Board Overload

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Roy Shapira
Reichman University (IDC) and ECGI

Asaf Eckstein
Hebrew University of Jerusalem

Ariel Shillo
Hebrew University of Jerusalem

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We thank Atinuke Adediran, Roy Baharad, Steve Bainbridge, Cary Coglianese, Lawrence Cunningham, Jared Elias, Luca Enriques, Lisa Fairfax, Zohar Goshen, Danielle Haim, Amir Licht, Moran Ofir, Gideon Parchomovsky, and participants in Duke's Changing Landscape of Corporate Law Conference, the Compliance Forum, the Modern Era of ESG Conference, the ESG Seminar on Corporate Governance, the Corporate and Securities Litigation Conference, Oxford's Directors' Responsibilities in Times of Change conference, and BC's Regulation and Markets Workshop for helpful comments. Diego Glagovsky, Eden Glazar, Ziv Granov, Amit Kaplan, Tamar Korem, Lidor Nargasi, Shir Rochwerger, Lidor Rotem, Omar Shlabbi, and Mia Winraob provided excellent research assistance.

Abstract

The board of directors plays a critical role in steering corporate behavior. Over the past two decades, regulators have increasingly required boards to oversee compliance on issues ranging from cybersecurity and anti-money laundering to climate risk. In isolation, each board involvement mandate makes sense, as it is intended to elevate a first-order issue to the highest levels of governance and ensure firm-wide buy-in. But taken together, these mandates create a problem of board overload. A typical board has ten members and meets eight times a year. Directors' time and attention are finite, as is space on the meeting agenda. As a result, there is a growing asymmetry between boards' expanded responsibilities and the structural limits on their capacity. Boards must constantly triage competing demands, often without clear guidance on how to prioritize. Understanding how boards make these choices, and which issues fall through the cracks, is one of the most urgent questions in corporate governance, with implications for both long-term corporate success and broader societal outcomes. This Article offers a comprehensive analysis of board overload and makes the following three contributions. First, the Article examines the causes of board overload. Drawing on original data on board and committee meetings, a systematic analysis of regulatory board involvement mandates, and practitioner surveys, we show that while directors' responsibilities have expanded dramatically, board size and meeting frequency have remained relatively fixed. Second, the Article evaluates the consequences of board overload. By interviewing board members and borrowing insights from decision-making literature, we identify two key effects. At the individual director level, overload leads to information fatigue, whereby even diligent and capable directors resort to heuristics and lose motivation to invest in learning unfamiliar issues. At the group level, overload distorts agenda-setting, causing boards to underinvest in long-term strategy and systemic risk. Finally, the Article offers concrete policy solutions. For regulators, our central proposal is to consider rolling back board involvement mandates. Regulators should focus on telling companies how to behave, rather than specifying who within the company should do what. Courts, for their part, should account for board overload by setting high materiality thresholds when interpreting oversight duties, and by liberally interpreting shareholder inspection rights doctrines.

Keywords: Corporate Governance, Compliance, Boards of Directors, Corporate Social Responsibility, Oversight Duties, Corporate Law, ESG, Information Overload, Organizational Wrongdoing, AI-assisted Monitoring, Inspection Rights, Regulatory Governance, Board Agenda

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Roy Shapira*
Professor of Law
Reichman University (IDC)
8 University Street
Herzliya 4610101, Israel
phone: + 972 9 9602410
e-mail: roy.shapira@idc.ac.il

Asaf Eckstein
Associate Professor
Hebrew University of Jerusalem
Mt. Scopus
Jerusalem 9190, Israel
e-mail: Asaf.Eckstein@mail.huji.ac.il

Ariel Shillo
Researcher
Hebrew University of Jerusalem
Mt. Scopus
Jerusalem 91905, Israel
e-mail: ariel.shillo@mail.huji.ac.il

*Corresponding Author

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ASAF ECKSTEIN, ROY SHAPIRA, & ARIEL SHILLO [*]

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[*] Eckstein: Professor of Law, Hebrew University. Shapira: Professor of Law, Reichman University; Mehrotra Visiting Professor, BU's Questrom School of Business; Visiting Senior Fellow, Harvard Law School's Program on Corporate Governance; Research Member, ECGI. Shillo: LLB student, Hebrew University. We thank Atinuke Adediran, Roy Baharad, Steve Bainbridge, Cary Coglianese, Lawrence Cunningham, Jared Elias, Luca Enriques, Lisa Fairfax, Zohar Goshen, Danielle Haim, Amir Licht, Moran Ofir, Gideon Parchomovsky, and participants in Duke's Changing Landscape of Corporate Law Conference, the Compliance Forum, the Modern Era of ESG Conference, the ESG Seminar on Corporate Governance, the Corporate and Securities Litigation Conference, Oxford's Directors' Responsibilities in Times of Change conference, and BC's Regulation and Markets Workshop for helpful comments. Diego Glagovsky, Eden Glazar, Ziv Granov, Amit Kaplan, Tamar Korem, Lidor Nargasi, Shir Rochwerger, Lidor Rotem, Omar Shlabbi, and Mia Winraob provided excellent research assistance.

INTRODUCTION

The board of directors has been at the heart of nearly every major regulatory reform in the past two decades. In response to the early-2000s accounting scandals, the Sarbanes–Oxley Act tasked boards with active oversight of financial reporting.[1] After 9/11, regulators required bank directors to adopt and oversee their bank's anti-money-laundering policies.[2] The 2008 financial crisis brought on new mandates for bank boards to monitor capital adequacy on an ongoing basis.[3] In the wake of the mid-2010s cyberattacks, financial regulators began insisting on board involvement in data security.[4] Health regulators, following a series of Medicare fraud scandals, required hospital boards to formally approve credentialing criteria as a condition for participating in Medicare.[5] Most recently, concerns about climate change have led international regulators to require that boards oversee and disclose their company's climate-related risks and strategies.[6] Other examples abound.[7]

Considered in isolation, each of these board involvement mandates makes sense. They target first-order issues ranging from climate change and user privacy to fighting terrorism. By issuing board involvement mandates, regulators aim to elevate these first-order issues to the highest tier of governance, thereby reinforcing the tone at the top and increasing the likelihood that the regulated entities will buy in.

But when viewed in the aggregate, these mandates create a problem by overloading the board. A typical board has just ten members and meets only eight times a year.[8] Directors' time and attention are finite, as is space on the meeting agenda. Requiring boards to address all these regulatory issues—on top of core board responsibilities like executive pay and succession planning,

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[1] Pub. L. No. 107-204, § 301, 2002 U.S.C.C.A.N. (116 Stat.) 745 (codified at 15 U.S.C. § 78j-1).

[2] *See BSA/AML Manual: Assessing the BSA/AML Compliance Program*, FFIEC (2024), https://bsaaml.ffiec.gov/manual/AssessingTheBSAAMLComplianceProgram/05.

[3] *See* BANK FOR INTERNATIONAL SETTLEMENTS, CORPORATE GOVERNANCE PRINCIPLES FOR BANKS 8 (2015) (at the global level); NAIC OWN RISK AND SOLVENCY ASSESSMENT (ORSA) GUIDANCE MANUAL 12 (2022), https://www.in.gov/idoi/files/ORSA-Guidance-Manual-December-2022.pdf (at the national level).

[4] *See* FTC Standards for Safeguarding Customer Information Rule, 16 C.F.R. § 314.4(i) (2023) (at the federal level); N.Y. COMP. CODES R. & REGS. tit. 23, § 500.1 (2023) (at the state level).

[5] *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, STATE OPERATIONS MANUAL: APPENDIX A – SURVEY PROTOCOL, REGULATIONS AND INTERPRETIVE GUIDELINES FOR HOSPITALS 41-56 (Rev. 220, Apr. 19, 2024), https://www.cms.gov/ Guidance/Manuals/downloads/som107ap_a_hospitals.pdf; FTC Condition of Participation: Governing Body Rule, 42 C.F.R. § 482.12 (2014).

[6] *See, e.g.*, Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/ EC and Directive 2013/34/EU, as regards corporate sustainability reporting, 2022 O.J. (L 322) 15, 24.

[7] *Infra* Section I.A.1.

[8] SPENCER STUART, 2024 SPENCER STUART BOARD INDEX 11, https://www.spencerstuart.com/-/media/2024/09/ssbi2024/2024_us_spencer_stuart_board_index.pdf (reporting that the average number of board meetings in 2024 was 7.7); Ted Sikora, *2025 Inside the Public Company Boardroom*, NACD (Jan. 4, 2025), https://www.nacdonline.org/all-governance/governance-resources/governance-surveys/surveys-benchmarking/2025-inside-the-public-company-boardroom/ (reporting on typical board size).

and emerging concerns such as AI bias—may stretch boards beyond their practical capacity.

The biggest challenge for boards today is therefore how to prioritize. Boards must triage competing responsibilities, often without clear guidance on tradeoffs. The real-world ramifications of this prioritization dilemma are significant: when boards prioritize compliance and leave strategic foresight off the agenda, they risk undermining long-term corporate success. And when boards focus on short-term financial metrics while engaging only superficially with regulatory mandates, they weaken efforts to address pressing systemic problems such as climate risk and financial instability. In either case, board overload can prevent even the most capable directors from giving adequate attention to critical issues.[9]

Understanding how boards prioritize, and which of their responsibilities fall through the cracks, is critical. Business companies serve as hubs of economic and social activity.[10] And boards shape the behavior of these companies, affecting issues that go beyond financial performance, such as environmental degradation and racial justice.[11] Even if you are not a shareholder, your life is affected by the actions (or inaction) of corporate boards. Board overload, then, is not merely an internal governance issue. It is a public concern deserving broad academic and policy attention. Regulators, for instance, must recognize that layering new board responsibilities may crowd out attention to existing responsibilities.

Despite this practical significance, board overload has largely escaped academic scrutiny.[12] Prior research on board effectiveness has focused on readily observable structural elements, such as counting how many directors are independent or whether the roles of Chair and CEO are separated.[13] The relatively limited research that does address board capacity focuses on the individual director level: counting how many directorships a director holds or what skillsets they disclose.[14] This Article instead offers theory and evidence on the less visible but critical aspects of board behavior at the group level: how boards set agendas, allocate responsibilities, and manage information flows to

[9] *See, e.g.*, Friso van der Oord & Ted Sikora, *Directors Should Prepare to Address Five Board Dilemmas in 2025*, NACD (Dec. 11, 2024), https://www.nacdonline.org/all-governance/governance-resources/governance-research/outlook-and-challenges/2025-governance-outlook/preparing-for-five-crucial-board-balancing-acts-in-2025/ (presenting survey-based evidence).

[10] *See, e.g.*, Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1560–61 (2018) (compiling examples of the outsized influence of large corporations on society).

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

[12] Section III.B.3 *infra* explains the relationship between our analysis and the existing literature.

[13] *See* Virginia E. Harper Ho, Corporate Climate Governance 11 (ECGI Working Paper No. 804, 2024), https://ssrn.com/abstract=4934244 (describing the extant literature).

[14] *See* Renée B. Adams, Benjamin E. Hermalin, & Michael S. Weisbach, *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey*, 48 J. ECON. LIT. 58, 81 (2010) (surveying the literature).

cope with their expanding remit. In the process, the Article makes three contributions: descriptive, normative, and prescriptive.

First, the Article documents the causes of board overload. In addition to the steady expansion of regulatory mandates requiring board involvement, both fiduciary duty expectations and reputational pressures on boards have intensified over the past decade. Corporate law's oversight duty doctrine has undergone a resurgence, with courts increasingly criticizing boards for failing to allocate sufficient attention to central compliance areas such as product safety or workplace misconduct.[15] And even when a certain social or environmental issue is not punishable by law, large institutional investors and social activists now routinely hold directors accountable for how their companies address these concerns. For example, several groups of investors now vote against directors who do not give adequate attention to ESG (Environmental, Social and Governance) priorities, such as reducing greenhouse gas emissions.[16]

While expectations for boards have been ramping up, their capacity has remained relatively fixed. By culling the proxy statements of S&P 500 companies and drawing on data from practitioner surveys, we document the resources that boards dedicate to their responsibilities. For example, the median size of boards has held steady at around ten members,[17] and the average number of annual meetings has remained at roughly eight.[18] As a result, the asymmetry between expanding responsibilities and fixed capacity has never been more pronounced.

The Article's second contribution is to evaluate the consequences of board overload. Drawing on interviews that we conducted with board members and insights from a multidisciplinary literature on decision-making, we identify two key effects. At the individual director level, the central problem is *information* overload. Directors of large companies are expected to read hundreds of pages of dense pre-meeting materials and to offer meaningful input on complex, wide-ranging topics—from AI to geopolitics. Such obligations can overwhelm even the smartest, hardest-working director. And when directors are overwhelmed, they are more likely to rely on cognitive shortcuts (such as heuristics or groupthink) and less likely to invest the time and energy needed to learn about unfamiliar issues.

At the group level, the main challenge is *agenda* overload. Even boards with ideal structure, composition, and processes lack sufficient space on their agendas to meaningfully engage with all their responsibilities. Indeed, the

[15] Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1861 (2021).
[16] *See, e.g.*, Holly Gregory, *Board Oversight: Key Focus Areas for 2022*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 5, 2022), https://corpgov.law.harvard.edu/2022/01/05/board-oversight-key-focus-areas-for-2022/ [hereinafter Gregory, *Board Oversight*]; Amelia Miazad, Faith Investors 11 (working paper, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5152567.
[17] Sikora, *supra* note 8
[18] SPENCER STUART 2024, *supra* note 8.

binding constraint on board effectiveness today is not the availability of information or the bandwidth of any individual director, but the board's collective attention—its capacity to devote shared, high-quality deliberation to a given issue. As a result, boards constantly face difficult prioritization decisions. And there is good reason to believe that boards do not resolve these dilemmas optimally. Boards are often reluctant to deprioritize issues that are highly salient or legally mandated, even when doing so would enhance board effectiveness. This can lead boards to underinvest in issues that are critical for long-term corporate success (such as strategic foresight) or for broader societal outcomes (such as product safety or environmental risk).

Finally, the Article offers concrete policy solutions to board overload. The first step is to examine what solutions boards can take on their own, such as adding directors, increasing meeting frequency, creating new committees, appointing specialist directors, or deploying AI-based monitoring. While these steps may help boards process individual complex responsibilities more effectively, they fall short of addressing the challenge of prioritizing competing responsibilities. In short, firm-level responses can mitigate information overload but not agenda overload. Because agenda overload is largely driven by external mandates, meaningful solutions must also come from outside the company. The next step is therefore to explore how regulators (ex ante) and courts (ex post) can help to alleviate board overload.

Regulators should reconsider their newfound approach of mandating board involvement. They should focus on *what* companies must do ("reduce carbon emissions by 2030", "safeguard user privacy"), instead of prescribing *who* within the company must perform specific tasks ("boards should approve the user privacy policy and the CISO should report quarterly to the board").

As for judges, recognizing the challenge of board overload carries two key implications. First, courts should apply high materiality thresholds when evaluating oversight claims, thereby preserving directors' discretion to decide which issues make it to the full-board agenda. Second, overload is reshaping board dynamics in ways that require courts to rethink even doctrines that are nominally procedural. Boards now conduct more work between meetings through informal communications, and they depend heavily on officers and outside advisors to filter and frame the information boards receive. These shifts make it essential to reinterpret doctrines such as shareholder inspection rights in ways that allow shareholders to examine not only formal board minutes, but also informal communications and the conduct of the officers and advisors who shape the board's understanding of compliance risks.

A few words on methodology and terminology are in order at the outset.[19] Legal scholars have largely neglected how boards set agendas and allocate responsibilities—not because these questions are unimportant, but because they

[19] We elaborate on the methodology in Section I.B and the Appendix *infra*.

are difficult to study empirically and resist formal modeling.[20] To overcome the lack of data we constructed our own dataset of frequency of meetings and the establishment of new committees, and we supplemented it with data from practitioner-based surveys. We also scoured legal databases, including a content analysis of law firm memos sent to director clients regarding oversight duty expectations. To address the challenge of studying internal board dynamics, we conducted semi-structured interviews with directors and board consultants.[21] This method is especially well-suited to examining complex, nuanced issues such as how boards triage competing demands.[22] The interviews helped us provide context to findings from our dataset, large-scale practitioner surveys, and the theoretical literature on board decision-making. And the iterative nature of these interviews enabled us to probe unexpected themes and revisit the data to test new hypotheses.[23]

The Article uses several key terms that are related but distinct. "Board capacity" refers to the finite resources a board can dedicate to its responsibilities. It is shaped by structural factors such as board size, meeting frequency, and even the board's budget to hire external advisors. "Board overload" arises when the external and internal demands placed on the board exceed this fixed capacity. "Board effectiveness" refers more broadly to how well a board performs its advisory and monitoring functions. While board capacity constrains what a board can do, effectiveness also depends on other factors beyond capacity. A board may have ample time and resources but still perform poorly (for instance, if it focuses on the wrong issues). Finally, the Article occasionally moves from assessing board effectiveness to evaluating firm-level outcomes, using terms such as "firm performance." Firm performance is shaped in part by how effective the board is, but also depends on many other factors, including the quality of executive leadership, market conditions, and the regulatory environment.

The Article proceeds in three parts. Part I sets the stage by presenting evidence of rising board responsibilities alongside the structural limits of board capacity. Part II analyzes the effects of overload on board functioning and on

[20] Renee B. Adams, *Boards, and the Directors Who Sit on Them*, *in* THE HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 291, 332 (2017) (noting that lack of available data makes it notoriously hard to understand the internal dynamics of boards).

[21] In this type of interview, the researcher introduces a topic in broad strokes, the interviewee reflects freely about their relevant experience and insights, and the researcher follows up with more specific questions to explore key points in greater depth. THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH 127 (Lisa Given, ed., 2008). Appendix A elaborates on the methodology and provides the list of interviewees.

[22] *See* Amedeo Pugliese, Alessandro Zattoni, Bruno Buchetti, & Francesca Romana Arduino, *The Methodological Challenges to Opening up the Black Box of Boardroom Dynamics*, *in* HANDBOOK OF RESEARCH METHODS FOR CORPORATE GOVERNANCE 268, 272 (2023) (noting the importance of using interviews to understand the inner processes of corporate boards).

[23] While most of our datapoints and examples come from large, publicly traded U.S. corporations, our interviewees share insights from boards in other national markets and in varying company sizes. We do not fully develop the comparative aspects of board overload in this Article for considerations of scope and brevity.

corporate behavior more broadly. Part III develops implications for practitioners, policymakers, and scholars. A brief Conclusion clarifies the Article's contributions in light of the existing literature and outlines avenues for future research.

I. THE CAUSES OF BOARD OVERLOAD

Two contrasting trends have combined to create board overload: while the board's remit has constantly expanded, the board's capacity has remained largely fixed. This Part explores the drivers of both trends. Section A shows that most of the recent increase in board responsibilities comes from outside the company, such as via regulatory mandates. Section B collects evidence on several indicators of board capacity, such as the size of the board and the frequency of its meetings. The findings are conclusive: while boards these days face many more obligations than their predecessors, the number of members and the number of annual meetings have remained remarkably stable over the years.

A. Increasing Responsibilities

Directors themselves report in practically every survey that they face too many tasks to be able to handle them effectively.[24] Granted, boards have always had to deal with complex tasks such as overseeing CEO selection, designing executive pay, and reviewing major corporate strategies.[25] But over the past decade or so, the volume and scope of directors' responsibilities have significantly increased.[26]

The dramatic increase in board responsibilities is in large part a function of the two biggest trends in corporate governance over the past decade, namely, compliance and ESG. Compliance rose into prominence in the 1990s, as more and more regulators realized that they lacked the resources to ensure that all regulated entities comply with the law.[27] These regulators therefore started providing companies with carrots and sticks to incentivize investment in internal controls.[28] But by the 2000s, the same regulators started realizing that too often companies' internal controls amount to little more than cosmetic

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[24] *See, e.g.*, Oord & Sikora, *supra* note 9.

[25] Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More than It Can Deliver,* 10 U. ST. THOMAS L.J. 416, 444 (2012) [hereinafter Fairfax, *Managing Expectations*]; Amy Deen Westbrook & David A. Westbrook, *Sisyphus the Director*, CLS BLUE SKY BLOG (Sep. 10, 2025), https://clsbluesky.law.columbia.edu/2025/09/10/sisyphus-the-director/.

[26] Oord & Sikora, *supra* note 9 (providing survey-based evidence).

[27] *See* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 707 (2020).

[28] *See* Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 962–66 (2009); James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 183, 191 (2021); Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 268 (2004).

compliance: companies became adept at checking the right boxes to receive credit, without really curbing wrongdoing.[29] The next step for regulators was then to demand, explicitly or implicitly, that boards of directors vouch for the seriousness of their company's compliance efforts. The reasoning was straightforward: board involvement mandates elevate a certain issue to the highest governance tier, thereby increasing the chances of getting companies to truly buy in. Today, various regulations explicitly mandate that boards dedicate attention to a specific issue, and corporate law courts scrutinize boards that do not allocate enough time for critical issues. Section 1 details those mounting legal demands for board involvement.

Concurrently, a booming ESG movement has raised environmental and social issues to the top of corporate board agendas.[30] Powerful institutional investors and social activists constantly pressure boards to incorporate ESG considerations when they design executive pay packages,[31] pick new board members,[32] allocate responsibilities to board committees,[33] and communicate with shareholders.[34] Section 2 spotlights these mounting market demands for board involvement.

1. Increasing Legal Expectations

Oversight of legal compliance has been occupying more and more space on board agendas.[35] The reason for this trend is twofold: (1) the legal system imposes more obligations on companies,[36] and (2) the legal system increasingly demands that boards be actively involved in their company's compliance with said obligations.

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[29] *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1341, 1407–10 (1999).

[30] Steve Klemash, Rani Doyle, & Jamie C. Smith, *Eight Priorities for Boards in 2020*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 14, 2020), https://corpgov.law.harvard.edu/2020/01/14/eight-priorities-for-boards-in-2020; Stavros Gadinis & Silvia Fregoni, Beyond the Brussels Effect: The Surprising Rise of the International Sustainability Standards Board, (ECGI Working P. No. 886/2025, 2025), https://ssrn.com/abstract=5777602.

[31] *See* Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. 37, 45–47 (2022).

[32] Yaron Nili & Roy Shapira, *Specialist Directors*, 41 YALE J. ON REG. 652, 666 (2024).

[33] Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 372 (2022) [hereinafter Fairfax, *Committee Charters*].

[34] Nili & Shapira, *supra* note 35, at 686-687.

[35] *See, e.g.*, THOMSON REUTERS, 2023 COST OF COMPLIANCE: REGULATORY BURDEN POSES OPERATIONAL CHALLENGES FOR COMPLIANCE 5 (2023), https://practicalcompliance.thomsonreuters.com/Link/Document/Blob/I47eedce10aec11ee8921fbef1a541940.pdf?transitionType=Default&contextData=(sc.Default)&firstPage=true (survey-based evidence, showing that directors perceive the ever-increasing regulatory burden as one of their biggest challenges). *See also* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077 (2016); Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance,* 103 MINN. L. REV. 2135, 2146 (2019).

[36] *See, e.g.*, Michael J. Bommarito & Daniel Martin Katz, Measuring the Temperature and Diversity of the U.S. Regulatory Ecosystem 8 (Jan. 10, 2017) (unpublished manuscript), https://arxiv.org/abs/1612.09244 (presenting evidence that the intensity and complexity of regulatory requirements have been increasing).

The well-documented tendency of the legal system to lay new rules upon existing ones over time is dubbed "regulatory accretion."[37] The idea is intuitive: whenever regulators encounter evidence of corporate misconduct on a grand scale, they respond by introducing new demands.[38] When there is a financial crisis, new financial regulations are added;[39] when there is a toxic pollution debacle, new environmental regulations are added; [40] and so on. It seems there is always evidence for instituting new regulations but seldom evidence for eliminating existing ones.[41] In other words, it is easier to add new regulations than to repeal existing ones.[42] As a result, each crisis tends to ratchet up the volume and scope of regulatory requirements that companies face.[43]

The corporate organ in charge of risk oversight is the board of directors. When the volume and scope of legal risks that the company faces expand, boards must decide just how much more attention to dedicate to these expanding risks. Theoretically, a corporate board could decide that the heavier regulatory load will not affect its agenda. Say that the board decides to dedicate ten percent of its meeting time to discussing legal oversight, regardless of changes in the volume and scope of these obligations. If that were the case, regulatory accretion would have limited impact on board overload. But that is decidedly *not* the case, if only because regulators are now taking the decision on how to allocate time to legal oversight out of the board's hands.

Various regulations now explicitly insist that it will be the board of directors that approve compliance policies, continuously monitor compliance, and certify to the regulators that the company complies. Effectively, these regulations mandate that boards dedicate agenda slots to specific legal issues.

An early example of such a regulatory approach comes from the Sarbanes Oxley Act of 2002 (SOX).[44] Following a wave of corporate

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37 Cary Coglianese, *Strengthening Global Connections in Regulatory Governance*, REG. REV. (Jun. 24, 2024), https://www.theregreview.org/2024/06/24/coglianese-strengthening-global-connections-in-regulatory-governance/ ("By nearly any measure, the volume of regulation is greater today than it was fifty years ago. Part of this increase in regulation stems from a steady accumulation of rules over time, a layering of new rules upon old ones").

38 *See* Veronica Root Martinez, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1012 (2017).

39 *Id.*; Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 25 (2014).

40 *See, e.g.*, Hana Vizcarra, *Deepwater Horizon Ten Years Later: Reviewing Agency and Regulatory Reforms,* ENV'T & ENERGY L. PROGRAM: HARV. L. SCH. (May 4, 2020), https://eelp.law.harvard.edu/deepwater-horizon-ten-years-later-reviewing-agency-and-regulatory-reforms/.

41 *See* Omri Ben-Shahar & Carl E. Schneider, *The Futility of Cost–Benefit Analysis in Financial Disclosure Regulation*, 43 J. LEGAL STUD. 253, 267 (2014).

42 *See generally* J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 787 (2003) (identifying various reasons for accretion: from path dependence to regulators' incentives to expand their remit to interest group politics).

43 *See* Stephen M. Bainbridge, *Dodd–Frank: Quack Federal Corporate Governance Round II*, 95 MINN L. REV. 1779, 1820 (2011) (describing the ratcheting up of federal intervention in corporate governance).

44 Pub. L. No. 107–204, *supra* note 1. *See also* Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 941-43, 943 (2021).

governance and accounting scandals, policymakers decided that it is not enough to tell companies that they should report accurately. To ensure that companies comply, the law must enlist the company's board as a gatekeeper, or so the reasoning went. SOX thus mandated that boards actively monitor their company's financial reporting.[45] In fact, SOX went further and interfered with board structure and composition, by requiring that boards establish an audit committee, and that the committee be comprised of independent directors with at least one financial expert.[46]

Numerous regulations have since followed SOX's lead and expanded the board's role beyond oversight of financial reporting. Following the 9/11 terrorist attack, when regulators wanted to ramp up anti-money-laundering (AML) requirements, they required that directors of banks adopt and oversee their bank's AML policies.[47] Following the 2008 financial crisis, regulators started insisting that bank boards continuously monitor their bank's capital adequacy.[48] And following major cyberattacks on banks in 2016–2017, regulators started requiring that bank boards be more actively involved in data security.[49]

Numerous additional examples extend beyond the financial sector, and beyond the U.S.[50] To illustrate, health regulators require as a condition for participation in Medicare that directors of hospitals formally approve credentialing criteria and demonstrate ongoing proactive oversight.[51] And once a healthcare provider fails to ensure compliance, the regulators force the provider to sign a "corporate integrity agreement" that often contains specific provisions for stronger board involvement going forward. For example, Eli Lilly's agreement requires the board to establish a committee dedicated to oversight of healthcare regulations and to ensure that the committee meets at least quarterly.[52]

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[45] *Id*. at §301.
[46] *Id*. at §301, §407.
[47] *BSA/AML Manual*, *supra* note 2.
[48] *See* CORPORATE GOVERNANCE PRINCIPLES FOR BANKS, *supra* note 3; NAIC MANUAL, *supra* note 3.
[49] *See Standards for Safeguarding Customer Information Rule*, *supra* note 4.
[50] For non-U.S. examples *see, e.g.*, Rachel Hayes, *NIS2: A Game-Changer for Senior Management and Boards*, WILLIAM FRY (Mar. 13, 2025), https://www.williamfry.com/knowledge/nis2-a-game-changer-for-senior-management-and-boards/ (explaining how a 2024 EU directive demands that cybersecurity be handled at the board level); Eli Bukspan, *Stakeholder Fairness and Corporate Social Impact: The Behavioral Economic Structure of Corporate Law*, 13 MICH BUS. & ENTREPRENEURIAL L. REV. 1, 29–31 (2024) (compiling examples of such noncorporate law regulations in Israeli law); Press Release, Cent. Bank of Ir., *GlobalReach Multi-Strategy ICAV Fined €192,500 and Reprimanded by the Central Bank of Ireland for Breach of Its Reporting Obligation under EMIR* (Nov. 30, 2023), https://www.centralbank.ie/news/article/press-release-globalreach-fined-192-500-and-reprimanded-by-central-bank-of-ireland-under-emir-30-november-2023 (Ireland's financial regulators demanding more board involvement).
[51] *See* FTC Condition of Participation, *supra* note 5.
[52] David E. Matyas et al., *New DHHS OIG Integrity Obligations Imposed on Members of Health Care Boards of Directors*, EPSTEIN BECKER & GREEN (Jan. 26, 2009), https://www.ebglaw.com/insights/publications/new-dhhs-oig-integrity-obligations-imposed-on-members-of-health-care-boards-of-directors.

More recently, regulators have even started to enlist large companies as regulators of their supply chains.[53] In other words, regulators now require that the largest regulated companies monitor and punish (by withholding business from) smaller third-party business partners that engage in wrongdoing.[54] Pertinently, such supply chain liability regulations frequently insist that the board of directors engage in active supply chain oversight.[55]

To illustrate, when American Express's third-party service providers charged consumers excessive late fees, the Consumer Financial Protection Bureau (CFPB) explicitly faulted American Express's board for not engaging in oversight of these third-party providers.[56] As part of the settlement, American Express committed to putting third-party oversight more firmly on its board agenda: the compliance department must report to the board on a quarterly basis regarding the compliance of third-party providers, and the board is the one responsible for ensuring that corrective actions are taken.[57] Similarly, in its settlement with Citibank over telemarketing centers' shenanigans, the CFPB required that Citi's board form a committee dedicated to compliance, and stipulated that the committee must meet monthly and report to the regulator quarterly on how the bank oversees third-party telemarketing centers.[58] Environmental regulators similarly require big oil companies to ensure that their contractors comply with environmental standards.[59] For example, when BP settled the Deepwater Horizon case, the regulator insisted that, as part of the settlement, the BP board itself oversee the improvements of drilling safety at BP's contractors.[60]

Another recent addition to the load on the board is a spate of ambitious ESG regulations.[61] These regulations typically come from outside the U.S. but apply to large U.S. companies that conduct business abroad.[62] Pertinently, these regulations expand risk oversight geographically (requiring boards to conduct oversight of the entire value chain) and temporally (for example, requiring boards to align the company's business plan with reducing net carbon emissions to zero by 2050).[63]

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[53] *See* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (2020) (on U.S. federal regulations); Luca Enriques, Matteo Gatti, & Roy Shapira, *How the EU Sustainability Directive Could Reshape Corporate America*, 78 STAN. L. REV. (forthcoming), https://ssrn.com/abstract=5083571 (analyzing EU legislation that applies to virtually all large American companies).
[54] Van Loo, *id.* at 493.
[55] *Id*. at 469 & note 4.
[56] Am. Express Centurion Bank, CFPB No. 2012-CFPB-0002, at 4 (Oct. 1, 2012) (joint consent order).
[57] *Id*. at 19.
[58] Citibank, N.A., CFPB No. 2015-CFPB-0015, at 32–34 (July 21, 2015) (consent order).
[59] Van Loo, *supra* note 53, at 490.
[60] *Id*.
[61] Enriques et al., *supra* note 53, at 12.
[62] *Id*.
[63] Harper Ho, *supra* note 13, at 15.

Even when the regulation in question does not contain an explicit board-involvement mandate, enforcement actions often convey to boards that regulators expect them to be actively involved. Indeed, the updated U.S. Sentencing Guidelines state that the board should be knowledgeable about the company's compliance program and exercise reasonable oversight.[64] And virtually all large enforcement actions of recent years allude to the role of board involvement in one way or another.[65] To illustrate, when the Department of Justice entered a plea deal with Boeing over the 737 MAX debacle, the regulator insisted that Boeing's board meet with victims' families.[66] And the Office of the Comptroller of the Currency demanded that TD Bank's board submit a certification that the bank corrected its AML deficiencies before the bank be allowed to distribute dividends.[67]

Regulatory requirements are not the only reason that boards feel obligated to dedicate more and more attention to legal oversight. Another crucial reason is developments in fiduciary duty case law. A board's decision regarding the amount of time it chooses to dedicate to legal oversight is influenced by judicial interpretation of directors' oversight duty. The more directors anticipate a realistic threat of oversight duty claims against them, the more they are likely to prioritize legal oversight. Until recently, the threat of oversight duty litigation had been largely irrelevant.[68] The bar for failure-of-oversight claims was set high, and virtually no case survived the pleading hurdle.[69]

But starting in 2019, a string of decisions by Delaware courts have revamped the oversight duty doctrine.[70] Elsewhere, we analyzed the causes and consequences of this resurgence in oversight duty litigation.[71] Here, we emphasize just how much the evolving case law has shaped board agendas, catapulting legal risk oversight to the top.

A careful reading reveals that virtually all recent oversight duty decisions explicitly scrutinized the board's decisions to allocate responsibilities and time to oversight. *Marchand* criticized the board of an ice-cream company for not assigning responsibility for food-safety oversight to one of its

[64] U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(2)(A) (2023).
[65] *See* Asaf Eckstein & Gideon Parchomovsky, *The Agent's Problem*, 70 DUKE L.J. 1509, 1544–45 (2021).
[66] David Shepardson, *US DOJ Says It Has Made Substantial Progress toward Final Boeing Plea Agreement*, REUTERS (Jul. 19, 2024, at 2:41 AM), https://www.reuters.com/business/aerospace-defense/us-doj-says-it-has-made-substantial-progress-toward-final-boeing-plea-agreement-2024-07-18/.
[67] Office of the Comptroller of the Currency, *Fact Sheet: OCC Cease and Desist Order and Civil Money Penalty against TD Bank N.A. and TD Bank USA, N.A.* (Feb. 28, 2024), https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-21a.pdf.
[68] *See, e.g.*, Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 216 (2010) (calling the doctrine "a toothless tiger").
[69] *See generally* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013 (2019) (providing a comprehensive overview of *Caremark* claims up until 2019).
[70] Shapira, *New* Caremark *Era, supra* note 15, at 1859.
[71] *Id*. at 1860.

committees,[72] and for not having a schedule "to consider on a regular basis, such as quarterly or biannually, any key food safety risks."[73] *Chou* faulted the board of a pharmaceutical giant for not having a "committee specifically designated to oversee compliance with FDA rules and regulations."[74] And *Boeing* lamented that that none of the board committees "were specifically tasked with overseeing airplane safety."[75] Some judicial decisions even delved into the number of minutes that the board dedicated to specific compliance issues. *Boeing* faulted the board for allocating more minutes to discussing public relations moves than to discussing consumer safety after the first crash.[76] And *Hughes* criticized the audit committee for meeting only sporadically and allocating only five minutes to discussing reporting requirements.[77]

Such criticisms of how boards allocate time and responsibilities are not lost on directors. Indeed, a careful examination of the memos that law firms sent to their director clients reveals just how much the recent string of oversight duty cases affected the norms of board agenda-setting.[78] We analyzed all law firm memos appearing on the prominent Harvard Corporate Governance Forum that mention "*Caremark*,"[79] specifically looking for what practical advice law firms relay to their director clients. We found that after each one of the recent judicial decisions, the legal advisors to corporate boards sent memos to their clients, nudging them to institute new committees, schedule regular compliance reports to the board, and expand the board's remit to include new oversight issues.[80] Directors who listen to their legal advisors have by now added new

[72] Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019).
[73] *Id*.
[74] Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, 2020 WL 5028065, at *31 (Del. Ch. Aug. 24, 2020).
[75] *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *72–75 (Del. Ch. Sept. 7, 2021).
[76] *Id*; Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law,* 48 J. CORP L. 121, 123 (2022).
[77] Hughes v. Hu, 2020 WL 1987029, at *14 (Del. Ch. Apr. 27, 2020).
[78] *See generally* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (on the importance of law firm memos in effecting change in corporate behavior).
[79] Oversight duties are often dubbed *Caremark* duties, after Delaware's leading precedent.
[80] *See, e.g.*, Gail Weinstein et al., *Caremark Liability for Regulatory Compliance Oversight*, HARV. L. SCH. F. CORP. GOVERNANCE (Jul. 8, 2019), https://corpgov.law.harvard.edu/2019/07/08/caremark-liability-for-regulatory-compliance-oversight/ (recommending that boards institute a compliance committee, and ensure regular compliance reporting to the full board).

regular items to their agenda: product safety,[81] AI,[82] cybersecurity,[83] climate change,[84] and many more.[85]

In summary, a regulatory approach that emphasizes board involvement and a resurgence of oversight duty litigation are exerting constant pressure on boards to dedicate more time to existing items and add many new items to their agendas.

2. Increasing Market Expectations

Aside from facing increased legal requirements, companies are also facing increased social and market demands to treat their stakeholders and the environment better.[86] Even if neglecting these ESG issues is not punishable by law, companies that neglect them risk significant financial and reputational fallouts.[87] In other words, the nature of demands to treat workers or the environment better has gradually shifted from a "nice-to-have," corporate philanthropy category to a "central risk" category.[88] The upshot for our purposes

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[81] Cynthia Mabry et al., *Revisiting the Board's Oversight Role after In re: Boeing Co.*, HARV. L. SCH. F. CORP. GOVERNANCE (Jun. 1, 2022), https://corpgov.law.harvard.edu/2022/06/01/revisiting-the-boards-oversight-role-after-in-re-boeing-co/.

[82] Avi Gesser, Bill Regner, & Anna Gressel, *AI Oversight Is Becoming a Board Issue*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 26, 2022), https://corpgov.law.harvard.edu/2022/04/26/ai-oversight-is-becoming-a-board-issue/ (calling on boards to have AI as a "periodic agenda item").

[83] Gregory A. Markel et al., *A Director's Duty of Oversight after Marchand in "Caremark" Case*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 23, 2022), https://corpgov.law.harvard.edu/2022/01/23/a-directors-duty-of-oversight-after-marchand-in-caremark-case/ (underscoring just how important it is that boards include cybersecurity in regular reports to the full board).

[84] William Savitt et al., *Carbon, Caremark, and Corporate Governance*, HARV. L. SCH. F. CORP. GOVERNANCE (May 30, 2021), https://corpgov.law.harvard.edu/2021/05/30/carbon-caremark-and-corporate-governance/.

[85] Shaun Mathew & Daniel Wolf, *Ten Questions for Board Chairs Preparing for Activism and Hostile Takeovers*, HARV. L. SCH. F. CORP. GOVERNANCE (Jun. 19, 2023), https://corpgov.law.harvard.edu/2023/06/19/ten-questions-for-board-chairs-preparing-for-activism-and-hostile-takeovers/ (advising boards to discuss with management when and how the company should take a stand on thorny political issues).

[86] Lin, *supra* note 10, at 1546; Michal Barzuza, Quinn Curtis, & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers,* 28 STAN. J.L. BUS. & FIN. 255, 258 (2023) (attributing the shift in institutional investors' behavior to their need to cater to millennial investors);*See also* Kasey Wang, *Why Institutional Investors Support ESG Issues,* 22 U.C. DAVIS BUS. L.J. 129 (2021) (providing a typology).

[87] *See* Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 734–35 (2022) (compiling references); *see generally* Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (2020) (documenting how investors pressure companies to behave better on various ESG issues).

[88] *See* Allison Herren Lee, SEC Comm'r, *Keynote Address at the 2021 Society for Corporate Governance National Conference* (Jun. 28, 2021), https://www.sec.gov/news/speech/lee-climate-esg-board-of-directors ("[E]nvironmental and social issues, once perhaps treated as more peripheral, are now central business considerations").

is that issues that in the not-so-distant past never came close to board agendas are now appearing regularly on them.[89]

Importantly, and just like regulators, market actors do not simply demand that companies meet ESG demands; they demand that boards be actively involved and be held accountable when their company fails to meet such demands.[90] Indeed, the largest institutional investors showed a willingness to vote against directors who do not dedicate enough attention to ESG concerns.[91] Voting guidelines for faith-based investors call on shareholders to vote against the chair of the board if the company fails to take meaningful steps to reduce its greenhouse gas emissions.[92] And large law firms nudge their director clients to institute special ESG committees, and to dedicate time at the full board meeting to "regularly discuss ESG as a component of the company's long-term strategy and risk management."[93]

Recent studies suggest that these pressures have succeeded, in the sense that ESG considerations now feature prominently in all types of board work.[94] When boards engage with shareholders, ESG concerns are the top item on the agenda.[95] When boards split into committees, more and more of these committees now explicitly commit to dedicate time to ESG.[96] And when boards design executive pay packages, they increasingly incorporate ESG targets.[97]

One could challenge our argument that ESG pressures have added a plethora of responsibilities to boards, by invoking the anti-ESG backlash and

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[89] *See, e.g.*, Ernest Lim, *Fiduciary Duty and Corporate Externalities: Rethinking Directors' Climate Obligations* 6 (ECGI Working Paper No. 842/2025), https://ssrn.com/abstract=5250589 (noting that climate has by now become an integral part of board decision-making processes); Katie LaVoy, *A Board's Guide to Oversight of ESG*, HARV. L. SCH. F. CORP. GOVERNANCE (Jul. 22, 2022), https://corpgov.law.harvard.edu/2022/07/22/a-boards-guide-to-oversight-of-esg/ ("boards are stepping up their engagement on climate and ESG related risks and opportunities").

[90] In the words of interviewee #1: "You have an increasing amount of time spent on environmental needs, not only to satisfy whatever's coming down the pipe from [regulators in] the EU or the US or Australia or Canada… but [also from] employees, customers and partners of the company looking for [you] to be able to make certain certifications and representations." *Cf.* Asaf Eckstein, *The Virtue of Common Ownership in an Era of Corporate Compliance*, 105 IOWA L. REV. 507, 512-13 & n. 19, 565-6 (2020) (showing how the largest institutional investors readily vote against the reelection of directors when boards fail to deal with material risks); Asaf Eckstein, *The Rise of Corporate Guidelines in the United States, 2005-2021: Theory and Evidence*, 98 IND. L.J. 921, 959, 972-3 (2023) (documenting how boards continuously engage with institutional investors' voting guidelines).

[91] *See* Gregory, Board Oversight, *supra* note 16.

[92] Miazad, *supra* note 16, at 11.

[93] LaVoy, *supra* note 89.

[94] *See* Lee Ballin, Maureen Bujno & Kristen Sullivan, *Board Governance Structures & ESG,* HARV. L. SCH. F. CORP. GOVERNANCE (Feb. 15, 2023), https://corpgov.law.harvard.edu/2023/02/15/board-governance-structures-and-esg/ (noting that ESG issues are now clogging the board's agenda).

[95] Fairfax, *Committee Charters*, *supra* note 33, at 391 (noting that ESG has become the number one topic that shareholders want to hear about from the board in their engagements).

[96] *Id.* (finding that many companies have revised their committee charters to explicitly assign responsibility for ESG concerns).

[97] *Cf.* Adam B. Badawi & Robert P. Bartlett, *ESG Overperformance? Assessing the Use of ESG Targets in Executive Compensation Plans* (Stan. L. & Econ. Working Paper No. 592/2024), https://ssrn.com/abstract=4941016 (showing evidence suggestive of opportunities for manipulation in ESG-based pay).

cosmetic ESG concerns. The first counterargument is that ESG pressures have subsided over the past couple of years, due to backlash from certain investors and parts of the government.[98] The anti-ESG backlash has allowed companies to revert to their old ways of ignoring these environmental and human rights concerns, or so the counterargument goes.[99] The factual assertion of this counterargument is correct: many high-profile companies have recently rolled back their DEI programs and climate change initiatives.[100]

However, the backlash counterargument misses an important distinction between the company level and the board level. In the context of board capacity, the anti-ESG backlash has not reduced (and in some cases, has even increased) the burden on the board.[101] When certain groups of shareholders submit growing amounts of ESG-oriented proposals,[102] while others submit growing amounts of anti-ESG proposals,[103] the board must consider both types of proposals and navigate in stormy "damned if you do, damned if you do not" waters.[104] Wading into these waters takes a toll on boards' time and sometimes creates internal tensions. To illustrate, recently a director of Werner Enterprises resigned from the board, citing disagreements over the board's changing approach to ESG.[105]

The second counterargument is that ESG pressures are inconsequential, in that boards address them cosmetically, without effecting real change in corporate behavior.[106] But here as well, the important question for our purposes is not how the company ultimately behaves on issue X but rather whether the board dedicates time to issue X. Even if directors engage in issue X halfheartedly, the fact that they regularly dedicate time in the full board meeting to issue X and rewrite committee charters to assign responsibility for issue X

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[98] *See, e.g.*, Taylor Nchako & Lisa Benjamin, *ESG Backlash in the United States – Investor Concerns or "Red Scare"?*, 5 J. L & POL. ECON. 268 (2025) (providing a comprehensive account of the anti-ESG backlash).
[99] *Id*.
[100] *See* William J. Moon, *Havens for Corporate Lawbreaking*, 103 WASH. U. L. REV. (forthcoming), https://ssrn.com/abstract=5148347 (compiling examples).
[101] For the practitioners' view on how the anti-ESG backlash creates more work for boards *see, e.g.*, Heidi Welsh, *Anti-ESG Shareholder Proposals in 2023,* HARV. L. SCH. F. CORP. GOVERNANCE (Jun. 1, 2023), https://corpgov.law.harvard.edu/2023/06/01/anti-esg-shareholder-proposals-in-2023/; Joseph Pisani & Chip Cutter, *The Activist Pushing Companies to Ditch Their Diversity Policies,* WALL ST. J. (Aug. 3, 2024), https://www.wsj.com/business/the-activist-pushing-companies-to-ditch-their-diversity-policies-aeb82873; Siladitya Ray, *Walmart Rolls Back DEI Policies amid Conservative Backlash,* FORBES (Nov. 26, 2024), https://www.forbes.com/sites/siladityaray/2024/11/26/walmart-is-the-latest-major-company-to-roll-back-dei-policies-amid-conservative-backlash/.
[102] *See The Expansion of ESG Beyond Proxy Voting,* GLASS LEWIS (Jun. 4, 2024), https://www.glasslewis.com/the-expansion-of-esg-beyond-proxy-voting/; Wang, *supra* note 86, at 132.
[103] Welsh, *supra* note 101.
[104] *See* Andrew Ross Sorkin, *Dealbook: Profits of Doom*, N.Y. Times (Jun. 17, 2025) (noting that even when anti-ESG proposals fail, they still "ratchet up pressures on boards").
[105] WERNER ENTERS. INC., FORM 8-K CURRENT REPORT (2024), https://www.sec.gov/Archives/edgar/data/793074/000079307424000016/wern-20240227.htm; Letter from Vikram Mansharamani to Derek Leathers, CEO and Chairman of the Board, Werner Enterprises (Feb. 27, 2024), https://www.sec.gov/Archives/edgar/data/793074/000079307424000016/wern-8k20240227_exhibit1.htm.
[106] *See, e.g.*, Bebchuk & Tallarita, *supra* note 31, at 99.

means that they will have less time and attention for other issues. A performative ritual of cosmetic compliance still takes time to perform.

Relatedly, boards these days must constantly deal with *geopolitical upheaval and polarization*.[107] At the national level, boards are asked to decide when and how the company should take a stand on burning social issues.[108] In fact, prominent corporate governance scholars have advocated for *mandated* board involvement in corporate political speech.[109] At the global level, political tensions push boards of manufacturing companies to constantly reevaluate supply chain contingencies.[110] Indeed, among those companies listed in the Russell 3000 Index that disclosed how they handle geopolitical risks, a large majority reported that their board is the organ assuming responsibility for such risks.[111] And board advisory firms are now nudging their director clients to establish a "trade risk committee" and to make the evaluation of trade environments a recurring agenda item at full board meetings.[112]

Yet another vector that contributes to the load on the board is *technological disruption*.[113] Boards have long been required to consider how changes in the surrounding technological and economic ecosystem affect their company's business model. What is new these days is just how frequent and severe these technological disruptions are. The most vivid example may be the generative AI revolution, which is currently forcing many companies to execute transformations of their entire business model, and is creating new risks of irresponsible use.[114] These types of decisions and risks are simply too high-stakes to take without board-level advice and monitoring.[115] And once such decisions and risks make it to the board agenda, they occupy a lot of space: because of the emerging and unfamiliar nature of these risks, boards typically invite managers and outside experts to share their views, which in turn increases

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[107] For a book-length recent account *see* MATTEO GATTI, CORPORATE POWER AND THE POLITICS OF CHANGES (2025).

[108] *See* Oord & Sikora, *supra* note 9.

[109] *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech, Who Decides?*, 124 HARV. L. REV. 83, 102 (2010). *Compare* Jill E. Fisch & Jeff Schwartz, *How Did Corporations Get Stuck in Politics and Can They Escape?*, 3 U. CHI. BUS. L. REV. 325, 355 (2024) (arguing that boards should sign an "anti-political posturing pledge," thereby committing to staying out of politics).

[110] *See, e.g.*, Curtis J. Milhaupt, *Corporate Governance in an Era of Geoeconomics* 15 (ECGI Working Paper No. 790/2024), https://ssrn.com/abstract=4888623 (highlighting "the magnitude of the task facing corporations in building supply chain resilience" and discussing implications for director liability and board composition); Oord & Sikora, *supra* note 9 (noting that geopolitical disorder and protectionism considerations bring supply chain disruptions to the top of corporate board agendas).

[111] Milhaupt, *id*. at Tbl. 1. *See also* Arjun Neil Alim et al., *Companies on the Hunt for Geopolitical Advice as Tensions Rise*, FIN. TIMES (Oct. 17, 2023), https://www.ft.com/content/608a43e2-710c-4918-84d6-e0d75511918e (reporting that global companies are now looking to add directors with expertise in geopolitics).

[112] *See* Snežana Gebauer*, Tariffs, Turbulence And The Strategic Role Of The Board,* CORPORATE BOARD MEMBER, https://boardmember.com/tariffs-turbulence-and-the-strategic-role-of-the-board/ (last visited Jul. 23, 2025).

[113] Oord & Sikora, *supra* note 9.

[114] *Id*.

[115] In the words of interviewee #8: "these questions are about firm strategy [and so] they go up to the board."

the strain on the board's time and attention.[116] Several institutional investors have already pledged to oppose the reelection of directors whose companies fail to adequately oversee AI risks.[117] The upshot, here as well, is that directors feel obligated to dedicate scarce agenda slots to these issues.

By now, every reader can do the math: there are simply too many issues for boards to fit into their agenda. Directors must discuss cybersecurity. And geopolitics. And AI bias. And climate change. And product safety. Not to mention strategy, executive pay, succession plans, the accuracy of financial reporting, and so on. And they must delve deep into of *all* these issues, sometimes within a single meeting.

It is therefore unsurprising that in survey-based studies, many directors admit to being overwhelmed, and even "paralyzed," by the scope and complexity of their newfound social and market duties (not to mention their legal duties).[118]

B. *Fixed Capacity*

The previous Section showed that the demand for corporate boards' time and attention has greatly increased. This Section examines whether the supply of boards' time and attention has increased concomitantly. The short answer is no.[119]

We focused on two well-accepted proxies for measuring board capacity, namely, the number of board members and the frequency of board meetings.[120] The link between board capacity and board size is straightforward: the more members on the board, the bigger the pool of resources that the board can draw from to provide advice and monitor the barrage of new responsibilities. The link between board capacity and frequency of board meetings is even more straightforward: the more meetings held, the more time the boards have to delve into each task. If a board in 2025 faces double the number of tasks that its predecessors did, the 2025 board can simply double the number of meetings it conducts, thereby keeping the time a board dedicates to each task constant, or so the thinking goes.

To gather evidence on changes in board size and meeting frequency, we scoured the databases of board advisory firms, which annually survey board

[116] Oord & Sikora, *supra* note 9 (providing evidence from a directors' survey).
[117] Dominic Webb, *US Pension Funds to Target Directors over AI Oversight Failings*, RESPONSIBLE INVESTOR (Apr. 7, 2025), https://www.responsible-investor.com/us-pension-funds-to-target-directors-over-ai-oversight-failings/.
[118] *See* HEIDRICK & STRUGGLES, CHANGING THE CLIMATE IN THE BOARDROOM 5, 24 (2021).
[119] In the concise words of interviewee #1: "The number of things you need to cover has grown. The board meeting time hasn't grown as much." *See* interview #1 at the Appendix *infra*.
[120] *See, e.g.*, Renee B. Adams et al., *Death by Committee? An Analysis of Corporate Board Committees*, 141 J. FIN. ECON. 1119, 1121 (2021) ("Meetings of the board are the best available proxy for the time directors spend communicating"). These two factors were also suggested by our interviewees as the most natural candidates for expanding board capacity. *See, e.g.*, interview #1 at the Appendix.

characteristics. We then supplemented these secondary sources by hand-collecting data from the proxy materials of large companies.[121] And to provide context on the raw numbers, we asked our interviewees to explain the observed patterns.

What we found was conclusive: both board size and meeting frequency have remained remarkably stable over the decades. Consider board size first. Among S&P 500 companies, the average size of the board has remained fixed at 10.7–10.8 members for decades, and the median fixed at 11.[122] Among Russell 3000 companies (smaller cap), the average board size has similarly remained fixed at 10.3, and the median at 10.[123]

When practitioners are asked to explain why board size has remained so remarkably stable, they allude to entrenched norms and expectations in the investor community. Corporate insiders, institutional investors, and proxy advisory firms view deviations from the 8–10 members range as suspect.[124] Indeed, theoretical and empirical studies have long found that the link between board size and board effectiveness follows an inverted U-shaped curve: very small or very large boards correlate with weaker firm performance.[125] As a result, companies and their investors are wary of addressing the increased overload by adding board members. What about adding board *meetings*, then? On paper, tweaking the frequency of meetings seems easier than tweaking board size. But here as well, the historical evidence shows little change.[126] As of 2024, boards met on average 7.7 times a year,[127] a slight *decrease* from the eight meetings a year their predecessors conducted twenty years ago.[128]

When asked to explain why the increased workload did not make boards meet more frequently, practitioners suggest that these days (1) more board work is done in board committees, and (2) more board work is done between formal

[121] The SEC demands that each company disclose the name, membership, purpose, and number of meetings for boards and their committees. 17 C.F.R §240.14a-101 item 22(b)(14), §240.14a-9 item (a).

[122] *See, e.g.*, SPENCER STUART, 2015 SPENCER STUART BOARD INDEX 10 https://www.spencerstuart.com/~/media/pdf%20files%E2%80%8C/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf (reporting that the average board size in 2015 was 10.8); SPENCER STUART, 2020 SPENCER STUART BOARD INDEX 6, https://www.spencerstuart.com/-/media/2020/december/ssbi2020/2020_us_spencer_stuart_board_index.pdf (average board size in 2020 was 10.7); SPENCER STUART 2024, *supra* note 8, at 13 (average board size in 2024 was 10.8). The variation around this average is limited: roughly 77% of boards have between 9-12 members. *Id*. at 42.

[123] Sikora, *supra* note 8.

[124] *See, e.g.,* Joann S. Lublin, *Smaller Boards Get Bigger Returns*, WALL ST. J. (Aug. 26, 2014), https://www.wsj.com/articles/smaller-boards-get-bigger-returns-1409078628 (relaying the conventional wisdom).

[125] *See, e.g.*, David Yermack, *Higher Market Valuation of Companies with a Smaller Board of Directors,* 40 J. FIN. ECON. 185, 185 (1996) (providing empirical evidence).

[126] SPENCER STUART 2024, *supra* note 8, at 11 (reporting that the average number of board meetings in 2024 was 7.7, which is a slight decrease from the 8.1 average that was recorded a decade ago, while the median number of meetings has remained fixed at 7 throughout the years).

[127] *Id*.

[128] SPENCER STUART 2015, *supra* note 122, at 6. As for variation around this average, most boards (51%) conduct between 6-9 meetings. *See* SPENCER STUART 2024, *supra* note 8, at 36.

meetings.[129] In other words, the argument is that boards deal with increased responsibilities not in their formal full board meetings, but rather between meetings. Upon closer inspection, we find this argument wanting.

Consider first the argument about dealing with new responsibilities via more work at the committee level. This argument has an intuitive appeal. It has long been the case that a significant part of board activity takes place at committee meetings rather than at full board meetings.[130] Therefore, when one evaluates changes in board capacity over time, one must look not just at the frequency of full board meetings but also at the frequency of committee meetings.

Yet when examining the number of committee meetings, we found little change over time.[131] In fact, in 2024, the frequency of committee meetings slightly decreased compared to five and ten years ago.[132] The numbers therefore do not support the assumption that board committees meet more frequently so that they can effectively deal with ever-increasing board responsibilities. If the board delegates new responsibilities to one of its committees, that committee will dedicate less time and attention to its preexisting responsibilities, simply because the amount of time that committees spend together has remained fixed.

To illustrate this with concrete examples, we investigated companies that explicitly added ESG responsibilities to their committee charters. Lisa Fairfax has recently identified several such companies.[133] For example, Fairfax notes that Amazon added "ESG oversight" to its nominating committee.[134] We scoured Amazon's proxy materials over time and discerned that this change in responsibilities happened in 2018.[135] We then examined the number of meetings for the nominating committee before and after the addition of ESG

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[129] *Board Leadership and Structure: Press Release,* THE CONFERENCE BOARD (Dec. 7, 2023), https://www.conference-board.org/press/board-leadership-and-structure-2023; *see* interview #1 (noting that the issues that did not make it to the board agenda were often addressed "on the sidelines of meetings," such as in one-on-one conversations between a director and a member of the management team); interview #5 (suggesting that when boards need more time to deal with burning issues, they increase their informal meeting time, which is not captured in the publicized data on formal board meetings); interview #8 (noting same); interview #7 (noting that she participates these days in more "out of cycle" meetings); interview #5 ("in one of my boards we were meeting for dinner four times just in the last two months").

[130] *See, e.g.*, Adams et al., *supra* note 120 (finding that 52% of board activity of S&P 1500 companies takes place at the committee level).

[131] SPENCER STUART 2024, *supra* note 8, at 11. To generalize: in a company where the board meets eight times per year, each committee meets on average five times. Megan Pantelides, *The State of Board Effectiveness in 2025,* BOARD INTELLIGENCE (2025), https://www.boardintelligence.com/blog/the-state-of-board-effectiveness-in-2025?_ug. To be more granular, the audit committee typically meets more (usually around eight times) than the compensation and governance committees (around four times). *Id*.

[132] SPENCER STUART 2024, *id.*

[133] Fairfax, *Committee Charters*, *supra* note 33.

[134] *Id*. at 376.

[135] The 2019 and 2020 Amazon proxy statements reveal that the committee did not exist in 2018 but did exist in 2019. *See* AMAZON, 2019 PROXY STATEMENT 9 (Apr. 11, 2019), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/d5c9cdfa-ef4f-4b18-beb4-14fadf706099.pdf; AMAZON, 2020 PROXY STATEMENT 18 (Apr. 16, 2020), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/ac352482-ce29-49bf-896d-11b0478a032f.pdf.

responsibilities. We found that the committee met four times a year before the change, and that it meets four times a year now.[136] Nothing changed. Similarly, Lockheed Martin incorporated ESG oversight into its governance committee in 2018.[137] But the number of meetings before and after 2018 has remained fixed at four.[138] To reiterate, our point is not that these committees never deliberated ESG oversight. In fact, we believe that they did. Our point is that dedicating time to new responsibilities inevitably came at the expense of preexisting ones.

We then examined the possibility that boards increase their capacity by adding new committees. For some background, large companies typically have three "required" committees,[139] namely, Audit,[140] Governance,[141] and Compensation.[142] But some boards add nonrequired committees, designated to focus on specific issues of relevance to the company in question, such as a technology committee. Is it possible that companies have been adding more and more nonrequired committees to deal with mounting board responsibilities?[143]

To test this hypothesis, we conducted the following deep dive. We examined the 2024 proxy statements of all S&P 500 companies to find out which companies added nonrequired committees. For the companies that added such committees, we then went back and reviewed their proxy statements in previous years, to find out when exactly a given committee was established. We found that nowadays 14.9% of S&P 500 companies have a technology

[136] In the year following its establishment, the committee held 5 meetings. This number went back down to 4 the next year, and so it remains today. *See* AMAZON, 2018 PROXY STATEMENT 8 (Apr. 19, 2018), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/b1885048-5c22-465e-8130-06a2744a02d3.pdf; AMAZON 2020 PROXY STATEMENT, *id.* at 14; AMAZON, 2021 PROXY STATEMENT 15 (Apr. 15, 2021), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/2975fdf9-395e-44aa-93e6-1568f701b4b8.pdf; AMAZON, 2025 PROXY STATEMENT 21 (Apr. 10, 2025), https://s2.q4cdn.com/299287126/files/doc_financials/2025/ar/Amazon-2025-Proxy-Statement.pdf.

[137] LOCKHEED MARTIN, 2019 PROXY STATEMENT 5 (Mar. 15, 2019), https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/annual-reports/2019-proxy-statement.pdf.

[138] *See* LOCKHEED MARTIN, 2017 PROXY STATEMENT 20 (Mar. 17, 2017), https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/annual-reports/2017-proxy-statement.pdf; LOCKHEED MARTIN, 2018 PROXY STATEMENT 15 (Mar. 16, 2018), https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/annual-reports/2018-proxy-statement.pdf; *Id.* at 18; LOCKHEED MARTIN, 2020 PROXY STATEMENT 23 (Mar. 11, 2020), https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/annual-reports/2020-proxy-statement.pdf.

[139] Establishing audit committees is required by the Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 301, 2002 U.S.C.C.A.N. (116 Stat.) at 775–77 (codified at 15 U.S.C. § 78j1(m)). Establishing compensation committees is required by NYSE Listed Company Manual §303A.05 and Nasdaq Rule §5605(d). Establishing governance committees is required by NYSE Listed Company Manual §303A.04 and Nasdaq Rule §5605(e).

[140] Audit committees are generally responsible for financial oversight, internal controls, risk management, external auditors, and compliance.

[141] Governance committees are typically responsible for board composition, corporate governance practices, board performance, and succession planning.

[142] Compensation committees are typically responsible for executive compensation and incentive plans.

[143] *Cf.* John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance,* 104 MINN. L. REV. 1191, 1201 (2020) (noting that designated nonrequired committees may lead to more focused oversight than assigning responsibilities to existing required committees).

committee, 12.9% have an ESG committee,[144] and 2.4% have a cybersecurity committee. Almost all of them were established during the past decade. This tells us that the overwhelming majority of companies do not alleviate board overload by adding committees. If 12.9% of companies have a dedicated ESG committee, this means that 87.1% of companies deal with the barrage of new ESG responsibilities via the packed full-board agenda, or via the packed agendas of existing committees. This is consistent with existing surveys of board governance, which suggest that for the past eight years the average number of committees has remained relatively stable.[145]

Another way to illustrate that the budding trend of adding new committees is just a drop in the bucket (when it comes to increasing board capacity) is to examine the average number of all board and committee meetings. We did this manually for each of the twenty-four largest companies of the S&P 500, and found that the overall number of meetings slightly *declined*, from around 38 board and committee meetings in 2015, to around 35 such meetings in 2023.[146] This suggests that (1) the number of new committees is too small to increase the average of total meetings, and (2) certain companies actually may have *reduced* the number of board or preexisting committee meetings to clear room in the schedule for new committee meetings.

The evidence therefore does not support the argument that boards solve the overload problem by adding many specialist committees.

Let us now examine the second argument, namely, that boards address new responsibilities by conducting more informal calls between meetings. We do not have statistical evidence about the frequency of informal communications (we suspect no one does), so we cannot corroborate the factual assertion here. But even if we assume that it is true—that is, assume that directors communicate informally much more frequently these days—the nature of such communications makes us skeptical that they can solve the overload problem. Informal calls can help in some respects, such as smoothing out the information flow. With more calls between meetings directors can arrive better prepared to deal with packed agendas in formal meetings. Yet informal calls cannot relieve the main bottleneck, which is agenda slots in formal meetings. No board decisions are being made in these informal calls. Nor are minutes being taken. As a result, an informal meeting cannot obviate the need to address a given issue in the regularly scheduled meetings.[147] In the words of

[144] Different companies give different names to committees that handle ESG issues. For our purposes, we unified all committees whose charters defined their responsibilities as contending with environmental risks and social issues under the umbrella term "ESG committee."
[145] SPENCER STUART 2024, *supra* note 8, at 43.
[146] The exact numbers were 34.92 in 2023 and 37.79 in 2015. Both these numbers represent a slight increase from the total number of meetings in 2005, which stood at 32.75.
[147] One could claim that if directors hammer out key details in informal calls between meetings, this will create more room on the board agenda in formal meetings, because they will be able to dedicate less time to each item. But an approach that emphasizes informal meetings comes with negative ramifications for the

one of our interviewees, "What you sacrifice with [the approach of handling issues in informal conversations between meetings] is the fulsome conversation where you have … eight of my fellow directors marinate and think about [an issue]."[148]

When we combine the evidence from Section A with the evidence in the current Section, we observe a clear asymmetry: while the scope and complexity of board obligations have skyrocketed, board capacity to deal with these obligations has remained relatively fixed. The upshot is board overload. The question then becomes how such overload affects board effectiveness.

II. THE CONSEQUENCES OF BOARD OVERLOAD

Board overload creates two effects: one at the individual director level and one at the group level. For individual directors, the biggest problem with the current situation is *information overload*. Section A describes how a director of a large company is asked to read hundreds of pages of dense pre-meeting materials each month,[149] and to provide deep insight into widely different and complex topics such as AI, cybersecurity, and geopolitics. Such obligations can overwhelm even the smartest, hardest-working director. And when a director is overwhelmed, he or she is susceptible to adopting suboptimal decision-making strategies (such as relying on heuristics and not considering alternatives), and to becoming less motivated to invest in learning new topics.

Yet the information overload problem may not be the most pressing issue. Say that a given board has managed to ameliorate information overload by using AI tools, packaging the pre-meeting materials more effectively, or nominating board members with greater expertise. That board still faces an *agenda overload* problem. In other words, the main problem is that boards these days are forced to triage many critical issues. Even if each individual director reads up on and comprehends every specific task, they will not have time to meaningfully discuss these tasks together at the full board level. Certain tasks will inevitably receive little to no board attention. Section B highlights the vectors that prevent boards from prioritizing among their tasks in a socially optimal way. Some tasks are legally mandated, more salient, or more politically palatable than others. When influential stakeholders or regulators are watching them, boards are less willing to deprioritize these tasks, even if doing so would improve board effectiveness. Agenda overload also pushes boards to over-delegate responsibilities to third-party advisors, and to over-rely on the opinions of perceived experts. As a result, critical issues receive less board attention than intended.

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transparency and accountability of board work. For example, one study shows that directors who implement governance reforms and ask tough questions are not invited to informal meetings. James D. Westphal & Poonham Khanna, *Keeping Directors in Line: Social Distancing as a Control Mechanism in the Corporate Elite*, 48 ADMIN. SCI. Q. 361 (2003).

[148] *See* interview #1.

[149] *See* Pantelides, *supra* note 131; interview #3.

A. *Information Overload*

A barrage of new responsibilities increases the cognitive load on individual directors.[150] At some point, increased cognitive load is likely to reduce the ability and willingness of individual directors to provide high-quality advice and monitoring, for the following reasons.[151]

When individuals feel overwhelmed by information, they tend to over-rely on heuristics and employ simplifying shortcuts.[152] In our context, being bombarded with information and considerations may make directors ignore relevant considerations, and fail to actively question the CEO's decisions and look for explanations beyond those that were provided to them.[153]

Indeed, the theme of lacking the ability to process all information (and consequently relying on partial information) resurfaces often in director surveys.[154] One practitioner-based study found that a director of a large company receives around 600 pages of dense pre-meeting reading material (the size of pre-meeting "board packs" has been steadily increasing in recent years).[155] The same study suggested that directors spend three to four hours reading these 600-page board packs.[156] Directors are typically smart and hardworking, but they are not superhuman. As a result, it is highly unlikely that directors manage to properly evaluate all of this necessary information prior to board meetings.[157] In the words of one experienced director, "It's incredibly frustrating as a board member when you receive 1,200 pages to read over the weekend and, as a result, you can't see the wood for the trees. By the time you've got through all of that, you realise you're missing the big picture."[158]

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[150] While there is a debate in the psychology literature on the exact limits of information overload, "there is a consensus that they are quite modest." OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATORY DISCLOSURE 102 (2014).

[151] *See generally* Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 19 (2002) (linking the literature on bounded rationality to corporate governance).

[152] *See* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417, 490 (2003) (compiling references).

[153] *See, e.g.*, Marilieke Engbers et al., *Unsaid Known in the Boardroom: Theorizing Unspoken Assessments of Behavioral Board Dynamics*, 9 FRONT. COMM. 1347271 (2024) (noting that under time and information-processing pressures, directors tend to compress or omit their contributions). *See also* Steven Boivie et al., *Are Boards Designed to Fail? The Implausibility of Effective Board Monitoring*, 10 ACAD. MGMT. ANNALS 319, 333 (2016) (compiling references for how strategic decision-making is particularly subject to cognitive biases); Nicola Sharpe, *Informational Autonomy in the Boardroom*, 2013 U. ILL. L. REV. 1089, 1119 (2013).

[154] *See also* Kobi Kastiel & Yaron Nili, *"Captured Boards": The Rise of "Super Director" and the Case for a Board Suite*, 2017 WIS. L. REV. 19, 28.

[155] "Board packs" refer to the pre-meeting materials that are shared with directors ahead of meetings. These packs contain information on the range of topics relevant to the agenda, and the idea is that directors will review them when preparing for the upcoming meeting. *See* Pantelides, *supra* note 131. Our interviewees mentioned, anecdotally, an even bigger load of pre-meeting materials: interviewee #8, for example, relayed that a director of a relatively small S&P500 company must read 800 pages before each meeting.

[156] *Id.*

[157] *Id*; interview #3.

[158] *See* Scarlett Brown, *Conversation with Sir John Manzoni*, BOARD INTELLIGENCE, https://www.boardintelligence.com/blog/in-conversation-with-sir-john-manzoni (last visited Jul. 23, 2025).

We would add that in today's environment, the problem is not just that directors confront "an indigestible overload of information,"[159] but that they confront different topics in quick succession. It is one thing to deal with a barrage of details on one complex issue, and another to rapidly switch between different complex issues.[160] Switching between varying topics amplifies the cognitive load, making it harder for directors to consistently ask the right questions, process the answers, and anticipate future problems.[161]

Aside from hurting the quality of individuals' decision-making strategies, information overload can also hurt individuals' *motivation*. For some directors, the overload brings such exhaustion and fatigue that it leads to burnout and resignations.[162] For the directors who remain in their position, information overload provides a readymade excuse for them to slack off. Directors, like the rest of us, tend to "keep tabs" on their contributions to the group.[163] When a director is overwhelmed and feels that she has meaningfully contributed in one area of board work (say, cybersecurity oversight), she may perceive herself as having done her part, and become less inclined to engage with tasks in other areas.

The ramifications for corporate governance are significant. A practitioner-based survey revealed that in 2024, 57% of director respondents had a hard time recognizing the key messages in their board materials, up from 50% in 2023.[164] Another 42% of the respondents went further by claiming that members of management "were not up-front enough about bad news in their briefing note."[165] The overload thus makes it easier for those managers who do not want directors sniffing around to hide damning information and escape

[159] Ralph D. Ward, SAVING THE CORPORATE BOARD: WHY BOARDS FAIL AND HOW TO FIX THEM 1 (2003).
[160] *See* Iring Koch et al., *Cognitive Structure, Flexibility, and Plasticity in Human Multitasking: An Integrative Review of Dual-Task and Task-Switching Research,* 144 PSYCH. BULLETIN, 557, 557 (2018).
[161] *See* Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877, 893 (2018).
[162] *See* Lila MacLellan, *Board Members are Burned Out and It's Becoming a "Recipe for Disaster,"* YAHOO! FINANCE (Dec. 12, 2023), https://finance.yahoo.com/news/board-members-burned-becoming-recipe-124500626.html (describing director fatigue due to overworking and chronic stress). As an additional empirical check, we reviewed the Item 5.02 8-K filings relating to director resignations from S&P 500 companies over the years 2016–2024, searching for references to overload or related concepts. We found numerous instances where directors cited time constraints as a reason for stepping down. However, we ultimately chose not to include these findings, given the difficulty of ruling out the possibility that "time constraints" served as a diplomatic pretext for other, potentially more contentious reasons, such as personal or substantive disagreements. *See, e.g.*, the Emerson Electric Co. Current Report (Form 8-K) (Dec. 15, 2017), https://www.sec.gov/Archives/edgar/data/32604/000003260417000049/a8-klanguage.htm ("Because of … the time required to effectively serve on the Emerson Board, Mr. Stephenson felt it was best to make room for someone with sufficient time to devote to the position").
[163] *See* Donald C. Hambrick, Vilmos F. Misangyi, & Chuljin A. Park, *The Quad Model for Identifying a Corporate Director's Potential for Effective Monitoring: Toward a New Theory of Board Sufficiency*, 40 ACAD. MGMT. REV. 323, 333 (2015).
[164] *See* Pantelides, *supra* note 131.
[165] *Id.*

accountability.[166] Unfortunately, the overload also makes it harder for managers who *want* to engage with directors to get the latter's undivided attention. In other words, the overload hurts directors' ability to fulfill both their monitoring and advisory roles.

A potential counterargument is that directors are less prone to the perils of information overload than we normal individuals. For one, directors enjoy great expertise in some of the information-heavy tasks at hand. Their expertise allows these directors to quickly determine what to ignore and what to focus on, or so the argument goes. Further, directors are repeat players who are likely to gain valuable experience over time. By the tenth time you read a cybersecurity report, you are bound to process the information more effectively than your first time. Directors also have strong incentives to make good decisions. Unlike individual consumers who do not bother to read the fine print because they feel that it would not matter, directors know that they must do a good job processing complex information if they want to maintain a good labor-market reputation. As a result, directors are more willing to work harder at processing complex information. Perhaps most importantly, directors have resources at their disposal to help them process complex tasks, such as funds for hiring experts. To continue our cybersecurity example, after a director has heard a cybersecurity expert present the gist of a report and answer questions, that director will find it easier to process the next cybersecurity report they receive.

All these factors may alleviate the information overload problem, but they are unlikely to fully resolve it. Expert directors may be able to effectively process more information than we nonexperts, but at some point, they too become overloaded.[167] To illustrate, consider the classic finding of the inverted U-curve of decision-making where having too little information leads to poor decisions, while having too much information can overwhelm the decision-makers and lead to poor decisions too. The quality of decision-making thus improves with more information only up to a point, after which it declines. Applied to expert directors, one may surmise that the curve will begin its downward trend at a higher threshold of information (further along the x-axis), and that the slope will be less steep, but will nevertheless curve downward at some point.[168]

Still, the "directors are well-equipped" counterargument helps us zoom in on the real problem, which is not that directors cannot process complex tasks, but rather that they have finite amounts of time and cognitive resources. An individual director can spend a lot of time and cognitive resources on

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[166] *See* Gavin Hinks, *Board Meetings are not "Up to Scratch,"* BOARD AGENDA (May 20, 2025), https://boardagenda.com/2025/05/20/board-meetings-are-not-up-to-scratch/ (noting that directors are overwhelmed and cannot read through the pre-meeting materials).

[167] *See* James Shanteau, *Competence in Experts: The Role of Task Characteristics*, 53 ORG. BEHAV. & HUM. DECISION PROCESSES, 252, 254 (1992) (noting that experts suffer from the same cognitive limitations as nonexperts).

[168] Paredes, *supra* note 152, at 454–55.

understanding, say, how AI bias affects their company. But that will mean that the director will have less time and cognitive resources to spend on, say, how climate change affects their company. The main constraint is therefore not at the individual task level (how complex the task is), but rather at the aggregate task level (how much time and effort must be dedicated to all of the tasks combined). The emphasis on resource constraints makes even more sense when one shifts the unit of analysis from individual directors to the board as a group. It is to the issue of board overload at the group level that we now turn.

B. Agenda Overload

The biggest challenge that boards face these days is how to triage many issues that are all framed as urgent or legally material. It is not simply that boards must prioritize; they must *heavily* prioritize.[169] The asymmetry between ever-increasing responsibilities and relatively fixed capacity is big and growing. As a result, boards must either ignore certain issues altogether to leave enough room for discussing others, or spread themselves so thin that they nominally discuss all issues without delving deeply into any. The main question then becomes how boards tackle the prioritization challenge.

Unfortunately, there is ample reason to suspect that boards prioritize in a suboptimal manner.[170] They are prone to dedicating too little attention to matters that are critical to their companies and to society, and too much attention to matters that are easily observable and measurable.[171] Not all issues clamoring for room on the board agenda are created equal. Some issues are salient or legally mandated. Others are opaque or intuitively less urgent. When the costs of neglecting issue X are more salient to directors than the costs of neglecting issue Y, directors are likely to dedicate more attention to X than to Y, even if Y is a more critical issue.[172]

Boards thus engage in "defensive agenda-setting": they preemptively add items to their agenda to be able to defend themselves from legal and market scrutiny. Defensive agenda-setting hurts the company's bottom line. It diverts board attention "from the most important items facing the business, the kind that need to be discussed in depth if the board is to add value."[173] Instead of discussing strategic foresight and long-term planning, boards dedicate much of their time to

[169] In the words of one of our interviewees, "I may have 10 issues. I'm going to pick my top three, right? And the other seven either don't get addressed or I'll try to address them, you know, on the sidelines of the meeting." *See* interview #1.

[170] *See, e.g.*, Pantelides, *supra* note 131 ("Cramped agendas are clearly a problem, given constraints on time. But that problem is made worse when agendas include items that should not be there—and the evidence suggests this is a persistent performance blocker for boards"); Oord & Sikora, *supra* note 9 (one-third of director respondents believe that it has become increasingly difficult, over the past five years, to prioritize mission critical issues).

[171] Oord & Sikora, *id*.

[172] *Cf.* BEN-SHAHAR & SCHNEIDER, *supra* note 150, at 101 (noting in general that when people are overwhelmed with information, more salient cues weaken the effects of less salient ones).

[173] *See* Armour et al., *supra* note 143, at 1260; Pantelides, *supra* note 131.

"reports from management and various formalities."[174] Indeed, in one survey of S&P 500 directors, 37% of respondents noted that lack of discussions of strategic direction is the top problem with board effectiveness.[175] In another survey, 43% of respondents said that the board agenda contains far too many backward-looking or operational items.[176] Importantly here, the proportion of directors who think that the board agenda is too "stuck in the weeds" and neglects the big picture has been increasing from year to year, from 71% in 2022 to 80% in 2024.[177]

Defensive agenda-setting can also be detrimental for broader societal concerns. ESG responsibilities such as promoting inclusion or transitioning to a climate-neutral business plan are generally vaguer and more amorphous than traditional responsibilities such as evaluating the accuracy of financial reporting.[178] Assessing ESG performance is thus more difficult not just for those from outside the company but also for those inside it.[179] As a result, board ESG responsibilities may be more prone to deprioritization, regardless of how socially impactful they are.[180]

Aside from the main prioritization problem, agenda overload creates two ancillary problems, namely, over-delegation and authority bias. Overloaded boards are bound to heavily delegate certain responsibilities to third-party advisors.[181] Outside compliance professionals advise boards on how to map critical risks and design reporting systems, conduct internal investigations and report their findings to boards, and even negotiate on behalf of the company with regulators for leniency once wrongdoing has been uncovered.[182] Further, in recent years the role of outside compliance advisors has expanded into ESG issues: boards now regularly hire outside consultants to conduct "racial equity audits" or "labor conditions audits."[183] One could claim that such extensive delegation is an organic, value-enhancing response to overload: delegating responsibilities to outside experts can enhance expertise and reduce liability.

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[174] Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAW. 59, 64 (1992). In one survey of S&P 500 directors, 37% of respondents noted that lack of discussions of strategic direction is the top problem with board effectiveness. Pantelides, *id*.
[175] *See* Stuart S. Crandell et al., *In Search of Growth, From Anywhere,* KORN FERRY (Jan. 9, 2025), https://www.kornferry.com/insights/briefings-for-the-boardroom/in-search-of-growth-from-anywhere.
[176] *See* Pantelides, *supra* note 131.
[177] *Id*.
[178] On the ambiguity of ESG concepts *see, e.g.*, Elizabeth Pollman, *The Making and Meaning of ESG,* 14 HARV. BUS. L. REV. 404, 443 (2024).
[179] *See, e.g*., Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKLEY BUS. L.J., 258, 274–76 (2022).
[180] *See, e.g.*, Daina Mazutis, *Sustainability (Is Not) in the Boardroom: Evidence and Implications of Attentional Voids*, 14 SUSTAINABILITY 8391, 8394 (2022).
[181] Asaf Eckstein & Roy Shapira, *Compliance Gatekeepers*, 41 YALE J. ON REGUL. 469, 473 (2024).
[182] *Id*.
[183] *See, e.g.*, Ron S. Berenblat & Elizabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 30, 2021), https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative.

Yet even if extensive delegation helps individual directors cope with their responsibilities, it is not necessarily optimal for the company's long-term shareholders or for society. An increased reliance on outside advisors comes with at least three sets of costs. First, there are the direct costs of hiring advisors. In an earlier study, two of us documented the significant amounts companies spend these days on outside compliance advisors.[184] Second, for various doctrinal and economic reasons, outside compliance advisors are rarely held accountable for compliance failures.[185] They are relied on to deliver, but when they colossally fail to do so, they nevertheless emerge unscathed.[186] The board overload problem thus breeds a lack-of-accountability problem. Finally, delegation of an issue to outsiders increases the risk that said issue will not receive the board attention it deserves.[187] Outside advisors are hired on an ad-hoc basis. When their engagement is done, no one on the board "owns" the issue or bears the opportunity costs of not monitoring it.[188] As a result, the board "is more likely to fall into complacency" with regard to that issue.[189]

One way to reduce these costs of relying on outside experts is by securing the expertise in-house. Indeed, over the past few years many boards have added members with narrow subject-matter expertise: a cyber director, a climate director, an AI director, and so on.[190] The idea is intuitive: if the board's oversight responsibilities are expanding, expanding the skill sets of board members seems necessary.[191] Appointing, say, a director with expertise in climate change could enhance the board's ability to analyze climate risks and anticipate future developments instead of putting out fires.[192]

However, relying on specialist directors creates its own set of costs. For example, the shift to specialist directors raises the specter of authority bias.[193] "Authority bias" denotes the human tendency to overvalue the ideas and opinions of those we perceive to be of higher authority.[194] When it comes to board effectiveness, authority bias can be extremely damaging.[195] Boards are effective when directors are willing to respectfully ask tough questions and entertain a healthy skepticism toward each other. By contrast, boards are ineffective when directors let one of their colleagues monopolize the discussion and blindly accept

[184] Eckstein & Shapira, *supra* note 181, at 481–82.
[185] *Id*. at 494–97 (highlighting the main doctrinal hurdles, namely, the "in pari delicto" doctrine and the interpretation of "aiding-and-abetting" claims).
[186] *Id*. at 474, 488 (providing examples).
[187] Nili & Shapira, *supra* note 32, at 686.
[188] *Id* (presenting interview-based evidence).
[189] *Id*.
[190] *Id*. at 658.
[191] *Id*. at 685.
[192] *Id*.
[193] *Id*. at 693.
[194] Timothy R. Clark, *Don't Let Hierarchy Stifle Innovation*, HARV. BUS. REV. (Aug. 23, 2022), https://hbr.org/2022/08/dont-let-hierarchy-stifle-innovation.
[195] *See* Travis Laster, *Cognitive Bias in Director Decision-Making*, 20 CORP. GOV. ADVISOR 1, 5–6 (2012).

what others are saying.[196] Information overload and agenda overload thus create space for authority bias to creep into even well-functioning boardrooms: when directors are swamped with new complex responsibilities, they are bound to feel less confident of their own ability to understand, say, AI bias or cyber or geopolitics, and to perceive others in the room to have much greater expertise in said topics.[197]

Over-delegation to outsiders and overreliance on inside experts are therefore two sides of the same coin: they both lead to board responsibilities receiving less scrutiny than intended.

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To conceptualize the difference between information overload problems and agenda overload problems, it is useful to draw from the well-developed Theory of Constraints (TOC).[198] Organization scientists have developed TOC as a methodology for identifying and managing bottlenecks that hinder organizational success. The idea is that at any given time, a single constraint limits the system's performance, and addressing it leads to continuous improvement. The key is therefore to diagnose what the key bottleneck is in each system. When diagnosing bottlenecks, it is important to distinguish between "task bottlenecks" and "resource bottlenecks."[199] The former arises when a given task is complex, and the latter arises when the system's resources are limited. Solving each type of bottleneck requires a different approach: to solve task bottlenecks, one needs to simplify a given task or parallelize workstreams. To solve resource bottlenecks, one needs to add capacity or triage tasks based on importance. The application to board governance is straightforward. Some items on the agenda may create task bottlenecks, due to their high complexity or sequencing requirements (such as evaluating CEO performance). But when such tasks are successfully resolved, boards in 2026 still face a resource bottleneck, driven by limited meeting time and agenda slots. Framing information overload and agenda overload as a task bottleneck and a resource bottleneck, respectively, will prove useful in Part III below, when we evaluate concrete policy solutions.

III. THE POLICY IMPLICATIONS OF BOARD OVERLOAD

[196] Holly J. Gregory, *Establishing Norms for Director Behavior to Enhance Board Culture and Effectiveness*, HARV. L. SCH. F. CORP. GOVERNANCE (Nov. 8, 2022), https://corpgov.law.harvard.edu/2022/11/08/establishing-norms-for-director-behavior-to-enhance-board-culture-and-effectiveness.

[197] *See* Asaf Eckstein & Gideon Parchomovsky, *Toward a Horizontal Fiduciary Duty in Corporate Law*, 104 CORNELL L. REV. 803, 838 (2019); Oord & Sikora, *supra* note 9 (reporting that many directors find it challenging to grasp new tasks related to technology, thereby increasing the risk that they will blindly follow whatever their tech-savvy colleagues decide on these issues).

[198] ELIYAHU M. GOLDRATT & JEFF COX, THE GOAL: A PROCESS OF ONGOING IMPROVEMENT (30th ed. 2014).

[199] Samina Karim, Chi-Hyon Lee, & Manuela N. Hoehn-Weiss, *Task Bottlenecks and Resource Bottlenecks: A Holistic Examination of Task Systems through an Organization Design Lens*, 44 STRATEGIC MGMT. J. 1839 (2023).

Part I canvassed the various legal and market requirements of active board involvement. All these requirements rest on the assumption that board involvement improves corporate behavior. But this assumption holds only when boards have the capacity to engage in effective oversight. Part II explained that board capacity is capped by (1) individual directors' ability to process information, and (2) the time that the directors spend together in meaningful discussions. Information overload hurts (1), and agenda overload hurts (2). As a result, the current situation renders the regulatory approach of demanding active board involvement futile or even counterproductive. This Part examines what, if anything, can regulators and judges do to improve this state of affairs.

The first question when discussing policy implications is what steps companies can take on their own, without legal intervention. Section A analyzes potential changes to board structure, composition, and processes. Some steps, such as increasing board size, come with clear negative tradeoffs, and so companies hesitate to adopt them in the first place. Other changes, such as shifting to specialist directors or adopting AI-based monitoring systems that report to the board, have already started taking place, but the initial evidence and theory suggest that they alone cannot solve board overload. In general, steps that companies can take on their own are limited: they can help the board process a given complex task, thereby alleviating information overload, but they do not help the board solve the main challenge of prioritizing across various tasks. The problem of agenda overload is caused in large part by *external* interventions (multiple regulatory demands). Solutions may therefore have to come from outside the company.

This is where Section B comes in, delineating what regulators can do ex ante and what judges can do ex post to alleviate board overload. Our main proposal for regulators is that they stop demanding board involvement. Regulators should focus on telling companies how to behave ("reduce carbon emissions to zero by 2030!," "safeguard user privacy!"), instead of telling companies who inside them should do what ("boards should approve the user privacy policy and the CISO should report quarterly to the board!"). For judges, recognizing the problem of board overload bears two types of implications. First, it highlights the need to set high materiality thresholds, allowing directors wide latitude to decide what issues make it to the full-board agenda. Fortunately, Delaware corporate law already does just that. Second, board overload increases the role of officers and third-party advisors, who screen and package critical information for boards. Unfortunately, a mix of doctrinal hurdles currently blocks the legal channels for holding these officers and outside advisors accountable for compliance failures. We propose a couple of tweaks to existing doctrines that could fix this accountability issue. We then offer lessons for academics, rethinking the role of boards by shifting the focus from incentives and expertise to structural limits on collective attention, and situating board overload within broader debates in corporate governance, regulatory governance, and corporate purpose.

A. Bottom-Up Solutions: Increasing Board Capacity

Practitioners are aware of the board overload challenge.[200] What is stopping them from answering the challenge by concomitantly increasing the supply of board capacity? This Section groups the steps that companies can take into three categories: changes to board composition, such as shifting to more insider or more specialist directors; changes to board structure, such as increasing the size of boards or number of committees; and changes to board processes, such as implementing AI-driven tools to streamline the pre-meeting materials. In each category, we examine why companies are hesitant to adopt certain steps, and why the steps that companies do adopt have thus far failed to solve the overload problem.

1. Board Composition: Shifting to More Insiders and Specialists?

If current board members are having a hard time coping with their responsibilities, perhaps companies should replace these members with new ones who will have more capacity. This is the logic behind common proposals to (1) shift from outsider-dominated boards to more insider representation, and (2) shift from generalist to specialist directors with narrow subject-matter expertise (such as "a cyber director" and "a climate director").

Shifting to Insiders. After a couple of decades of experience with the "2.0" model of corporate boards[201]—which emphasizes independent, outside directors as monitors— some practitioners and scholars are growing skeptical about whether outside directors can monitor effectively.[202] To increase the oversight capacity of boards, these practitioners and scholars suggest that companies resort to more insider representation on boards.[203] At first glance, the idea is appealing: outside directors are typically part-timers who have a busy day job elsewhere. As a result, outsiders typically lack the information and time needed to effectively address the plethora of obligations that boards face.[204] Having more directors who are employees of the company can inject valuable expertise and contextual understanding that will supposedly enhance the ability of boards to deal with these obligations.

Our perspective sheds light on a hitherto ignored consideration: the relevant tradeoff when shifting to insiders is not expertise versus independence,

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[200] *See, e.g.*, interviews #2 and #3; Gregory, *supra* note 91 ("Boards function in a complex and dynamic business setting in which stakeholder expectations and demands for board attention are expanding").
[201] Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0: An Introduction*, 74 BUS. LAW. 351, 354 (2019).
[202] *See, e.g.*, Lisa M. Fairfax, *The Uneasy Case for Insider Director*, 96 IOWA L. REV. 127, 145–76 (2010); William B. Chandler III, *On the Instructiveness of Insiders, Independents, and Institutional Investors*, 67 U. CIN. L. REV. 1083, 1087–88 (1999).
[203] *Id*; Kastiel & Nili, *supra* note 154, at 55.
[204] Fairfax, *supra* note 202, at 164–67.

but rather information overload versus agenda overload. Insiders typically have better information than outsiders on how and how much a given issue affects the company, thereby alleviating the effects of information overload. But having more insiders on boards could worsen the effects of agenda overload by skewing how competing tasks are prioritized. Insiders are typically more beholden to the company's CEO,[205] and as executives their compensation is often tied to short-term yardsticks.[206] As a result, insiders may deprioritize oversight tasks that are critical of the CEO and deprioritize risks that materialize only in the long run.[207] In today's world, companies' short-term plans often shift and evolve in the face of unexpected events, and so there is added value for boards that act "as ballast" by forcing the CEO to discuss long-term strategic and compliance goals.[208] Outsiders are better positioned to act as such ballast, relative to insiders. Further, even if shifting to an insider-dominated board does not objectively hurt boards' ability to prioritize, it may subjectively hurt the credibility of boards' tough prioritization decisions in the eyes of public shareholders and regulators.[209]

Shifting to Specialists. We already mentioned the recent trend of nominating "specialist directors" with narrow subject-matter expertise.[210] On paper, shifting from generalist to specialist directors seems like a natural reaction to board overload: as boards face more frequent disruptions and a wider range of tasks, they may require deeper knowledge from their members. To effectively advise and monitor management on issues such as cyber, AI, and geopolitics, boards need directors with expertise in these matters. However, the shift to specialist directors comes with its own set of costs. Part II highlighted one drawback, namely, increasing the risk of authority bias.

Here let us focus on a more fundamental problem: shifting from generalists to specialists will likely hurt boards' ability to prioritize various tasks. Directors who are brought in because they are experts in cybersecurity or climate change will have an easier time understanding the nuances of cyber and climate oversight. But these specialists will probably have a harder time prioritizing strategic long-term planning and product safety concerns, compared to their generalist colleagues. A generalist director who served as CEO and has experience leading businesses on a large scale will probably be better at prioritizing varied issues than a specialist director. Having extensive leadership

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205 *Id*. at 139.
206 On the evolution of directors' pay structure and the differences between inside and outside directors in that regard *see* Charles M. Elson, *Director Compensation and the Management-Captured Board: The History of a Symptom and a Cure,* 50 SMU L. REV. 127, 141 (1996).
207 It is hard to differentiate between sorts of risks on which one can trust the judgment of insiders and those on which once cannot. Brett H. McDonnell, *Meeting Lowered Expectations*, 10 U. ST. THOMAS L.J. 449, 451–52 (2012).
208 Oord & Sikora, *supra* note 9.
209 Ira M. Millstein, *The Evolution of the Certifying Board*, 48 BUS. LAW. 1485, 1494 (1992).
210 Nili & Shapira, *supra* note 32.

experience is crucial to a director's ability to balance the needs of different stakeholders and to quickly pivot to new strategies in response to disruptions.[211]

Ultimately, boards may be better off managing overload by investing more in the training and onboarding of existing directors than by overhauling their composition and bringing in insiders and specialists.[212]

2. Board Structure: More Meetings, More Committees, and More Members?

Increasing the frequency of meetings. If boards do not have enough time to thoroughly discuss key issues when they meet, an intuitive solution is to increase the frequency of meetings or the length of each meeting. Yet the empirical evidence that we presented in Section I.B suggests that companies are hesitant to do so. The question is why. Our interviewees and board advisory materials provide four nonexclusive reasons.

First, a primary reason why the frequency and duration of meetings have not significantly increased is the combination of mundane scheduling constraints and structural compensation constraints.[213] Most directors in large companies are outsiders with busy day jobs and other directorships. Coordinating their schedules is simply an arduous task.[214] Further, over the past decade nearly all S&P 500 companies have shifted to compensating directors strictly through fixed retainers (rather than retainers plus per-meeting fees),[215] thereby reducing directors' willingness to add meetings that require substantial time but provide no incremental compensation.

Second, if Company A somehow manages to solve its scheduling constraints and double the frequency and duration of meetings, the nature of the position of the individual director and the board as a group would change, and not necessarily for the better.[216] Members of Company A's board would probably become too busy to fulfil their roles in the other companies that they serve in. More importantly, the board of Company A could become too mired in operational sandboxes. If boards were to meet, say, biweekly, they would be more

[211] Oord & Sikora, *supra* note 9.

[212] *See* interview #4 (noting the significant increase in "board education" programs over the last few years); *cf*. Paredes, *supra* note 152, at 479 (arguing in a parallel context of financial disclosures that training and education are often the best tools to combat information overload).

[213] *Key Considerations in Board Meeting Frequency,* BOARDWORKS (May 27, 2024), https://www.boardworks.nz/resources/key-considerations-in-board-meeting-frequency/.

[214] *See* interview #1.

[215] Lawrence A. Cunningham & Carlos Juarez, *Trends in Director Compensation,* HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 26, 2024), https://corpgov.law.harvard.edu/2024/01/26/trends-in-director-compensation/.

[216] *See, e.g.*, Bill Huyett & Rodney Zemmel, *Changing the Nature of Board Engagement,* MCKINSEY & COMPANY (Apr. 1, 2015), https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/changing-the-nature-of-board-engagement#/ ("As directors and management teams adapt, they're bumping into limits: both on the amount of time directors can be asked to spend before the role is no longer attractive and on the scope of the activities they can undertake before creating organizational noise or concerns among top executives about micromanagement").

likely to veer from the "noses in, fingers out" principle for ideal board monitoring.[217] In other words, doubling the frequency (or duration) of meetings could blur the line between oversight and management: instead of seasoned businesspersons coming together bimonthly as a group to provide a fresh perspective and big-picture oversight ("noses in"), boards would turn into a shadow management team that is involved in day-to-day aspects of the business ("fingers in").

Third, lengthening or multiplying meetings does not reliably expand effective agenda space.[218] The reason will be familiar to anyone who has spent more than two hours in an intensive meeting or class: attention, energy, and decision quality typically degrade over extended sessions or frequent meetings.[219] Put differently, directors' attention and engagement are not linear functions of meeting length or frequency. Adding hours often leads to rushed deliberation or superficial treatment of issues.[220]

Finally, expanding the time that directors spend together does not necessarily solve the pressure of prioritization: even with more time together, boards may still overly focus on the highly salient, regulatory-driven topics, and crowd out important but less "urgent" topics.[221] The constraint is thus not purely temporal: it is less about how many minutes directors spend together and more about how much deliberative focus directors can sustain and allocate among competing priorities.

Increasing the number of committees. Aside from adding capacity, another natural solution to resource bottleneck problems is to reallocate capacity. In our context, if a board faces a barrage of new responsibilities, it can either assign a new responsibility to a given committee (such as assigning cyber risk to the audit committee), or establish a new committee dedicated to that given responsibility (a new cyber committee).

Breaking the board into many subgroups (designated committees) comes with clear advantages. For one, a dedicated committee serves as a commitment device that forces the board to allocate sufficient time and attention to the topic at hand.[222] A new committee comes with a charter that explicitly delineates its goals and agenda, and the committee keeps minutes of its discussions. As a result,

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[217] *See* interview #7 ("there's a shifting expectation that [boards] are all up in the details… a misunderstanding of the role of [boards]"); Lawrence A. Cunningham, *Dealing with Director Overload*, MAYER BROWN, https://acrosstheboard.mayerbrown.com/dealing-with-director-overload/ (noting that overload makes directors shift from oversight to hands-on management).
[218] iDeals Board, *How Long Should a Board Meeting Last?*, https://idealsboard.com/how-long-should-a-board-meeting-last/ (last visited Jul. 23, 2025) (quoting research about directors' attention spans during meetings).
[219] *Id*; Anthony Taranto, *Board Meeting Best Practices: 10 Steps,* DLA PIPER (Jul. 31, 2025), https://www.dlapiper.com/en/insights/publications/accelerate/formation/board-meeting-best-practices-10-steps (advising against lengthening the duration of meetings).
[220] Adams et al., *supra* note 120, at 1122.
[221] *See* interview #4 (noting that adding time will not necessarily mean that boards will prioritize better or focus on more issues).
[222] *See, e.g.,* Fairfax, *Committee Charters, supra* note 33, at 388.

members of that committee are more likely to be invested in and get into focused discussions about the specific issue.[223] More generally, breaking a board into designated committees helps the board parse complex and pressing issues and delve into them more deeply.[224] But establishing designated committees also comes with negative tradeoffs: it may impair the flow of information to the full board and the accountability of directors who are not part of that committee.[225] At some point, the coordination costs of dividing up tasks outweigh the benefit.[226]

Pertinently to our case, establishing designated committees does not solve the prioritization problem. A board with ten designated committees will still face the challenge of which of these ten issues to discuss at the full board level.[227] To illustrate with a real-world example, consider SolarWinds' cybersecurity debacle.[228] SolarWinds, a key software supplier to multiple government agencies, suffered a significant cybersecurity breach, which provided hackers with a backdoor into sensitive government information.[229] Shareholders brought a derivative action to hold the company's board accountable for failure of oversight of cybersecurity.[230] SolarWinds' directors claimed in their defense that they allocated responsibility for cybersecurity to a board committee.[231] But plaintiffs rebutted by showing that the committee never elevated cybersecurity concerns to the full board level in the two years leading up to the debacle.[232] In other words, the problem was that information about a significant risk was siloed within the confines of a small committee, and subsequently the risk was not given the attention it deserved.

Increasing board size. Yet another intuitive way to increase board capacity is by increasing the number of directors. Adding board members can increase the pool of information and expertise that boards tap in their advisory and monitoring roles.[233] Yet here as well, the evidence that we collected (Section

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[223] *See* Kevin D. Chen & Andy Wu, The Structure of Board Committees (Harv. Bus. Sch. Working Paper No. 17–032, 2016), https://www.hbs.edu/ris/Publication%20Files/17-032_22ea9e7a-4f26-4645-af3d-042f2b4e058c.pdf.
[224] Adams et al., *supra* note 120, at 1122.
[225] *Id*. at 1123. The accumulated experience in companies that established several nonrequired committees suggests that their establishment aggravates the information overload problem. As one practitioner put it, "More committees means more work … Once in the weeds, directors struggle to find their way out and request even more detailed data. … Too much information can make it harder for board members to satisfy their concerns, causing frustration, confusion, and a loss of focus on the core issue." Ross Bunham, *When Boards Ask for Too Much*, CORPORATE BOARD MEMBER, https://boardmember.com/when-boards-ask-for-too-much-how-risk-oversight-can-backfire/ (last visited Jul. 30, 2025).
[226] *See* Nikos Vafeas, *Board Meeting Frequency and Firm Performance*, 53 J. FIN. ECON. 113, 116 (1999) ("The net effect of delegation [to committees] on board activity is not clear and is an empirical question").
[227] *See* interview #4 (noting the importance of having "clear protocols" on what to elevate from the committee level to the full-board level).
[228] Const. Indus. Laborers Pension Fund et al. v. Bingle et al., 2022 Del. Ch. LEXIS 223.
[229] *Id*. at *2–3.
[230] *Id*.
[231] *Id*. at *10.
[232] *Id*. at *32–33.
[233] *See* Adams, *supra* note 20, at 333 (discussing the advantages of larger boards).

I.B above) suggests that companies have not adopted this natural solution.[234] Why not increase board capacity by adding board members?

As Section I.B already alluded to, a well-developed literature documents several costs associated with increasing board size.[235] Adding more members could slow down communications and hurt coordination.[236] Further, as board size increases, individual directors may become less inclined to thoroughly engage with materials or challenge management with probing questions. [237]

We add to the literature on optimal board size by spotlighting another type of cost, namely, the cost of prioritization. As coordination becomes harder, prioritizing among issues on crowded agendas is likely to become harder too. Larger boards require more time to handle formalities, and to discuss each given issue (as more voices vie to be heard), thereby leaving less time for other issues. Further, with more members, each individual director may feel less personally accountable for agenda-setting, thereby reducing the urgency in identifying or resolving tradeoffs among competing agenda issues.

All in all, changes to board structure can alleviate overload only when they expand the finite agenda space at full board meetings. Adding committees or adding members does not do that. Adding meetings may do that, but not in a linear fashion, and at considerable cost. We conjecture that at some point companies will stop experimenting with minor tweaks and start experimenting with wholesale changes to their models of board structure. For example, one could think of an X-team model: maintaining a "formal" board that is comprised of a core group of 8–10 members, alongside additional advisory members who would be called on periodically to assist on "new responsibilities," such as AI, cybersecurity, supply chain sustainability, and geopolitics.[238]

3. <u>Board Processes: Relying on AI-Based Monitoring?</u>

Another way to alleviate the overload problem is by streamlining board processes. Indeed, while corporate legal academics tend to focus on board structure and composition, practitioners dedicate much more attention to the processes of sharing and processing information before, during, and after meetings.[239] The National Association of Directors explains that given the increased demands from boards, "It's never been more important to equip

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[234] *Supra* Section I.B.
[235] *See, e.g.*, Theodore Eisenberg, Stefan Sundgren, & Martin T. Wells, *Larger Board Size and Decreasing Firm Value in Small Firms*, 48 J. FIN. ECON. 35, 37 (1998) (presenting empirical evidence). *But see* Jeffrey L. Coles, Naveen D. Daniel, & Lalitha Naveen, *Boards: Does One Size Fit All?*, 87 J. FIN. ECON. 329 (2008) (finding that both larger and smaller boards can be optimal).
[236] Lipton & Lorsch, *supra* note 174, at 67–68.
[237] Milton Harris & Artur Raviv, *A Theory of Board Control and Size*, 21 REV. FIN. STUD. 1797, 1799 (2008).
[238] On an X-team approach to corporate boards see Jaap Winter, *Towards a Duty of Societal Responsibility of the Board*, 17 EUR. COMP. L.J. 192, 197 (2020).
[239] *See, e.g.,* Meghan Day, *Effective Board Meetings: 20 Key Board Meeting Best Practices*, DILIGENT (May 5, 2025), https://www.diligent.com/resources/blog/conducting-effective-board-meetings.

directors to work efficiently and effectively."[240] And a cursory look at recent board advisory materials reveals discussions about how to prepare more effective board packs for pre-meeting readings,[241] how to optimize presentations during meetings,[242] and which visual dashboards to adopt in order to assist directors in constantly monitoring company performance in between meetings.[243]

Among all the developments meant to streamline board processes, the most important one for our purposes is the increased usage of AI tools.[244] Could the AI revolution solve all problems stemming from board overload? The answer, at least in the foreseeable future, is no.[245] AI tools are good at alleviating certain problems with board governance, but not so good at addressing others.[246]

When working properly, AI tools can alleviate the problem of directors being kept in the dark. Historically, directors were in a responsive position, relying on the data points and framing that their company's managers provided.[247] Today, with powerful AI tools at their disposal, directors can access on-demand information, beyond what management feeds them.[248] Aside from dealing with the problem of too little information, AI tools may also help with the problem of too much information. Ideally, AI tools will evolve to help boards filter, analyze, and highlight the most relevant pieces of information for their consideration in a 600-page board pack.[249] It is expected that AI tools will also help identify patterns and outliers throughout the company's financial statements, ESG reports, or compliance records.

Yet even these purported AI tools will have a hard time solving the agenda overload problem. AI tools are currently only auxiliary to board decision-

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240 *See Board Packs: The Elephant in the Boardroom,* NACD (Sept. 19, 2024), https://www.nacdonline.org/all-governance/governance-resources/governance-research/director-faqs-and-essentials/board-packs-the-elephant-in-the-boardroom/.

241 *Id*.

242 *See, e.g.,* Maureen Bujno, *Tips for Improving Board Communications and Effectiveness,* DELOITTE (Jun. 11, 2024), https://www.deloitte.com/us/en/services/audit-assurance/blogs/accounting-finance/effective-board-communications.html.

243 *See, e.g., Audit Committee Dashboard Reporting,* PWC, https://www.pwc.com/us/en/services/governance-insights-center/library/audit-committee-dashboard-reporting.html (last visited Jul. 23, 2025) (providing concrete examples of dashboards).

244 *See, e.g.*, Jennifer Arlen, The Compliance Function 28 (N.Y.U.L. & Econ. Working Paper No. 23-38, 2023).

245 *See generally* Luca Enriques & Dirk A. Zetzsche, *Corporate Technologies and the Tech Nirvana Fallacy*, 72 HASTINGS L.J. 95 (2020) (warning against the false hope that technology will solve all corporate governance problems).

246 A fast-developing literature on AI in the boardroom emphasizes familiar concerns such as data breaches and hacking threats, errors, and hallucinations. *See, e.g.*, Christopher M. Bruner, *Artificially Intelligent Boards and the Future of Delaware Law*, 22 J. CORP. L. STUD. 783, 785 (2022). We focus on the hitherto ignored concern of AI's impact on prioritization.

247 *See* Kastiel & Nili, *supra* note 154, at 23; David F. Larcker et al., *The Artificially Intelligent Boardroom* 2 (Rock Cent. for Corp. Gov. at Stan. Uni. Working Paper No. CL110, 2025).

248 Larcker et al., *id*.

249 *See* interview #4 (noting that she uses LLMs to help her understand issues that she is less familiar with, like "red teaming" a legal issue, learning how to ask questions about it in the upcoming board meeting).

making.[250] That is, AI supplements, rather than replaces, directors' decision-making. If an AI system processes information on issue X, it does not absolve the board from putting issue X on its agenda. Put differently, when there are twelve issues vying for directors' attention and only space on the agenda for five of them, the fact that the board used AI to process information on all twelve does not resolve the need to decide which seven issues get passed over.

In fact, the increased reliance on AI-assisted oversight may increase the pressure to add items to an already packed agenda. Scholars have suggested that one aspect of corporate governance where "AI's strengths, relative to human capabilities, would appear to be at their zenith" is compliance oversight.[251] The reasoning is intuitive: AI tools could scour "mountains of data to detect patterns indicating potential wrongdoing in the organization."[252] But from our perspective of board overload, this is not necessarily good news: AI-based monitoring is bound to generate constant warnings about irregularities.[253] Once directors receive AI-generated warning signals, they are forced to decide how to prioritize them: what to discuss at the board level, what to schedule for a follow-up, and so on.[254]

Using AI to solve an agenda-overload problem is therefore akin to adding more lanes to a highway when the congestion stems from a toll booth. Adding lanes (AI-based monitoring) will incentivize more drivers to use the highway (more red flags), which in turn will make the toll booth bottleneck (board agenda slots) only more congested. To revisit our theory-of-constraints framework,[255] much like changes to composition (shifting to specialist directors) and changes to structure (establishing dedicated committees), AI-driven changes to board processes may help alleviate the "task bottleneck" (making it easier to deal with a given complex issue), but they do not solve the "resource bottleneck."

In corporate law lingo, AI-based monitoring protects the board from "information-system" claims (no one can say that they failed to set up a system that monitors misconduct),[256] but increases the board's exposure to "red flag" claims.[257] If the AI-system reports each anomaly to the board and directors take each warning seriously, the board will have no time to discuss anything else. On

[250] Hadassah Drukarch & Eduard Fosch-Villaronga, *The Role and Implications of Autonomy in AI-Driven Boardrooms,* in LAW AND ARTIFICIAL INTELLIGENCE 345, 345 (Bart Custers & Eduard Fosch-Villaronga, eds., 2022).
[251] Bruner, *supra* note 246, at 794.
[252] *Id*.
[253] Larcker et al., *supra* note 247.
[254] Roy Shapira, *Conceptualizing* Caremark, 100 IND. L.J. 467, 534 (2025) (discussing how AI-based monitoring could affect directors' fiduciary duties) [hereinafter Shapira, *Conceptualizing* Caremark].
[255] *Supra* notes 198-199 and accompanying text.
[256] Several scholars predict that in the future, directors who do not utilize AI-based information systems will be liable for breaching fiduciary duties. Bruner, *supra* note 246, at 804; Geneviève Helleringer & Florian Möslein, *AI & The Business Judgment Rule: Heightened Information Duty*, U. CHI. L. REV. ONLINE (2025).
[257] On how the usage of AI-assisted monitoring interacts with the oversight duty doctrine *see also* Geeyoung Min & Veronica Root Martinez, From Artificial to Deliberative Compliance (working paper, on file with authors); Pierluigi Matera, From Red Flags to Black Boxes: Corporate Oversight in the Age of Artificial Intelligence (working paper, 2026), https://ssrn.com/abstract=6161886.

the other hand, if directors opt to discuss only a small fraction of AI-generated warnings, they expose themselves to failure-of-oversight claims: in the event of a corporate debacle, sophisticated plaintiff attorneys will be able to portray directors as consciously ignoring red flags. Similarly, if directors decide to calibrate the AI-warning thresholds such that the system reports only the most egregious anomalies to the board, they expose themselves to liability: the same sophisticated plaintiff attorneys could frame the calibration of thresholds as reflecting disregard for specific regulatory requirements. Fear of litigation may therefore cause directors to err on the side of dedicating *more* agenda space to oversight responsibilities compared to the pre-AI situation. In that way, AI-based monitoring could lead to "paralysis by analysis."[258]

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There are two broader points at play in this discussion about why companies cannot be trusted to solve board overload problems on their own (and why external intervention may thus be warranted).

First, certain corporate decision-makers may *not want* to solve board overload. An overloaded board is less likely to challenge management decisions, which may benefit the CEO by reducing scrutiny. Further, any given company may not want to signal that its board is overloaded and cannot fulfill its obligations. In a way, there is a collective action problem here: all companies as a group would benefit from candid acknowledgment of the burdens boards face, but each given company prefers to portray their board effectiveness in a rosier light.

Second, even when these corporate decision-makers sincerely want to solve board overload, there are limits to what they can do: the best a company can do is alleviate information overload. By contrast, companies cannot alleviate agenda overload on their own, simply because many of the items on the agenda are externally dictated. This problem was evident when we asked our interviewees for creative solutions to the overload problem. One interviewee insisted that directors should shift to continuously monitoring company performance on a daily (even hourly) basis with the help of constantly updated electronic dashboards.[259] But for such a solution to work, directorships must become a full-time position. Relatedly, another interviewee suggested that one way to solve overload is to change the expectations of what the director role entails: instead of appointing part-time directors in their 60s and 70s after they have had successful careers as CEOs, boards should shift to full-time professional directors in their 40s who are willing to put in the endless hours required to deal with new board responsibilities.[260] But while such a solution could help directors deal with information overload (a full-time director has the time to fully grasp, say, the complex issue of AI bias), it would aggravate the

[258] Larcker et al., *supra* note 247, at 3.
[259] *See* interview #2.
[260] *See* interview #1; interview #5 (suggesting that "career board directors" are more willing to spend the time needed to come prepared to meetings relative to "sunset CEOs directors").

agenda overload problem: bringing in younger directors who were never CEOs would cost boards in terms of the experience and wisdom needed to prioritize multiplying responsibilities.

From a policy perspective, the relevant question is thus not whether companies are doing the best they can to deal with the problem of board overload. We can assume that they are and, instead, focus on whether the environment that companies operate in can be manipulated in ways that alleviate the current constraints on board effectiveness. For boards to work effectively, the policymakers who impact board agendas (regulators and judges) should therefore be aware of the overload problem and change their mandates accordingly.

B. *Top-Down Solutions: Reducing Board Overload*

When many items on the board agenda are externally imposed, the board's ability to effectively prioritize is constrained, and its agenda-setting becomes defensive. The solution to agenda overload must therefore come from the outside, namely, from the policymakers who packed the agenda to begin with. Section 1 explains what regulators can and should do to alleviate board overload. Section 2 examines how the problem of board overload should affect the way that judges interpret directors' oversight duties. Section 3 clarifies the differences between our analysis and the existing literature on board behavior.

1. <u>Lessons for Regulators: Treat the Company as a Black Box</u>

Theoretically, a regulator who is aware of the overload problem could adjust the requirements for board involvement: the regulator would simply prioritize the few requirements that are most important, and stop imposing requirements when the board agenda reaches saturation.[261] Instead of layering new board duties, our hypothetical regulator would consider whether existing duties can be streamlined. To illustrate, if a new climate risk oversight mandate is necessary, our regulator would scale back less impactful or redundant board involvement mandates.

In practice, such a scenario is unrealistic, if only because *multiple* regulators impose requirements on corporate boards. Each regulator adds mandates over time in response to social problems within their own remit, without giving much thought to the accumulation of board involvement mandates from other regulatory fields. A climate regulator is unlikely to eliminate its requirement of board oversight just because the cyber regulator is considering adding its own requirement. This is not because the climate regulator maliciously disregards user privacy concerns: the climate regulator simply does not have the opportunity, information, methods, or incentives to

[261] Ben-Shahar & Schneider, *supra* note 41, at 266.

evaluate how its own climate mandate will crowd out board attention to cybersecurity or other mandates.[262]

In other words, the first-best solution to an agenda overload problem is for regulators to set priorities, yet interregulatory coordination problems make the prospect of setting priorities unrealistic. No single regulator manages the aggregate regulatory demands on board agenda space. Regulators in a specific field do not have the capacity or incentive to prioritize across different fields.[263] As a result, each regulatory requirement for board involvement added to the agenda will necessarily diminish the board's attention to the other, existing regulatory requirements on its agenda.

A more realistic way to tackle board overload is to adopt a sweeping "hands-off" approach: regulators should stop adding board involvement mandates and consider rolling back existing ones. That way, regulators will leave it to each company to decide which issues merit a slot on the board agenda, based on that company's specific context and tradeoffs.

To clarify, we do *not* advocate rolling back regulations that safeguard user privacy or protect the environment.[264] We simply advocate rolling back the provisions within these regulations that mandate board involvement. Regulators should focus on telling companies how to behave, instead of telling companies which unit of the company should oversee what. In other words, we advocate for changing the regulatory approach. Granted, demanding board involvement makes sense on paper: it signals just how important regulators deem an issue to be, and serves as an internal safeguard against lack of board attention. But recognizing that boards do not enjoy limitless reservoirs of oversight capacity should make regulators think twice before adopting a regulatory approach that relies on active board oversight.

Our proposed hands-off approach will restore the flexibility that each company needs to reconfigure its board agenda.[265] One company might decide to delegate cybersecurity governance to the Chief Information Security Officer, another might delegate it to the board's risk committee, and yet another might decide to regularly discuss cybersecurity at the full board level. Such an approach is in line with the accumulated evidence of previous regulatory efforts to promote changes in board governance: one-size-fits-all regulatory efforts to

[262] *Id*. at 266–67.
[263] Regulators are each tasked with safeguarding a specific domain, and their reputation is determined by how they perform on that specific domain. They therefore lack incentives to trade off their "own" priorities against those of other regulators.
[264] In fact, we have written extensively on these topics. *See, e.g.*, Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing?*, 50 HARV. ENVT'L L. REV. (forthcoming 2026), https://ssrn.com/abstract=3037091.
[265] *See, e.g.*, Benjamin E. Hermalin & Michael S. Weisbach, *Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature*, 9 ECON. POL. REV. 7, 14 (2023) (arguing that companies adjust their board governance voluntarily when they perform poorly).

nudge all companies to change their board structure, composition, or processes tend to backfire.[266]

Beyond this big-picture lesson, our framework also yields more pinpointed lessons on steps that regulators can take. For example, recognizing that the primary constraint on board effectiveness is slots on the agenda highlights the need to regulate the positions of Lead Independent Directors (LIDs) and Independent Chairs.[267]

As a quick primer, both positions started gaining traction in the early 2000s, after publicized corporate governance scandals exposed a need to boost the effectiveness of board monitoring.[268] To this end, many companies started separating the roles of the CEO and the Chair.[269] Of those companies that left the CEO or another executive as Chair, many established an LID who coordinates the activities of the independent directors.[270] Pertinently here, both Independent Chairs and LIDs are supposed to play an active role in setting the board agenda and ensuring independent oversight.[271] But a careful look reveals that in too many companies these positions are figureheads of independence rather than architects of prioritization with control over the agenda.[272] To illustrate, companies commonly qualify the power of the LID, such that instead of "approving meeting agendas for the board," its role becomes "advising the Chairman on the agenda for board meetings."[273]

By emphasizing the importance of board agenda-setting, our framework underscores the need for stock exchanges or the SEC to consider requiring disclosure of the functional powers that LIDs or Independent Chairs have. For example, instead of simply disclosing that they nominated an LID, companies should disclose whether that LID has agenda-setting authority. In this way, market actors will be able to better assess the ability of a given board to prioritize effectively. As the National Association of Directors explains, the board itself, and not management, should be the one determining which issues it focuses on in each meeting and in the long run.[274] Understanding which

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[266] *See, e.g.*, Dirk Jenter, Thomas Schmidt, & Daniel Urban, *Does Board Size Matter?* 25 (ECGI Working Paper No. 916, 2023), https://ssrn.com/abstract=4371743 (on the suboptimality of interventions in board composition); James S. Linck, Jeffry M. Netter, & Tina Yang, *The Determinants of Board Structure*, 87 J. FIN. ECON. 308 (2008) (on the suboptimality of interventions in board structures).
[267] *See* interview #3 (noting that board overload increases the influence of those who set the board's agenda); interview #5 (noting that boards' ability to deal with overload depends "to a large extent on how good the chair is" in "focusing and directing the conversation" and "disciplining the process"); interview #7 (noting same).
[268] SPENCER STUART 2023 BOARD INDEX 17, https://www.spencerstuart.com/-/media/2023/september/usbi/2023_us_spencer_stuart_board_index.pdf.
[269] *Id*.
[270] Krause et al., *supra* note 13, at 2240.
[271] Yaron Nili, *Board Gatekeepers*, 72 EMORY L.J. 91, 142 (2022).
[272] *Id*.
[273] *Id*. at 131.
[274] *See* NACD, *Setting the Board Calendar and Meeting Agendas* (Jan. 13, 2023), https://www.nacdonline.org/all-governance/governance-resources/governance-research/director-faqs-and-essentials/setting-board-calendar-meeting-agendas/.

boards set the agendas for themselves and which accept the priorities that management dictates is thus material for investors.

2. Lessons for Judges: Establish Materiality Thresholds

If regulators accept our proposal and roll back their intervention in board agenda-setting, this will not necessarily create a vacuum in the oversight of board involvement: courts will still be able to hold directors accountable for not dedicating agenda slots to a critical issue. In the event of a corporate trauma such as a data breach or toxic pollution, shareholders often file a failure-of-oversight claim, alleging a lack of board attention to central risks. Corporate law courts then use the oversight duty doctrine to evaluate whether directors prioritized and addressed given central risks with diligence, including assessing the board's prioritization of its duties and obligations[275] and the amount of time dedicated to each one.[276]

In that sense, courts can act as meta-regulators of boards' prioritization decisions. But unlike regulators, who demand that boards dedicate agenda slots to specific issues before a compliance violation, courts assess boards' decisions to allocate agenda slots after the fact. The previous Section explained why regulatory prescription of ex ante board involvement is ineffective. This Section highlights why such an ex post judicial assessment can be more effective.

The biggest advantage of ex post judicial evaluation is flexibility. Regulatory mandates tend to follow a one-size-fits-all approach ("the board should approve the company's cybersecurity policy!"), which is generally not advisable when it comes to corporate governance.[277] Courts, by contrast, evaluate the board's prioritization against the backdrop of a specific company's context and tradeoffs. Judges in Delaware's Court of Chancery have expertise and experience in adjudicating complex boardroom disputes regularly.[278] These judges are therefore adept at adjusting their evaluation of boards' prioritization decisions to the situation at hand.

To be sure, ex post judicial evaluations come with their own costs, such as the specter of hindsight bias. Oversight duty litigation tends to implicate conduct that happened many years before the case is litigated, so that courts often look at the way that the board (de)prioritized a certain risk in 2015 through a 2025 lens.[279] Directors may therefore face ambiguity about what is expected of them, which in turn can prompt defensive agenda-setting. Alternatively, if the courts adopt a deferential mode of review, the oversight duty doctrine can

[275] Bingle, 2022 WL 4102492, at *13.
[276] Boeing, 2021 WL 4059934, at *14, 17.
[277] *See supra* note 265 and the accompanying discussion; interview #4 (noting the common refrain in the corporate governance community that "if you've seen one board, you've seen one board," to suggest that regulatory interventions in how boards should allocate their time are counterproductive).
[278] *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1067 (2000).
[279] Shapira, *Conceptualizing Caremark*, *supra* note 254, at 489.

resort to being a "toothless tiger" as it largely had been until 2019.[280] In that case, ex post judicial evaluation will not serve as much of a check on boards' ex ante prioritization decisions.

For judicial evaluation to serve as an effective check on boards' prioritization decisions, courts must therefore strike the right balance between affording directors wide latitude and allowing public shareholders to hold directors accountable when the latter fail. Recognizing that boards are overloaded should encourage judges to resist hindsight bias and to afford boards significant discretion regarding which oversight tasks are elevated to the full board level, and what gets delegated to officers or to board committees. Judges should hold directors liable only when the issue that was not discussed is critical.

Fortunately, Delaware corporate law courts are already doing just that.[281] They recognize that not all risks can receive board attention and scrutinize directors only when the latter disregard high-impact issues that must be prioritized. Indeed, the "mission critical" construct that was introduced in *Marchand* was meant to serve as a *qualifier*: Chief Justice Strine explained there that he scrutinized Blue Bell's lack of discussion of food safety issues because the company sells only one product, namely, ice cream.[282] Similarly, courts routinely accept boards' decisions to delegate new topics to subcommittees so that these topics do not consume full-board bandwidth. To illustrate, let us recast *SolarWinds*, where a committee did not elevate cybersecurity concerns to the full board for more than two years prior to a major breach.[283] The *SolarWinds* court insisted that committee members enjoy discretion to decide which issues to elevate to the full board level.[284] Importantly, the court took the specific situation into account: the company was contending with transitioning to a public company (it had just completed its initial public offering) while at the same time dealing with the first major COVID-19 outbreak.[285]

At the same time, there are at least two related aspects of Delaware corporate law that require adjustment to the reality of board overload: (1) the (in)ability to hold officers and third-party advisors accountable for oversight failures, and (2) the recent narrowing of shareholder inspection rights.

When a board is overloaded, it will inevitably try to absorb or buffer external demands on its time and attention. The natural way to do so is by using upper management, general counsel, and third-party advisors as the gatekeepers who decide which regulatory oversight items to elevate to the board level, and

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[280] Tucker, *supra* note 68; Pollman, *supra* note 69.
[281] *See* Lavoy, *supra* note 89 (noting the significant discretion that courts afford directors in that regard).
[282] Marchand, 212 A.3d 805, 824.
[283] Bingle, 2022 Del. Ch. LEXIS 223, at *32.
[284] *Id*. at *34.
[285] Shapira, Conceptualizing *Caremark*, *supra* note 254, at 495.

how to summarize these items for directors.[286] Yet a mix of procedural and substantive hurdles currently makes it hard for public shareholders to hold these officers and third-party advisors accountable even for the grossest compliance violations.[287] To open channels for holding outside advisors accountable, courts should interpret shareholders' inspection right liberally and allow shareholders to bring aiding-and-abetting claims against these advisors when necessary.

But aiding-and-abetting claims in the oversight-duty context are notoriously difficult to prove (as two of us showed elsewhere).[288] And the Delaware legislature's recent overhaul of DGCL §220 has further reduced access to the type of evidence needed to prove such claims.[289] As a result, it is now even less likely that shareholders will be able to hold outside advisors accountable when the latter fail the board by withholding or downplaying material problems.

This narrowing of shareholder inspection rights is especially problematic in light of how overload is reshaping board behavior. Every one of our interviewees emphasized that overloaded boards increasingly conduct substantive work between formal meetings. Before the 2025 legislative overhaul, Delaware courts had already acknowledged this reality and ordered production of relevant informal exchanges, such as emails between board members concerning company matters.[290] The legislative amendment sharply limits access to such material.[291] Our analysis thus highlights a previously underdiscussed cost of the amendment: In an era when boards increasingly work through informal channels, restricting inspection rights only to formal board minutes leaves outside shareholders with little insight into how prioritization decisions are made.

The legislative overhaul has therefore potentially destabilized the balance between director discretion and accountability. The only remaining path for restoring accountability—for both the information that reaches the board (via aiding-and-abetting claims) and the decisions that the board makes with that information (whether inside or outside formal meetings)—is for courts to use their limited discretion to order informal documents turned over, against the spirit of the recent legislative overhaul.

3. Lessons for Academics: Rethink the Role of Boards

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[286] Section II.B *infra*.
[287] Eckstein & Shapira, *supra* note 181.
[288] *Id*. at 496–97.
[289] DEL. CODE ANN. tit. 8, § 220 (2025), as amended by Del. S. Substitute 1 for S.B. 21.
[290] *See* Lebanon Cnty. Emps.' Ret. Fund v. Amerisourcebergen, 2020 WL 132752 (Del. Ch. Jan. 13, 2020), at *25 (compiling examples).
[291] *Compare* S.B. 21's language (requiring shareholders to show "compelling evidence") *with* the previous Delaware Supreme Court precedent KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 755 (Del. 2019) (clarifying that "§220 does not require the petitioner to meet an unrealistic 'compelling evidence' standard just to obtain that discrete set of documents").

Many prior accounts have decried the persistent disparity between lofty expectations placed on corporate boards and their disappointing real-world performance.[292] This Article differs from existing accounts for this disparity along three dimensions: (1) the primary cause of board ineffectiveness, (2) the nature of its consequences, and (3) the appropriate policy response.

Most of the early literature treated board ineffectiveness as a problem of bad incentives.[293] Directors were seen as too beholden to the CEO or controlling shareholders to exercise effective oversight. The proposed solution was straightforward: increase board independence by nominating directors without financial or personal ties to management. By now, this historical debate is virtually over. Independence won. Almost all large companies have boards that consist mostly of people coming from outside the company.[294]

With the rise of independent boards, attention shifted to a different concern, namely, expertise gaps.[295] Part-time outsiders lack the necessary experience and expertise needed to ask the right questions and process answers, or so the argument went.[296] Here too, the solution appeared clear: nominate directors with domain-specific expertise.[297] And indeed, many companies responded by recruiting specialist directors and disclosing detailed skill matrices in their proxy statements.[298]

Yet neither the push toward more independence nor the push toward more expertise has quelled concerns about board ineffectiveness.[299] This suggests that the root problem lies elsewhere. Our analysis explains where "elsewhere" is. The main constraint on board effectiveness is not necessarily that directors lack motivation or expertise, but rather that they lack time. In other words, the problem is less about individual shortcomings and more about structural limits to board capacity.

A structural problem of this kind has broad ramifications. The extant literature frames board ineffectiveness in terms of agency costs, emphasizing how ineffective boards allow CEOs and controlling shareholders to tunnel money away from outside shareholders.[300] In an era when regulators and investors increasingly count on boards to guide corporate behavior on matters ranging from racial diversity to climate change, understanding how boards

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[292] *See, e.g.*, Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L, REV. 1051, 1053 (2014).
[293] Boivie et al., *supra* note 153, at 343.
[294] 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, 1468 (2007).
[295] *See, e.g.*, Bainbridge & Henderson, *supra* note 292.
[296] Fairfax, *Insider Directors*, *supra* note 202, at 164-166.
[297] Nili & Shapira, *supra* note 32.
[298] *Id*. at 672.
[299] *See* Richard Fields & Rusty O'Kelley, *Global Corporate Governance Trends for 2023,* HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 10, 2023), https://corpgov.law.harvard.edu/2023/03/10/global-corporate-governance-trends-for-2023/ (identifying skepticism about board quality as the number one global corporate governance trend in 2023).
[300] Boive et al., *supra* note 153, at 342.

triage competing priorities becomes a question with implications far beyond shareholder wealth.

In that regard, our framing also intersects with the ongoing debate over "corporate purpose" and the role of ESG commitments.[301] This debate often splits between two poles: one camp sees ESG behavior as a genuine attempt to do well by doing good (the "win-win approach"),[302] and the other camp views ESG as a smokescreen for managerial entrenchment.[303] Our board overload perspective offers a different angle: regardless of directors' intentions or ideological commitments, an overloaded agenda necessitates tradeoffs.[304] A pro-ESG board may deprioritize certain social and environmental issues simply because it cannot do everything at once, while an anti-ESG board may find itself allocating attention to salient ESG topics because it is pressured to do so.

Our analysis further departs from the existing literature in its approach to practical implications. Because we frame the main constraint on board effectiveness as a legal problem—stemming from uncoordinated board involvement mandates—our policy proposals go beyond bottom-up solutions that market actors can adopt on their own. Consider, for example, the difference between our analysis and the well-known "busy directors" or "overboarding" literature, which showed that holding multiple board seats may impair a director's performance.[305] The proposed fix in that literature was straightforward and has since been widely adopted: today, more than 80% of S&P 500 companies place limits on their directors accepting directorships in other companies.[306] Yet, despite this trend, concerns about board overload are more pressing than ever.[307] This is because the "busy directors" literature treats the individual director as its unit of analysis, while the more pressing constraint

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[301] *See, e.g.*, Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose,* 109 MINN. L. REV. 2089 (2025) (delineating the contours of the debate).
[302] *See, e.g.*, COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 39 (2018).
[303] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 167 (2020).
[304] To be sure, these questions are interrelated: individual directors' value preferences are bound to affect the prioritization decisions of boards. Renée Adams & Amir Licht, *Shareholderism Around the World: Corporate Purpose, Culture and Law,* MGMT. SCI. (forthcoming), https://ora.ox.ac.uk/objects/uuid:4e93d1c0-ede4-4910-bce8-579b189b9c1a.
[305] For a couple of classic studies *see* Laura Field, Michelle Lowry, & Anahit Mkrtchyan, *Are Busy Boards Detrimental?*, 109 J. FIN. ECON. 63 (2013); Eliezer M. Fich & Anil Shivdasani, *Are Busy Boards Effective Monitors?*, 61 J. FIN. 689 (2006). For the legal angle see Kress, *supra* note 161.
[306] The Conference Board, *Study: Corporate Boards Are More Diverse Than Ever, But Growth in Racial Diversity Among New Directors Is Slowing* (Dec. 3, 2024), https://www.conference-board.org/press/board-composition-2024 (noting that "corporate America is cracking down on overboarding" and providing data); SPENCER STUART 2024, *supra* note 8, at 32. *See also* NYSE Listed Company Manual § 303A.07(a) (requiring companies to disclose when one of their audit committee members serves on more than three public-company audit committees, and requiring that the board determines that such "busyness" level does not impair the member's effectiveness); *id.* § 303A.07(a) cmt. (stating that each committee member should carefully evaluate his availability before accepting the assignment). These provisions reflect an institutional recognition that excessive commitments may impair directors' effectiveness. Similarly, Clayton Act § 8, 15 U.S.C. § 19, which prohibits certain interlocking directorates in the name of antitrust considerations (preventing collusion) can have the effect of mitigating directors' busyness levels.
[307] SPENCER STUART, *id* (noting that today the median director has two public companies' directorships).

lies at the group level, with overcrowded agendas. Even directors who serve on just one board must face tough prioritization decisions on which issues to invest in learning before meetings and which to raise during meetings.[308] Such structural constraints cannot be resolved through investor voting policies alone. Instead, addressing board overload requires a change in how regulators and courts assign oversight responsibilities.

The focus on regulatory approaches takes our analysis beyond corporate governance and into the *regulatory* governance literature. While political scientists and administrative law scholars have long examined the causes of regulatory accretion—why and how agencies layer new rules onto existing ones—we shift the focus to how regulated entities respond to accretion. It is one thing to impose additional obligations on companies generally, and another to impose additional duties directly on the board. In the former case, large companies can respond by expanding their compliance departments. In the latter case, however, large companies face structural limits: board time and agenda space cannot easily scale. Recognizing the causes and consequences of board overload should prompt policymakers to revisit the balance between outcome-based and process-based regulation.[309]

Finally, our analysis sheds light on the relationship between regulation and litigation, and specifically the role of Delaware corporate law in regulating corporate America. Over the past year, prominent corporate insiders have criticized the Delaware Court of Chancery's tendency to hold insiders accountable.[310] Some of these insiders, such as Elon Musk, reincorporated their company out of Delaware or threatened to do so.[311] In response, the Delaware legislature enacted a sweeping overhaul of its corporate law in March 2025, supposedly to curtail the threat of companies exiting Delaware (DExit).[312] Pertinently here, the 2025 amendment cabins shareholders' inspection rights in ways that limit their ability to investigate potential board failures.[313] And the

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308 *See* Boivie et al., *supra* note 153, at 347-48. The study closest to ours is probably Hahn and Stevelman's analysis of how boards process information. Faith Stevelman & Sarah C. Haan, *Boards in Information Governance,* 23 U. PENN. J. BUS. L. 1 (2020). Like us, they observe that boards face ever-expanding expectations. *Id*. at 3. But they reach a different prognosis: they argue that director overload would soon be solved through professionalizing directorships and relying on sophisticated information technology. *Id*. at 56-57. Their focus is therefore on information overload at the individual-director level: with full-time availability and advanced technological tools, a director would be able to manage the volume and complexity of information they face. By contrast, we highlight a group-level problem: even if each director were perfectly informed, the board would not be able to dedicate shared attention to all issues that "must" be on the agenda.

309 *See* Cary Coglianese, *Management-Based Regulation: Implications for Public Policy*, *in* RISK AND REGULATORY POLICY 162 (Gregory Bounds & Nikolai Malyshev, eds., 2010) (mapping out the differences).

310 Ann M. Lipton, *The Legitimation of Shareholder Primacy*, J. CORP. L. (forthcoming) (manuscript at 2), https://ssrn.com/abstract=5120765.

311 *Id*.

312 Del. S. Substitute 1 for S.B. 21 (2025).

313 Roy Shapira, *An Overlooked Cost of Delaware's Corporate Law Overhaul*, CLS BLUE SKY BLOG (Feb. 26, 2025), https://clsbluesky.law.columbia.edu/2025/02/26/an-overlooked-cost-of-delawares-corporate-law-overhaul/.

prospect of DExit has arguably triggered a race among states to offer the most effective legal shield against board accountability.[314]

Our analysis clarifies why a robust corporate litigation environment benefits not just society at large, but also corporate boards themselves. The recent resurgence in Delaware oversight duty litigation did not emerge out of thin air or on account of a couple of activist judges. It was an organic response to rising regulatory and societal expectations for boards to oversee a widening set of issues. These expectations will not fade simply because corporate law courts stop scrutinizing board prioritization. On the contrary, removing private enforcement mechanisms may push regulators to respond with more one-size-fits-all mandates and direct more public enforcement actions against boards.[315] The value of Delaware corporate law litigation lies not in making directors pay out of pocket for poor prioritization decisions (directors practically never pay out of pocket). The value is rather in providing a channel for clarifying how boards should prioritize (thereby shaping norms) and flushing out information about what boards behaved below or above the benchmark (thereby shaping reputations).

To be sure, our novel claims should be taken with due caution. The phenomenon we highlight—board overload—is still relatively new,[316] and it is possible that companies will, in time, develop more effective strategies to deal with it. Indeed, one interviewee insisted that he resists calling overload "a problem," and instead frames it among his fellow directors as a "challenge."[317] But even if boards do rise to meet that challenge—for example, by shifting toward more continuous year-round work (as our interviewees proposed)—the consequences would be far-reaching: boards would cease to be bodies that keeps their "noses in but fingers out," and would instead drift toward becoming shadow management teams. In this sense, the uncharted nature of board-overload research is all the more reason to engage with it now. Regulatory approaches and judicial interpretations that fail to account for overload are not just ill-suited for the future; they are already undermining firm value and broader societal outcomes today.

CONCLUSION

In the early 1990s, the most prominent legal advisor and most prominent management advisor to corporate boards wrote an influential article, providing

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[314] William J. Moon, *Havens for Corporate Lawbreaking,* WASH. U. L. REV. (forthcoming), https://ssrn.com/abstract=5148347 (analyzing the ramifications of the current state corporate law competition).
[315] *Cf.* Millstein, *supra* note 209, at 1492 (making a similar claim in the context of evolution of board governance in the 1990s).
[316] Interview #1 (noting that the overload problem as we describe it here is a relative recent phenomenon, starting in the 2020s).
[317] Interview #8.

a menu of concrete proposals to improve board effectiveness.[318] Fast forward to 2026, and almost all their proposals have been fully implemented: the average size of the board is limited to around ten members[319]; boards are comprised mostly of independent directors[320]; all boards have an audit committee, a compensation committee, and a nomination committee consisting solely of independent directors[321]; directors spend more than one-hundred hours annually preparing and meeting on each board that they serve on[322]; directors are now compensated nicely and receive stock options to align their incentives with company growth[323]; most companies separate the jobs of Chairperson and CEO and those that do not have an LID[324]; management regularly feeds directors information that goes beyond the financial reports[325]; and so on.[326] Picture perfect, right?

Wrong. Even with all these improvements, frustration with board ineffectiveness has never been higher.[327] Corporate insiders bemoan the inability of boards to provide added value on emerging issues such as how the AI revolution affects the company's business model.[328] Outside stakeholders criticize boards for not standing up more firmly to management's short-termism and inattention to compliance and to DEI values.[329] To practitioners and academics, the growing frustration with board effectiveness presents a puzzle: "It is surprising considering all that boards and governance teams have done to improve board practices and ways of working in recent years. Boards are more diverse than ever, recruitment processes are more rigorous, and an increasing proportion of boards conduct regular external performance reviews."[330]

This Article proposed a solution to the puzzle: the main constraint on board effectiveness is not directors' motivation or skill sets, but rather directors' time together—the board's collective attention. Boards may have improved their composition, structures, and processes. But at the same time, regulators and market actors have increased their demands for board involvement in a plethora of new issues. Combine that with our finding that the amount of time that boards spend together in meetings has not increased concomitantly. And

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[318] Lipton & Lorsch, *supra* note 174.
[319] *Id*. at 67.
[320] *Id*; SPENCER STUART 2024, *supra* note 8, at 33.
[321] Lipton & Lorsch, *id*. at 68.
[322] *Id*.
[323] *Id*. at 69; SPENCER STUART 2024, *supra* note 8, at 11 (76% of companies grant stock awards to directors).
[324] Lipton & Lorsch, *id*. at 70; SPENCER STUART, *id*. (66% of companies have a LID).
[325] *Id.* at 71.
[326] Other proposals that were fully adopted include instituting a mandatory retirement age, evaluating board performance annually, and engaging more directly with shareholders. SPENCER STUART, *id*. at 11, 31.
[327] As one board advisory firm put it, "In nearly 20 years of working with boards, we have never seen such public frustration at board performance." Pantelides, *supra* note 131.
[328] *Id*; *Tesla, Intel and the Fecklessness of Corporate Boards*, THE ECONOMIST (Dec. 12, 2024).
[329] Pantelides, *id*; Tarun Khanna, *Boards Need a New Approach to Technology*, HARV. BUS. REV. (Sep.-Oct. 2024).
[330] Pantelides, *id*.

the inevitable result is that even the best boards find themselves deprioritizing critical issues.

To improve board effectiveness, practitioners, policymakers, and academics must therefore develop a deeper understanding of the causes, consequences, and solutions to board overload. This Article canvassed the various noncorporate law regulations mandating board involvement, and distinguished between task bottlenecks arising from the complexity of given tasks and resource bottlenecks stemming from the limited attention that boards as a group can dedicate to all tasks. While companies can solve some task bottlenecks on their own, it is hard to solve resource bottlenecks without external intervention.

This is where our most important takeaway point comes in: various requirements for board involvement compete for directors' finite time and attention. Asking boards to add an issue to their agenda will necessarily displace or dilute attention to existing issues. Recognizing this fact should push corporate scholars and policymakers to search harder for unorthodox policy solutions. We proposed that regulators go back to focusing on telling companies how to behave and stop telling companies which unit inside the company should do what. In other words, regulators should leave the policing of boards' prioritization decisions to corporate law courts.

Considerations of scope and brevity prevented us from covering many other angles of board overload (like boards, we had to prioritize!). For example, we have not dedicated enough attention to cross-sectional variation, namely, which types of boards do a better job of dealing with overload compared to others.[331] Future work should dive into differences across firm size, industry, and legal systems.[332] It should also investigate how overload affects the board's distinct functions: for instance, ongoing monitoring may suffer more than advisory work.[333] To be sure, this will not be an easy task: lack of available data on board processes makes it notoriously difficult to ascertain which boards work more effectively than others.[334] But given the central role that boards play in shaping corporate behavior, a lack of available data should not stop researchers from trying to advance our understanding via creative methods, such as conducting interviews or gaining some access to board minutes.[335]

As corporations continue to grow larger and become more intertwined with societal challenges, boards are asked to shoulder an ever-expanding set of responsibilities. The stakes of understanding how overload shapes board

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[331] Interview #5 (emphasizing the variation in how boards that she served on dealt with overload); interview #7 (emphasizing same).
[332] *See* Boivie et al., *supra* note 153, at 342 (noting that future research should study how product-related diversification and geographic diversification affect board effectiveness).
[333] *Id*. at 345-46.
[334] Adams, *supra* note 233, at 332.
[335] *Id*.

effectiveness could therefore not be higher. This Article represents a first step toward injecting much needed theory and evidence into the discussion.

APPENDIX: INTERVIEWS

To provide context for how individual directors and boards react to overload, we conducted interviews with board members and their consultants. For each interview, we retain copies of the full transcript (or, when the interviewee declined to be recorded, detailed notes). In some cases, personal identifiers were removed at the interviewee's request. Our sampling of interviewees was largely based on the "snowballing" technique, starting from personal referrals and asking each interviewee to refer us to others.[336] All interviews (except one) were conducted via Zoom. Their length ranged from thirty to seventy minutes, with an average interview lasting for around forty minutes. We interviewed individuals of diverse racial, gender, and geographical backgrounds, and with diverse boardroom experience: our interviewees served on or consulted for boards of organizations ranging from large publicly traded companies to small private startups and nonprofit entities. All our interviewees have experience with preparing for board meetings and directly managing (or advising on how to manage) triage among various board responsibilities.

Using the qualitative methodology of interviews is especially conducive to understanding complex, nuanced issues such as how individual directors deal with information overload and prioritize various tasks.[337] Previous attempts to study boards have usually focused on observable structural aspects, thereby downplaying the importance of boardroom dynamics and decision-making processes and norms.[338] By contrast, semi-structured conversations with board members and consultants can provide insight into the intricacies that are often overlooked in quantitative studies.[339] The iterative nature of interviews allowed us to probe deeper into specific themes that we did not anticipate, and to test emerging hypotheses against company disclosures and practitioner surveys.

To be sure, the interview method has its own limitations. For example, interviewees may not be candid in their responses and opt to present their behavior in a rosier light (due to "social desirability bias").[340] And snowball

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[336] A note on our sample size: the current draft utilizes insights from eight interviewees. Since interviews are not the primary source of data in this Article but rather serve the purpose of adding richness and context to the data, a relatively small number of interviews could be sufficient, provided that they achieved saturation. "Saturation" in this context means that additional interviews would not add much to the insight already collected. For the guidelines behind saturation considerations *see generally* Patricia I. Fuchs & Lawrence R. Ness, *Are We There Yet? Data Saturation in Qualitative Research*, 20 QUAL. REP. 1408 (2015). For how interview-based studies of board processes typically rely on small sample sizes see Mazutis et al., *supra* note 180 (compiling examples).

[337] *See* Pugliese et al., *supra* note 22, at 272.

[338] *Cf.* Miriam Schwartz-Ziv & Michael Weisbach, *What do Boards Really Do? Evidence from Minutes of Board Meetings*, 108 J. FIN. ECON. 349 (2013) ("A major difficulty in designing research about boards of directors is that the day-to-day workings of a boardroom are private").

[339] Pugliese et al., *supra* note 22, at 272.

[340] Schwartz-Ziv & Weisbach*, supra* note 338, at 350 (interview-based studies may "reflect inflated perceptions of directors regarding their own abilities and their contribution to the firm"). On social

sampling may lead to a biased sample of interviewees.[341] We tried to be cognizant of these potential limitations and mitigate them, such as by offering interviewees anonymity (which could reduce the social desirability bias[342]) or by diversifying our initial interviewees (which helps alleviate the snowball sampling bias). Most importantly, while we acknowledge all these limitations, we note that interviews are only one component in our study. We used them mainly to provide context on other sources of data. In other words, our methodology is based on triangulating between multiple theoretical and empirical materials. Triangulation minimizes the biases of any single theory or method.[343] Triangulating methods are especially fitting where, as in our case, researchers are dealing with complex phenomena with limited prior data.[344]

LIST OF INTERVIEWEES [redacted at the draft stage[345]]

Interview	Name	Date	Role
1	[redacted]	Jun. 26, 2025	Board Member in three public companies traded in the UK. Previously Lead Independent Director and Member in numerous American public companies, startups, and NGO boards (M; US)
2	[redacted]	Jul. 11, 2025	CEO of CGF Institute, which advises boards of publicly traded and private companies (M; South Africa)
3	[redacted]	Jul. 15, 2025	Executive Director, "Boards of the Future" (an NGO advising boards on

desirability bias *see generally* Leonardo Bursztyn et al., The Social Desirability Atlas (Becker Friedman Working Paper No. 2025-82, 2025), https://ssrn.com/abstract=5282258.

341 Pugliese et al., *supra* note 22, at 272.

342 Social desirability bias can be persistent, and ensuring anonymity may not fully eliminate it. We therefore gave stronger weight to shared experiences and insights that did not reflect glowingly on the interviewee. For example, if an interviewee admitted to coming to board meetings without reading the board pack, such a statement would run counter to social desirability bias, and could be relied on more (since the interviewee has little incentive to present her/himself in an unflattering light).

343 *See* THE SAGE ENCYCLOPEDIA, *supra* note 21.

344 Pugliese et al., *supra* note 22, at 271–74.

345 [Note to readers/editors at the draft stage: Some of our interviewees agreed to speak on record, while others requested anonymity or wished to review a draft of the paper before agreeing to attribution. To respect these requests and protect confidentiality, we have redacted the full list of interviewees for the purposes of circulating the draft. Ultimately, our intention is to publish the paper with a list of those who have consented to being named, while maintaining a complete list on file with the publishing journal.]

			compliance and ethics). Board member in several for-profit and non-profit organizations (F; US, EU)
4	[redacted]	Aug. 4, 2025	Former executive and full-time board member in the technology sector (F; US)
5	[redacted]	Oct. 9, 2025	Non-executive director (F; UK)
6	[redacted]	Oct. 21, 2025	Head of board advisory services at a large accounting firm (M; US)
7	[redacted]	Nov. 17, 2025	Non-executive director (F; Australia)
8	[redacted]	Nov. 21, 2025 (via phone)	Long-time advisor to boards and now a board member (M; US)

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