infra* Part II; see also Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 171 (2019) (showing that only 9.6% of LIDs were women in 2015) [hereinafter *Beyond the Numbers*].

⁴³ See *Beyond the Numbers*, *supra* note 42, at 160, 162–63; Laura Casares Field, Matthew E. Souther & Adam S. Yore, *At the Table but Can Not Break Through the Glass Ceiling: Board Leadership Positions Elude Diverse Directors*, 137 J. FIN. ECON. 787, 805–07 (2020); Aida Sijamic Wahid, *The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, 159 J. BUS. ETHICS 705, 721–22 (2019) (suggesting that firms with more female board members engage in less financial misconduct); Christopher Fredette & Ruth Sessler Bernstein, *Ethno-Racial Diversity on Nonprofit Boards: A Critical Mass Perspective*, 48 NONPROFIT & VOLUNTARY SECTOR Q., 931, 936–38 (2019) (finding that boards with a critical mass of racially diverse board members have better corporate governance).

I. DIRECTOR INDEPENDENCE AND THE EVOLVING ROLE OF THE BOARD

Understanding the increasing importance of the board—a principal institution within both corporations and society—as the key corporate institution provides a helpful backdrop against which to understand the emerging roles of Independent Chairs and LIDs as internal gatekeepers within the board. Modern-day boards are not only tasked with guiding the company’s key decisions or mentoring management, but are also being increasingly asked to provide a check on management, ensuring the integrity of management’s decisions for the benefit of shareholders and stakeholders alike.⁴⁴

Thus, as boards’ monitoring functions become increasingly important, so too do the mechanisms through which investors and companies seek to fulfill and enhance these roles. This section outlines the role of the board of directors; the increasing importance that regulators, courts, and investors have placed on board independence as a key pillar of its gatekeeping role; and the current structure and mechanisms that have emerged to ensure its independence.

A. *The Role of the Board of Directors*

Corporations exist at the heart of society—acting as a hub around which most economic and social activity centers—and the board of directors has remained at the heart of these corporations for centuries.⁴⁵ This is especially true of America, where corporate boards can be traced directly back to the country’s founding fathers.⁴⁶ Today, corporations represent a convergence of social and political spheres that reach far beyond the commercial world.⁴⁷ Corporations are actively shaping issues such as immigration reform, environmental policies, gun regulation, racial justice, gender equality, and religious freedoms.⁴⁸ As companies continue to grow in size and scope of impact, boards of directors are uniquely situated to impact both their respective companies and society at large.⁴⁹

⁴⁴ Alces, *supra* note 21, at 789–90; Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 269 (1997).

⁴⁵ See Melvin Aron Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CALIF. L. REV. 375, 375–76 (1975) (discussing the origins of the board of directors as the core of modern corporate decision-making).

⁴⁶ See STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, *OUTSOURCING THE BOARD: HOW BOARD SERVICE PROVIDERS CAN IMPROVE CORPORATE GOVERNANCE* 17 (2018) [hereinafter *OUTSOURCING THE BOARD*].

⁴⁷ Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1558 (2018).

⁴⁸ See *id.* at 1535, 1537–58, 1561.

⁴⁹ See Yaron Nili, *Horizontal Directors*, 114 NW. U. L. REV. 1179, 1188–90 (2020) [hereinafter *Horizontal Directors*] (discussing the increased reliance on boards).

Over half of Americans are directly invested in corporations through the stock market, and just over four in ten Americans have retirement investments through employer- or union-sponsored programs.⁵⁰ Large corporations, however, affect the lives of more than just shareholders. Exxon, for example, has operations in almost every country and annual sales close to that of Sweden's gross domestic product.⁵¹ Walmart "supports an employee/family community of eight to ten million, which is about the size of Austria, Switzerland, or Israel, and larger than a hundred other countries."⁵² At the core of these organizations sits the board of directors, meant to manage, monitor, and guide the corporation.⁵³ The impact of corporate success or failure is felt by shareholders, stakeholders, and society at large.

In recent years, individual directors and the boards on which they serve have begun to take on increasingly important roles within the corporate governance framework.⁵⁴ While corporate boards originated to serve mostly as an advisory role, boards today are tasked with much more, including monitoring company management.⁵⁵ In fact, the board of directors was one of the first solutions to address the agency problems that arose under corporations' dispersed ownership structure, whereby diffused ownership led to increased power at the hand of management.⁵⁶ The board was therefore tasked with monitoring management to ensure the company was run in the best interest of its shareholders. Ultimately, the board's role is to curtail management's ability to extract private benefits⁵⁷ or act in a suboptimal way with respect to shareholder interests.⁵⁸

In addition to this monitoring role, the board must also be an active participant in the company's key managerial decisions, including mergers, stock issuances, changes of company governance documents, and the hiring of the

⁵⁰ Kim Parker & Richard Fry, *More than Half of U.S. Households Have Some Investment in the Stock Market*, PEW RSCH. CTR. (Mar. 25, 2020), <https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/>.

⁵¹ Lin, *supra* note 47, at 1559–60.

⁵² DAVID ROTHKOPF, *POWER, INC.: THE EPIC RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT—AND THE RECKONING THAT LIES AHEAD* 310 (2013).

⁵³ MODEL BUS. CORP. ACT § 8.01(b) (2016) (AM. BAR ASS'N); DEL. CODE ANN. tit. 8, § 141(a) (2006).

⁵⁴ See *Out of Sight*, *supra* note 19, at 39 (discussing the importance of directors); Gregory H. Shill, *The Independent Board as Shield*, 77 WASH. & LEE L. REV. 1811, 1824 (2020).

⁵⁵ See MELVIN ARON EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* 139–41 (1976) (discussing the practices of the corporate board); Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1053 (2014) ("[S]tate law requires boards to mediate the relations between ownership and control of the corporation."); Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J.L. & BUS. 63, 136–38 (2009).

⁵⁶ See generally Gordon, *supra* note 19, at 1468.

⁵⁷ See Alces, *supra* note 21, at 789.

⁵⁸ See Harner, *supra* note 20, at 583–84.

management team.⁵⁹ Delaware courts have continuously reiterated the importance of the director's management role, noting that "directors, not shareholders, are charged with the duty to manage the firm."⁶⁰ Delaware's key business judgment rule helps to further ingrain this role by creating a "presumption of deference to the board's authority as the corporation's central and final decision maker."⁶¹

Recently, boards have also been increasingly pushed to engage and protect the interests of other stakeholders. In 2019, Business Roundtable released a statement acknowledging stakeholders' interests.⁶² Johnson & Johnson's Chairman and CEO similarly reflected that corporations can and should play an essential role in improving society when it is "committed to meeting the needs of all stakeholders."⁶³ Growing support for stakeholder interests is prevalent among institutional investors as well. For example, Larry Fink, the CEO of BlackRock, the world's largest asset manager, issued a letter to all CEOs urging them to be "committed to embracing purpose and serving all stakeholders."⁶⁴ Perhaps realizing the push to prioritize stakeholder interests, board advisors considered key stakeholder demands, interests, and preferences a top priority for boards in 2020.⁶⁵

Finally, alongside its monitoring and managing roles, the board also serves as an important resource to management by providing insight, advice, and networking benefits that afford the company channels through which to access resources.⁶⁶ Within this role, the board, particularly the independent board members, is able to provide strategic guidance and bring a more objective,

⁵⁹ See STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 45 (2012). To this end, boards are largely expected to coordinate succession planning long before the current CEO ever steps down. See OUTSOURCING THE BOARD, *supra* note 46, at 35.

⁶⁰ *Paramount Commc'ns, Inc. v. Time Inc.*, Nos. 10866, 10670 & 10935, 1989 WL 79880, at *30 (Del. Ch. July 14, 1989); *accord In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 54 (Del. Ch. 2013); *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989); *TW Servs. Inc. v. SWT Acquisition Corp.*, No. Civ. A. 10298, 1989 WL 20290, at *9–10 (Del. Ch. Mar. 2, 1989); Shill, *supra* note 54, at 1874–75.

⁶¹ Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 787 (2006).

⁶² *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

⁶³ *Id.*

⁶⁴ Larry Fink, *A Fundamental Reshaping of Finance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 16, 2020), <https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/>.

⁶⁵ Steve Klemash, Rani Doyle & Jamie C. Smith, *Eight Priorities for Boards in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 14, 2020), <https://corpgov.law.harvard.edu/2020/01/14/eight-priorities-for-boards-in-2020>.

⁶⁶ *Out of Sight*, *supra* note 19, at 43.

experienced perspective compared to corporate insiders on a range of issues.⁶⁷

B. *The Push for Director Independence*

Given corporate boards' increasing importance, many companies are rethinking and revising the composition of their boards in response to heightened public and regulatory attention. To ensure that boards effectively carry out their monitoring function, shareholders,⁶⁸ regulators, exchanges,⁶⁹ and courts⁷⁰ have come to expect that boards are designated as independent from the management they are meant to supervise, lauding independence as the best way to achieve effective monitoring and curb agency costs created by dispersed ownership and managerial power.⁷¹

Indeed, while some have contested the need or value of independent boards,⁷² investors and regulators enthusiastically clamor for it. Shareholders have been looking for board members who can effectively scrutinize management and object to management decisions when necessary⁷³—and shareholders perceive an independent director as the best qualified to do so.⁷⁴ As a result of this push toward independence, the CEO has often become the lone insider in most boardrooms.⁷⁵ It is not surprising, therefore, that board composition and independence, with an emphasis on director tenure and board leadership, have been key issues for both investors and the ever-influential⁷⁶

⁶⁷ Donald C. Langevoort, *Commentary: Puzzles About Corporate Boards and Board Diversity*, 89 N.C. L. REV. 841, 844 (2011); see Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877, 884 (2018).

⁶⁸ See Gordon, *supra* note 19, at 1540.

⁶⁹ *Id.* at 1468.

⁷⁰ *Id.*

⁷¹ Alces, *supra* note 21, at 789–90; see also *Captured Boards*, *supra* note 22, at 22.

⁷² Stephen M. Bainbridge, *A Critique of the NYSE's Director Independence Listing Standards*, 30 SEC. REG. L.J. 370 (2002); Steven Davidoff Solomon, *The Case Against Too Much Independence on the Board*, N.Y. TIMES (Nov. 11, 2013, 10:42 AM), <https://archive.nytimes.com/dealbook.nytimes.com/2013/11/11/the-case-against-too-much-independence-on-the-board/>; Robert C. Pozen, *The Big Idea: The Case for Professional Boards*, HARV. BUS. REV. (Dec. 2010), <https://hbr.org/2010/12/the-big-idea-the-case-for-professional-boards>; Olubunmi Faleye, *The Downside to Full Board Independence*, 58 MITSLOAN MGMT. REV. 87, 87–88 (2016).

⁷³ See S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *Do Independent Directors Curb Financial Fraud? The Evidence and Proposals for Further Reform*, 93 IND. L.J. 757, 780 (2018).

⁷⁴ See Yaron Nili, *Successor CEOs*, 99 B.U. L. REV. 787, 798–99 (2019) [hereinafter *Successor CEOs*].

⁷⁵ See *Captured Boards*, *supra* note 22, at 22.

⁷⁶ George W. Dent, Jr., *A Defense of Proxy Advisors*, 2014 MICH. ST. L. REV. 1287, 1290–91 (2014). Proxy advisors dramatically changed proxy voting by solving the collective action problem. *Id.* at 1288. Institutional investors typically follow the advice of proxy advisor services, increasing votes against management. *Id.* at 1289. As a result, corporate executives have been lobbying Congress and the SEC to regulate proxy advisors. *Id.* at 1289–90; see also Kobi Kastiel & Yaron Nili, *Competing for Votes*, 10 HARV. BUS. L. REV. 287, 317 (2020); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 688 (2005) (“[P]owerful CEOs come on the bended

proxy advisory firms in recent years.⁷⁷ For instance, proxy advisory firm Glass Lewis outlines in its policy guidelines that a board “can best protect and enhance the interests of shareholders if it is sufficiently independent.”⁷⁸ Both ISS and Glass Lewis also recommend an Independent Chair or other independent leadership position.⁷⁹ Institutional investors have also focused on independent leadership, often supporting calls for independent board chairs and voting against directors when they deem the directors to lack independence.⁸⁰

Regulators and courts have also embraced these shifts, and, in some instances, have added new requirements for bolstering independence. Specifically, following the collapses of Enron and WorldCom, private and public regulatory players took strong action to ensure boards were held accountable for monitoring management.⁸¹ The federal government began by overhauling the regulatory requirements for public corporations with the Sarbanes-Oxley Act (“SOX”).⁸² These regulatory requirements were

knee to Rockville, Maryland, where ISS resides, to persuade the managers of ISS of the merits of their views”); Asaf Eckstein & Sharon Hannes, *A Long/Short Incentive Scheme for Proxy Advisory Firms*, 53 WAKE FOREST L. REV. 787, 795–801 (2018) (describing the increasing power of proxy advisors).

⁷⁷ Ann Yerger, *Four Takeaways from Proxy Season 2016*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 14, 2016), <https://corp.gov.law.harvard.edu/2016/07/14/four-takeaways-from-proxy-season-2016/>; David A. Katz & Laura A. McIntosh, *Director Tenure Remains a Focus of Investors and Activists*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 1, 2016), <https://corp.gov.law.harvard.edu/2016/08/01/director-tenure-remains-a-focus-of-investors-and-activists>.

⁷⁸ GLASS LEWIS, 2020 PROXY PAPER GUIDELINES: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE 3 (2020), https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf.

⁷⁹ INSTITUTIONAL S’HOLDER SERVS., PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS 8 (2021), <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf>; GLASS LEWIS, 2021 PROXY PAPER GUIDELINES 7–8 (2021), <https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf>.

⁸⁰ STAN. GRADUATE SCH. OF STAN. BUS., RR DONNELLY, EQUILAR & STAN. UNIV. ROCK CTR. FOR CORP. GOVERNANCE, 2015 INVESTOR SURVEY: DECONSTRUCTING PROXY STATEMENTS—WHAT MATTERS TO INVESTORS 1, 8 (2015), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-survey-2015-deconstructing-proxy-statements_0.pdf (noting that 62% of leading institutional investors indicated they read the director independence section of the proxy statement and relied on it to make voting decisions; this was the second-most read section after the pay for performance section (64%)); Yaron Nili, *The “New Insiders”:* *Rethinking Independent Directors’ Tenure*, 68 HASTINGS L.J. 97, 108 (2016) [hereinafter *New Insiders*]; Nikitha Sattiraju, *Director Accountability a Top Priority for BlackRock*, THE DEAL (Nov. 23, 2020), <https://www.thedeal.com/activism/director-accountability-a-top-priority-for-blackrock> (noting that BlackRock recently indicated that holding board members accountable can be an effective tool to impact corporate responsibility). In 2019, the firm voted against 5,000 directors due to issues such as lack of independence. Sattiraju, *supra*.

⁸¹ See Gordon, *supra* note 19, at 1535–36.

⁸² See *New Insiders*, *supra* note 80, at 150. Shareholder proposals for an independent board chair regularly receive strong shareholder support, which suggests that independence remains an important concern for corporate shareholders; for example, in 2020 (2021) shareholder proposals for an independent board chair received 35% (32%) support on average. MARC TREVIÑO, MELISSA SAWYER & JUNE HU, SULLIVAN & CROMWELL LLP, LESSONS FROM THE 2021 PROXY SEASON 13 (2021), <https://www.sullcrom.com/files/upload/Lessons-from-the-2021-Proxy-Season.pdf>.

subsequently strengthened with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).⁸³ Motivated by the belief that company employees (often termed as insiders) and those with significant ties to the company are less capable of effectively monitoring corporate officers, and that independent directors are better equipped to detect fraud, protect shareholders’ interests, and monitor managerial abuse of authority, these regulatory reforms forced the U.S. exchanges to revamp their director independence requirements.⁸⁴ Consequently, the NYSE and NASDAQ have also imposed listing standards that require firms to populate their boards and committees with independent directors.⁸⁵ However, the board has considerable discretion when classifying directors as “independent,” making its gatekeeping role, at least when it comes to determining independence, self-fulfilling.⁸⁶

State laws also require director independence in specific situations, such as approval of interested transactions, derivative suits, and litigation committees.⁸⁷ Recognizing the importance of the board in any corporate decision, Delaware law places a large emphasis on independent directors in deciding how to evaluate challenged board decisions. Specifically, Delaware courts require that independent directors approve any related party transactions in order for the less

⁸³ See Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (2010).

⁸⁴ See Gordon, *supra* note 19, at 1540; see also William W. Bratton & Michael L. Wachter, *Tracking Berle’s Footsteps: The Trail of the Modern Corporation’s Last Chapter*, 33 SEATTLE U. L. REV. 849, 866 (2010).

⁸⁵ For example, SOX mandated the creation of an audit committee of the board that has greater powers and many more responsibilities than ever before, such as working with external auditors of internal controls. See COVINGTON & BURLING LLP, *CONSIDERING DIRECTOR INDEPENDENCE 5* (2007) (copy on file with the Emory Law Journal). The NYSE and NASDAQ requirements largely track those of the SEC Item 407 of Regulation S-K. See *Horizontal Directors*, *supra* note 49, at 1206–07, 1207 n.160. This mandate requires companies to identify each director or nominee that the company considers independent. 17 C.F.R. § 229.407(a) (2012). Companies usually satisfy the Item 407 requirements by including the disclosures within their annual proxy statement or annual 10-K. Companies must also disclose individual independence standards, as well as each director that is a member of the compensation, nominating, or audit committee that is not independent. *Id.*; N.Y.S.E. Manual (CCH), § 303A.01, 303A.04-06; NASDAQ Stock Mkt. Rules (CCH) 5605(b)(1), 5605(c)(2), 5605(d)(2), & 5605(e); see also *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2187 (2004) (“The revised listing standards of both the NYSE [New York Stock Exchange] and NASDAQ . . . require (with a few exceptions) that listed-company boards have a majority of independent directors . . .”).

⁸⁶ The guidelines mandate that a director is not independent if the director has a material relationship with the company, but the board retains the power to determine whether a material relationship exists. *Out of Sight*, *supra* note 19, at 40. A nice illustration is the case of Penny Pritzker—one of America’s richest and most powerful businesswomen—who was an independent director of Hyatt Hotels until her status changed. See John R. Emshwiller & Alexandra Berzon, *Hyatt Director Gets a Status Makeover*, WALL ST. J. (Aug. 24, 2010), <http://online.wsj.com/article/SB10001424052748703649004575437713243128>; Gary Larkin, *Just What is an Independent Director Anyway?*, THE CONF. BD. (Sept. 10, 2010), <https://www.conference-board.org/blog/postdetail.cfm?post=5649> (offering a more detailed critique).

⁸⁷ See *New Insiders*, *supra* note 80, at 115.

stringent business judgment rule to apply.⁸⁸ Delaware courts thus pay special attention to the independence of each director the board claims as independent, engaging in a fact-driven analysis.

C. Compliance and the Board

One of the growing areas of board focus is corporate compliance, so much so that one scholar noted “compliance is the new corporate governance.”⁸⁹ Increasingly, regulators and courts turn to the board as a key institution tasked with ensuring corporate compliance.⁹⁰ Each individual director maintains a fiduciary duty to the company they serve. Part of fulfilling that fiduciary duty involves ensuring that management has an effective corporate compliance program in place and staying informed of and overseeing the compliance program.⁹¹

In order to avoid prosecution when challenged, compliance programs must be well designed, applied earnestly and in good faith, and must work in practice.⁹² For example, the Supreme Court of Delaware recently upheld a *Caremark* claim⁹³ against the board of ice cream manufacturer, Blue Bell Creameries, after listeria-infected ice cream led to consumer injury and death.⁹⁴ The court refused to dismiss a plaintiff’s bad faith claim against the board of directors, as the complaint contended the board “utterly failed to adopt or implement any reporting and compliance systems,”⁹⁵ which breached the board’s duties under *Caremark* and *Stone v. Ritter* to exercise oversight and “to monitor the corporation’s operation viability, legal compliance, and financial

⁸⁸ See *In re Caremark Int’l Derivative Litig.*, 698 A.2d 959, 959 (Del. Ch. 1996); Nicolle Stracar, *Applying a New Regulatory Framework to Interested Transactions by Minority Shareholders*, 20 U. PA. J. BUS. L. 993, 993–94 (2018).

⁸⁹ Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2075 (2016).

⁹⁰ *In re Caremark*, 698 A.2d at 959; *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 364 (Del. 2006).

⁹¹ Robert Biskup, Krista Parsons & Robert Lamm, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 15, 2018), <https://corpgov.law.harvard.edu/2019/10/15/board-oversight-of-corporate-compliance-is-it-time-for-a-refresh/#1b>.

⁹² U.S. DEP’T OF JUST.: CRIM. DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 2 (2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁹³ *Caremark* derivative claims allege directors knew or should have known that the company was violating the law, and that the board of directors failed to take good faith efforts to prevent or remedy the situation to the ultimate detriment of the shareholders. See *In re Caremark.*, 698 A.2d at 961; Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1857 (2021) (discussing the role corporate law plays in holding directors accountable for compliance failures).

⁹⁴ *Marchand v. Barnhill*, 212 A.3d 805, 805 (Del. 2019).

⁹⁵ *Id.* at 808 (quoting *Marchand v. Barnhill*, C.A. No. 2017-0586-JRS, 2018 WL 4657159, at *16 (Del. Ch. Sept. 27, 2018)).

performance.”⁹⁶ The decision came just a few months after Wells Fargo issued one of the largest shareholder derivative lawsuit settlements in history, paying shareholders \$320 million in value, with \$240 million in cash.⁹⁷ In large part, the Wells Fargo settlement came as a result of the directors’ failure to ensure corporate compliance with applicable laws after the company’s infamous fake accounts scandal.⁹⁸

These cases help articulate the board’s importance to corporate compliance and risk oversight generally. Not only must the board help install compliance programs, but the board must also remain meaningfully engaged throughout by approving key policies and procedures.⁹⁹ To do so, the board must stay knowledgeable about the company’s compliance programs as well as the industry standards.¹⁰⁰ This risk oversight role plays an important part in corporate governance today, effectively situating the board to play a pivotal role in companies and society at large.¹⁰¹

D. The Emergence of Gatekeepers in the Boardroom

Given boards’ increasing importance within corporations and the proceeding push for independence in the boardroom, two specific leadership positions have emerged to serve as guardians of independence within the boardroom: the Independent Board Chair and the LID.¹⁰² In all companies, the chair remains the key leader in the boardroom. Traditionally, many companies had their CEO also serve as chair, therefore consolidating the power dynamic of the board around the CEO. However, recent years have seen a push for chair independence to ensure more effective independent monitoring of management, including the CEO herself.¹⁰³ Where the chair is not the CEO, her role is to both monitor and advise the company’s management team while leading the board.¹⁰⁴ Alongside

⁹⁶ *Id.* at 809.

⁹⁷ Kevin M. LaCroix, *Massive Settlement in Wells Fargo Bogus Account Scandal Derivative Suit*, THE D&O DIARY (Mar. 3, 2019), <https://www.dandodiary.com/2019/03/articles/shareholders-derivative-litigation/massive-settlement-in-wells-fargo-bogus-account-scandal-derivative-suit/>; *In re Wells Fargo & Co. S’holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1074–75 (N.D. Cal. 2017).

⁹⁸ *In re Wells Fargo*, 282 F. Supp. 3d at 1087.

⁹⁹ Daniel R. Roach, *The Board of Directors’ Role in Compliance and Ethics*, J. HEALTH CARE COMPLIANCE 53, 54 (2007).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 53.

¹⁰² See Subodh Mishra, *2019 ISS Global Policy Survey Results*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 25, 2019), <https://corpgov.law.harvard.edu/2019/09/25/2019-iss-global-policy-survey-results/> (noting that the most common type of governance proposal submitted for consideration in 2019 was the request to have the board chair be an independent director).

¹⁰³ *Independent Board Leadership*, COUNCIL OF INSTITUTIONAL INV’S. (Feb. 24, 2014), https://www.cii.org/independent_board.

¹⁰⁴ Ryan Krause, *Being the CEO’s Boss: An Examination of Board Chair Orientations*, 38 STRAT. MGMT.

the push for separating the roles of chair and CEO, a parallel trend has led to the emergence of an LID, especially for companies who lack an Independent Chair. When implemented, an LID plays a dual and overlapping role in corporate governance, acting as an intermediary between company leadership and independent directors.¹⁰⁵

To understand the backdrop against which board gatekeepers emerged, it is first important to understand why boards that are comprised with mostly independent directors needed a gatekeeping reinforcement.

1. *The Limitations of Independent Boards*

While the move of boards toward independence was an important development, it was not without its limitations. Below is an overview of some of the key concerns with the independent board and the emergence of board gatekeepers as a partial attempt to counter these limitations.

a. *Functional Versus Designatory*

While most boards are comprised almost solely of directors designated as independent, there are good reasons to doubt their ability to truly exert independence from management in their board work. The ability to act independently is what this Article terms as directors' functional independence.

Despite the heightened focus on director independence, the current approach to director independence—one that is focused on a set of rudimentary prerequisites and subsequent certification by the board of directors—is, as many have highlighted, a flawed approach.¹⁰⁶ It leaves too much discretion at the hands of companies in designating directors as independent; even when there are close social and financial ties that may cast doubt on such designation, the consideration and information before the board is rarely disclosed to investors

J. 697, 697 (2017) [hereinafter *Being the CEO's Boss*].

¹⁰⁵ *Role of LID*, *supra* note 26.

¹⁰⁶ See *Out of Sight*, *supra* note 19, at 37–38; Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 461–63 (2008); Theo Francis & Joann S. Lublin, *Boards Get More Independent, but Ties Endure*, WALL ST. J. (Jan. 19 2016), <https://www.wsj.com/articles/boards-get-more-independent-but-ties-endure-1453234607> (highlighting many prominent examples of directors that technically qualify as independent, yet fail to satisfy the true spirit of independent leadership given enduring ties to the company and its leaders); Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 870 (“The theory of structural bias merely recognizes the limits of director independence. When a conflict arises, it may be possible to find directors . . . disinterested from a financial perspective (although the implicit conspiracy theory suggests otherwise), but it is virtually impossible for directors to be unconflicted in all meaningful respects.”); S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *The Elusive Monitoring Function of Independent Directors*, 21 U. PA. J. BUS. L. 235, 235 (2018) (finding that requiring the existence of independent board members on a board has not resulted in more effective monitoring, but rather created the illusion of it).

and, in practice, violations are not enforced. Moreover, after directors join the board, even if they are as independent as they come, there are strong forces that gradually erode their independence.

First, director interlocks, especially among companies within the same industry, call into question the true ability of many directors to independently monitor management and act in the best interests of shareholders. Many directors have become full-time directors, splitting their time between multiple companies because of the appeal of director positions.¹⁰⁷ Because management controls the nomination process, directors who seek to maintain board positions may be less likely to alienate management for fear of losing their position.¹⁰⁸ This means that despite the company designating them as independent, they may rely entirely upon management to maintain their source of income, which raises questions as to whether they truly fulfill the duties of an independent director.

Second, as directors serve on the company board, there is a heightened risk of a director cultivating social ties, human capital, and reputational concerns, which may ultimately lessen the impetus to act independently or to hold inside directors and management accountable.¹⁰⁹ Furthermore, longer director tenure often correlates with increased equity in the company,¹¹⁰ thereby putting independent directors' willingness to act independently at risk if, by doing so, this equity could be damaged, as may often be the case.¹¹¹

b. Board Structure

The design of corporate boards in the modern corporate governance ecosystem leads to an additional structural limitation which may significantly hinder the functional independence of directors: the board's "information capture."¹¹² This "information capture" is characterized by the need for directors' access to information in order to perform their roles.¹¹³

¹⁰⁷ Aida Sijamic Wahid & Kyle T. Welch, *Does the Market Value Professional Directors?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 26, 2017), <https://corpgov.law.harvard.edu/2017/03/26/does-the-market-value-professional-directors/>.

¹⁰⁸ See *Horizontal Directors*, *supra* note 49, at 1232.

¹⁰⁹ See *New Insiders*, *supra* note 80, at 132; Gordon, *supra* note 19, at 1473.

¹¹⁰ See Steve Pakela & John Sinkular, *Trends in Board of Director Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 13, 2015), <https://corpgov.law.harvard.edu/2015/04/13/trends-inboardof-director-compensation/>.

¹¹¹ See *Horizontal Directors*, *supra* note 49, at 1234–35; *New Insiders*, *supra* note 80, at 121.

¹¹² See *Captured Boards*, *supra* note 22, at 24; Ronald J. Gilson & Jeff N. Gordon, *Board 3.0: An Introduction*, 74 BUS. LAW. 351, 351 (2019); Ann C. Mul. . . & Charles M. Elson, *A New Kind of Captured Board*, DIRS. & BDS. (2014), <https://www.directorsandboards.com/articles/singlenew-kind-captured-board>.

¹¹³ In a survey, "independent directors were found to be less satisfied with the financial, operational and strategic information they received than their nonindependent counterparts." Robert J. Thomas, Joshua B. Bellin

Indeed, despite the growing push for independent directors, boards very much still depend on management for information,¹¹⁴ and often are likely to overly rely on and defer to the CEO in their work. This is not surprising considering boards still depend on management for reelection, only meet a handful of times a year, and directors lack independent access to information or company resources.¹¹⁵

2. *Board Leadership as Gatekeeping*

The term “gatekeeping” is often ascribed to the many third parties tasked with preventing a corporation from wrongdoing.¹¹⁶ A gatekeeper has been defined as one who (1) acts as a reputational intermediary; (2) is in place to prevent wrongdoing; and (3) is susceptible to significant reputational capital depreciation or depletion if found to have condoned wrongdoing.¹¹⁷ Traditional gatekeepers fulfill two roles: ensure financial compliance and monitor the corporation.¹¹⁸

Conventionally, external gatekeepers have been thought to fulfill these roles. External gatekeepers include external auditors, analysts, and credit rating agencies.¹¹⁹ While these gatekeepers are meant to be effective in detecting and exposing types of financial misreporting, accounting fraud, or other questionable decisions, such as those that lead to the collapse of Enron and WorldCom,¹²⁰ their effectiveness is limited. Specifically, these gatekeepers rely on management for their employment, as management retains the power to hire and fire them.¹²¹ This creates an inherent conflict: auditors are hired by the management they audit, lawyers are paid by the firms that use them, etc.¹²²

Given the inherent issues with external gatekeepers, investors and regulators

& George Marcotte, *How Boards Can Be Better—A Manifesto*, MITSLOAN MGMT. REV. (Jan. 7, 2009), <https://sloanreview.mit.edu/article/how-boards-can-be-better-a-manifesto/>.

¹¹⁴ See, e.g., William George, *Board Governance Depends on Where You Sit*, MCKINSEY & CO. (Feb. 1, 2013), <https://www.mckinsey.com/featured-insights/leadership/board-governance-depends-on-where-you-sit>; Martin Lipton, *Some Thoughts for Boards of Directors in 2019*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 14, 2019), <https://corpgov.law.harvard.edu/2018/12/14/some-thoughts-for-boards-of-directors-in-2019/>.

¹¹⁵ See *Captured Boards*, *supra* note 22, at 28.

¹¹⁶ See *supra* note 27.

¹¹⁷ JOHN C. COFFEE, JR., GATEKEEPERS: THE ROLE OF THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006); Adair Morse, Wei Wang & Serena Wu, *Executive Lawyers: Gatekeepers or Strategic Officers?* 33 (Nat'l Bureau of Econ. Rsch., Working Paper No. w22597, 2016); Peter J. Henning, *The New Corporate Gatekeeper*, 62 WAYNE L. REV. 29, 29–31 (2016).

¹¹⁸ Tuch, *supra* note 27, at 1594–96; Morse, Wang & Wu, *supra* note 117, at 1.

¹¹⁹ CORNELIS A. DE KLUYVER, A PRIMER ON CORPORATE GOVERNANCE 16 (2009).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

have increasingly turned toward the board to fulfill an internal gatekeeping function.¹²³ Specifically, they have turned toward independent board members in leadership positions. Because of their lack of insider status or perceived ties to management, these independent directors in key leadership roles are thought to be capable of impartially assessing the actions and decisions of the company and its management, as well as guard and ensure the independence of the board, as a whole, from within.¹²⁴ Additionally, these directors are largely viewed as sensitive to reputational concerns,¹²⁵ which is a key pillar of effective gatekeepers.¹²⁶ With this trend, two key roles have emerged to lead and guide the independent directors and strengthen the board's independent decision making: the LID and the Independent Chair.

3. *The Rise of the Independent Chair*

As noted, historically, the role of chair was often given to the CEO because it was believed that the executive under such a structure would possess multiple perspectives as well as the power to quickly enact corporate initiatives.¹²⁷ Today, however, most large public companies have separated the roles of CEO and chair, and many have chosen to nominate an independent director as the chair. The underlying rationale for separating the two roles and replacing the CEO-chair with an independent board member is that the board must be able to monitor management properly and effectively. When the head of management is also the head of the board, this becomes less likely given the clout the CEO has on both management and the board.

As the leader of the board, the chair's role cannot be understated, and an independent leader "curbs conflicts of interest, promotes oversight of risk, manages the relationship between the board and CEO, serves as a conduit for regular communication with shareowners, and is a logical next step in the

¹²³ Theoretically, the services of gatekeepers can be performed from within or outside the corporation. See, e.g., Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 905 (1990) (discussing in-house lawyers as internal gatekeepers); Tuch, *supra* note 27, at 1592–93.

¹²⁴ Avci, Schipani & Seyhun, *supra* note 106, at 239.

¹²⁵ See, e.g., Eliezer M. Fich & Anil Shivdasani, *Financial Fraud, Director Reputation, and Shareholder Wealth*, 86 J. FIN. ECON. 306, 307 (2007) (finding that following a financial fraud lawsuit, outside directors experience a significant decline in other board seats held); Martin Bugeja, Raymond Da Silva Rosa & Andrew Lee, *The Impact of Director Reputation and Performance on the Turnover and Board Seats of Target Firm Directors*, 36 J. BUS. FIN. & ACCT. 185, 208 (2009) (finding a reputation effect for directors in the context of takeovers).

¹²⁶ Tuch, *supra* note 27, at 1594–96 (discussing the importance of reputational function to gatekeepers); COFFEE, *supra* note 117, at 3 (2006) ("Central to this model is the concept of reputational capital.").

¹²⁷ Aiysha Dey, Ellen Engel & Xiaohui Liu, *CEO and Board Chair Roles: To Split or Not to Split?*, 17 J. CORP. FIN. 1595, 1595 (2011) ("Historically, an overwhelming majority of U.S. firms have chosen to combine the role of CEO and chairman of the board.").

development of an independent board.”¹²⁸ Because the chair leads the board and board meetings, the chair maintains significant prestige among her board, allowing her to exert influence during board deliberations and prior to important votes.¹²⁹

The board chair serves a critical role not only on the board, but also within the overall function of the corporation. The board chair acts as an asset to the CEO and management, while also monitoring and evaluating the CEO’s performance. The chair typically provides leadership on the board, ensures the board fulfills its duties, schedules meetings, organizes the agenda for meetings, ensures proper flow of information to the board, oversees the proxy materials’ preparation and distribution, acts as a liaison between the board and management, and represents the company to external groups.¹³⁰

For example, in a letter to Wells Fargo’s chair, the Federal Reserve Board wrote:

As Chair, it was your responsibility to lead the WFC board in its oversight of the firm’s business and operations. With respect to that responsibility, it was incumbent upon you as leader of the WFC board to ensure that the business strategies approved by the board were consistent with the risk management capabilities of the firm. It was also incumbent on you to ensure that the WFC board had sufficient information to carry out its responsibilities.¹³¹

Additionally, when asked about the difference between her roles as CEO of Hewlett-Packard, Inc. and board chair of Hewlett-Packard Enterprise when Hewlett-Packard split in 2015, Margaret Whitman responded, “[t]he chairman [role] is to help the board be productive, help the CEO be successful.”¹³² When Walgreens chose to separate the role of CEO and chair, it explained in its proxy statement that the separation allowed the chair to “focus on leadership of the

¹²⁸ THE MILLSTEIN CTR. FOR CORP. GOVERNANCE & PERFORMANCE, YALE SCH. OF MGMT., CHAIRING THE BOARD: THE CASE FOR INDEPENDENT LEADERSHIP IN CORPORATE NORTH AMERICA 3 (2009), <https://web.law.columbia.edu/sites/default/files/microsites/millstein-center/2009%2003%2030%20Chairing%20The%20Board%20final.pdf>; see *Independent Board Leadership*, *supra* note 103.

¹²⁹ See Eli DuBosar, *Separate CEO and Chairman Roles: A Biennial Determination Shareholders Should Be Empowered to Make*, 13 FLA. ST. U. BUS. REV. 157, 166 (2014) (“The appointment of a lead director has emerged as a possible alternative to splitting the CEO and chairman positions in many corporations.”).

¹³⁰ NACD EXPRESSSOURCE SERV., ROLE OF THE LEAD DIRECTOR 2–3 (2010), https://www.nacdonline.org/files/PDF/NACD-%20Role%20of%20the%20Lead%20Director_1284573862798.pdf.

¹³¹ Letter from Michael S. Gibson, Dir., Div. of Supervision & Regul., Bd. of Governors of the Fed. Rsrv. Sys., to John Stumpf, Chair, Wells Fargo & Co. (Feb. 2, 2018), <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a4.pdf>.

¹³² See *Being the CEO’s Boss*, *supra* note 104, at 697.

Board of Directors, including . . . serving as a liaison and supplemental channel of communication between independent directors and the Chief Executive Officer, and serving as a sounding board and advisor to the Chief Executive Officer.”¹³³ In its 2020 proxy statement, Intel noted that maintaining an Independent Chair helps better fulfill the role of the chair, including “helping to facilitate relations between the Board, the CEO, and other senior management, assist the Board in reaching consensus on particular strategies and policies, and foster robust evaluation processes, and by efficiently allocating oversight responsibilities between the independent directors and management.”¹³⁴

While traditionally one individual held the role of both CEO and chair of any given corporation, Independent Chairs rose to popularity quickly. In fact, the vast majority of U.S. corporations had a dual CEO-chair position as late as the end of the financial crisis,¹³⁵ and only recently have investors placed heightened pressure on firms to separate the positions and install an Independent Chair.¹³⁶ Soon after the financial crisis, calls for independent leadership rang out as a supposed antidote for what was viewed largely as a failure to engage in effective corporate oversight—even by those boards comprised of independent directors.¹³⁷ Members in both houses of Congress introduced bills mandating independent board chairs,¹³⁸ and Congress introduced several proposals calling for mandatory separation of the CEO and chair functions.¹³⁹ Though such proposals were unsuccessful in Congress, the SEC began to require companies to disclose “(a) whether and why the company has chosen to combine or separate

¹³³ *Id.* at 698 (citing Walgreen Co., 2010 Notice and Proxy Statement (2010)).

¹³⁴ Intel Corp., Proxy Statement (Schedule DEF 14A), at 27 (Mar. 30, 2020).

¹³⁵ Aiysha Dey, Ellen Engel & Xiaohui Liu, *CEO and Board Chair Roles: To Split or Not to Split?*, 17 J. CORP. FIN. 1595, 1595 (2011).

¹³⁶ See, e.g., *Proxy Firms Recommend JPMorgan Shareholders Vote Against Pay Plan*, REUTERS BUS. NEWS (May 6, 2015), www.reuters.com/article/us-jpmorgan-pay/proxy-firms-recommend-jpmorgan-shareholders-vote-against-pay-plan-idUSKBN0NR1XY20150506 (reporting that proxy advisory firm ISS recommended stripping JPMorgan Chase CEO Jamie Diamond from his chairmanship); John Laide, *Issue Focus: Separate Chairman and CEO*, SHARK REPELLENT (Sept. 18, 2015), <https://perma.cc/7BH7-GHKW> (reporting that shareholder activists have continuously lobbied companies to appoint an independent chairman); Matteo Tonello, *Separation of Chair and CEO Roles*, HARV. L. SCH. F. ON CORP. GOV. (Sept. 1, 2011), <https://corpgov.law.harvard.edu/2011/09/01/separation-of-chair-and-ceo-roles/#2b>.

¹³⁷ See, e.g., Nell Minow, *Commentary: Blame Boards of Directors for Financial Mess*, CNN POLS. (Sept. 18, 2008), <https://www.cnn.com/2008/POLITICS/09/18/minow.pay/>; Grant Kirkpatrick, Héctor Lehedé & Dorothee Teichmann, *Corporate Governance Lessons from the Financial Crisis*, SSRN 10–11 (May 1, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393978.

¹³⁸ Lisa M. Fairfax, *Separation Anxiety: A Cautious Endorsement of the Independent Board Chair*, 47 IND. L. REV. 237, 241 (2014); Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. § 5(2) (2009); Shareholder Empowerment Act of 2009, H.R. 2861, 111th Cong. § 2 (amending § 16 of the Securities Exchange Act of 1934) (2009).

¹³⁹ Fairfax, *supra* note 138, at 242; Tina Yang & Shan Zhao, *CEO Duality, Competition, and Firm Performance*, SSRN 3–4 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177403.

the principal executive officer and board chair positions, and (b) why the company believed that its leadership structure is the most appropriate.”¹⁴⁰

Investors also saw the implementation of an Independent Chair as a solution to many of their corporate governance concerns. The Council for Institutional Investors’ governance policies, for instance, advocate that “board[s] should be chaired by an independent director” in order to provide the clearest separation of power between management and the board.¹⁴¹ Proxy advisory firm Glass Lewis also advocates for Independent Chairs, noting that Independent Chairs are more likely to set pro-shareholder agendas and lead proactive and effective boards.¹⁴² BlackRock also favors an Independent Chair, but considers implementation of an LID as an appropriate alternative.¹⁴³

These overarching policies are supported by the continuing prevalence of shareholder proposals advocating for either separation of the chair and CEO role or implementation of an Independent Chair. In 2020, forty-four companies in the S&P 500 voted on shareholder proposals requesting a separate CEO and chair or Independent Chair.¹⁴⁴ The number of proposals presented on this topic increased by 12% and 23% in 2018 and 2019, respectively, compared to prior years.¹⁴⁵ For instance, in 2017, thirty-eight companies in the Equilar 500 faced shareholder proposals requesting an Independent Chair.¹⁴⁶ Companies that do not implement independent or separate chairs as a response to these proposals often face a similar proposal the next year, signifying shareholders’ dedication

¹⁴⁰ Fairfax, *supra* note 138, at 241.

¹⁴¹ *Policies on Corporate Governance*, COUNCIL OF INSTITUTIONAL INV’S (Mar. 7, 2022), https://www.cii.org/corp_gov_policies.

¹⁴² See PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS, *supra* note 79, at 7. ISS also generally recommends voting for shareholder proposals requiring independent chairs. See *id.* at 19–20.

¹⁴³ BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR U.S. SECURITIES 9 (effective as of 2022), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>.

¹⁴⁴ SULLIVAN & CROMWELL LLP, 2021 PROXY SEASON REVIEW: PART 1: RULE 14A-8 SHAREHOLDER PROPOSALS 14 (2021), <https://www.sullcrom.com/files/upload/sc-publication-2021-Proxy-Season-Review-Part-1-Rule14a-8.pdf>.

¹⁴⁵ See SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW 21 (2018), <https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf> (showing forty-two such proposals voted on); SULLIVAN & CROMWELL LLP, 2019 PROXY SEASON REVIEW: PART 1: RULE 14A-8 SHAREHOLDER PROPOSALS 15 (2019), <https://www.sullcrom.com/files/upload/SC-Publication-2019-Proxy-Season-Review-Part-1-Rule-14a-8-Shareholder-Proposals.pdf> (showing forty-seven such proposals voted on); SULLIVAN & CROMWELL LLP, 2020 PROXY SEASON REVIEW: PART 1: RULE 14A-8 SHAREHOLDER PROPOSALS 19 (2020), <https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf> (showing fifty-eight such proposals voted on).

¹⁴⁶ Joseph Kieffer, *Shareholder Rejection of Chair-CEO Separation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 24, 2018), <https://corpgov.law.harvard.edu/2018/07/24/shareholder-rejection-of-chair-ceo-separation/>.

to independent leadership.¹⁴⁷ Walmart, for example, faced similar proposals each year for the five years prior.¹⁴⁸ In 2020, shareholders at Boeing offered a majority support in favor of splitting the CEO and chair role, with the support of top institutional investor, Vanguard Group, using the vote as a way to signal dissatisfaction with corporate leadership in recent years.¹⁴⁹

In response to this pressure, whether as a result of shareholder proposals or voluntary adoption of what is widely considered best practice, in 2019, the majority of S&P 500 boards had split chair and CEO positions, compared with only 40% a decade ago.¹⁵⁰ Moreover, as of 2019, 34% of S&P 1500 boards have an Independent Chair, more than double the mere 16% in 2009.¹⁵¹

4. *The Rise of the LID*

In tandem with the rise of the Independent Chair role, the Lead Independent Director role has also risen in popularity, since an increasing number of firms have “electe[d] to designate a lead independent director and have tailored the position’s responsibilities to the unique needs of the firm.”¹⁵² Today, nearly 58% of S&P 500 companies have appointed an LID,¹⁵³ and the vast majority of companies that have resisted implementing an Independent Chair have, at the very least, instituted the position of an LID.¹⁵⁴

In contrast with the board chair, who fulfills a similar purpose on each board, LIDs are not officially mandated or required on any board regardless of the board’s structure. This means that companies may also more freely choose which powers to grant LIDs and how strong to make these powers when they do choose to implement an LID. The powers allocated to an LID, as well as any requirements, restrictions, or qualifications, are often included within a

¹⁴⁷ Yafit Cohn, *Independent Chair Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 22, 2016), <https://corpgov.law.harvard.edu/2016/08/22/independent-chair-proposals-2/#6b>.

¹⁴⁸ Kieffer, *supra* note 146.

¹⁴⁹ Julie Johnsson, *Boeing Rebuked by Investors in Vote to Split CEO, Chairman Roles*, BLOOMBERG L. (Apr. 27, 2020), <https://www.bloomberg.com/news/articles/2020-04-27/boeing-investors-rebuke-leaders-by-splitting-ceo-chairman-roles>; Ross Kerber, *Top Boeing Shareholder Vanguard Voted Against Chair Kellner*, REUTERS (Apr. 29, 2020), <https://www.reuters.com/article/us-boeing-vanguard/top-boeing-shareholder-vanguard-voted-against-chair-kellner-idUSKBN22B26F>.

¹⁵⁰ SPENCER STUART, 2020 U.S. SPENCER STUART BOARD INDEX 21 (2020), https://www.spencerstuart.com/-/media/2020/december/ssbi2020/2020_us_spencer_stuart_board_index.pdf.

¹⁵¹ SPENCER STUART, 2019 U.S. SPENCER STUART BOARD INDEX 1, 10 (2019), https://www.spencerstuart.com/-/media/2019/ssbi-2019/us_board_index_2019.pdf; information on file with author via FactSet.

¹⁵² See *Successor CEOs*, *supra* note 74, at 801.

¹⁵³ See discussion *infra* Section II.A.

¹⁵⁴ Nicola Faith Sharpe, *Informational Autonomy in the Boardroom*, 2013 U. ILL. L. REV. 1089, 1110 (2013).

company's corporate governance guidelines.¹⁵⁵ These documents are a more detailed extension of the bylaws: they elaborate on the issues involving board composition and process, committee assignments and responsibilities, and other important governance details.¹⁵⁶ Companies treat these documents extremely seriously, putting intentional effort into drafting and revising them over time.¹⁵⁷ Regulators have used these guidelines when assessing directors' failures.¹⁵⁸ Similarly, shareholders value these guidelines for the details that they provide around the roles and responsibilities of the board and the governance roadmap they create for the company.¹⁵⁹

The LID plays an important role between and among many key players in the corporate governance area. Among other things, the LID is expected to help ensure that the board appropriately monitors the CEO, evaluate and support the chair, act as a point of contact for stakeholders and shareholders, and serve as an alternative communication channel and mediator for nonexecutive directors.¹⁶⁰ When the corporation is operating smoothly, the LID is a versatile contributor to good relationships and the functioning of the board, but the LID is also expected to assist in resolution facilitation in times of stress.¹⁶¹ The LID also plays an important role in leading the search for a new chair when the current chair steps down.¹⁶²

When given the proper powers and tools to lead, an LID fulfills an important role within the board and can enhance communication both among board members themselves and between the board and management, while also enhancing the board's gatekeeping function. An LID is elected from among the independent directors to act as their representative and can serve as "a point of contact among the independent directors with whom management can discuss ideas informally."¹⁶³ For example, in a letter to Wells Fargo's LID, the Federal

¹⁵⁵ Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097, 1112 (2020) [hereinafter *Shadow Governance*].

¹⁵⁶ *Id.*; Armand Picou & Michael J. Rubach, *Does Good Governance Matter to Institutional Investors? Evidence from the Enactment of Corporate Governance Guidelines*, 65 J. BUS. ETHICS 55, 55 (2006).

¹⁵⁷ *Shadow Governance*, *supra* note 155, at 1123–26 (describing the importance that companies ascribe to governance policies and the annual process in which they are revised).

¹⁵⁸ *See supra* note 3 and accompanying text.

¹⁵⁹ *Id.*

¹⁶⁰ *See Role of LID*, *supra* note 28.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Daniel Mouw, *Shooting from the Hip: The Invalidity of SEC Rule No. S7-03-04*, 31 J. CORP. L. 225, 243–44 (2005) (quoting JOHN J. BRENNAN, DAWN-MARIE DRISCOLL, PAUL G. HAAGA, JR., MANUEL H. JOHNSON, WILLIAM M. LYONS & GERALD C. MCDONOUGH, INVESTMENT CO. INST., REPORT OF ADVISORY GROUP ON BEST PRACTICES FOR FUND DIRECTORS 25 (1999), https://www.idc.org/doc-server/pdf%3Arpt_best_practices.pdf).

Reserve Board described the LID's role:

As lead independent director, you had a responsibility to lead other non-executive directors in forming and providing an independent view of the state of the firm and its management . . . To fulfill that role, you needed to have sufficient information from management to understand and assess problems at the firm.¹⁶⁴

Proxy advisors ISS and Glass Lewis have successfully advocated for the LID structure and recommend granting these directors specific powers.¹⁶⁵ ISS, for example, considers a lead director role to be robust only if elected by and from the independent members of the board.¹⁶⁶ According to ISS, the LID “should also have clearly delineated and comprehensive duties,” including at least serving as a liaison between the chair and independent directors; approving what information is sent to the board; approving board meeting agendas; approving meeting schedules; maintaining authority to call meetings of independent directors; and maintaining availability for communication with major shareholders upon request.¹⁶⁷

Large investors have also pushed for more independent oversight in the form of an Independent Chair or LID. Institutional investor TIAA-CREF, for example, notes that “a company should disclose how the [LID's] role is structured to ensure they provide an appropriate counter balance to the CEO/chair.”¹⁶⁸ CalPERS recommends implementing an LID in the absence of an Independent Chair, and notes that the position “provides shareholders and directors with a valuable channel of communications should they wish to discuss concerns relating to the chair.”¹⁶⁹ CalPERS offers a list of the twelve minimum duties an Independent Chair or LID must fulfill, including “oversee[ing] the process of hiring, firing, evaluating, and compensating the CEO[;] . . . approv[ing] the retention of consultants who report directly to the board;” and

¹⁶⁴ Letter from Michael S. Gibson, Dir., Div. of Supervision & Regul., Bd. of Governors of the Fed. Rsrv. Sys., to Stephen Sanger, Lead Indep. Dir., Wells Fargo & Co. (Feb. 2, 2018), <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a3.pdf>.

¹⁶⁵ Amy Lee Rosen, *Support for Independent Chairmen Waning, Proxy Firm Finds*, CQ. ROLL CALL WASH. CORP. GOVERNANCE BRIEFING (June 20, 2016), 2016 WL 3382203; Holly J. Gregory, *Board Leadership and the Role of the Independent Lead Director*, THE GOVERNANCE COUNS.: CAP. MKTS. & CORP. GOVERNANCE 32, 34 (2018), www.sidley.com/-/media/publications/mar18_governancecounselor.pdf.

¹⁶⁶ INSTITUTIONAL S'HOLDER SERVS., U.S. PROXY VOTING RESEARCH PROCEDURES & POLICIES (EXCLUDING COMPENSATION-RELATED): FREQUENTLY ASKED QUESTIONS 36 (2021), <https://www.issgovernance.com/file/policy/active/americas/US-Procedures-and-Policies-FAQ.pdf>.

¹⁶⁷ *Id.*

¹⁶⁸ TIAA-CREF, TIAA-CREF POLICY STATEMENT ON CORPORATE GOVERNANCE 18 (6th ed.), http://www.shareholderforum.com/e-mtg/Library/20110225_TIAA-CREF-policy6.pdf.

¹⁶⁹ CAL. PUB. EMPS.' RET. SYST., GLOBAL GOVERNANCE PRINCIPLES 31 (2015), <https://www.calpers.ca.gov/docs/forms-publications/global-principles-corporate-governance.pdf>.

assisting the board in assuring compliance with governance principles.¹⁷⁰ Perhaps in a nod to the important monitoring role the LID plays,¹⁷¹ even the Business RoundTable advises companies to appoint an LID in the absence of an Independent Chair.¹⁷² And indeed, that pressure has led to a significant rise in the prevalence of LIDs. In 2020, 58% of the S&P 500 companies had an LID on their board.¹⁷³

II. BOARD GATEKEEPERS: THE PROBLEMATIC SOLUTION TO DIRECTOR INDEPENDENCE

Today, as noted, most large public companies have taken action to address investors' and courts' growing demand for independent boards, and in the push for truly independent leaders, companies have installed two key internal gatekeepers to guard the board. They have separated the roles of CEO and chair of the board, in many cases choosing instead to install an Independent Chair at the board's helm. Additionally, companies have implemented the role of LID, particularly when their CEO still holds the title of chair. In many ways, these movements have come to life through private ordering, without regulatory or stock exchange prescription.¹⁷⁴ This has allowed companies not only to pick and choose their preferred leadership structure, but also to self-designate the powers granted to these gatekeepers.

Herein lies the problem. While the creation of new gatekeepers with the potential to improve board monitoring and communication are important developments, they are, to a large extent, untested and ununiform. Moreover, the voluntary nature of the creation of these roles and the allowance for private ordering also carries with it significant concerns. Nothing prevents companies from establishing an LID in name only, with no additional powers or responsibilities compared to her peer directors. Similarly, nothing prevents companies from separating the roles of CEO and chair, but installing a chair that is not truly independent.

Thus, to the extent that these new gatekeepers are merely symbolic, an increased reliance by investors and regulators on gatekeepers as a pivotal component in the board's ability to monitor management may not only prove to

¹⁷⁰ *Id.* at 80.

¹⁷¹ Kress, *supra* note 67, at 919.

¹⁷² BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 13 (2016), [1/s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf](https://s3.amazonaws.com/brt.org/Principles-of-Corporate-Governance-2016.pdf).

¹⁷³ *See infra* Section II.A.

¹⁷⁴ *See, e.g.*, Holly J. Gregory, *Looking Ahead: Key Trends in Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 10, 2019), <https://corpgov.law.harvard.edu/2019/01/10/looking-ahead-key-trends-in-corporate-governance/>.

be unwarranted, but may also allow companies to further insulate themselves from shareholder and stakeholder monitoring. To examine these concerns, this Article analyzes hand-collected data from the S&P 500 companies (larger companies), as well as a sample of 400 S&P 600 and Russell 3000 companies (smaller companies). The data illuminates several key concerns regarding both the independence of these gatekeepers as well as the powers afforded to them.

A. *Lead Independent Directors*

As previously outlined, corporate boards increasingly use an LID to bolster independent leadership on the board.¹⁷⁵ These gatekeepers are meant to serve as an additional check on board chairs, especially if the chair is not independent. Yet, while many market participants agree that, in principle, independent board leadership is needed, disagreement exists as to whether an LID can substitute for the ideal of an Independent Chair.¹⁷⁶

Ultimately, the powers granted to independent directors, specifically when it comes to LIDs, may prove pivotal in addressing this concern. The sections that follow provide the first-of-its-kind in-depth exploration of LIDs in the U.S., providing both descriptive data regarding their prevalence as well as hand-collected data regarding their powers. The data exposes one of the key flaws with the current landscape of LIDs. LIDs are, in many cases, granted fewer enumerated powers than one might hope. In fact, LIDs may have essentially become “lead” in title only.

1. *Methodology*

Granular LID data was hand-coded for companies within the S&P 500 and a random sample of 400 companies interspersed throughout the S&P 600 and Russell 3000 to measure the powers companies grant to their LIDs. This data was collected by reviewing each company’s investor relations website, corporate governance guidelines (which are often disclosed because the NYSE requires listed companies to adopt and disclose them¹⁷⁷), and bylaws. Each company’s available governance documents were culled to determine whether the company utilized an LID and the text of each power granted was gathered.

To maintain uniformity between data sets, thirty-seven “common” powers

¹⁷⁵ *Successor CEOs*, *supra* note 74, at 800–01.

¹⁷⁶ *Cf. id.* at 801 (suggesting that some firms are changing from calls for independent chairs to calls for LIDs).

¹⁷⁷ PATRICK SCHULTHEIS & JEANA KIM, WILSON SONSINI GOODRICH & ROSATI, CORPORATE GOVERNANCE REQUIREMENTS 9 (2017) (copy on file with the Emory Law Journal).

were identified as allowing an LID to fulfill their intended role adequately and robustly as a boardroom gatekeeper and as a truly independent check on management. These powers encompass all facets of board service, from oversight of meeting agendas to guiding CEO succession planning; a full breakdown of the powers is included in Appendix A. Any powers, qualifications, or restrictions were coded accordingly. The data ranges from the personal characteristics of the LIDs, such as their career trajectory leading to the position, as well as more structural data, such as what powers each company grants to these gatekeepers in its organizational documents. Such data includes the prevalence of the LID position across the indices, the conditions under which a company requires an LID to serve on the board, and the LID's tenure. Each company's corporate governance guidelines were also reviewed to see if there were any term limits imposed, restrictions on access to information, or specific qualifications required for the LID.

The hand-collected data was coded, consolidated, and analyzed to assess the powers that LIDs are granted in three different complementary ways that are further discussed herein. First, a "Simple Score" was calculated based on the total number of powers each company's LID was allocated. Next, the powers were classified as strong, medium, and weak to assess the level of responsibility that each power grants. Lastly, the "Super Score" for each company was calculated to reflect any powers that were qualified by limiting language, limited ability to exercise, or shared power.

First, this Article provides an easily digestible and direct comparison across the S&P 500, S&P 600, and Russell 3000 using a "Simple Score" analysis. Simple Scores, true to their name, reflect only the number of powers that each company grants to their LID. Thus, a Simple Score of 8 or a company's LID means that the company grants their LID eight distinct powers out of the possible thirty-seven powers identified in Appendix A. To provide a more nuanced view into these powers, we then labelled each granted power as either "Explicit" or "Qualified." An Explicit power is one with no limitations in application, exclusivity, or strength. Conversely, a Qualified power is subject to one or more such limitations. The Explicit or Qualified label does not factor into the Simple Score but acts instead as an additional metric for comparison.

Second, each power was classified as strong, medium, or weak based on the level of responsibility given to each LID. Powers that were classified as strong are crucial to the LID's ability to guide the board and enhance communication. For example, some powers that were classified as strong include presiding at all board meetings when the chair is not present and leading the evaluation of the chair's performance. Weak powers include things like facilitating

communication generally or providing feedback to the CEO or senior management.

Finally, in addition to the Simple Scores, the data for the S&P 500 companies was further analyzed utilizing a multifaceted coding methodology, resulting in a “Super Score” for each LID power. A company’s Super Score reflects three benchmarks: (1) How “qualified” the language of a given power is; (2) Whether that power resides solely with the LID; and (3) Whether that power is “active” or requires a triggering event to be exercised.

An individual company-level analysis was then performed by scoring each granted power based on the three benchmarks mentioned above. The first benchmark—strength of language—incorporates some subjectivity. If a power has strengthening language, it receives a +1 score; conversely, if the power is materially weakened, it receives a –1 score. For example, a neutral phrasing of communicating with major stockholders would earn a strength score of zero since it has no strengthening or weakening language. However, “[i]s available for consultation/communication with significant shareholders, when appropriate”¹⁷⁸ would earn a negative strength score because it is qualified by “when appropriate.” Conversely, acting as “the principal representative of the independent directors in communicating with . . . shareholders”¹⁷⁹ earns a positive strength score due to the addition of “principal representative.”

The second and third benchmarks—exclusivity and activity—are relatively objective. If a power is granted *solely* to an LID, it receives a +1; conversely, if the power is shared, it receives a 0. Further, if an LID may exercise the power at any time she pleases, the power is “active” and receives a +1; conversely, if the power requires a triggering event or is limited in application, it receives a 0. For example, a natural phrasing of “liaison between insiders and other directors” is active at UnitedHealth Group where the LID serves “as the principal liaison between the Independent Directors and the Chair.”¹⁸⁰ Meanwhile, it is dormant in Raytheon Technologies Corporation’s phrasing of “[a]t the request of the independent directors, the Lead Director shall serve as liaison on Board-wide issues between the independent directors and the Executive Chairman.”¹⁸¹ To

¹⁷⁸ GEN. DYNAMICS, CORPORATE GOVERNANCE GUIDELINES 5 (2019), https://s22.q4cdn.com/891946778/files/doc_downloads/gov_docs/2019/corporate-governance-guidelines-5-2019.pdf.

¹⁷⁹ LEGGET & PLATT INC., CORPORATE GOVERNANCE GUIDELINES 3 (2021), <https://leggett-search.com/governance/corporate-governance-guidelines.asp>.

¹⁸⁰ UNITEDHEALTH GRP. INC., BOARD OF DIRECTORS PRINCIPLES OF GOVERNANCE 2 (2022), <https://www.unitedhealthgroup.com/content/dam/UHG/PDF/About/UNH-Principles-of-Governance.pdf>.

¹⁸¹ RAYTHEON TECHS. CORP. RAYTHEON TECHNOLOGIES CORPORATION CORPORATE GOVERNANCE GUIDELINES 8 (2022), <https://prd-sc101-cdn.rtx.com/-/media/rtx/our-company/corporate-governance/media/documents/corporate-governance-guidelines--april-25->

calculate the Super Score, the three numbers were added. Each combined score was then summed up for each of the thirty-seven powers to reach a final number. Each section will present the coded Super Scores for the S&P 500 and Simple Scores for the S&P 500, S&P 600, and Russell 3000.

2. *Lead Independent Directors' Prevalence*

Appointing an LID has become a best practice for companies that have maintained a combined CEO-chair role.¹⁸² This is partly the result of a New York Stock Exchange listing requirement that companies have non-management directors hold regularly scheduled executive sessions without management, overseen by a “presiding” director.¹⁸³

Indeed, the lead director role has grown in popularity, as more and more firms elect to designate an LID. Proxy advisor Glass Lewis has noted that declining support for proposals calling for independent chairpersons (which decreased from 31.5% in 2014 to 28.9% in 2016) could be tied to the creation or the strengthening of LID roles.¹⁸⁴ In 2017, only 11% of companies in the S&P 1500 had neither an LID nor an Independent Chair, which is marked improvement over 2008, where 33% of the companies lacked either position.¹⁸⁵ As of 2020, only five boards in the S&P 500 did not report having either an Independent Chair or an LID.¹⁸⁶ Moreover, as Figure 1 shows, S&P 500 firms favor the LID approach as opposed to instituting an Independent Chair, with 61% of such firms reporting an LID in 2020,¹⁸⁷ a slight increase from the 59% reported in 2018.¹⁸⁸

2022.pdf?rev=2e7d3ca2454840a49e9c018fce09a15f.

¹⁸² Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1289 n.22 (1998) (“[V]arious best practices documents exhibit consensus as to the importance of director independence . . .”).

¹⁸³ N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 303A.03 cmt. (2009) (“To promote open discussion among the non-management directors, companies must schedule regular executive sessions in which those directors meet without management participation.”); PRAC. L. CORP. & SEC., LEAD DIRECTOR: UNDERSTANDING AND FILLING THE ROLE, Westlaw 5-519-6933 (2022) (noting that NYSE listing requirements require companies to have regular meetings of non-management directors).

¹⁸⁴ Rosen, *supra* note 165 (suggesting decreased support for independent chairpersons because companies have either created or strengthened the lead independent director’s responsibilities).

¹⁸⁵ KOSMAS PAPADOPOULOS, ROBERT KALB, ANGELICA VALDERRAMA & JARED SORHAINDO, INSTITUTIONAL S’HOLDER SERVS., U.S. BOARD STUDY: BOARD ACCOUNTABILITY PRACTICES REVIEW 10 (2018), <https://www.issgovernance.com/file/publications/board-accountability-practices-review-2018.pdf> (noting institutional investors are “gaining traction” after having “long encouraged boards to appoint independent board leaders”).

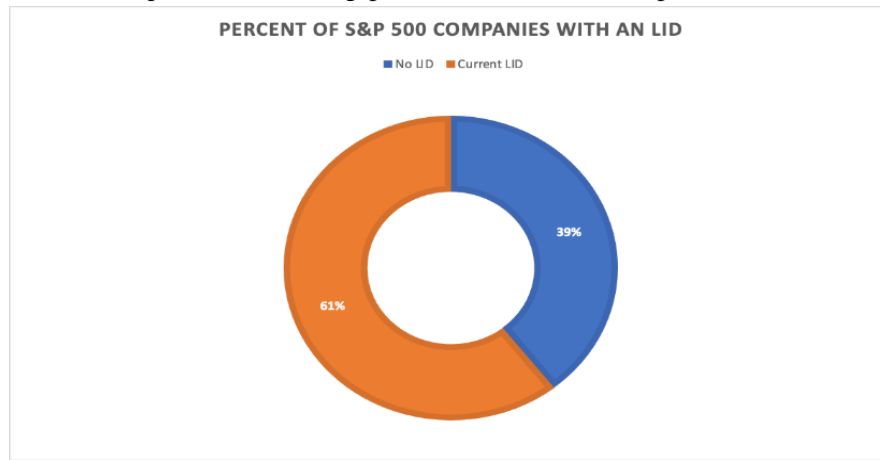
¹⁸⁶ 2020 U.S. SPENCER STUART BOARD INDEX, *supra* note 150, at 18.

¹⁸⁷ Similarly, Spencer Stuart found that LIDs account for a large percentage of these companies, with 73% of companies having LID and only 34% having an independent chair. *Id.* at 3, 19.

¹⁸⁸ Steve W. Klemash, Jamie C. Smith & Kellie C. Huennekens, *Today’s Independent Board Leadership*

Figure 1: LIDs in S&P 500 Companies in 2020

Yet, despite the increasing prevalence of LIDs, companies maintain wide

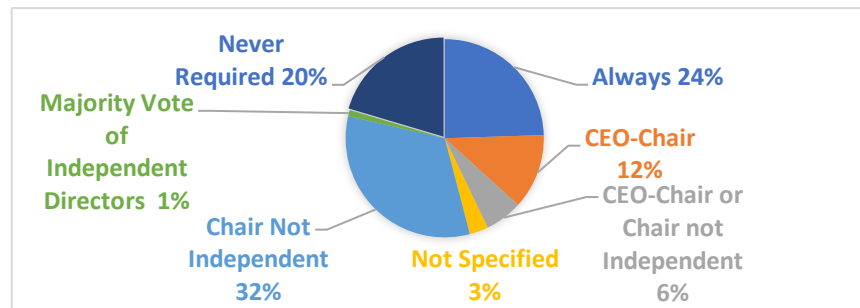


discretion in choosing when to appoint an LID. Among the S&P 500 companies that do disclose criteria, they most commonly require the board to maintain an LID when the chair is not independent, when their leadership structure results in a joint CEO-chair, or always. For example, the Coca-Cola Co. discloses in its corporate governance guidelines that it delegates the decision whether to have a dual CEO-chair to the board, but if the board determines a joint CEO-chair is in the best interest of shareholders, the independent directors must appoint an LID.¹⁸⁹ Twenty percent of companies, however, do not require an LID in any circumstances. Figure 2 below demonstrates the prevalence of each criterion.

Landscape, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 20, 2018), <https://corpgov.law.harvard.edu/2018/11/20/todays-independent-board-leadership-landscape>.

¹⁸⁹ COCA-COLA CO., CORPORATE GOVERNANCE GUIDELINES (2020), https://d1io3yog0oux5.cloudfront.net/_68e2c943e4f3167d9aaef6d804d03be9/cocacolacompany/db/719/7231/file/Corporate+Governance+Guidelines+as+of+October+15%2C+2020.pdf.

Figure 2: Criteria for Adoption of LIDs in S&P 500 Companies



Certainly, while companies may choose to utilize LIDs, they maintain complete autonomy over when and whether they will adopt one at any given time. Within the S&P 500, only 6% of companies did not disclose criteria for when the company must appoint an LID and 20% of companies stated that an LID is never required.¹⁹⁰ Relatedly, because companies choose when to designate an LID, some choose only to do so when the CEO and chair are the same person,¹⁹¹ while others do so also when the chair is, herself, an insider.¹⁹² This essentially allows the company to choose when the heightened monitoring that an LID theoretically provides is necessary.

Finally, although there is relatively widespread disclosure of companies' policies governing when an LID must be appointed, only 7% of companies disclosed the qualifications or characteristics required of their LID.¹⁹³ Furthermore, most of these qualification requirements include meeting the definition of independent in accordance with relevant listing standards. This emphasizes the wide discretion that corporate insiders have when choosing to appoint a director as the LID.

A review of the corporate governance guidelines and company websites for the S&P 500 and a selection of companies within the S&P 600 and Russell 3000 has shown that smaller companies often do not have the same

¹⁹⁰ Information on file with the author.

¹⁹¹ See, e.g., *Corporate Governance Guidelines*, BANK OF N.Y. MELLON CORP. (Dec. 13, 2021), <https://www.bnymellon.com/us/en/investor-relations/corporate-governance/corporate-governance-guidelines.html>.

¹⁹² See, e.g., BEST BUY CO., INC., *CORPORATE GOVERNANCE PRINCIPLES 4* (2019), http://s2.q4cdn.com/785564492/files/doc_downloads/Gov_docs/2019/09/13/Corp-Gov-Principles-Sept-2019.pdf.

¹⁹³ Information on file with the author.

corporate governance requirements in place, and, when they do, there is little visibility into the requirements they have adopted. Where 93% of the S&P 500 disclosed requirements for when an LID was required, only 28% of our selection within the S&P 600 had requirements listed within their corporate governance guidelines.¹⁹⁴ Even worse, no corporate governance guidelines within the sample of Russell 3000 companies had any mention of LID requirements.¹⁹⁵

3. *LIDs' Tenuous Independence*

LIDs' prevalence, while nonuniform, is growing. Yet, LIDs fall prey to the same concerns that befall other directors who are deemed independent by their companies' self-designations.¹⁹⁶ First, LIDs suffer from designation discretion—the company has the discretion to decide whether a director is considered independent.¹⁹⁷ Therefore, the same concerns that plague independent director designations generally apply to LIDs as well, only now with heightened stakes, as those concerns pertain to a key gatekeeper in the boardroom.¹⁹⁸

The following example illustrates this subjectivity in LID designations: in 2016, Tim Cook, the CEO of Apple, became the LID of Nike's board.¹⁹⁹ However, Cook's classification as "independent" is puzzling. Prior to Cook's appointment, Nike and Apple had long been partners. Their relationship dates back to 2006, when the two companies joined forces and released the Nike+iPod.²⁰⁰ This alliance was strengthened when Apple launched the Apple Watch Nike+, which some feel was "Nike's reward" for discontinuing its Nike FuelBand—a similar product, which arguably would have placed the two companies in competition.²⁰¹ Nike, however, like the majority of its peers, does

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Yaron Nili, *The Fallacy of Director Independence*, 2020 WIS. L. REV. 491, 507 (2020) [hereinafter *Fallacy of Director Independence*].

¹⁹⁷ *Id.* at 508.

¹⁹⁸ *See id.*; *Out of Sight*, *supra* note 19, at 53.

¹⁹⁹ Nike, Inc., Proxy Statement (Form 14A), at 4, 21 (Sept. 22, 2016).

²⁰⁰ Press Release, Apple, Inc., Nike and Apple Team Up to Launch Nike+iPod (May 23, 2006), <https://www.apple.com/newsroom/2006/05/23Nike-and-Apple-Team-Up-to-Launch-Nike-iPod/>; Press Release, Apple, Inc., Apple & Nike Launch the Perfect Running Partner, Apple Watch Nike+ (Sept. 7, 2016), <https://www.apple.com/gr/newsroom/2016/09/07Apple-Nike-Launch-the-Perfect-Running-Partner-Apple-Watch-Nike-/>; Mark Sullivan, *Apple Watch Sales Were Way Up over the Holidays, Slice Data Shows*, FAST CO. (Jan. 6, 2017), <https://www.fastcompany.com/3067040/apple-watch-sales-were-way-up-over-the-holidays-slice-data-shows>.

²⁰¹ Mark Sullivan, *Apple Watch Nike+ May Be Nike's Reward for Letting FuelBand Die*, FAST CO. (Sept. 7, 2016), <https://www.fastcompany.com/3063539/apple-watch-nike-may-be-nikes-reward-for-letting-fuelband-die>.

not disclose its standard for determining independence, nor does it impose heightened requirements for the role of LID,²⁰² allowing the “independence” designations of directors like Cook to go unchecked despite close ties with company operations and management.

It is worth noting that Apple’s compensation committee includes Nike as one of its “peer companies,”²⁰³ meaning Apple reviews Nike’s “compensation practices and program design” to use as a benchmark for setting its own management compensation.²⁰⁴ Interestingly enough, Cook is the chair of Nike’s compensation committee,²⁰⁵ meaning he has a say on Nike’s management compensation—a factor Apple’s compensation committee will consider when deciding how to set Cook’s own salary as Apple’s CEO. Thus, in theory, Cook has the power to influence Apple’s compensation committee by raising compensation at Nike. The long-standing partnership between the companies, combined with Cook’s ability to influence his own compensation via his role on Nike’s compensation committee, raises substantial doubt as to his ability to be a truly independent monitoring check. The current LID framework, however, does nothing to account for this misalignment and Tim Cook still serves as LID for Nike.²⁰⁶

Companies generally do not regulate how long an LID can serve. Only twenty-seven companies within the S&P 500 included a minimum tenure requirement within their corporate governance guidelines; the minimum terms imposed ranged anywhere from one year to seven years on the board.²⁰⁷ Even fewer companies impose a maximum term limit for the LID. Only nineteen companies (4%) of the S&P 500 dictate the maximum number of consecutive years or terms that an LID may serve in that role.²⁰⁸ The average term limit for companies with a maximum listed in their corporate governance guidelines is five years.²⁰⁹

Because of the lack of term limits imposed, as Figure 3 below depicts, this Article’s survey of the S&P 500 companies finds that many LIDs are relatively long-tenured. As a particularly egregious example, George Carter was elected to the People’s United Financial, Inc. board in 1976, and has served as the board’s

²⁰² See Nike, Inc., Proxy Statement, *supra* note 199.

²⁰³ Apple Inc., Proxy Statement (DEF 14A), at 33 (Dec. 27, 2017).

²⁰⁴ *Id.* at 34.

²⁰⁵ John Kell & Jonathan Vanian, *Tim Cook Becomes Nike’s Lead Independent Director*, FORTUNE (June 30, 2016, 5:57 PM), <https://fortune.com/2016/06/30/apple-ceo-tim-cook-nike/>.

²⁰⁶ Information on file with the author.

²⁰⁷ *Id.*

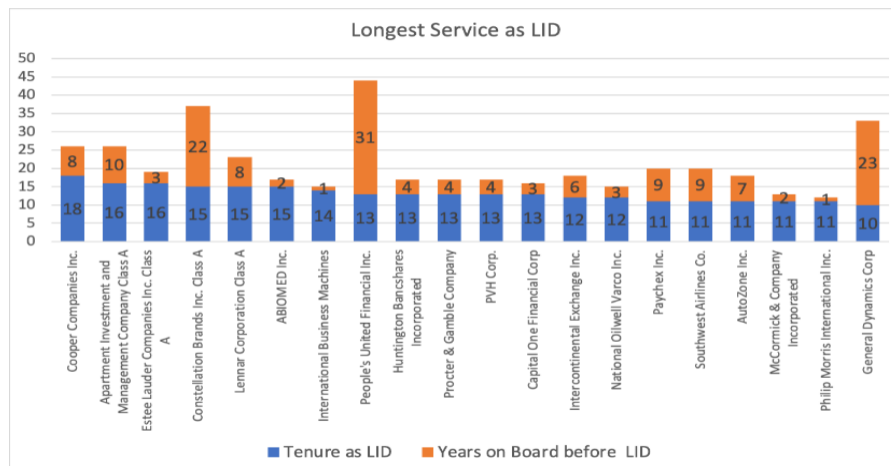
²⁰⁸ *Id.*

²⁰⁹ *Id.*

chair/LID for fourteen years, for a total tenure of forty-six years.²¹⁰ Long tenure has been increasingly deemed to reduce a director's independence, since the significant human capital, social ties, equity, and reputation invested in the corporation that long-term directors have culminated over time might compromise independent directors' willingness to act independently or hold insiders accountable.²¹¹ This concern is even more important when applied to a key gatekeeper such as the LID.

Figure 3: Companies Within the S&P 500 with the Longest LID Tenure

The findings above are especially concerning given that many LIDs serve on the board for several years prior to assuming the role of LID. For example,



in 2020, Meredith Corporation elected Donald Baer as the board's LID.²¹² Interestingly, Baer had already been a member of the Meredith Board of Directors since 2014, offering him six extra years to form ties and work closely with management.²¹³ A more extreme example can be found with United Health Group's LID who served on the company's board and learned the ins and outs of the company for forty years prior to his nomination to this position. For the 287 companies that currently have an LID in the S&P 500, the average number of years served prior to becoming an LID is nine years.²¹⁴ The average LID

²¹⁰ People's United Financial, Inc., Proxy Statement (DEF 14A), at 6 (Apr. 2, 2019).

²¹¹ See *New Insiders*, *supra* note 80, at 149–50.

²¹² Press Release, Meredith Corp., Meredith Corporation Board Elects Baer Lead Independent Director (Feb. 5, 2020), https://s21.q4cdn.com/842953260/files/doc_news/Meredith-Corporation-Board-Elects-Don-Baer-Lead-Independent-Director-2020.pdf.

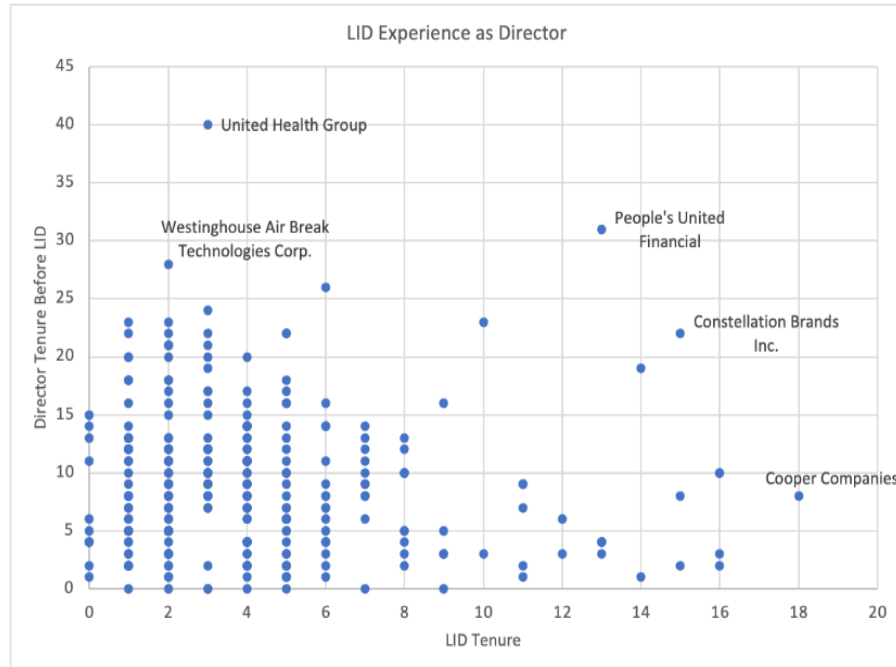
²¹³ *Id.*

²¹⁴ Information on file with the author.

tenure is four years.²¹⁵ Figure 4 below shows the correlation between the number of years a director spent on the board before being appointed as LID and their LID tenure for companies within the S&P 500 that had an LID in 2020.

Figure 4: LID Director Tenure for the S&P 500

LIDs typically sit on more committees than the average number of committees that directors sit on for each index, especially within smaller companies that make up the Russell 3000. LIDs across all indices sat on 2.3



committees on average compared to an average of 1.6 for non-LID directors.²¹⁶ While committee service is an important facet of a director's role and can allow the LID to gain invaluable information, it also raises concern of overwork, potentially taking away from the LID's ability to focus on the big picture.

Further complicating the issue, increased tenure can also lead to an increased equity stake in a company. This can prove especially worrisome when the LID accumulates a significant stake in the company, arguably diverging her interests from those of long-term shareholders.²¹⁷ For example, American Airlines

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Michael Barzuza & Eric Talley, *Long-Term Bias*, 2020 COLUM. BUS. L. REV. 104, 187 (2020)

Group's LID, John Cahill, recently purchased \$628,000 worth of shares, 26% more shares than he previously owned.²¹⁸ This comes against the backdrop of other board members, such as the CEO-chair, William Parker, purchasing \$1.4 million in shares.²¹⁹ The stakes acquired by key members of American Airlines' board may *overly align* their interests with those of management, focusing on immediate stock returns rather than the long-term prospect of the corporation. These corresponding interests raise doubts as to whether the board can effectively carry out its role of monitoring management and informing shareholders—even if that would entail short-term stock depreciation.

Further, an overwhelming majority of LIDs are white men, and the lack of diversity in leadership roles in the boardroom could be indicative of social bias and an old boys' club atmosphere that could prevent independent thinking, inquiry, and monitoring.²²⁰ Only 6% of all LIDs included within this analysis are female, and all of their respective companies were included within the S&P 500 or S&P 600.²²¹ Interestingly, companies that did appoint female LIDs within each index allocated, on average, two more powers than to their male counterparts. For example, the thirty-three female LIDs within the S&P 500 were allocated ten powers on average compared to eight powers allocated to the male LIDs within the same index.²²²

4. *Lead Independent Directors' Powerless Powers*

Putting aside the concerns regarding the intrinsic independence of LIDs, these directors must be given the tools necessary to effectively ensure that the board remains independent—in other words, whether their *functional* independence is protected. But the data reveals that the strain on LIDs' gatekeeping abilities is exacerbated by the limited powers they are afforded. Almost 85% of all companies within the S&P 500 mention LIDs within their

(reviewing the growing concerns relating to managers chasing short-term profits while presenting a contrary concern regarding overvaluing long-term projects); Lucian Bebchuk & Jesse Fried, *Equity Compensation for Long-Term Results*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 16, 2009), <https://corpgov.law.harvard.edu/2009/06/16/equity-compensation-for-long-term-results/>.

²¹⁸ *The Lead Independent Director of American Airlines Group Inc. (NASDAQ:AAL), John Cahill, Just Bought 26% More Shares*, SIMPLY WALL ST. (Feb. 27, 2020), <https://simplywall.st/stocks/us/transportation/nasdaq-aal/american-airlines-group/news/the-lead-independent-director-of-american-airlines-group-inc-nasdaqaal-john-cahill-just-bought-26-more-shares/>.

²¹⁹ *Id.*

²²⁰ See *Beyond the Numbers*, *supra* note 42, at 171, 202. In 2020, of the Fortune 500 companies with an LID, 77.1% were white males, 11.1% were white women, 9.6% were minority men, and 2.2% were minority women. DELOITTE & ALL. FOR BD. DIVERSITY, *supra* note 41, at 26.

²²¹ Information on file with the author.

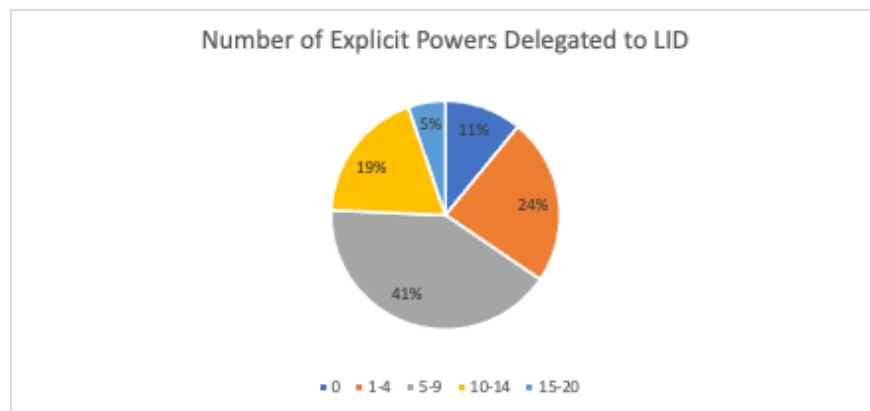
²²² *Id.*

corporate governance guidelines.²²³

Appendix B shows the number of companies within each Super Score that granted “positive” language, which provides an LID with the ability to act, and “negative” language, which has qualified it in some way, either by limiting language in terms of exclusivity or strength. As Appendix B further details, 95% of all companies that mention LIDs within their corporate guidelines afforded at least one power to them.²²⁴ However, only 20% of the companies with an LID awarded powers that were not qualified by any limiting language, which subjugates the LID’s functional power.²²⁵ Generally, as a company designates more specific powers to an LID, the more likely it is to undermine these powers with qualifying language that restricts the LID’s ability to act effectively. On average, 75% of the positive powers designated to a company with a Super Score of 1–10 are offset by net negative factors.²²⁶ However, this number increases to 87% for Super Scores of 11–22.²²⁷

Figure 5: Explicit Powers Delegated to LIDs in the S&P 500

Indeed, ISS advocates assigning several key duties to LIDs, including the following: “serv[ing] as liaison between the chairman and the independent directors; approv[ing] information sent to the board; approv[ing] meeting agendas for the board; approv[ing] meeting schedules to assure that there is sufficient time for discussion of all agenda items;” retaining the ability to call



²²³ *Id.*

²²⁴ *See infra* Appendix B.

²²⁵ Information on file with the author.

²²⁶ *See infra* Appendix B.

²²⁷ *See infra* Appendix B.

meetings of the independent directors; and, if requested by major shareholders, being available for consultation and direct communication.²²⁸ While each of these powers is highly prevalent among companies, the powers are often qualified by limiting language that suppresses LIDs' powers.²²⁹ For example, "approving information sent to the board" becomes "[a]pproves, in consultation with the Chairman of the Board and other members of senior management and to the extent practicable, the information to be provided to the Board;"²³⁰ and "approving meeting agendas for the board" becomes "advising the Chairman on the agenda for Board meetings."²³¹ This limiting language hamstring the effectiveness of the LID structure and introduces the possibility that LIDs may serve a symbolic, rather than functional, role.

Furthermore, close to 20% of the powers delegated to LIDs are what can be termed as "dormant," meaning that they can only be exercised in specific circumstances.²³² For example, the most common dormant power is one that is inherently dormant by design—the LID's power to preside at board meetings when the chair is unable to attend.²³³ This power only triggers when the chair is unable to attend a board meeting.

Importantly, most of the powers that companies grant to LIDs are nonexclusive, meaning the LID lacks the authority and discretion to act on her own in these situations. For example, instead of approving or setting board meeting agendas, the LID at Johnson Controls, "[i]n collaboration with the Chair and Chief Executive Officer, develops Board meeting agendas to ensure that topics deemed important by the independent directors are included in Board discussions and sufficient executive sessions are scheduled as needed."²³⁴ Fifty-seven percent of the powers granted to LIDs across the S&P 500 are nonexclusive, meaning the LID maintains exclusive authority and discretion with only 43% of their enumerated powers.²³⁵

²²⁸ Carol Bowie, *ISS 2015 Independent Chair Policy FAQs*, HARV. L. SCH. F. ON CORP. GOV. (Jan. 26, 2015), <https://corpgov.law.harvard.edu/2015/01/26/iss-2015-independent-chair-policy-faqs/>.

²²⁹ See *infra* Figure 6.

²³⁰ WALGREENS BOOTS ALL., INC., CORPORATE GOVERNANCE GUIDELINES (2022), [https://s1.q4cdn.com/343380161/files/doc_downloads/governance_guidelines/WBA-Corporate-Governance-Guidelines-\(2019-01\).pdf](https://s1.q4cdn.com/343380161/files/doc_downloads/governance_guidelines/WBA-Corporate-Governance-Guidelines-(2019-01).pdf).

²³¹ FORD MOTOR CO., CORPORATE GOVERNANCE PRINCIPLES 5 (2022), <https://corporate.ford.com/content/dam/corporate/us/en-us/documents/governance-and-policies/company-governance-corporate-governance-principles.pdf>.

²³² Information on file with the author.

²³³ *Id.*

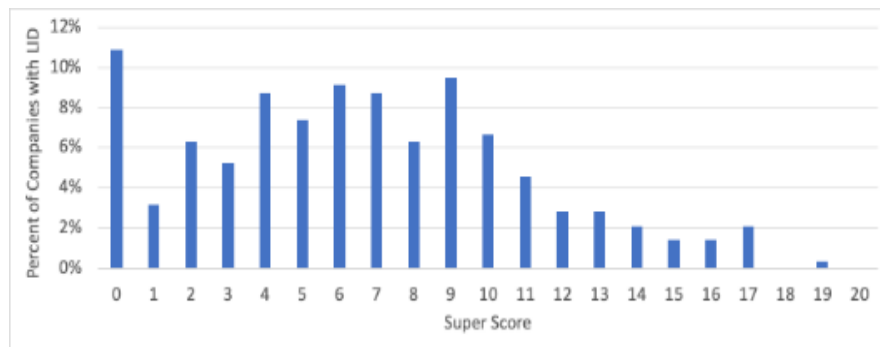
²³⁴ JOHNSON CONTROLS INT'L PLC, CORPORATE GOVERNANCE GUIDELINES 6 (2021), https://investors.johnsoncontrols.com/~/_media/Files/J/Johnson-Controls-IR/committee-charter-policies-procedures/2021-09-16-jci-plc-corporate-governance-guidelines.pdf (emphasis added).

²³⁵ Information on file with the author.

Although 85% of companies reference LIDs within their corporate governance guidelines, only 58% of the companies in the S&P 500 currently have an LID on the board.²³⁶ As Figure 6 below shows, 11% of those companies with an LID have not granted them any specifically enumerated powers. Of the majority of companies that have granted at least one power, there is still significant variance in terms of the number of powers allocated and the strength of those powers. Forty-nine percent of companies with an LID in the S&P 500 are below the median Super Score of 6, and an additional 25% of companies have a Super Score of 7, 8, or 9.²³⁷ In these circumstances, LIDs enjoy some explicit delegations of power, but by no means do they wield the full suite of powers that a fully empowered LID could otherwise enjoy. In fact, the platonic “fully empowered LID” simply does not exist—Medtronic plc, the company with the highest Super Score, only garnered a Super Score of 22. Even then, Medtronic plc has two instances of limiting powers where the LID must first consult or work directly with the chair or CEO.²³⁸

Figure 6: LID Super Scores in the S&P 500

To provide a deeper insight into exactly which powers each company granted its LID, we constructed Appendix A. Appendix A shows that, of the thirty-seven crucial powers that an S&P 500 company could grant its LID, the



most common (76%) was the ability of the LID to preside at executive sessions of the Independent Directors.²³⁹ The second- and third-most prevalent granted powers pertain to setting the structure and content of board meetings and serving

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See *infra* Appendix A.

as a liaison between insiders and other directors.²⁴⁰ Conversely, the least prevalent powers concerned more substantial delegations of authority, such as assisting in determining when to relax securities requirements and deciding to direct specific matters to the Audit Committee.²⁴¹ As shown within Appendix A, while the five powers that are granted most often are powers classified as delegating a high degree of responsibility or ability to act, the next most popular powers are classified as “weak,” and these powers are ancillary to the main objectives, like seeking feedback or communicating with shareholders as appropriate.²⁴² There are a handful of critical powers crucial to the role of an LID that are rarely granted, like participating in chair evaluations or the ability to call special board meetings.

To better understand the relationship between company size and LIDs, powers granted to LIDs within the S&P 500 were compared to the powers granted to LIDs in a random sample of small-cap companies. Figure 7 below displays the Simple Scores for companies across each index. From a random sample of 400 companies, consisting of 200 from the S&P 600 and 200 from the bottom of the Russell 3000, 104 and 40 companies from the S&P 600 and Russell 3000, respectively, had LIDs. The presence of an LID is far more prevalent in larger companies than companies with a smaller market capitalization. Only 20% of our sample for the Russell 3000 had an LID, compared to 52% and 58% of the S&P 600 and S&P 500, respectively. Even when companies within the Russell 3000 have an LID, they are more likely not to designate any powers to the LID compared to the other two indices. Larger companies are more likely to designate more powers to the LID to allow them to act. The median Super Score is 6, 7, and 8 for the Russell 3000, S&P 600, and S&P 500, respectively. More companies within the S&P 500 designate thirteen or more powers than smaller companies within the S&P 600 or Russell 3000.

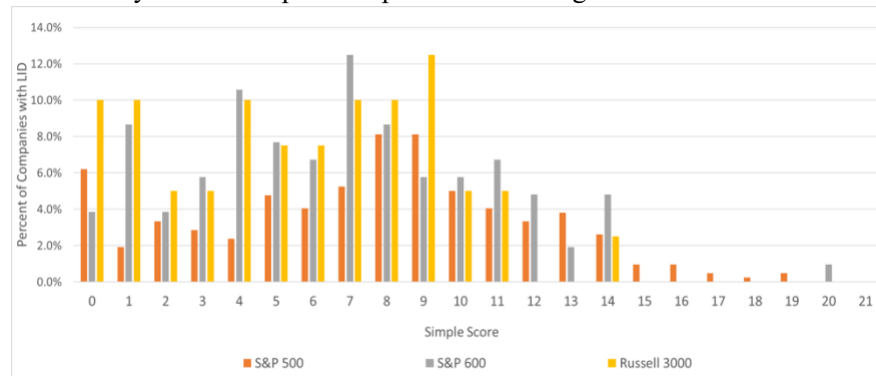
²⁴⁰ See *infra* Appendix A.

²⁴¹ See *infra* Appendix A.

²⁴² See *infra* Appendix A.

Figure 7: Simple Score Across Market Cap²⁴³

An analysis of each power's prevalence throughout the S&P 600 and the



Russell 3000, as shown in Appendix D, mirrors that of the S&P 500. Power “2,” presiding at executive sessions of the independent directors, remains the most prevalent power in each index.²⁴⁴ Other prevalent powers are “1,” presiding at board meetings when the chair is not present; “3,” serving as a liaison between insiders and other directors; and “4,” approving board meeting agendas.²⁴⁵ Similar to the S&P 500, the most prevalent powers do not entrust the LID with a great deal of actionable powers, such as retaining independent advisors, directing matters to relevant committees, or approving stock transactions of company insiders.

Importantly, the least common powers ($\leq 0.5\%$ in all exchanges), in comparison, are “32,” helping determine whether to grant exceptions to securities policies; “33,” directing specific matters to the Audit Committee; “35,” approving insider stock transactions; and “36,” vice-chairing the board. There is a stark difference between these two sets of powers: the most common relate to overseeing broad functions of the board and facilitating discussions among members.²⁴⁶ In comparison, the least common powers grant the LID the authority to act on her own, outside the confines of the regular board meeting.

It should be noted that the data pulled for the S&P 600, and especially the Russell 3000, may be incomplete. This is because a significant number, 160 (80%), of the 200 analyzed companies in the Russell 3000 either do not have an LID, do not have corporate governance guidelines in place, or do not make them

²⁴³ Information on file with the author.

²⁴⁴ See *infra* Appendix D.

²⁴⁵ See *infra* Appendix D.

²⁴⁶ See *infra* Appendix D.

publicly available.²⁴⁷ The unavailability of these documents prevented a complete analysis but leads to additional questions regarding the governance practices of these companies. Without available guidelines, how are investors to understand the internal governance of these companies? Without public access to this information, shareholders, both active and prospective, are left in the dark.

Understanding the number of powers granted to companies throughout the three exchanges is useful but adding another dimension to the analysis—whether the powers are Explicit or Qualified—aids the understanding of the current field of play for LIDs. Appendix H details the average number of qualified powers as a percent of total powers allocated to each LID for each Simple Score. The data shows that companies with a Simple Score of 3 and 4 are most likely to materially qualify the powers allocated.²⁴⁸ On average, when a company allocates only four powers to an LID, at least two of those are qualified in some way, limiting their ability to act on their own volition.²⁴⁹ In comparison, companies with higher Simple Scores not only grant more powers in general, but are less likely to materially limit a majority of those granted powers.²⁵⁰ This is particularly important because it means that LIDs with few powers are further hamstrung by having these enumerated powers weakened through limiting or qualifying language. This creates an entire subset of LIDs that are “Lead” in title only. On the flip side, this also indicates the existence of a subset of LIDs that are truly empowered, not only with different delegated powers, but also with the tools and language to carry out their designated roles and act as effective gatekeepers. Notably, however, this empowered subset does not account for the majority of LIDs.

As previously discussed, each of the powers identified have been classified as strong, medium, or weak based on the level of responsibility authorized to an LID. An analysis of the number of strong powers allocated as a percent of total powers revealed that, on average, 68% of all powers allocated to LIDs authorize them to act in a way that maximizes their role as a gatekeeper.²⁵¹ Of the companies that allocated at least one power to the LID, only one company did not allocate any strong powers.²⁵² However, out of twenty potential strong powers or responsibilities identified, LIDs within the S&P 500 are allocated, on average, only 4.5 strong powers.²⁵³ Around one-third of the companies within

²⁴⁷ Information on file with the author.

²⁴⁸ See *infra* Appendix H.

²⁴⁹ See *infra* Appendix H.

²⁵⁰ See *infra* Appendix H.

²⁵¹ Information on file with the author.

²⁵² *Id.*

²⁵³ *Id.*

the S&P 500 with a Super Score of 1, 2, or 3 have allocated only strong powers to the LID.²⁵⁴ As shown in Table 1 below, as companies allocate more powers, the percent of strong powers allocated as a percent of total powers generally decreases.

Table 1: Strength of Powers Allocated

Super Score	Average Percent of Strong Powers as a Percentage of Powers Allocated	Percent of Companies with 100% Strong Powers
1 - 3	67%	27%
4 - 6	66%	10%
7 - 9	63%	8%
10 - 12	56%	16%
13 - 15	51%	16%
16 - 18	48%	6%
19 - 20	44%	0%

B. Independent Chairs

In addition to LIDs, Independent Chairs also provide a key gatekeeping function. As the push for independent monitoring gained traction, so too did a push to separate the roles of CEO and chairperson of the board. This, in turn, has led to 51.5% of S&P 500 companies now holding Independent Chairs.²⁵⁵ Furthermore, Independent Chairs are prevalent gatekeepers in large S&P 500 companies. While 287 companies within the S&P 500 had LIDs as of 2020, 61% of the companies that did not have an LID had an Independent Chair, and about 45% of the companies with an LID also elected to have an Independent Chair.²⁵⁶

Unlike LIDs, however, if a board has an Independent Chair, the board must designate a chairperson as the leader of the board. The board then chooses whether to implement an Independent Chair or a different type of leadership, such as a dual CEO-chair or other non-Independent Chair. As recently as 2010, 60% of S&P 500 boards maintained a dual CEO-chair structure, meaning the majority of boards maintained an insider-executive at their helm.²⁵⁷ Recall that

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ SPENCER STUART, 2015 SPENCER STUART BOARD INDEX 6 (2015), https://www.spencerstuart.com/~media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf.

the push for an Independent Chair arises from investors' concerns that a CEO who is also the chair has unrivaled influence over the board, which, in turn, may compromise the board's collective independence. Using a similar methodology to that of our LID study, this Article analyzes both the prevalence of Independent Chairs and the powers companies grant to their Independent Chairs.

1. Methodology

The data analysis for this section began again with a broad overview of Independent Chairs throughout the S&P 500, and through a random selection of the S&P 600 and Russell 3000, including items such as the prevalence of "Successor CEOs"²⁵⁸ and the chair's tenure on the board before assuming the position. This Article then used the same multifaceted methodology employed for the LIDs to collect a Super Score for each Independent Chair of an S&P 500. Again, this score is an empirical reflection of three benchmarks: (1) how "qualified" the language of a given power is; (2) whether that power resides solely with the Independent Chair; and (3) whether that power is "active" or requires a triggering event to be exercised. As previously discussed, each power granted to the Independent Chairs was also classified as strong, medium, or weak based on the level of responsibility given to the Independent Chair and their ability to act without oversight from the CEO or senior management. Lastly, after obtaining Super Scores for the S&P 500, this Article utilized the same Simple Score methodology used for the LIDs across the S&P 500, S&P 600, and Russell 3000.

2. Independent Chair Prevalence

In the last ten years, the number of companies in the S&P 500 that have dual CEO-chairs has decreased from 60% in 2010, to only 45% in 2020.²⁵⁹ Shareholders' focus on the chair as a key gatekeeper places an appropriate weight on the importance of the chair's role on the board. As the leader of the board, the chair's role cannot be understated, and an independent leader "curbs conflicts of interest, promotes oversight of risk, manages the relationship between the board and CEO, serves as a conduit for regular communication with shareowners, and is a logical next step in the development of an independent board."²⁶⁰ Because the chair leads the board and board meetings, the chair

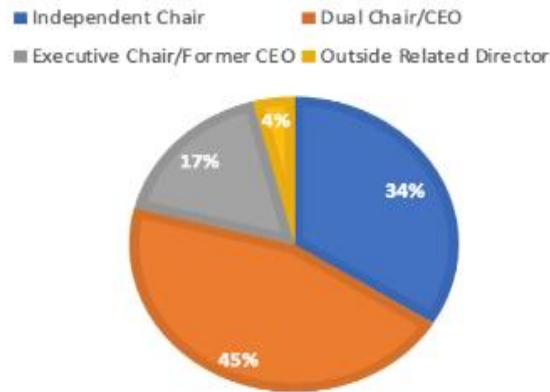
²⁵⁸ See *Successor CEOs*, *supra* note 74, at 787, 792.

²⁵⁹ 2020 U.S. SPENCER STUART BOARD INDEX, *supra* note 150, at 3 (2020).

²⁶⁰ THE MILLSTEIN CTR. FOR CORP. GOVERNANCE & PERFORMANCE, YALE SCH. OF MGMT., CHAIRING THE BOARD: THE CASE FOR INDEPENDENT LEADERSHIP IN CORPORATE NORTH AMERICA 3 (2009), <https://millstein.law.columbia.edu/sites/default/files/content/docs/2009%2003%2030%20Chairing%20The%20Board%20final.pdf>; see *Independent Board Leadership*, *supra* note 103.

maintains significant prestige among her board, allowing her to exert influence during board deliberations and prior to important votes.²⁶¹

CHAIR'S RELATIONSHIP WITH THE COMPANY



However, while companies have increasingly split the roles of chair and CEO, not all have replaced the chair with an independent leader. In fact, as of 2020, 55% of S&P 500 companies had split the role of chair and CEO but replaced the chair with a non-independent leader.²⁶² Thirteen percent of companies appointed a different executive, such as the CFO or COO, as the board chair, and 4% of companies appointed an outside related director such as a major investor, retired company executive, or a director with business relationships with the company.²⁶³ Notably, the company may also eschew independent leadership while still splitting the roles by allowing the CEO to remain chair after stepping down as CEO (in what was termed elsewhere as “Successor CEOs”).²⁶⁴

Figure 8: Chair’s Relationship with Company

3. Tenuous Independence

Just like LIDs, Independent Chairs are subjected to the same concerns that

²⁶¹ Yvonne D. Harrison & Vic Murray, *Perspectives on the Leadership of Chairs of Nonprofit Organization Boards of Directors: A Grounded Theory Mixed-Method Study*, 22 *NONPROFIT MGMT. & LEADERSHIP* 411, 421 (2012); Michael C. Withers & Markus A. Fitza, *Do Board Chairs Matter? The Influence of Board Chairs on Firm Performance*, 38 *STRATEGIC MGMT. J.* 1343, 1345–46 (2017).

²⁶² 2020 U.S. SPENCER STUART BOARD INDEX, *supra* note 150, at 18.

²⁶³ *Id.*

²⁶⁴ *Successor CEOs*, *supra* note 74, at 787.

befall other directors who are deemed independent.²⁶⁵ First, Independent Chairs, too, suffer from designation discretion—the company has the discretion to decide whether a director is considered independent. Consequently, the same concerns that plagued independent director and LID designations generally apply to Independent Chairs as well, but, again, with heightened stakes. Importantly, the “Successor CEO” phenomenon is particularly troubling, since companies often designate the former CEO as an “independent” chair despite their prior role and enduring close connection with the company.²⁶⁶ Therefore, this push to separate the roles based on a desire to improve board independence vis-à-vis management becomes an empty exercise.²⁶⁷

This phenomenon undercuts board independence for two reasons. First, having a former CEO on the board in conjunction with the current CEO may subvert any power given to the rest of the independent directors, including an appointed LID, if any.²⁶⁸ Second, because the ex-CEO, now chair, is not technically an “insider,” companies may refrain from appointing an LID at all, instead viewing the ex-CEO as sufficiently independent, despite her enduring ties to the company. These designations and decisions highlight the problems with company autonomy over independence designations, and further illustrates that a title of “independent” may be just an illusion.

Notably, additional factors can compound the independence issues of Independent Chairs who previously served as CEOs. Tenure among former CEOs tends to be longer than other directors, with an average difference in tenure of 8.6 years between ex-CEO chairs and their non-CEO counterparts, which is compounded by the significant equity the former CEO accumulated during her management service.²⁶⁹ In fact, Successor CEOs’ equity, compared to other directors, is notably higher, and, in many years, almost double that of other directors.²⁷⁰ In combination with extended tenure, these elevated levels of equity raise significant concerns for a successor CEO’s ability to remain independent when her interests, stemming from such equity, may diverge from those of general shareholders. On average, chairs for companies within the S&P 500 spend eighteen years at the company in various capacities. Nonindependent chairs serve on the board three years on average before they are appointed as

²⁶⁵ See discussion *supra* Sections I.C, II.A.

²⁶⁶ In fact, 24 of the 217 S&P 1500 companies in 2016 with Successor CEOs reported their chair as independent despite being a former CEO of the company. See *Successor CEOs*, *supra* note 74, at 828.

²⁶⁷ See *id.* at 796, 805, 809.

²⁶⁸ See *id.* at 820; see also, e.g., *The Bank of New York Mellon Corporation Corporate Governance Guidelines*, BANK N.Y. MELLON CORP. (Dec. 13, 2021), <https://www.bnymellon.com/us/en/investor-relations/corporate-governance/corporate-governance-guidelines.html>.

²⁶⁹ Information on file with the author.

²⁷⁰ See generally *Successor CEOs*, *supra* note 74, at 827 fig.12.

chair, and the average chair tenure for nonindependent chairs is ten years.²⁷¹ Further, Independent Chairs sit on more committees compared to the average for all chairs within a respective index. In 2019, Independent Chairs across all indices served on an average of 1.7 committees, with a max of seven committees, compared to only an average of 0.5 committees and a max of five committees for Nonindependent Chairs.²⁷²

Independent Chairs are subjected to even more of a boys' club environment compared to LIDs. In 2020, only seven companies within the S&P 500 had female Independent Chairs;²⁷³ that number rose slightly to 8% in 2021.²⁷⁴ No companies within the sample of companies from the S&P 600 or Russell 3000 have any female Independent Chairs.²⁷⁵

4. *Independent Chairs' Powerless Powers*

A Super Score analysis of the Independent Chair positions throughout the S&P 500 is shown in Appendix F and depicts the net positive and net negative language qualifications delegated for each company. Of the companies that have a Super Score of 0, thirty-one companies did not grant the Independent Chair any powers, and twenty-one companies granted the same number of positive powers as offsetting negative powers.²⁷⁶ Only 34% of the companies that make up the S&P 500 were designated powers that were not negated in any way by offsetting negative language.²⁷⁷ Generally, companies with a lower Super Score have a higher portion of net negative powers compared to net positive powers.²⁷⁸ There were six companies that had a negative Super Score where the corporate governance guidelines only included limiting language.²⁷⁹

The remaining 72.9% of companies with a nonzero Super Score paint an interesting picture, as shown in Figure 9 below. The most common Super Score is 2 (7.2%), followed by 3, 1, and 4 (5.2%, 4.8%, and 4.6%, respectively).²⁸⁰ As

²⁷¹ Information on file with the author.

²⁷² *Id.*

²⁷³ Information collected from personal review of Author.

²⁷⁴ SPENCER STUART, 2021 S&P 500 BOARD DIVERSITY SNAPSHOT 9 (2021), https://www.spencerstuart.com/-/media/2021/july/boarddiversity2021/2021_sp500_board_diversity.pdf.

²⁷⁵ On average, female Independent Chairs are allocated one more power than their male counterparts, with an average Simple Score of 5. However, these women are hardly independent or insulated from pressures because they have an average board tenure of thirteen years.

²⁷⁶ See *infra* Appendix F.

²⁷⁷ Information on file with the author.

²⁷⁸ *Id.*

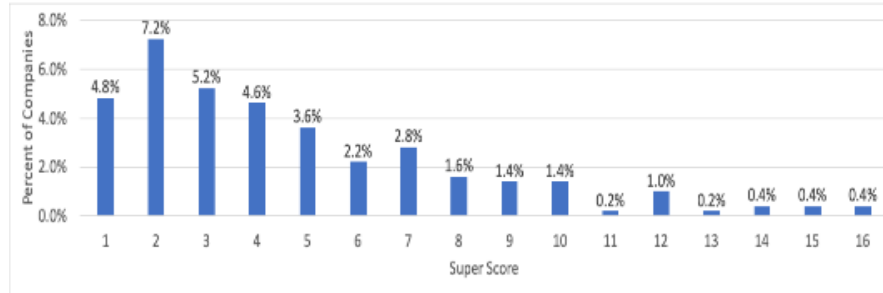
²⁷⁹ The six companies with negative Super Scores are IDEXX Laboratories, Inc., Kimco Realty Corporation, L Brands, Inc., PerkinElmer, Inc., PPL Corporation, and Walmart Inc.

²⁸⁰ Information on file with the author.

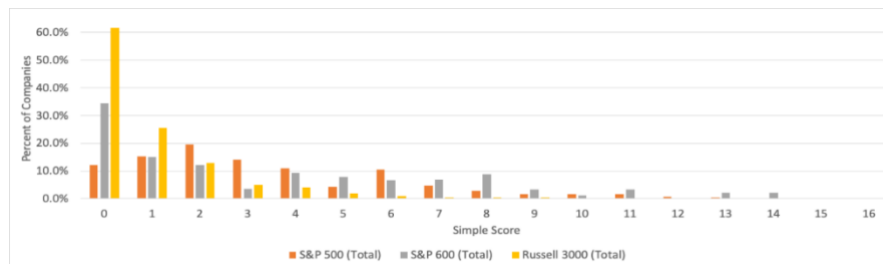
previously noted, the function of a Super Score is to provide a useful heuristic in evaluating exactly how empowered an Independent Chair may be.

Figure 9: Super Scores of the S&P 500

Overall, of the companies that grant their Independent Chair powers, those powers might be significantly limited either in force, application, or unity within the Independent Chair position. One could easily imagine a theoretical Independent Chair with a robust set of powers that she could exercise at her own



discretion; such a chair would have a high Super Score. In fact, such a fully empowered Independent Chair may appear similar to the Independent Chairs currently serving at Starbucks Corp. or Delta Air Lines, Inc. (both companies



received a Super Score of 16).²⁸¹ While not every company should, or even could, exactly mirror its peers, these two companies provide a framework for other companies to look to when examining the enumerated powers given to their Independent Chair.

Figure 10: Simple Scores Among the Indices

The data presented in Figure 10 above shows the percentage of companies in the S&P 500, S&P 600, and Russell 3000 with a certain Simple Score for purposes of market capitalization comparison.²⁸² Small-cap companies that

²⁸¹ Information on file with the author.

²⁸² Due to the varied number of companies in each data set, percentage scale was used to allow for a fair

make up the S&P 600 or Russell 3000 are more likely not to designate any powers to the Independent Chair than larger companies within the S&P 500. In fact, 62% of the companies within the selection from the Russell 3000 and 34% of the companies within the selection from the S&P 600 did not grant any powers to Independent Chairs.²⁸³ The data reveals that the most common number of powers granted to an active Independent Chair within the S&P 500 was two. Interestingly, the S&P 500 and the Russell 3000 tend to trend with each other despite the stark difference in company size within each index. In contrast, the S&P 600 has far more companies than the other two indices that grant their Independent Chairs more than seven powers.

Like powers designated for LIDs, there is a significant likelihood that powers are materially limited in application (“Qualified”) for companies with lower Simple Scores (<6).²⁸⁴ Conversely, a company with a higher Simple Score (>6) is much less likely to do the same.²⁸⁵ As shown in Appendix I, companies that only allocate one power to the Independent Chair typically do not qualify that power in any way.²⁸⁶ However, companies with a Simple Score between 2 and 6 typically qualify at least 44% of any powers allocated, whereas companies with a Simple Score between 7 and 13 qualify, on average, only 19% of the allocated powers.²⁸⁷

Again, simply knowing the number of powers granted to the Independent Chair is not enough; to fully understand the current state of the Independent Chair position within the current corporate governance landscape, it is necessary to understand *what* powers the Independent Chair is likely to enjoy. As depicted in Appendix G, among all three indices, the most prevalent power is “Approving or Setting Board Meeting Agendas” (“4”).²⁸⁸ This is followed—again, among all three exchanges—by “Presides at Executive Sessions of the Independent Directors” (“2”).²⁸⁹ These two powers are largely supervisory, in that they allow the Independent Chair to set up meetings of directors and guide the discussions through setting agendas. The least common powers, in comparison, are those that are more active and grant the Independent Chairs the authority to act in a nonsupervisory manner, such as evaluating members of the Board and retaining independent advisors.²⁹⁰

comparison across indices. All data is on file with the author.

²⁸³ Information on file with the author.

²⁸⁴ See *infra* Appendix C.

²⁸⁵ See *infra* Appendix C.

²⁸⁶ See *infra* Appendix I.

²⁸⁷ See *infra* Appendix I.

²⁸⁸ See *infra* Appendix G.

²⁸⁹ See *infra* Appendix G.

²⁹⁰ See *infra* Appendix G.

C. Doubling Up? When Independent Chairs are Joined by LIDs

A subset of companies has elected to include both an Independent Chair and an LID in the boardroom. In the sampled data, 26.8% of the 900 companies include both gatekeepers on their boards.²⁹¹ Interestingly, the companies that include both roles on their board might not be the governance leaders one might infer them to be. In fact, when examining the aggregate Simple Scores of both the Independent Chair and the LID, the average score is not markedly different than that of a company with only an LID (average combined score of 9.7 vs. 8.6, with an identical median of 9).²⁹²

More often, as Table 2 shows, companies that have either an LID or Independent Chair have a higher average percentage of independent directors on their boards compared to companies without either, and companies with both an LID and an Independent Chair have the lowest average percentage of independent directors on their boards altogether. This might indicate an attempt by companies with larger insider, nonindependent, boards to offset that perception with the inclusion of both gatekeeping roles even if the enumerated powers remain relatively the same.

Table 2: Percentage of Independent Directors

When the board has an Independent Chair	83.21
When the board has an LID	82.74
When the board has neither	81.70
When the board has both	80.51

D. Enumerated Powers: The View from the Ground

This section presents data from original interviews with directors and general counsels about the role of gatekeepers' powers in the governance of corporations. Directors and general counsels of public companies were interviewed to develop further insight into the role of gatekeepers' powers in the governance of the corporation. A table describing the interviews is set out in Appendix J. These directors served on companies ranging from large Fortune 500 companies to small Russell 3000 companies. To identify interview subjects, a snowball sampling technique was employed, beginning with a sample of directors taken from the membership of the National Association of Corporate Directors, and then asking each interviewee for further references. The major downside of snowball sampling is that it is difficult to obtain an unbiased

²⁹¹ Information on file with the author.

²⁹² *Id.*

sample. However, this technique provided access to directors and general counsels who might have otherwise been disinclined to participate. Because of the challenges associated with using snowball sampling and interviews in general, these interviews only provide context and support to the importance of gatekeepers and their enumerated powers.

1. *The Importance of Gatekeepers*

The interviews affirmed the growing importance of gatekeepers in the boardroom. One public company director, for example, described the pressure to add an LID to their board after several of their peer companies did so, and how, after being appointed, the LID took charge of the board's work in a new way.²⁹³ Another director, who was the inaugural LID in their own company, similarly pointed to the importance that investors, directors, and the CEO all saw in the newly established position as a key feature of facilitating the board's work with both the management team and investors alike.²⁹⁴ A third interviewee indicated that "independent leadership, whether lead independent directors or independent chair, are [sic] extremely important."²⁹⁵ A fourth interviewee, who was an LID, highlighted the importance of the LID in cases of uncertainty. In their company, there was an unexpected death of the chair and much uncertainty about who would decide and lead the board in selecting a new chair (as the guidelines had no clear details regarding how to navigate this). The LID took on the role of leading the board and speaking to directors to navigate this uncharted situation.

2. *The Importance of Gatekeepers' Explicit Powers*

Our interviews revealed that directors and general counsels view the explicit powers given to LIDs as particularly important.²⁹⁶ One aspect is making clear *ex ante* what gatekeepers are allowed to do and therefore preventing future disputes regarding their actions. For example, one interviewee highlighted the importance of enumerated powers for the sake of the LID herself—articulated powers protect the LID by giving her "something [she] can anchor back to."²⁹⁷ Another director described a situation in which an activist shareholder attempted to influence a company, the board of which he was a member. The LID took

²⁹³ Telephone Interview with Participant 1 (Nov. 11, 2021).

²⁹⁴ Telephone Interview with Participant 12 (Dec. 21, 2021).

²⁹⁵ Telephone Interview with Participant 3 (Dec. 6, 2021).

²⁹⁶ See Telephone Interview with Participant 1, *supra* note 293; Telephone Interview with Participant 3, *supra* note 295; Telephone Interview with Participant 12, *supra* note 294; Telephone Interview with Participant 5 (Dec. 9, 2021). See *infra* Appendix J for individual information.

²⁹⁷ Telephone Interview with Participant 10 (Dec. 17, 2021).

charge of communicating with the activist and brokering a deal, since they were empowered to do so by the corporate governance guidelines. The director stated that without such powers, such brokering might not have happened or, if it were to happen, it might have been attacked by unhappy parties viewing the act as unauthorized.²⁹⁸ Another interviewee suggested that it is important to be explicit about powers.²⁹⁹ They stated that the importance is two-sided: “giving shareholders an understanding of what to expect and also providing directors and the CEO a better understanding of how the LID can serve their goals.”³⁰⁰ Enumerated powers were viewed to serve a particularly important role in cases in which the board itself was divided or fractured in a way that explicit powers defused potential challenges from one fraction of the board. Another noted that “explicit powers prevent the CEO/chair from encroaching on the LID’s role.”³⁰¹

E. A False Sense of Trust

While a fair number of companies grant their Independent Chair and/or LID a number of significant powers, in many other instances, the data invokes a concern of window dressing. Granting a broad range of superficial powers may convey a false sense of trust to shareholders, while leaving the gatekeeping post unmanned. To be effective, an Independent Chair and/or LID must have powers sufficient to act, not merely to observe. Yet, the data shows that in many companies, a majority of powers granted to both Independent Chairs and LIDs are of a relatively procedural nature. They observe goings-on around the company, plan agendas, and generally facilitate communication among the directors. However, there is a distinct lack of actionable authority granted to these two positions. In most cases, the Independent Chair and/or LID are unable to actually serve as a fully empowered independent gatekeeper. Instead of holding the line with sword in hand, these “gatekeepers” are more akin to an unarmed watchman, observing the field of play but lacking both the strength and authority to act.

These board gatekeepers, even when operating under a veneer of authority, may be materially limited in the utilization of their powers. This is reflected by the Super Score calculations; even an Independent Chair with five granted powers could still, technically, receive a Super Score of 0 if each power is widely shared, limited in application, or materially weakened through its granting language. A company that grants its gatekeepers a wide range of limited powers

²⁹⁸ Telephone Interview with Participant 1, *supra* note 293.

²⁹⁹ Telephone Interview with Participant 3, *supra* note 295.

³⁰⁰ *Id.*

³⁰¹ Telephone Interview with Participant 6 (Dec. 14, 2021).

might well be arming them with a sword, but also constricting them with chains to a shared post.

The false sense of trust is further fueled by the reality that many LIDs and Independent Chairs may not be independent at all. The data shows that board gatekeepers suffer from the same ailments of independent directors as a class. Long tenure, misalignment of incentives, and prior ties may all jeopardize the willingness of gatekeepers to act, even when they are empowered to do so.

Granted, enumerated powers only convey an incomplete picture regarding the specific power dynamic of any given board. Indeed, some LIDs and Independent Chairs may be able to exert significant influence and power, even without specific enumerated powers. Similarly, weak gatekeepers might not use any of the powers at their disposal, even if, on paper, they are significant. Yet, the point this Article makes is that despite outliers in either direction, it is hard to ignore the vested authority given to gatekeepers. The enumerated powers that are given to gatekeepers do set the tone in the boardroom, both in setting expectations regarding the expected role of gatekeepers and, in many cases, in their ability to carry them out. Moreover, as corporate misconduct is exposed, the powers given to gatekeepers, if not utilized, are an effective tool in ensuring *ex post* accountability of gatekeepers. Recall that in the Wells Fargo investigation, the report specifically mentioned enumerated powers that were not utilized by the LID as a key failure in performing their role.³⁰² In turn, gatekeepers are likely to utilize their powers *ex ante*, knowing that they may be held accountable in the future if they fail to utilize them.

III. POLICY IMPLICATIONS

This Article exposes a stark divide between the apparent rise of independent board gatekeepers and their functional independence. These key gatekeeping positions have emerged in response to the modern-day push for increased director and board independence. But, while investors have clamored for more independent boards and tried to assure their ability to function independently by appointing and insulating independent gatekeepers, companies have, once again,³⁰³ muddied the water by chipping away at their functional powers and their view of independence.

For true gatekeeping to take place, however, there must be a shift in how board gatekeepers are designated as independent, in how independence is

³⁰² Bd. of Governors of the Fed. Rsv. Sys., *supra* note 35 and accompanying text.

³⁰³ See *Fallacy of Director Independence*, *supra* note 196, at 495–96.

disclosed and perceived, and in how these key independent gatekeepers are equipped to carry out their intended role. This Part focuses on each of these three areas, identifying how the current divide can be bridged in an effort to ensure that investors' expectations of board gatekeepers are truly met.

A. *Rethinking Gatekeepers' Independence Designations*

Investors, large and small, seek independent board leadership not only to ensure the overall independence of the board, but also to ensure that they are informed and have their interests represented.³⁰⁴ However, the process by which directors, including Independent Chairs and LIDs, are classified as independent has, for the most part, remained undisclosed. This lack of information requires investors and shareholders to defer to companies' self-designations.³⁰⁵ In a sense, companies and boards are the gatekeepers of their own independence—they are the fox guarding the henhouse. And, up until now, investors have not challenged the process by which boards make independence designations, ultimately allowing companies to convey a false sense of trust to investors and regulators regarding the true independence of their board.

In order to ensure that, at a minimum, key independent figures on the board—LIDs and Independent Chairs—are indeed independent, companies must set clear and transparent criteria for determining independence. While the minimum threshold requirements for director independence are set in exchange guidelines,³⁰⁶ companies can and should maintain discretion regarding their own concrete standards for independent leadership roles that should differ from, and be more stringent than, the standard for independent directors generally.

While directors' independence is an important matter for any director who is designated as such by the board, the clout and power of board gatekeepers merit specific attention to their functional independence. Moreover, since, in many cases, companies only have one of these gatekeepers at any given point in time, holding these gatekeepers to a heightened standard is unlikely to prove detrimental to recruiting and retaining good directors—an argument often raised in the context of board independence requirements.³⁰⁷

While tailoring the specific independence requirements should ideally be left

³⁰⁴ See Holly J. Gregory, *Board Leadership and the Role of the Independent Lead Director*, THOMAS REUTERS PRAC. LAW (Mar. 1, 2018), <https://us.practicallaw.thomsonreuters.com/w-013-3518>.

³⁰⁵ Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 602 (2006).

³⁰⁶ See Gordon, *supra* note 84, at 1539–40.

³⁰⁷ See, e.g., Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 183–84 (2010).

to companies, several components must be considered. First, LIDs or Independent Chairs should be discouraged from serving on other companies' boards. Having ties to other companies, especially within the same industry, can compromise a director's ability to devote adequate time³⁰⁸ to their role.³⁰⁹ Service on multiple boards may also jeopardize their ability to act independently. After all, if directors serve on multiple boards, the interests of shareholders across the companies they serve may, at times, diverge.

The Tim Cook example provides a clear illustration of the concerns such service may entail—particularly where two companies have an existing relationship or are competitors. Indeed, companies can require candidates for key leadership roles on the board to limit their service on other boards, just as many currently do for their CEOs.³¹⁰ At the very least, it is important that directors' ties be considered and examined to ensure that the director is not partial to another company within the same industry, which could compromise their ability to loyally serve the company's investors and shareholders. Ultimately, these ties can lead to companies taking actions that are not in the interests of shareholders, such as failing to engage in horizontal mergers and acquisitions, due to their potential collusion with other companies in the industry.³¹¹

Second, as the data demonstrates, many independent directors, particularly LIDs, have previously served in a management role or are veterans of the board. It is no surprise that former managers and current board members are top-of-mind when it comes to appointing a key leadership position on the board. But the very fact that certain individuals are so closely intertwined with the company

³⁰⁸ See, e.g., Laura Field, Michelle Lowry & Anahit Mkrtychyan, *Are Busy Boards Detrimental?*, 109 J. FIN. ECON. 63, 63–64 (2013) (finding that venture-backed IPO firms benefit from busy director expertise since busy directors serve more as advisors than monitors); Ira C. Harris & Katsuhiko Shimizu, *Too Busy to Serve? An Examination of the Influence of Overboarded Directors*, 41 J. MGMT. STUD. 775, 775 (2004) (finding that busy directors enhance acquisition performance through expertise); Wolfgang Drobetz, Felix von Meyerinck, David Oesch & Markus Schmid, *Industry Expert Directors*, 92 J. BANKING & FIN. 195, 195 (2018) (“We analyze the valuation effect of board industry experience and channels through which industry experience of outside directors relates to firm value. Our analysis shows that firms with more experienced outside directors are valued at a premium compared to firms with less experienced outside directors.”); George D. Cashman, Stuart L. Gillan & Chulhee Jun, *Going Overboard? On Busy Directors and Firm Value*, 36 J. BANKING & FIN. 3248, 3252 (2012).

³⁰⁹ See Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 949 (2021).

³¹⁰ SPENCER STUART, 2016 SPENCER STUART BOARD INDEX: A PERSPECTIVE ON U.S. BOARDS 15 (2016), https://www.spencerstuart.com/~media/pdf%20files/research%20and%20insight%20pdfs/spencer-stuart-us-board-index-2016_1mar2017.pdf (“20% of S&P 500 boards set a specific limit in their corporate governance guidelines on the CEO’s outside board service; 97% of those boards limit CEOs to one or two outside boards. One board does not allow the company CEO to serve on any outside corporate boards.”).

³¹¹ See *Horizontal Directors*, *supra* note 49, at 1228–30.

should, at a minimum, raise flags as to their functional independence. In that context, the case for capping the tenure of gatekeepers in their roles as gatekeepers is particularly strong, reducing the significant concerns that long tenure raises with respect to independence.³¹²

Third, the compensation of these gatekeepers should account for their gatekeeping function. If gatekeepers are to monitor management, their compensation should be decoupled from that of management. For instance, increasing the base pay component of their compensation package, as well as long-term equity grants that are only exercisable several years after their departure, can prove effective in increasing their independence.

B. Peer Group, Disclosure, and “Say on Independence”

Even if companies adopt criteria for determining whether a director is independent, the change is a fruitless exercise unless the criteria is adequately disclosed and accepted by investors and shareholders. The current system imposes little accountability on companies to ensure their designations are merited.³¹³ One way to hold companies accountable is by requiring disclosure of the factors weighed and the analysis undergone by the board—both of which help determine whether or not a gatekeeper is truly independent—and a summary of the powers granted to the gatekeeper stacked against peer groups.

Disclosing peer group analysis has become a key portion of pay considerations for corporations, and the SEC now requires a company to disclose its criteria for considering a company as a peer, which already encompasses such factors as industry, size, and talent.³¹⁴ This provides a quantifiable benchmark against which companies can compare their governance practices that could translate well to comparing powers granted to a gatekeeper. Moreover, peer group benchmarking carries the promise of improving gatekeepers’ independence in the long run. Studies have shown that peer groups create a ratcheting effect in companies that tend to adopt practices adopted by their peers because they do not want to be the worst of their peers by any metric.³¹⁵

³¹² See *New Insiders*, *supra* note 80, at 152.

³¹³ *Out of Sight*, *supra* note 19, at 39.

³¹⁴ SEC final rules 33-8732a, Item 402(b)(2)(xiv), August 29, 2006; Michael Faulkender & Jun Yang, *Inside the Black Box: The Role and Composition of Compensation Peer Groups*, 96 J. FIN. ECON. 257, 258–59 (2010); Louisa Lan, *Industry as Peer Group Criterion*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 9, 2019), <https://corpgov.law.harvard.edu/2019/02/09/industry-as-peer-group-criterion/>.

³¹⁵ See Pablo Casas-Arce, Martin Holzhaecker, Matthias D. Mahlendorf & Michal Matejka, *Relative Performance Evaluation and the Ratchet Effect*, 35 CONTEMP. ACCT. RSCH. 1702, 1705 (2018) (“[W]hen past peer performance is better than expected, current targets are increased to reflect a more favorable economic environment.”). The ratchet effect refers to the idea that every company wants to be above average; by doing so,

Consequently, requiring this disclosure would have two effects. It would first allow shareholders, at the very least, to be informed and to pressure the company where it is merited. It also would hold the board accountable for their decisions, requiring them to articulate their reasoning for why and how they determined a gatekeeper is independent. While, ideally, companies would disclose their criteria for both independent directors and independent leadership roles, companies should, at a minimum, be required to disclose their heightened requirements for independent leadership roles.

To further hold companies accountable, upon receiving information regarding a director's independence, companies may wish to adopt a "say-on-independence" vote similar to the existing "say-on-pay" vote³¹⁶ and recent proposals on "say on corporate purpose."³¹⁷ A nonbinding shareholder vote on gatekeepers' independence would have the ability to influence corporate behavior on a more nuanced company-specific level, since evidence indicates boards react to negative say-on-pay votes by reducing excessive compensation despite their nonbinding nature.³¹⁸

This proposed ability for shareholders to challenge the board's classifications works twofold. First, it incentivizes the board to be transparent and to state a particular and justifiable rationale as to why a director is independent. Absent such rationale, the designation is more likely to be challenged. Second, it also encourages boards and shareholders alike to consider the overall board independence when electing a new director. For example, a board could, when hiring a new director, indicate its intent to make a director the Independent Chair or LID. It could then use the vote and subsequent election of the director as shareholders' assent to having the director classified as independent. Therefore, the only time an additional vote could be elicited by a shareholder's challenge is when an existing director becomes an LID.

Ultimately, transparency through disclosures and shareholders' ability to challenge board designations would, at the least, create some accountability for

the average keeps on moving up—leading to a continuous increase ("ratchet") in pay or other measurable metrics. See Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 20 ACAD. MGMT. PERSPS. 5, 11 (2006).

³¹⁶ Say-on-pay votes offer shareholders the opportunity to cast an advisory vote on the compensation of the highest paid executives. SEC. EXCH. COMM'N, INVESTOR BULLETIN: SAY-ON-PAY AND GOLDEN PARACHUTE VOTES 1 (2011), <https://www.sec.gov/investor/alerts/sayonpay.pdf>.

³¹⁷ Alex Edmans & Tom Gosling, *How to Give Shareholders a Say in Corporate Social Responsibility*, WALL ST. J. (Dec. 6, 2020), <https://www.wsj.com/articles/how-to-give-shareholders-a-say-in-corporate-social-responsibility-11607270401>; Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 270 (2017).

³¹⁸ Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 107 (2018).

boards in classifying directors and restore investors' trust in the overall independence of boards.

C. Courts' Unfounded Deference

The presence of a truly empowered and independent LID or Independent Chair could be important for Delaware cases where independent board processes are important, such as controlling shareholder transactions or management-driven decisions. In such instances, the Delaware court looks for a special committee of independent directors fully empowered to say no to a transaction as part of the court's consideration to apply the deferential business judgment rule, essentially allowing the existence of such directors to protect a transaction from legal challenges to its fairness.³¹⁹ Given that these decisions generally center in part on the fairness of the underlying *process* of the transaction, and that independent directors often grant companies a presumption of fairness, a court could also look toward whether the company had a *functionally effective* independent gatekeeper in place as an additional factor to weigh when evaluating the underlying fairness. An effective gatekeeper, for instance, may have protected and prevented the now-infamous board in *Smith v. Van Gorkom* from a finding of gross negligence after the court determined the board made an uninformed decision when pressed by the CEO when engaging in a buyout merger.³²⁰

Courts also provide a second way to hold companies accountable. While courts have, at times, taken inconsistent approaches when assessing whether a director is independent, their role in reviewing company designations has become increasingly important, and perhaps necessary. This is especially true for approval of related-party transactions, which requires director independence in order for the business judgment rule to apply.³²¹ However, given the strong presumption favoring directors' actions that the business judgment rule affords, it is perhaps problematic that the factor triggering its application is a self-declared classification of a director as "independent."

Director independence is usually called into question by plaintiffs seeking to remove a corporate decision from the protection of the business judgment rule by casting doubt on the process by which the decision was made.³²² If the

³¹⁹ See, e.g., *In re MFW S'holders Litig.*, 67 A.3d 496, 496, 500–02 (Del. Ch. 2013).

³²⁰ *Smith v. Van Gorkom*, 488 A.2d 858, 864 (Del. 1985).

³²¹ Stracar, *supra* note 88, at 995, 999.

³²² See, e.g., *iXCore, S.A.S. v. Triton Imaging, Inc.*, No. 1135-N, 2005 WL 1653942, at *1 (Del. Ch. July 8, 2005) ("Allegations such as these, that may indicate a violation of the fiduciary duty of care in considering all material information reasonably available before making a business decision, are sufficient to remove the

plaintiff adequately raises doubts about the directors' independence, then regardless of whether independence is truly compromised, the defendant has the burden of overcoming these doubts. Often, in such cases, courts evaluate the directors' and board's independence on a case-by-case basis.³²³ Nonetheless, due to limited resources to investigate, courts often are deferential to the company's designations, absent a reason for further inquiry.

Within the current structure, if companies adopt the proposed disclosure practices and provide at least the minimum enumerated powers to their gatekeepers, this deference and presumption of a proper board process could again have merit. Companies who disclose their requirements for classifying board leadership roles as independent (and ideally for director independence generally) and who grant independent leadership a minimum threshold of enumerated powers would be more likely to be presumed to have an independent board process. This reduces the likelihood of judicial intervention.

D. Stock Exchange Definitions

As discussed above,³²⁴ companies have approached the issue of designating gatekeepers as independent in different, nonuniform ways. Some companies treat the chair as nonindependent, while some refer to the NYSE's three-year "cooling-off period"³²⁵ and declare the chair as independent once that time has elapsed, even if that chair has served as the CEO for the previous twenty years. Some companies declare the chair as independent but nevertheless acknowledge the need for an LID, while others do not even appoint an LID at all.³²⁶

Yet, designating a former CEO of the company as an independent director, immediately or even after the "cooling-off period,"³²⁷ undermines the goal behind director independence designations³²⁸ and is particularly concerning

presumption of business judgment.”).

³²³ See *Marchand v. Barnhill*, 212 A.3d 805, 818 (Del. 2019).

³²⁴ See discussion *supra* Section I.C (discussing when chairs can be considered “independent”).

³²⁵ See R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 852 n.83 (2003) (explaining exclusion of certain persons from being considered independent as subject to three year “cooling-off period”); *supra* note 84 and accompanying text (discussing NYSE rules regarding independence of directors).

³²⁶ Data file containing a breakdown of the companies is on file with the author.

³²⁷ Glass Lewis, for instance, encourages an expanded look-back period of five years. However, this still seems to discount the case of a CEO serving as chair. See GLASS LEWIS, 2018 PROXY PAPER GUIDELINES: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE 3 n.1, 4 (2018), https://www.glasslewis.com/wp-content/uploads/2017/11/US_Guidelines_2018.pdf (considering five-year look-back period more appropriate).

³²⁸ See *Out of Sight*, *supra* note 19, at 39 (“[T]he purpose of independent boards is to ensure that directors are objective and free of conflicts that can impair their judgment when serving as monitors of management . . .”).

when the person declared as independent is a gatekeeper.³²⁹ This, in turn, necessitates a reconsideration of the independence requirements for chairs, and consideration by stock exchanges of potentially issuing specific minimum, heightened, independence thresholds for board gatekeepers.

E. Functional Independence

As this Article has demonstrated, the current self-fulfilling structure for designating a director as independent is problematic. However, perhaps even more problematic is the inability of these key independent figures to effectively carry out their intended role. This is especially important when an ex-CEO is the chair, forcing the LID to face an uphill battle in curtailing management's power over the board.³³⁰ In these cases, the grip of the CEO on the boardroom is further strengthened by the presence of an executive chair, leaving the LID at a distinct disadvantage in the board's power dynamics. Thus, Independent Chairs and LIDs alike must have adequate enumerated powers to allow them to effectively oversee management and interact with shareholders. The current system falls short.

The current lack of power that independent directors are afforded is not only due to an inability to obtain independent information or a lack of resources available to obtain independent information.³³¹ Rather, it is also due to a combination of (1) directors not being afforded opportunities to leverage this information; and (2) companies' apparent apprehension to grant LIDs practical executionary powers.³³² This requires that investors and regulators rethink the specific functions of the LID role. Indeed, as the data demonstrates, some companies grant their LIDs greater responsibilities than others, but those responsibilities vary by company and are often qualified with suppressing language. Accordingly, a more formalized approach to allocating powers, consistently applied across companies, may be warranted.³³³

Companies like Chevron Corporation and Sempra Energy, for example, show that it is obtainable to have an LID appointed who is granted sufficient powers to make a meaningful impact within their role. Chevron and Sempra

³²⁹ See discussion *supra* Section II.B.3.

³³⁰ See *Captured Boards*, *supra* note 22, at 29–30.

³³¹ See *id.* (discussing approaches to maximizing the ability of a board to gather its information and data from independent sources in order to minimize the dependence on management for such information).

³³² See discussion *supra* Section II.B.4.

³³³ See generally Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131, 136–39, 141–42, 144 (2018) (arguing against conventional wisdom, which states that firms effectively utilize private ordering to efficiently tailor governance terms to their particular needs).

have calculated Super Scores of 20 and 19, respectively.³³⁴ Each company allocated over twenty powers with at least seven of those powers being strong. They each only had one qualified power, which limited the LID's ability to communicate directly with shareholders as appropriate or as requested.³³⁵ Additionally, the powers allocated to gatekeepers in these two companies are clearly defined and listed within each company's corporate governance guidelines, as well as prominently displayed on their investor relations page.³³⁶

One avenue through which investors could effectuate change for independent leadership positions is through shareholder proposals. In fact, shareholder proposal efforts have proven fruitful in recent years. Take, for example, the Boardroom Accountability Project launched by New York City Comptroller Scott Stringer in 2014.³³⁷ This project involved extensive submissions of shareholder proposals regarding shareholder nomination of directors in the company's proxy statement (known as proxy access).³³⁸ By 2017, 139 firms had implemented these proposals.³³⁹ Other shareholders followed this initiative, submitting proxy access proposals themselves.³⁴⁰ By 2019, almost 500 firms, over two-thirds of which were in the S&P 500, had added proxy access to their bylaws.³⁴¹ This example demonstrates the manner in which practices, specifically those related to board-related matters, can be permeated through companies to effectuate change across the board.

While a project that is as comprehensive and well-backed as the Boardroom Accountability Project may not be immediately feasible, it provides a potential

³³⁴ Information on file with the author.

³³⁵ *Id.*

³³⁶ See CHEVRON CORP., CHEVRON CORPORATION CORPORATE GOVERNANCE GUIDELINES (2022), <https://www.chevron.com/-/media/shared-media/documents/chevrongovernanceguidelines.pdf>; SEMPRA ENERGY, SEMPRA ENERGY CORPORATE GOVERNANCE GUIDELINES 5 (2020), <https://www.sempra.com/sites/default/files/content/files/node-media-document/2020/3.1%202020%20Nov%2018%20SE%20Corporate%20Governance%20Guidelines.pdf>.

³³⁷ See *Boardroom Accountability Project: Overview*, N.Y.C. COMPTROLLER, <https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview/> (last visited Feb. 8, 2021).

³³⁸ *See id.*

³³⁹ See Press Release, N.Y.C. Comptroller, Comptroller Stringer, NYC Pension Funds Launch National Boardroom Accountability Project Campaign—Version 2.0 (Sept. 8, 2017), <https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-nyc-pension-funds-launch-national-boardroom-accountability-project-campaign-version-2-0/>.

³⁴⁰ See generally Holly J. Gregory, Rebecca Grapsas & Claire Holland, *Proxy Access: A Five-Year Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 4, 2020), <https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review/>.

³⁴¹ Stephen T. Giove, Arielle L. Katzman & Daniel Yao, *Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 19, 2018), <https://corpgov.law.harvard.edu/2018/10/19/proxy-access-proposals-2/> (“In total, well over 500 companies, and over two-thirds of the S&P 500, have adopted proxy access by-laws.”).

framework for how to integrate meaningful independent director powers into boardrooms. Proposals arguably should be uniform across companies and provide set powers that the board must, at a minimum, grant the Independent Chair or LID. These powers would not be subject to limiting language and would be directly tied to these positions' intended purpose.

Only once independent directors are given powers that are exercisable and that provide them with the necessary tools to carry out their intended role—ensuring the independence of the board as a whole—will the “independence” title granted to these key figures be restored. And, once it is restored, courts can rightfully grant the appropriate deference, and investors' sense of trust can be restored in both the designation process and the safeguarding of their interests.

CONCLUSION

Who will guard the guards? This ancient question is at the heart of this Article. Boards are meant to guard management at the behest of investors and stakeholders. Yet, boards themselves are mired with a host of structural and personal concerns that hinder their independence. In a sense, the emergence of board gatekeepers is an attempt to guard the guards and ensure that boards perform their vital monitoring role at the behest of shareholders and society at large.

Yet, while many boards now include these gatekeepers in title, questions still surround their functional gatekeeping. As this Article demonstrated, many company-proclaimed gatekeepers suffer from concerns regarding their individual independence, their functional powers, or both. If gatekeepers are present in name only, then the question of who will guard the guards looms large. In order to ensure that boards are up to the task investors and regulators expect them to carry, the spotlight must shine more closely on the board as a whole, and on its gatekeepers in particular.

This Article took the first step by bringing to light the issues currently surrounding board gatekeepers' independence. Yet, much more qualitative and quantitative research is needed in order to better understand and address this key corporate governance issue. With the proper attention, regulators and investors could ensure that the guards are properly guarded.

APPENDICES³⁴²

Appendix A

Crucial Powers & Proportions

Power Index	Power	Degree of Responsibility Allocated	Number of Companies Granting Powers	Percent of Total Companies Granting Powers
1	PRESIDES AT BOARD MEETINGS	Strong	273	54.9%
2	PRESIDES AT EXECUTIVE SESSIONS OF THE INDEPENDENT DIRECTORS	Strong	378	76.1%
3	LIASON BETWEEN INSIDERS AND OTHER DIRECTORS (USUALLY INDEPENDENT)	Strong	320	64.4%
4	APPROVES OR SETS BOARD MEETING AGENDAS	Strong	318	64.0%
5	APPROVE MATERIALS DISTRIBUTED TO BOARD	Strong	221	44.5%
6	CALL MEETINGS OF INDEPENDENT DIRECTORS	Strong	259	52.1%
7	FEEDBACK OR DIRECT COMMUNICATION TO CHAIR (OR CEO/CHAIR) ON PERFORMANCE OR INFORMATION PROVIDED TO BOARD	Weak	115	23.1%
8	COMMUNICATION WITH MAJOR STOCKHOLDERS	Weak	251	50.5%
9	VARIOUS OTHER REQUESTED DUTIES	Weak	166	33.4%
10	PARTICIPATE IN CEO EVALUATION PROCESS	Strong	109	21.9%
11	COMMITTEE EVALUATION, COMMITTEE AGENDA REVIEW, OR COMMITTEE FEEDBACK/ADVISE	Strong	82	16.5%
12	ENCOURAGING BOARD PARTICIPATION	Medium	17	3.4%
13	REPRESENT OR COORDINATE INDEPENDENT BOARD MEMBERS	Medium	45	9.1%
14	FACILITATE COMMUNICATION GENERALLY	Weak	67	13.5%
15	REVIEW OR APPROVE MEETING SCHEUDLE TO ENSURE SUFFICIENT TIME	Weak	170	34.2%
16	APPROVE ANNUAL MEETING PLANNING AND SCHEDULING; PARTICIPATE IN LONG-TERM MEETING PLANNING	Strong	18	3.6%
17	APPRISE CHAIR OF DISCUSSIONS AT INDEPENDENT SESSIONS	Weak	50	10.1%
18	PUT FORTH BOARD EXPECTATIONS AND FOCUS	Strong	9	1.8%
19	MONITOR AND COORDINATE APPROPRIATE GOVERNANCE DEVELOPMENTS	Medium	40	8.0%
20	PARTICIPATE IN BOARD EVALUATION	Strong	82	16.5%
21	CEO OR CHAIR OR DIRECTOR SUCCESSION PLANNING	Strong	49	9.9%
22	LEAD BOARD IF CEO-CHAIR IS CONFLICTED OUT OR INCAPACITATION	Strong	28	5.6%
23	FEEDBACK OR DIRECT COMMUNICATION TO CEO POSITION (ON INFORMATION, PERFORMANCE, ETC.)	Weak	48	9.7%
24	RETAIN INDEPENDENT LEGAL/FINANCIAL ADVISORS	Medium	63	12.7%
25	INPUT ON DIRECTOR NOMINATION OR INDEPENDENCE ASSESMENTS	Medium	44	8.9%
26	OPTIMIZE BOARD PERFORMANCE	Weak	18	3.6%
27	COMMUNICATE WITH REGULATORS	Strong	11	2.2%
28	PARTICIPATE IN CHAIR EVALUATION (NOT CEO-CHAIR)	Strong	10	2.0%
29	SERVE ON EXECUTIVE COMMITTEE	Strong	11	2.2%
30	CALL SPECIAL BOARD MEETING	Strong	30	6.0%
31	CHAIR THE NOMINATING AND GOVERNANCE COMMITTEE	Strong	19	3.8%
32	HELP DETERMINE WHETHER TO GRANT EXCEPTIONS TO SECURITIES POLICIES	Weak	1	0.2%
33	DIRECT SPECIFIC MATTERS TO THE AUDIT COMMITTEE	Strong	1	0.2%
34	LEADERSHIP IN EXTRAORDINARY MEASURES LIKE M&A OR MONITORING OF LONG-TERM STRATEGY	Strong	9	1.8%
35	DEVELOP TALENT RETENTION AND DEVELOPMENT PROGRAMS	Weak	5	1.0%
36	APPROVE INSIDER STOCK TRANSACTIONS	Medium	1	0.2%
37	VICE-CHAIR BOARD	Medium	1	0.2%

³⁴² All information contained herein is on file with the author.

Appendix B

Number of Positive and Negative Designated Powers for Each Super Score

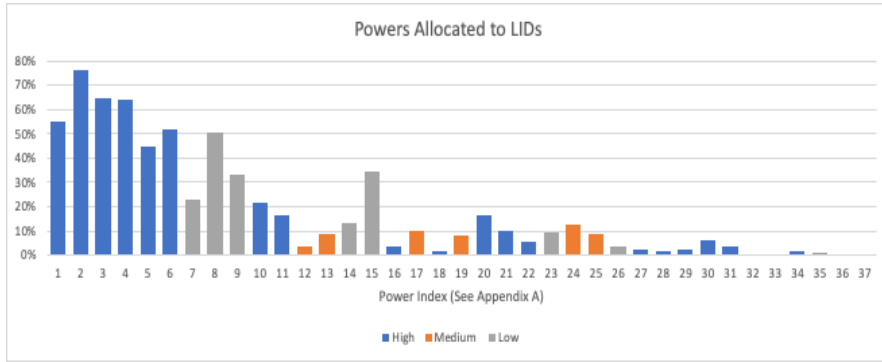
Note: This appendix shows the number of companies within each Super Score that

Companies without LID		
Super Score	Number of Companies	
N/A	78	
Designated Powers for Companies with LIDs		
Super Score	Number of Companies with Positive Scores Allocated	Number of Companies with Qualified Scores Allocated
0	7	7
1	12	11
2	25	14
3	28	22
4	36	28
5	27	17
6	42	30
7	43	32
8	37	24
9	32	25
10	29	20
11	16	10
12	12	12
13	11	10
14	6	5
15	7	7
16	6	5
17	8	7
18	3	2
19	2	2
20	1	1
21	1	1
22	3	2

have been granted “positive” powers that provide an LID with the ability to act as well as “negative” powers that have been qualified in some way either by limiting language in terms of exclusivity or strength. There are twenty-five companies not included within the graph that have an LID but were not granted any powers (therefore, had a Super Score of 0). For example, this chart shows that there are seven companies that have an LID that were allocated both a positive power and a qualifying power resulting in a Super Score of 0. Additionally, there was only one company with a Super Score of 1 that was allocated a positive power without an offsetting negative power but eleven companies with a Super Score of 2.

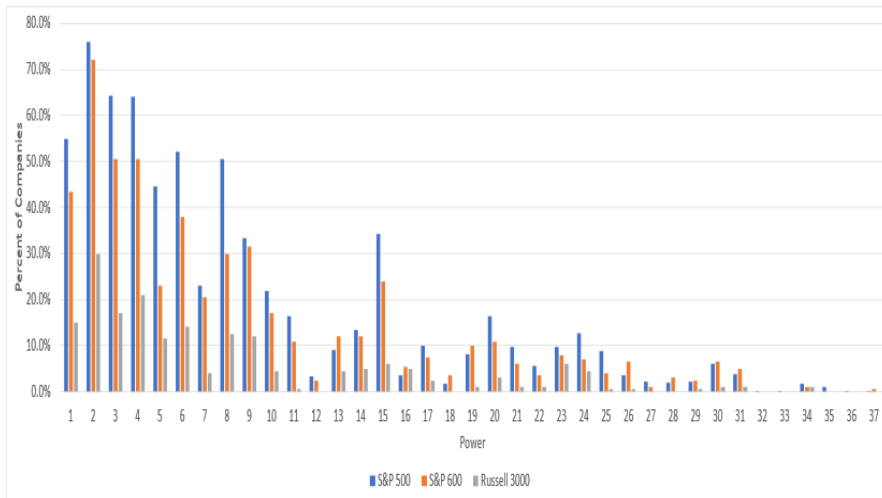
Appendix C

LID Power Prevalence for S&P 500



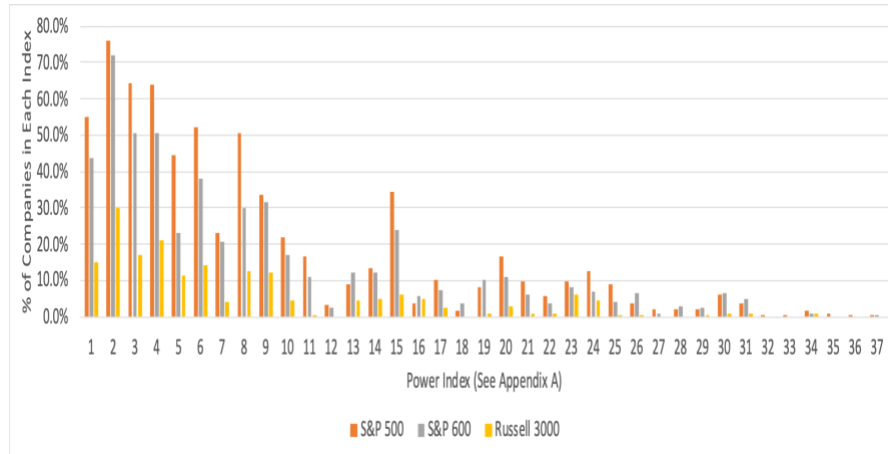
Appendix D

LID Power Prevalence by Market Cap



Appendix E

Power Prevalence by Market Cap



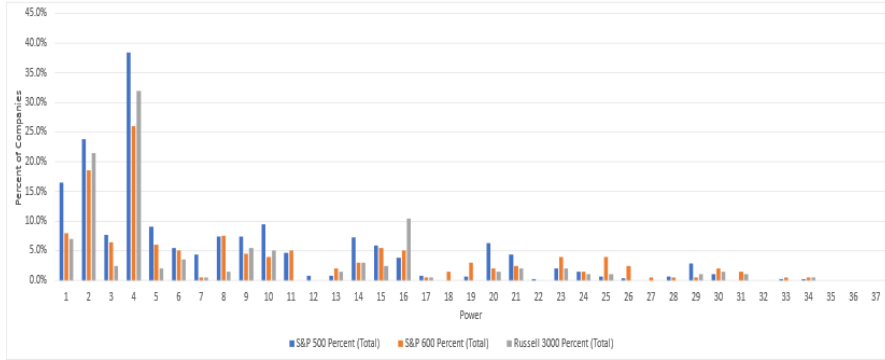
Appendix F

Net Positive and Net Negative Super Scores

Companies with Non-Independent Chair		
Super Score	Number of Companies	
N/A	241	
Designated Powers for Companies with Independent Chair		
Super Score	Number of Companies with Positive Scores Allocated	Number of Companies with Qualified Scores Allocated
-1	6	6
0	63	32
1	24	15
2	36	28
3	26	17
4	23	14
5	18	12
6	11	7
7	13	11
8	8	6
9	7	4
10	7	7
11	1	1
12	5	4
13	1	1
14	2	1
15	2	2
16	2	1

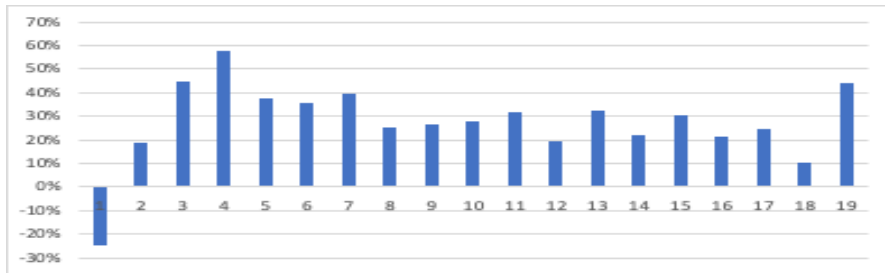
Appendix G

IC Power Breakdown Across Market Cap



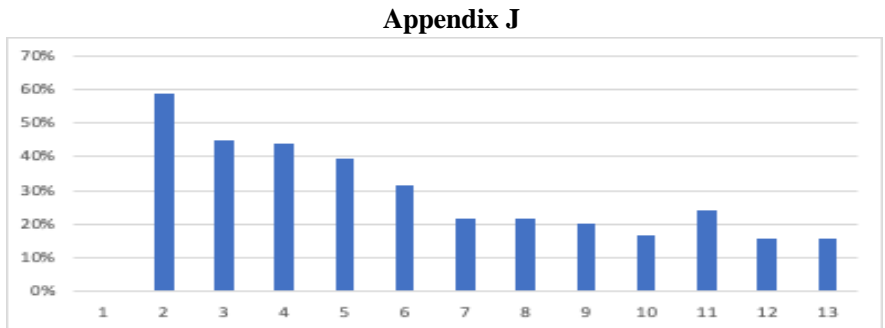
Appendix H

Average Number of Qualified Powers as a Percent of Total Powers Allocated for LIDs



Appendix I

Average Number of Qualified Powers as a Percent of Total Powers Allocated for Independent Chairs



Appendix J

Interview Participants

Participant Number	Date Interviewed	Background
1	November 11, 2021	Extensive public company experience including serving as chair of audit, compensation and nominating/governance committees
2	November 12, 2021	Decades of experience as public company general counsel; served on various board committees; chair of non-profit board and member of several non-profit boards.
3	December 6, 2021	Director of three public companies; general counsel of several public companies.
4	December 6, 2021	General counsel of public company for approximately 20 years.
5	December 9, 2021	15 years of experience serving on two public company boards.
6	December 14, 2021	Served on five public company boards in various capacities.
7	December 14, 2021	Served on a private board of a major family-owned company.
8	December 16, 2021	General counsel of formerly public (now private) company.
9	December 16, 2021	Director on 6-7 large public boards and was a public company CFO.
10	December 17, 2021	Director on six public boards as chair of the board, LID, audit chair and comp committee chair. Currently on two public boards
11	December 17, 2021	Director and former CEO with over 20 years of experience on public company and other company boards; served on audit, nomination/governance, and several special committees.
12	December 21, 2021	Executive in large public company and a director in several large cap public companies including as LID

