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Jennifer O'Hare
Villanova University Charles Widger School of Law

PRIVATE ORDERING AND IMPROVING INFORMATION FLOW TO THE BOARD OF DIRECTORS: THE DUTY TO INFORM BYLAW

Jennifer O'Hare *

ABSTRACT

It seems that almost every day there is another report of a corporate scandal at a public company. Whether the scandal involves sexual harassment by senior management or widespread illegal conduct by employees, the first question asked by investors and the media is usually, "Where was the board?" And the board's response is almost always, "We didn't know." Directors of public companies rely on officers to provide the information the board needs to manage the corporation, but, strangely enough, officers may not even be legally required to provide information to the board. The Delaware General Corporation Law is silent on the issue. Some commentators have argued that fiduciary duties impose on officers a duty to provide information to the board, but the Delaware courts have been slow to address this issue. In this article, I demonstrate that the few cases addressing the fiduciary duties of officers do not completely clarify whether officers have a fiduciary duty to provide information to the board or what the duty requires. I then propose a new approach: using private ordering to improve the information flow to the board of directors. I recommend that the bylaws of all public companies should include a new type of bylaw, a "Duty to Inform Bylaw." A Duty to Inform Bylaw would impose on the Chief Executive Officer and the Chief Financial Officer a duty to inform the board promptly of all information necessary to enable the board to manage the business and affairs of the company in conformity with its statutory and fiduciary obligations.

* Professor of Law, Villanova University Charles Widger School of Law. J.D., George Washington Law School; B.S.E., Wharton School of the University of Pennsylvania.

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INTRODUCTION

It seems that almost every day there is another report of a corporate scandal at a public company. Whether the scandal involves sexual harassment by senior management or widespread illegal conduct by employees, the first question asked by investors and the media is usually, "Where was the board?" And the board's response is almost always, "We didn't know."

Directors rely on officers to provide the information the board needs to do its job of managing the corporation. While courts and academics have given significant attention to the board's oversight duties and its responsibility to stay informed, there has been relatively little analysis of an officer's duty to provide the information the board needs to manage the corporation. What little analysis there is has focused entirely on fiduciary duties as the source of the officer's duty to inform the board. Unfortunately, the Delaware[1] courts have been very slow to explore the role of officers, and the few cases addressing the fiduciary duties of officers do not completely clarify whether officers have a fiduciary duty to provide information to the board or what that duty requires.

There is, however, another potential source of an officer's duty to inform the board: the corporation's bylaws. Surprisingly, neither the courts nor academics have explored using private ordering to improve information flow to the board of directors. This article does. It recommends that the bylaws of all public companies should include a new type of bylaw: the "Duty to Inform Bylaw." A Duty to Inform Bylaw would impose on the Chief Executive Officer ("CEO") and the Chief Financial Officer ("CFO") a duty to promptly inform the board of all information necessary to enable it to manage the business and affairs of the company in conformity with its statutory and fiduciary obligations.

1. This article focuses on Delaware law because Delaware is universally viewed as the most important jurisdiction for corporate law. Over two-thirds of Fortune 500 companies are incorporated in Delaware. Del. Div. of Corps. *About the Division of Corporations*, DELAWARE.GOV, https://corp.delaware.gov/aboutagency/ [https://perma.cc/LY63-3GL8] (last visited Dec. 1, 2018). *See generally* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW (Stephen M. Bainbridge et al. eds., 2018) (discussing the reasons for Delaware's dominance and whether Delaware will maintain its preeminent position).

Part I of this article discusses the roles played by the board of directors and the officers in managing a public corporation. It examines the composition of the boards of public companies, which consist almost entirely of "outside" directors who do not work for the company. It then focuses on the distinctive responsibilities of the CEO and CFO. Part I also introduces the longstanding academic debate over whether agency law, including agency law's imposition of fiduciary duties on agents, applies to corporate officers.

Part II of this article addresses the flow of information to the board of directors. It begins by observing that the board composition of public companies has led to problems with informational asymmetry. Because outside directors do not work for the corporation, these directors must primarily rely on corporate officers to obtain the information they need to complete their oversight duties and fulfill their advisory roles. Part II also reviews the emphasis Delaware corporate law places on an informed board. The article then takes a practical turn, detailing how the directors of public companies primarily receive information through an informational package prepared by corporate officers and sent to directors in advance of board meetings. It highlights the deficiencies of this information process. Part II concludes by considering reasons why officers might not provide information to the board of directors.

Part III of this article explores whether officers have a broad duty to inform the board of directors. First, it shows that the Delaware General Corporation Law ("Delaware GCL") does not impose a duty to inform on officers. It then examines fiduciary law as a potential source of a duty to disclose. It rejects claims that corporate law imposes a broad fiduciary duty on directors and officers to disclose all information to the board. Rather, a careful review of Delaware caselaw demonstrates that corporate law imposes a much more limited duty to disclose information to the board in specific types of duty of loyalty cases, such as self-dealing transactions. It also considers whether agency law imposes on officers a broad fiduciary duty to disclose information to the board. Finally, Part III analyzes the recent Delaware Court of Chancery decision in *Amalgamated Bank v. Yahoo! Inc.*,[2] in which the court purported to impose agency law on corporate officers, concluding that *Amalgamated* made an already murky area of the law even murkier.

2. 132 A.3d 752 (Del. Ch. 2016).

Part IV presents a thorough discussion and analysis of the contours, challenges, and administrability of a Duty to Inform Bylaw. It discusses and demonstrates that a Duty to Inform Bylaw is legal and enforceable under Delaware law. It also highlights that the shareholder proposal process would be available for stockholders to amend the corporation's bylaws to include a Duty to Inform Bylaw, providing an opportunity for stockholders to improve the information flow to directors. Finally, Part IV argues that an officer's violation of a Duty to Inform Bylaw should be characterized as a direct, as opposed to derivative, action. This characterization makes the enforcement of Duty to Inform Bylaws far more workable.

Part V recommends that all public companies should amend their bylaws to include a Duty to Inform Bylaw. After presenting a model Duty to Inform Bylaw, Part V argues that Duty to Inform Bylaws will improve information flow to the board of directors. First, a Duty to Inform Bylaw imposes a clear and explicit duty to inform on officers. Second, the procedural rules relating to the enforcement of a Duty to Inform Bylaw give the bylaw the necessary teeth to encourage officers to meet their duties. Third, the Duty to Inform Bylaw will encourage officers to work with directors to find better ways of providing information to the board. Part V concludes by discussing some innovative methods companies are using to improve information flow to the board.

I. THE ROLES OF DIRECTORS AND OFFICERS

A. *The Board of Directors*

1. The Board's Role

According to the Delaware GCL, the board of directors is responsible for managing the "business and affairs" of a corporation.[3]

3. DEL. CODE ANN. tit. 8, § 141(a) (2011 & Supp. 2016). In addition to overseeing the business and affairs of the company, the board of a public company also plays an important role in corporate governance. For example, through the nominating committee, the board of a public company selects individuals for election to the board. *See New York Stock Exchange Listed Company Manual*, N.Y. STOCK EXCH. § 303A.04, [https://perma.cc/WLY3-Q8XY] (last visited Dec. 1, 2018) [hereinafter *NYSE Listed Company Manual*]. The board sets its own compensation. DEL. CODE ANN. tit. 8, § 141(h) (2011 & Supp. 2016). Many boards also conduct an annual self-evaluation process. *See NYSE Listed Company Manual*, *supra*, § 303A.09.

Thus, the board has an important oversight function. It oversees corporate performance and the performance of its senior executives, especially the CEO.[4] The board also oversees the effectiveness of the company's financial controls and compliance programs, and, through the audit committee, the board of a public company supervises the company's audit process and preparation of the company's financial reports.[5]

Traditionally, the board's role has been one of oversight. However, the role of a board of a public company has evolved. Directors now are much more involved in strategic planning; they advise the CEO regarding strategy, and they review and approve strategic initiatives.[6] Moreover, in recent years, the responsibilities of the board have increased, as corporations are faced with new challenges regarding risk management and cybersecurity threats.

2. Board Composition of Public Companies

The board of a public company typically consists of between eight and eleven directors.[7] Boards are composed almost entirely of "outside" directors—individuals who are not employed by the corporation.[8] A quick scan of director profiles on public company websites reveals that outside directors are typically a mix of senior executives of other public companies and large non-profits, retired CEOs of other public companies, former high-ranking government officials, and deans and professors from business schools and other graduate schools.[9]

4. *See generally* DEL. CODE ANN. tit. 8, § 122(5) (2011 & Supp. 2016). One of the board's most important duties is to select the corporation's CEO, structure an appropriate compensation package for the CEO, and evaluate the CEO's performance. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02 (AM. LAW INST. 1992) [hereinafter CORPORATE GOVERNANCE].

5. *See* CORPORATE GOVERNANCE, *supra* note 4, §§ 3.02, .05.

6. *See* MODEL BUS. CORP. ACT § 8.01 (AM. BAR ASS'N 2016).

7. DELOITTE & SOC'Y FOR CORP. GOVERNANCE, 2016 BOARD PRACTICES REPORT: A TRANSPARENT LOOK AT THE WORK OF THE BOARD 8 (10th ed. 2016) [hereinafter BOARD PRACTICES REPORT].

8. SPENCER STUART, 2017 SPENCER STUART U.S. BOARD INDEX 8 (2017) (stating that eighty-five percent of directors on a board of a large public company are independent directors).

9. *See, e.g.*, *About Us*, JPMORGAN CHASE & CO., https://jpmorganchase.com/corporate/About-JPMC/board-of-directors.html [https://perma.cc/WF6U-GRXJ] (last visited Dec. 1, 2018); *Apple Leadership*, APPLE, https://www.apple.com/leadership/ [https://perma.cc/8X

The predominance of outside directors is due to stock exchange listing standards, which require that a majority of the board[10] of a public company be composed of "independent directors."[11] Directors who also work for the company—"inside" directors—do not meet the independence standard.[12] This means that company employees can serve on the board, but these inside directors cannot constitute a majority of the board. However, perhaps prompted by a desire to show investors that they comply with good corporate governance practices, most public corporations have exceeded the minimum stock exchange requirements so that the CEO is often the only company employee sitting on the board of directors.[13]

The inclusion of independent directors on the boards of public companies is thought to offer several benefits. Independent directors can provide specific skills and expertise that are helpful to the corporation. Most importantly, because they do not have an employment relationship, or any other material relationship, with the corporation, independent directors are thought to be better able to monitor the performance of the CEO and other corporate officers, which presumably leads to better corporate results.

8A-SDJX] (last visited Dec. 1, 2018); *Leadership*, WALMART, https://corporate.walmart.com/our-story/leadership [https://perma.cc/TAA8-SPMB] (last visited Dec. 1, 2018).

10. *NYSE Listed Company Manual*, *supra* note 3, § 303A.01; *Nasdaq Listed Company Manual Standards*, NASDAQ § 5605(b)(1), http://nasdaq.cchwallstreet.com/NASDAQTTools/PlatformViewer.asp?selectednode=chp_1_1_1_1&manual=/nasdaq/main/nasdaq-equityrules/ [http://perma.cc/GM2H-CWQG] (last visited Dec. 1, 2018).

11. The stock exchanges define "independence." Under the New York Stock Exchange rules, to qualify as an independent director the board must "affirmatively determine" that the director "has no material relationship with the listed company (either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company)." *NYSE Listed Company Manual*, *supra* note 3, § 303A.02(a), Under the Nasdaq rules, an independent director is "a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." *Nasdaq Listed Company Manual Standards*, *supra* note 10, § 5605(b)(1). While inside directors can never qualify as independent directors, outside directors may or may not be independent directors, depending on if they have other relationships with the company. *Id*. § 5605(a)(2).

12. Both the New York Stock Exchange ("NYSE") and Nasdaq independence standards expressly stated that a director who is also an employee of the company cannot be an independent director. *Nasdaq Listed Company Manual Standards*, *supra* note 10, § 5605(a)(2); *NYSE Listed Company Manual*, *supra* note 3, § 303A.02(b).

13. *See* Steven Davidoff Solomon, *The Case Against Too Much Independence on the Board*, N.Y. TIMES (Nov. 11, 2013), https://dealbook.nytimes.com/2013/11/11/the-case-against-too-much-independence-on-the-board/ [https://perma.cc/DW37-K4CJ] ("[N]ot only do we have boards that are populated by independent directors, but often, the C.E.O. is the sole nonindependent director on the board.").

Corporate governance experts recognize, however, that a corporation's senior officers should also sit on the board.[14] Because they work for the corporation, inside directors—especially the CEO—are much more knowledgeable about the company's business than outside directors.[15] They will be able to assist independent directors by bringing this knowledge into the boardroom.

B. *Officers*

1. In General

It is generally understood that the role of officers is to manage the day-to-day operations of the corporation and to carry out the policies set by the board of directors.[16] Officers, therefore, have extraordinary power over the corporation. Strangely, however, the Delaware GCL is largely silent on the role of corporate officers. The statute does not even define the term "officer," nor does it set forth the duties and responsibilities of officers.[17] The only statutory requirement regarding officers is that each corporation must appoint an officer to keep the corporate books and records.[18] Other than that, the Delaware GCL permits the corporation to specify everything else—such as the number and titles of officers, their powers, and their duties—in the corporation's bylaws.[19]

2. The Definition of "Officer"

Given the importance of the role played by officers in corporations, as well as the use of term in several corporate statutes, it is curious that neither the Delaware legislature nor the Delaware judiciary have defined "officer" for purposes of corporate law. Even

14. *See* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 131–32 (2010).

15. As the American Law Institute recognized, "[p]ermitting senior executives to serve on the board ensures knowledgeable and detailed board discussion about the business, and encourages management to take important issues to the board." CORPORATE GOVERNANCE, *supra* note 4, § 3A.01 cmt. c.

16. *See* DEL. CODE ANN. tit. 8, § 142 (2011 & Supp. 2016); CORPORATE GOVERNANCE, *supra* note 4, § 3.01.

17. *See generally* DEL. CODE ANN. tit. 8, § 142 (2011 & Supp. 2016) (noting the lack of definition of or description for the term "officer").

18. *Id*. § 142(a) ("Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws . . . .").

19. *Id.*

without an express definition, there are a few things we can comfortably conclude about the definition of "officer." First, not every employee of a corporation is an officer. Several provisions in the Delaware GCL draw a distinction between officers and employees. For example, the indemnification statute states that a corporation can indemnify "a director, officer, employee or agent of the corporation," thereby indicating that there are differences between the positions of officer and employee.[20]

Second, the term "officer," as used in the Delaware GCL, means someone who has significant authority in the corporation, such as a member of the company's senior management team. This conclusion can be traced to the common understanding of the word. "Officer" has long been used by the military to identify someone who is in a position of authority.[21] Nowadays, the term is more broadly used to describe someone in a position of authority in any organization, including a corporation.[22]

Third, certainly the corporation's highest-ranking officer—typically the CEO—would be an "officer" for the purposes of Delaware corporate law. But what about the corporation's other senior managers? Is the CFO an "officer?" What about a Chief Strategic Officer? Or a corporation's Executive Vice President for Sales? Where should the line be drawn? This is where Delaware law is most unclear.

One approach would be to define "officer" simply by listing a series of titles. If a corporate employee has been given a certain title, he or she would be deemed to be an officer for purposes of Delaware corporate law. This is the approach that Delaware has largely adopted in its service of process provision. That provision states that "the president, chief executive officer, chief operating officer,

20. *Id.* § 145(a). Other examples include section 141(e) of the Delaware GCL (insulating directors from liability if they rely in good faith on reports made by "officers or employees") and section 143 (permitting corporation to loan money to "any officer or other employee of the corporation"). *Id*. §§ 141(e), 143.

21. *Officer*, OXFORD ENGLISH DICTIONARY, https://en.oxforddictionaries.com/definition/officer [https://perma.cc/9R78-RUCK] (last visited Dec. 1, 2018).

22. For example, the Merriam-Webster dictionary states that an "officer" is "one who holds an office of trust, authority, or command." *Officer*, MERRIAM-WEBSTER, https://merriamwebster.com/dictionary/officer [https://perma.cc/M6S9-T786] (last visited Dec. 1, 2018). The Oxford Dictionary states that an "officer" is a "person holding a position of authority, especially one with a commission, in the armed services" and continues on to define "officer" as a "holder of a senior post in a society, company, or other organization." *Officer*, *supra* note 21.

chief financial officer, chief legal officer, controller, treasurer, [and] chief accounting officer" are officers of the corporation for purposes of receiving service of process.[23]

While this approach to the definition of "officer" has the advantage of being easy to apply, it—like all bright-line tests—might be abused. Corporations could choose to give different titles to senior managers in order to get around certain duties or responsibilities that are linked to officer status. Therefore, another approach would be to attempt to define what a corporate officer is or does. For example, officer could be defined to be an employee who oversees the corporation or a division or subsidiary of the corporation.

A third approach would be to combine the two tests. An example of this can be found in the definition of "executive officer" in the federal securities laws.[24] According to this definition, an executive officer is the corporation's "president, any vice president of the [corporation] in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy-making functions for the [corporation]."[25] Thus, after listing a series of titles that are deemed to meet the definition of "officer," the definition then ignores the title to focus on the authority of the employee. If the employee performs a policy-making function, then the employee is deemed to be an executive officer, regardless of the employee's title.

23. DEL. CODE ANN. tit. 10, § 3114(b) (2013 & Supp. 2016). In addition to anyone having one of the enumerated list of titles, anyone "identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was 1 of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful" is an officer for purposes of the service of process provision. *Id.*

24. The federal securities laws also include a definition of the term "officer," as opposed to "executive officer." According to this definition, an officer is the "president, vice president, secretary, treasury or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated." *See* 17 C.F.R. § 240.3b-2 (2018).

25. This definition of "executive officer" is found in several different provisions of the federal securities laws, including: (1) Rule 405 of the Securities Act of 1933 (the general definition section of the rules under the '33 Act); (2) Rule 501(f) of the Securities Act of 1933 (the definitional section relating to unregistered sales made pursuant to Regulation D); (3) Rule 3b-7 of the Securities Exchange Act of 1934 (the general definition section of the rules under the '34 Act); and (4) Rule 16a-1(f) of the Securities Exchange Act of 1934 (the definitional section relating to Section 16's disclosure obligations for employees buying or selling their employer's securities). *See* 17 C.F.R. §§ 230.405, 230.501(f), 240.3b-7, 240.16a-1(f) (2018).

While each of the three approaches has pros and cons, Delaware corporate law has yet to adopt any of them.

3. The Duties of Officers

Similarly, Delaware law has not focused on identifying the duties of officers. Section 142(a) of the Delaware GCL states in part that corporations "shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors."[26] However, a review of the bylaws[27] of the fifty largest United States public companies[28] demonstrates that bylaw provisions relating to officers are generally boilerplate and provide very little information about officers or their responsibilities.[29]

While some corporate bylaws purport to provide information about both officer powers and duties, upon review, it is apparent that they actually fail to provide any substantive information about either the powers or the duties of the corporation's officers. For example, the bylaws of AmerisourceBergen, a Delaware corporation, state:

> Section 5.03 Powers and Duties. The officers of the Corporation shall have such powers and duties in the management of the Corporation as shall be stated in these Bylaws or in a resolution of the Board which

26. DEL. CODE ANN. tit. 8, § 142(a) (2011 & Cum. Supp. 2016).

27. As provided by the statute, duties of officers may also be set forth in board resolutions. *Id.* While bylaws of public companies are available to the public, board resolutions are not public documents. *What Information Do Public Companies Have to Disclose That Private Companies Do Not?*, ALLBUSINESS, https://www.allbusiness.com/what-information-do-public-companies-have-to-disclose-that-private-companies-do-not-1295-1.html [https://perma.cc/X9WN-8RHT] (last visited Dec. 1, 2018). Therefore, I was unable to review board resolutions to determine if they set forth officer duties.

28. Bylaws of the fifty largest companies, as set forth on the Fortune 500 list for 2018, were reviewed. *Fortune 500 Full List*, FORTUNE, http://fortune.com/fortune500/list/ [https://perma.cc/6HJ2-Z6YB] (last visited Dec. 1, 2018). They are: Walmart, ExxonMobil, Berkshire Hathaway, Apple, United Health Group, McKesson, CVS Health, Amazon, AT&T, General Motors, Ford Motor, AmerisourceBergen, Chevron, Cardinal Health, Costco, Verizon, Kroger, General Electric, Walgreens Boots Alliance, JPMorgan Chase, Fannie Mae, Alphabet, Home Depot, Bank of America, Express Scripts Holdings, Boeing, Wells Fargo, Boeing, Phillips 66, Anthem, Microsoft, Valero Energy, Citigroup, Comcast, IBM, Dell Technologies, State Farm Insurance, Johnson & Johnson, Freddie Mac, Target, Lowe's, Marathon Petroleum, Procter & Gamble, MetLife, UPS, PepsiCo, Intel, DowDuPont, Archer Daniels Midland, Aetna, and FedEx. *Id.*

29. *See, e.g.*, AMAZON.COM, INC., AMENDED AND RESTATED BYLAWS OF AMAZON.COM, INC. § 4.7 (2016), https://ir.aboutamazon.com/static-files/46190e86-758b-4975-bca4-3a9d56b594c9 [https://perma.cc/7HPV-XKCX]; CITIGROUP INC., BY-LAWS OF CITIGROUP INC. (2015), https://www.citigroup.com/citi/investor/data/cbylaws.pdf [https://perma.cc/NT78-FKWW].

> is not inconsistent with these Bylaws and, to the extent not so stated, as generally pertain to their respective offices, subject to the control of the Board. A Secretary or such other officer appointed to do so by the Board shall have the duty to record the proceedings of the meetings of the stockholders, the Board and any committees in a book to be kept for that purpose. The Board may require any officer, agent or employee to give security for the faithful performance of his or her duties.[30]

The bylaw provision is titled "Powers and Duties," which implies that the powers and duties of officers will be set forth in the bylaw. However, apart from stating that a Secretary or other officer has the duty to record the proceedings of meetings, section 5.03 does not define the duties of corporate officers.[31] While it states that the duties of officers might appear in other bylaws, a review of the AmerisourceBergen bylaws reveals that there are no other bylaws defining the powers or duties of corporate officers.[32]

Other bylaws provide more information about the powers of officers—and specifically the CEO—but do not set forth any duties owed by the officer to the board or the corporation. Many bylaws simply state that the CEO has the general power to "supervise and control the business and affairs of the Corporation."[33] Other bylaws add to the broad grant of power and delineate additional specific powers. A typical example of this approach can be found in the bylaws of UnitedHealth Group, Inc., a Delaware corporation. Its bylaws state:

> Section 4.02. Chief Executive Officer. Unless provided otherwise by a resolution adopted by the Board of Directors, the Chief Executive Officer: (a) shall have general active management of the business of the corporation; (b) shall, when present, preside at all meetings of the shareholders; (c) shall see that all orders and resolutions of the Board of Directors are carried into effect; (d) shall sign and deliver in the name of the corporation any deeds, mortgages, bonds, contracts or other instruments pertaining to the business of the corporation, except in cases in which the authority to sign and deliver is required by law to be exercised by another person or is expressly delegated by these Bylaws or the Board of Directors to some other officer or agent

30. *See Amended and Restated Bylaws of AmerisourceBergen Corporation*, AMERISOURCEBERGEN § 5.03, (Mar. 2, 2017), https://www.sec.gov/Archives/edgar/data/114 0859/000114085 917000010/exhibit32.htm [https://perma.cc/66NN-ANG4].

31. *Id.*

32. *Id.*

33. *E.g.*, *Bylaws of Bank of America Corporation*, BANK AM. § 6.6, http://invest or.bank ofamerica.com/phoenix.zhtml?c=71595&p=irol-govhighlights#fbid=x1iZDg4sLWQ [https:// perma.cc/Y4WL-XS5D] (last visited Dec. 1, 2018).

> of the corporation; and (e) shall perform such other duties as from time to time may be assigned by the Board of Directors.[34]

The intention of these bylaw provisions seems to be to ensure that the CEO has a broad grant of actual authority to run the corporation's business. And, again, the bylaws are silent as to setting forth the CEO's responsibilities to the board and the corporation.[35]

4. The Distinctive Roles of the Chief Executive Officer and Chief Financial Officer in Public Corporations

Regardless of Delaware law's relative silence on the duties of officers, two officers play distinctive roles at all public companies: the CEO and the CFO.

a. The Chief Executive Officer

The Chief Executive Officer is the highest ranking officer in public corporations.[36] The powerful role played by the CEO of a public company has been well-recognized by the courts, corporate governance experts, journalists, and the federal government. The CEO sets corporate strategy, manages the corporation's business, and oversees the performance of other senior corporate officers, all of whom report to the CEO.[37] While the CEO delegates much of his authority to other corporate officers and employees, the CEO is ultimately responsible for the corporation's results of operations.[38]

The CEO of a public company works closely with the board of directors, and is therefore accountable to the board for his performance.[39] In addition, the CEO almost always sits on the board of a public company and, in many public companies, the CEO also

34. *Bylaws of UnitedHealth Group Incorporated*, UNITEDHEALTH GROUP § 4.02 (Aug. 15, 2017), https://www.unitedhealthgroup.com/content/dam/UHG/PDF/About/UNH-Restated-Bylaws.pdf [https://perma.cc/7QL6-GWCY].

35. *See id.*

36. The use of the terms "President" and "CEO" is occasionally confusing. Nowadays, if the term "President" is used, it generally refers to the second highest-ranking position, identical to the term "Chief Operating Officer." *See* Sudhakar I. Prabu, *6 Big Differences Between a President and a CEO*, BUSINESS.COM (Feb. 22, 2017), https://www.business.com/articles/6-big-differences-between-a-president-and-a-ceo/ [https://perma.cc/UY7Y-887Z].

37. *See* ABA CORP. LAWS COMM., CORPORATE DIRECTOR'S GUIDEBOOK 102–03 (6th ed. 2011).

38. *See id.* at 103.

39. *See id.* at 14.

serves as the Chairman of the board of directors.[40] In addition, the CEO prepares much of the information furnished to the board of directors.[41]

Because the CEO is the most powerful officer of a corporation, and presumably, the most knowledgeable officer, the CEO spends much of his time communicating with the company's stockholders, analysts, and the media.[42]

b. The Chief Financial Officer

The Chief Financial Officer is generally the second most important officer of a public company.[43] The CFO reports to the CEO.[44] The CFO is not simply a finance or accounting officer; the CFO works closely with the CEO and is "often a key partner to the [CEO] in formulating, evaluating, and implementing strategic choices" for the company.[45] The critical role played by the CFO has been recognized by the federal government, which requires two corporate officers—the CEO and the CFO—to certify the accuracy of the company's annual and quarterly reports when they are filed with the SEC.[46]

40. BOARD PRACTICES REPORT, *supra* note 7, at 18 (stating that the CEO also serves as the Chair of the Board at approximately forty-seven percent of large public companies).

41. *See infra* Part III.C.1.

42. *See* ABA CORP. LAWS COMM., *supra* note 37, at 111.

43. JASON KARAIAN, THE CHIEF FINANCIAL OFFICER, at xi (2014). The power of CFOs of public companies has come under increasing scrutiny. *E.g., The Imperial CFO*, ECONOMIST (June 18, 2016), https://www.economist.com/business/2016/06/18/the-imperial-cfo [https://perma.cc/54UX-ERVB] ("[A] new authority figure has emerged within companies, much less exuberant than old-fashioned autocratic CEOs but just as determined to amass power: the imperial CFO.").

44. Kerry Maruna, *The Delicate Dance: Improving the CEO-CFO Relationship*, CFO (May 4, 2018), http://ww2.cfo.com/human-capital-careers/2018/05/interview-catriona-fallon/ [https://perma.cc/7PF4-P95E].

45. C. Fritz Foley & Michael Lemm, *The Role of the Chief Financial Officer*, HARV. BUS. SCH. TECH. NOTE 216-079, at 1 (2016).

46. The Sarbanes-Oxley Act of 2002 requires the CEO and the CFO to certify, inter alia, that:

> (1) the signing officer has reviewed the report;
> (2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;
> (3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report . . .

One of the CFO's most important duties is to ensure that the company's financial statements are prepared in a timely and accurate manner.[47] The preparation of the financial statements involves the work of many people, including the company's accountants, inside auditors, and outside auditors, but it is the CFO who is ultimately responsible for them.[48]

Most CFOs of public companies have significant interaction with the company's board.[49] Many CFOs meet regularly with the audit committee, a subset of the full board.[50] Some CFOs actually sit on the board, but even if they do not, CFOs of public companies would certainly attend board meetings at the invitation of the board,[51] where they would be available to explain the company's financial results to the board and answer board questions.[52]

The CFO is incredibly knowledgeable about the company's financial condition, as well as all aspects of the company's operations. Therefore, the CFO position has developed into an important external relations job. Like the CEO, the CFO regularly communicates with investors, analysts, and the financial media.[53] For example, CFOs typically participate on the company's quarterly earnings calls, where they answer questions about the company's financial condition, and often attend the annual meeting of stockholders of the company.[54]

5. Agency Law and Officers

Officers are often referred to as "agents" of the corporation.[55] They are hired by, and report to, the board of directors, who monitor their actions and who can terminate their employment.[56]

Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (2012).

47. *See* Foley & Lemm, *supra* note 45, at 1–3.

48. *See generally* BOARD PRACTICES REPORT, *supra* note 7, at 7; Foley & Lemm, *supra* note 45, at 3.

49. *See* Foley & Lemm, *supra* note 45, at 3.

50. BOARD PRACTICES REPORT, *supra* note 7, at 7.

51. According to a recent survey conducted by Deloitte, ninety-five percent of large public companies reported that the company's CFO regularly attends board meetings. *Id.* at 21.

52. *The Imperial CFO*, *supra* note 43.

53. *See id.*

54. James Willhite, *How to Ace an Earnings Conference Call*, WALL ST. J. (Apr. 6, 2015, 7:55 PM), https://www.wsj.com/articles/how-a-cfo-can-ace-an-earnings-conference-call-1428364502 [https://perma.cc/ASH5-AZKV].

55. *E.g.,* STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCS 32 (2004) ("Corporate employees, especially officers, are agents of the corporation.").

56. *Id.*

Therefore, corporate officers meet the definition of "agent" under agency law.[57]

While officers may be agents, this does not necessarily mean that agency law applies to corporate officers. This may seem puzzling, until one remembers that the corporate "officer" is a creation of corporate law.[58] Therefore, corporate law, rather than agency law, might be the appropriate law to apply to officers. Or perhaps only parts of agency law should be applied to corporate officers.[59] As one Delaware court recently noted, "[a] vibrant debate exists over the extent to which the full agency law regime should apply to officers."[60] The Delaware courts have been slow to address this issue.

Most of the scholarship in this area addresses the potential liability of an officer who made a bad decision that harmed the company.[61] This would give rise to claim for breach of duty of care under either corporate law or agency law. Under agency law, the officer would be liable if his decision was negligent.[62] However, if corporate law applies, the officer might receive the protections of the business judgment rule, meaning that the officer would not be liable if his decision was merely negligent.[63] The Delaware courts have not yet addressed this issue.[64]

57. An agency relationship is created when "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

58. Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1194 (2003).

59. *Id.* at 1190 (arguing that "agency law provides a solid base for the CEO's duty of candor" to the board but recognizing that agency law as a whole may not fit when applied to the corporation).

60. *See* Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 780 n.24 (Del. Ch. 2016).

61. Following the Enron fraud, there was a spirited scholarly debate between Professor Lyman Johnson, who argued that the business judgment rule should not be extended to officers, and Professor Lawrence Hamermesh and corporate law expert Gilchrist Sparks, who argued that it should. *See* Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. L. 865, 865 (2005); Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. L. 439, 440 (2005). That debate restarted several years later. *See also* Paul Graf, *A Realistic Approach to Officer Liability*, 66 BUS. L. 315, 315 (2011); Lyman Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. L. 75, 75 (2011); Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 847–48 (2017) (discussing this scholarship, and framing it in relation to recent Delaware caselaw).

62. *See* DeMott, *supra* note 61, at 859.

63. *See id.* at 863, 868.

64. *See Amalgamated*, 132 A.3d at 780 n.24 (recognizing the debate, but stating that

II. THE IMPORTANCE OF INFORMATION FLOW TO THE BOARD OF DIRECTORS

A. *Board Composition and the Need for Effective Information Flow*

Obviously, corporate boards need information to make decisions. Ensuring information flow to the board is particularly important in public companies, where most of the directors do not work for the company.[65] For these outside directors, serving on a board is akin to a part-time job, although a very important part-time job. Because of their limited involvement in the corporation, these directors must primarily rely on corporate officers to obtain the information they need to meet their oversight duties and fulfill their advisory roles. As Professors Kastiel and Nili noted, "the move toward board independence generated severe informational asymmetries between top executives and outside directors."[66]

B. *Delaware Corporate Law and the Informed Board*

Delaware corporate law stresses the importance of an informed board. It is a constant theme that runs throughout Delaware's fiduciary duty cases. For example, the board's failure to make an informed decision will rebut the business judgment rule, leading to a breach of the duty of care.[67] Moreover, if the board's failure to become informed is particularly egregious, the directors may be found to have acted in bad faith, leading to a breach of the duty of loyalty,[68] which is not exculpable under Delaware law.[69] A direc-

"[t]his opinion does not speculate on that issue").

65. *See* Fairfax, *supra* note 14, at 137.

66. Kobi Kastiel & Yaron Nili, "*Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 2017 WIS. L. REV. 19, 27.

67. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (1985) ("Under the business judgment rule there is no protection for directors who have made an 'unintelligent or unadvised judgment.'").

68. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 291 (Del. Ch. 2003) ("[O]ur corporation law's theoretical justification for disregarding honest errors simply does not apply to intentional misconduct or to egregious process failures that implicate the foundational directoral obligation to act honestly and in good faith to advance corporate interests.").

69. Section 102(b)(7) permits a corporation to include a provision in its certificate of incorporation that eliminates the personal liability for monetary damages for breach of fiduciary duty of care, but not for breach of fiduciary duty of loyalty, or for acts not in good

tor's candor is an important part of the judicial entire fairness review applied to director self-dealing transactions.[70] Furthermore, approval by a disinterested board may shield a self-dealing transaction from a court's entire fairness review, but only if the board approval is found to be fully informed.[71]

Delaware law also recognizes that the board's oversight responsibilities impose on the board an obligation to be informed. For example, in the seminal case of *In re Caremark International, Inc. Derivative Litigation*,[72] the court held that the board has a "duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists."[73] This means that boards must proactively adopt compliance programs to manage risks facing the company.

C. *How Do Directors Receive Information?*

We know that directors depend on officers to receive information, but how does this happen? And when? And who decides what information will be provided to the board? It is not as though officers of public companies e-mail status updates to members of the board on a daily basis. Instead, the board primarily receives information through the board meeting process, through "board books" given to directors in advance of board meetings, and

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faith. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2011 & Supp. 2016).

70. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (stating that fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained").

71. Delaware's Interested Director Statute provides that:

> No contract or transaction between a corporation and 1 or more of its directors . . . shall be void or voidable solely for this reason . . . if:
>
> > (1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum . . . .

DEL. CODE ANN. tit. 8, § 144(a) (2011 & Supp. 2016).

72. 698 A.2d 959 (Del. Ch. 1996).

73. *Id.* at 970. To establish liability, a shareholder must overcome a very high standard: bad faith. In other words, "only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system [exists]—will establish the lack of good faith that is a necessary condition to liability." *Id.* at 971.

through information disclosed at the board meeting itself.[74] To a lesser degree, directors at some public companies receive information at board retreats and through more informal interactions with management.[75] And, finally, if important information comes to light between board meetings, the CEO must determine whether to provide this information to the board immediately or wait until the next board meeting.[76]

1. Information Provided Through the Board Meeting Process

a. The Board Book

The board of a public company will receive information in advance of each board meeting. The current practice is that directors receive information through an information package—sometimes referred to as a "board book" or "board pack"—prepared by officers that is sent[77] to directors a few days in advance of board meetings.[78]

The board book is supposed to contain the information that will help the directors understand the matters to be discussed and considered at the board meeting.[79] For a regular board meeting, the board book typically includes a copy of the agenda, the minutes of the previous board meeting, an executive summary of the contents of the board package, current financial information, copies of any management presentations, and committee reports.[80]

74. Alex Baum et al., *Building a Better Board Book*, *in* STANFORD CLOSER LOOK SERIES 1 (2017).

75. Jay W. Lorsch & Robert C. Clark, *Leading from the Boardroom*, HARV. BUS. REV. (Apr. 2008), https://hbr.org/2008/04/leading-from-the-boardroom [https://perma.cc/U7ZS-4KHJ].

76. *See id.*

77. While board packages might be distributed by email or sent out by mail, public corporations now generally use web-based portals, such as Nasdaq Boardvantage's Board Portal, that allow directors to access documents via computer, tablet, or smartphone. *See* Kyle Andrei, *A Few Good Tools: Board Portals and Other Ways to Collaborate*, IDEALWARE (Apr. 2015), https://www.idealware.org/few-good-tools-board-portals-and-other-ways-collaborate/ [https://perma.cc/Z5BB-LQ3J].

78. Most large public companies make their board book available at least five to seven business days before the board meeting. BOARD PRACTICES REPORT, *supra* note 7, at 20 (showing that forty-one percent of large public companies send their materials to the board at least seven days in advance of the board meeting, and approximately ninety percent of large public companies send their materials to the board at least five days in advance).

79. *See* Baum et al., *supra* note 74, at 1.

80. Jeremy Barlow, *Best Practice Board Reporting*, BOARD EFFECT (Mar. 9, 2017), https://www.boardeffect.com/blog/best-practice-board-reporting/ [https://perma.cc/CN74-XH3M];

Although the board has the power to decide what information it needs and to direct management to include it in the board book,[81] boards do not necessarily do a very good job in asking for information.[82] Officers—and particularly the CEO—play the key role in determining what information will be contained in the board package.[83] This is unsurprising, since the officers, not the board, have the most knowledge about the corporation.

In practice, the board book is usually prepared by the General Counsel or Secretary of the corporation, with significant input by the CFO.[84] However, before it is sent out, the board book is typically reviewed by the CEO, who authorizes it to be sent to the board; the CEO is the ultimate gatekeeper of the board book and has the power to decide what information is in the board book and what information is kept out of the board book.[85]

In addition to deciding the type of information that will be included in the board book, the officers also determine the level of detail of information provided. Management often sends a lengthy board book—typically 200 to 300 pages[86]—to ensure that the board receives all the information it needs for the meeting. However, if too much information is included in the board package, or the information is too detailed, directors may be overwhelmed by the information and dissuaded from reviewing it at all.[87] Too much infor-

What Documents Should You Include for Board Meetings?, DILIGENT (Mar. 13, 2017), https://diligent.com/blog/documents-include-board-meetings [https://perma.cc/GMQ4-QZ3Z].

81. According to the influential Corporate Director's Guidebook, "[d]irectors should establish expectations with respect to management provision of sufficient information in a timely manner." ABA CORP. LAWS COMM., CORPORATE DIRECTOR'S GUIDEBOOK 20 (6th ed. 2011).

82. *E.g.,* Cheryl L. Wade, *What Independent Directors Should Expect from Inside Directors:* Smith v. Van Gorkom *as a Guide to Intra-Firm Governance*, 45 WASHBURN L.J. 367, 374 (2006) (noting the failures of boards to ask for information from officers).

83. *See* Baum et al., *supra* note 74, at 1.

84. Jordan Karp, *Best Practices for Board Meeting Preparation*, OUTSIDE GC BLOG (Aug. 7, 2015, 10:41 AM), http://www.outsidegc.com/blog/best-practices-for-board-meeting-preparation [https://perma.cc/NQ7A-8LXW].

85. *See generally* Barlow, *supra* note 80. Officially, the board package is distributed by the Chairman of the Board. If the CEO is also the Chairman, the CEO has the ultimate power to decide what information is included in the information package and what information is excluded. Even if the CEO is not the Chairman, the CEO has tremendous influence about the contents of the board package; he oversees its creation and approves it before the Chairman sends it out. *Id.*

86. Baum et al., *supra* note 74, at 1.

87. As one commentator noted, "How much information is it realistic to expect a part-

mation may also make it difficult for directors to determine what information is most important.

The frequency of information reaching the board depends on the number of regularly scheduled board meetings held each year, which varies by company.[88] The typical large public company board holds eight meetings a year,[89] meaning that the boards of most public companies receive information from officers in a formal, regularized process approximately every six weeks.

Although the usefulness of a board book will vary with the company, board books in general have been subject to substantial criticism regarding the quantity of information, the quality of information, and the frequency of information given to the board.[90] Directors are often dissatisfied with the amount of information contained in the board book, and a frequent board complaint is that the board books are too voluminous and that management should do a better job of editing the information into more manageable chunks.[91]

Although board books typically contain a large amount of information, they do not necessarily contain the right kind of information. The information contained in board books often focuses on the company's financial reports to the detriment of other information that would help the board understand how the business is actually doing and plan for the company's future. As one article

time body composed mostly of people from a range of industries, institutions, and professions, that typically meets four to six times a year, to absorb and act upon?" H. Stephen Grace, Jr. et al., *Corporate Governance and Information Gaps: Importance of Internal Reporting for Board Oversight*, BUS. L. TODAY (Jan. 15, 2018), https://businesslawtoday.org/2018/01/corporate-governance-and-information-gaps-importance-of-internal-reporting-for-board-oversight/ [https://perma.cc/5KUR-8Z4S].

88. The Delaware GCL does not require the board to hold a specific number of regular board meetings each year. *See* DEL. CODE ANN. tit. 8, § 141 (2011 & Supp. 2016); *see also* ERNST & YOUNG CORP. GOVERNANCE CTR., GOVERNANCE TRENDS AND PRACTICES AT U.S. COMPANIES 15 (2013), https://www.ey.com/Publication/vwLUAssets/Governance_trends_practices_at_US_companies/$FILE/Governance_trends_practices_at_US_companies.pdf [https://perma.cc/F7QL-6DJY].

89. DAVID F. LARCKER & BRIAN TAYAN, BOARD OF DIRECTORS: STRUCTURE AND CONSEQUENCES 1, 3 (2015), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-quick-guide-05-board-directors-structure-consequences.pdf [https://perma.cc/527A-TJEL].

90. Baum et al., *supra* note 74, at 1.

91. For example, thirty-one percent of respondents to a survey of directors of public companies stated that information flow would be improved through more concise reporting by management. SPENCER STUART & NYSE GOVERNANCE SERVS., WHAT DIRECTORS THINK 2016, at 1, 5 (2016) [hereinafter WHAT DIRECTORS THINK] https://www.spencerstuart.com/-/media/2018 /april/what-directors-think-2018.pdf [https://perma.cc/YYM7-YSPG].

recently concluded, "[board books] overemphasize standard financial metrics (such as revenue growth, margins, and cash flow) and underemphasize the detailed financial and nonfinancial metrics that provide deeper insight into the fundamental health of the business."[92]

Finally, many directors are concerned about the frequency of information updates. They want more updates from management.[93]

b. The Board Meeting

At most public companies, board meetings consist of presentations by officers, board committees, and outside advisors, followed by question and answer sessions. There will also be time set aside for board discussion and board votes, if applicable. Because board meetings are a few hours long, there is only a limited amount of time available for directors to receive information at board meetings.[94]

2. Information at Board Retreats and at Informal Meetings with Officers

a. The Board Retreat

In response to the limited hours available for board discussion at board meetings, more and more public company boards are holding day-long or multiday retreats for the board and senior officers to discuss company strategy.[95]

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92. Baum et al., *supra* note 74, at 1. The report also pointed out two other related problems with the information provided in board books. First, the typical board book does not include information that would help the board put the information in context, such as industry trends or comparative information. *Id.* And, second, the contents of a company's board book are relatively static, following the same format as the previous meeting's format. *Id.*

93. For example, thirty-six percent of respondents to a survey of directors of public companies stated that information flow would be improved through a "higher frequency of updates" from management. WHAT DIRECTORS THINK, *supra* note 91, at 5.

94. According to a survey conducted by Deloitte as part of its annual Board Practices Report, fifty-three percent of large public companies reported that a regular board meeting typically lasted between three and five hours. BOARD PRACTICES REPORT, *supra* note 7, at 20. Thirty-three percent of large cap companies reported that a regular board meeting typically lasted between six and eight hours. *Id.*

95. *Id.* at 29 (stating that the boards of eighty-four percent of large public companies participate in an annual strategy retreat with management).

b. Informal Meetings with Officers

Directors could certainly receive additional information by meeting with officers outside of board meetings and retreats, but that does not appear to be standard practice at most large public companies.[96]

Whether, or how often, directors interact informally[97] with officers is not disclosed by public companies, but the "Corporate Governance Guidelines"[98] of public companies may indicate whether this kind of interaction is occurring. Corporate Governance Guidelines generally include a section addressing board interaction with corporate officers. A review of Corporate Governance Guidelines of the fifty largest United States corporations[99] shows that a large majority[100] of these Corporate Governance Guidelines merely state that directors have "access" to officers.[101] In other words, the guidelines make clear that directors are permitted to contact officers if they choose to, but there is no expectation that the corporation will create opportunities for the board and officers to meet outside of the boardroom. A few companies go one step further by stating that

96. *See infra* Table 2.

97. By informal, what is meant is interactions not occurring at a board meeting, a board committee meeting, or a board retreat. These interactions could occur in different ways. For example, they could occur at a one-on-one meeting or group meeting initiated by an individual director or at a planned visit by outside directors to the company's offices or operations.

98. As part of establishing and demonstrating good corporate governance practices, the boards of most public companies have voluntarily adopted Corporate Governance Guidelines. These Corporate Governance Guidelines serve as frameworks for the company's corporate governance. However, they are not binding on the board.

99. I reviewed the Corporate Governance Guidelines of the fifty largest companies as set forth in the Fortune 500 list for 2018. *See Fortune 500 Full List*, *supra* note 28; *infra* Table 2.

100. Thirty-one out of fifty companies, or sixty-four percent, provide for director "access" to officers. *See infra* Table 2.

101. Walmart's Corporate Governance Guidelines are typical of this approach. They provide that:

> Directors have full and free access to officers and other associates of the Company and the Company's outside advisors. Any meetings or contacts that a director wishes to initiate may be arranged through the CEO or the Secretary or directly by the director. The directors will use their judgment to ensure that any such contact is not disruptive to the business operations of the Company. It is the expectation of the Board that directors will keep the CEO informed of communications between a director and an officer or other associate of the Company, as appropriate.

WALMART INC., CORPORATE GOVERNANCE GUIDELINES § 4 (2018), http://s2.q4cdn.com/056532643/files/doc_downloads/Gov_Docs/2018/LEGAL-Corporate_Governance_Guidelines_-_proposed_revisions.pdf [https://perma.cc/V7SS-RYZH].

directors are "encouraged" to contact officers, or that there is an "expectation"[102] that the directors will have the opportunity to meet formally or informally with senior officers. However, there is no description of how these informal meetings would occur.

Only three[103] of the fifty largest U.S. companies have committed to organizing opportunities for informal interactions between directors and officers.[104] The Corporate Governance Guidelines of Procter & Gamble, for example, state that:

> Non-employee members of the Board are encouraged to contact and/or meet with Company employees without principal officers being present for purposes of gathering information. The Company will, on a regular basis, provide specific opportunities for this type of interaction. However, no individual director should give direction to Company employees during these meetings; such direction should be provided by the full Board to the Company's Chief Executive Officer.[105]

3. Information Received Between Board Meetings and Board Retreats

Finally, sometimes boards receive information between board meetings and board retreats. This would occur, for example, if new

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102. For example, ExxonMobil follows this approach. Its Corporate Governance Guidelines provide that:

> Access to Employees. Non-employee directors will have full access to senior management of the Corporation and other employees on request to discuss the business and affairs of the Corporation. The Board expects that there will be regular opportunities for directors to meet with the CEO and other members of management in Board and committee meetings and in other formal or informal settings.

Corporate Governance Guidelines, EXXONMOBIL (Nov. 1, 2017), https://corporate.exxonmobil.com/en/investors/corporate-governance/corporate-governance-guidelines/guidelines [https://perma.cc/6ZW9-3FB6].

103. The companies are AmerisourceBergen, Chevron, and Procter & Gamble. *See* AMERISOURCEBERGEN CORP., AMERISOURCEBERGEN CORPORATION CORPORATE GOVERNANCE PRINCIPLES § 21 (2017), http://investor.amerisourcebergen.com/static-files/e38593f8-4a1b-4b20-bee4-97031a4e3fdc [https://perma.cc/5DEG-65R3] (stating that management will "make an effort" to create informal opportunities); CHEVRON CORP., CHEVRON CORPORATION CORPORATE GOVERNANCE GUIDELINES 5 (2017), https://www.chevron.com/-/media/shared-media/documents/chevrongovernanceguidelines.pdf [https://perma.cc/48SL-ARAZ] (stating that directors are provided with informal opportunities); PROCTER & GAMBLE, THE PROCTER & GAMBLE COMPANY BOARD OF DIRECTORS CORPORATE GOVERNANCE GUIDELINES § 7A, https://assets.ctfassets.net/oggad6svuzkv/3glGmG4CHmI8gIa8wuaYU6/5788428211a13f5a2b9ca7483bc93c9e/GUIDELINES_-_Corporate_Governance_2015-06-09_pdf.pdf [https://perma.cc/BR8E-VX83].

104. Several other companies encourage board visits to company plants. *See infra* Table 2.

105. PROCTER & GAMBLE, *supra* note 103, § 7A.

information about the company becomes known to senior officers and the CEO determines that they are required,[106] or that they should, disclose the information to the board immediately and not delay disclosure until the next board book.[107]

D. *Why Might Officers Not Inform the Board?*

Given that the board needs to be informed to do its job, why might officers not provide adequate information to directors? There are several possible explanations.

First, although it seems strange to say, officers may not even be aware that they have a broad, ongoing duty to provide information to the board of directors. In fact, two studies show that officers are often not advised about their fiduciary duties as officers of a corporation.[108] For example, one study reported that at more than forty-two percent of public companies responding to the study, senior officers did not receive any advice from the General Counsel's Office about their fiduciary duties as officers of the corporation.[109] If officers are not aware that they are required to disclose information to the board, then it is not surprising if they fail to do so.

Second, it is always difficult for anyone to give bad news to someone else. Even well-meaning officers may delay disclosing negative information to the board in the hope that circumstances improve.

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106. It is unclear whether officers have a duty to disclose the information to the board. *See* discussion *infra* Part IV.

107. This determination may not be an easy judgment call. As one commentator noted:

> In considering whether and when to engage in informal communications with the board, remember that sending something to the board on a too-frequent basis may be a bit like the boy who cried wolf; if you're constantly sending material to the board, it may be hard for directors to distinguish between routine matters . . . and materials that truly require their attention.

Robert B. Lamm, *Managing Information Flows Among Board and Management*, *in* NYSE: CORPORATE GOVERNANCE GUIDE 97, 100 (Steven A. Roseblum et al. eds., 2014).

108. *See* Lyman P.Q. Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1110 (2009) (concluding that officers "appear to be somewhat under-advised" by inside counsel about their fiduciary duties); Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 670 (2007) (concluding that "many corporate lawyers do not regularly provide fiduciary duty advice to officers in their capacity as officers").

109. Johnson & Garvis*, supra* note 108, at 1114. Given that *directors* of public companies typically receive significant advice on their duties, it may seem strange that officers of so many public companies do not. There may be several reasons for the omission, including the fact that until fairly recently, it was unclear whether officers even had fiduciary duties. And even now, the contours of those duties are unclear. *See infra* Part IV.

Third, the relationship between senior officers—particularly the CEO—and the board may discourage officers from sharing information with the board. The relationship between the CEO and the board at many public companies can be described as more adversarial than cooperative.[110] Although the CEO reports to the board, the CEO may view himself as being the ultimate decisionmaker for the corporation. These CEOs may see the board as a potential obstacle to the CEO's plans for the company, or they may be concerned that providing information to the board may cause the directors to become involved with the day-to-day operations of the company. For these CEOs, one way to ensure that the CEO is in charge of the company is to keep information from reaching the board. Without the information, the board would be unable to adequately supervise the CEO or to interfere with his plans.

Fourth, officers other than the CEO and the CFO are likely afraid to provide information directly to the board. These "junior" officers have little to no interaction with the board and presumably would not even dream of contacting a director on their own initiative. Moreover, to provide information directly to the board, these junior officers would have to go over the heads of their superior officers and the CEO, which would likely not be well received by senior management. An officer's concern for job security would make board contact very unlikely.[111]

And, finally, officers who are engaged in fraud or misconduct would, obviously, not inform the board of this information. Failing to inform the board would simply be another facet of their misconduct.

III. DOES AN OFFICER HAVE A DUTY TO INFORM THE BOARD?

There is agreement that officers *should* play an integral role in helping information reach the board of directors. But whether the officers are *required* by law to provide information to the board—and what information—is not as clear. The Delaware GCL does not require officers to inform the board.[112] Therefore, most scholarly

110. *See* Langevoort, *supra* note 58, at 1194–95 (recognizing that "the social dynamics of the board-management relationship" may impact information reaching the board).

111. *See generally id.* at 1210–12 (describing the practical difficulties for subordinates seeking go over the heads of their supervisors).

112. *See* DEL. CODE ANN. tit. 8, § 142 (2011 & Supp. 2016).

discussion has focused on two other potential sources of a duty to disclose: (1) fiduciary duties imposed on officers by corporate law; and (2) fiduciary duties imposed on officers by agency law.[113] However, as discussed below, the law in this area can be described as undeveloped and murky, leading to confusion about what (if anything) an officer must disclose to the board of directors. Corporate bylaws could impose a duty to disclose on officers, but a survey of the bylaws of large public companies shows that bylaws are not being used for that purpose.[114]

A. *Statutory Duties Under Corporate Law*

Nothing in the Delaware GCL requires officers to provide information to the board.[115] However, the statute does recognize that officers might voluntarily provide information to the board. Specifically, section 141(e) provides that:

> A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation *by any of the corporation's officers* or employees, or committees of the board of directors,

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113. *See, e.g.*, Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor: Do the CEO and CFO Have a Duty to Inform?*, 41 VAL. U. L. REV. 269, 272 (2006) (arguing for "an underlying affirmative and separate duty to disclose for senior officers" under corporate law); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 50 (2006) (stating that the officer's duty to inform comes from the duty of good faith); Shannon German, *What They Don't Know Can Hurt Them: Corporate Officers' Duty of Candor to Directors*, 34 DEL. J. CORP. L. 221, 223 (2009) (proposing to extend the board's duty of candor owed to stockholders to require officers to disclose information to the board); Langevoort, *supra* note 58, at 1190 (arguing that "agency law provides a solid base for the CEO's duty of candor" to the board but recognizing that agency law as a whole may not fit when applied to the corporation).

114. An employment agreement between the corporation and the CEO could be another source of the officer's duty to inform the board.

115. The Model Business Corporation Act imposes a duty to disclose to the board, but the duty extends only to the CEO; section 8.42 states that

> (b) [t]he duty of an officer includes the obligation:
> (1) to inform the superior officer to whom, or the board of directors or the board committee to which, the officer reports of information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known to the officer to be material to such superior officer, board or committee.

MODEL BUS. CORP. ACT § 8.42(b) (1969) (AM. BAR ASS'N, amended 2016). The Official Comments make clear that the disclosure obligation must be conducted through "regular reporting channels." *Id.* § 8.42 cmt. Thus, the CEO is required to disclose information to those to whom he is accountable: the board of directors. Senior officers who report to the CEO, such as the CFO, would have an obligation to disclose to the CEO, not the board of directors.

> or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.[116]

Although two noted experts on Delaware corporate law have stated that section 141(e) implies that officers do have a duty to inform the board,[117] that conclusion is misplaced. The clear purpose of section 141(e) is to provide express protection to directors who must often rely on experts for information. In enacting section 141(e), the legislature wanted to ensure that directors were not required to double-check the accuracy of an expert's reports in order to rely on them.[118] The goal of the provision was to protect directors, not to impose a duty on officers.[119]

B. *Fiduciary Duties of Officers under Corporate Law*

Corporate law can impose fiduciary duties on officers in two ways. First, if the officer is also a member of the board of directors, the officer will have fiduciary duties arising from his status as a director. Second, the officer also has fiduciary duties arising from his status as an officer. However, neither fiduciary duty requires officers to inform the board promptly of all information necessary

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116. DEL. CODE ANN. tit. 8, § 141(e) (2011 & Supp. 2016) (emphasis added).

117. *Id*. These experts concede that:

> While there is no Delaware case specifically stating that a senior officer has a duty to inform the corporation's board of directors, such a duty can be inferred from the statutory requirement that the corporation be managed by or under the direction of a board of directors and that a director "shall, in the performance of his duties, be fully protected in relying in good faith . . . upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers."

Lawrence A. Hamermesh & A. Gilchrist Sparks, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. L. 215, 226 (1992).

118. *See* R. Franklin Balotti & Megan W. Shaner, *Safe Harbor for Officer Reliance: Comparing the Approaches of the Model Business Corporation Act and Delaware's General Corporation Law*, 74 LAW & CONTEMP. PROBS. 161, 168 (2011) (stating that the purpose of section 141(e) was to make clear that "in discharging their duty to be informed in making decisions on behalf of the corporation, directors, by statute, have no additional duty to research or verify independently that the corporate reports or the underlying data upon which they rely are accurate").

119. The argument that section 141(e) impliedly imposes a duty to inform on officers might be stronger if section 141(e) referred only to reports prepared by officers. However, the statute extends protection to reports prepared by third party experts, such as accounting firms, investment banks, and law firms. Section 141(e) certainly could not be read as imposing a duty to inform on third parties. DEL. CODE ANN. tit. 8, § 141(e) (2011 & Supp. 2016).

to enable the board to manage the business and affairs of the company.

1. Fiduciary Duties of Officers from Status as Directors

It is popular for commentators to state that directors have an uncompromising "duty of candor"[120] to other directors.[121] According to these commentators, fiduciary duties grounded in corporate law require directors to fully inform their board colleagues of all material information in their possession. However, this is an overstatement of the law.[122] As the Delaware Chancery Court has succinctly stated,

> [the director's] duty to disclose is not a general duty to disclose everything the director knows about transactions in which the corporation is involved. Rather, the director disclosure cases decided in Delaware courts have implicated circumstances in which the director is personally engaged in transactions harmful to the corporation, but beneficial to the director.[123]

The cases that are typically cited to support a broad duty to inform involve one specific fact pattern: director self-dealing.[124] In these self-dealing cases, the claim is that the interested director

120. The "duty of candor" owed to the board should not be confused with the "duty of disclosure" that directors owe to shareholders in certain circumstances. The duty of disclosure requires directors to fully and fairly disclose all material facts to stockholders when the board seeks shareholder approval. Malone v. Brincat, 722 A.2d 5, 9 (Del. 1988); *see* Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475, 476 (2002) (discussing the duty of disclosure owed to stockholders in depth).

121. For example, the influential Corporate Director's Guidebook states that "[g]enerally, directors must inform other directors and management about information material to corporate decisions of which they are aware." ABA CORP. LAWS COMM., *supra* note 37, at 22.

122. According to one of the two authoritative treatises on Delaware corporate law, directors "may" have a duty to disclose information to the rest of the board under certain circumstances. R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.18 (3d ed. Supp. 2018). The second treatise states that "[t]he duty of loyalty includes, in some circumstances, a duty of disclosure." EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 141.02 (6th ed. Supp. 2018).

123. Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC, 922 A.2d 1169, 1184 (Del. Ch. 1996).

124. *See, e.g.*, Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1279 (Del. 1988) (directors involved in proposed leveraged buyout of corporation had a duty of disclosure to board); HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94, 119 (Del. Ch. 1999) (directors engaged in self-dealing transaction "had an 'unremitting obligation' to deal candidly with their fellow directors") (citing *Mills Acquisition Co.*, 559 A.2d at 1283); Greco v. Columbia/HCA Healthcare Corp., No. Civ. A. 16801, 1999 WL 1261446, at *9 (Del. Ch. Feb. 12, 1999) (recognizing a duty to disclose in self-dealing transactions).

failed to fully inform the disinterested directors of the material facts of the transaction.[125] It is understandable that these cases have been read to impose a "duty of candor" on interested directors. Candor is an important part of the judicial test to determine whether the interested director breached his fiduciary duty of loyalty by engaging in the self-dealing transaction.[126]

In self-dealing cases, the court applies a two-part entire fairness test.[127] In addition to examining whether the price paid (or received) by the corporation was fair, the court will determine whether the dealings between the interested director and the corporation were fair.[128] As part of the fair dealing analysis, the court looks at whether the interested director was "candid" with the board; i.e., whether the interested director informed the board of all material information relating to the transaction.[129] In other words, even in self-dealing cases, there is no independent "duty" of candor. It would be more accurate to say that the disclosure (or nondisclosure) of information relating to the self-dealing transaction is part of the entire-fairness test, the standard of review used by courts in self-dealing cases.[130]

The cases that are incorrectly cited to in order to impose a broad duty on directors to disclose fall into two other categories. Each represents specific types of loyalty violations: (1) claims that a director usurped an opportunity from the corporation without informing the board;[131] and (2) claims that a director knew that the corporation was being defrauded, or the director engaged in fraud, but failed to tell the board.[132] In each of these types of cases, the

125. *See Mills Acquisition Co.*, 559 A.2d at 1279; *HMG/Courtland Props., Inc.*, 749 A.2d at 119 (citing *Mills Acquisition Co.*, 559 A.2d at 1283); *Greco*, 1999 WL 1261446, at *9.

126. Desimone v. Barrows, 924 A.2d 908, 936 (Del. Ch. 2007).

127. Weinberger v. UOP, Inc., 457 A.2d. 701, 711 (Del. 1983) ("The concept of fairness has two basic aspects: fair dealing and fair price.").

128. *Id.*

129. *Id.* at 714.

130. The Delaware Supreme Court appears to have acknowledged this. *See Mills Acquisition Co.*, 559 A.2d at 1283 ("As the duty of candor is one of the elementary principles of fair dealing, Delaware law imposes this unremitting obligation . . . on officers and directors . . . .").

131. *See* Thorpe v. CERBCO, Inc., 676 A.2d 436, 442 (Del. 1996); Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1061–62 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).

132. *See* Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 Del. Ch. LEXIS 144, at *124 (July 12, 2010) ("[W]hen a corporate officer is aware of financial misreporting that involves high-level management and that has evaded the corporation's auditors, and nonetheless certifies that he is not aware of any material weakness in the company's internal controls, he is making a false statement and failing to bring material information to the

court held that the failure to disclose information to the board constituted a breach of fiduciary duty of loyalty.[133]

A review of these cases shows that the director's duty of candor is not a standalone duty; it is part of the duty of loyalty.[134] Put another way, a director has a duty to disclose information to the board only if the failure to do so would constitute a breach of the duty of loyalty. Thus, these cases cannot be cited to support an expansive and ongoing duty for officers to disclose all information about the company to the board.

2. Fiduciary Duties of Officers from Status as Officers

The Delaware courts have only recently turned their attention to the fiduciary duties of officers. In 2009, in *Gantler v. Stephens*,[135] the Delaware Supreme Court held for the first time that officers have fiduciary duties under corporate law and that those fiduciary duties were "identical" to the duties of directors.[136] Therefore, just as directors do not owe a broad "duty of candor" under corporate law to the board, neither do officers.

Gantler involved actions taken by some directors and senior officers of First Niles, a Delaware corporation, after the board had voted to put the corporation up for sale.[137] Certain managers were not in favor of that decision and preferred to take the company private.[138] These managers included William L. Stephens, the Chief

board, in breach of his duty of loyalty."); Am. Int'l Grp., Inc. v. Greenberg, 965 A.2d 763, 807 (Del. Ch. 2009) ("[A] fraud on the board has long been a fiduciary violation under our law and typically involves the failure of insiders to come clean to the independent directors about their own wrongdoing, the wrongdoing of other insiders, or information that the insiders fear will be used by the independent directors to take actions contrary to the insiders' wishes."); Ryan v. Gifford, 935 A.2d 258, 272 (Del. Ch. 2007) (concealing knowledge of illegal conduct constituted a breach of duty of loyalty); Hoover Indus., Inc. v. Chase, No. 9276, 1988 Del. Ch. LEXIS 98, at *7 (July 13, 1988) ("The intentional failure or refusal of a director to disclose to the board a defalcation or scheme to defraud the corporation of which he has learned, itself constitutes a wrong . . . .").

133. *See Thorpe*, 676 A.2d at 442; *Hollinger Int'l, Inc.*, 844 A.2d at 1061–62; *Hampshire Grp., Ltd.*, 2010 Del. Ch. LEXIS 144, at *124; *Am. Int'l Grp., Inc.*, 965 A.2d at 807; *Ryan*, 935 A.2d at 272; *Hoover Indus., Inc.*, 1988 Del. Ch. LEXIS 98, at *6–7.

134. *See Thorpe*, 676 A.2d at 442; *Hollinger Int'l, Inc.*, 844 A.2d at 1061–62; *Hampshire Grp., Ltd.*, 2010 Del. Ch. LEXIS 144, at *124; *American Int'l Grp., Inc.*, 965 A.2d at 807; *Ryan*, 935 A.2d at 272; *Hoover Indus., Inc.*, 1988 Del. Ch. LEXIS 98, at *6–7.

135. 965 A.2d 695, 708 (Del. 2009).

136. *See id.*

137. *Id.* at 701–02.

138. *Id.* at 701.

Executive Officer and Chairman of the Board of First Niles, and Lawrence Safarek, the Treasurer of First Niles.[139] Allegedly, these managers sought to "sabotage" the sales process so that that the board would have to reconsider the decision to sell the company.[140] For example, Stephens and Safarek—who were responsible for preparing the due diligence materials requested by the bidders—never provided the due diligence materials requested by one of the bidders, and the bidder eventually withdrew its bid.[141] Without bids, the board eventually approved the privatization of First Niles.[142]

First Niles shareholders brought suit, alleging, inter alia, that Stephens and Safarek had breached their fiduciary duties to First Niles.[143] The defendants moved to dismiss, arguing that the shareholders had failed to plead facts that would overcome the business judgment rule; for example, facts that would infer that they had acted disloyally.[144] The chancery court agreed and dismissed the complaint.[145] On appeal, the Delaware Supreme Court reversed.[146]

The supreme court first examined whether the plaintiffs had sufficiently pled that Stephens breached his duty of loyalty as a director.[147] The court had little difficulty finding disloyalty, stating that "it may reasonably be inferred that what motivated Stephens' unexplained failure to respond promptly to [the bidder's] due diligence request was his personal financial interest, as opposed to the interests of the shareholders."[148]

More importantly, the supreme court then turned its attention to whether Stephens and Safarek breached their duty *as officers*.[149] The court first noted that whether officers had fiduciary duties was

139. *Id.* at 699.
140. *Id.* at 704.
141. *Id.* at 700.
142. *Id.* at 702.
143. *Id.* at 703.
144. *Id.*
145. *Id.* at 703; Gantler v. Stephens, No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *83 (Feb. 14, 2008).
146. *Gantler*, 965 A.2d at 699.
147. *Id.* at 706–07.
148. *Id.* at 707.
149. *Id.* at 708–09.

an issue of first impression in Delaware.[150] It then stated: "In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold."[151]

The supreme court cited past Delaware corporate law cases to support its holding.[152] Interestingly, although the supreme court was no doubt well-aware of the debate regarding agency law and the duties of corporate officers,[153] the court did not discuss agency law at all in the opinion.[154]

After clarifying the fiduciary duties of officers, the court then addressed the sufficiency of the pleadings. Stephens was an easy decision; because the court had already determined that the allegations were sufficient to infer that Stephens had violated his duty of loyalty as a director, the court used the same allegations to infer that Stephens had violated his duty of loyalty as an officer.[155]

Safarek, however, was not a director.[156] Therefore, the court had to examine the plaintiff's allegations to determine whether they adequately pled that Safarek had breached his duty of loyalty as an officer. The court noted that Safarek had aided and abetted Stephens' breach of loyalty for selfish reasons.[157] According to the court, the pleadings implied that Safarek sabotaged the sales process because he "depended upon Stephen's continued good will to retain his job and the benefits that it generated."[158] The supreme court determined that this was enough to survive a motion to dismiss.[159]

Gantler addressed the general question of whether officers had fiduciary duties, but it did not directly address the more specific

150. *Id.* at 708.

151. *Id.* at 708–09 (footnotes omitted).

152. In a footnote, the supreme court stated, "That officers and directors of Delaware corporations have identical fiduciary duties has long been an articulated principle of Delaware law." *Id.* at 709 n.36 (citing Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)).

153. *See supra* Part II.B.

154. *Gantler*, 965 A.2d at 709.

155. *Id.*

156. *Id.* at 703 n.6.

157. *Id.* at 709.

158. *Id.*

159. *Id.*

question of whether officers have a broad and ongoing duty to disclose information to the board of directors.[160] However, based on *Gantler*, the answer to this question is clearly no. *Gantler* holds that officers and directors have "identical" fiduciary duties.[161] Thus, an officer would have a general duty to disclose information to the board only if directors have such a broad duty. And, as discussed above,[162] directors do not. Therefore, neither do officers.

C. *Fiduciary Duties Under Agency Law*

As discussed above,[163] experts have vigorously debated whether agency law applies to corporate officers, and, if so, to what extent. Therefore, it has been unclear whether corporate officers had fiduciary duties under agency law. Recently, in *Amalgamated Bank v. Yahoo! Inc.*,[164] the Delaware Chancery Court addressed this issue and stated that officers do have fiduciary duties under agency law.[165] Therefore, officers may have a fiduciary duty to provide information to the board. However, as shown below, *Amalgamated* does not necessarily resolve this question, and there are compelling reasons to believe that *Amalgamated* will be revisited by Delaware courts.

1. The Duty to Inform and the Restatement (Third) of Agency

Under agency law, agents owe a duty of loyalty to their principal, as well as six specified duties of performance.[166] One of these duties of performance is a duty to provide information to the agent's principal.

The contours of the duty to provide information are set forth in the Restatement (Third) of Agency. Specifically, section 8.11 states:

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160. *Id.* at 699.
161. *Id.* at 708.
162. *See supra* Part III.B.1.
163. *See supra* Part III.B.2.
164. 132 A.3d 752 (Del. Ch. 2016).
165. *Id.* at 780.
166. RESTATEMENT (THIRD) OF AGENCY §§ 8.02–.12 (AM. LAW INST. 2006). The duties of performance are the: (1) duty created by contract; (2) duties of care, competence, and diligence; (3) duty to act within scope of actual authority; (4) duty of good conduct; (5) duty to provide information; and (6) duty to keep principal's property separate. *Id.* §§ 8.07–.12.

> An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when
> (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
> (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.[167]

Thus, unlike corporate law, under agency law, there is a standalone duty to disclose information. And unlike corporate law, under agency law, the duty to disclose is not grounded in the duty of loyalty.[168] Therefore, enforcement under agency law does not require a breach of duty of loyalty. If officers are subject to agency law, they would have a clear duty to inform the board of all material information in the officer's possession. The Delaware Chancery Court recently addressed this issue in *Amalgamated Bank v. Yahoo! Inc.*,[169] but the answer is still not entirely clear.

2. The Duty to Inform and *Amalgamated Bank v. Yahoo! Inc.*

Amalgamated Bank involves actions taken by Yahoo's board and Yahoo's CEO, Marissa Mayer, related to the hiring and firing of Yahoo's COO, Henrique de Castro.[170] When Mr. de Castro's employment was announced in 2012, experts criticized the decision to make him Yahoo's COO and bashed his excessive compensation package.[171] Similarly, when Mr. de Castro's termination was announced fourteen months later, Yahoo management was criticized for the size of the severance package that Mr. de Castro received—nearly $60 million in cash and stock awards.[172]

Following Mr. de Castro's termination, Amalgamated Bank—a Yahoo stockholder—sought to inspect Yahoo's books and records under section 220 of the Delaware GCL.[173] Amalgamated's stated purpose was to investigate the hiring and firing of Mr. de Castro

167. *Id.* § 8.11.
168. *See generally* DeMott, *supra* note 61, at 858 ("Showing that an officer breached a duty grounded in agency law does not require showing that the officer, additionally, breached a duty of loyalty . . . .").
169. 132 A.3d 752 (Del. Ch. 2016).
170. *Id.* at 761.
171. *Id.* at 771.
172. *Id.* at 772–73.
173. *Id.* at 774 (citing DEL. CODE ANN. tit. 8, § 220 (2011 & Supp. 2016)).

to determine if it involved wrongdoing by Yahoo's management.[174] Yahoo rejected the demand, arguing that Amalgamated did not have a proper purpose to inspect the books, as required by section 220.[175] Specifically, Yahoo argued that the "[d]emand did not identify a credible basis to infer wrongdoing."[176] As result, Amalgamated brought a "books and records" summary action in chancery court to compel Yahoo to turn over the requested books and records.[177]

In its pleadings, Amalgamated made numerous allegations of misconduct by Yahoo management to meet the credible basis standard. One allegation, however, is particularly significant for purposes of this article: Amalgamated alleged that CEO Mayer committed misconduct because she "*failed to provide material information* to the [Compensation] Committee during the early stages of the hiring process, when she cryptically withheld de Castro's name, position, and qualifications while seeking the Committee's blessing for a large compensation package."[178]

Amalgamated had alleged that CEO Mayer failed to disclose certain information to the Yahoo board.[179] Whether this failure constituted misconduct would turn on whether she had a duty to disclose the information to the board. In addressing this allegation, Vice Chancellor Laster chose to discuss whether there was credible evidence that CEO Mayer—who was also a member of Yahoo's board—committed misconduct as an officer, not as a director.[180]

The chancery court began its discussion by noting that "[o]fficers are corporate fiduciaries who owe the same fiduciary duties to the corporation and its stockholders as directors."[181] However, the chancery court—without explanation—did not apply corporate law to determine if CEO Mayer had a duty to disclose information to the board. Instead, the court turned directly to agency law.

174. *Id.*

175. *See id.*; *see also* DEL. CODE ANN. tit. 8, § 220 (2011 & Supp. 2016)).

176. *See Amalgamated Bank*, 132 A.3d at 774.

177. *See id.* at 774–75. *See generally* DEL. CODE ANN. tit. 8, § 220 (2011 & Supp. 2016) (describing the rights of stockholders to inspect books and records).

178. *Amalgamated Bank*, 132 A.3d at 782 (emphasis added). Amalgamated also alleged that CEO Mayer lied to the Yahoo Compensation Committee and board. *Id.*

179. *See id.* at 774.

180. *See id.* at 781–82.

181. *Id.* at 780 (citing Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009)).

The chancery court stated that in addition to being corporate fiduciaries, "[o]fficers also are agents who report to the board of directors in its capacity as the governing body for the corporation."[182] According to the chancery court, as a matter of agency law, the officers therefore "have a duty to provide the board of directors with the information that the directors need to perform their statutory and fiduciary roles."[183] The court cited section 8.11 of the Restatement (Third) of Agency as support for its position.[184] Because Amalgamated had alleged that CEO Mayer had failed to disclose material information to the board, and because, according to Vice Chancellor Laster, agency law imposed a duty on her to do so, the court found that Amalgamated had stated a proper purpose to inspect Yahoo's books and records.[185]

Regardless of the outcome of the case, *Amalgamated* does not settle the issue of whether officers have a broad and ongoing duty to inform the board of all necessary information. *Amalgamated* is a chancery court decision, and the supreme court has yet to hear, or decide, this issue. Until it does, the question remains open. Moreover, there are several reasons to think that the Vice Chancellor's broad statement will not be quickly followed by other hancery courts or by the Delaware Supreme Court.

First, *Amalgamated* is inconsistent with the Delaware Supreme Court's holding in *Gantler*. *Gantler* identified Delaware corporate law as the source of an officer's fiduciary duties, not agency law.[186] In fact, the Delaware Supreme Court did not even mention agency law in *Gantler*. Given the prominence of the agency law debate, it is doubtful that the supreme court overlooked agency law as a possible source for an officer's fiduciary duties when it decided *Gantler*. The Chancery Court may not like that outcome, but, unless the Delaware Supreme Court changes its mind, *Amalgamated* is contrary to *Gantler*.

Similarly, *Amalgamated*'s imposition of additional duties on officers is inconsistent with *Gantler*. *Gantler* recognized that officers

182. *Id.*

183. *Id.* at 781.

184. *Id.* at 781 n.26 (citing RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. (2005)). For additional discussion of section 8.11 of the Restatement (Third) of Agency, see *supra* Part III.C.1.

185. *Amalgamated Bank*, 132 A.3d at 784–85.

186. *See Gantler*, 965 A.2d at 709 n.37 (citing DEL. CODE ANN. tit. 8, § 102(b)(7) (2011 & Supp. 2016)).

have two fiduciary duties: care and loyalty.[187] *Amalgamated* purports to impose extra duties, as set forth in the Restatement (Third) of Agency.[188] That outcome is in conflict with the Delaware Supreme Court's holding in *Gantler* that the duties of officers and directors are "identical."[189]

Second, *Amalgamated* was a particularly weak case to make such an important statement concerning officer duties. As discussed above,[190] whether agency law applies to corporate officers is an important and contentious issue. Such an issue should be decided only when the question is squarely before the court, so that appropriate attention can be given to the issue. *Amalgamated* was not that case. *Amalgamated* was a books and records summary proceeding, not a breach of fiduciary duty case.[191] In addition, the agency law issue was not the main issue in the case. In fact, the plaintiff did not advance the agency law argument to gain access to Yahoo's book and records; that argument apparently came from the court.[192] Amalgamated's pleadings focused on the duties of Yahoo's managers as directors, not officers. In Amalgamated's brief, the only mention of CEO Mayer's potential liability as an officer occurs in a brief footnote.[193] Amalgamated never argued that officer liability would come from agency law, as opposed to corporate law.[194] And because Amalgamated did not make these arguments, Yahoo did not address these issues in its responsive pleadings.[195] Therefore, the *Amalgamated* chancery court did not have the benefit of a fully briefed case before the trial or its decision. In short,

187. *See Gantler*, 965 A.2d at 708–09.

188. *See Amalgamated Bank*, 132 A.3d at 781; RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. 2005).

189. *See Gantler*, 965 A.2d at 708–09.

190. *See supra* Part I.B.5.

191. *See Amalgamated Bank*, 132 A.3d at 775 (describing the legal standard for a books and records case).

192. *Compare id*. at 781 (using agency law to define and support officer fiduciary duties), *with* Plaintiff's Opening Pre-Trial Brief at 27 n.15, *Amalgamated Bank*, 132 A.3d 752 (No. 10774-VCL) (alleging possible fiduciary duty claims with no mention of agency liability).

193. After a long discussion of CEO Mayer's potential misconduct as a director, footnote 15 of Amalgamated's Pre-Trial Brief then states that "[t]here may also be claims against Mayer for breach of her duties as Yahoo's CEO." *See* Plaintiff's Opening Pre-Trial Brief, *supra* note 192, at 27 n.15.

194. *Amalgamated Bank*, 132 A.3d at 780 (citing *Gantler*, 965 A.2d at 708–09).

195. *See generally* Yahoo's Opening Pre-Trial Brief, *Amalgamated Bank*, 132 A.3d 752 (No. 10774-VCL) (discussing officer liability from a corporate law perspective, as opposed to agency law).

Amalgamated was not the optimal case to create important Delaware law.

Third, courts may not be persuaded by the reasoning in *Amalgamated*. *Amalgamated* cited several Delaware cases as support for the statement that officers have a duty under agency law to inform the board. However, a review of the cases indicates that none of them stand for this proposition.[196]

Fourth, the broad statement regarding the officer's duty to disclose information to the board is largely dicta. To support its books and records order, the court did not have to decide that CEO Mayer was an agent and therefore subject to agency law. CEO Mayer was also a member of the Yahoo board.[197] That means that, arguably, she had a duty as a director to disclose information relating to his hiring to the Yahoo board.[198] That would have been sufficient to meet the "credible evidence" standard, justifying Amalgamated's right to inspect Yahoo's books and records.

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196. In a footnote, the Chancery Court cited five cases to support its statement that officers have a duty under agency law to disclose information to the board. *Amalgamated Bank*, 132 A.3d at 781 n.26 (citing Kalisman v. Friedman, No. 8447-VCL, 2013 WL 1668205, at *4 (Del. Ch. Apr. 17, 2013); Hampshire Grp., Ltd. v. Kuttner, No. 3607-VCS, 2010 WL 2739995, at *34 (Del. Ch. July 12, 2010); Ryan v. Gifford, 935 A.2d 258, 272 (Del. Ch. 2007); Lewis v. Vogelstein, 699 A.2d 327, 334 (Del. Ch. 1997); Hoover Indus., Inc. v. Chase, 1988 WL 73758, at *2 (Del. Ch. July 13, 1988)). *Kalisman* did not address whether an officer was required by agency law to disclose information to the board. Rather, it addressed whether some members of the board had wrongfully withheld information from another member of the board. *See Kalisman*, 2013 WL 1668205, at *4. *Lewis* did not even address whether the board was uninformed. Instead, the case addressed whether directors had withheld information from shareholders, making a shareholder ratification of an interested transaction ineffective. *See Lewis*, 699 A.2d at 334. In *Hampshire Group*, the court held that officers who had falsely certified a corporation's financial statements and who had failed to disclose the financial misconduct of other managers to the board had breached their fiduciary duty of loyalty, but the court relied on both corporate law and agency law to reach its decision. *See Hampshire Grp.*, 2010 WL 2739995, at *34. Similarly, in *Ryan*, the court addressed whether an officer who had failed to disclose misconduct to the board violated his fiduciary duty of loyalty under corporate law, not agency law. *See Ryan*, 935 A.2d at 272. And *Hoover Industries* addresses the duty of directors to disclose information to other directors. *See Hoover*, 1988 WL 73758, at *2.

197. *Amalgamated Bank*, 132 A.3d at 761.

198. As previously discussed, directors do not have an overarching duty to disclose all information to the board. *See supra* Part III.A. However, the director does have a duty of candor to the board if the director is engaged in self-dealing or if the behavior would have violated the duty of loyalty. *See* BALOTTI & FINKELSTEIN, *supra* note 122, § 4.18. Because CEO Mayer was not a party to the transaction leading to the hiring of the COO, she was not engaged in a traditional self-dealing transaction with Yahoo. However, it is arguable that she breached her duty of loyalty because she was acting in her own interests by trying to hire a former colleague to work for her at Yahoo. If so, she would have been under a fiduciary duty to disclose the information to the board because of her status as a director.

D. *Duty from Bylaws: A Survey of Duty to Inform Bylaws at Public Companies*

The Delaware GCL expressly provides that the duties of officers can be set forth in the company's bylaws.[199] However, a survey of the bylaws of the fifty largest public companies[200] indicates that the overwhelming majority of corporations' bylaws do not include a Duty to Inform Bylaw. In fact, only two of the largest fifty corporations impose on the CEO a broad duty to disclose information to the board on a continuing basis.[201] For example, the bylaws of Valero state that the CEO must keep the board "fully informed . . . [of] the business of the corporation."[202] And, perhaps surprisingly, the bylaws of Wells Fargo state that the CEO

> shall be charged with the duty of causing to be presented to the Board full information regarding the conditions and operations of the Company, as well as matters of a policy nature concerning the affairs of the Company and information requisite to enable the Board in the discharge of its responsibilities to exercise judgment and take action upon all matters requiring its consideration.[203]

The bylaws of a few other corporations impose on the CEO a much more limited reporting obligation to the board.[204] Some of

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199. *See* DEL. CODE ANN. tit. 8, § 142 (2011 & Supp. 2016).

200. I reviewed the bylaws of fifty largest companies as set forth on the Fortune 500 list for 2018. *See Fortune 500 Full List*, *supra* note 28. The results of the survey can be found *infra* Table 1.

201. VALERO ENERGY CORP., BYLAWS art. 1, § 7 (2017), http://media.corporate-ir.net/media_files/IROL/25/254367/cg/Bylaws%202017-09-20.pdf [https://perma.cc/PG8Y-C93M] (stating that the CEO "shall keep the Board of Directors fully informed and shall consult with them concerning the business of the Corporation"); WELLS FARGO & CO., BY-LAWS OF WELLS FARGO & CO. § 5.4 (2018), https://www08.wellsfargomedia.com/assets/pdf/about/corporate/governance-by-laws.pdf [https://perma.cc/D4KY-EJGF] (stating that the CEO "shall be charged with the duty of causing to be presented to the Board full information regarding the conditions and operations of the Company, as well as matters of a policy nature concerning the affairs of the Company and information requisite to enable the Board in the discharge of its responsibilities to exercise judgment and take action upon all matters requiring its consideration").

202. VALERO ENERGY CORP., *supra* note 201, at art. I, § 7.

203. WELLS FARGO & CO., *supra* note 201, § 5.4.

204. *See, e.g.*, ANTHEM, INC., BYLAWS OF ANTHEM, INC. § 3.3 (2018), https://ir.anthieminc.com/static-files/26464bf7-7e15-4796-a5c8-195dd58ea93b [https://perma.cc/3D2J-BTCN] (discussing that the CEO's duty is limited to reporting "major activities" to the board); CITIGROUP, INC., *supra* note 29, at art. XI, § 2 (limiting the CEO's duty to reporting "current operations" at regular board meetings); FED. NAT'L MORTG. ASSOC., FANNIE MAE BYLAWS § 5.06 (2016), http://www.fanniemae.com/resources/file/aboutus/pdf/bylaws.pdf [https://perma.cc/LER2-M 3SG] (limiting the duty to reports of "current operations" at board meetings); *Code of Regulations*, PROCTER & GAMBLE, INC. art. V, § 2, https://us.pg.com/structure-and-governance/code-of-regulations/ [https://perma.cc/92FY-FC7H] (last visited Dec. 1, 2018)

these bylaws merely require the officer to submit reports on company performance to the board at board meetings; there is no duty to provide information between board meetings. Moreover, some of these bylaws require the CEO to report only on specific matters, such as "current operations" or "major projects." Thus, the officers at most public companies are not required by the bylaws to disclose all of the information the board needs to meet its responsibilities.

IV. PRIVATE ORDERING AND THE DUTY TO INFORM BYLAW

Information flow to directors is essential for the board to do its job and officers are the most important cogs in the information machine. Unfortunately, the Delaware GCL does not impose upon officers a duty to disclose information to the board, and the fiduciary duties of officers to do so are unclear. There is, however, another way to impose a duty to inform on officers: through private ordering. Specifically, a corporation's bylaws can require officers to disclose to the board the information necessary to manage the corporation.

A. *Private Ordering Through Bylaws*

More and more public corporations have turned to private ordering to modify the traditional rules of corporate governance provided by Delaware law.[205] For example, corporations have adopted rules requiring majority voting for director elections, rules granting stockholders access to the company's proxy materials to nominate directors, rules giving the company advance notice of any

(discussing how the CEO's duty is limited to periodic reports to the board of the corporation's business); WALGREENS BOOTS ALL., INC., AMENDED AND RESTATED BY-LAWS OF WALGREENS BOOTS ALLIANCE, INC § 5.5, https://investor.walgreensbootsalliance.com/static-files/754b0ed2-84b4-4e8f-bac5-6532d4ebfc2d [https://perma.cc/W8M5-96XL]).

205. *See* Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1638–39 (2016) (using "the term 'the new governance' to describe the use of issuer-specific bylaws by both corporate board and shareholders to structure governance rights") [hereinafter *The New Governance*]; *see also* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373 (2018) (discussing private ordering through bylaws) [hereinafter *Governance by Contract*]; D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125 (2011).

stockholder resolutions before the annual meeting, and rules requiring stockholders to bring lawsuits in certain courts (usually the Delaware Chancery Court).[206]

Most of this private ordering occurs through the company's bylaws,[207] which set forth the rules regulating the internal workings of the company and the rules regulating the actions of directors, officers, and stockholders. Under Delaware law, the bylaws are considered a contract among the directors, officers, and stockholders of the corporation.[208]

Often, private ordering is initiated by the board, which may try to use the bylaws to deter shareholder activism. However, stockholders can also initiate bylaws that affect corporate governance, and these stockholder-initiated bylaws generally seek to allocate more power to stockholders, perhaps at the expense of the board.[209] The primary legal issue is whether a stockholder-initiated bylaw impermissibly interferes with the board's power to manage the business, as provided by section 141 of the Delaware GCL.[210] If so, the shareholder-initiated bylaw would be invalid because it would be in violation of section 141.[211]

206. *See The New Governance*, *supra* note 205, at 1649–50, 1654, 1667.

207. Private ordering can also be accomplished through the corporation's certificate of incorporation. However, it is more difficult to amend the certificate of incorporation than the bylaws, as amending the certificate of incorporation requires the approval of both the board of directors and the stockholders. DEL. CODE ANN. tit. 8, § 242(b) (2011 & Supp. 2016). Amending the certificate of incorporation also requires approval by a higher vote (majority of outstanding shares) than amending the bylaws (majority of shares present in person or represented by proxy at a meeting). *Id*. Amending the bylaws, on the other hand, requires only the approval of either the board or the stockholders. Section 109 of the Delaware GCL gives the power to adopt, amend, or repeal bylaws to the stockholders. *Id.* § 109(a). However, a corporation's certificate of incorporation may also confer on the board an independent power to adopt, amend, or repeal bylaws. *Id.* Therefore, a board of a public company can amend bylaws on its own, without stockholder approval, and the stockholders can amend bylaws without board approval.

208. *See* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders . . . ."); Boilermakers Local 154 Ret. Fund v. Chevron, 73 A.3d 934, 939 (Del. Ch. 2013) ("As our Supreme Court has made clear, the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL.").

209. *See* DEL. CODE ANN. tit. 8, § 109(a) (2011 & Supp. 2016).

210. *See id*. § 141.

211. *Id*. For further discussion of stakeholder-initiated bylaws, see *infra* Part IV.C.

B. *The Validity of a Duty to Inform Bylaw*

A Duty to Inform Bylaw is valid and enforceable under Delaware law. According to the Delaware GCL, corporate bylaws "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[212] Thus, the validity of a bylaw turns on: (1) whether the substance of the bylaw relates to the business of the corporation or its corporate governance; and (2) whether the bylaw would violate law or the company's certificate of incorporation.

First, the substance of a Duty to Inform Bylaw is valid. The statutory language—"relating to the business of the corporation, the conduct of its affairs, and its rights or power or rights or power of its stockholders, directors, officers or employees"—has been recognized by courts to be extremely broad.[213] By addressing how a board receives information, a Duty to Inform Bylaw relates to the conduct of a corporation's affairs. More importantly, the Delaware GCL specifically envisions using bylaws to set forth the duties of officers.[214] Therefore, the substance of a Duty to Inform Bylaw is appropriate.

Second, a Duty to Inform Bylaw is "not inconsistent with law or with the certificate of incorporation."[215] There are no current laws that are inconsistent with a Duty to Inform Bylaw. To the extent that the Delaware Supreme Court holds that officers have a fiduciary duty to disclose information to the board, a Duty to Inform Bylaw would serve as an additional contractual obligation to disclose information to the board.

If the Duty to Inform Bylaw is initiated by stockholders, as opposed to the board, there may be an argument that the bylaw is invalid because it violates section 141 of the Delaware GCL.[216] The validity of stockholder-initiated bylaws is almost always at issue because the bylaw may be viewed as interfering with the board's managerial authority in violation of Delaware law. As shown in the next section, that argument is not persuasive.

212. *See* DEL. CODE ANN. tit. 8, § 109(b) (2011 & Supp. 2016).
213. *Id.*
214. *See supra* Part I.B.3.
215. *See* DEL. CODE ANN. tit. 8, § 109(b) (2011 & Supp. 2016).
216. *See id.* § 141.

C. *The Duty to Inform Bylaw and the Shareholder Proposal Process*

The board of a public company could amend the bylaws to include a Duty to Inform Bylaw.[217] However, if the board does not do so, the stockholders could. After drafting the bylaw amendment, the proposing stockholder would have to obtain approval from other stockholders to reach the necessary vote to amend the bylaws. The stockholders of a public company seeking to amend the bylaws would need to use the shareholder proposal process to get the necessary votes.[218]

Under the shareholder proposal process, a public company must include the stockholder's proposal in the company's own proxy materials, unless the proposal falls into one of the rule's exclusions.[219] The shareholder proposal process is governed by Rule 14a-8[220] of the Securities Exchange Act of 1934.[221] Rule 14a-8(i) sets forth a list of circumstances permitting the company to exclude the stockholder's proposal from company materials.[222]

When stockholders use the shareholder proposal process to attempt to amend the corporation's bylaws, the corporation almost always seeks to omit the proposal using exclusion number one, namely that the proposal is "[i]mproper under state law."[223] "Improper under state law" means that "the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization."[224] At the heart of the "improper under state law" exclusion is the concern that the stockholder's proposal, if approved, would intrude on the statutory power of the

217. *See supra* note 207 and accompanying text.

218. The federal proxy rules require anyone soliciting a proxy from a stockholder to provide a proxy statement to the stockholder. *See* Securities Exchange Act of 1934 Rule 14a-8, 17 C.F.R. § 240.14a-8 (2018).Without the shareholder proposal rules, a stockholder who, for example, wants to amend the bylaws would be forced to send proxy materials to all of the corporation's stockholders. As a practical matter, the expense of soliciting proxies makes it impossible for stockholders to solicit votes from their fellow stockholders. Recognizing this, the Securities and Exchange Commission adopted rules that permit stockholders of public companies to use the company's annual proxy materials to send out their own materials. *Id*.

219. *See id*.

220. *Id.*

221. 15 U.S.C. §§ 78(a)–99 (2012 & Supp. 2018).

222. Rule 14a-8(i) lists thirteen grounds for exclusion. Securities Exchange Act of 1934 Rule 14a-8, 17 C.F.R. § 240.14a-8 (2018).

223. *See id*.

224. *Id.*

board of directors to manage the business and affairs of the company.

The seminal case in this area is *CA, Inc. v. AFSCME Employees Pension Plan*,[225] where the Delaware Supreme Court was called upon to determine the validity of a shareholder-initiated bylaw that, if approved by the stockholders, would have required the board to reimburse an insurgent's proxy expenses.[226] The Delaware Supreme Court was required to reconcile the stockholder's broad power to adopt bylaws under section 109 of the Delaware GCL, on the one hand, with the board's exclusive power to manage the corporation's business under section 141 of the Delaware GCL, on the other hand.[227]

The court first decided that boards and stockholders do not have the same power to adopt bylaws.[228] In other words, a board-initiated bylaw might be valid, while a shareholder-initiated bylaw with the exact same content might not be. According to the court, "the shareholders' statutory power to adopt, amend or repeal bylaws is not coextensive with the board's concurrent power and is limited by the board's management prerogatives under Section 141(a)."[229] The Delaware Supreme Court noted that section 141 conferred upon the board "*exclusive* managerial authority."[230] Therefore, a shareholder-initiated bylaw could not improperly intrude on that exclusive authority.

The Delaware Supreme Court then examined the role of bylaws, stating that "[i]t is well-established Delaware law that a proper function of bylaws is not to mandate how the board should decide specific substantive business decisions, but rather, to define the process and procedures by which those decisions are made."[231] The

225. 953 A.2d 227 (Del. 2008). The procedural posture of AFSCME is somewhat unique. The case arose out of AFSCME's attempt to use the shareholder proposal process to force CA to include the bylaw amendment in its proxy materials. *Id*. at 229. CA decided to exclude the bylaw amendment because it believed it would violate the Delaware GCL. *Id*. at 230. As required by federal law, CA sought a "no action" position from the Securities and Exchange Commission, which would require the SEC to determine whether the bylaw was valid under Delaware law. *Id*. Because there was uncertainty in Delaware law, the SEC certified the question of the bylaw's validity to the Delaware Supreme Court. *Id*.

226. *Id*. at 229.

227. *See id*. at 230–32; *see also* DEL. CODE ANN. tit. 8, §§ 109, 141 (2011 & Supp. 2016).

228. *See AFSCME*, 953 A.2d at 232.

229. *Id.* (citing DEL. CODE ANN. tit. 8, § 141(2) (2011 & Supp. 2016)).

230. *Id.* at 234 n.14 (emphasis added).

231. *Id.* at 234–35.

court therefore adopted a procedure versus substance test to determine whether a shareholder-initiated bylaw improperly intruded on the board's power.[232]

According to the court, if the bylaw is "one that establishes or regulates a process for substantive director decision-making," the bylaw is procedural and would be valid under state law.[233] On the other hand, if the bylaw "mandates the decision itself," the bylaw is substantive and would be invalid under state law.[234] Ultimately, the Supreme Court concluded that the purpose of the proxy expense reimbursement bylaw, though "infelicitously couched" as a board mandate to expend corporate funds, was to regulate the process to elect the board.[235]

The Duty to Inform Bylaw does not fall into this problematic area. The *AFSCME* case created a framework for determining the validity of a shareholder-initiated bylaw that arguably interferes with a *board's* ability to manage the corporation. But a Duty to Inform Bylaw does not interfere with the board's ability to manage the corporation. The Duty to Inform Bylaw addresses *officer* behavior, not board behavior. It does not impose any kind of obligations on the board. In fact, because the bylaw will improve information flow to the board, the board's ability to manage the business will not be hampered; it will be helped. Therefore, the *AFSCME* test may not be applicable to determining whether a Duty to Inform Bylaw is improper under state law.

However, if *AFSCME* does apply, a shareholder-initiated Duty to Inform Bylaw would still be valid. First, *AFSCME* emphasized the importance of the board's *exclusive* authority.[236] While section 141 of the Delaware GCL gives the board the exclusive power to manage the business and affairs of the company, the Delaware GCL does not give the board the exclusive power to appoint officers or define their duties.[237] As discussed above,[238] the Delaware GCL

232. *See id.* at 235.

233. *Id.*

234. *Id.* at 235–36.

235. *Id.* Therefore, the court held that the bylaw was a proper subject for shareholder action. *Id.* at 236. However, the supreme court ultimately determined that the bylaw as drafted was invalid for a different reason: because it could cause the board to violate their fiduciary duties. *Id.* at 238.

236. *Id.* at 234 n.14.

237. *See* DEL. CODE ANN. tit. 8, § 141 (2011 & Supp. 2016).

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

provides that a corporation "shall have such officers with such titles and duties as shall be stated in the bylaws."[239] Thus, defining the duties of officers—including a duty to disclose information to the board—does not interfere with the board's exclusive authority.

Moreover, a Duty to Inform Bylaw is procedural, not substantive. It does not mandate any board decision. It sets forth a rule that improves the process of information flow to directors. The Duty to Inform Bylaw will improve the board's decision-making process and oversight abilities. Therefore, the bylaw is not improper under state law.

A Duty to Inform Bylaw can be contrasted with a shareholder-initiated bylaw relating to officers that the Delaware Chancery Court struck down as a violation of section 141 of the Delaware GCL. In *Gorman v. Salamone*,[240] the stockholders purported to amend the bylaws to give stockholders the power to remove an officer with or without cause.[241] The court, applying *AFSCME*, held that the amendment to the bylaw was invalid because it "would unduly constrain the board's ability to manage the Company."[242] Although the bylaw amendment did not mandate a board decision, the court held it was nonetheless invalid because it impermissibly interfered with the board's ability to make a decision.[243] The court noted that a board manages the corporation's business through officers, primarily the CEO; if the stockholders could remove the CEO at any time for any reason, it would be impossible for the

239. DEL. CODE ANN. tit. 8, § 142(a) (2011 & Supp. 2016).

240. No. 10183-VCN, 2015 WL 4719681 (Del. Ch. July 31, 2015).

241. *See id*. at *2. The bylaw stated:

> Section 6.2. Term of Office. The elected officers of the Corporation shall be elected annually by the Board at its first meeting held after each annual meeting of stockholders. All officers elected by the Board shall hold office until the next annual meeting of the Board and until their successors are duly elected and qualified or until their earlier death, resignation, retirement, disqualification or removal from office. Any officer may be removed, with or without cause, at any time by the Board *or by the stockholders acting at an annual or special meeting or acting by written consent pursuant to Section 2.8 of these Bylaws. The Board shall, if necessary, immediately implement any such removal of an officer by the stockholders*. Any officer appointed by the Chairman of the Board or President may also be removed, with or without cause, by the Chairman of the Board or President, as the case may be, unless the Board otherwise provides. Any vacancy occurring in any elected office of the Corporation may be filled by the Board *except that any such vacancy occurring as a result of the removal of an officer by the stockholders shall be filled by the stockholders*.

Id. at *2.

242. *Id.* at *6.

243. *Id*.

board to manage the business.[244] Therefore, the Delaware Court of Chancery concluded that the bylaw amendment was invalid.[245]

D. *The Enforcement of a Duty to Inform Bylaw*

A Duty to Inform Bylaw will only be effective if it is enforced. If officers recognize that they will be held accountable for failing to disclose required information to the board, they will presumably try to ensure that they do not violate the Duty to Inform Bylaw.

The corporation itself would certainly be able to enforce a bylaw violation. However, just as boards are often hesitant to bring suits against officers for violating their fiduciary duties,[246] boards may also be hesitant to sue officers for violating a Duty to Inform Bylaw. That leaves the stockholders as the most likely enforcer of a Duty to Inform Bylaw. This raises two important legal issues: (1) whether stockholders are legally permitted to bring suit against an officer for violating a corporation's bylaws; and (2) if so, whether the lawsuit would be brought as a direct or derivative action.

There is no Delaware caselaw expressly stating that stockholders are permitted to sue officers who violate a corporate bylaw. However, Delaware law does provide an analogy: stockholders can sue the board for causing the corporation to take action that violates the corporation's certificate of incorporation.[247]

The more difficult question is whether a stockholder suit would be characterized as a direct or derivative action. In other words, is this an action that belongs to a stockholder? Or does it belong to the corporation? If it belongs to the corporation, the stockholder could still bring the suit, but the suit would be on behalf of the corporation.[248] This is an important determination because the deficiencies of derivative actions as enforcement tools are well known. As one commentator noted:

244. *Id.* at *5 ("How a board without the power to control who serves as CEO could effectively establish a long term corporate strategy is difficult to conceive.").

245. *Id.* at *6.

246. *See, e.g.*, Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 305–11 (2014) (discussing the diminishment of incentives for boards to enforce an officer's fiduciary duties).

247. *See, e.g.*, SEPTA v. Volgenau, No. 6354-VCN, 2012 WL 4038509, at *3 (Del. Ch. Aug. 31, 2012) ("[T]his Court has determined that direct claims by shareholders for breach of a certificate of incorporation are permissible.").

248. BALOTTI & FINKELSTEIN, *supra* note 122, § 13.10 (discussing derivative actions).

> The procedural rules (and corresponding case law) governing stockholders' ability to bring a derivative lawsuit challenging the actions of officers create significant hurdles. These procedural rules have resulted in a process that is expensive, onerous, and has little chance of success in holding officers accountable for their actions. As a result, stockholders can be significantly deterred from using this enforcement mechanism.[249]

Thus, a stockholder would much prefer to bring a direct action than a derivative action.

Characterizing a stockholder action as direct or derivative can be a difficult challenge, and the Delaware Supreme Court set forth a test in *Tooley v. Donaldson, Lufkin & Jenrette, Inc*.[250] In *Tooley*, the court stated that two questions had to be answered: (1) "[w]ho suffered the alleged harm—the corporation or the suing stockholder individually;" and (2) "who would receive the benefit of the recovery or other remedy?"[251]

The *Tooley* test is easier to apply in some cases than others. For example, under *Tooley*, a stockholder's claim that the board breached its fiduciary duty will ordinarily be characterized as derivative. While the stockholder may have suffered harm because his stock was now worth less, that harm came about only because the corporation was harmed. The board misconduct damaged the stockholders as a group, not individually. Thus, any damages would be paid to the corporation. The monetary award would presumably boost the value of the company's stock, thereby making stockholders whole.

Another example of a straightforward application of *Tooley* would be a claim that the corporation interfered with the rights of stockholders, such as dividend rights or voting rights. In this situation, the stockholder's action would be direct. The stockholders have voting rights, not the corporation. Therefore, the stockholders would be harmed if those rights were violated. And the stockholders would be entitled to receive damages.

Stockholder claims of a breach of a contractual right—which would include violations of bylaws—are more difficult to characterize. Traditionally, claims that the stockholders' contractual rights

249. Shaner, *supra* note 246, at 312. For an excellent description of the challenges faced by stockholders bringing derivative actions, see *id*. at 311–15.

250. 845 A.2d 1031 (Del. 2004).

251. *Id*. at 1035.

were violated were more or less automatically characterized as direct actions.[252] However, the Delaware Supreme Court recently rejected this bright-line approach, stating that the caselaw "does not support the proposition that *any* claim sounding in contract is direct by default, irrespective of *Tooley*."[253] Thus, courts must conduct a *Tooley* analysis to determine if a contractual claim is direct or derivative.

While there are no cases directly on point, the Chancery Court case of *Allen v. El Paso Pipeline GP Co., LLC*[254] is analogous and provides helpful guidance. *Allen* addressed a conflict of interest transaction involving El Paso MLP, a publicly traded limited partnership.[255] El Paso MLP purchased a business from El Paso Corporation ("El Paso Parent"), which was the parent company of El Paso MLP's general partner El Paso Pipeline GP Company, Inc. ("the General Partner").[256] El Paso MLP's Limited Partnership Agreement provided that El Paso MLP could not engage in a conflict of interest transaction unless it was approved in good faith by a special "Conflicts Committee" appointed by the General Partner.[257] Allen, an owner of El Paso MLP, believed that El Paso MLP had overpaid for the business.[258] He brought suit against the General Partner, the General Partner's board of directors, and El Paso Parent, arguing that they violated the Limited Partnership Agreement because the Conflicts Committee had not approved the transaction as required by the agreement.[259] He contended that his claim could be brought as a direct action.

252. *See, e.g.*, Allen v. El Paso Pipeline GP Co., 90 A.3d 1097, 1105 (Del. Ch. 2014) ("Pre-*Tooley* cases recognized that a stockholder could assert a direct claim if the cause of action involved a 'contractual right of shareholders.'"); SEPTA v. Volgenau, No. 6354-CVN, 2012 WL 4038509, at *3 (Del. Ch. Aug. 31, 2012) ("[T]his Court has determined that direct claims by shareholders for breach of a certificate of incorporation are permissible."); Grayson v. Imagination Station, Inc., No. 5051-CC, 2010 WL 3221951, at *5 (Del. Ch. Aug. 16, 2010) ("[A]ny shareholder who was harmed by the violation of the structural relationship established between the corporation and the shareholder is harmed directly and has an individual cause of action."); MCG Capital Corp. v. Maginn, No. 4521-CC, 2010 WL 1782271, at *7 (Del. Ch. May 5, 2010) (holding every contract claim brought by shareholder to be a direct claim).

253. *See* El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d. 1248, 1259 (Del. 2016).

254. *Allen*, 90 A.3d at 1097.

255. *Id*. at 1099.

256. *Id.* at 1100.

257. *Id*. at 1102–03.

258. *Id*. at 1104.

259. *Id*. at 1104–05.

The Chancery Court first noted that "[t]he test for distinguishing between direct and derivative claims in the limited partnership context is substantially the same as in the corporate context."[260] Therefore, the court applied the *Tooley* test; the first prong of *Tooley* indicated that Allen's claim was direct because the owner, and not the limited partnership, had been injured.[261] The court pointed out that pre-*Tooley* cases had permitted stockholders to bring direct claims if the claim involved a contractual right of shareholders, and *Tooley* did not overrule these cases.[262] According to the court:

> Post-*Tooley* cases have held that stockholders suffer direct injury and may sue individually for breach of their contractual rights, even when all stockholders held the same right and suffered the same injury. The decisions recognize that when the certificate of incorporation or bylaws contain a protective provision for the benefit of stockholders, such as a class vote, consent right, notice right, or other procedural requirement, then the stockholders can sue directly to enforce it . . . . Stockholders similarly can sue directly to enforce a constraint on the board's authority.[263]

The court also noted that:

> The [Delaware GCL] establishes a structural relationship between the corporation and its officers, directors, and shareholders. Although the DGCL empowers corporate directors and officers to act for the corporation, the DGCL also imposes certain restraints on the use of this authority. If a corporate officer acts in a manner that the DGCL prohibits, then the officer has violated this structural relationship by disregarding the specific restraints placed on him or her by the shareholders. It is consequently the rights of the shareholders, not those of the corporation, that are injured by the encroachment. Thus, any shareholder who was harmed by the violation of the structural relationship established between the corporation and the shareholder is harmed directly and has an individual cause of action.[264]

Because the certificate of incorporation and bylaws also form part of the "structural relationship" between the corporation and its officers, directors, and stockholders, violations of the certificate of

260. *Id.* at 1104.
261. *Id.* at 1110.
262. *Id.* at 1105.
263. *Id.* at 1107.
264. *Id.* at 1107 (quoting Grayson v. Imagination Station, Inc., No. 5051-CC, 2010 WL 3221951, at *5 (Del. Ch. Aug. 15, 2010)).

incorporation or bylaws would similarly directly injure the stockholder.[265]

Applying the law to the facts of *Allen*, the Chancery Court was careful to point out that Allen's claim was different from the claim that the Limited Partnership overpaid for the business; that claim would have been derivative.[266] Allen's claim was that his contractual rights had been violated.[267] The court noted that the Limited Partnership Agreement gave the owners of El Paso MLP a contractual right: that the limited partnership would not engage in a conflict of interest transaction unless certain approvals were obtained.[268] This contractual right was violated when the purchase occurred in breach of the required approval process, and the General Partner had exceeded its authority by going forward with the purchase in violation of the Limited Partnership Agreement.[269] Therefore, the court concluded that the first prong of *Tooley* supported a direct claim.[270] After determining that the second prong of *Tooley* could support either a derivative action or a direct action, the court reasoned that the first prong was particularly important.[271] In holding that the action was direct, the court emphasized "the longstanding recognition in *Tooley* and other decisions that investors can sue directly for violations of their contractual rights."[272]

Allen implies that a stockholder's claim that an officer violated a Duty to Inform Bylaw could be brought on a direct, as opposed to derivative, basis.[273] First, like *Allen*, the claim that an officer violated a Duty to Inform bylaw is different than a complaint that the officer's actions devalued his stock. The Delaware courts have repeatedly held that bylaws are contracts between the board, the officers, and the stockholders of a corporation.[274] Thus, like *Allen*, the violation of a Duty to Inform Bylaw would constitute a violation of a contractual right.

265. *Id.* at 1110–08.
266. *Id.* at 1110.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 1111.
272. *Id.*
273. *Id.* at 1107.
274. *Id.* at 1107–08.

In addition, like *Allen*, an officer's violation of a Duty to Inform Bylaw can be viewed as violating the "structural relationship"[275] created by Delaware law. It is true that a Duty to Inform Bylaw is not a restraint, so that it cannot be said that the officer exceeded his authority when he violated a Duty to Inform Bylaw. However, that violation nevertheless violates the structural relationship created by Delaware law. A failure to comply with a duty "disregards" the expectations of stockholders just as much as a violation of a restraint. And, finally, as in *Allen*, the tradition of permitting stockholders to sue directly for violations of their contractual rights supports the conclusion that a claim for a violation of a Duty to Inform Bylaw would be a direct action.[276]

V. RECOMMENDATIONS

A. *A Model Duty to Inform Bylaw*

If a corporation adopted a Duty to Inform Bylaw, what should it look like? At a minimum, it should (1) identify who is subject to the bylaw; (2) define the information that must be disclosed to the board; and (3) state when the information must be disclosed to the board.

1. Who Should Be Subject to the Duty to Inform Bylaw?

Obviously, the CEO should be subject to the duty to inform bylaw. As the officer in charge of running the company's operations, the CEO has the most knowledge of the corporation's operations. The board's effectiveness depends in large part on the CEO providing information to the board, which is why the CEO almost always sits on the board in the first place.[277] The CEO's close relationship with the board also means that it is reasonable to impose a duty on the CEO. In short, to ensure that the board receives the information needed to manage the operations of the company, the Duty to Inform Bylaw must apply to the CEO.

275. *Id. at* 1107.
276. *Id.* at 1111.
277. *See supra* Part I.B.4.a.

In addition, the CFO should be subject to the Duty to Inform Bylaw. As discussed above,[278] the CFO plays a distinctive role in a public company. Because of his job responsibilities relating to financial reporting and strategic initiatives, the CFO is extremely knowledgeable about the company's financial position, as well as all aspects of the company's business.[279] Although the CFO may not sit on the board, the Duty to Inform Bylaw should nonetheless apply to him because of the CFO's depth and breadth of knowledge about the company.

A critic might argue that it would be unfair to impose a duty to disclose on the CFO because CFOs do not typically sit on the board of directors of public companies. However, the CFO interacts with the board on a regular basis and interacts with the board's audit committee even more frequently.[280] The CFO would know whether the board had the information it needed to manage the company and would be in a position to provide information to the board.

What about other officers? Should all officers be subject to a Duty to Disclose Bylaw? Since the goal of the bylaw is to improve information flow to the board of directors, at first it seems that the answer should be yes. After all, the more people subject to a duty to inform, the more likely it is that information would reach the board. However, imposing a duty on all officers would create several problems.

First, it would require the corporation to identify who is an "officer," which, as discussed above,[281] is not easy to do. Second, even if a corporation could adequately define "officer" for purposes of its bylaws, imposing such a duty on *all* officers is unlikely to improve information flow to the board—simply because most of these officers would be very unlikely to comply with it. Most corporate officers have no opportunity to interact with the board.[282] Moreover, junior officers would be afraid to go over the CEO's head to provide information to the board. Purposely adopting a bylaw that is unlikely to be adhered to will not improve information flow to the board.

278. *See supra* Part I.B.4.b.
279. *See supra* Part I.B.4.b.
280. *See supra* Part I.B.4.b.
281. *See supra* Part I.B.2.
282. *See supra* Part II.D.

Third, imposing a duty on all officers might actually harm the ability of directors to manage the company. If all officers were subject to a Duty to Inform Bylaw, and they all complied with the duty, directors might be overwhelmed by officer communications. Because most officers do not sit on the board, they would not know if the directors had already received the information. Thus, the board could be bombarded with duplicative communications. Moreover, these officers may not be in the best position to determine what information the board needs to manage the business or how it should be presented to them. Out of fear of violating the bylaw, these officers might decide to disclose too much information to the board. Important information could be inadvertently buried in a package of information. In addition, directors would not know whether the communications they received were credible or not. The goal of the Duty to Inform Bylaw is to improve information flow to the board, but not if the bylaw would turn the process of information flow into the Wild West.

2. What Information Should Be Disclosed to the Board?

The Duty to Inform Bylaw should clearly set forth the information that must be disclosed to the board by the officer. Because the goal of the Duty to Inform Bylaw is to help ensure that boards receive the information they need to manage the company, the bylaw language should be focused on, and tailored to, that purpose. Thus, the Duty to Inform Bylaw should require the CEO and CFO to disclose "all information necessary to enable the Board to manage the business and affairs of the Company in conformity with its statutory and fiduciary obligations."

This model language can be compared to language currently found in some corporate bylaws. As discussed above, a few large companies impose some sort of duty to disclose on officers in their bylaws. Reviewing the language of these bylaws is instructive, and it also reveals that these bylaws are inadequate. For example, Procter & Gamble's bylaws require the CEO to disclose "such information as may be required relating to the Company's business and affairs."[283] The biggest problem with this language is that it

283. *Code of Regulations*, *supra* note 204, at art. V, § 2. The Procter & Gamble bylaw states in full:

> Section 2. Chief Executive Officer. The Board of Directors shall elect the Chief

does not actually impose a clear duty on officers. What does the clause "such information *as may be required*" mean? "May be required" by whom? By what? The bylaw seems to be referencing a duty from some source other than bylaws. An effective Duty to Inform Bylaw needs to impose an explicit duty on officers. It needs to be clear that the duty arises from the bylaw, and not from any other source, such as a fiduciary duty.

The Valero bylaws require the CEO to keep the board "fully informed . . . [of] the business of the Corporation."[284] At first glance, the term "business of the company" seems very broad, and certainly the board of a public company should be informed about the

> Executive Officer of the Company. The officer so elected shall be responsible for the supervision, general control and management of all the Company's business and affairs, subject only to the authority of the Board of Directors. He shall make periodic reports to the Board of Directors, making such recommendations as he thinks proper, and shall bring before the Board of Directors such information as may be required relating to the Company's business and affairs. The Board of Directors may designate one of the officers of the Company to perform the duties and have the powers of the officer who is the Chief Executive Officer in his or her absence, and during such absence the officer so designated shall be authorized to exercise all of his or her responsibilities.

Id.

284. VALERO ENERGY CORP., *supra* note 201, at art. V, § 7. The Valero bylaw states in full:

> Section 7. Chief Executive Officer. The Chief Executive Officer shall serve as general manager of the business and affairs of the Corporation and shall report directly to the Board of Directors, with all other officers, officials, employees and agents reporting directly or indirectly to him. The Chief Executive Officer shall preside at all meetings of the stockholders. In the absence of the Chairman of the Board, or if there is no Chairman of the Board, the Chief Executive Officer shall also preside at all meetings of the Board of Directors unless the Board of Directors shall have chosen another presiding officer. The Chief Executive Officer shall formulate and submit to the Board of Directors matters of general policy for the Corporation; he shall keep the Board of Directors fully informed and shall consult with them concerning the business of the Corporation. Subject to the supervision, approval and review of his actions by the Board of Directors, the Chief Executive Officer shall have authority to cause the employment or appointment of and the discharge of assistant officers, employees and agents of the Corporation, and to fix their compensation; and to suspend for cause, pending final action by the Board of Directors, any officer subordinate to the Chief Executive Officer. The Chief Executive Officer shall vote, or give a proxy to any other officer of the Corporation to vote, all shares of stock of any other corporation (or any partnership or other interest in any partnership or other enterprise) standing in the name of the Corporation, and in general he shall perform all other duties normally incident to such office and such other duties as may be prescribed from time to time by the Board of Directors. The Chief Executive Officer shall designate the person or persons who shall exercise his powers and perform his duties in his absence or disability and the absence or disability of the President.

Id.

"business of the company." However, the language may not be expansive enough. That the word "business" could mean something less than all the information needed by a board is reflected in the Delaware GCL, which states that the "business *and affairs*" of the corporation shall be managed by the board.[285]

The relevant Wells Fargo bylaw supports the conclusion that the term "business" might be too narrow. Rather than confining disclosure to information about the company's business, the Wells Fargo bylaw requires disclosure of "full information regarding the conditions and operations of the Company, as well as matters of a policy nature concerning the affairs of the Company."[286] Having an expansive definition of the information that must be disclosed to the board will help ensure that the board has the information it needs to manage the corporation.

Each of these bylaws tries to ensure that directors will obtain information by identifying categories of information that the drafter thinks the board needs to know—i.e., information about the company's "business" or "operations" or "affairs." The downside of this drafting approach is that some information needed by the board might not be disclosed to the board if the bylaw's language is not broad enough to capture it. The better drafting approach would be to simply require the officer to disclose the information the board needs to meet its duties to manage the company. For example, the second part of Wells Fargo's bylaw goes one step further, by requiring disclosure of "information requisite to enable the

285. DEL. CODE ANN. tit. 8, § 141(a) (2011 & Supp. 2016).

286. WELLS FARGO & CO., *supra* note 201, § 5.4. The Wells Fargo bylaw states in full:

> Section 5.4 Chief Executive Officer. The Board shall elect a Chief Executive Officer of the Company. The Chief Executive Officer shall, subject to the direction and control of the Board, supervise and control the business and affairs of the Company and shall see that all orders and resolutions of the Board are carried into effect. The Chief Executive Officer shall be charged with the duty of causing to be presented to the Board full information regarding the conditions and operations of the Company, as well as matters of a policy nature concerning the affairs of the Company and information requisite to enable the Board in the discharge of its responsibilities to exercise judgment and take action upon all matters requiring its consideration. Except where by law the signature or action of any other officer is required, the Chief Executive Officer shall possess the same power as any such other officer to sign certificates, contracts and other instruments of the Company and to take other action on behalf of the Company. The Chief Executive Officer shall have the general powers and duties of supervision and management usually vested in the chief executive officer of a corporation.

Id.

Board in the discharge of its responsibilities to exercise judgment and take action upon all matters requiring its consideration."[287] A better approach is to avoid specifying categories of information and instead to require the officers to disclose the information necessary for the board to do its job.[288]

3. When Should Information Be Disclosed to the Board?

Currently, most boards receive information on a periodic basis, through the board meeting process.[289] Because most public companies have six or fewer board meetings per year, that means that directors receive information from officers approximately every eight weeks.[290] Thus, the boards of many companies may be unaware of important information for nearly two months. That gap is too long. The CEO and the CFO should be required to inform the board continuously, not just periodically. Moreover, the Duty to Disclose Bylaw should make clear that the CEO and CFO must disclose information to the board within a certain time period. The best approach would be to require the information to be disclosed "promptly."

Certainly, there are other choices to consider. A Duty to Disclose Bylaw could allow the officers to exercise their judgment in deciding when the information should be disclosed to the board. However, considering the dynamics between the board and officers, that approach would be unlikely to improve information flow to the board of directors.

Because the goal of the Duty to Inform Bylaw is to get information to the board faster, the bylaws should require disclosure to the board to be made "immediately" or "promptly." The legal definition of these two terms, and whether they mean the same thing, has been questioned by the courts and drafting experts.[291] "Immediately" is often defined to mean instantly, without any delay,

287. *Id.*

288. An argument could be made that the Duty to Inform Bylaw should be conditioned on materiality. In other words, officers would have to disclose "all *material* information necessary to enable the Board to manage the business and affairs of the Company in conformity with its statutory and fiduciary obligations." However, information that is "necessary to enable the Board to manage the business and affairs of the Company" is presumably material information. Adding the word "material" to the bylaw would obscure the officer's duty. It would also create opportunities to withhold information to the board. Therefore, a Duty to Inform Bylaw should not include a materiality qualifier.

289. *See supra* Part II.C.

290. *See* BOARD PRACTICES REPORT, *supra* note 7, at 19.

291. *But see* Ken Adams, *"Promptly" and "Immediately,"* ADAMS ON CONTRACT DRAFTING

while "promptly" often is defined to mean as soon as reasonably practicable.[292] In other words, whether someone acted promptly depends on the circumstances; it is subject to a reasonableness review.

Requiring the CEO or CFO to disclose information to the board "immediately" is not the best approach. A requirement of instant disclosure does not recognize that officers may be facing business challenges that demand their full attention at that time. While getting information to the board quickly is important, it may not always be the most important priority for the company. The surrounding circumstances must be evaluated. Thus, the Duty to Inform Bylaw should require officers to "promptly" inform the board.

4. Example of a Model Duty to Inform Bylaw

Thus, putting everything together, the Duty to Inform Bylaw should read as follows:

Officer's Duty to Inform the Board. The Chief Executive Officer and the Chief Financial Officer are required to promptly inform the Board of all information necessary to enable the Board to manage the business and affairs of the Company in conformity with its statutory and fiduciary obligations. "Promptly" means as soon as reasonably practicable after the officer becomes aware that the information is necessary to enable the Board to manage the business and affairs of the Company in conformity with its statutory and fiduciary obligations.[293]

B. *All Public Companies Should Include a Duty to Inform Provision in Their Bylaws*

All public companies should adopt a Duty to Inform Bylaw. The Duty to Inform Bylaw will improve information flow to the board,

(Feb. 4, 2008), http://www.adamsdrafting.com/promptly-and-immediately/ [https://perma.cc/N977-HA87]. *See generally* K.M.L. Laboratories LTD. v. Hopper, 830 F. Supp. 159, 166 (E.D.N.Y 1993).

292. *Immediate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

293. Note that this model Duty to Inform Bylaw is intended to make clear that the CEO and CFO have ongoing, continuous obligations to disclose information to the board. Thus, this duty from the bylaw would be in addition to the officer's obligation to provide information to the board upon board request or any obligations to provide information to the board under fiduciary law.

leading to better board oversight and better board decisions. Given the importance of information to directors, boards should want to amend the corporate bylaws to include a Duty to Inform Bylaw. However, if boards choose not to do so, stockholders should use the shareholder proposal process to initiate a Duty to Inform Bylaw.

The Duty to Inform Bylaw provides a clear statement of the officer's obligations to disclose information to the board. Without a Duty to Inform Bylaw, the only legal source requiring officers to disclose information to the board is fiduciary law. But, as shown above,[294] those obligations are extremely unclear. Assuming officers do have fiduciary duties, basic questions are still unanswered. What officers are subject to fiduciary duties? Do those duties impose a broad duty on officers to disclose information to the board? If so, what kind of information? When must it be disclosed? All of these questions can be answered through careful drafting in a Duty to Inform Bylaw.

With such a clear statement of their duties, the CEO and CFO will understand their obligations and thus be more likely to provide information to the board. Lawyers will also be able to provide better legal advice to officers about their duty to inform the board.

In addition, the CEO and CFO will be likely to comply with a Duty to Inform Bylaw because they will have a significant incentive to do so. A Duty to Inform Bylaw will be easier to enforce than a duty under fiduciary duty.[295] A Duty to Inform Bylaw creates a contractual duty. Thus, a plaintiff seeking to enforce the bylaw would only need to show that the bylaw was violated. On the other hand, if the source of the fiduciary duty is corporate law, a plaintiff would have to show that the failure to inform the board constituted a breach of the officer's duty of loyalty,[296] which is very difficult to do. In addition, actions based on breaches of fiduciary duty will almost certainly be characterized as derivative, which are much more difficult for stockholders to bring. Actions based on contractual violations, such as a breach of a Duty to Inform Bylaw, are likely to be characterized as direct, which is much more attractive to stockholders.[297]

294. *See supra* Parts III.D, IV.
295. *See supra* Part IV.D.
296. *See supra* Part III.B.1.
297. *See supra* Part IV.D.

Finally, a Duty to Inform Bylaw will improve information flow to the board because it will cause officers to work closely with directors to adopt better ways to deliver information to the board. Traditionally, directors have received information through the board book and the board meeting. Although the deficiencies of this approach have been apparent for some time, there has been no real legal pressure on officers to make changes to this process. With a Duty to Inform Bylaw, the officers will have to consider new procedures. And since the board has its own duty to keep informed,[298] the board and the officers will have every reason to collaborate.

A few companies are already beginning to think outside of the box regarding facilitating information flow to directors. For example, a recent article by Professor David F. Larcker and Brian Tayan of the Stanford Graduate School of Business describes Netflix's unique approach to corporate governance.[299] Netflix is attempting to improve information flow to the board in two ways. First, directors attend monthly and quarterly management meetings, and, second, the approach to the board book has been dramatically changed.[300]

Netflix's CEO holds three types of management meetings: (1) monthly meetings with the top seven executives to discuss the highest priority issues facing the company; (2) quarterly meetings with the top ninety executives to consider high-level issues including company strategy; and (3) two-day "Quarterly Business Review" meetings with the top 500 company employees.[301] Under Netflix's approach, one Netflix director attends the monthly executive meetings, one or two directors attend the quarterly staff meeting, and two-to-four directors attend the Quarterly Business Review meetings.[302]

The purpose of director attendance at management meetings is to provide better, more meaningful, information to the board.[303] Netflix directors are able to see management in action, which helps

298. *See supra* Part II.B.

299. DAVID F. LARCKER & BRIAN TAYAN, NETFLIX APPROACH TO GOVERNANCE 1 (2015), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-71-netflix-approach-governance-boards.pdf [https://perma.cc/2LYW-2G8V].

300. *See id.* at 1–3.

301. *See id*. at 2.

302. *Id.* While directors attend these meetings, they are there strictly as observers; they do not ask questions or participate in the meetings. *Id.*

303. *See id.*

them to better understand the challenges faced by the company. They get to know officers beyond the CEO and CFO, leading to increased opportunities for information. And the information they receive is less scripted and less subject to the control of the CEO. For example, part of the agenda of each Quarterly Business Review is determined by employee crowdsourcing,[304] which allows directors to learn more about issues that employees think are important, as opposed to what senior management decides to focus on.

Netflix has also changed up the board book process. Rather than the lengthy package that primarily consists of financial statements and presentations with little or no analysis, Netflix directors receive a twenty-to-forty page digital memo in advance of board meetings. The "board memo" is presented in narrative form, with the goal of "highlight[ing] business performance, industry trends, competitive developments, and other strategic and organizational issues."[305] The memo contains links to the underlying data and analysis, so that directors can obtain more detailed information.[306] In addition, the board memo provides directors with open access to all data in the shared files on the company's internal systems.[307] Finally, directors can ask digital questions within the memo, which are answered by management before the board meeting.[308] All of these changes improve the quality of the information received by the board.

While the Netflix approach might not work for every company, all public companies should consider new ways to keep the board informed. If officers continue to rely solely on the traditional process of informing the board, they will likely violate the Duty to Inform Bylaw.

304. *Id.*
305. *Id.*
306. *Id.* at 2–3.
307. *Id.* at 1–2.
308. *Id.* at 2.

CONCLUSION

Corporate scandal after corporate scandal demonstrates that directors are not getting the information they need to manage and oversee the corporation. Boards rely on officers to obtain information, but, surprisingly, officers are not under a clear duty to disclose all necessary information to directors. This issue is too important to leave uncertain. This article argues that private ordering should be used to impose clear duties on officers. A Duty to Inform Bylaw will improve information flow from officers to the board, leading to better board oversight and, presumably, fewer corporate scandals.

Table 1: List of Top 50 Corporations Showing Whether Bylaws Impose on CEOs a Broad Duty to Inform the Board

Fortune 500 Rank	Name of Corporation	State of Incorporation	Do Bylaws Require CEO to Inform Board?
1	Walmart	Delaware	No
2	Exxon Mobil	New Jersey	No
3	Berkshire Hathaway	Delaware	No
4	Apple	California	No
5	UnitedHealth Group	Delaware	No
6	McKesson	Delaware	No
7	CVS Health	Delaware	No
8	Amazon.com	Delaware	No
9	AT&T	Delaware	No
10	General Motors	Delaware	No
11	Ford Motor	Delaware	No
12	AmerisourceBergen	Delaware	No
13	Chevron	Delaware	No
14	Cardinal Health	Ohio	No
15	Costco	Washington	No
16	Verizon	Delaware	No
17	Kroger	Ohio	No
18	General Electric	New York	No
19	Walgreens Boots Alliance	Delaware	Limited[i]
20	JPMorgan Chase	Delaware	No
21	Fannie Mae	Federal	Limited[ii]
22	Alphabet	Delaware	No
23	Home Depot	Delaware	No
24	Bank of America Corp.	Delaware	No
25	Express Scripts Holding	Delaware	No
26	Wells Fargo	Delaware	Yes [iii]
27	Boeing	Delaware	No
28	Phillips 66	Delaware	No
29	Anthem	Indiana	Limited[iv]
30	Microsoft	Washington	No
31	Valero Energy	Delaware	Yes[v]
32	Citigroup	Delaware	Limited[vi]
33	Comcast	Pennsylvania	No
34	IBM	New York	No
35	Dell Technologies	Delaware	No
36	State Farm Insurance Cos.	N/A	N/A
37	Johnson & Johnson	New Jersey	No
38	Freddie Mac	Virginia	No
39	Target	Minnesota	No
40	Lowe's	North Carolina	No
41	Marathon Petroleum	Delaware	No
42	Procter & Gamble	Ohio	Limited[vii]
43	MetLife	Delaware	No
44	UPS	Delaware	No
45	PepsiCo	North Carolina	No
46	Intel	Delaware	No
47	DowDuPont	Delaware	No
48	Archer Daniels Midland	Delaware	No
49	Aetna	Pennsylvania	No
50	FedEx	Delaware	No

Table 2: List of Top 50 Corporations Showing Board Access to Officers/Employees under Corporate Governance Guidelines

Fortune 500 Rank	Name of Corporation	Type of Board Interaction with Officers?
1	Walmart	Have "access"
2	Exxon Mobil	Have "access;" "expectation" of frequent meetings (formal and informal)
3	Berkshire Hathaway	Have "access"
4	Apple	Communication is "encouraged"
5	UnitedHealth Group	Have "access"
6	McKesson	Have "access"
7	CVS Health	Have "access"
8	Amazon.com	No provision
9	AT&T	Have "access;" "expectation" of frequent meetings (formal and informal)
10	General Motors	Have "access;" "expectation" of frequent meetings (formal and informal)
11	Ford Motor	Have "access"
12	AmerisourceBergen	Communication is "encouraged;" management "will make an effort" to provide opportunities for communication
13	Chevron	Communication is "encouraged;" directors are "provided opportunities" for communication
14	Cardinal Health	Have "access"
15	Costco	Have "access"
16	Verizon	Have "access"
17	Kroger	Have "access"
18	General Electric	Communication is "encouraged;" directors are "expected" to make two trips to GE each year to facilitate contact
19	Walgreens Boots Alliance	Have "access"
20	JPMorgan Chase	Have "access"
21	Fannie Mae	Officers are "available"
22	Alphabet	Have "access"
23	Home Depot	Have "access"
24	Bank of America Corp.	Have "access"
25	Express Scripts Holding	Have "access"
26	Wells Fargo	Have "access;" management is "expected" to update the Board on significant matters between board meetings
27	Boeing	Have "access"
28	Phillips 66	Have "access"
29	Anthem	Have "access;" "encouraged" to visit operations
30	Microsoft	Have "access"
31	Valero Energy	Have "access"
32	Citigroup	Have "access"
33	Comcast	Have "access"
34	IBM	Have "access"
35	Dell Technologies	Have "access"
36	State Farm Insurance Cos.	N/A
37	Johnson & Johnson	Have "access"
38	Freddie Mac	Have "access;" communication "encouraged"

39	Target	Have "access;" "expected" to visit retail operations
40	Lowe's	Have "access;" "encouraged" to make contact
41	Marathon Petroleum	Have "access"
42	Procter & Gamble	Have "access;" the company "will, on a regular basis, provide specific opportunities for this type of interaction"
43	MetLife	Have "access"
44	UPS	Have "access"
45	PepsiCo	"Expected" to be "highly interactive" with senior officers
47	DowDuPont	Have "access;" "encouraged" to visit facilities
48	Archer Daniels Midland	Have "access"
49	Aetna	Have "access"
50	FedEx	Have "access"

[i] WALGREENS BOOTS ALL., INC., *supra* note 204, at art. V § 5.5 ("The [CEO] shall submit to the Board of Directors, prior to the date of the annual meeting of stockholders, an annual report of the operations of the corporation and its subsidiaries, including a balance sheet showing the financial condition of the corporation and its subsidiaries consolidated as at the close of such fiscal year and statements of consolidated income and surplus.").

[ii] FED. NAT'L MORTG. ASSOC., *supra* note 204, at art. 5, § 5.06 ("The [CEO] . . . shall submit reports of the current operations of the corporation to the Board of Directors at regular meetings of the Board of Directors . . . .").

[iii] *See* WELLS FARGO & CO., *supra* note 201, at art. V, § 5.4 (providing that the CEO "shall be charged with the duty of causing to be presented to the Board full information regarding the conditions and operations of the Company, as well as matters of a policy nature concerning the affairs of the Company and information requisite to enable the Board in the discharge of its responsibilities to exercise judgment and take action upon all matters requiring its consideration").

[iv] *See* ANTHEM INC., *supra* note 204, at art. III, § 3.3 (providing that the CEO "shall study and make reports and recommendations to the Board of Directors with respect to major activities of the Corporation and shall see that the established policies are placed into effect and carried out").

[v] *See* VALERO ENERGY CORP., *supra* note 201, at art. V, § 7 ("The Chief Executive Officer shall formulate and submit to the Board of Directors matters of general policy for the Corporation; he shall keep the Board of Directors fully informed and shall consult with them concerning the business of the Corporation.").

[vi] *See* CITIGROUP INC., *supra* note 204, at art. XI, § 2 ("The Chief Executive Officer . . . shall submit reports of the current operations of the Company to the Board of Directors at regular meetings of the Board, and annual reports to the stockholders.").

[vii] *See Code of Regulations*, *supra* note 204, at art. V, § 2 ("[The Chief Executive Officer] shall make periodic reports to the Board of Directors, making such recommendations as he thinks proper, and shall bring before the Board of Directors such information as may be required relating to the Company's business and affairs.").