AI Corporate Governance and Ben & Jerry's Risk

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Jesse M. Fried
Harvard University and ECGI

Idan Reiter
Harvard University

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Jesse M. Fried*
William Nelson Cromwell Professor of Law
Harvard University
Griswold 506, 1563 Massachusetts Ave
Cambridge, MA 02138, United States
phone: +1 617 384 8158
e-mail: jfried@law.harvard.edu

Idan Reiter
Researcher
Harvard University
1585 Massachusetts Ave.
Cambridge, MA 02138, USA
e-mail: idanreit@gmail.com

*Corresponding Author

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May 3, 2026

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This paper critically analyzes the governance arrangements of OpenAI and Anthropic. These firms have an unusual built-in conflict: each raises funds from profit-seeking investors, then lets *self-appointed* individuals decide how much profit to sacrifice for the firm's mission—ensuring its AI benefits humanity. We explain that such investor-overriding "self-appointed mission guardians" have been used only once before, at former Unilever subsidiary Ben & Jerry's. That experiment ended in failure, with the guardians causing *double trouble*: both harming investors and achieving the opposite of their mission. Our analysis highlights the risk of installing such guardians, and can explain Anthropic's adoption of a "kill switch" allowing a super-majority of investors to dump theirs.

* William Nelson Cromwell Professor of Law, Harvard Law School. Fried has served as an expert witness in a confidential arbitration connected to one of the disputes discussed in this paper.

** S.J.D. Candidate, Harvard Law School. Thanks to Bianca Turman HLS '28 and especially Cassidy Hunt HLS '26 for excellent research assistance. For comments, we thank Rick Alexander, Yifat Aran, Ofer Eldar, Jennifer Fan, Noah Feldman, Stavros Gadinis, Jill Horwitz, Rob Katz, Ann Lipton, Dorothy Lund, John Morley, Mark Ørberg, Gideon Parchomovsky, Elizabeth Pollman, Mark Roe, Max Schanzenbach, Larry Summers, Roberto Tallarito, Gad Weiss, Tyler Whitmer, seminar participants at Hebrew University of Jerusalem and Sapienza Università di Roma, and attendees at the 12th Law and Economics Conference in Lucerne and University of Haifa's 2025 Financial Regulation Conference. Special thanks to David Webber for assistance in analyzing the governance structure of Ben & Jerry's. All errors are our own. Comments are welcome and can be sent to jfried@law.harvard.edu.

I. Introduction

This paper critically analyzes the governance arrangements of OpenAI and Anthropic. We show that these firms have an unusual built-in conflict: each raises billions of dollars from investors,[1] and then lets *self-appointed* individuals override investor preferences and decide, directly or indirectly, how much profit to sacrifice for the firm's mission: ensuring its AI benefits humanity. A deep and potentially unmanageable tension is thus hard-wired into the firms' corporate DNA.

Similar investor-overriding "self-appointed mission guardians" ("investor-overriding guardians" or "guardians") have been used only once before, at Unilever subsidiary Ben & Jerry's.[2] That experiment, we explain, ended in spectacular failure, with investor-overriding guardians causing *double trouble*: both harming investors and achieving the opposite of their mission. Our analysis highlights the risk to firms and their investors of using such guardians, and can explain why Anthropic installed a "kill switch" allowing a super-majority of investors to fire its guardians.

A firm's choice to empower investor-overriding guardians reflects three inter-related beliefs. First, the firm should be run in part to benefit not only traditional corporate

[1] We will use the term "investors" to refer to parties purchasing equity in a firm primarily for the purpose of generating financial returns.

[2] *See infra* Part II.

stakeholders, such as employees and suppliers,[3] but also society more broadly.[4] Second, investor-appointed directors cannot be trusted to run the firm for society's benefit.[5] Third, society can be effectively represented by guardians—agents without principals, answerable to nobody but themselves—empowered to override investors.[6]

But because the goal of benefitting society—unlike profit-maximization—is inevitably open-ended, a firm cannot provide incentives to induce guardians to pursue their mission. Accordingly, the standard critique is that these guardians will fail to resist investors in the face of countervailing economic pressures, including the need to raise funds

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[3] Expressions of support for traditional stakeholderism have become widespread in recent years. *See, e.g.,* ANDREW JOHNSTON ET AL., CORP. GOVERNANCE FOR SUSTAINABILITY STATEMENT (2019) (a statement published by academics from various fields worldwide declaring their support for stakeholderism principles).

[4] *See Our Values, Activism and Mission*, BEN & JERRY'S HOMEMADE ICE CREAM, https://www.benjerry.com/values (last visited Feb. 18, 2026) (explaining that Ben & Jerry's seeks to integrate meeting human needs and eliminating injustice in the world into its day-to-day ice cream business); *How We Think About Safety and Alignment*, OpenAI, https://openai.com/safety/how-we-think-about-safety-alignment/ (last visited Feb. 18, 2026) (reiterating that OpenAI's core mission was to ensure AGI that benefits all of humanity); *Making AI Systems You Can Rely On*, ANTHROPIC, https://www.anthropic.com/company (last visited Feb. 18, 2026) (explaining that Anthropic values safety and aims to act for the global good).

[5] *Cf.* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 107 CORN. L. REV. 91 (2020) (explaining that the incentive structure influencing directors of for-profit firms—including their appointment by investors and their compensation packages often tied to the share price—motivates them to prioritize maximizing shareholder value, at the expense of other conflicting interests); Mark J. Roe, *Why Shareholder-Driven Corporate Social Responsibility Failed* (working paper, 2026) (explaining that the political forces that blocked progressive legislation at the national level also blocked shareholder-led efforts to steer corporations in a more progressive direction).

[6] *See infra* Parts II, III, V.

from investors,[7] engage in strategic partnerships,[8] and placate founders[9] and equity-paid employees.[10] The public benefit will thus be subordinated to profit.[11] In other words, the guardians will do too little.

While we agree that investor-overriding guardians could end up doing *too little*, we argue that they may end up doing *too much*. Because guardians lack both (1) accountability[12] to investors and (2) interest-aligning incentives to pursue their mission, they may not only harm investors, but also act in ways that undermine the mission. In fact, at two of the three firms with investor-overriding guardians—Ben & Jerry's and OpenAI—the guardians endangered or harmed investors *and* achieved the opposite of their mission (as they saw it to be).[13] In other words, guardians can be worse than useless.

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[7] *See* Roberto Tallarita, *AI Is Testing the Limits of Corporate Governance*, HARV. BUS. REV. (2023) https://hbr.org/2023/12/ai-is-testing-the-limits-of-corporate-governance (claiming in the context of OpenAI that because of the need for large cash investments "[e]ven creative governance structures will struggle to tame the profit motive"). *See also* Gad Weiss, *Aligned Structuring of AI Startups* 28–29 (working paper, Oct. 3, 2025) (noting that VCs may use their leverage via staged financing to pressure the firm to deprioritize safety).

[8] *See* Weiss, *supra* note xx, at 28–29 (noting that tech firms with influence over AI startups may use their leverage to advance their own interests at the expense of safety).

[9] *See* Weiss, *supra* note xx, at 29–30 (noting that a valuable founder can use his positional power to prevent a focus on safety against the founder's wishes).

[10] *Cf.* Note, *Amoral Drift in AI Corporate Governance,* 138 HARV. L. REV. 1633, 1647–50 (2025) (describing equity-paid employees as "superstakeholders" who will care more about profit than the social mission) [hereinafter, *Amoral Drift*].

[11] *See id.* at 1656 (concluding that "amoral drift" toward profit-seeking rather than prosocial activity may be "inevitable"); Ronit Levine Schnur & Moran Ofir, *GenAI Models and the Hybrid Governance Trap* (forthcoming CORN. J. L. & PUB. POL'Y, 2026) ("Directors appointed to advance the public interest [in firms such as OpenAI] typically lack shareholder backing or financial leverage, rendering their influence largely symbolic.").

[12] By "accountability to investors," we mean that the investors have the power to replace them (that is, "functional accountability"). Guardians may owe fiduciary duties directly to the firm and indirectly to investors, but in our three firms any such duties do not prevent guardians from prioritizing other objectives, including the mission, over profits. *See infra* Parts II, III, V.

[13] *See infra* Parts II, III.

Ben & Jerry's arrangement was the first to fail, in 2021.[14] In 2000, as it was acquiring Ben & Jerry's, Unilever agreed to create a Ben & Jerry's board controlled by self-perpetuating independent directors.[15] These directors were empowered to override Unilever to preserve Ben & Jerry's "social mission" and "brand integrity"—on the belief that Unilever, accountable to its investors, could not be trusted to "do the right thing."[16] The directors shared power with Unilever, which retained control over all "operational" and "financial" aspects of Ben & Jerry's.[17]

For about two decades, conflicts between the directors and Unilever were resolved behind closed doors. But then board chair Anuradha Mittal became (in Unilever's words) "recklessly focus[ed]"[18] on the Israeli-Palestinian conflict and decided in July 2021, over Unilever's objections, to announce the prospective non-renewal of the license held by Ben & Jerry's Israeli licensee.[19] The boycott announcement precipitated a multi-year battle between Unilever and the directors, counterboycotts of Unilever and Ben & Jerry's, divestments of Unilever securities by several U.S. states, the intervention of an activist investor, and several legal proceedings in the United States and Israel, including three between Ben & Jerry's independent directors and Unilever (one of which is ongoing).[20]

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[14] *See infra* Part II.

[15] *See infra* Part II.B.2.

[16] *See infra* Part II.B.2.

[17] *See infra* Part II.B.1.

[18] Memorandum of Law in Support of Unilever's Motion to Dismiss Plaintiff's Second Amended Complaint at 1, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 57.

[19] *See infra* Part II.D.

[20] *See infra* Part II.D.

During this battle, Unilever's CEO resigned and the firm lost billions of dollars of market value, far more than the value of Ben & Jerry's itself.[21]

Ben & Jerry's exemplifies the substantial risks to investors of empowering guardians to override them. Of course, the fact that guardians endangered or damaged investors, by itself, does not mean the arrangement necessarily failed. If guardians harmed investors but advanced their mission, one might say that the arrangement worked as intended. But if guardians not only harm investors but also undermine their own mission, as they see it (what we call "double trouble"), then the arrangement has clearly failed.

And that is precisely what happened at Ben & Jerry's. In 2022, before the non-renewal would have occurred, Unilever overrode the wishes of Mittal and her fellow Ben & Jerry's directors and gave the Israeli licensee, whose license could be renewed only with Ben & Jerry's consent, everything it needed to sell Ben & Jerry's ice cream in Israel and its controlled territories, in perpetuity.[22] The directors claimed that selling Ben & Jerry's ice cream in Israel was inconsistent with the firm's social mission and undermined brand integrity.[23] But their actions led to such sales continuing indefinitely. In 2025, Unilever spun off its ice cream businesses, including Ben & Jerry's, into another company—a move that will prevent the decisions of Ben & Jerry's guardians from ever again negatively spilling over onto Unilever.[24]

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[21] *See infra* Part II.D.3.

[22] *See infra* Part II.D.4.

[23] *See infra* Part II.D.2.

[24] *See infra* Part II.D.7.

Because Ben & Jerry's was the first firm to install investor-overriding guardians who caused double trouble, we will use the term "Ben & Jerry's risk" to mean the risk that guardians cause double trouble.

OpenAI offers a similar cautionary tale of investor-overriding guardians acting in destructive and counter-productive ways. Its self-perpetuating directors, tasked with ensuring that the firm's AI does not harm humanity, tried to fire CEO and director Sam Altman in 2023, even at the risk of completely wiping out investors, apparently at least in part because they believed adherence to OpenAI's safety-focused mission—to develop AI for the benefit "of all humanity" —demanded no less.[25] This attempted decapitation nearly wiped out OpenAI and its investors.[26] The episode ended with Altman regaining the CEO position and his board seat, all but one of the original directors departing, and the apparently most safety-minded AI researchers at the firm eventually leaving to start ventures that could compete with OpenAI.[27] In other words, as at Ben & Jerry's, guardians caused double trouble. In 2025, OpenAI tried to curb the power of its guardians, but its origins as a nonprofit regulated by Delaware and California made this difficult; its Ben & Jerry's risk thus remains.[28]

Anthropic, created after OpenAI and Ben & Jerry's, has thus far avoided a similar fate, perhaps because its investor-overriding guardians can be fired by a super-majority of

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[25] *See infra* Part III.B.1.

[26] *See infra* Part III.B.1.

[27] *See infra* Part III.B.2.

[28] *See infra* Part III.D.

stockholders.[29] This "kill-switch" (or as Anthropic calls it, "failsafe") mechanism, the full details of which are not public, substantially limits the power of Anthropic's guardians to harm investors, and potentially cause double trouble.[30] But it also reduces their power to achieve their mission, increasing the likelihood that these guardians will, as the standard critique suggests, do too little.[31] (We will refer to investor-overriding guardians as "fully insulated" when, as at Ben & Jerry's and OpenAI, investors lack a kill switch to disarm them, and "partly insulated" otherwise.)

As far as we can tell, Ben & Jerry's, OpenAI, and Anthropic are the only firms with investor-overriding guardians whose missions, from inception, were understood to be sharply at odds with investor interests. Certain commercial firms—such as Bosch,[32] Mozilla,[33] and Patagonia[34]—are controlled by mission entities but lack investors. Others with investors—such as The Hershey Company and Novo Nordisk—are controlled by entities whose missions are highly aligned with investor interests, eliminating the possibility of severe conflict. We know of no other firm with a sharp built-in conflict between investors and guardians like our three.

Of these three, only two deliberately chose their guardian arrangements: Ben & Jerry's and Anthropic. By contrast, OpenAI's guardian arrangement came into being, and can't easily be discarded, because OpenAI began as a nonprofit (that continues to be

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[29] *See infra* Part V.

[30] *See infra* Part V.

[31] *See infra* Part V.

[32] *See infra* note XX.

[33] *See infra* note XX.

[34] *See infra* note XX.

regulated by Delaware and California).[35] Of the two deliberately-chosen arrangements, one (Ben & Jerry's) has spectacularly failed already, causing double trouble, and the other one (Anthropic) can be terminated if investors find it too costly as the guardians are only partly-insulated. In this paper, we will hazard a prediction: given the fiascos at Ben & Jerry's and OpenAI, the only two firms with fully-insulated guardians, few firms in the future will deliberately choose to adopt this structure.

Our analysis has implications for investors. Purchasing equity in firms with investor-overriding guardians is risky, especially when the guardians are fully insulated. We do not claim that fully-insulated guardians will *always* endanger or harm investors, undermine their own mission, or both. After all, we have seen only two firms with such directors: Ben & Jerry's and OpenAI. Guardians might work well enough in other firms for an isolated period, as they did at Ben & Jerry's for two decades, or even indefinitely. However, it would be unwise to ignore the fact that the only two firms that have ever had fully-insulated guardians suffered widely-publicized meltdowns. Their experience teaches that it is risky for investors to fully empower guardians—agents without principals who answer to nobody but themselves—to help decide when and how much investors should pay to advance the guardians' interpretation of the firm's mission. An Anthropic-style kill switch, we explain, can reduce this risk.

Our analysis also has implications for regulators seeking to protect the interests of society. We understand that AI (unlike ice cream) could pose a major threat to humanity, and that the government has limited ability to regulate this quickly evolving technology. We thus understand the potential societal benefits of "in-house" guardians at AI firms.

[35] *See infra* Part III.C.2.b.

However, our analysis suggests that regulators should not count on most firms to voluntarily install such guardians, at least without a kill switch that would substantially degrade guardians' ability to protect society. And absent the widespread adoption of guardians throughout the AI industry, the presence of guardians at one or two firms is unlikely to yield much social benefit, as "unguarded" firms will rush to seize profitable opportunities abandoned by "guarded" firms for the sake of their mission.

And as for the regulator-required guardians at OpenAI, our analysis points to an underexplored problem with these guardians: that they might not only do too little (as the standard critique suggests) but also do too much.[36]

The paper proceeds as follows. Part II explores Ben & Jerry's and its meltdown. Part III turns to OpenAI. In Part IV, we consider two prominent commercial firms controlled by mission entities (i.e., The Hershey Company, controlled by the Hershey Trust, and Novo Nordisk, controlled by the Novo Nordisk Foundation) and explain why they lack the kind of severe built-in conflict present at OpenAI. Part V discusses Anthropic. Part VI concludes.

II. THE BEN & JERRY'S DOUBLE-TROUBLE MELTDOWN

Section A describes Ben & Jerry's before its 2000 acquisition by Unilever. Section B analyzes the bespoke structure negotiated by Unilever and Ben & Jerry's, including the

[36] We do not know whether it is socially desirable for OpenAI to have fully-insulated guardians. While these guardians may do too little or do too much, one can hope that, as in *Goldilocks and the Three Bears*, they will be "just right." Our goal is to point out a drawback with these guardians that, we believe, has not been widely recognized.

use—for the first time, to our knowledge—of self-appointed mission guardians to override investor interests. Section C explains that, for about two decades, conflicts between the guardians and Unilever were resolved behind closed doors. Section D describes the complete breakdown of the arrangement after the guardians decided that Ben & Jerry's Israeli licensee's license should not be renewed, a move that damaged Unilever and its investors, and ended up achieving the opposite of the guardians' objectives.

A. Ben & Jerry's Before Unilever

Ben & Jerry's, the ice cream purveyor known for its progressive political stances and business practices, was founded by Ben Cohen and Jerry Greenfield in Burlington, Vermont in 1978.[37] Cohen and Greenfield said their business concerned itself with both profits and people (or, as they called it, the "double dip").[38]

Cohen and Greenfield established the firm as a Vermont for-profit corporation, which they continued to control through a dual-class structure after it went public in 1984.[39]

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[37] *About Us*, BEN & JERRY'S HOMEMADE ICE CREAM, https://www.benjerry.com/about-us (last visited Mar. 26, 2025); Antony Page & Robert A. Katz, *The Truth About Ben & Jerry's*, STAN. SOC. INNOVATION REV., Aug. 2012, at 39–43.

[38] *See generally* BEN COHEN & JERRY GREENFIELD, BEN & JERRY'S DOUBLE DIP: HOW TO RUN A VALUE-LED BUSINESS AND MAKE MONEY, TOO (1997).

[39] Page & Katz, *supra* note x, at 41. In 1984, Ben & Jerry's initiated Vermont's first-ever *direct* public offering, specifically offering shares of the ice cream company to in-state Vermont residents to raise funds for a new manufacturing facility. *See* Haskell Murray, *Ben & Jerry's Struggles with Corporate Social Responsibility in an International Context*, SSRN ELEC. J., May 31, 2014, at 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443318 ("Ben & Jerry's raised $750,000 to finance a new manufacturing plant by conducting a Vermont-only public offering of stock.").

The mission activities of Ben & Jerry's included paying livable wages, supporting sustainability efforts, and opposing use of rBGH (recombinant bovine growth hormone).[40]

As the firm's controllers and largest shareholders, Cohen and Greenfield had an incentive to integrate mission activities into the business, and to promote pet political causes, as long as these activities either: (a) increased profits, or (b) decreased profits but yielded enough non-pecuniary benefit to outweigh their share of decreased profits.

As directors of Ben & Jerry's, Cohen and Greenfield were subject to fiduciary duties under Vermont corporate law.[41] But these duties, unlike the fiduciary duties imposed on directors of Delaware-domiciled corporations, would not have required them to focus exclusively on generating value for Ben & Jerry's shareholders. Under Vermont corporate law, each was required to "discharge his or her duties as a director . . . (1) [i]n good faith[;] (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances[; and] (3) in a manner the director reasonably believes to be in the best interest of the corporation[.]"[42] The vagueness of the formulation "best interests of the corporation" gave Cohen and Greenfield substantial latitude in running the firm.[43]

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[40] Articles of Incorporation of Surviving Corporation, Sched. 6.14(1–5) (proposed in conjunction with the 2000 Merger Agreement, to be filed immediately after the merger, in April 2000) [hereinafter 2000, "Proposed Charter"] (listing the social mission priorities of the firm). The filed Articles of Incorporation's "Mission Statement" also emphasizes the same social mission themes of sustainability, environmental protection, and fair trade. Ben & Jerry's Homemade, Inc. Amended and Restated Articles of Incorporation (Aug. 3, 2000), art. 10 [hereinafter, "Articles of Incorporation"].

[41] VT. STAT. ANN. tit. 11A, § 8.30(a).

[42] VT. STAT. ANN. tit. 11A, § 8.30(a).

[43] Effective 1998, § 8.30(a) of the Vermont Business Standard Code of Conduct was amended to add that, for publicly-traded firms (like Ben & Jerry's at the time): "in determining what the director reasonably believes to be in the best interest of the corporation, a director . . . may, in addition, consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the State, region and nation, community and societal considerations, including those of any community in which any offices or facilities of the corporation are located, and any other factors the director in his or her discretion reasonably considers appropriate in determining what he or she reasonably believes to be in the best interests of the corporation,

Despite (or perhaps because of) Ben & Jerry's mission orientation, the company eventually began performing poorly.[44] By 1999, Ben & Jerry's stock had dropped nearly 50% from its peak, attracting interest from potential buyers.[45] In 2000, Ben & Jerry's was acquired by the large conglomerate Unilever, which became the sole shareholder.[46]

B. Ben & Jerry's Structure as a Unilever Subsidiary

To seal the deal, Unilever agreed to install guardians at its new subsidiary, empowered to override Unilever to preserve the "double dip."

1. Unilever's Powers

After the acquisition, Ben & Jerry's remained a Vermont for-profit corporation.[47] However, it became a "close corporation." [48] Under Vermont law, "shareholders of a close

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and the long-term and short-term interests of the corporation and its stockholders, and including the possibility that these interests may be best served by the continued independence of the corporation . . . ." VT. STAT. ANN. tit. 11A, § 8.30(a). This amendment made explicit that, unlike in Delaware, shareholders in Vermont corporations do not come first.

[44] Page & Katz, *supra* note x, at 40.

[45] Page & Katz, *supra* note x, at 40.

[46] Unilever acquired Ben & Jerry's via its wholly-owned subsidiary Conopco. *See, e.g.*, (1) the Agreement and Plan of Merger (Apr. 11, 2000) [hereinafter, "Merger Agreement"]; (2) the Shareholders Agreement (Aug. 3, 2000) [hereinafter, "Shareholders Agreement"]; (3) the Articles of Incorporation. For ease of exposition, we will refer to Unilever, to Conopco, and to both Unilever and Conopco together as "Unilever."

[47] Merger Agreement §§ 1.03, 1.05 (explaining that Ben & Jerry's would "continue" as a surviving corporation and will file merger documents with the state or Vermont confirming as much).

[48] Shareholders Agreement § 1(a).

corporation may agree . . . to regulate the exercise of . . . corporate powers and . . . management of the business . . . of the corporation,"[49] allowing them to eliminate the board of directors altogether,[50] or restrict its powers as they see fit.[51]

With the exception of certain limited powers given to the board, described below, all powers related to Ben & Jerry's were reserved to Unilever,[52] including the power to appoint the CEO.[53] The CEO, in turn, was to manage the firm's affairs without obtaining prior approval from Unilever or the board.[54] In particular, Unilever (and thus its appointed CEO) was given "primary responsibility" for the financial and operational aspects of the firm and for "other aspects . . . not [otherwise] allocated to the [b]oard."[55] The power to appoint the CEO gave Unilever, indirectly, the power to appoint (and direct) all officers and employees of Ben & Jerry's, and thereby direct day-to-day operations.[56]

2. Guardians and the Limited-Purpose Board

[49] VT. STAT. ANN. tit. 11A, § 20.09(a)..

[50] *Id.* at § 20.09(b).

[51] *Id.* at § 20.09(b)(2).

[52] Shareholders Agreement § 1(a). The Bylaws of Ben & Jerry's [hereinafter, "Bylaws"] indicate that "[t]he Board . . . shall only have such corporate powers as are expressly provided to it in the Shareholders Agreement." Bylaws § 3.1.

[53] Shareholders Agreement § 1(c). The appointment was to be made after "good faith consultation" with an advisory committee of one or two members of the Board. *Id.*

[54] Shareholders Agreement § 1(b).

[55] Shareholders Agreement § 1(j). These other aspects included ensuring that Ben & Jerry's makes high-quality ice cream (the "Product Mission") and operates on a sustainable financial basis (the "Economic Mission"). *Id.*

[56] Shareholders Agreement, Ex. A, Form of Delegation of Authority § 2B (delegating to the CEO authority over capital expenditures, operations, and contracts).

Ben & Jerry's board was converted into a limited-purpose board,[57] now called "the Independent Board," with "only those powers and functions expressly granted to it."[58]

The Independent Board had 11 seats. Two were contractually allocated to Unilever appointees (the Unilever-appointed CEO of Ben & Jerry's and another individual); the nine remaining seats were set aside for "Class I Directors."[59] The Class I Directors voted, by majority, to elect their fellow directors, including the Chair,[60] and could only be removed at the request of a majority of the Class I Directors.[61] Thus, the Class I Directors, and their chosen successors, constituted a majority of the Board. While the Class I directors were initially Ben & Jerry's board members prior to the 2000 acquisition, over time they became self-appointed mission guardians, unaccountable to Unilever, Ben & Jerry's sole owner until the ice cream maker was spun off in 2025.

As directors of a Vermont corporation, members of the Board were subject to the same fiduciary duties as pre-acquisition directors. Each was required to "discharge his or her duties as a director . . . (1) [i]n good faith[;] (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances[; and] (3) in a manner the director reasonably believes to be in the best interest of the corporation[.]"[62] The

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[57] Shareholders Agreement § 1(a).

[58] Shareholders Agreement § 1(a).

[59] Articles of Incorporation, art. 7.

[60] *Id.*

[61] *Id.*

[62] VT. STAT. ANN. tit. 11A, § 8.30(a).

vagueness of "best interests of the corporation" gave them substantial latitude in decision-making, as it had given Cohen and Greenfield before 2000. [63]

The powers allocated to the Board were oversight over "Social Mission Priorities" and the "Essential Integrity of the Brand" of Ben & Jerry's,[64] and control over Ben & Jerry's philanthropy, as explained in more detail below.

a. Social-Mission Priorities

The Board was given "primary responsibility for preserving and enhancing the objectives of the historical social mission of the company . . . ."[65] In particular, the Shareholders Agreement (along with the Articles of Incorporation and Bylaws, collectively "the governing documents") provided that the Board "shall work together with the CEO to integrate Social Mission Priorities into the business."[66]

These Social Mission Priorities, totaling 11 and enumerated in the governing documents, focused on continued sustainability efforts, support of non-profits and cooperatives, philanthropy, and opposition to the use of rBGH and GMO ingredients.[67]

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[63] *See supra* Part II.A.

[64] *See* Shareholders Agreement § 1(d).

[65] Shareholders Agreement § 1(e).

[66] *Id.*

[67] *2000 Proposed Charter*, Sched. 6.14(1–5) (listing the social mission priorities of the Independent Board). The Articles of Incorporation's "Mission Statement" also emphasizes the same social mission themes of sustainability, environmental protection, and fair trade. Articles of Incorporation, art. 10.

While the Merger Agreement provides that Ben & Jerry's "objectives . . . may evolve from time to time," this evolution must be "consistent" with Ben & Jerry's "historical social mission."[68] Notably, the Articles of Incorporation emphasize that Ben & Jerry's mission, while "progressive," is also "nonpartisan."[69]

b. Essential Integrity of the Brand

In addition, the Board was to be "the custodians of the Ben & Jerry's-brand image and . . . have primary responsibility for safeguarding the integrity of the essential elements of the Ben & Jerry's brand-name . . . ."[70]

The Board was authorized to "prevent any action by the CEO in the areas of . . . the licensing or other use of the Ben & Jerry's trademark that . . . a majority of the [Board] reasonably determines to be inconsistent with the Essential Integrity of the Brand."[71]

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[68] Shareholders Agreement § 1(e).

[69] Articles of Incorporation, art. 10. The first paragraph of the "Mission Statement" reads:

> "We have a progressive, nonpartisan social mission that seeks to meet human needs and eliminate injustices in our local, national and international communities by integrating these concerns into our day-to-day business activities. Our focus is on children and families, the environment and sustainable agriculture on family farms." *Id.*

[70] *See, e.g.*, Shareholders Agreement § 1(f).

[71] Shareholders Agreement § 1(f). Other provisions of the governing documents and the Merger Agreement seek to reinforce the powers of the Independent Board vis-à-vis Unilever. *See, e.g.*, Merger Agreement § 6.14(i) (explaining that while Unilever has financial and operational authority over Ben & Jerry's, Unilever is prohibited from taking any action that may "prevent the [Board] from "fulfilling its obligations"); Merger Agreement § 9.10 (providing that "irreparable damages would occur in the event that any provision . . . were not performed in accordance with their specific terms" and that Ben & Jerry's would "be entitled to an injunction" to "prevent breaches" and "enforce specifically the terms and provisions" of the governing documents).

c. Philanthropy

The Board was given responsibility over corporate philanthropy.[72] Ben & Jerry's practice of making charitable contributions was to continue for at least ten years after the merger,[73] with the Board allocating annual contributions among The Ben & Jerry's Foundation, Inc., (the "Foundation") and other charitable initiatives.[74] The Foundation was controlled by its Trustees, some of whom historically were members of the Board.[75] Contributions to the Foundation continued after the ten-year period ended; by 2025, it was receiving about $5 million yearly from Ben & Jerry's.[76]

C. 2000–2020: Two Decades without Open Conflict

For two decades, conflict between Unilever and the Class I Directors was managed outside of public view. From 2000 through 2020, the Independent Board pursued its social-mission and brand-integrity objectives by, for example, choosing to release ice cream flavors in support of various progressive causes (Barack Obama's presidency in 2009,

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[72] 2000 Proposed Charter, Sched. 6.14(10) (listing the social mission priorities of the Independent Board).

[73] Shareholders Agreement § 1(h).

[74] *Id.*

[75] At the end of 2025, before most members of the Independent Board had left, *see infra* note x, two of the Foundation's trustees were members of the Independent Board. *Our Team*, BEN & JERRY'S FOUND., https://benandjerrysfoundation.org/about/our-team/ [perma: https://perma.cc/B7ER-KJUE].

[76] Jessica DiNapoli, *Unilever Threatens to Pull Funding from the Ben & Jerry's Foundation, Sources Say*, REUTERS (Apr. 22, 2025), https://www.reuters.com/sustainability/land-use-biodiversity/unilever-threatens-pull-funding-ben-jerrys-foundation-sources-say-2025-04-21/.

climate change action in 2015, Black Lives Matter in 2021) and posting progressive messages on social media.[77]

In addition to such messaging activities, the Board reportedly sought to influence operational decisions. In 2008, Ben & Jerry's (Unilever-appointed) CEO proposed closing Ben & Jerry's Waterbury, Vermont plant, which (according to the Board) would have devastated the local economy.[78] According to the Board, after it determined that the closing would be inconsistent with the Social Mission of the firm, and objected to it, Unilever agreed not to close the factory.[79]

However, there were frequent tensions between Unilever and the Class I Directors, who at some points contemplated suing Unilever for allegedly breaching the governing documents.[80]

D. 2021: Civil War Erupts Over Attempted Israel Boycott

The conflict between the Independent Board and Unilever erupted into public view after the Board decided to not renew the license of Ben & Jerry's Israeli licensee, against Unilever's wishes. This led to an escalating conflict between the Board and Unilever—

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[77] Sarah Todd, *A Brief History of Ben & Jerry's Political Ice Cream Flavors*, QUARTZ (Aug. 26, 2022), https://qz.com/a-brief-history-of-ben-jerrys-political-ice-cream-fla-1849461747; *see generally Our Values*, BEN & JERRY'S HOMEMADE ICE CREAM, https://www.benjerry.com/values (last visited Mar. 26, 2025).

[78] Complaint ¶ 33–34, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 1.

[79] *Id.*

[80] *See* BRAD EDMONDSON, ICE CREAM SOCIAL: THE STRUGGLE FOR THE SOUL OF BEN & JERRY'S 207–32 (Berrett-Koehler Publishers, Inc., 2014).

including two lawsuits by the Board against Unilever and, allegedly, various retaliations by Unilever against the Board—and ended with Unilever spinning off Ben & Jerry's into The Magnum Ice Cream Company.

1. The Ben & Jerry's-Israel Connection and Mounting Boycott Pressure

In the late 1980s, Avi Zinger obtained a license from Ben & Jerry's to produce and sell Ben & Jerry's ice cream in Israel.[81] The license territory included Israel-controlled territories beyond Israel's 1967 borders, such as the Jewish quarter of the Old City of Jerusalem (hereinafter, "the Territories").[82]

Around 2014, anti-Israel activists began to pressure the Independent Board to stop the sale of Ben & Jerry's products in the Territories.[83] Anuradha Mittal, who was appointed Board chair in 2018,[84] became increasingly focused on the Israeli-Palestinian conflict,[85]

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[81] Avi Zinger, *Why I'm Suing Ben & Jerry's*, FREEPRESS (Mar. 28, 2022), https://www.thefp.com/p/why-im-suing-ben-and-jerrys. The license was held by Zinger's company, American Quality Products, Ltd. ("AQP") and other affiliated entities. For simplicity, we will use "Zinger" to mean either the individual or AQP.

[82] Carl Hoffman, *The Scoop on Ben & Jerry's in Israel*, JERUSALEM POST (Dec. 29, 2018), https://www.jpost.com/Magazine/Cookies-n-cream-and-tikkun-olam-575562. Israel thus became the first foreign country to manufacture Ben & Jerry's ice cream. *Id.*

[83] Memorandum of Law on Behalf of Defendant Conopco, Inc. in Opposition to Plaintiff's Application for Preliminary Injunctive Relief at 9, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 30.

[84] Alexander Marrow, *Ben & Jerry's Ousts Board Chair Mittal as it Sets New Term Limits*, REUTERS (Dec. 15, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/ben-jerrys-plans-remove-three-board-members-set-term-limit-wsj-reports-2025-12-15/.

[85] For an overview of Mittal's actions relating to the Israeli-Palestinian conflict, *see* Sean Savage, *Ben & Jerry's Board Chair Speaks Out: 'I am not an anti-Semite'*, JNS (July 27, 2021), https://www.jns.org/ben-jerrys-board-chair-speaks-out-i-am-not-an-anti-semite/?utm_.

not only at Ben & Jerry's but also at the Oakland Institute, a nonprofit she ran that was supported by the Ben & Jerry's Foundation (of which she was a Trustee).[86]

In July 2020, the Board passed a resolution instructing management to develop a plan to end distribution of Ben & Jerry's products in "Israeli-only settlements in the . . . [the Territories]."[87] In October 2020, Ben & Jerry's license with Zinger was amended to change the definition of the licensed "Territory" to include only the "the State of Israel" and to excise reference to the Territories.[88]

However, Zinger continued to sell Ben & Jerry's products in the Territories.[89] He apparently had little choice. Under Israeli law, a company cannot discriminate based on location, by, for example, refusing to sell ice cream in the Jewish quarter of the Old City of Jerusalem while selling ice cream elsewhere in Israel.[90]

2. The July 2021 Israel-Boycott Announcement

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[86] Jerusalem Post Staff, *Report: Ben & Jerry's Board Chair Diverted Funds to Anti-Israel Groups*, JERUSALEM POST (Aug. 30, 2021), https://www.jpost.com/bds-threat/ben-and-jerrys-board-director-diverted-funds-to-anti-israel-orgs-678087 (reporting on a watchdog complaint to the IRS in connection with a $104,000 payment by the Foundation to the Oakland Institute); Jessica DiNapoli, *Exclusive: Ben & Jerry's Board Chair Does Not Plan to Resign as Pressure Mounts from Unilever Unit,* REUTERS (Dec. 15, 2025), https://www.reuters.com/business/ben-jerrys-board-chair-does-not-plan-resign-pressure-mounts-unilever-unit-2025-12-07/ (explaining that Mittal became a trustee of the Foundation in 2012).

[87] Complaint ¶ 9, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 5.

[88] Memorandum of Law on Behalf of Defendant Conopco, Inc. in Opposition to Plaintiff's Application for Preliminary Injunctive Relief at 9, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 30.

[89] *Id.*

[90] Avi Zinger, *Why I'm Suing Ben & Jerry's*, FREEPRESS (Mar. 28, 2022), https://www.thefp.com/p/why-im-suing-ben-and-jerrys; Law Prohibiting Discrimination in Products, Services, and Entrance to Entertainment and Public Places, 5761-2000, § 3(a) (2000) (amended 2017) (Isr.).

In May 2021, the Board apparently determined that it would be "inconsistent with the essential elements of Ben & Jerry's brand integrity for Ben & Jerry's to be sold in the West Bank."[91] And in July 2021, Mittal told Unilever that the Board would announce the end of Ben & Jerry's ice cream sales in the Territories.[92]

On July 19, 2021, Ben & Jerry's notified Zinger that the license would expire at the end of 2022, and announced the non-renewal on its website, stating:

> We believe it is inconsistent with our values for Ben & Jerry's ice cream to be sold in the [Territories] . . . .
>
> [W]e have informed our [Israeli] licensee that we will not renew the license agreement when it expires at the end of next year.
>
> Although Ben & Jerry's will no longer be sold in the [Territories], we will stay in Israel through a different arrangement. We will share an update on this as soon as we're ready . . . .[93]

The Board claimed that its decision to not renew Zinger's license was made pursuant to its primary responsibility around Ben & Jerry's social-mission priorities.[94]

However, taking a position on the Israeli-Palestinian conflict was not consistent with Ben & Jerry's "historical social mission" (that had focused exclusively on sustainability efforts, support of non-profits, philanthropy, and opposition to use of rBGH

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[91] Complaint ¶ 4, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 1.

[92] Memorandum of Law on Behalf of Defendant Conopco, Inc. in Opposition to Plaintiff's Application for Preliminary Injunctive Relief at 10, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 30.

[93] *Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory*, BEN & JERRY'S HOMEMADE ICE CREAM, https://www.benjerry.com/about-us/media-center/opt-statement (last visited Feb. 20, 2024).

[94] First Amended Complaint ¶ 5, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 58.

and GMO ingredients),[95] as required by the Merger Agreement.[96] Indeed, not only had Ben & Jerry's ice cream been sold in Israel since the late 1980s, but as part of the 2000 acquisition Ben & Jerry's agreed to help Unilever sell the ice cream in Israel,[97] indicating (again) that it was not inherent in Ben & Jerry's "social DNA" to boycott Israel. Nor did taking a position on the very contentious Israeli-Palestinian conflict appear to be "nonpartisan," as required by the Articles of Incorporation.[98]

It turns out that the statement "we will stay in Israel through a different arrangement" was added to the nonrenewal announcement at the direction of Ben & Jerry's Unilever-appointed CEO, against the Board's wishes.[99] The Board had wanted to release a different statement—one that made no reference to continued sales in Israel.[100] So the Board released a separate statement directly to NBC, saying Unilever's announcement did

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[95] *See supra* Part II.B.2.a.

[96] Merger Agreement § 6.14(e).

[97] *See* License Agreement between Ben & Jerry's Homemade Inc. and Unilever (Apr. 11, 2000) ("[Ben and Jerry's] shall use commercially reasonable efforts to obtain (at [Ben and Jerry's] expense) for [Unilever] the right to conduct all facets of the Business in Israel.").

[98] Articles of Incorporation, art. 10.

[99] Olivia Solon, *Ben & Jerry's Withdraws Sales from Israeli Settlements but Clashes with Parent Company Unilever*, NBC NEWS (July 19, 2021), https://www.nbcnews.com/business/business-news/ben-jerry-s-withdraws-sales-israeli-settlements-clashes-parent-company-n1274403. Recall that all of the employees of Ben & Jerry's, including those operating the website, reported directly or indirectly to the CEO. *See supra* note x.

[100] *Id.* The Board would have objected to staying in Israel for two reasons. First, as noted above, *see supra* note x, Israeli law prohibits a company from discriminating based on location, by, for example, refusing to sell ice cream in the Jewish quarter of the Old City of Jerusalem (part of the Territories) while selling ice cream elsewhere in Israel. Thus, the only way for Ben & Jerry's to remove its ice cream from the Territories was to remove it from Israel altogether. Second, given Mittal's anti-Israel activism, she and other members of the Independent Board would be unlikely to want to find a way to keep Ben & Jerry's in Israel, even if it were possible to do while cutting off sales in the Territories.

"not reflect the position of the independent board," and accused Unilever and the CEO of violating "the spirit and the letter of the acquisition agreement."[101]

Unilever responded by announcing on its own website that Unilever remained "fully committed to [its] presence in Israel" and "also welcome[d] the fact that Ben & Jerry's will stay in Israel."[102] As discussed below, about a year later (in June 2022), Unilever ensured that Ben & Jerry's ice cream would stay in Israel: it transferred to Zinger all assets necessary to operate Ben & Jerry's in Israel and the Territories, including Hebrew and Arabic brand-names and logos.[103]

3. The Backlash

The 2021 Israel-boycott announcement generated substantial backlash against Ben & Jerry's and, more importantly, Unilever. By announcing that it would not renew Zinger's license for political reasons, Ben & Jerry's aligned itself with the anti-Israel Boycott, Divestment, Sanctions ("BDS") movement, which openly seeks the destruction of Israel as a Jewish state,[104] and which pressures individuals and entities to boycott, sanction, and divest from anything connected to Israel.[105] Israel sees the BDS movement as a threat to

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[101] Solon, *supra* note xx.

[102] *Unilever Statement on Ben & Jerry's Decision***,** UNILEVER (July 19, 2021), https://www.unilever.com/news/press-and-media/press-releases/2021/unilever-statement-on-ben-and-jerrys-decision/.

[103] *See infra* Part II.D.4.

[104] Steven A. Cook, *The BDS Movement Has Already Lost*, FOREIGN POL'Y (May 19, 2022), https://foreignpolicy.com/2022/05/19/bds-movement-boycott-israel-palestine-harvard-crimson/.

[105] *What is BDS?, BDS MOVEMENT*, https://bdsmovement.net/what-is-bds (last visited Feb. 20, 2024).

its existence, and many of Israel's supporters, including Democratic and Republican leaders in Washington and the legislatures of dozens of U.S. states, hold similar views.[106] Predictably, Ben & Jerry's July 2021 Israel-boycott announcement subjected both it and Unilever to substantial adverse publicity, counter-boycotts, as well as litigation, causing material harm to Unilever and its investors.

a. Criticism from Politicians and Investors

Days after the boycott announcement, Ned Price, spokesperson for the U.S. Department of State, confirmed that Biden White House officials "firmly reject the BDS movement, which unfairly singles out Israel."[107] In October 2021, seven Republican Senators urged Unilever to reverse Ben & Jerry's boycott of the West Bank, calling the choice 'misguided' and citing their opposition to the BDS movement.[108]

Around the time that Ben & Jerry's announced its Israel boycott, Unilever also released disappointing financial results.[109] During a very short period, Unilever's stock price fell substantially, wiping out almost $10 billion of stockholder value.[110]

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[106] *See, e.g.*, Cook, *supra* note xx.

[107] Dan Williams & Siddharth Cavale, *Israel PM warns Unilever boss over Ben and Jerry's boycott*, REUTERS (July 20, 2021), https://www.reuters.com/world/middle-east/israel-pm-warns-unilever-severe-consequences-ben-jerrys-decision-2021-07-20/.

[108] Shiryn Ghermezian, *Senate Republicans Ask Unilever to 'Override' Ben & Jerry's 'Misguided' West Bank Boycott*, ALGEMEINER (Oct. 28, 2021), https://www.algemeiner.com/2021/10/28/senate-republicans-ask-unilever-to-override-ben-jerrys-misguided-west-bank-boycott/.

[109] Zev Chafets, *Finally, Something Unites Israeli Politicians: Ice Cream*, BLOOMBERG (July 26, 2021), https://www.bloomberg.com/opinion/articles/2021-07-26/israel-ben-jerry-s-boycott-is-a-bellyache-for-unilever?utm_.

[110] Ethan Wu, *Unilever Dips 6% as Rising Commodity Prices Cut Into Margin Outlook*, BUS. INSIDER

In December 2021, other Republican Senators called for an investigation into Unilever and Ben & Jerry's for making "knowingly and recklessly false" statements that the boycott was limited to the Territories, based on Ben & Jerry's knowledge that Israeli law made it illegal for the ice cream to leave the Territories but stay in all other parts of Israel.[111] In early 2022, British fund manager Terry Smith criticized Unilever (and its then CEO, Alan Jope) for their "ludicrous" obsession with social issues at the expense of performance.[112] Meanwhile, Nelson Peltz's Trian fund, which acquires shares in underperforming firms and seeks to fix them, had begun acquiring shares in Unilever.[113] In late 2021, Peltz met with Jope and advised him to end the boycott.[114] Peltz joined the Unilever board in July 2022.[115] In September 2022, Jope announced that he would retire as CEO of Unilever.[116]

(July 22, 2021), https://markets.businessinsider.com/news/stocks/unilever-stock-price-earnings-call-commodities-israel-ben-jerrys-boycott-2021-07 (explaining that Unilever's stock fell by as much as six percent in July 2021). Unilever's market capitalization at the time was about $150 billion before the fall. *See* UNILEVER, CompaniesMarketCap, https://companiesmarketcap.com/unilever/marketcap/.

[111] Caitlin McFall, *GOP Senators Demand SEC Investigate Unilever After Ben & Jerry's Israel Boycott*, FOX BUS. (Jan. 5, 2022), https://www.foxbusiness.com/politics/gop-senators-sec-investigate-unilever-ben-jerrys-israel-boycott.

[112] Patrick Hosking, *Unilever Has Lost the Plot, Says Star Stockpicker*, TIMES (Jan. 12, 2022), https://www.thetimes.com/business/markets/article/unilever-has-lost-the-plot-says-star-stockpicker-sjg6zqw27?gaa_.

[113] Harriet Agnew & James Fontanella-Khan, *Nelson Peltz: The Activist Investor Hot on Unilever's Heels*, FIN. TIMES (Jan. 28, 2022), https://www.ft.com/content/a5644e85-b0f7-443d-a949-1ff7d5b33374.

[114] *Id.*

[115] Sachin Ravikumar & Richa Naidu, *After P&G Revamp, Activist Investor Peltz Moves on to Unilever*, REUTERS (May 31, 2022), https://www.reuters.com/markets/deals/unilever-adds-activist-investor-peltz-board-2022-05-31/.

[116] Richa Naidu, *Unilever CEO Set to Leave After GSK Debacle, Arrival of Activist Investor*, REUTERS (Sep. 26, 2022), https://www.reuters.com/business/retail-consumer/unilever-ceo-alan-jope-retire-end-2023-2022-09-26/.

b. State Divestments

By 2021, over 30 U.S. states had enacted anti-boycott laws obligating themselves to stop doing business with companies that boycott Israel and/or divest from these companies' securities.[117] Following Ben & Jerry's Israel-boycott announcement in July 2021, at least a half dozen of these states ordered their pension funds to divest from Unilever securities.[118] For example, in October 2021, the New York State Controller announced that the New York State Common Retirement Fund, which had $111 million of Unilever equity, was divesting its Unilever stock.[119] Florida, Texas, Illinois, Colorado and Arizona also announced their decisions to divest their holdings of Unilever stock.[120]

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[117] *See, e.g.,* Associated Press, *Arizona Dumps Bonds After Ben & Jerry's Stops Selling In Israeli-Occupied Territories*, NPR (Sep. 10, 2021), https://www.npr.org/2021/09/10/1036180160/arizona-ben-jerrys-israeli-occupied-territories-unilever-ice-cream.

[118] Luke Tress, *Ben & Jerry's Israel, Parent Company Unilever Reach Deal to End Settlement Boycott*, TIMES OF ISR. (June 29, 2022), https://www.timesofisrael.com/ben-jerrys-israel-parent-company-unilever-reach-deal-to-end-settlement-boycott/.

[119] Caroline Downey, *NY Pension Fund Withdraws $111 Million Investment from Ben & Jerry's Parent Company Over Israel Boycott*, NAT'L REV. (Oct. 29, 2021), https://www.nationalreview.com/news/ny-pension-fund-withdraws-111-million-investment-from-ben-jerrys-parent-company-over-israel-boycott/.

[120] *Class Action Suit Launched Against Unilever Over Ben & Jerry's Boycott*, JNS (June 16, 2022), https://www.jns.org/unilever-sued-over-alleged-mishandling-of-ben-jerrys-israel-boycott/. According to Unilever, as of March 2025, although Zinger had received all of the Ben & Jerry's assets necessary to conduct business in 2022, and Ben & Jerry's could no longer boycott Israel, Ben & Jerry's and/or Unilever still remain on at least nine states' anti-BDS lists. Memorandum of Law in Support of Motion to Dismiss Plaintiff's First Amended Complaint ¶ 3, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 40.

c. Litigation

Unilever and Ben & Jerry's faced multiple lawsuits and investigations after Ben & Jerry's announced the non-renewal of Zinger's license. In Israel, two class action complaints were filed against Ben & Jerry's, asserting that its decision not to sell in the Territories violated Israel's anti-discrimination laws.[121] The Israel Competition Authority (ICA), which had been required to approve Unilever's 2000 acquisition of Ben & Jerry's, opened an investigation.[122]

In the U.S., Zinger sued Ben & Jerry's and Unilever for, among other things, breach of contract.[123] And a securities class action complaint was filed against Unilever and certain of its officers alleging misrepresentations and omissions concerning the risks and uncertainties regarding the Israel boycott and the dispute with the Independent Board.[124]

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[121] Memorandum of Law on Behalf of Defendant Conopco, Inc. in Opposition to Plaintiff's Application for Preliminary Injunctive Relief at 12, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 30. These class actions were captioned in Israel as DC (Jer.), 45950-07-21, *Spigelman v. Ben & Jerry's Homemade, Inc.* (Isr.) and DC (CT), 45950-07-21, *Ben Ami v. Ben & Jerry's Homemade, Inc.* (Isr.).

[122] Because Unilever owned other ice cream companies that conducted business in Israel, its 2000 acquisition of Ben & Jerry's was reviewed by the Israel Antitrust Authority (now the Israel Competition Authority, or "ICA"). Memorandum of Law on Behalf of Defendant Conopco, Inc. in Opposition to Plaintiff's Application for Preliminary Injunctive Relief Ex. G, ¶ 13, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 36. The ICA issued a consent decree that approved the merger under certain conditions. *Id.* In 2022, the ICA informed Unilever that it had determined that the Independent Board's decision appeared to demonstrate a *prima facie* violation of the decree. *See* Declaration of Mattan Meridor in Support of Defendant Conopco, Inc.'s Opposition to Plaintiff's Application for Preliminary Injunctive Relief ¶ 7, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 32.

[123] *See* Complaint, *Zinger v. Ben & Jerry's Homemade, Inc*, 2:22-cv-01154-ES-JBC (D.N.J. 2022), ECF No. 1.

[124] *See City of St. Clair Shores v. Unilever PLC*, No. 1:22-cv-05011-LGS, 2023 WL 5578090 (S.D.N.Y. June 15, 2022) (ultimately dismissed for failure to demonstrate scienter).

4. Unilever's Settlement with Zinger

In June 2022, Unilever settled the Zinger lawsuit, in part by transferring to Zinger all rights required to operate Ben & Jerry's business in Israel and the Territories, including rights to Hebrew versions of the trademarks and rights to register Arabic versions.[125]

While Zinger did not receive rights to the English versions of Ben & Jerry's trademarks, his position was otherwise improved, from licensee to owner, ensuring that he could make and sell Ben & Jerry's ice cream in Israel and the Territories for as long as he wishes.[126] In retrospect, Ben & Jerry's and Unilever had been accurate in posting, in July 2021, that Ben & Jerry's would "stay in Israel under a different arrangement." The Class I Directors thus appear to have achieved the opposite of what they sought. [127]

5. The Board's 2022 Lawsuit

On July 5, 2022, after the sale of Ben & Jerry's business in Israel had closed, the Independent Board sued Unilever alleging that Unilever breached the Merger Agreement and Shareholders Agreement by transferring to Zinger the rights to operate Ben & Jerry's in Israel and the Territories (the "2022 Lawsuit").[128] The Board claimed that this

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[125] Memorandum of Law on Behalf of Defendant Conopco, Inc. in Opposition to Plaintiff's Application for Preliminary Injunctive Relief at 14, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 30.

[126] *Id*.

[127] The Class I directors may have achieved the exact opposite of their stated mission because they failed to understand the limits of their own power, or because "taking a stand" was more important than succeeding.

[128] *See generally Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022). Unilever's two representatives voted against the lawsuit at a special board meeting held to discuss the

"unauthorized transfer" would cause it to lose control over the Ben & Jerry's brand, which is their "primary responsibility for safeguarding."[129] Unilever moved to dismiss.[130]

In September 2022, the Independent Board amended its complaint, claiming among other things, that Unilever (1) made statements on behalf of Ben & Jerry's that the Board had expressly rejected, while refusing to allow the Board to make its own statements; (2) threatened to limit the Board's authority should the lawsuit continue; (3) refused to disburse Ben & Jerry's revenues meant for charities; and (4) refused to pay Class I Directors.[131]

In December 2022, Unilever and the Board agreed to settle the 2022 Lawsuit in a confidential settlement (as later amended, the "Settlement Agreement"), parts of which were disclosed in subsequent court filings.[132] The Board extracted from Unilever, among other things, a promise to buy ingredients from Canaan Fair Trade (CFT), a Palestinian almond collective in the Territories.[133] Unilever also agreed to make two payments of $2.5 million to Ben & Jerry's—one each in 2023 and 2024—for subsequent disbursement to

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issue. *See* Sabrina Chaudhuri, *Ben & Jerry's to Take on Owner in Court Hearing Over Israeli Business*, WALL ST. J. (Aug. 7, 2022), https://tinyurl.com/4v5t8esh.

[129] Plaintiff's Memorandum of Law in Support of its Application for Temporary Restraining Order and Preliminary Injunctive Relief at 5, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 9.

[130] *See* Memorandum of Law in Support of Defendant Conopco, Inc., Unilever IP Holdings B.V. and Unilever PLC's Motion to Dismiss at 3–4, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc.*, No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 76.

[131] Amended Complaint at 30–31, *Ben & Jerry's Homemade, Inc. v. Conopco, Inc*., No. 1:22-cv-05681 (S.D.N.Y. July 5, 2022), ECF No. 58.

[132] *See., e.g.*, Memorandum of Law in Support of Unilever PLC's and Conopco, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint, *supra* note x, at 8.

[133] *See* First Amended Complaint, *supra* note x, at 13. On August 30, 2023, Unilever and the Class I Directors agreed to amend the Settlement Agreement, under which Unilever agreed that it would pay $2 million annually to CFT for Palestinian almonds (or for the direct benefit of Palestinian almond farmers) for at least ten years and confirm such payments with Mittal each quarter. *See id.*

"humanitarian and human rights organizations" selected by Mittal, after good faith consultation, with consent not to be "unreasonably withheld" by Unilever.[134]

6. The Board's 2024 Lawsuit

Implementation of the Settlement Agreement gave rise to another lawsuit against Unilever in November 2024 (the "2024 Lawsuit"). The Independent Board claimed that Unilever unreasonably blocked donations to Mittal's chosen charities.[135] The Board also claimed that Unilever did not fulfill its promise to pay Palestinian almond farmers, and wrongly blocked four attempts via social media to speak about Israel,[136] all of which it described as breaches of the Agreement.[137] The Board also claimed that Unilever

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[134] *Id.* at 10 (quoting the Settlement Agreement) ("Unilever will make two $2,500,000 payments to Ben & Jerry's Homemade Inc. . . . [Mittal] in good faith consultation with Unilever will determine to which humanitarian and human rights organizations the funds will be disbursed. Unilever's consent will not be unreasonably withheld.").

[135] Complaint at 9–11, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 5. In 2023, Mittal designated two high-profile pro-BDS organizations to receive the donations, and Unilever withheld consent. Memorandum of Law in Support of Unilever PLC's and Conopco, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint, *supra* note x, at 9.

After they failed to reach agreement, Unilever and the Board submitted to an arbitrator the issue of whether Unilever reasonably withheld consent. Memorandum of Law in Support of Unilever PLC's and Conopco, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint, Ex. D, Arbitration Award at 6, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 41. In March 2024, the arbitrator concluded that withholding consent was a "reasonable decision by Unilever, based on objective evidence." *Id.*

In June 2024, Mittal notified Unilever that she selected two other pro-BDS organizations to receive Unilever's 2024 donations. *See* First Amended Complaint, *supra* note x, at 30. Unilever then again refused consent, Memorandum of Law in Support of Unilever PLC's and Conopco, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint, *supra* note x, at 9–10, and the Board filed the 2024 Lawsuit.

[136] Complaint at 3–7, 11–12, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024).

[137] *Id.* at 7.

threatened to dismantle it and sue its members, and intimidated Ben & Jerry's personnel.[138] Unilever denied the claims.[139]

In April 2025, Unilever reportedly threatened to halt its approximately $5 million in annual funding to the Ben & Jerry's Foundation,[140] the nonprofit directly funded by the Independent Board.[141] Unilever told the Foundation that it must agree to an expedited donation audit or risk losing funding.[142] In June 2025, Unilever cut off funding to the Foundation after determining that its trustees "have continued to resist basic oversight" and are not cooperating with requests from corporate auditors.[143]

7. The Divorce

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[138] *Id.* at 1, 5 (alleging that Unilever threatened to dismantle the Independent Board and to sue each board member in their individual capacity).

[139] Zoya Mirza, *Ben & Jerry's Sues Parent Company Unilever for Stifling its Stance on Gaza*, ESG DIVE (Nov. 19, 2024), https://www.esgdive.com/news/ben-jerrys-sues-parent-company-unilever-for-stifling-its-stance-on-gaza/733385/. During January-March 2025, the Board amended its complaint several times, claiming, among other things, that Unilever had suppressed social media statements relating to President Donald Trump. *See* Auzinea Bacon, *Ben & Jerry's Parent Company, Unilever, Accused of Censoring a Statement on Trump*, CNN (Jan. 25, 2025), https://www.cnn.com/2025/01/25/business/ben-jerrys-lawsuit-unilever-trump/index.html. In May 2025, the Independent Board amended its complaint again, alleging that Unilever again threatened Ben & Jerry's board and its individual members. Jessica DiNapoli, *Ben & Jerry's Cites Investor Peltz's Growing Influence Over Parent Company Unilever*, REUTERS (May 2, 2025), https://www.reuters.com/sustainability/society-equity/ben-jerrys-cites-investor-peltzs-growing-influence-over-parent-company-unilever-2025-05-02/.

[140] Jessica DiNapoli, *Unilever Threatens to Pull Funding from the Ben & Jerry's Foundation, Sources Say*, REUTERS (Apr. 22, 2025), https://www.reuters.com/sustainability/land-use-biodiversity/unilever-threatens-pull-funding-ben-jerrys-foundation-sources-say-2025-04-21/.

[141] *Id.*

[142] *Id.*

[143] Liz Hoffman, *Unilever cuts off funding from Ben & Jerry's foundation amid tensions over Gaza, audit*, SEMAFOR (June 20, 2025), https://www.semafor.com/article/06/30/2025/unilever-cuts-off-funding-for-ben-jerrys-foundation-amid-tensions-over-gaza-audit.

In March 2024, before the 2024 Lawsuit was filed, Unilever announced it would spin off its ice cream brands, including Ben & Jerry's, into a separate firm, The Magnum Ice Cream Company (TMICC).[144] The spinoff was finalized before the end of 2025.[145]

Unilever described the spinoff as "an attempt to win back shareholder confidence."[146] The spinoff may well have been motivated, at least in part, by the desire to prevent the Class I Directors from imposing more costs on Unilever. But whatever the purpose of the spinoff, it shields Unilever and its investors from ever again being harmed by the guardians of Ben & Jerry's.

To be sure, the Independent Board could still act in ways that damage its new parent company, as TMICC itself has acknowledged.[147] But the damage would be smaller because TMICC would be less prominent and newsworthy than Unilever. And for that same reason, TMICC might have a freer hand to deal with the Class I Directors.[148]

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[144] Jessica DiNapoli, *Exclusive: Unilever Proposes Peter ter Kulve as CEO of Ice Cream Spin-Off*, REUTERS (June 17, 2025), https://www.reuters.com/world/europe/unilever-proposes-peter-ter-kulve-ceo-listed-ice-cream-unit-2025-06-17/. The new company was named after Unilever's Magnum ice cream brand (which has more sales than Ben & Jerry's). *Id.*

[145] Elsa Ohlen & April Roach, *Unilever Spinoff Magnum Ice Cream Debuts on Amsterdam Stock Market*, CNBC (Dec. 8, 2025), https://www.cnbc.com/2025/12/08/magnum-ice-cream-ben-jerrys-amsterdam-stock-market-debut.html. TMICC is headquartered in the Netherlands, and its shares are listed in Amsterdam, London, and New York. *Id.*

[146] *See* Timothy McQuiston, *Unilever to Spin Off Ice Cream Companies Including Ben & Jerry's*, VT BIZ (Mar. 19, 2024), https://vermontbiz.com/news/2024/march/19/unilever-spin-ice-cream-companies-including-ben-jerrys.

[147] *See* The Magnum Ice Cream Company B.V., Form 20-F at 9 (Filed Nov. 4, 2025), https://www.sec.gov/Archives/edgar/data/2071668/000110465925106340/tm2515841-10_20fr12b.htm ("The governance structure of Ben & Jerry's may pose certain risks to the reputation and operations of the Group.").

[148] Before the spinoff occurred, Ben & Jerry's Class I Directors claimed that Unilever had refused to discuss how the spin-off would affect the Board's rights, duties, and obligations set out in the governing documents and settlement agreements. Motion for Leave to File Amended Complaint at 17, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 38-1.

In fact, as TMICC was spun off, it amended Ben & Jerry's bylaws to impose a retroactive nine-year term limit on Class I Directors, which rendered Mittal, the anti-Israel Board chair, and two other Class I Directors ineligible for continued board service.[149] TMICC also updated the bylaws to require directors, who had previously been required to abide by Unilever's Code of Business, to sign TMICC's Code of Business Integrity.[150] The remaining Class I Directors then resigned rather than sign.[151] This left only two members on the Board: the Unilever/TMICC appointees.[152] TMICC has reportedly indicated that it plans to appoint a new independent chair who will then appoint new Class I directors.[153]

In early 2026, Mittal and the other Class I Directors sought leave to amend their 2024 Lawsuit to challenge these two bylaw changes, calling the removal "corporate overreach" in violation of Ben & Jerry's rights.[154]

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[149] Alexander Marrow, *Ben & Jerry's Ousts Board Chair Mittal as it Sets New Term Limits*, REUTERS (Dec. 15, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/ben-jerrys-plans-remove-three-board-members-set-term-limit-wsj-reports-2025-12-15/. TMICC also reportedly blocked the appointment by the Class I Directors of a new independent director, Chris Miller. *See* Aimee Look, *Ben & Jerry's Board Members Say Magnum Blocked Appointment of New Director–Update*, MORNINGSTAR (Jan. 13, 2026), https://www.morningstar.com/news/dow-jones/202601135986/ben-jerrys-board-members-say-magnum-blocked-appointment-of-new-director-update.

[150] Memorandum of Law in Opposition to Motion for Leave to File Third Amended Complaint at 4–6, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 73.

[151] Charlotte Hughes-Morgan, *Ben & Jerry's Independent Directors Edged Out in Magnum Feud*, BLOOMBERG (Jan. 23, 2026), https://www.bloomberg.com/news/articles/2026-01-22/ben-jerry-s-independent-directors-edged-out-in-magnum-feud?sref=IrXjXN7s.

[152] Memorandum of Law in Opposition to Motion for Leave to File Third Amended Complaint at 13, *Ben & Jerry's Homemade, Inc. v. Unilever, Inc.*, No. 1:24-CV-08641-PKC (S.D.N.Y. Nov. 13, 2024), ECF No. 73.

[153] *See* Aimee Look, *Magnum Ice Cream Says New Independent Ben & Jerry's Board Members to Be Appointed*, WALL ST. J. (Jan. 22, 2026), https://www.wsj.com/business/magnum-ice-cream-says-new-independent-ben-jerrys-board-members-to-be-appointed-221544a0?.

[154] Reuters, *Former Ben & Jerry's directors challenge Magnum efforts to shape independent board*, REUTERS (Jan. 30, 2026), https://www.reuters.com/legal/transactional/former-ben-jerrys-directors-challenge-magnum-efforts-shape-independent-board-2026-01-30/. One might argue that the fact that TMICC was able to (at least temporarily) force several Class I Directors off the board via the midstream adoption of term limits means these directors were, ultimately, accountable to Ben & Jerry's owner. But the legality of this move is

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During the period 2021–2025 the Class I directors: (a) created a public relations nightmare for Unilever, drawing criticism from U.S. Senators, the State Department, and influential investors; (b) embroiled Unilever in multiple lawsuits and investigations, including an arbitration and two lawsuits brought by the Independent Board, one of which (the 2024 Lawsuit) is still ongoing; (c) caused multiple state pension funds to dump Unilever securities and (d) used their hold-up power to extract funds for favored recipients. In the end, the costs to Unilever of investor-overriding guardians proved to be extremely high and, perhaps at least partially for this reason, Unilever divorced Ben & Jerry's.

The story also makes clear that guardians can fail at their own mission, as they see it to be. Ben & Jerry's Class I Directors believed their social mission and brand integrity duties required them to remove Ben & Jerry's ice cream from Israel. But the opposite occurred. The Israeli licensee now can sell Ben & Jerry's ice cream in perpetuity in Israel, an upgrade from his previous position.

The guardians installed to preserve Ben & Jerry's *double dip* thus ended up causing *double trouble*: they both harmed Unilever and its investors and achieved the opposite of what they said their mission required.

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being challenged. And all of the parties, including Unilever, acted as if the Class I directors were unaccountable for over four years, during which time the directors inflicted considerable damage on Unilever.

III. OPENAI

Section A describes the structure OpenAI adopted in 2019, which mixed investors and investor-overriding guardians in a for-profit arm (OpenAI LLC). Section B describes that subsidiary's 2023 Ben & Jerry's-style meltdown. Section C describes OpenAI's current structure, adopted in 2025. Section D argues that because the 2025 structure largely replicates the 2019 structure, the Ben & Jerry's risk that materialized once can materialize again.

A. The 2019 Structure and OpenAI LLC's Guardians

1. The 2019 Structure

In 2015, OpenAI, Inc. ("OpenAI Nonprofit") was established by Elon Musk, Sam Altman, Greg Brockman and others as an IRC 501(c)(3) nonprofit corporation with the goal of "advancing digital intelligence in the way most likely to benefit humanity as a whole, *unconstrained by a need to generate financial return*."[155] OpenAI Nonprofit's

[155] *Why OpenAI's Structure Must Evolve to Advance Our Mission*, *OpenAI*, https://openai.com/index/why-our-structure-must-evolve-to-advance-our-mission/ (last visited Mar. 13, 2025) (emphasis added).

directors, like those of other nonprofit corporations, choose their own replacements (usually, themselves).[156] In 2018, Musk resigned from the board of directors.[157]

While OpenAI Nonprofit initially operated on donations alone,[158] its directors soon realized that donations alone would not suffice for their ambitious plans.[159] In 2019, to facilitate a $1 billion investment by Microsoft, the board put the operating business in a newly created for-profit indirect subsidiary, Delaware-domiciled OpenAI Global, LLC ("OpenAI LLC").[160] All OpenAI Nonprofit employees were transferred to OpenAI LLC.[161] Although a separate entity, OpenAI LLC was controlled by OpenAI Nonprofit's directors.[162]

OpenAI Nonprofit, along with OpenAI LLC employees and other investors, owned 51% of OpenAI LLC via a holding company owned and controlled by another subsidiary

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[156] Certificate of Incorporation of a Non-Stock Corporation OpenAI, Inc. (2017) (explaining that OpenAI, Inc. board members would constitute the "members" of OpenAI Inc., and therefore would have the exclusive right to elect and remove fellow directors).

[157] According to OpenAI's website, Musk resigned because he wanted to prevent conflicts of interest as he recruited AI talent for his automotive company, Tesla, Inc. OpenAI Supporters, OpenAI, https://openai.com/index/openai-supporters/ (last visited Feb. 4, 2026). In 2024, Musk filed a lawsuit against Altman, Brockman, and AI Nonprofit claiming that in 2023 Altman and Brockman breached a founding agreement entered into by Musk, Brockman, and Altman. Complaint at 7, Musk v. Altman, No. CGC-24-612746 (N.D. Cal dismissed June 12, 2024). That lawsuit was dropped in June 2024 and a similar lawsuit, which is still ongoing, was filed in August 2024. Request for Dismissal, Musk v. Altman, No. CGC-24-612746 (N.D. Cal dismissed June 12, 2024); *Elon Musk Drops Lawsuit Against ChatGPT-maker OpenAI Without Explanation, Associated Press* (June 12, 2024), https://apnews.com/article/elon-musk-drops-openai-lawsuit-e3932deb15957c915cd694d63583a043.

[158] *Amoral Drift, supra* note xx, at 1641.

[159] *Why OpenAI's Structure Must Evolve to Advance Our Mission*, *supra* note xx.

[160] Jennifer S. Fan & Xuan-Thao Nguyen, *Novel Corporate Governance Structures*, 38 HARV. J.L. & TECH. 1027, 1049–50 (2025) (describing the OpenAI organizational model); *Microsoft Invests in and Partners with OpenAI to Support Us Building Beneficial AGI, OpenAI,* https://openai.com/index/microsoft-invests-in-and-partners-with-openai/ (detailing Microsoft's $1 billion investment in OpenAI).

[161] *OpenAI LP*, *OpenAI*, https://openai.com/index/openai-lp/ (last visited Feb. 4, 2026).

[162] Fan & Nguyen, *supra* note x, at 1051.

of OpenAI Nonprofit.[163] The other 49% of OpenAI LLC was owned by Microsoft, which committed up to $13 billion to the entity.[164]

OpenAI LLC was structured as a "capped profit company." Under this structure, profits allocated to investors and employees were limited to a certain multiple of their investment.[165] Any surplus value would flow to OpenAI Nonprofit for use in its nonprofit mission.[166]

As part of the 2019 restructuring, OpenAI Nonprofit's new mission statement eliminated reference to it being "unconstrained by the need to generate financial return." It was now simply "to build artificial general intelligence (AGI) that is safe and benefits all of humanity."[167]

Every investor in OpenAI LLC received the following statement:

> Investing in [OpenAI LLC] is a high-risk investment. Investors could lose their capital contribution and not see any return. It would be wise to view any investment in [OpenAI LLC] in the spirit of a donation, with the understanding that it may be difficult to know what role money will play in a post-AGI world. [OpenAI LLC] exists to advance [OpenAI Nonprofit's] mission of ensuring that safe artificial general intelligence is developed and benefits all of humanity. [OpenAI LLC's]

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[163] Xinyu Huang, *Navigating Turbulent Waters: OpenAI's Leadership Crisis and Corporate Governance Imperatives*, TSVC (Dec. 6, 2023), https://www.tsvcap.com/post/navigating-turbulent-waters-openais-leadership-crisis-and-corporate-governance-imperatives.

[164] Karen Weise & Cade Metz, *OpenAI Takes Big Steps Toward Its Long-Planned Reorganization*, N.Y. TIMES (Sep. 11, 2025), https://www.nytimes.com/2025/09/11/technology/openai-microsoft-deal.html.

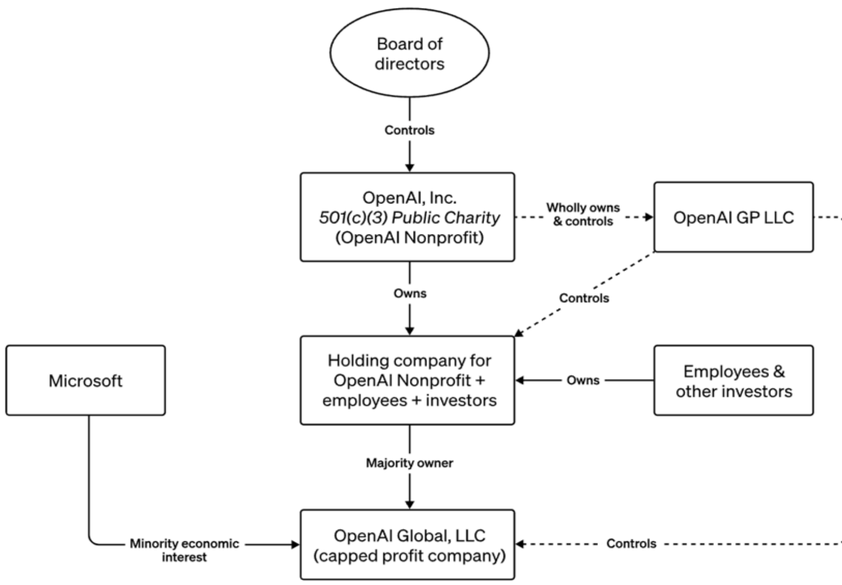
[165] Rajat Sethi & Shashankaa Tewari, *Lessons from OpenAI: Boards and the Spin of Corporate Governance*, LEXOLOGY (Nov. 18, 2024), https://www.lexology.com/library/detail.aspx?g=3854b224-bae8-4b29-b244-863e6b48982d.

[166] *Id.*

[167] Michael R. Wade & David Bach, *OpenAI: The Future is Looking Great for AI, Less so for Humanity*, IMD (Nov. 23, 2023), https://www.imd.org/ibyimd/governance/openai-the-future-is-looking-great-for-ai-less-so-for-humanity/. *See also Our Structure*, OPENAI, https://openai.com/our-structure/ [Archived at Wayback Machine, https://web.archive.org/web/20240207154612/https://openai.com/our-structure/]

duty to this mission and the principles advanced in the [OpenAI Nonprofit] Charter take[s] precedence over any obligation to generate a profit.*"*[168]

Below is a diagram illustrating OpenAI's structure after the 2019 restructuring, as was shown on its website:[169]



2. OpenAI LLC's Investors and Guardians

By mid 2023, OpenAI LLC's investors included prominent VC funds.[170] While the corporate governance arrangements of OpenAI LLC were private,[171] OpenAI Nonprofit

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[168] Gary Marcus, "No one person should be trusted here," *Marcus on AI*, SUBSTACK (Nov. 19, 2023), https://garymarcus.substack.com/p/no-one-person-should-be-trusted-here.

[169] This diagram was removed from the OpenAI website in 2025. It can be viewed for posterity at Axios, *How OpenAI is Structured*, AXIOS (Nov. 18, 2023), https://www.axios.com/2023/11/18/how-openai-board-is-structured. *See also Our Structure*, OPENAI, https://openai.com/our-structure/ [Archived at Wayback Machine, https://web.archive.org/web/20240207154612/https://openai.com/our-structure/]

[170] Anders Bylund, *Who Owns OpenAI? Details of the Top Shareholders & Board of Directors*, Motley Fool (last visited Apr. 6, 2026), https://www.fool.com/investing/how-to-invest/stocks/who-owns-openai/ [https://perma.cc/DUJ5-YE6U]. The investors invested in OpenAI LLC through a holding company set up to pool investments. *See supra* note x.

[171] The "Certificate of Formation" of an LLC has little detail and the LLC's "constitution"—the operating agreement—need not be (and in this case was not) publicly filed in Delaware.

directors managing the LLC appear to have had no obligation other than to carry out OpenAI Nonprofit's mission.[172] That mission, again, was to build artificial general intelligence (AGI) that is "safe" and "benefits all of humanity,"[173] without regard for profit.[174]

Thus, like Ben & Jerry's, OpenAI LLC had both investors and investor-overriding guardians (OpenAI Nonprofit's directors). However, unlike Ben & Jerry's guardians, which had limited powers and could not direct the funds and personnel of Ben & Jerry's, OpenAI Nonprofit's directors had full control of OpenAI LLC.

To be sure, OpenAI Nonprofit's nonprofit status likely required the LLC to be run by self-appointed mission guardians (OpenAI Nonprofit's directors) or their appointees, while Ben & Jerry's adoption of guardians was freely-chosen and intentional. Yet, despite their different paths, the two firms ended up at the same destination: a combination of investors and investor-overriding guardians.

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[172] Fan & Nguyen, *supra* note x, at 1051 n. 131.

[173] Matteo Wong, *OpenAI Can Stop Pretending,* ATLANTIC (May 30, 2025), https://www.theatlantic.com/technology/archive/2025/05/openai-nonprofit-pbc/682979/.

[174] If OpenAI Nonprofit directors had owned equity in OpenAI LLC, they might have been personally concerned about profits. But they apparently did not own much if any equity in OpenAI LLC. See *Lessons from OpenAI: Board and The Spin of Corporate Governance,* LEGAL 60 (Nov. 20, 2024), https://legal60.com/lessons-from-openai-boards-and-the-spin-of-corporate-governance/?utm_ (only a minority of the board was allowed to have any financial interest, and independent board members (like Altman, at the time) were not allowed any financial interest).

Table 1 below compares arrangements at Ben & Jerry's and OpenAI LLC (2019).

Table 1: Comparing Ben & Jerry's to OpenAI LLC (2019)

	Ben & Jerry's	OpenAI LLC (2019)
Investors	Unilever (later, TMICC) and, indirectly, their public investors.	Investors in OpenAI LLC.
Guardians & their control rights	Self-appointed Class I Directors control Independent Board, which has limited powers.	Self-appointed OpenAI Nonprofit directors fully control OpenAI LLC.
Mission	Independent Board given "primary responsibility for preserving and enhancing the objectives of the historical social mission of the company" and preserving "brand integrity."	OpenAI Nonprofit directors controlling OpenAI LLC required to pursue Nonprofit mission (*Ensure that safe AGI is developed and benefits all of humanity*).
Fiduciary constraint on harming investors?	Class I Directors also subject to vague Vermont corporate fiduciary duties that don't explicitly require prioritizing investor interests.	None.

B. OpenAI LLC's Double-Trouble Meltdown

1. The Attempted Firing of Altman

On the morning of November 17, 2023, OpenAI Nonprofit's board consisted of six members: Brockman, the chair; Altman, who also served as CEO; Ilya Sutskever, OpenAI's chief scientist; Helen Toner, a Georgetown University AI researcher; Adam D'Angelo, a former Facebook executive; and Tasha McCauley, a RAND Corporation management scientist.[175]

[175] Keach Hagey, Deepa Seetharaman & Berber Jin, *Behind the Scenes of Sam Altman's Showdown at OpenAI*, WALL ST. J. (Nov. 22, 2023), https://www.wsj.com/tech/ai/altman-firing-openai-520a3a8c.

At noon, Altman was told in a video call attended by other board members (except Brockman) that he was being terminated as CEO and as a director.[176] After being informed of Altman's dismissal, Brockman resigned in protest.[177] Immediately afterwards, the board announced that Altman would step down as CEO and director, and that Mira Murati, the current CTO, would be interim CEO.[178] The board said it had lost confidence in Altman.[179]

The board's decision was apparently motivated, at least in part, by concerns over Altman's perceived haste and non-transparency in commercializing products, potentially creating safety risks.[180] Reportedly, Altman had clashed with Helen Toner over her

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176 *Id.*

177 Cade Metz, *OpenAI's Board Pushes Out Sam Altman, Its High-Profile C.E.O.*, N.Y. TIMES (Nov. 17, 2023) https://www.nytimes.com/2023/11/17/technology/openai-sam-altman-ousted.html. According to one report, Brockman was removed from the board and demoted, and then resigned. S*ee* Joshua Solomon, *What Happened at OpenAI? A Timeline (and What's Next)*, PROD. MANAGER (Dec. 20, 2024) https://theproductmanager.com/ai-llms/what-happened-at-openai/.

178 *OpenAI announces leadership transition*, *OpenAI* (Nov. 17, 2023), https://openai.com/blog/openai-announces-leadership-transition.

179 *Id.* The statement reads: "Mr. Altman's departure follows a deliberative review process by the board, which concluded that he was not consistently candid in his communications with the board, hindering its ability to exercise its responsibilities. The board no longer has confidence in his ability to continue leading OpenAI."

180 Max Chafkin & Rachel Metz, *The Doomed Mission Behind Sam Altman's Shock Ouster From OpenAI*, BLOOMBERG (Nov. 19, 2023), https://www.bloomberg.com/news/articles/2023-11-20/sam-altman-openai-latest-inside-his-shock-firing-by-the-board?sref=1kJVNqnU (claiming that OpenAI's board was "worried that the company's expansion was out of control, maybe even dangerous"); Karen Hao & Charlie Warzel, *Inside the Chaos at OpenAI,* ATLANTIC (Nov. 19, 2023), https://www.theatlantic.com/technology/archive/2023/11/sam-altman-open-ai-chatgpt-chaos/676050/ ("Altman's dismissal by OpenAI's board on Friday was the culmination of a power struggle between the company's two ideological extremes—one group . . . energized by rapid commercialization; the other steeped in fears that AI represents an existential risk to humanity and must be controlled with extreme caution."); Cade Metz, Tripp Mickle & Mike Isaac, *Before Altman's Ouster, OpenAI's Board Was Divided and Feuding*, N.Y. TIMES (Nov. 21, 2023), https://www.nytimes.com/2023/11/21/technology/openai-altman-board-fight.html. The board said Altman had shown patterns of deception. For instance, the board was not aware that OpenAI had released ChatGPT until after it happened. Keach Hagey, *The Secrets and Misdirection Behind Sam Altman's Firing From OpenAI*, WALL ST. J. (Mar. 28, 2025), https://www.wsj.com/tech/ai/the-real-story-behind-sam-altman-firing-from-openai-efd51a5d (explaining that Altman had taken steps toward commercialization that concerned more safety-focused board members).

research paper criticizing OpenAI's approach to safety while praising Anthropic, OpenAI's main competitor.[181] Interpersonal dynamics also might have played a role.[182]

2. Pushback Against the Guardians

Microsoft, which held 49% of the equity of OpenAI LLC, was informed of Altman's termination only moments before.[183] That day, it reaffirmed its dedication to its partnership with OpenAI, Murati, and the team.[184]

However, behind closed doors, Microsoft exerted considerable pressure to have Altman reinstated.[185] Simultaneously, Thrive Capital and other investors actively

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[181] Metz, Mickle & Isaac, *supra* note x.

[182] *See* Cathy Hwang & Dorothy Lund, *Purpose and Nonprofit Enterprise*, 125 COLUM. L. REV. 2267, 2299–330 (2025) (describing tensions between Altman and various other directors).

[183] Dina Bass, *Microsoft to Appoint Sam Altman CEO of New In-House AI Team*, BLOOMBERG (Nov. 20, 2023), https://www.bloomberg.com/news/articles/2023-11-20/microsoft-says-altman-brockman-will-lead-new-in-house-ai-team?cmpid=BBD112023_MONEYSTUFF&utm_medium=email&utm_ ("Microsoft was shocked Friday when it received just a few minutes notice that the board had ousted Altman.").

[184] *A statement from Microsoft Chairman and CEO Satya Nadella*, *Microsoft* (Nov. 17, 2023), https://blogs.microsoft.com/blog/2023/11/21/a-statement-from-microsoft-chairman-and-ceo-satya-nadella/ ("We remain committed to our partnership with OpenAI and have confidence in our product roadmap, our ability to continue to innovate . . . and in continuing to support our customers and partners. We look forward to getting to know . . . [OpenAI]'s new leadership team and working with them.").

[185] Emily Chang et al., *OpenAI Board Urged by Microsoft, Investors to Restore Altman,* BLOOMBERG (Nov. 18, 2023), https://www.bloomberg.com/news/articles/2023-11-18/openai-board-being-pressed-by-some-investors-to-reinstate-altman.

campaigned to restore Altman to the CEO position.[186] And OpenAI's senior managers, along with Altman, negotiated with the board to reinstate Altman.[187]

Jason Kwon, OpenAI's chief strategy officer, accused the board of violating its fiduciary duties, asserting that it "cannot be your duty to allow the company to die . . . ."[188] One director responded: "[t]he destruction of the company could be consistent with the board's mission."[189]

On November 19, despite the pressure exerted by both OpenAI's senior managers and investors, the board announced the appointment of Emmett Shear, former CEO of livestreaming site Twitch, as interim CEO of OpenAI, replacing Murati.[190] And the four remaining directors indicated in a memo sent to employees that "[t]he board firmly stands by its decision [to terminate Altman] as the only path to advance and defend the mission of OpenAI."[191] In response, Microsoft declared that "Sam Altman and Greg Brockman, together with colleagues, will…join…Microsoft to lead a new… AI research team."[192]

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[186] Dina Bass, Emily Chang & Ashlee Vance, *OpenAI Investors, Led By Thrive, Angle to Bring Back Altman*, BLOOMBERG (Nov. 20, 2023), https://www.bloomberg.com/news/articles/2023-11-20/openai-investors-led-by-thrive-angle-to-bring-back-altman; Matt Levine, *OpenAI Is a Strange Nonprofit*, BLOOMBERG (Nov. 21, 2023), https://www.bloomberg.com/opinion/articles/2023-11-21/openai-is-a-strange-nonprofit ("OpenAI's other investors, led by Thrive Capital, are actively trying to orchestrate [Altman's] return.").

[187] Hagey, Seetharaman & Jin, *supra* note X.

[188] *See* Tripp Mickle, Cade Metz, Mike Isaac & Karen Weise, *Inside OpenAI's Crisis Over the Future of Artificial Intelligence*, N.Y. TIMES (Dec. 9, 2023), https://www.nytimes.com/2023/12/09/technology/openai-altman-inside-crisis.html.

[189] *Id.*

[190] Kellen Browning, *Who Is Emmett Shear, OpenAI's Interim Chief Executive?*, N.Y. TIMES (Nov. 20, 2023), https://www.nytimes.com/2023/11/20/business/emmett-shear-openai-interim-chief-executive.html.

[191] Mike Isaac, Kevin Roose & Cade Metz, *Microsoft Hires Sam Altman Hours After OpenAI Rejects His Return*, N.Y. TIMES (Nov. 20, 2023), https://www.nytimes.com/2023/11/20/business/openai-altman-ceo-not-returning.html.

[192] *A statement from Microsoft Chairman and CEO Satya Nadella*, *Microsoft* (Nov. 19, 2023), https://blogs.microsoft.com/blog/2023/11/21/a-statement-from-microsoft-chairman-and-ceo-satya-nadella/.

On November 20, 700 out of OpenAI's 770 employees signed a letter declaring their intention to leave for Microsoft unless the board resigned and Altman returned to his role.[193] Among the signatories was Sutskever, a director involved in Altman's removal.[194] That day, Sutskever publicly expressed regret for his involvement in the removal.[195] Murati, who had been appointed as interim CEO by the board following Altman's termination, also signed the letter.[196]

Finally, on November 22, the board yielded and announced that Altman would be reinstated to the CEO position.[197] The company also announced that all board members except D'Angelo would step down, and two new directors would be appointed to serve alongside D'Angelo.[198] Microsoft was also given the right to appoint a board observer.[199]

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[193] Cade Metz, Tripp Mickle & Mike Isaac, *OpenAI Staff Threatens Exodus, Jeopardizing Company's Future,* N.Y. TIMES (Nov. 20, 2023), https://www.nytimes.com/2023/11/20/business/openai-staff-exodus-turmoil.html.

[194] Keach Hagey, *The Secrets and Misdirection Behind Sam Altman's Firing From OpenAI*, WALL ST. J. (Mar. 28, 2025), https://www.wsj.com/tech/ai/the-real-story-behind-sam-altman-firing-from-openai-efd51a5d.

[195] Ilya Sutskever (@ilyasut), X (Nov. 20, 2023, 8:15 AM), https://twitter.com/ilyasut/status/1726590052392956028?s=20.

[196] Metz, Mickle & Isaac, *supra* note X.

[197] Jeffrey Dastin & Aditya Soni, *Sam Altman to Return as OpenAI CEO After His Tumultuous Ouster*, REUTERS (Nov. 22, 2023), https://www.reuters.com/technology/sam-altman-return-openai-ceo-2023-11-22/. Altman was not reinstated as a director initially, but eventually returned to the board. Ina Fried, *Sam Altman Returns to OpenAI's Board*, AXIOS (Mar. 8, 2024), https://www.axios.com/2024/03/08/sam-altman-returns-to-openai-board.

[198] Tom Giles et al., *Altman Is Back at OpenAI, But Questions Remain as to Why He Was Fired in First Place*, BLOOMBERG (Nov. 22, 2023), https://www.bloomberg.com/news/articles/2023-11-22/altman-returns-to-openai-after-firing-showed-rifts-left-unhealed.

[199] Deepa Seetharaman, *OpenAI's New Board Takes Over and Says Microsoft Will Have Observer Role*, WALL ST. J. (Nov. 29, 2023), https://www.wsj.com/tech/ai/openais-new-board-takes-over-and-says-microsoft-will-have-observer-role-50e55b73.

The reportedly more safety-oriented AI researchers—including Murati and Sutskever—eventually left to start competing ventures.[200]

3. Comparing Meltdowns at Ben & Jerry's and OpenAI LLC

Like Ben & Jerry's Class I Directors, the guardians of OpenAI LLC caused harm to, or at least endangered, investors. But unlike the Class I Directors, who merely inflicted large costs on Ben & Jerry's sole shareholder (until 2025, Unilever), the OpenAI LLC guardians almost wiped out OpenAI LLC and its investors. The guardians' actions and ensuing events also may well have caused, or at least accelerated, exits by Murati and Sutskever, who started competing ventures, potentially harming investors via another channel.

And, as at Ben & Jerry's, where the guardians' attempted removal of Ben & Jerry's ice cream from Israel led to it being sold there indefinitely, the guardians' move at OpenAI LLC appears to have backfired. Altman was fired at least in part because of the guardians' concern that Altman was being "unsafe." But when the dust had settled, he stayed and the purportedly most safety-oriented AI researchers (including Murati and Sutskever) left,[201]

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[200] Jeremy Kahn & Sharon Goldman, *Wave of Defections from Former OpenAI CTO Mira Murati's $12 Billion Startup Thinking Machines Shows Cutthroat Struggle for AI Talent,* YAHOO! FIN. (Jan. 16, 2026), https://finance.yahoo.com/news/wave-defections-former-openai-cto-144458704.html; *see also* Helen Toner & Tasha McCauley, *AI firms mustn't govern themselves, say ex-members of OpenAI's board*, ECONOMIST (May 26, 2024), https://www.economist.com/by-invitation/2024/05/26/ai-firms-mustnt-govern-themselves-say-ex-members-of-openais-board (noting the departure of "senior safety-focused talent" after Altman returned to OpenAI).

[201] Steven Zeitchik, *What the Heck Is Going on At OpenAI?,* HOLLYWOOD REP. (Oct. 4, 2024), https://www.hollywoodreporter.com/business/business-news/sam-altman-openai-1236023979/ (explaining that both were very focused on safety at OpenAI, as Sutskever was "concerned with Altman's 'accelerationism,'" while Murati had long tried to "reform or slow down the company from within").

along with most of the guardians themselves. OpenAI may well have been rendered less safe as a result.

Of course, the OpenAI Nonprofit directors may have fired Altman simply for reasons other than safety; perhaps they just did not like him. Similarly, Ben & Jerry's Class I Directors might have decided to stop renewing Zinger's license not because they believed in good faith their mission duties required it, but rather to advance personal political objectives. People's actual motivations are often hidden, sometimes even from themselves.

However, regardless of actual motives, double trouble ensued in both cases. Had the guardians been "normal directors," appointed by and thus accountable to parties with value at risk, we doubt either meltdown would have happened.

C. The 2025 Structure

1. Transitioning Toward the 2025 Structure

In December 2024, OpenAI announced a plan to transition to a form characterized by "conventional equity and less structural bespokeness."[202] The for-profit arm would become a public benefit corporation (PBC), a kind of corporation described in more detail below, without a profit cap.[203] As originally planned, this restructuring would result in

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[202] *Why OpenAI's Structure Must Evolve to Advance Our Mission, OpenAI*, https://openai.com/index/why-our-structure-must-evolve-to-advance-our-mission/ (last visited Mar. 13, 2025).

[203] *See infra* Part III.C.2.a.

OpenAI Nonprofit becoming a "significant" but non-controlling shareholder of the PBC.[204] The hope, apparently, was to reduce the power of the guardians. It appears that the move to a PBC was motivated, at least in part, by SoftBank Group conditioning new funding on the capped-profit OpenAI LLC being replaced by a for-profit corporation without a cap.[205]

In May 2025, OpenAI announced, after consultation with the Attorneys General of California and Delaware ("the Attorneys General"), a "recapitalization plan" that differed from the prior plan.[206] Like the prior plan, the capped-profit limitation would be eliminated.[207] But, instead of OpenAI Nonprofit being a mere "significant shareholder" in the PBC, it (that is, the guardians managing OpenAI Nonprofit) would continue to control the for-profit arm.[208] According to a notice circulated to OpenAI employees, the original plan, which would have eliminated guardians' control over the for-profit arm, was abandoned based on conversations with "civic leaders" and "the offices of the Attorneys General" which would be required to approve changes to OpenAI Nonprofit, including its giving up of control of the for-profit arm.[209] The Attorneys General not only insisted that

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[204] *Why OpenAI's Structure Must Evolve to Advance Our Mission*, *OpenAI*, https://openai.com/index/why-our-structure-must-evolve-to-advance-our-mission/ (last visited Mar. 13, 2025); *Amoral Drift, supra* note xx, at 1645.

[205] Krystal Hu, Arsheeya Bajwa, Aditya Soni & Anna Tong, *OpenAI Dials Back Conversion Plan, Nonprofit to Retain Control,* REUTERS (May 6, 2025), https://www.reuters.com/business/openai-remain-under-non-profit-control-change-restructuring-plans-2025-05-05/.

[206] Gerrit De Vynck, *Sam Altman Hands Elon Musk a Win, Scrapping OpenAI's For-Profit Plan*, WASH. POST (May 6, 2025), https://www.washingtonpost.com/technology/2025/05/05/openai-restructures-abandons-plan-profit/.

[207] *Id.*

[208] Hu, Bajwa, Soni & Tong, *supra* note xx.

[209] De Vynck, *supra* note xx.

OpenAI Nonprofit remain a controlling stockholder of the PBC, but also that it possess other rights as a controller, as explained below.

2. The Structure: A PBC Controlled by OpenAI Nonprofit

On October 28, 2025, OpenAI announced the details of its "updated structure" after its "recapitalization plan" was approved by the Attorneys General.[210] As we explain below: OpenAI Nonprofit would now be known as "OpenAI Foundation" (or "the Foundation") with the right to appoint and replace all directors of the for-profit arm, now a PBC without a profit cap called "OpenAI Group PBC," with the same mission as the Foundation.[211]

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[210] *Our Structure*, OPENAI, https://openai.com/our-structure/ (last visited Dec. 9, 2025). *See also* Statement of No Objection from the Delaware Attorney General to OpenAI, Inc.'s Corporate Restructuring (Oct. 28, 2025), https://news.delaware.gov/files/2025/10/2025-10-28-OpenAI-DEAG-Statement-of-Nonobjection.pdf [hereinafter DE AG Statement of No Objection]; Memorandum of Understanding Between OpenAI and California Attorney General re Notice of Conditions of Non-Objection (Oct. 27, 2025), https://tinyurl.com/cwnfxxh7 [hereinafter, "CA AG MOU"]. The Attorney General of Delaware has authority over OpenAI Nonprofit because it is incorporated in Delaware, and the Attorney General of California has authority over the firm because it has significant operations in that state. *See* Jill Horwitz, Ellen P. Aprill & Rose Chan Loui, *Legal complications await if OpenAI tries to shake off control by the nonprofit that owns the rapidly, growing tech company*, CONVERSATION (Nov. 20, 2022) (https://theconversation.com/legal-complications-await-if-openai-tries-to-shake-off-control-by-the-nonprofit-that-owns-the-rapidly-growing-tech-company-241326).

[211] *Our Structure*, OPENAI, https://openai.com/our-structure/ (last visited Dec. 9, 2025). The structure might seem similar to Mozilla Corporation, a for-profit corporation controlled by the nonprofit Mozilla Foundation, except that there are no investors, as the Foundation owns 100% of the Corporation. *See Mozilla Organizations*, Mozilla, https://www.mozilla.org/en-US/about/governance/organizations/.

a. OpenAI Group PBC

OpenAI Group PBC is a Delaware PBC,[212] a for-profit corporation whose directors are required to ". . . manage or direct the business and affairs of the . . . corporation in a manner that balances [1] the pecuniary interests of the stockholders, [2] the best interests of those materially affected by the corporation's conduct, and [3] the specific public benefit or public benefits identified in its certificate of incorporation."[213]

As will be explained below, directors of Delaware PBCs have not been given specific guidance—neither by statute nor by courts—on how to strike this balance where two or more of these three objectives conflict.

However, OpenAI Group PBC's charter provides an unusually detailed description of its public benefit, which is identical to that of OpenAI Foundation,[214] and how directors should weigh that objective against the other two:

> The Corporation will promote the following public benefit: ensure that artificial general intelligence benefits all of humanity, including by conducting and/or funding artificial intelligence research (the "Mission"). The Corporation may also research and/or otherwise support efforts to safely develop and distribute such technology and its associated benefits, including analyzing the societal impacts of the technology and supporting related educational, economic, and safety policy research and initiatives . . . .

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[212] Certificate of Incorporation of OpenAI Group PBC (Oct. 28, 2025) [hereinafter, "OpenAI Charter"].

[213] DEL. CODE ANN. tit. 8, § 362(a) (2025). Managers of for-profit non-PBC firms can get away with sacrificing profits in the public interest, if this sacrifice is modest, subtle, or occasional. *Cf.* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. __ (2005) (arguing that corporate law gives managers considerable implicit and explicit discretion to sacrifice profits in the public interest). A PBC enables managers to sacrifice profits in the public interest in ways that are substantial, salient, and ongoing. For a comprehensive review of how Delaware PBCs work, including the purpose for creating this kind of alternative for-profit corporation, *see* Frederick H. Alexander, Benefit Corporation Law and Governance (Berrett-Koehler Publishers, Inc., 2017).

[214] *See supra* note x.

> In furtherance of the Mission of the Corporation and having considered the appropriate balance of the factors referenced in the preceding paragraph, the Board of Directors of the Corporation (the "Board of Directors") must solely consider the Mission (and may not consider the pecuniary interests of stockholders or any other interest) in respect of safety and security issues related to the OpenAI enterprise . . . . The members of the Board of Directors comply with their fiduciary duties by complying with the first sentence of this paragraph, and no member of the Board of Directors or any officer of the Corporation will have breached his or her fiduciary duty, or have any liability whatsoever, for complying or facilitating compliance with the first sentence of this paragraph.[215]

The prioritization of "safety and security" over profit and other interests was apparently required by the Attorneys General.[216]

b. OpenAI Foundation and Its Rights

OpenAI Foundation, like its predecessor OpenAI Inc. (OpenAI Nonprofit), is governed by its self-perpetuating board of directors, which currently consists of independent directors Bret Taylor (Chair), Adam D'Angelo, Dr. Sue Desmond-Hellmann, Dr. Zico Kolter, Retired U.S. Army General Paul M. Nakasone, Adebayo Ogunlesi, and Nicole Seligman—as well as CEO Sam Altman.[217]

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[215] OpenAI Charter, art. III.

[216] *See* DE AG Statement of No Objection ¶¶ 2, 6; CA AG MOU ¶¶ 3, 8. The Attorneys General define "safety and security issues" to include "all actions and decisions of the members of [OpenAI Foundation's] Safety and Security Committee." CA AG MOU ¶ 8; DE AG Statement of No Objection ¶ 6.

[217] *Our Structure,* OPENAI https://openai.com/our-structure/ (last visited Dec. 9, 2025).

(i) Director Appointment Rights

OpenAI Foundation has the exclusive right to appoint every director of OpenAI Group PBC.[218] In addition, the Foundation has the non-exclusive right to remove them; the holders of two-thirds of the voting power of non-Foundation-held shares also have the right to remove, in any 12-month period, no more than one-third the total number of directors that the PBC would have, assuming no vacancies.[219]

The Attorneys General said that they expect the Foundation to act in furtherance of the Mission when exercising director appointment and removal rights at the PBC.[220] The Attorneys General can apparently intervene if the Foundation appoints or fails to remove PBC directors who act inconsistently with the Mission.[221]

The Attorneys General also require that the PBC board be majority "independent," that is, directors who are "not . . . employees or members of management, and in the determination of the PBC Board, will have no relationship or interest that could

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[218] *Id. See also* OpenAI Charter, art IV.2(b)(i) (providing that if OpenAI Foundation continues to own one share of Class N Common Stock, it will have a majority of the voting power for director elections).

[219] OpenAI Charter, art V.3. This allocation of almost complete control to OpenAI Foundation was required by the Attorneys General of Delaware and California. *See* DE AG Statement of No Objection ¶¶ 1, 4; CA AG MOU ¶¶ 2, 5.

[220] DE AG Statement of No Objection ¶¶ 1, 4; CA AG MOU ¶¶ 2, 5.

[221] The letters from the Attorneys General present conditions under which they will "not object" to OpenAI's recapitalization plan. Thus, if OpenAI or OpenAI Foundation fail to adhere to the outlined requirements, the Attorneys General may intervene to halt the implementation of the new governance structure. DE AG Statement of No Objection at 1; CA AG MOU ¶ 22.

compromise their judgment—ensuring…oversight that reinforces accountability and mission alignment."[222] At least initially, all PBC directors are also Foundation directors.[223]

(ii) Financial and Transaction Blocking Rights

OpenAI Foundation owns 26% of OpenAI Group PBC and has a warrant for additional shares if the PBC hits a valuation milestone.[224] Of the remaining 74%, Microsoft owns 27% and other investors and current and former employees own 47%.[225]

The Foundation has the right to veto, among other things, any changes to the PBC's public benefit, as well as certain major transactions or sales of material assets.[226] These rights may well give the guardians of OpenAI substantial leverage over the PBC, which they can exercise in their capacity as Foundation directors, whether or not they continue serving on the PBC board.

(iii) Special Blocking Rights for Safety and Security

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[222] DE AG Statement of No Objection ¶ 13; CA AG MOU ¶ 15.

[223] *Our Structure,* OPENAI https://openai.com/our-structure/ [https://perma.cc/E6HJ-7TF4] (last visited Apr. 11, 2026) ("To ensure the mission, long-term incentives, and commercial success advance together—and to avoid fragmented governance—all [but one] current OpenAI Foundation directors will also serve on OpenAI Group's board . . . .").

[224] *Our Structure,* OPENAI https://openai.com/our-structure/ (last visited Dec. 9, 2025).

[225] *Id.*

[226] *See* OpenAI Charter, art. IV.2(c).

In addition to giving OpenAI Foundation transaction-blocking rights with respect to OpenAI Group PBC, the Attorneys General require that the Foundation's Safety and Security Committee (SSC) have veto rights over "PBC actions relating to safety and security."[227] The SSC was a board committee of OpenAI Nonprofit that the Attorneys General insist be retained by the Foundation, be chaired by a Foundation director who is not also a director of the PBC,[228] and have (not publicly-disclosed) powers "consistent with current practice prior to" the creation of the 2025 structure, including the following:

> [O]verseeing and reviewing the safety and security processes and practices of the Corporation and its controlled affiliates with respect to model development and deployment [and] . . . the authority to require mitigation measures—up to and including halting the release of models or AI systems even, for the avoidance of doubt, where the applicable risk thresholds would otherwise permit release.[229]

In principle, the Attorneys General can intervene if the SSC fails to carry out its safety and security mission.[230]

3. Comparing OpenAI LLC (2019) to OpenAI Group PBC (2025)

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[227] DE AG Statement of No Objection ¶ 7; CA AG MOU ¶ 9.

[228] DE AG Statement of No Objection ¶¶ 7, 8; CA AG MOU ¶ 10.

[229] DE AG Statement of No Objection ¶¶ 7, 9; CA AG MOU ¶¶ 9, 11.

[230] *See supra* note x.

Table 2 below compares the arrangements of OpenAI LLC (2019) and OpenAI Group PBC (2025).

Table 2: Comparing OpenAI LLC (2019) to OpenAI Group PBC (2025)

	OpenAI LLC (2019)	OpenAI Group PBC (2025)
Structure	Delaware LLC controlled by nonprofit corporation (OpenAI Nonprofit).	Delaware PBC controlled by nonprofit corporation (OpenAI Foundation).
Controller Mission	*Ensure that safe AGI is developed and benefits all of humanity ("2019 Mission").*	*Ensure that AGI benefits all of humanity ("2025 Mission").*
Controller Appointment Rights	OpenAI Nonprofit directors directly controls LLC.	Can appoint/remove each PBC director; one-third of directors can be removed in 12 months by two-thirds of the other shares.
Fiduciary Duties	OpenAI Nonprofit directors controlling LLC subject to Nonprofit's fiduciary duties.	For "actions relating to safety and security:" Solely *2025 Mission*. Otherwise: Balance (1) *2025 Mission*, (2) Profit, (3) Stakeholder interests.
Controller veto rights	N/A.	Changes to PBC's public benefit, certain major transactions, "actions relating to safety and security" (via SSC).
Fiduciary constraint on harming investors?	None.	For "actions relating to safety and security:" None. Otherwise: Not much (profit can be subordinated to Mission and stakeholders under PBC balancing).

D. The Persistence of Ben & Jerry's Risk Under the 2025 Structure

Aside from eliminating the profit cap, a change that does not affect OpenAI's guardians' powers or lack of accountability to investors, the 2025 Structure is very similar to the 2019 Structure. Under the 2019 Structure, OpenAI Nonprofit's self-perpetuating directors controlled OpenAI LLC. Under the 2025 Structure, they now control OpenAI

PBC via OpenAI Foundation's blocking rights and their PBC board seats. Thus, under both structures, guardians control the for-profit arm.

To be sure, OpenAI Foundation's self-perpetuating directors might, in the future, appoint other individuals to serve on the PBC's board. In this scenario, the PBC will be controlled in part by guardians (through OpenAI Foundation's control rights) and in part by individuals appointed and removable by these guardians. But for now, all control rights are still directly exercised by guardians, as under the 2019 structure.

The only significant difference under the 2025 structure is that the directors of the new for-profit arm (and potentially OpenAI Foundation, its controlling stockholder) are subject to PBC fiduciary duties.[231] In theory, this could make those controlling the PBC (the PBC's directors and potentially OpenAI Foundation) legally answerable to PBC investors, reducing the guardians' power to subordinate profit to other objectives.

However, as we explain below, from investors' perspective the PBC's fiduciary duties do not constrain the guardians: these duties allow (or in some cases require) the subordination of profits to other objectives. Thus, those controlling the for-profit arm are still free to act in ways that endanger or harm investors and, potentially, also undermine the mission ("to ensure that artificial general intelligence benefits all humanity"[232]).

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[231] The ability of other shareholders to remove a limited number of OpenAI Group PBC's directors might also be seen as a significant change, because it could make the PBC's directors at least partially accountable to other shareholders. However, the requirement that holders of two-thirds of the other shares must agree to the removal, as well as the Foundation's ability to immediately replace any removed director with a person it chooses, reduces both the ability and the incentive of other shareholders to use this removal power. Thus, this power appears to have little bite.

[232] *Our Structure,* OPENAI https://openai.com/our-structure/ (last visited Feb. 23, 2026).

1. Directors' Ability (or Obligation) to Subordinate PBC Profits

Recall that the PBC's directors are obligated to manage or direct the business and affairs of the PBC in a manner that balances: (1) the pecuniary interests of the stockholders, (2) the best interests of those materially affected by the corporation's conduct, and (3) the mission.[233]

However, as indicated earlier, OpenAI Group PBC's charter actually <u>requires</u> directors to ignore (not just balance) stockholders' and other stakeholders' interests and focus entirely on the mission around safety and security matters, the issues that reportedly played a role in leading OpenAI LLC's guardians to fire Altman in 2023.[234] And it provides that no director will be considered to breach their fiduciary duty, or "have any liability whatsoever for complying with [or even] facilitating compliance with" this directive.[235] Because there are likely to be safety and security issues embedded in many AI projects, and "facilitating compliance" can be broadly interpreted, PBC's directors will often be free, or even obligated, to ignore profit to pursue their view of the mission.

Where safety and security interests are clearly not implicated, and thus balancing of the three objectives is permitted, Delaware law does not provide any guidance on such balancing.[236] Thus, for example, the directors are free to weigh each of the three purposes

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[233] *See* OpenAI Charter, art. III; DEL. CODE ANN. tit. 8, § 362(a) (2025).

[234] *See supra* Part III.B.1.

[235] *See* OpenAI Charter, art. III.

[236] The statute does not explain how directors should balance the pecuniary interests of stockholders, the interests of stakeholders, and the public benefit. *See* DEL. CODE ANN. tit. 8, § 365(a) (2025) (requiring balancing but omitting any explanation of how to balance). Nor has Delaware case law provided any guidance. *See* Amy L. Simmerman, Ryan Greecher & Brian Currie, Wilson Sonsini Goodrich & Rosati, *Converting to a Delaware Public Benefit Corporation: Lessons from Experience*, HARV. L. SCH. F. ON CORP.

equally, giving profits a weight of only 33%, and stakeholders and the public benefit a combined weight of 67%. Or they can choose to weigh profits less than each of the other two objectives (say, 20%, 40%, and 40%).

Moreover, the Delaware PBC statute makes it unlikely that a plaintiff will successfully challenge a balancing decision. First, the statute indicates that a balancing decision "will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not [one] that no person of ordinary, sound judgment would approve."[237] Thus, directors prevail as long as they are informed and disinterested, and at least one rational person would approve their decision, a very low bar. Second, directors flunking this test would not face monetary liability, absent a personal conflict of interest,[238] because of a DGCL § 102(b)(7) provision in the PBC's charter.[239] This reduces the financial incentive to sue, even if one strongly believes that unconflicted directors failed the test.

Thus, even outside the safety and security setting, the guardians serving as PBC directors are permitted to subordinate profit to other objectives,[240] and may do even if their

GOVERNANCE (Feb. 18, 2022), https://corpgov.law.harvard.edu/2022/02/18/converting-to-a-delaware-public-benefit-corporation-lessons-from-experience/ ("In contrast to the traditional corporate context—where thousands of cases exist and help guide corporate behavior—there is no case law addressing PBCs specifically.").

[237] DEL. CODE ANN. tit. 8, § 365(b) (2025). Also, as long as OpenAI Group PBC is not publicly listed, only a shareholder (or shareholders) owning at least two percent of the corporation's shares can bring a suit to enforce the balancing requirement. DEL. CODE ANN. tit. 8, § 367 (2025).

[238] DEL. CODE ANN. tit. 8, § 365(c) (2025) ("In the absence of a conflict of interest, no failure to satisfy the balancing requirement shall, for the purposes of § 102(b)(7) . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty, unless the certificate of incorporation so provides.").

[239] *See* OpenAI Charter, art. VIII.

[240] *See* Alexander, *supra* note x, at 93 ("[A]s long as the directors act independently and in good faith, the courts are not authorized to reject their balancing decisions."). *See also* Elizabeth Pollman, *The History and*

efforts to achieve the other objectives backfire, as they did at Ben & Jerry's in 2021 and OpenAI LLC in 2023.

2. The Foundation's Obligation to Subordinate PBC Profits

Power over OpenAI Group PBC is divided between its board and its controller, OpenAI Foundation, which has various blocking rights, including the right of the Foundation's Safety and Security Committee (SSC) to veto "PBC actions relating to safety and security,"[241] as described above. Safety and security issues are likely embedded in many AI projects, potentially giving the SSC veto rights across a wide swath of PBC decisions.

In exercising its blocking rights, including that of the SSC, OpenAI Foundation is bound by its mission: "ensur[ing] that artificial general intelligence benefits all of humanity.[242] The mission does not include generating value for PBC investors. Thus, in exercising its veto rights, the Foundation directors (via the SSC or otherwise) are free to ignore investors.[243]

Revival of the Corporate Purpose Clause, 99 TEX. L. REV. 1423, 1452 (2021) (noting the challenge of achieving both meaningful commitment and productive flexibility in corporate-charter purpose provisions).

[241] *See supra* note x.

[242] *See supra* note x.

[243] To the extent the Attorneys General monitor OpenAI Foundation and its directors for adherence to the Foundation's mission, *see supra* Part III.C.1., the directors are more likely to adhere to the mission and ignore profits.

To be sure, as the PBC's controller, the Foundation also potentially owes fiduciary duties to the PBC (and its investors) when exercising its blocking rights.[244] But PBC investors cannot expect the Foundation to be substantially constrained by such duties.

To begin, consider situations where safety and security issues are implicated. Recall that the PBC's charter explicitly states that, when those issues are implicated (and thus the SSC is empowered to veto), the PBC should prioritize the (shared) mission over other objectives.[245] Thus, there are unlikely to be situations where the SSC acts inconsistently with the PBC's own definition of its "interests," and thus in potential violation of fiduciary duties.

Next, consider settings where safety and security issues are not implicated. To the extent the Foundation considers exercising its other blocking rights in those settings, the PBC's fiduciary duties, including those applied to the Foundation, would require balancing that mission with stockholder and stakeholder interests.[246] However, as we have seen, the balancing test does not prevent prioritizing other objectives over stockholder interests.[247] Thus, even outside the safety and security setting, the PBC's fiduciary duties are unlikely to constrain the Foundation from exercising its blocking rights in a way that subordinates profit to other objectives.

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244 Controllers of Delaware corporations can owe fiduciary duties when exercising blocking rights. Gail Weinstein, Philip Richter, and Steven Steinman, Fried, Frank, Harris, Shriver & Jacobson LLP, *Fiduciary Duties of Controller Exercising Stockholder-Level Powers to Block Board Action*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2024), https://corpgov.law.harvard.edu/2024/03/04/fiduciary-duties-of-controller-exercising-stockholder-level-powers-to-block-board-action/.

245 See *supra* Part III.C.2.a.

246 See *supra* Part III.C.2.

247 *See supra* Part III.C.2.

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The main difference between the 2019 and 2025 structures is that the latter imposes PBC fiduciary duties on the guardians serving as directors of OpenAI's for-profit arm, and potentially on OpenAI Foundation as the PBC's controller. But these duties are unlikely to orient OpenAI's guardians that much closer towards the interests of the PBC's investors. Around issues of safety and security, the PBC's fiduciary duties require directors (and the controlling Foundation) to focus exclusively on the PBC's humanity-benefitting mission, ignoring profits. In other contexts, the duties give the directors and the Foundation substantial discretion, enabling them to legally subordinate profits to other objectives. The PBC's fiduciary duties, by themselves, will not provide much protection to investors.

IV. SHOULD HERSHEY AND NOVO NORDISK REASSURE OPENAI INVESTORS?

Having considered OpenAI's current (2025) structure, we now turn to the question: Do the experiences of The Hershey Company and Novo Nordisk, both controlled by mission entities that are in turn controlled by self-appointed individuals, provide any reassurance about OpenAI's future, once it goes public? The answer is "No."

Most importantly: OpenAI Group PBC suffers a potentially severe built-in conflict between its guardians and investors because faithfully carrying out the OpenAI Foundation's mission ("ensure that AGI benefits all of humanity") will almost inevitably mean sacrificing profits and harming investors. At both The Hershey Company and Novo Nordisk, by contrast, the purpose of their controlling mission entities is to make money for the entities' beneficiaries, a purpose that is highly aligned with investor interests, eliminating the possibility of a severe conflict between the mission entities and investors in the public firm.[248] Section A examines The Hershey Company. Section B turns to Novo Nordisk. Section C considers whether OpenAI is likely to melt down again.

A. The Hershey Company

Like OpenAI Group PBC, The Hershey Company ("Hershey") is a for-profit Delaware-domiciled firm.[249] Like OpenAI Group PBC, Hershey is controlled by a mission entity controlled by self-appointed individuals: a charitable trust (the Milton Hershey School Trust ("the Hershey Trust")), run by self-perpetuating trustees, which relies on income generated by Hershey to support a school and its students.[250] Like OpenAI Foundation, the Hershey Trust appoints every director of the controlled for-profit firm.[251]

But the Hershey Trust trustees' sole duty is to ensure that cash continues to flow from Hershey to the Hershey Trust and its beneficiaries.[252] The trustees would violate this

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[248] For this reason, The Hershey Company and Novo Nordisk are also different from Anthropic, which we will discuss shortly.

[249] Hershey Company's Amended and Restated Certificate of Incorporation (Apr. 19, 2005).

[250] *See* Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off,* 108 COLUM. L. REV. 749 (2008) (describing Hershey and the trust controlling it and demonstrating the existence of agency costs associated with trust control of Hershey).

[251] The Hershey Trust owns roughly 80% of the voting power of Hershey, essentially allowing it to dictate the composition of the board. *Hershey Trust Company Announces Sale of Hershey Company Common Stock*, MILTON HERSHEY SCH., https://www.mhskids.org/news/hershey-trust-company-announces-sale-of-hershey-company-common-stock/ (last visited Mar. 28, 2026).

[252] *See* Klick & Sitkoff, *supra* note x, 779–80. *See generally* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020) (explaining that trustees of charities and trusts must focus solely on the financial interests of their beneficiaries).

duty by appointing (or not removing) Hershey directors who subordinated profits to other objectives.[253] The trustees' duty is thus highly aligned with Hershey investor interests.[254]

By contrast, the only goal of OpenAI Foundation, which appoints OpenAI Group PBC's directors and exercises various veto rights over the PBC,[255] is to "ensure that AGI benefits all of humanity."[256] This may mean preventing the PBC from pursuing projects that are likely to generate harm, even if they are lucrative, creating the kind of conflict between profit and mission that is absent at Hershey. Or worse: previous directors at the OpenAI nonprofit believed that fulfilling this mission required wiping out OpenAI LLC and its investors.[257] And, if OpenAI Foundation fails to take its mission seriously enough, the Attorneys General might intervene.[258]

In addition, Hershey is a regular (non-PBC) Delaware corporation. Thus, directors appointed by the Hershey Trust must put stockholders first, and are not permitted to

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[253] In the terminology of Ofer Eldar and Mark Ørberg, OpenAI Group PBC is a "socially-oriented for-profit" and Hershey is an "income-generating for-profit." See Ofer Eldar & Mark Ørberg, *The Anatomy of Nonprofit Control of Business Enterprise*, 43 YALE J. ON REG. 335–414 (2026) (distinguishing between income-generating for-profits owned by nonprofits, which are controlled by the nonprofit to generate income for the nonprofit, and socially-oriented for-profits owned by nonprofits, which are controlled by a nonprofit to ensure that the for-profit adheres to the nonprofit's mission).

[254] There is not necessarily complete alignment between the Hershey Trust and other Hershey investors. Directors appointed by Hershey Trust can be expected to bend to the preferences of those controlling the Trust, giving rise to some agency costs. *See* Klick & Sitkoff, *supra* note x.

[255] *See supra* Part III.C.2.b.

[256] *See supra* note x.

[257] *See supra* Part III. Of course, OpenAI Foundation directors will benefit from additional profits flowing from the PBC to the Foundation, as they will have more value to allocate to favored charities. This, on the margin, may elevate the relative importance to them of the PBC pursuing profitable opportunities.

[258] *See supra* Part III.C.2.b.

subordinate profits to other objectives.[259] On the other hand, OpenAI Group PBC's fiduciary duties do not orient directors towards investor interests; they are either required or free to subordinate profits to other objectives.[260]

To sum up: at Hershey guardians have a (trust) duty to appoint directors who will act in ways aligned with investors, and those directors have (corporate fiduciary) duties to put investors first. At OpenAI, on the other hand, guardians have a (nonprofit) duty to "ensure that AGI benefits all of humanity," which may mean sacrificing profits to reduce harm, and the directors they appoint to OpenAI Group PBC are either required or permitted by their (corporate fiduciary) duties to subordinate investor interests.

Because of the very different legal constraints acting on the guardians (and the directors they appoint) at Hershey and OpenAI Group PBC, the conflict between guardians and investors will be much more severe at OpenAI Group PBC. The experience of Hershey thus should not provide any reassurance to investors in OpenAI Group PBC.

B. Novo Nordisk

Like OpenAI Group PBC, Novo Nordisk A/S ("Novo Nordisk") is a for-profit firm. (It is governed by the Danish Companies Act,[261] and owned by public investors in the

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[259] *See* Frederick H. Alexander, Benefit Corporation Law and Governance 26–31 (Berrett-Koehler Publishers, Inc., 2017).

[260] *See supra* Part III.D.1.

[261] *Corporate Governance,* NOVO NORDISK, https://annualreport.novonordisk.com/2025/governance/corporate-governance.html (last visited Mar. 27, 2026).

United States and Denmark.[262]) Like OpenAI Group PBC, Novo Nordisk is controlled by a mission entity with guardians: the Novo Nordisk Foundation, which appoints a majority of Novo Nordisk directors.[263]

The Novo Nordisk Foundation, which is governed by its Articles of Association and the Danish Enterprise Foundation Act, has four objectives: (1) "to provide a stable basis for the commercial and research activities of Novo Nordisk [and other related firms];" (2) "to support physiological, endocrinological, metabolic and other medical research;" (3) "to support research hospital activities within diabetes in Denmark;" and (4) "to support scientific, humanitarian and social purposes."[264]

The first objective ("providing a stable basis for commercial and research activities of Novo Nordisk") appears to be fully achieved simply by maintaining control of Novo Nordisk's board. Such control deters takeover bids and makes hedge-fund activism all but impossible, insulating Novo Nordisk from market pressures.

The other three objectives all require that Novo Nordisk continue to distribute cash to the Foundation far into the future, thereby aligning the Foundation's interests with those of Novo Nordisk investors, in the same way that the Hershey Trust's interests are aligned with those of Hershey investors. Indeed, as American and Danish scholars of corporate

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[262] *Share Information, Novo Nordisk,* https://www.novonordisk.com/investors/stock-information.html (last visited Mar. 28, 2026).

[263] *Corporate Governance, supra* note x. Under the Danish Companies Act, employees are entitled to be represented by half of the total of shareholder-elected board members. *Id.* Novo Nordisk is one of many successful Danish companies, including Carlsberg, that are controlled by enterprise foundations. *See* Henry Hansmann and Steen Thomsen, *The Governance of Foundation-Owned Firms*, 13 J. Leg. Anal. 172 (2021). Our analysis here could apply to most if not all of these Danish firms.

[264] *Foundation Governance*, NOVO NORDISK, *https://novonordiskfonden.dk/en/who-we-are/foundation-governance/* last visited Apr. 22, 2026).

governance have observed, the Novo Nordisk Foundation owns and controls Novo Nordisk "primarily for profit,"[265] and Novo Nordisk "actually maximiz[es] the value of cash flows similar to other for-profits that compete with [it]."[266] As at Hershey, the controller's mission is downstream of commercial success, not a competing claim on the company's resources or strategic direction.

By contrast, as we have seen, the only goal of OpenAI Foundation, which appoints OpenAI Group PBC's directors and exercises various veto rights over the PBC, is to "ensure that AGI benefits all of humanity."[267] As noted earlier, this may involve preventing the PBC from pursuing projects that are likely to generate harm, even if they are profitable, a conflict not present at Novo Nordisk. And the Attorneys General might intervene if the self-perpetuating mission guardians at OpenAI Foundation stray from the mission.[268]

As at Hershey, conflict between guardians and investors at Novo Nordisk is likely to be relatively minor—while at OpenAI Group PBC it is inevitable, and potentially severe.

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[265] See Eldar & Ørberg, supra note x, at ___.

[266] See Eldar & Ørberg, supra note x, at ___.

[267] *See* OpenAI Charter, art. III.

[268] *See supra* Part III.C.2.b. Another possible difference between Novo Nordisk and OpenAI Group PBC is that Danish fiduciary duties appear to place limits on the ability of directors to sacrifice firm value for external parties, while OpenAI Group PBC's duties do not. In particular, the Danish Companies Act applicable to Novo Nordisk imposes standard fiduciary duties on directors, imposing liability on directors if they "intentionally or negligently cause a loss for the company." *New Guidance from the Danish Business Authority on Companies' Indemnification of Management and Board*, Moalem Weitemeyer (May 9, 2023), https://www.moalemweitemeyer.com/2023-05-09-New-Guidance-from-the-Danish-Business-Authority-on-Companies-Indemnification-of-Management-and-Board. By contrast, at OpenAI Group PBC, the directors appointed by OpenAI Foundation (and the Foundation itself) are not just permitted, but *required*, to ignore profits on matters relating to safety and security. *See supra* Part III.D. And on other matters, standard PBC duties apply, enabling the directors to subordinate investor interests to the mission and stakeholders, with no minimum required weight for profits. *See supra* Part III.D.1.

Thus, the experience of Novo Nordisk, like Hershey's, cannot provide too much reassurance to investors in OpenAI Group PBC.

C. So, Will OpenAI Melt down Again?

We have seen that the 2025 Structure does not diminish Ben & Jerry's risk, and OpenAI Group PBC poses a much greater risk of conflict than does Hershey and Novo Nordisk. However, *at least in the short run*, we doubt OpenAI's guardians (acting as PBC directors or via the Foundation) will endanger or harm investors and potentially undermine the mission, as their predecessors did in 2023 at OpenAI LLC.

OpenAI and the world have changed considerably since late 2023. The old guardians have been replaced by new individuals, who were presumably chosen, at least in part, because they were expected to behave differently than their predecessors. Other AI companies (such as Anthropic, Google, Meta, SpaceX/xAI, as well as Chinese competitors like DeepSeek) are catching up with or may even have surpassed OpenAI, reducing the potential public benefit of throttling advances at OpenAI.[269]

And even if OpenAI were to be the leader, its guardians may be deterred from throttling AI advances by the prospect of key engineers taking the abandoned projects to other firms or developing them in their own newly-created firms. Indeed, the OpenAI LLC

[269] This competitive dynamic has caused Anthropic, known for its safety focus, to relax safety policies. *See* Amrith Ramkumar & Georgia Wells, *Anthropic Dials Back Safety Commitments*, WALL ST. J. (Feb. 24, 2026), https://www.wsj.com/tech/ai/anthropic-dials-back-ai-safety-commitments-38257540?mod=hp_lead_pos2 ("Anthropic previously paused development work on its model if it could be classified as dangerous, but said it would end the practice if a comparable or superior model was released by a competitor.").

guardians learned this lesson the hard way, when the effort to carry out their mission was thwarted by employees credibly threatening to decamp *en masse* to Microsoft.[270]

In addition, a portion of the value created by the PBC will flow to the Foundation,[271] where the PBC directors (who also sit on the Foundation's board) can direct it to causes they favor.[272] Reducing this flow of value will, on the margin, reduce the power PBC directors enjoy via the Foundation.[273] This, in turn, could diminish their incentive to sacrifice profit for other objectives.

Indeed, OpenAI Group PBC directors and the OpenAI Foundation may well be tempted to let profits or growth trump the mission, as the standard critique suggests. If so, the Attorneys General might try to protect the public interest, at least with respect to the Foundation and its PBC director-appointment and blocking rights.[274] But they may well lack the will, the means or the political clout to do so effectively.[275] If so, there is little anyone else could do about it.[276]

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[270] *See supra* Part III.B.2.

[271] *Our Structure,* OPENAI, https://openai.com/our-structure/ (last visited Dec. 9, 2025) ("[T]he Foundation is positioned to be the single largest long-term beneficiary of OpenAI's success.").

[272] *Announcing the Initial People-First AI Fund Grantees*, *OpenAI*, https://openai.com/index/people-first-ai-fund-grantees/ (last visited Feb. 4, 2026) (explaining the applicant review process, which includes final decision by the Foundation board).

[273] If the Foundation eventually appoints directors to the PBC who are not also Foundation directors, these individuals will not enjoy the ability to direct Foundation giving. However, they may well have more psychological distance from the Foundation's mission, and therefore weigh the PBC's mission less heavily than other objectives.

[274] *See supra* Part III.C.

[275] *Cf.* Roberto Tallarita, *Who Will Enforce AI's Social Purpose?*, PROMARKET (Mar. 16, 2024), https://www.promarket.org/2024/03/16/who-will-enforce-ais-social-purpose/ (noting that nonprofit fiduciary duties are typically enforced by state attorneys general who are too busy and understaffed to adequately police them).

[276] Mission-oriented PBC shareholders might consider suing the PBC's directors, but such a suit will face challenges. *See supra* Part III.D.1. It's not clear who else would have standing to sue either the Foundation

However, *in the long run*, Ben & Jerry's risk will likely increase. When Ben & Jerry's Independent Board was created in 2000 and staffed with directors who had been serving quietly on the public board, nobody would have imagined that their successors would eventually start a civil war with Unilever over the Israeli-Palestinian conflict. Similarly, the identity of the guardians at OpenAI, and the political, technological and economic environments, will change over time in ways that cannot be predicted. As Unilever learned the hard way, a guardian arrangement that works tolerably today might fail spectacularly in two decades.

V. ANTHROPIC

Anthropic, like OpenAI, is a PBC controlled by a non-commercial entity. Its governance arrangements were created in June 2023,[277] after Ben & Jerry's meltdown in July 2021 but before OpenAI's in November 2023.

Like Ben & Jerry's and OpenAI, Anthropic has investor-overriding guardians. However, these guardians have appointed other individuals to sit on Anthropic PBC's

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or the PBC. PBC directors are not considered to owe a fiduciary duty to anyone beyond the corporation and its shareholders. *See* DEL. CODE ANN. tit. 8 § 365(b) ("A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct."). Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 579–580 (2015) ("[T]he text of section 365 of the Delaware General Corporation Law . . . makes it clear that the administration of public benefit corporations entails fiduciary obligations to two parties . . . the stockh*olders and the corporation are the only identified beneficiaries of the board's fiduciary duties."). See generally,* Jill E. Fisch and Steven Davidoff Solomon, *The "Value" of a Public Benefit Corporation*, *in* RSCH. HANDBOOK ON CORP. PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., Elgar, 2021) (expressing skepticism about the ability of the PBC form to shift directors away from shareholder value-maximization).

[277] Based on a review of Anthropic's certificates of incorporation from 2021 onwards, and conversations with individuals familiar with Anthropic's history.

board, rather than sit on the board themselves, thus exercising control indirectly. But a more important difference is that Anthropic's legal architects installed a legal "kill switch" enabling an unspecified super-majority of the PBC's investors to terminate the guardian arrangement.[278] Section A describes Anthropic's structure. Section B explains the key differences between Anthropic PBC's guardian-appointed directors and those of OpenAI Group PBC.

A. Anthropic's Structure

1. Anthropic PBC

Anthropic, like OpenAI Group PBC, is a PBC ("Anthropic PBC").[279] The public benefit that Anthropic PBC aims to promote is to "responsibly develop and maintain advanced AI for the long-term benefit of humanity."[280]

Unlike OpenAI Group PBC directors who are required, "in respect of safety and security interests," to ignore the interests of stockholders and stakeholders and consider only the mission of "ensur[ing] that artificial general intelligence benefits all of humanity,"[281] Anthropic PBC directors are not given specific instructions for how to

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[278] *See infra* Part V.A.2.c.

[279] Amended and Restated Certificate of Incorporation of Anthropic, PBC (2026) [hereinafter Anthropic Charter].

[280] Anthropic Charter, art. III.

[281] OpenAI Charter, art. III.

balance the public benefit of "responsibly develop[ing] and maintain[ing] advanced AI for the long-term benefit of humanity"[282] with the interests of stockholders and other stakeholders affected by the company's conduct.

2. The Anthropic Long-Term Benefit Trust

Like OpenAI Group PBC, Anthropic PBC's board is controlled by another entity. This entity is a noncharitable purpose trust called the "Anthropic Long-Term Benefit Trust" ("Anthropic LTBT" or "the Trust"),[283] whose purposes overlap with the three objectives of Anthropic PBC, namely, the development and maintenance of advanced AI for the long-term benefit of humanity, stockholders' pecuniary interests, and the interests of other stakeholders affected by the firm's conduct.[284]

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[282] Anthropic Charter, art. III.

[283] John Morley, David Berger & Amy Simmerman, *Anthropic Long-Term Benefit Trust*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 28, 2023), https://corpgov.law.harvard.edu/2023/10/28/anthropic-long-term-benefit-trust/.

[284] *The Long-Term Benefit Trust*, ANTHROPIC , https://www.anthropic.com/news/the-long-term-benefit-trust (last visited Mar. 6, 2026). For-profit Patagonia is also controlled by a non-charitable purpose trust (Patagonia Purpose Trust), with all remaining shares held by a nonprofit. *See* Yvon Chouinard, *Earth is Now Our Only Shareholder*, *Patagonia* (Sep. 14, 2022), https://www.patagonia.com/ownership/ (describing the 2022 transfer by the Chouinard family, the founders and sole owners of Patagonia, of all voting shares to the Patagonia Purpose Trust and all non-voting shares to the Holdfast Collective, an IRC 501(c)(4) nonprofit, with the Chouinard family continuing to "guide" all three entities). Thus, unlike Anthropic, there are no investors.

The Bosch Group has a similar investor-less structure: a for-profit operating company, a controlling trust, and a nonprofit. See *Company Overview*, Bosch, https://www.bosch.com/company/. (reporting that a nonprofit foundation (Robert Bosch Stiftung GmbH) holds about 94% of Bosch's equity without control rights, using distributions from the Bosch Group to support the (now-deceased) founder's public welfare priorities); *The Bosch Constitution,* Robert Bosch Stiftung, https://www.bosch-stiftung.de/en/bosch-constitution?utm_. (reporting that almost all voting rights (93%) are held by an Industrial Trust (Robert Bosch Industrietreuhand KG, or RBIK), with the remaining seven percent held by the founder's descendants).

The Trust has (up to) five Voting Trustees.[285] The initial trustees were selected by Anthropic.[286] The trustees are appointed for a one-year term.[287] Subsequent trustees are designated by the serving trustees at that time (in consultation with Anthropic PBC's directors and CEO).[288] As will be explained in more detail below, the Trust has no material financial rights, but elects directors to the PBC board via its Class T Common Stock.[289]

a. Director Appointment Rights

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[285] The initial trustees were Jason Matheny, the CEO of the RAND Corporation; Paul Christiano, the Founder of the Alignment Research Center; Neil Buddy Shah, the CEO and chair of the Clinton Health Access Initiative; Kanika Bahl, who serves as the CEO and President of Evidence Action; and Zach Robinson, currently serving as the Interim CEO of Effective Ventures US. *The Long-Term Benefit Trust*, ANTHROPIC (Sep. 19, 2023), https://www.anthropic.com/news/the-long-term-benefit-trust.

[286] *Id.*

[287] Morley, Berger & Simmerman, *supra* note x.

[288] *Id.* As of January 2026, the trustees are Neil Buddy Shah, Mariano-Florentino Cuéllar, and Richard Fontaine. *Mariano-Florentino Cuéllar appointed to Anthropic's Long-Term Benefit Trust, Anthropic* (Jan. 21, 2026), https://www.anthropic.com/news/mariano-florentino-long-term-benefit-trust ("New Trustees are selected by existing Trustees, in consultation with Anthropic, and have no financial stake in Anthropic.").

[289] Anthropic PBC has three classes of stock: "Common Stock," "Class T Common Stock," and "Preferred Stock." Anthropic Charter, art. IV.

Unlike OpenAI Foundation, which can appoint every director of OpenAI Group PBC, the Trust can appoint only a majority: initially, three of five.[290] The board was subsequently increased to seven members, four of whom are appointed by the Trust.[291]

The Trust can apparently remove its appointed directors at any time, with or without cause.[292] Currently, none of the four Trust-appointed directors is also a trustee.[293] The three other PBC directors are investor-appointed.[294]

The Trust-appointed directors are thus accountable to Anthropic's guardians (the Trustees), and <u>un</u>accountable to PBC investors. The Trust-appointed PBC directors will likely be swayed by the preferences of the Trustees who, like the PBC directors themselves, can balance the three objectives (mission, profits, stakeholders) however they wish. Because the Trustees are not investors, they (and the Trust-appointed PBC directors) can

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[290] Anthropic Charter, art. VIII.B(4)(a)–(b). Initially, in the "first stage," the Trust had the right to appoint one of five directors. In the second stage (May 2026 or when the company raised at least $5 billion, whichever came first), the Trust had the right to appoint two directors out of the five. In the third stage (May 2027 or when the company raised $6 billion, whichever came first), the Trust acquired the right to appoint three out of five directors. *Id.* However, Anthropic has quickly raised far more than that, most recently raising $30 billion. *See Anthropic raises $30 billion in Series G funding at $380 billion post-money valuation, Anthropic* (Feb. 12, 2026), https://www.anthropic.com/news/anthropic-raises-30-billion-series-g-funding-380-billion-post-money-valuation. Thus, the Trust quickly gained the right to appoint three directors.

[291] *Id.* at art. VII.B(5)(a)–(b). The number of directors cannot be increased or decreased without the Trust's consent, unless there is an increase in which at least half the newly created directorships are elected by the Trust. *Id.* at art. IV.D(5)(a)(iii). The four Trustee-appointed directors are, as of April 2026, co-founder Daniela Amodei, Reed Hastings, Jay Kreps, and Vas Narasimhan.

[292] Anthropic Charter, art. VIII.B(8). The Trust, which is not public, might place restrictions on the Trustees' ability to remove appointed directors. Under the charter, any director may be removed at any time "for cause as provided by law." *Id.*

[293] ANTHROPIC, https://www.anthropic.com/company [https://perma.cc/WE35-JUGP] (last visited Feb 9, 2026).

[294] One is appointed by the "Electing Preferred Holders" (certain holders of preferred stock) Anthropic Charter, art. VIII.B(5)(b). That director is, as of April 2026, Yasmin Razavi, a VC at Spark Capital, which led the Series C round. Two are appointed by the holders of common stock. *Id.* They are, as of April 2026, co-founder Dario Amodei and Chris Liddell.

be expected to weigh the mission more heavily than investors and the PBC directors they appoint.

In any event, the Trust-appointed Board majority does not fully control the Board. Under a super-majority provision, the affirmative vote of either: (i) the "Electing Preferred Director,"[295] or (ii) at least 61% of the then-serving directors "may be required for authorization by the Board of . . . matters set forth in the Investors' Rights Agreement."[296]

Because the Investors' Rights Agreement is not public, we do not know how much power this super-majority provision takes away from the Trust-appointed majority. But it could, in theory, remove their power to effect any major decision at the board level, leaving them with mere blocking rights.

b. Financial and Blocking Rights

Unlike OpenAI Foundation, which owns common stock and warrants in OpenAI Group PBC, and will thus profit from its financial success, the Trust's Class T Common stock is not entitled to receive any dividends from the company[297] or any payment in a liquidation, dissolution, or winding up.[298]

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[295] The term is not defined in the Charter, but presumably refers to the director elected by the Electing Preferred Holders.

[296] Anthropic Charter, art. VIII.C. There are currently four Trust-appointed directors out of seven, yielding a percentage below 60%.

[297] Anthropic Charter, art. IV.D(1). We understand that the Trust is entitled to a modest amount of funding from Anthropic PBC to cover its expenses.

[298] Anthropic Charter, art. IV.D.2.

And unlike OpenAI Foundation, which can veto any change in the public benefit of OpenAI Group PBC, or specified "deemed liquidation events" (such as a merger or sale of material assets), the Trust only has the right to a five-day *notice* of certain major transactions (excluding changing the public benefit).[299] Thus, unlike OpenAI Foundation's guardians, the Trust's guardians cannot use veto rights to exert leverage over Anthropic PBC.

c. ***The Kill Switch***

The most important difference between Anthropic PBC and OpenAI Group PBC is that an unspecified super-majority of Anthropic PBC investors can unilaterally amend the Trust, and thus (presumably) fire the guardians and their appointees on the PBC board.[300]

Anthropic does not reveal the precise supermajority that is needed, although its advisors indicate that the supermajority will increase over time.[301]

The advisors to the Trust describe the purpose of the kill switch as follows:

> "Because . . . amendment by a supermajority of stockholders . . . can be accomplished without the consent of the Voting Trustees, it operates as a kind of failsafe against the actions of the Voting Trustees and safeguards the interests of stockholders. The required supermajority of stockholders grows larger over time to

[299] Anthropic Charter, art. IV.D.5(b)(i), (iii), (iv). The Trust has certain protective provisions designed to ensure that the board-appointment rights of the Class T Common Stock are not undermined, *id.* at art. IV.D.5(a)(i)–(iii); art. IV.D.6, and no voting rights except with respect to these protective provisions and director appointments. *Id.* at art. IV.D.7.

[300] Morley, Berger & Simmerman, *supra* note x. The Trust and its rights can also be modified through the agreement of both the Voting Trustees and the stockholders of the company. *Id.* And before the Voting Trustees attained the authority to elect a majority of the directors, changes could also have been made through the agreement of the Voting Trustees and the company's directors. *Id.*

[301] Morley, Berger & Simmerman, *supra* note x.

> reflect the accumulation of experience and the increasing need for commitment as the company's technology grows more powerful."[302]

Because of the kill switch, the Trust's guardians and their appointees on the PBC are, unlike the fully-insulated guardians at Ben & Jerry's and OpenAI, only partly insulated.[303]

We assume that fear of the kill switch being flipped will deter the Trust-appointed directors from "crossing the line" (advancing the mission in ways strongly opposed by the supermajority of stockholders). But if Trust-appointed directors nevertheless cross the line, they and the guardians who appointed them can be removed.[304]

To be sure, a super-majority of stockholders is unlikely to be strongly opposed to Trust-appointed directors pursuing the mission when humanity is actually at risk; in that situation, we would not expect investors to flip the kill switch. And even if a super-majority of stockholders were strongly opposed to the Trust-appointed directors in such a scenario, they may still refrain for fear of public criticism or government intervention. The switch is most likely to be pulled when investors believe that the Trust-appointed directors are acting

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[302] Morley, Berger & Simmerman, *supra* note x.

[303] Among Anthropic PBC's investors are the seven co-founders, including Dario and Daniela Amodei, who appear to own slightly less than two percent of the equity each. *See* Richard Nieva, *Despite Digs from Musk and Altman, Anthropic's Billionaire Founders Double Their Fortunes,* FORTUNE (Feb. 12, 2026), https://www.forbes.com/sites/richardnieva/2026/02/12/anthropics-seven-billionaire-cofounders-nearly-double-their-fortunes-as-ai-giants-valuation-soars-to-380-billion/ (reporting that each of the founders' stakes is worth $7 billion on a $380 billion valuation for the firm). To the extent that the co-founders collectively are willing to sacrifice financial returns, it would be more difficult (or, depending on the supermajority required, impossible) for other investors to flip the kill switch. The co-founders presumably will be percentage-diluted by subsequent financing rounds and/or an IPO, reducing their potential ability to frustrate use of the kill switch.

[304] Stockholders have another, but much less important, source of leverage over the Trust and its trustees. The Trust's arrangements authorized the Trust to be enforced by "groups of the company's stockholders who have held a sufficient percentage of the company's equity for a sufficient period of time." *See* Berger, Morley & Simmerman, *supra* note x.

unreasonably and eliminating them will not be widely seen as inappropriate. This, in turn, will tend to deter the Trust-appointed directors from acting unreasonably, which presumably is the legal architects' goal.

3. Comparing Anthropic and OpenAI

Table 3 below summarizes the key differences between OpenAI Group PBC and Anthropic PBC.

Table 3: Comparing OpenAI Group PBC and Anthropic PBC

	OpenAI Group PBC	Anthropic PBC
Structure	Delaware PBC controlled by nonprofit (OpenAI Foundation) owning 26%.	Delaware PBC controlled by trust (Long-Term Benefit Trust) owning zero percent.
Controller Mission/Purpose	*Ensure that AGI benefits all of humanity ("Mission").*	Mirrors PBC Duties.
PBC Mission	Same.	*Responsibly develop and maintain advanced AI for the long-term benefit of humanity* ("*Mission*").
PBC Duties	For "actions relating to safety and security": Solely *Mission*. Otherwise: Balance (1) *Mission*, (2) Profit, (3) Stakeholder interests.	Balance (1) *Mission*, (2) Profit, (3) Stakeholder interests.
Controller Board Appointment Rights	Can appoint/remove each PBC director; one-third of directors can be removed in 12 months by two-thirds of the other shares.	Appoints four of seven PBC directors; but some matters require consent of five, or of particular investor-appointed director.
Controller veto rights	Changes to PBC's public benefit, certain major transactions, "actions relating to safety and security" (via SSC).	Changes to PBC's public benefit.

	OpenAI Group PBC	Anthropic PBC
Fiduciary constraint on harming investors?	For "actions relating to safety and security:" None. Otherwise: Not much (profit can be subordinated to *Mission* and stakeholders under PBC balancing duties).	Not much (profit can be subordinated to *Mission* and stakeholders under PBC balancing duties).
Other constraints on harming investors?	No.	Kill switch . Board super-majority requirement.

4. Comparing Ben & Jerry's Risk at OpenAI and Anthropic

Anthropic's investor-overriding guardians are significantly different than their counterparts at OpenAI along two investor-relevant dimensions: (1) alignment with investors, and (2) power to resist investors. Guardians and investors are more aligned at Anthropic than at OpenAI, and Anthropic guardians have less power over investors than OpenAI's. Both tend to make Anthropic's Ben & Jerry's risk much lower than OpenAI's.

a. Alignment with Investors

The only goal of OpenAI Foundation, which appoints OpenAI Group PBC's directors and exercises various veto rights over the PBC,[305] is to "ensure that AGI benefits all of humanity."[306] PBC profits are irrelevant. Thus, in appointing PBC directors and

[305] *See supra* Part III.C.2.

[306] *See supra* note x.

exercising veto rights, OpenAI Foundation's guardians must focus solely on the mission, even if investors are harmed.[307] And the PBC's directors themselves, who are currently these same guardians, are required, as PBC directors, to ignore profits around "actions relating to safety and security."[308] Otherwise, they can balance the mission with profits and stakeholder interests.[309]

By contrast, the purposes of the Anthropic LTBT are identical to the three objectives of Anthropic PBC, namely, the responsible development and maintenance of advanced AI for the long-term benefit of humanity, profits, and stakeholder interests.[310]

As a result, guardians of the Anthropic LTBT and their appointees on the PBC board, unlike their counterparts at OpenAI, are (a) never required to ignore investor interests; and (b) could, if they so choose, always prioritize investor interests.[311] We would thus expect Anthropic guardians to be more aligned (or less misaligned) with the interests of investors than OpenAI guardians, reducing the risk of a conflict leading to a Ben & Jerry's-style meltdown.

b. Power to Resist Investors

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[307] And if they don't take their mission as Foundation directors seriously enough, the Attorneys General might intervene. *See supra* Part III.C.2.b.

[308] *See supra* Part III.D.1.

[309] *See supra* Part III.D.1.

[310] *The Long-Term Benefit Trust*, ANTHROPIC , https://www.anthropic.com/news/the-long-term-benefit-trust (last visited Mar. 6, 2026).

[311] *See supra* Part V.A.

OpenAI Foundation's guardians enjoy various veto rights over OpenAI Group PBC, via the SSC and otherwise, and appoint the entire PBC board.[312] Currently, guardians make up the entire PBC board.[313] The only constraint on the guardians' ability to exercise power over investors is that the PBC directors are subject to fiduciary duties which, as we have seen, impose essentially no constraint. [314]

Anthropic's guardians have much less power over investors. First, they lack veto rights over the PBC of the kind possessed by OpenAI Foundation, which give the Foundation direct influence over OpenAI Group PBC on "safety and security" matters and major transactions.[315] Second, Anthropic's guardians can appoint at most a majority of the board, rather than the entire board; and they have less power than a typical board majority because certain matters require consent from at least one investor-appointed director.[316] Third, and most importantly, a super-majority of Anthropic stockholders can choose to eliminate the guardians, reducing the probability that the guardians will step out of bounds.[317]

Table 4 below summarizes why Anthropic faces less Ben & Jerry's risk than OpenAI.

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[312] *See supra* Part III.C.2.

[313] *See supra* Part III.C.2.b.

[314] *See supra* Part III.D.1.

[315] *See supra* Part III.C.2.b.3.

[316] *See supra* Part V.A.2.a.

[317] *See supra* Part V.A.2.c.

Table 4: Comparing Ben & Jerry's Risk at OpenAI and Anthropic

	OpenAI Group PBC	Anthropic PBC
Guardian/investor misalignment	Mission trumps profit when Foundation exercises veto rights, appoints PBC directors, or PBC directors take "actions relating to safety and security." Otherwise, PBC director discretion.	PBC directors (and those appointing them) <u>never</u> required to ignore profits, and could <u>always</u> choose to prioritize profits.
Guardian power over investors	Extensive veto rights over PBC, not constrained by any fiduciary duties. Right to appoint entire PBC board, which itself is only minimally (if at all) constrained by fiduciary duties.	Lacks veto rights. Can only appoint a majority of board, and that majority must obtain consent of at least one investor-appointed director for certain matters. Super-majority of investors can flip kill switch.

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Unlike OpenAI and Ben & Jerry's, Anthropic has not yet had a public meltdown. Is it due to the firm's young age? The particular individuals leading Anthropic PBC and the Trust? The lower misalignment between guardians and investors? The limited power of the Trust-appointed directors, even absent the kill switch? The deterrence created by the kill switch? The fact that the directors sitting on the for-profit board are not themselves guardians (as they are at Ben & Jerry's and OpenAI), but rather appointed by guardians at the Trust? We don't know why. But we are confident that the kill switch substantially reduces the likelihood that Anthropic will ever have a meltdown of the kind experienced by Ben & Jerry's in 2021 and OpenAI in 2023.

VI. CONCLUSION

We have examined the entire universe of firms with a built-in conflict caused by pairing investors and guardians empowered to pursue social missions that can sharply conflict with investor interests: Ben & Jerry's, OpenAI, and Anthropic. Because their missions—unlike profit-maximization—are inevitably open-ended, there are no incentives to align guardians' interests with the social benefits they are supposed to achieve. At most, a firm can fully insulate guardians from accountability, by making guardians self-appointed rather than chosen by investors, and by depriving investors of the ability to unwind the arrangement.

The standard critique of these guardians is that the lack of incentives, combined with the needs of the business, will cause guardians to do too little. But we have shown that guardians may also do too much. In particular, guardians create what we call "Ben & Jerry's risk:" they may act in ways that not only endanger or hurt investors but also undermine their own mission. This is precisely what happened at Ben & Jerry's (in 2021) and at OpenAI (in 2023). Anthropic—created after OpenAI and Ben & Jerry's—has avoided a similar fate, perhaps because of its unique "kill switch" allowing a super-majority of stockholders to disarm the guardians.

We are not claiming guardians will always harm investors, undermine their own mission, or both. Such arrangements might work tolerably well for a period of time, as at Ben & Jerry's for two decades, or even indefinitely. But our analysis highlights the risk of having investor-overriding guardians whose job is to "do the right thing:" agents without principals, accountable only to themselves. Our analysis thus strengthens the normative case against using fully-insulated guardians. Not only might they do too little, as the standard critique suggests; they might also do too much. Our analysis also strengthens the normative case for adding a kill switch, as Anthropic has done, so that guardians are only partly-insulated.

We end with a prediction: given the fiascos at Ben & Jerry’s and OpenAI, the only two firms that have experimented with fully-insulated guardians, we do not expect many other firms to follow their lead.

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