THE U.S. OFFICE OF CORPORATE ETHICS: ENHANCING OFFICER AND DIRECTOR ACCOUNTABILITY IN PUBLICLY HELD CORPORATIONS

Stephen Shrewsbury* and Justin Blount*

* Stephen Shrewsbury is an Assistant Professor of Business Law in the Rusche College of Business at Stephen F. Austin State University in Nacogdoches, Texas. B.S. in Aviation Management, Metropolitan State University; M.S. Management, Florida State University, J.D. University of Utah College of Law.

* Justin Blount is an Associate Professor of Business Law in the Rusche College of Business at Stephen F. Austin State University in Nacogdoches, Texas. B.B.A. in Finance, Southwestern Oklahoma State University; J.D., Baylor Law School; M.B.A., The University of Texas at Austin.

INTRODUCTION

A perennial topic in corporate governance literature is the accountability of officers and directors for their management of the publicly held corporation. Despite decades of debate concerning best approaches to preventing unethical behavior by corporate officers[1] or proposals for options to improve corporate governance,[2] wrongdoing within corporations continues unabated. Examples abound, which cut across industries, involving nearly every aspect of corporate fiduciary duties.[3] Investigations of sexual harassment at Uber,[4] insider trading at Equifax,[5] fraudulent

1. *See, e.g.*, Andrew Stark, *What's the Matter with Business Ethics*, HARV. BUS. REV., May–Jun. 1993, https://hbr.org/1993/05/whats-the-matter-with-business-ethics [https://perma.cc/7GZM-KJ4A] (stating that the work of business ethicists suffers from being too general, too theoretical, and too impractical); *see also* Lynn S. Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, https://hbr.org/1994/03/managing-for-organizational-integrity [https://perma.cc/ZAT8-NAN8] (highlighting the difficulty of ensuring proper corporate governance).

2. *See, e.g.*, Joel F. Henning, *Federal Corporate Chartering for Big Business: An Idea Whose Time Has Come*, 21 DEPAUL L. REV. 915, 918 (1972) (arguing for consideration of a federal charter requirement for the big corporations to better control corporate power and enhance accountability); *see also* Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 116–19 (1999) (arguing that while requiring disclosure is important for investor protection, it is more important for corporate governance as related to shareholder voting and enforcement of managers' fiduciary duties).

3. *See Fiduciary Duty*, BLACK'S LAW DICTIONARY (6th ed. 1991) (defining a fiduciary duty as "a duty to act for someone else's benefit, while subordinating one's personal interest to that of the other person); *see also* Adam Barone, *What Are Some Examples of Fiduciary Duty?*, INVESTOPEDIA (May 4, 2019) https://www.investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp [https://perma.cc/5T64-RQEU] (defining fiduciary duty as "a legal term describing the relationship between two parties that obligates one to act solely in the interest of the other"). Some fiduciary duties typically include the duties of care, loyalty, good faith, and disclosure. *Fiduciary Duty*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/fiduciary_duty [https://perma.cc/L7XL-ZNCU] (last visited June 9, 2019).

4. *Uber to pay $1.9M for sexual harassment claims*, BBC NEWS (Aug. 22, 2018), https://www.bbc.com/news/business-45266954 [https://perma.cc/H7RZ-SJRL].

5. *See* Liz Moyer, *Former Equifax executive charged with insider trading for dumping nearly $1 million in stock ahead of data breach*, CNBC (Mar. 14, 2018), https://www.cnbc.com/2018/03/14/former-equifax-executive-charged-with-insider-trading-ahead-of-data-breach.html [https://perma.cc/RBL7-AWD9] (discussing internal failures of corporate governance in Equifax resulting in the inability to detect insider trading); Tara Siegel Bernard, *Another Equifax Employee Faces Charge of Insider Trading After Big Breach*, NY TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/business/equifax-insider-trading-sec.html [https://perma.cc/WK2F-YLR6] (illustrating the continued prevalence of internal issues in Equifax concerning insider trading).

customer accounts at Wells Fargo,[6] misuse of customer data by Facebook,[7] price collusion for generic drugs,[8] banking fraud at Goldman Sachs,[9] and emissions cheating by Volkswagen[10] are but a few examples.

Historically, there have been two traditional approaches to organizational integrity.[11] The first is the use of compliance-based ethics programs designed to deter and prevent legal violations.[12] These include, for example, existing compliance systems based on corporate criminal law, the transparency and certification requirements of Sarbanes-Oxley, or other statutory-based requirements.[13] Another primary mechanism for compliance accountability is the enforcement of fiduciary duties through shareholder derivative litigation.[14] However, in the United States it is extraordinarily difficult for shareholders to enforce fiduciary duties such that it is widely understood that they do not serve as a strong restraint on corporate malfeasance.[15] To remedy this perceived problem, the corporate governance

6. Ben Lane, *Court approves Wells Fargo's $480 million settlement for allegedly lying about fake accounts*, HOUSINGWIRE (Dec. 19, 2018), https://www.housingwire.com/articles/47757-court-approves-wells-fargos-480-million-settlement-for-allegedly-lying-about-fake-accounts [https://perma.cc/74HM-XHYB].

7. Mark Snider, *Facebook CEO Mark Zuckerberg: 'My mistake' for abuse of voter info*, USA TODAY (Apr. 9, 2018), https://www.usatoday.com/story/tech/news/2018/04/09/facebook-continues-data-misuse-investigation-suspends-two-more-firms/498266002/ [https://perma.cc/RB26-3P33].

8. Mark Terry, *At Least 16 Generic Drug Companies And 300 Drugs Target of Price-Fixing Investigation*, BIOSPACE (Dec. 10, 2018), https://www.biospace.com/article/at-least-16-generic-drug-companies-and-300-drugs-target-of-price-fixing-investigation/ [https://perma.cc/DK2P-WSCE].

9. Roomy Khan, *Goldman Sachs An Unwitting Villain? 1MDB and Rogues: It Takes More Than One To Tango*, FORBES (Jan. 23, 2019), https://www.forbes.com/sites/roomykhan/2019/01/23/goldman-sachs-an-unwitting-villain-1mdb-and-rogues-it-takes-more-than-one-to-tango/#42d90a141343 [https://perma.cc/64TC-NWQ6].

10. Hiroko Tabuchi, Jack Ewing, and Matt Apuzzo, *Six Volkswagen Executives Charged as Company Pleads Guilty in Emissions Case*, NY TIMES (Jan. 11, 2017), https://www.nytimes.com/2017/01/11/business/volkswagen-diesel-vw-settlement-charges-criminal.html [https://perma.cc/LV9W-XMYW].

11. Lynn S. Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, https://hbr.org/1994/03/managing-for-organizational-integrity [https://perma.cc/ZAT8-NAN8].

12. *Id*.

13. *See* discussion *infra* Section I(A).

14. *See* George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 268–71 (2014) (discussing how the shareholder derivative lawsuit operates as corporate governance mechanism).

15. *See, e.g.*, Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 240 (2009) (referring to corporate fiduciary duties as "little more than a fiction" such that "the relationship among corporate officers, directors, and the firm should no longer be characterized as a fiduciary one").

literature is replete with proposals for how accountability of officers and directors can be enhanced through modifications to shareholder derivative litigation mechanisms.[16]

The second traditional approach to organizational integrity is referred to as an integrity-based system,[17] also commonly known as values-based ethics.[18] Aside from the above-noted compliance-based mechanisms, many corporations have also sought to instill ethics compliance cultures within their organizations through self-regulation.[19] These types of programs have ballooned since the U.S. Federal Sentencing Guidelines were amended in 1991.[20] These guidelines provide for a mitigation of criminal penalties if a corporation has adopted and implemented an effective ethics and compliance program.[21] Because of this substantial incentive, surveys have found that most companies, particularly large ones, have a compliance program led by a Chief Compliance Officer.[22]

Yet, despite compliance and ethics-based efforts, the current mix of self-regulation and existing compliance requirements does not appear to be effective in achieving its goals. The sheer number of ethics violations by

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16. *See, e.g.*, Megan Shaner, *The (Un)Enforcement of Corporate Officer Duties*, 48 U.C. DAVIS L. REV. 271, 321 (2014) (proposing reforms to shareholder derivative litigation to enhance their enforcement); *see also* John Matheson, *Restoring the Promise of the Shareholder Derivative Suit*, 50 GA. L. REV. 327, 388 (2016) (proposing a federal statute that provides uniform standards regarding shareholder derivative litigation to make such litigation more effective).

17. Paine, *supra* note 11.

18. *See* Linda K. Treviño, Gary R. Weaver, David G. Gibson & Barbara L. Toffler, *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 131–151 (1999), https://doi.org/10.2307/41165990 [https://perma.cc/6JPU-G47R].

19. *See, e.g.*, *Compliance and Ethics at Microsoft*, MICROSOFT, https://www.microsoft.com/en-us/legal/compliance/default.aspx [https://perma.cc/M2H6-N9MZ] (last visited Jan. 1, 2020) (describing Microsoft's Compliance and Ethics Program, including standards and reporting procedures); *Code of Conduct Handbook*, FORD MOTOR COMPANY, https://corporate.ford.com/content/dam/corporate/en/company/corporate-governance/COC-Handbook_Public-Vsn_CURRENT_english_11082017.pdf [https://perma.cc/R2VB-ZCB5] (last visited Jan. 1, 2020) (setting forth Ford Motor Company's corporate policies and procedures related to ethics and compliance); *The Spirit & The Letter*, GENERAL ELECTRIC, https://www.ge.com/in/sites/www.ge.com.in/files/TheSpirit&TheLetter.pdf [https://perma.cc/F24G-NVFG] (last visited Jan. 1, 2020) (setting out GE's code of conduct, including procedures related to ethics and compliance).

20. *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2083–88 (2016) (discussing the impact of the Organization Sentencing Guidelines on corporate compliance).

21. *Id.*

22. *Id.* at 2102 (citing a Price Waterhouse Coopers's survey finding that while 69% of the respondents had a Chief Compliance Officer, this number increased to 88% for large companies and 86% for companies in highly regulated industries).

corporations remains high and Americans' confidence in big business remains low. It continues to flat-line at around twenty percent, dropping from twenty-eight percent in 1997.[23] Moreover, big business is the fourth least-trusted major institution in the U.S. according to a 2018 survey.[24] Put simply, existing mechanisms are not working effectively.

This article seeks to add to the literature in this area by proposing an entirely different mechanism for officer and director accountability. We argue that given the realities of the modern public corporation, current corporate governance, ethics, and compliance mechanisms are inadequate. Thus, we propose that the solution to enhancing officer and director accountability requires re-conceptualizing the accountability mechanism itself. We propose that ethical corporate management could be better achieved through a federal Office of Corporate Ethics, similar to the Office of Government Ethics, with the power to set corporate governance and ethics standards for officers and directors of publicly held companies and enforce them via corrective and disciplinary actions, including fines and injunctions. The structure of this proposed office is based upon characteristics of professional oversight boards used to oversee learned professions as well as the Office of Government Ethics that sets standards for government employees. We argue that such an office would provide enhanced accountability to officers and directors by treating them as quasi-professionals who are accountable not just to shareholders, but to other stakeholders and society as a whole, to manage publicly held corporations competently and ethically.

Section I discusses existing accountability mechanisms for corporate officers and directors and analyzes why they are inadequate given the realities of the modern publicly held corporation. Section II discusses the idea of treating the corporate manager as a professional with duties to society as a whole, similar to doctors, lawyers, and other learned professions. Section III describes the U.S. Office of Government Ethics as a model for ethics compliance in large organizations, discussing the similarity between ethical issues facing both executive branch employees and corporate officers, and focusing on its monitoring, training, and personal accountability

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23. *See* Frank Newport, *Business Gets Bigger Even as Americans Prefer Small*, GALLUP (Aug. 22, 2017), https://news.gallup.com/opinion/polling-matters/216674/business-gets-bigger-even-americans-prefer-small.aspx [https://perma.cc/B54V-X6NH] (noting that in 2017, 36% of Americans have "very little" confidence in big businesses but 70% have positive confidence in small business).

24. *See* Niall McCarthy, *The Institutions Americans Trust Most and Least in 2018*, FORBES (June 29, 2018), https://www.forbes.com/sites/niallmccarthy/2018/06/29/the-institutions-americans-trust-most-and-least-in-2018-infographic/#f7822762fc88 [https://perma.cc/RC9M-WFYN].

functions. Section IV provides our proposal for an Office of Corporate Ethics that we believe addresses existing shortcomings and provides enhanced accountability for officers and directors in a reasonable manner.

I. MANAGERIAL ACCOUNTABILITY IN THE MODERN PUBLICLY HELD CORPORATION

In the United States, managers[25] of publicly held corporations face accountability for their managerial decisions at both the federal and state levels.[26] Incorporators can choose to form a corporation in any state they wish.[27] The corporate law of the state of incorporation regulates internal corporate matters, including the scope of fiduciary duties owed to shareholders.[28] While there is little actual benefit to incorporating in Delaware, Delaware continues to be the dominant state of incorporation, largely for historical reasons.[29] At the federal level, corporate governance *per se* is not regulated, however many corporate governance-type issues are tangentially regulated through the application of the federal securities laws.[30] This section will discuss how corporate governance and ethics is regulated at both of these levels and how true managerial accountability at each level is lacking.

A. Corporate Governance and Ethics under Federal Law

With respect to publicly held corporations, the primary focus of federal law is to regulate securities markets to protect investors and ensure the

25. In the context of this article we refer to the word "manager" loosely to include either officers or directors when engaged in managerial decision making regarding corporate affairs.

26. *See* Arthur R. Pinto, *An Overview of United States Corporate Governance in Publicly Traded Corporations*, 58 AM. J. COMP. L. 257, 261–62 (2010) (describing the federalist nature of corporate governance in the United States).

27. *Id.* at 262.

28. *Id.*

29. *Id.*; *see also* Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1052 (2015) (empirically researching the value added by Delaware's corporate law and determining that it has little effect on shareholder value, and that Delaware's dominance in corporate law is largely based upon "lawyers' default decision making based upon Delaware's past preeminence").

30. *See* Pinto, *supra* note 26, at 263–64 (discussing federal securities laws); *see also* Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 861 (2003) (empirically demonstrating how most corporate governance regulation of the modern publicly held corporation takes place through application of the federal securities laws).

functioning of capital markets.[31] While there are numerous federal laws that impact publicly held corporations, the primary direct regulatory apparatus is the 1933 Securities Act ("Securities Act") and the 1934 Exchange Act ("Exchange Act"), which include various registration, anti-bribery, and accounting provisions.[32] These laws, administered by the Securities and Exchange Commission ("SEC"), primarily regulate securities markets through a system of mandatory disclosure of information to investors and anti-fraud provisions.[33] The disclosure requirements of the federal securities laws require publicly traded companies to provide public disclosure of material information to investors on a continuous basis.[34] This includes not only the required annual and quarterly reports, but more immediate disclosure of certain types of information when it occurs within these periodic reporting periods.[35] While there are other anti-fraud statutes and regulations in the securities laws, the primary, and most frequently used, anti-fraud provision is Rule 10b-5.[36] Rule 10b-5 provides a broad cause of action that applies to "any person" who engages in fraud or makes any untrue statement or omission of a material fact in connection with the purchase or sale of a security.[37] This anti-fraud provision has been interpreted broadly and can create immense liability for corporate officers or directors who make a misleading or fraudulent statement regarding, or fail to disclose material information related to, their company's securities.[38]

At first blush these disclosure and anti-fraud requirements seem to have little to do with corporate governance or ethics. They do not address ethical corporate decision making and governance directly, other than to require the disclosure of material, relevant information to the markets and not engage in fraud. However, due to their broad use by the SEC, the Department of Justice ("DOJ"), and private litigants, federal securities laws occupy an important role in constraining officers and directors from unethical behavior in the modern publicly held corporation.[39] Additionally, in the wake of various

31. *See About the SEC*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about.shtml [https://perma.cc/PYT2-W872] ("The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.").

32. Pinto, *supra* note 26, at 263.

33. Pinto, *supra* note 26, at 263.

34. *See* 17 C.F.R. §§ 240.15d-1, 240.15d-13, and 240.15d-11 (setting forth disclosure requirements for filing annual reports, quarterly reports on Form 10-Q, and current reports on Form 8-K, respectively).

35. *Id.*

36. *See* 17 C.F.R. § 240.10b-5.

37. *Id.*

38. *See* Thompson & Sale, *supra* note 30, at 882–84 (discussing the breadth of 10b-5 liability and its use as a corporate governance mechanism).

39. *See* Thompson & Sale, *supra* note 30, at 882–84.

financial crises and corporate scandals, federal securities laws have been expanded to encroach upon areas of corporate governance and ethics traditionally reserved for state regulation.[40]

1. SEC Civil Enforcement of Securities Laws

Under the Exchange Act, the SEC has the authority to seek both civil monetary penalties as well as injunctive relief for violations of securities laws and regulations.[41] With a few exceptions, the SEC can use this enforcement authority through filing an action in a federal district court or through an administrative proceeding.[42] This enforcement authority gives the SEC significant power to regulate corporate misconduct; however, this power is limited by the scope of federal securities laws as well as the resources of the SEC.

The most recent Annual Report of the SEC's Division of Enforcement (for Fiscal Year 2018) discloses that the SEC brought 490 "stand alone" and 210 "follow on" enforcement actions.[43] When the type of actions brought is considered, this report shows the value of the SEC aggressively enforcing violations of the securities laws but also illustrates the shortcomings of the securities laws as a mechanism for regulating corporate ethics.

According to this report, the most common action brought by the SEC in FY 2018 related to securities offerings violations (25% of enforcement actions).[44] These actions involve violations of the law in the offering of a security, including fraudulent securities offerings and failure to register the offering or comply with an exemption.[45] Examples of these types of actions given in this annual report include actions against issuers engaging in Ponzi

40. *See, e.g.*, Roberta A. Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005) (discussing the Sarbanes-Oxley Act and how it injected corporate governance into the securities laws); *see also* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1782–83 (2011) (discussing the passage of the Dodd-Frank Act).

41. *See* Steve Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 COLUM. BUS. L. REV. 1, 10 (2014) (discussing the civil enforcement options of the SEC for enforcing the Exchange Act and rules passed thereunder).

42. *Id.*

43. U.S. SEC. AND EXCH. COMM'N, DIV. OF ENF'T ANNUAL REPORT (2018), at 9, available at https://www.sec.gov/files/enforcement-annual-report-2018.pdf [https://perma.cc/KJ23-RBDV] (stating that "stand alone" actions are original actions brought by the SEC for violations of the securities laws, while "follow-on" actions seek bars based upon previous Commission actions or actions by other criminal authorities or regulatory authorities).

44. *Id.* at 10.

45. *Id.*

schemes and selling otherwise worthless or fraudulent investments.[46] While some of the actions brought within this category may be tangentially related to corporate governance and ethical decision-making issues, most are related to basic fraud or other legal violations in the offering of investments.[47] The second most common type of action related to investment advisor/investment company violations (22% of enforcement actions).[48] Another 13% of enforcement actions relate to broker-dealer misconduct.[49] This means that 60% of the enforcement actions brought by the SEC were either unrelated, or only tangentially related, to issues of ethics and corporate governance in the ongoing management of a publicly traded company.[50]

To be sure, the SEC does take enforcement actions related to corporate governance and ethics issues. For example, in 2018 the SEC instituted administrative proceedings against Panasonic Corporation for a years-long bribery scandal related to government aviation contracts in the Middle East.[51] Panasonic entered into an offer of settlement with the SEC consenting to the entry of an order finding violations of the Foreign Corrupt Practices Act, various accounting and reporting violations, and violations of Rule 10b-5.[52] Panasonic agreed to pay a fine of $143,199,018.93 and received a deferred prosecution agreement from the Department of Justice for any criminal violations.[53] This case serves as an example of how the SEC can use its enforcement powers to address quintessential corporate ethical misconduct. Another common example of such enforcement is actions brought related to insider trading, an issue of ethics involving breach of the duty of loyalty and exploitation of shareholders.[54] However, given the mission of the SEC and its limited resources, these types of actions represent a minority of the SEC's enforcement efforts.[55]

This is not a criticism of the SEC or a suggestion that it should focus its enforcement authority in any particular direction. Rather, we merely point out the fact that the primary focus of the SEC is protecting investors and ensuring that capital markets function properly and without fraud. This

46. *Id.* at 15.

47. *Id.*

48. *Id.* at 10.

49. *Id.*

50. *Id.*

51. Panasonic Corp., Exchange Act Release No. 3938, at 3–4 (Apr. 30, 2018), available at https://www.sec.gov/litigation/admin/2018/34-83128.pdf [https://perma.cc/DR3H-82VX].

52. *Id.* at 12.

53. *Id.*

54. *See* U.S. SEC. AND EXCH. COMM'N, *supra* note 43, at 10 (noting that 10% of the enforcement actions brought by the SEC relate to insider trading).

55. *See supra* notes 43–50 and accompanying text.

primary function may at times overlap with issues of corporate ethics. However, any enforcement actions that also implicate managerial ethics issues are ancillary to this primary goal. Furthermore, certain corporate ethics issues, such as the pervasive sexual harassment alleged against executives of Uber,[56] fall almost entirely outside the purview of the SEC. To expect more of the SEC in the area of ethics is arguably unreasonable given the scope of important securities markets issues it is charged with regulating and the limited tools at its disposal.

2. Private Securities Litigation

Private litigants can also sue for certain types of securities fraud, namely under Rule 10b-5.[57] As with SEC enforcement actions, private securities litigation can be used as a deterrent to certain types of unethical conduct or corporate mismanagement. However, private litigation has the same limitations as SEC enforcement actions – it only addresses conduct that fits within the strictures of the securities laws. While some corporate ethics issues will fall within the ambit of the securities fraud statutes, some will not.[58] Additionally, private securities litigation is limited by the same financial incentives behind all litigation – attorneys and plaintiffs will be drawn to cases that are the most likely to create a substantial financial windfall. This means that ethical misconduct that is not likely to result in a large verdict is unlikely to be policed by private litigation. It also means that the officers or directors that engaged in the conduct may not be held accountable in any way if the corporation simply pays a sufficient sum to settle the suit on their behalf. Additionally, misconduct or fraud that hurts certain stakeholders but is either not required to be disclosed or is accurately disclosed to the shareholders cannot be successfully litigated under Rule 10b-5.[59] Thus, while private securities litigation is a tool that can help deter some corporate malfeasance, just like the SEC's civil enforcement of

56. *Uber to pay $1.9M for sexual harassment claims*, *supra* note 4.

57. *See* Thompson & Sale, *supra* note 30, at 882–84 (discussing the breadth of 10b-5 liability and its use as a corporate governance mechanism).

58. *See supra* text accompanying note 56.

59. *See, e.g.*, *Uber to pay $1.9M for sexual harassment claims*, *supra* note 4. If the management of a company has developed a culture of sexual harassment or otherwise of treating employees in an unlawful or unethical way, as long as that conduct is either not material and not required to be disclosed or is properly disclosed, no 10b-5 cause of action would be possible because no fraud on the securities markets or shareholders would have taken place. *See* Thompson & Sale, *supra* note 30, at 909 (noting "[i]f managers are truthful about their shortcomings, the securities laws presumably offer no protection for breaches of the duty of care, no matter how egregious").

securities laws, it is necessarily limited in its scope.[60]

3. Sarbanes-Oxley and Other Internal Governance Requirements

There has always been a tension between federal securities regulation and state regulation of the internal affairs of the corporation.[61] In theory, the federal securities laws regulate securities markets and transactions, but internal corporate affairs are left to the states to regulate through their respective corporate statutes.[62] However, since the early 2000s various corporate scandals have led both the SEC and stock exchanges to impose requirements that move federal regulation more directly into these corporate governance matters traditionally reserved for the states.[63] The most oft-cited federal laws in this regard are the Sarbanes-Oxley Act ("SOX") and the Dodd-Frank Act ("Dodd-Frank").[64]

Passed in the wake of the Enron and WorldCom corporate scandals, SOX imposed new corporate governance-like requirements on publicly traded companies.[65] Broadly, these requirements mandate an audit committee of independent directors; prohibit accounting firms from providing non-audit services to companies they audit; prohibit companies from extending loans to their executive officers and directors; require that a company disclose whether or not it has adopted a code of ethics, and if not, why not; and require executive certification of financial statements, including a requirement that an external auditor assesses the internal controls of the company.[66] The most contentious section of SOX has been the requirement of the audit of internal controls, as many critics have asserted that it creates an undue expense for publicly traded companies without

60. *See* Thompson & Sale, *supra* note 30, at 909 (discussing how 10b-5 liability only addresses disclosure under the securities laws, and not the wrong conduct itself, noting "disclosure is, at best, a monitor of what managers say, not what they do. The two may be linked only at the margin.").

61. *See* Z. Jill Barclift, *Codes of Ethics and State Fiduciary Duties: Where is the Line?*, 1 J. BUS. ENTREPRENEURSHIP & L. 237, 238 (2008) (noting the "history of discord" between federal securities laws and the duties of managers under state fiduciary principles).

62. *Id.*

63. *Id.* at 238 (discussing the disclosure, certification, and codes of ethics requirements of Sarbanes-Oxley and how they "further the tension between federal securities, and state corporate law.").

64. *See* Romano, *supra* note 40.

65. Romano, *supra* note 40.

66. *Id.* at 1529–40 (discussing the substantive requirements of SOX); *see also* 17 C.F.R. § 229.406 (2019) (setting forth regulation carrying out the SOX requirement of disclosure regarding a code of ethics).

commensurate benefit.[67] Overall, SOX has been heavily criticized as an ineffective, unnecessary burden on publicly traded companies as well as an infringement on state regulation of internal corporate matters.[68]

Following the sub-prime lending crisis, the federal securities laws were further extended into traditional corporate governance issues with the passage of Dodd-Frank.[69] Dodd-Frank was a voluminous piece of legislation addressing a myriad of issues, with some provisions relating to corporate governance and ethics issues, including:

1. A "say on pay" vote requiring non-binding shareholder advisory votes on executive compensation;
2. Independent compensation committees on boards of directors;
3. Additional disclosure requirements related to executive compensation;
4. Expansion of clawbacks of executive compensation when certain securities laws are violated;
5. A requirement that the SEC create new shareholder access and proxy rules;
6. Disclosure requirements regarding the CEO serving as the chairman of the board.[70]

One commentator has referred to the disclosure provisions as "therapeutic disclosures," as they are not designed simply to inform investors but to use the shame of the disclosure to shape corporate conduct.[71] For example, the added disclosures related to executive compensation require the company to disclose a comparison of the CEO's compensation to the median compensation of all other employees.[72] The clear goal of such a provision is to force the disclosing company to highlight how much more the CEO makes than "normal" employees and to cause embarrassment if this ratio is extraordinarily high. However, Dodd-Frank does not create any type of

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67. *See* Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404*, 29 CARDOZO L. REV. 703, 703–04 (2007) (discussing the controversy and criticism surrounding the SOX 404 audit requirement).

68. *See, e.g.*, Roberta A. Romano, *Does the Sarbanes Oxley Act Have a Future?*, 26 YALE J. REG. 229, 243–54 (2009) (arguing that SOX has had an adverse impact on capital formation in the United States); *see also* Stanley B. Block, *The Latest Movement to Going Private: An Empirical Study*, 14 J. APPLIED FIN. 36, 37 (2004) (discussing an increase in companies going private and arguing the most frequently cited reason for the decision was SOX compliance costs).

69. *See* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1782–83 (2011) (discussing the passage of the Dodd-Frank Act).

70. *Id.* at 1783.

71. *Id.* at 1797.

72. *Id.*

standard for "excessive" compensation or any penalty related thereto.[73] It simply requires the disclosure. The same is true for the disclosure related to whether or not the CEO also serves as the chairman of the board of directors.[74]

Some of the requirements of Dodd-Frank are more substantive. Pursuant to Dodd-Frank, the SEC has issued rules requiring the national securities exchanges to require the board of directors of listed companies to have a compensation committee composed of independent directors.[75] The goal of this requirement is to ensure that the directors who determine executive compensation are free from conflicts of interest.[76] Dodd-Frank also provides for an enhanced scope of clawbacks of executive compensation if financials are reported incorrectly and requires reporting companies to have a non-binding advisory vote from shareholders on executive pay at least every three years.[77]

The basic premise of these pay requirements is that managers have too much control over the boards of directors who are supposed to oversee them and that this has resulted in pay that is not adequately tied to actual performance.[78] The actual effect that these requirements will have on executive compensation, and indeed whether "excessive" executive compensation is even a problem, has been debated by scholars.[79] What is not up for debate is that the SEC's role in traditional corporate governance and ethics matters has been expanded in recent years. These expansions invariably occur in response to corporate scandals with large economic impacts that ultimately spring from issues of unethical and dishonest behavior by executives and directors of publicly traded companies. However, they tend to not address the core issues of ethical behavior, but rather just address issues related to the scandal that occurred, and in arguably superficial ways.

73. *Id.*

74. *Id.* at 1798.

75. 17 C.F.R. § 240.10C-1(a)–(b) (2019).

76. *See* Bainbridge, *supra* note 40, at 1805.

77. Bainbridge, *supra* note 40, at 1806–07.

78. Bainbridge, *supra* note 40, at 1809.

79. Bainbridge, *supra* note 40, 1808–09 (discussing the debate on executive compensation and noting "the literature on this topic is immense."); *see also* Bernice Grant, *Independent Yet Captured: Compensation Committee Independence after Dodd-Frank*, 65 HASTINGS L.J. 761, 765–770 (2014) (discussing the scholarly debate regarding executive compensation).

4. Criminal Enforcement

The federal securities laws create criminal liability in addition to the civil liability previously discussed.[80] While the SEC enforces the civil provisions of the securities laws, the DOJ prosecutes criminal violations.[81] Violations of Rule 10b-5 fall within the scope of this criminal liability and carry a potential sentence for natural persons of a fine not exceeding $5,000,000 and a prison sentence not exceeding twenty years.[82] The DOJ enforces the criminal provisions of the SEC, as well as other economic and corporate crimes, through its Fraud Unit.[83] The Fraud Unit has sub-units related to the enforcement of the Foreign Corrupt Practices Act ("FCPA"), health care fraud, and securities and financial fraud.[84] Both the FCPA and securities and financial fraud units prosecute crimes which may be related to issues of corporate ethics and governance, as they bear on fraudulent actions taken by corporations and their management.[85]

Creating criminal liability for business decisions is understandably controversial. It is generally understood that there are certainly "business" actions that corporations or their agents can take that should be criminalized.[86] Blatant financial fraud, such as the Ponzi scheme conducted by Bernie Madoff, certainly falls into this category, and few would argue that such actions should not be criminal.[87] However, it is also generally understood that there is a risk of over-criminalizing business conduct that could be better regulated either through private litigation or civil enforcement.[88] Business requires risk-taking, and criminalizing business

80. *See* Thel, *supra* note 41, at 6 (discussing the criminal provisions of the Exchange Act).

81. Thel, *supra* note 41, at 6.

82. 15 U.S.C. § 78ff(a) (2019).

83. *See* DEP'T OF JUSTICE, FRAUD UNIT ANNUAL REPORT (2018), at 2, https://www.justice.gov/criminal-fraud/file/1123566/download [https://perma.cc/82FG-8LD9] (noting that the Fraud Section "combats financial crime, foreign bribery offenses, and complex health care fraud schemes in federal courts and across the country").

84. *Id.*

85. *Id.*

86. *See* Ellen S. Podgor, *White Collar Crime and the Recession: Was the Chicken or the Egg First?*, 2010 U. CHI. LEGAL F. 205, 206 (2010) (discussing white collar crimes surrounding the 2008 financial crisis and noting the public acceptance of large criminal sentences for such conduct).

87. *See* Felicia Smith, *Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor*, 40 U. BALT. L. REV. 215, 221–31 (2010) (discussing the multi-billion-dollar Madoff Ponzi scheme, which resulted in a guilty plea by Madoff and a 150-year sentence).

88. *See, e.g.*, George J. Terwilliger, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417–18 (2007) (discussing the dangers and potential negative economic effects of over-

decisions that are not clearly fraudulent can have a chilling effect on this risk-taking that helps drive the economy.[89] The line between aggressive business decisions and wrongdoing is sometimes clear, but oftentimes is not, making decisions to criminally prosecute business conduct controversial and difficult.[90] Furthermore, determining mens rea when multiple agents of a corporation participate in decision making is notoriously difficult, and courts have not articulated a consistent standard, making corporate criminal prosecution challenging.[91] These competing tensions make criminal prosecution a relatively ineffective tool for addressing most corporate governance and ethics issues.

The threat of criminal prosecution primarily affects corporate governance and ethics through two mechanisms – the U.S. Sentencing Guidelines for Organizations (the "Guidelines") and the DOJ's use of deferred prosecution and non-prosecution agreements.[92] The Guidelines were adopted in 1991, and they allow corporations to have criminal penalties mitigated if they implement and maintain an effective corporate compliance program.[93] The Guidelines also provide guidance on what constitutes an effective compliance program.[94] While the Guidelines do not mandate that corporations adopt a corporate compliance program, they provide a powerful incentive to adopt such a program, and thus have a strong effect on the shape of corporate compliance mechanisms in publicly traded corporations.

The DOJ also influences corporate compliance through its preference for using agreements referred to as deferred prosecution agreements, non-prosecution agreements, or pre-trial diversion agreements ("PDAs") in lieu of criminal prosecution.[95] In a typical PDA, the corporation avoids

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criminalizing business).

89. *Id.*

90. *Id.* (discussing how the line between lawful pollution and criminal violations of environmental law can be "razor thin, often expressed in parts per million, and the stuff of great debate between experts and scientists") (footnote omitted); *see also* Kip Schlegel, David Eitle & Steven Gunker, *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 118 (2000–2001) (noting the controversy surrounding criminalizing white collar crime, including its moral ambiguity in the minds of many).

91. *See* Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773, 780 (2019) (noting that U.S. courts have "created a loose and highly controversial doctrine of entity liability that has bedeviled scholars and practitioners alike for over a century").

92. *See* Griffith, *supra* note 20, at 2083–85 (discussing the impact on corporate compliance of the Organization Sentencing Guidelines and the increasing use of agreements in lieu of prosecution).

93. Griffith, *supra* note 20, at 2084.

94. Griffith, *supra* note 20, at 2086.

95. *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation through*

prosecution and conviction by acknowledging facts that constituted a crime, agreeing to cooperate with an investigation, waiving the right to a trial, agreeing to certain penalties (typically monetary), and implementing (or modifying an existing) corporate compliance program to try to deter future misconduct.[96] On their face, PDAs are not inherently bad and have some notable upsides: the DOJ is able to essentially obtain an admission of guilt, a fine, and a promise to make efforts to deter future wrongdoing without the time and expense of a trial. Many times, the compliance undertaking requires ongoing monitoring or auditing by a third party, hopefully increasing the likelihood that the compliance efforts will be genuine and effective.[97] However, critics have noted significant problems with mandating corporate compliance through PDAs.[98]

One obvious limit of PDAs is that they only impose ex post compliance duties on a limited number of firms that have been found to be engaging in illegal behavior.[99] If the compliance mandates that are being made are effective in deterring illegal conduct, then arguably a better option would be to require the same (or similar) compliance undertakings for all publicly traded companies.[100] Of course, it could be that the compliance undertakings mandated in PDAs are effective, but sufficiently costly that they should only be imposed on firms that have engaged in a legal violation. But even if this is the case, the fact still remains that corporate compliance mandates through PDAs will only ever apply to a limited subset of companies.

This raises a second concern with the corporate compliance mandates in PDAs – it is not at all clear that they are in fact effective.[101] One inherent problem with corporate compliance in general is that there are no accepted

Nonprosecution, 84 U. CHI. L. REV. 323, 334 (2017) (noting how the use of PDAs has "become federal prosecutors' primary tool for imposing sanctions on publicly held firms for many important offenses") (internal citations omitted).

96. *Id.* at 334–35 (describing the usual PDA process and terms).

97. *Id.* at 337–38 (reviewing the terms of PDAs and noting that most PDAs require ongoing reporting to the government and/or an outside monitor or auditor).

98. *See, e.g.*, Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1114 (2016) (reviewing a book on corporate PDAs and noting its author found that PDAs are "inconsistent, uninformative, too short in duration, occasionally secret (or accompanied by side deals), and, in Garrett's opinion, collectively unsuccessful in deterring wrongdoing and holding corporate actors accountable for the harm that they have caused") (internal citations omitted).

99. *See* Arlen & Kahan, *supra* note 95, at 348 ("The primary distinguishing features of PDA policing mandates are that they impose duties only on firms with detected wrongdoing and do so in an ad hoc fashion.") (internal citations omitted).

100. Arlen & Kahan, *supra* note 95, at 348 ("Ex ante rules are presumably superior whenever it would be desirable to impose policing duties on a broader set of firms that includes firms without detected wrongdoing.").

101. *See* Griffith, *supra* note 20, at 2105–06 (discussing the general problem of determining the effectiveness of compliance programs).

metrics for determining whether a compliance program is actually working.[102] This problem is not unique to compliance mandates found in PDAs, but it is compounded by the fact that these mandates are the product of a criminal prosecutor's judgment.[103] Criminal prosecutors do not have any particular expertise in managing corporate compliance, and there is no reason to believe that they are the ideal authority to be guiding corporations in developing and implementing an effective corporate compliance program.[104] Additionally, the DOJ gives prosecutors little to no guidance on what compliance mandates should be included in a PDA, giving individual prosecutors significant discretion in their design.[105] This has led to criticisms that these compliance mandates are not only potentially ineffective, but are inconsistent across companies and oftentimes vague.[106]

This is not to say that criminal enforcement or PDAs mandating certain compliance programs are entirely ineffective and should be done away with. Such a conclusion is outside the scope of this article. The point is rather that their inherent shortcomings make them of limited usefulness in incentivizing general corporate managerial accountability and ethical management across a broad swath of publicly traded companies.

B. Corporate Governance and Ethics through State Corporate Law

At least in theory, most corporate governance issues in the United States are regulated at the state level. The existing structure of corporate governance in the United States is based upon the premise that the publicly held company fits the classic "Berle-Means" model.[107] This model assumes

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102. Griffith, *supra* note 20, at 2105 (discussing the difficulty in measuring compliance effectiveness and noting "[m]oreover, many compliance metrics track *activity* rather than *impact*, thereby demonstrating that compliance may be busy but not necessarily effective") (internal citation omitted).

103. *See* Arlen & Kahan, *supra* note 95, at 342–43 (noting that the DOJ does not supervise prosecutors on PDAs nor provide them with clear guidelines for their content, thus giving individual prosecutors enormous discretion on their terms).

104. *See* Griffith, *supra* note 20, at 2128 (noting that compliance officers are not sure what works in compliance, and that "[i]f compliance officers cannot answer these questions definitively, there are very good reasons to suppose that generalist prosecutors who are not embedded in the day-to-day operation of the subject firm cannot answer them either").

105. Arlen & Kahan, *supra* note 95, at 342–43.

106. Baer, *supra* note 98, at 1114; *see also* Griffith, *supra* note 20, at 2129 ("It is not surprising then that prosecutors' compliance demands are occasionally vague, requiring firms to conduct 'appropriate due diligence,' build 'effective compliance,' and periodically review compliance in light of current standards, all without supplying specific content.") (internal citations omitted).

107. *See* Matheson, *supra* note 16, at 329 (discussing a seminal article written by Adolph Berle and Gardiner Means identifying that the separation of ownership and control and the

that the corporation has numerous shareholders that own a stake in the corporation, officers and directors manage this corporation on behalf of these shareholders, and the goal of corporate law is to reduce the agency costs inherent in this structure.[108] These agency costs include managerial shirking, incompetence, and putting managers' own interests above those of the shareholders.[109] Since ownership of the publicly held company is typically diffusely held, the ability of the shareholders to oversee officers and directors via the shareholder vote is incredibly difficult, and thus other mechanisms of accountability to reduce these agency costs and police executive malfeasance are necessary.[110] Shareholders commonly use the shareholder derivative suit as a tool to attempt to enforce this accountability and reduce agency costs.[111] In a typical shareholder derivative suit, one or more shareholders sue one or more officers or directors on behalf of the company for breaching their fiduciary duties owed to the company.[112] Whether fiduciary duties enforced through shareholder derivative litigation are an effective tool to encourage good corporate governance and ethical behavior is a matter of much debate.

Scholars have extensively studied the effectiveness of shareholder derivative litigation as a corporate governance mechanism.[113] Most of this research has led to the conclusion that shareholder derivative suits are a very ineffective accountability mechanism.[114] This is largely due to procedural

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different interests of owners and managers as the primary problem of corporate governance in the publicly held corporation).

108. Matheson, *supra* note 16, at 329.

109. Matheson, *supra* note 16, at 329.

110. *See* Jill Fisch & Simone M. Sepe, *Shareholder Collaboration*, TEX. L. REV. (forthcoming 2019), https://scholarship.law.upenn.edu/faculty_scholarship/1996/?utm_source=scholarship.law.upenn.edu%2Ffaculty_scholarship%2F1996&utm_medium=PDF&utm_campaign=PDFCoverPages [https://perma.cc/F4XP-AADW] (noting that for much of corporate history, shareholders have been "dispersed and passive, with few mechanisms to overcome collective action problems").

111. *See* Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 53 (2011) (noting that shareholder derivative lawsuits are "among the most common type of private corporate fraud lawsuit" and that at times outnumber other types of shareholder litigation).

112. *See* Matheson, *supra* note 16, at 344 ("A derivative action allows shareholders to bring a suit against directors or officers in the name of the corporation itself. The shareholders seek to enforce a right of action belonging to the corporation, which it might have asserted, but did not.") (internal citations omitted).

113. *See, e.g.*, Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 J. L. ECON. & ORG. 55, 84 (1991) (conducting an empirical analysis of shareholder derivative suits and concluding that "[t]he data support the conclusion that shareholder litigation is a weak, if not ineffective, instrument of corporate governance").

114. *Id.*; *see also* Stephen J. Choi, Jessica Erickson & A.C. Pritchard, *Piling On? An Empirical Study of Parallel Derivative Suits*, 14 J. EMPIRICAL LEGAL STUD. 653, 654 (2017) (studying 264 shareholder derivative suits and shareholder class actions suits filed in parallel

requirements that make these lawsuits difficult to bring and the application of the business judgment rule.

While the exact procedure can vary by state, the basic procedural impediment is that shareholders are typically required to make a demand to the board of directors to file a shareholder derivative suit on the behalf of the company before it can be filed by a shareholder.[115] This requirement exists because the board of directors is the body who is actually charged with overseeing the management of the company on behalf of the shareholders, and thus has the right to decide whether it is in the best interest of the company to bring the lawsuit.[116] Upon receiving a demand from the shareholders, the board of directors is charged with conducting an investigation of the shareholders' claim and determining whether the corporation should pursue it.[117] Of course, typically one or more of the members of the board of directors is a party charged with breaching fiduciary duties owed to the company, so the board is essentially being asked to determine whether it should allow itself to be sued by the corporation.[118] This is a difficult hurdle to overcome, and in most jurisdictions the shareholders must either try to sue without making a demand and subsequently prove that demand would have been futile, or file the lawsuit after the board of directors has determined it is not in the best interests of the corporation to file it and convince the court that the board of directors' determination was incorrect.[119] Pursuing the latter course can be very difficult because of the substantial deference given to the board's conclusion, as long as the conclusion was made by disinterested directors.[120]

with securities fraud class actions and finding that they add little value to the already filed securities fraud class action suits); *see also* Erickson, *supra* note 111, at 92–98 (finding that lawsuits alleging corporate fraud tend to be filed in parallel and overlap, and that shareholder derivative suits do not appear to serve a substantial role in policing conduct not already covered by other corporate fraud actions).

115. *See* Matheson, *supra* note 16, at 357 (discussing the board demand requirement of shareholder derivative suits).

116. Matheson, *supra* note 16, at 357 ("Since a derivative suit is a claim on behalf of the corporation, it is a corporate asset and should be subject to the control and management of the board of directors.").

117. Matheson, *supra* note 16, at 358.

118. Matheson, *supra* note 16, at 358 ("In most derivative cases, the shareholder is seeking to hold some or all of the current board members liable for breach of their fiduciary duties. Since it is these very same people upon who the shareholder is supposed to make a demand, shareholders understandably can be reluctant to ask the directors to sue themselves.").

119. *Id.* at 360 (discussing the demand futility requirement); s*ee also, e.g.*, TEX. BUS. ORGS. CODE ANN. §§ 21.554, 21.558 (West 2019) (allowing disinterested directors or committees of directors to investigate derivative claims and require their dismissal upon the determination that bringing the suit is not in the best interest of the corporation).

120. *Id.* § 21.558(b) (placing the burden of proof on the plaintiff to prove that the

The second impediment has to do with the substantial deference given to managers and boards of directors in business decision-making through the "business judgment rule."[121] Shareholder derivative suits typically assert that one or more officers or directors have violated their fiduciary duty of care. This fiduciary duty is often articulated as the "amount of care which ordinarily careful and prudent men would use in similar circumstances."[122] However, when evaluating claims for breach of this duty courts apply the business judgment rule, which creates a presumption that the directors and officers "acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company."[123] Thus, absent some showing of gross misconduct or fraud, the business judgment rule essentially insulates officers and directors from most fiduciary liability.[124] This presumption is so powerful one commentator has referred to it as an "abstention doctrine" by which the courts have decided they will abstain from questioning decisions made by officers and directors.[125]

There are certainly strong arguments for this rule to exist – business decision-making is incredibly difficult and entails a significant risk of failure.[126] Thus, if officers and directors were held liable as fiduciaries for simply making bad decisions, then very few individuals would want to manage corporations or would at least be very risk averse in their decision-making.[127] Additionally, there is no reason to believe that courts or

determination of the disinterested directors was either not in good faith or was not based upon a reasonable inquiry).

121. *See* David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 527 (2011) ("Under the business judgment rule, courts will not second-guess decisions—including decisions that appear to benefit nonshareholders at the expense of shareholders—as long as management can assert some plausible connection with the corporation's long-run best interests.").

122. *See, e.g.*, Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963).

123. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

124. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 128 (2004) ("The court beings with a presumption against review. It then reviews the facts to determine not the quality of the decision, but rather whether the decision-making process was tainted by self-dealing and the like. The requisite questions to be asked are more objective and straightforward: Did the board commit fraud? Did the board commit an illegal act? Did the board self-deal? Whether or not the board exercised reasonable care is irrelevant, as well it should be.").

125. *Id.* (referring to the business judgment rule as a doctrine of abstention and noting "[t]he business judgment rule thus builds a prophylactic barrier by which courts pre-commit to resisting the temptation to review the merits of the board's decision.").

126. *Id.* at 110–15 (discussing the significant risks that managerial decisions necessarily entail and how the business judgment rule gives room for risk-taking).

127. *Id.* at 109 (noting the tension between authority and accountability in board decision making and concluding, "Given the significant virtues of discretion, however, one must not

shareholders have expertise superior to directors such that they can better discern good decisions from bad, and a bad financial outcome does not necessarily mean that a bad decision was made.[128] Both legislatures and courts have determined that our economy is best suited by keeping courts out of the business of second-guessing business decisions, and this policy decision is likely a sound one.[129] Nevertheless, the result of this policy decision is that it is very difficult to successfully sue officers and directors for breach of fiduciary duty.

These impediments have led commentators to assert that fiduciary duties functionally do not exist in United States corporate law, nor do they serve an important role in policing misconduct.[130] Moreover, when shareholder derivative suits are filed against public companies, they tend to be filed in parallel with corporate fraud actions (such as securities fraud) which have already been filed.[131] Thus, shareholder derivative suits usually are not detecting and deterring any misconduct that is not already being

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lightly interfere with management or the board's decision-making authority in the name of accountability. Preservation of managerial discretion should always be the null hypothesis."); *see also* Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 250 (2009) ("Delaware courts do not want to discourage profitable risk-taking or keep worthy candidates from becoming corporate directors for fear that they will be personally bankrupted on account of business decisions that are deemed unsuccessful with the benefit of hindsight.").

128. *See* Bainbridge, *supra* note 124, at 119 (noting that one argument for the business judgment rule is that judges generally lack business expertise, or at least have less business expertise than directors or managers).

129. *See* David A. Wishnick, *Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark*, 121 YALE L.J. 2405, 2412 (2012) ("One of the deep principles animating Delaware corporate law is respect for private ordering."); *see also* Bainbridge, *supra* note 124, at 109 (noting the tension between authority and accountability in board decision making and concluding, "Given the significant virtues of discretion, however, one must not lightly interfere with management or the board's decision-making authority in the name of accountability. Preservation of managerial discretion should always be the null hypothesis.").

130. *See, e.g.*, Alces, *supra* note 127, at 281 ("Corporate governance relationships are no longer fiduciary. Delaware law has narrowed the scope of corporate fiduciary duties to the extent that they now only serve to address very specific and limited misbehavior by corporate officers and directors."); *see also* Erickson, *supra* note 111, at 91 ("When viewed through the lens of parallel litigation, shareholder derivative suits appear poised to play a meaningful role in deterring corporate directors, a role that other types of corporate litigation do not play. Yet the substantive law in shareholder derivative suits undercuts this deterrence function. Indeed, the substantive law may reinforce the idea that derivative suits are frivolous. It is extremely difficult for shareholders to allege a viable claim, so most claims inevitably fall short, which in turn bolsters the belief that these suits lack merit.").

131. Erickson, *supra* note 111, at 88 ("It is far more typical for corporate malfeasance to spark numerous parallel lawsuits, of which the shareholder derivative suit is typically the least successful.").

litigated through other means.[132] Furthermore, because of the procedural and substantive law issues noted above, shareholder derivative suits are less likely to be successful in holding the defendants accountable for the alleged misconduct.[133] Thus, the end result is that shareholder derivative suits tend to be nothing more than a method to over-litigate fraudulent conduct that is already being more effectively regulated through other legal mechanisms, such as securities fraud actions.[134]

C. Conclusion

Ultimately, the current corporate law landscape is a patchwork that tends to over-litigate certain types of fraudulent and unethical conduct (such as securities fraud),[135] but leaves substantial gaps for other types of unethical conduct. These state and federal regulatory regimes do impose a degree of accountability on publicly held corporations and their managers, but they fail to comprehensively address corporate ethical misconduct and leave substantial regulatory gaps.

For example, a corporate executive may enable, contribute to, or even direct a pattern of discriminatory hiring practices or sexual harassment within the corporation. While such conduct might be unethical and violate anti-discrimination laws, under the current legal regime most legal actions arising therefrom will be settled by the corporation. Unless the conduct is especially egregious, there is a good chance the corporate official responsible will not suffer any substantial personal consequence. The enforcement mechanism of the SEC would almost certainly not be triggered, because sexual harassment does not fall within the ambit of securities fraud.[136] This conduct might conceivably be caught in the net of shareholder derivative litigation based upon fiduciary duties, but for the reasons set forth above, shareholder derivative litigation is not an effective accountability

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132. Erickson, *supra* note 111, at 88.

133. Erickson, *supra* note 111, at 91.

134. Erickson, *supra* note 111, at 98 ("In the end, shareholder derivative suits represent the search for a needle in a haystack. The needle may be the egregious case of corporate misconduct that falls through the cracks of other types of corporate fraud litigation, or it may be the rare case that inspires the court to write a decision that will shape boardroom practice for years to come. As the data make clear, however, the vast majority of shareholder derivative suits do not fall into either of these categories. Within the haystack of corporate fraud litigation lies a significant number of shareholder derivative suits that neither compensate corporations nor deter corporate fraud.").

135. Erickson, *supra* note 111, at 98.

136. *See* discussion *supra* Section I(A) (discussing that the primary focus of federal securities laws is to protect investors through a system of mandatory disclosures and anti-fraud provisions).

mechanism and likely cannot be made to be one.[137] Furthermore, unless the employment misconduct creates loss of profits or stock value for the shareholders, they are unlikely to police it closely.

Of course, the argument could be made that since the individuals who have been wronged by the discriminatory conduct have legal recourse through filing an employment discrimination lawsuit, there is no societal harm created that is not already being addressed. However, we would argue that given the scope of impact that publicly held corporations have in a modern society, unethical conduct by their highest levels of management has spillover effects that other stakeholders have an interest in. As an example, other employees and candidates for employment have an interest in unethical managers that harass employees being removed from positions of power in publicly held corporations as opposed to their indiscretions being settled in private litigation on a piecemeal basis. Existing corporate accountability mechanisms fail to look in a comprehensive way at business as a societal force that affects more than just the parties directly engaged in business transactions.

For instance, while the Exchange Act provides a very broad remedy of a permanent injunction against serving as an officer or director of a publicly traded company, that remedy is necessarily limited to certain violations of the securities laws.[138] While this is the type of broad societal remedy we advocate, we argue that such remedies need to encompass a larger scope of unethical corporate behavior to be an effective accountability mechanism. Instead, existing corporate law focuses on compliance with very specific laws and the managers' duties to a very specific group – shareholders.

This focus is not necessarily misplaced – shareholders are a critically important stakeholder group and in most regulatory contexts, it makes sense that they are the focus of accountability efforts. However, it is our contention that the limited focus of existing corporate accountability mechanisms is inadequate given the scope of societal impact that unethical corporate management now has and the nature and structure of the modern corporation. Given these realities, we contend that corporate accountability can be enhanced by reforms that focus on treating officers and directors of publicly traded companies similarly to doctors, lawyers, and other learned professions with ethical duties that extend outside of their direct clients and transactions.

137. *See* discussion *supra* Section I(B) (discussing that procedural hurdles, including the demand requirement and the business judgment rule standard of review, make shareholder derivative suits ineffective).

138. *See* 15 U.S.C. § 78u-3(f) (2019) (providing for a temporary or permanent officer and director bar for violations of section 78j(b) of the Exchange Act or any of its rules or regulations).

In the next section, we will discuss this concept of the business manager as a professional.

II. THE CORPORATE MANAGER AS A PROFESSIONAL

Academics in the area of business education have long debated whether business management is a learned profession or just an academic area of study.[139] This debate had its genesis in the early years of the Industrial Revolution, as salaried managers of corporations began to appear as a powerful societal force.[140] As the need for corporate managers grew, the university-based business school was developed to train these future managers.[141] The business school was originally conceived of as a type of professional education, similar to law or medicine, in which trainees were being prepared to practice a learned profession for the benefit of society.[142] However, as both business education and corporate management developed in society, these original ideas of professionalism were ultimately abandoned in favor of pure economic logic – that managers are merely agents of shareholders tasked with carrying out the management of a corporation for the shareholder's economic benefit.[143] However, there are modern commentators that assert that society would be benefitted by returning to thinking of corporate management as a learned profession.[144]

In this section, we will discuss and evaluate this ongoing debate regarding the nature of management. Ultimately, we conclude that there are some critical differences between corporate management and learned

139. *See* RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS 6 (2007) (discussing the beginnings of business education and its original conception as a type of education for a learned profession, like medicine or law).

140. *Id.* at 3 ("When salaried managers first appeared in the large corporations of the late nineteenth century, then began to proliferate, it was not obvious who they were, what they did, or why they should be entrusted with the task of running corporations.").

141. *Id.* at 6–7 (discussing the origins of the business school).

142. *Id.* at 7 (discussing the professional origins of the business school and noting, "This notion comprised, among other things, a social compact between occupations deemed 'professions' and society at large, as well as a certain set of relations among professional schools, the occupational groups for which they serve as authoritative communities, and society.").

143. *Id.* ("In the course of history, the logic of professionalism that underlay university-based business school in its formative phase was replaced first by a managerialist logic that emphasized professional knowledge rather than professional ideals, and ultimately by a market logic that, taken to its conclusion, subverts the logic of professionalism altogether.").

144. *See* Rakesh Khurana, *Why Management Must be a Profession*, HARV. BUS. REV. (July 20, 2010), https://hbr.org/2010/07/why-management-must-be-a-profe [https://perma.cc/C4Z3-PWPN] (discussing the impact that corporate management has on society and concluding, "Business schools themselves have the responsibility to make management a profession").

professions like law or medicine, which prevent it from being treated in exactly the same way. However, we argue that there are important aspects of corporate management that make it very similar to a learned profession, such that it could be regulated as a "quasi-profession." First, we address the basic attributes of a profession and discuss whether they apply to corporate management.

Researchers have identified four key attributes of a learned profession:

1. A common body of knowledge resting on a well-developed, widely accepted theoretical base;
2. A system for certifying that individuals possess such knowledge before being licensed or otherwise allowed to practice;
3. A commitment to use specialized knowledge for the public good, and a renunciation of the goal of profit maximization, in return for professional autonomy and monopoly power; and
4. A code of ethics, with provisions for monitoring individual compliance with the code and a system of sanctions for enforcing it.[145]

In recent years, commentators have engaged in a lively debate regarding whether these attributes apply to corporate managers.[146] We will not fully rehash this debate here. Rather, we will analyze whether each of these points can reasonably be applied to business management. Ultimately, we conclude that they do not perfectly map to business management. However, there is substantial overlap and important similarities.

A. A Common Body of Knowledge and a System of Licensing and Certification

Because the first two elements of a profession are inextricably related, we will address them together. Learned professions, such as law and

145. *See* Rakesh Khurana, Nitin Nohria & Daniel Penrice, *Is Business Management a Profession?*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Feb. 21, 2005), https://hbswk.hbs.edu/item/is-business-management-a-profession [https://perma.cc/7SZ2-52SJ].

146. *Id.* at 6 (arguing for the professionalization of corporate management based upon these attributes). *But see* Ben W. Heineman, Jr., *Management as a Profession: A Business Lawyer's Critique*, HARV. BUS. REV. (Nov. 2, 2010), https://hbr.org/2010/11/management-as-a-profession-a-b [https://perma.cc/H3FX-GSGF] (arguing that analogizing business management to the legal profession is misguided); *see also* Richard Barker, *The Big Idea: No, Management is not a Profession*, HARV. BUS. REV. July-Aug. 2010, at 52–60 (arguing that "[l]audable and beguiling though professional standards and ethics may be, and however appealing professional status is, hanging the mantle 'professional' on business education fosters inappropriate analysis and misguided prescriptions").

medicine, typically have an accepted common body of knowledge that practitioners of the profession are expected to possess.[147] This is why specific professional schools have arisen, along with their own accrediting agencies, to train individuals for these professions.[148] These professions also have certification and ongoing education requirements that their practitioners must comply with.[149] These elements of a learned profession are difficult to apply directly to the management of public corporations.

At first blush, it would appear that there is clearly a common body of knowledge related to business management. The goal of legitimizing business management as a profession by developing such a common body of knowledge was part of the driving force behind the creation of business schools.[150] Certainly the proliferation of MBA programs, as well other masters and doctoral degrees in business, would lend credence to the idea that there is a common body of knowledge undergirding the practice of business management.[151]

The problem with this argument is that "business" is a very broad discipline composed of disparate sub-disciplines. For example, public accounting is a sub-area of business which constitutes its own learned profession with its own certifying body.[152] There are certain careers in finance and investing which also have their own certifications, some legally required and some not.[153] However, the broad area of corporate management

147. *See* Khurana, Nohria & Penrice, *supra* note 145, at 2 (discussing the bodies of knowledge developed in the fields of law, medicine, and the clergy).

148. Khurana, Nohria & Penrice, *supra* note 145, at 2.

149. *See* Khurana, Nohria & Penrice, *supra* note 145, at 2. (discussing the certification and ongoing education requirements for practicing law or medicine).

150. *See* KHURANA, *supra* note 139, at 49 (discussing the development of university based business schools in the United States as an exercise in attempting to obtain legitimacy for the growing numbers of corporate managers and to put this new occupation on par with established professions like law, medicine, and the clergy).

151. *See Accredited Universities and Business Schools*, AACSB.EDU, https://www.aacsb.edu/accreditation/accredited-schools [https://perma.cc/EZ8Z-AHU5] (last visited Jan. 6, 2020) (holding its spot as the lead accrediting body of schools of business, the AACSB claims 862 institutions in fifty-six countries are accredited by the AACSB); *see also* Top 10 MBA Programs in the US 2019, TOPMBA.COM (Sept. 25, 2018), https://www.topmba.com/mba-rankings/full-time-mba-rankings-north-america/top-10-mba-programs-us-2019 [https://perma.cc/M9RT-LAEM] (noting that in one survey, of the best 250 MBA programs worldwide, 109 of them were in the U.S.).

152. *See* CPA Licensure, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, https://www.aicpa.org/becomeacpa/licensure.html [https://perma.cc/FN3C-YTB3] (last visited Jan. 6, 2020) (discussing CPA licensure, which includes education and examination requirements).

153. *See, e.g.*, *CFA Program*, CHARTERED FINANCIAL ANALYST INSTITUTE, https://www.cfainstitute.org/programs/cfa [https://perma.cc/7AX8-RQWF] (last visited Jan. 6, 2020)

is different. It requires some knowledge and familiarity with sub-disciplines such as accounting, finance, and marketing, but does not inherently require intimate knowledge of their practice.[154] Management is ultimately about leading people in an organization, and one can lead people who are knowledgeable in an area without having sufficient knowledge to practice that discipline. For example, an individual might be an excellent Chief Executive Officer but not have sufficient knowledge of accounting to recreate all of the financial statements the company uses. If the company has good, trustworthy people managing the accounting function, the CEO does not necessarily need to be an expert in accounting to be a good, ethical business manager.

Furthermore, the ability needed to lead an organization can come from a variety of sources and does not easily permit itself of a common body of knowledge with a certification requirement. This conclusion is evidenced by the reality that numerous successful public companies have been led by individuals with no formal business education.[155] Additionally, each business is different. The knowledge and skills needed to manage a large pharmaceutical company will likely be substantially different than the knowledge and skills needed to run a publishing or media company. One could imagine a world in which some sort of exam and licensing requirement could be required of individuals before they could serve as an officer or director of a public corporation, but it is difficult to think of what such a test would consist of and how it would serve the same gate-keeping function that a bar exam or medical board examination would.

Ultimately, business management is quasi-professional in that there is an academic discipline that has studied and developed theories about it. However, these theories are not sufficiently developed such that there can truly be said to be a "right" way to run a business. Obtaining an education in business management can be very helpful in running a business, but it

(discussing the Chartered Financial Analyst professional designation, which is not legally required but highly desirable for finance professionals); *see also Series 7 – General Securities Representative Exam*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, https://www.finra.org/registration-exams-ce/qualification-exams/series7 [https://perma.cc/U84Z-SD27] (last visited Jan. 6, 2020) (setting out the Series 7 examination requirements, which is a required licensure to serve as a representative of a securities broker-dealer in the United States).

154. *See* Barker, *supra* note 146 ("In general, the professional is an expert, whereas the manager is a jack-of-all-trades and master of none—the antithesis of the professional.").

155. Well known examples of this are Bill Gates and Mark Zuckerberg, both of whom dropped out of college. *See* Jonathan Wai and Heiner Rindermann, *The Myth of the College Dropout*, U.S. NEWS AND WORLD REPORT (Apr. 20, 2017), https://www.usnews.com/news/national-news/articles/2017-04-20/bll-gates-mark-zuckerberg-and-the-myth-of-the-college-dropout [https://perma.cc/R5MP-TRGA].

cannot be said to be necessary in the way that a medical or law degree is necessary to practicing those professions. For example, there are certain aspects of human anatomy and biology that a medical doctor simply must know to practice medicine. Likewise, a lawyer must know something about civil procedure in order to be a competent attorney. As a society, we have determined that given the difficulty and importance of these fields, a formal course of study and a licensing requirement is the best method for ensuring competency of their practitioners. That determination seems eminently logical. It is difficult to argue that the same can be said of the management of a public corporation given the myriad types of businesses that exist and methods that can be used to successfully manage them.

B. A Commitment to Use Specialized Knowledge for the Public Good

A key aspect of a learned profession is the understanding and commitment that the specialized knowledge of that profession should be used for the public good.[156] For example, lawyers owe special ethical duties to the court system as a whole that transcend the duties owed to their specific client.[157] Likewise, doctors owe ethical duties to society in general, and not just to their own patients.[158]

These societal duties have at times been framed as a call to shun the maximization of profit in engaging in these professions and to consider them as "service" professions.[159] For example, prior to a Supreme Court ruling holding that commercial speech was protected under the First Amendment, lawyers were generally barred from advertising their services, as it was considered to be denigrating to the service orientation of the profession.[160] In modern times, it is understood that engaging in these learned professions does not require shunning profits.[161] It is widely understood that practicing law or medicine is a lucrative career, and it is professionally appropriate to

156. *See* Khurana, Nohria & Penrice, *supra* note 145, at 2.

157. *See, e.g.*, TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. B, § 3.03 (2019) (imposing ethical duties on lawyers to have candor towards tribunals).

158. *See, e.g.*, *Code of Medical Ethics Opinion 8.3*, AMERICAN MEDICAL ASSOCIATION, https://www.ama-assn.org/delivering-care/ethics/physicians-responsibilities-disaster-response-preparedness [https://perma.cc/M5J7-5VPK] (last visited Jan. 6, 2020) (imposing an ethical duty for physicians to be involved in responses to disasters, even "in the face of greater than usual risks to physicians' own safety, health, or life").

159. *See* Khurana, Nohria & Penrice, *supra* note 145, at 2.

160. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977) (holding that blanket restrictions on all attorney advertising violated the First Amendment).

161. *See* Heineman, Jr., *supra* note 146 ("In fact, law firms for more than a generation have been moving from loosely managed associations of professionals to disciplined business organizations.").

advertise one's services and seek to make a profit. Society no longer considers the profit motive and professional ethics to be inherently contradictory. However, there is an understanding that professional obligations *transcend* the profit motive. For example, a lawyer is expected to be a zealous advocate for his client, but regardless of how much a client is willing to pay, a lawyer cannot present evidence to a court that the lawyer knows to be false.[162]

These same principles can be transferred relatively well to the "profession" of business management. Generally, corporate officers and directors are expected to seek to manage their business in such a way as to make a profit for their shareholders.[163] In this sense, one could argue that this means they can't be considered professionals who owe broad societal duties. However, lawyers and doctors both have clients and patients to whom they owe specific duties that differ from those owed to society as a whole. Society accepts that this does not excuse these professionals from owing general ethical duties to society; it simply means that these professionals must exercise judgment when these rights seemingly come in conflict. We argue that the same can be applied to business management. To the extent there is no direct conflict, there is no logical inconsistency in expecting corporate managers to consider the societal good along with their fiduciary duties to shareholders when managing publicly traded companies.

A group of 181 CEOs of publicly traded companies recently affixed their signatures to a statement from the Business Roundtable affirming this principle.[164] This statement affirms that each separate company serves its own corporate purpose, but that companies should also seek to benefit society as a whole.[165] Some of the specific stakeholders referenced in this statement are employees, communities, the environment, and suppliers.[166] Notably, this statement does not reject capitalism or free market principles, nor does it expressly reject the principle of shareholder wealth maximization,

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162. *See, e.g.*, TEX GOV'T CODE ANN. tit. 2, subtit. G, app. B, § 3.03(a)(3) (2019) ("A lawyer shall not knowingly . . . offer or use evidence that the lawyer knows to be false.").

163. *See* Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others (even assuming that a transaction which one may refuse to enter into can meaningfully said to be at his expense) does not for that reason constitute a breach of duty.").

164. Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans', BUSINESS ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/B46V-SEJ5].

165. *See id.* ("While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to *all* of our stakeholders.").

166. *Id.*

but rather affirms that these goals can be pursued while still being cognizant of the needs of stakeholders besides shareholders.[167] The acceptance of this statement by numerous CEOs provides evidence that perhaps society and business managers are ready to hold executives of public companies accountable to the same type of commitment to societal good as we do other learned professions. We argue that such a commitment, if framed in a reasonable way, does not jeopardize the soundness of a free market economy focused on profits.

C. A Code of Ethics

The final element common to learned professions is an established code of ethics.[168] For example, both the legal and medical professions have specific codes of ethics to which licensed professionals in those fields are held.[169] Practitioners who fail to adhere to these ethical standards run the risk of censure, including losing the right to practice their profession.[170]

Currently, no such code of ethics exists for business managers. Due to exchange listing requirements, most publicly traded companies do have their own code of ethics.[171] However, enforcement of this code is left to that particular company, and there is no professional board with authority to enforce business ethics. We argue that this is an area of professionalism that can, and should, be applied to business management. While there is certainly disagreement among business management professionals on numerous

167. *See id.* ("We believe the free-market system is the best means of generating jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all.").

168. *See* Khurana, Nohria, & Penrice, *supra* note 145, at 2.

169. *See*, *e.g.*, *Code of Medical Ethics overview*, AMERICAN MEDICAL ASSOCIATION, https ://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview [https://perma.cc/ D6UT-9XQF] (showing the AMA Code of Medical Ethics, which applies to physicians as members of the medical profession); TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. B (2019) (enumerating a code of legal ethics for barred attorneys).

170. *See, e.g.*, *Punishment for Professional Misconduct*, TEX. BAR ASS'N, https://www. texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceE thicsInfo1/MisconductPunishment.htm [https://perma.cc/LBE6-6FXU] (setting forth the punishment attorneys may receive for misconduct, including disbarment).

171. *See* NASDAQ Equity Rule 5610, http://nasdaq.cchwallstreet.com/nasdaq/main/nasd aq-equityrules [https://perma.cc/87NK-TADD] (requiring NASDAQ listed companies to have a code of conduct that satisfies the definition of a "code of ethics" from the Sarbane Oxley Act; *see also* NYSE Listing Manual Rule 303A.10, https://nyse.wolterskluwer.cloud/l isted-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B 0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-78 [https ://perma.cc/XK6Y-D8BR] (requiring NYSE listed companies to adopt and publicly disclose their "code of business conduct and ethics").

issues, it should be easy to reach consensus on many core ethical issues such as duties of loyalty, conflicts of interest, bribery, compliance with applicable laws, and fraud. At least with respect to broad ethical principles, we argue that the professional standard of an enforced code of ethics is easily applicable to business management.

D. Conclusion – Business Management is a Quasi-Profession

Ultimately, in our opinion there are aspects of professionalism that map well to business management and aspects that do not. Business management does not lend itself well to a licensing requirement. Numerous entrepreneurs from various educational backgrounds and walks of life develop business ideas, bring them to fruition, and continue to manage them well as publicly traded companies. The art of managing an organization is sufficiently broad that it does not permit itself of a prescribed education and certification requirement to ensure that managers are competent. In this respect, we agree with commentators that have argued that business management is not a traditional learned profession.[172]

However, business management, at least with respect to publicly traded companies, would benefit greatly from a commitment to societal good and an enforced code of ethics. In these respects, business management looks very much like a learned profession. It is not reasonable to pretend that the manager of a publicly traded company should be treated by society the same as the manager of a private company. A large portion of society, either directly or indirectly through retirement funds, have their financial well-being tied up in the stock of publicly traded companies.[173] Large publicly traded companies fulfill defense contracts, build infrastructure, and ensure that the world's day-to-day needs are met. Thus, managers of a publicly traded company have an outsized influence on world affairs, the economy, and society in general. In exchange for this outsized influence, it is reasonable for members of society to expect business managers to have an enforceable commitment to societal good and ethics, just as we do with lawyers and doctors.

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172. *See* Barker, *supra* note 146 (arguing there are notable differences between business management and other learned and licensed professions).

173. *See Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, at 18, FED. RESERVE BULLETIN (Sept. 2017), https://www.federalreserve.gov/publications/files/scf17.pdf [https://perma.cc/LTM8-FENF] (finding that 13.9% of American households directly held stocks, 10.0% held pooled investment funds, and 52.1% held retirement accounts, which will almost invariably be in some way invested in the stock market).

We argue that managers of publicly traded companies can best be conceptualized as *quasi-professionals.* While management characteristics do not map perfectly to the historic learned professions, there is sufficient overlap that they can be regulated in a similar way. We believe that ethical business management can best be enforced by society through requiring the officers and directors of publicly traded companies to have an enforceable, professional commitment to certain ethical standards and the societal good.

III. A MODEL FOR ETHICS ACCOUNTABILITY: THE U.S. OFFICE OF GOVERNMENT ETHICS

As can be seen, the existing compliance mechanisms and self-regulation of ethical behavior by corporations and corporate officers is falling short. Personal accountability of corporate officers is particularly lacking. One need only note the near absence of personal accountability following the ethical lapses leading to the 2008 sub-prime financial crisis.[174] It is beyond the scope of this article to detail that crisis or all of its ethical dimensions. Nonetheless, despite the sheer magnitude of the ethical lapses that occurred leading up to the crisis, there were, ultimately, few personal consequences for corporate officers.[175] The reasons for this lack of personal accountability are many and include those discussed above, as well as the difficulty and reluctance to tackle the prosecution of white-collar business crime.[176]

174. One study noted that no Wall Street executive went to jail following the 2008 crisis. *You Asked, We Answered: Why Didn't Any Wall Street CEOs Go to Jail After the Financial Crisis? It's Complicated*, MARKETPLACE, https://features.marketplace.org/why-no-ceo-went-jail-after-financial-crisis/ [https://perma.cc/H69K-AHZN] (last visited Oct. 5, 2019). In fact, only eleven criminal referrals were made. *Id.* Instead, there were a few acquittals and very large civil penalties. *Id.* This is in contrast to over 30,000 DOJ criminal referrals that were made following the *Savings* and Loan Crisis of the 1980s. *Id.*

175. *Id.*

176. This is not a new problem. In 2002, James Comey, then a DOJ prosecutor (FBI Director) was speaking to fellow prosecutors on the failure of DOJ prosecutors to undertake their responsibility to prosecute corporate officials for wrongdoing, calling them "chickenshit" because their focus had turned to only tackling cases they thought they could readily win vice doing justice. Megan Harris, *Comey Saw It Coming: Why No One Went to Jail for the Housing Crash*, (July 18, 2017), https://www.wesa.fm/post/comey-saw-it-coming-why-no-one-went-jail-housing-crash#stream/0 [https://perma.cc/YCV6-5YKR]. The story is related in an interview with an author who explains the transformation of DOJ from vigorous prosecutors of white-collar crime to its current aversion to prosecuting corporate executives. *See id.* (citing JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017)). In the interview, Eisinger notes after the savings and loans prosecutions, there was an effort through corporate lobbying to have the DOJ roll back its prosecution policy and provide prosecutors less resources. As a result,

Increasingly, rather than enforcement of individual accountability through existing legal mechanisms, we are seeing the DOJ and other federal agencies "settle" with corporations over ethical lapses through the payment of fines.[177] Indeed, the "winners" in such settlements are the corporations themselves, who merely transmit payment to the government, as well as the government itself who typically keeps all or large portions of the money for itself.[178] The "losers" in such settlements include the direct victims of corporate wrongdoing in the case of tort liability, as they often receive nothing for their injuries from the settlement.[179] Moreover, while the collection of such fines adds to the federal coffers, the payer of such fines are not typically the corporate officials responsible for the unethical behavior for which the corporation is settling, but rather, its stockholders and customers.[180] The U.S. taxpayer also loses with these settlement arrangements since a large percentage of corporate settlements can be written off as tax deductions.[181]

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prosecutors turned to settling with corporations for money. *Id.*

177. *Id. See, e.g.*, *Walmart to pay $282 million to settle federal bribery charges*, CBS NEWS (June 20, 2019), https://www.cbsnews.com/news/walmart-to-pay-282-million-to-settle-federal-bribery-charges/ [https://perma.cc/QVD8-BL55]. The article notes Walmart's employees in this case were aware that payments to the intermediary were being recorded "as payments to a construction company, even though there were numerous 'red flags' to indicate that the intermediary was actually a government official." *Id. See also Press Release, SEC Charges Marketing and Printing Services Provider with FCPA Violations*, U.S. SEC. AND EXCH. COMM'N (Sept. 26, 2019), https://www.sec.gov/news/press-release/2019-193 [https://perma.cc/Y3NC-TN49] (noting imposition of a nearly $10 million fine against Quad/Graphics Inc. for bribery violations "[w]ithout admitting or denying the SEC's findings").

178. For example, a recent $5 billion fine against Facebook for deceiving its users regarding the handling of its user data, went to the U.S. Treasury. None went to the victims of the misconduct. Ben Gilbert, *Facebook Was Just Slapped With a Record-Setting $5 Billion Fine For Mishandling User Data, But Those Users Won't See a Penny. Here's Where That Money Goes*, BUSINESS INSIDER (July 24, 2019), https://www.businessinsider.com/facebook-5-billion-fine-where-does-it-go-2019-7 [https://perma.cc/HNC2-QK3D].

179. *Id.* Instead the civil penalty will go into the U.S. Treasury as provided by law. *Id.*; *see also* Kristine Frazao, *Billions in Federal Fines, Where Does It All Go?*, SINCLAIR BROADCASTING GROUP (Dec. 3, 2018), https://wjla.com/news/spotlight-on-america/billions-in-federal-fines-where-does-it-all-go-12-03-2018-190332284 [https://perma.cc/G5UC-5J4S] (noting that of the $56 billion in fines collected by the Consumer Product Safety Commission in a recent two year period, none went to victims).

180. *See, e.g.*, Andrew Sorkin, *Punishing Citi, or Its Shareholders?*, N.Y. TIMES (Aug. 2, 2010), https://www.nytimes.com/2010/08/03/business/03sorkin.html [https://perma.cc/F9GQ-WTCD] (noting that a $75 million fine imposed against Citigroup for violating SEC rules would be paid by its shareholders and cites former S.E.C. Chairman, Harvey Pitt, as stating "[a] class of innocent shareholders is being asked to pay for the misconduct of corporate officers.").

181. In one public interest group study of the DOJ cases between 2012 and 2014 where

This article proposes an entirely new mechanism of corporate ethics enforcement; one that does not make it the responsibility of investors, corporate customers, and taxpayers to pay for the lack of ethical behavior by corporate officials, but rather a system of effective monitoring and compliance by corporate officials of established ethical standards. Individual accountability is needed.[182]

One such system that could serve as a model for ethics oversight of individual corporate officers is the federal government's system of ethics oversight and compliance. An ethical commitment is required by employees of the executive branch of the United States government involving many of the same conflict of interest issues that corporate officers face.[183] The Office of Government Ethics imposes ethical requirements on these employees, in spite of the fact that executive branch employees have various educational backgrounds and skill sets. Likewise, we argue that an Office of Corporate Ethics can be devised that imposes similar ethical requirements on the wide variety of officers and directors of public companies.

A. *Ethics Guidance and Compliance within the Executive Branch of the Federal Government*

The U.S. government's ethics guidance and compliance system pertaining to the executive branch is established by a combination of statutes, regulations, and Executive Orders.[184] The system is overseen by the U.S. Office of Government Ethics (OGE), whose mission is to provide

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settlement data is available, only 18.4% was explicitly non-deductible. *See News Release: Government Agencies Allow Corporations to Write Off Billions in Federal Settlement Payments*, U.S. PIRG (Dec. 3, 2015), https://uspirg.org/news/usf/government-agencies-allow-corporations-write-billions-federal-settlement-payments [https://perma.cc/YY4Z-URW5]. Additionally, of the $80 billion in corporate payments from the ten largest settlements during the same time period, more than $48 billion could be written off. *Id.* A bill to amend the IRS code to prevent corporate tax write-offs from settlements for corporate wrongdoing was introduced in 2017 but does not appear to have gone anywhere. Government Settlement Transparency and Reform Act, S. 803, 115th Cong. (2017); *see also* News Release, *Bipartisan Bill to Prevent Corporate Penalties from Becoming Tax Deductions*, CHUCK GRASSLEY (Apr. 3, 2017), https://www.grassley.senate.gov/news/news-releases/bipartisan-bill-prevent-corporate-penalties-becoming-tax-deductions [https://perma.cc/PEM4-G92H] (discussing the introduction of the Government Settlement Transparency and Reform Act to the Senate).

182. *See* Sorkin, *supra* note 180. Pitt notes "the most effective way to deal with [unethical behavior] is to impose the fines and penalties on the individuals . . . . They should feel the sting of it." *Id.*

183. *See infra* Section III(B).

184. *Laws and Regulations*, U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/Laws+and+Regulations/ [https://perma.cc/ARR5-E2AF] (last visited Aug. 8, 2019).

"leadership and oversight of the executive branch ethics program" in order to "prevent and resolve conflicts of interest."[185] The OGE's legal mandate was created by the Ethics in Government Act (the "Act").[186] The Act established the OGE as an executive agency.[187] It also provides authority to the Director of the OGE to develop and monitor compliance with the requirements of the Act.[188] The Act also contains detailed financial disclosure requirements for federal personnel.[189] The focus of the Act is the maintenance of institutional integrity, and it charges the OGE with a number of responsibilities, including criminal, civil, and administrative enforcement of ethics, laws and regulations.[190]

The overall mission of OGE's ethics program is to prevent conflicts of interest or the appearance of conflicts of interest by members of the executive branch that can result from "financial interests; business or personal relationships; misuses of official position, official time, or public resources; and the receipt of gifts."[191] The OGE has robust government ethics education responsibilities to teach employees "how to identify government ethics issues and obtain assistance in complying with government ethics laws and regulations."[192]

The OGE executes its mission through prevention, identification, investigation, and enforcement of legal authorities established under the U.S. government's ethics framework.[193] Investigations of potential violations are

185. *Mission and Responsibilities*, U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/Mission%20and%20Responsibilities [https://perma.cc/B4R4-ZHU9] (last visited Aug. 8, 2019). Conflict of interest is a "[t]erm used in connection with public officials and fiduciaries and their relationship to matters of private interest or gain to them." *Conflict of Interest*, BLACK'S LAW DICTIONARY (6th ed. 1990). It refers to "a clash between public interest and private pecuniary interest of the individual concerned." *Id.*

186. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. §§ 101-505).

187. 5 U.S.C. app. § 401(a) (2020).

188. 5 U.S.C.A. app. § 402 (2020).

189. 5 U.S.C.A. app. §§ 101-111 (2020).

190. The responsibilities of the OGE are further detailed in 5 C.F.R. § 2638.108. *See also Mission and Responsibilities*, *supra* note 185 (explaining that the OGE is responsible for preventing and resolving conflicts of interest in the executive branch by advancing the executive branch ethics program and monitoring compliance).

191. 5 C.F.R. § 2638.101(b) (2020); *see also* 5 C.F.R. § 2638.101(a) (2020) (noting the primary mission of the executive branch ethics program is the prevention of conflicts of interest). The program's goals go beyond creating transparency towards ensuring integrity in decision making and promoting public confidence by preventing conflicts of interest. 5 C.F.R. § 2638.101(c) (2020).

192. 5 C.F.R. § 2638.301 (2020). 5 C.F.R. Subpart C outlines the specific education requirements to implement the general requirement from 5 C.F.R. § 2638.301.

193. *See Mission and Responsibilities*, *supra* note 185 (explaining that the OGE supervises

primarily performed by various Inspectors General staff members across the executive branch.[194] The DOJ also has enforcement authority that includes criminal and civil penalties.[195]

B. U.S. Government Ethics Compliance Legal Authorities

In addition to the Ethics in Government Act,[196] all employees of the executive branch are subject to a single set of principles of ethical conduct created by Executive Order (EO) 12,731.[197] The EO established fourteen basic ethical principles applicable to all executive branch employees and directed the OGE to establish a "single, comprehensive, and clear" set of ethical conduct standards.[198] Of the fourteen principles contained in the executive order, at least ten are directly applicable to corporate officers regarding their general duties. They are:

1. Requiring employees to place loyalty to the law and ethical

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the executive branch ethics program, monitors agency compliance, and educates the public about government integrity).

194. Government Ethics Responsibilities Of Inspectors General, 5 C.F.R § 2638.106 (2020). The Offices of Inspector General were established by the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified at 5 U.S.C. app. 3) [hereinafter "IG Act"]. The IG Act established Inspectors General (IGs) in twelve federal agencies. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL (July 14, 2014), https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf [https://perma.cc/6HAU-37VM]. This number later expanded to seventy-two. *Id.* The purpose of the IG Act is twofold: to ensure both integrity and efficiency in government operations. *Id.* To this end, the IG Act authorizes IGs to audit and investigate, and to keep the agency head and Congress informed. *Id.* For an example of an agency Inspector General description, see *About Us,* OFFICE OF THE INSPECTOR GENERAL, https://www.oig.dhs.gov/about [https://perma.cc/3ER5-85LH] (last visited Nov. 1, 2019).

195. *See Enforcement*, U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/enforcement [https://perma.cc/F8AB-7TWN] (last visited Aug. 30, 2019) (explaining that the DOJ enforces statutes through criminal prosecution and the use of civil penalties); *see also* 5 C.F.R. § 2638.502 (2020) (providing that the director of the Office of Government Ethics will notify the Inspector General or the Department of Justice of criminal law violations by an employee).

196. Ethics in Government Act of 1978, Pub. L. No. 95-521 § 1, 92 Stat. 1824, (codified as amended at 5 U.S.C. app. § 101-505).

197. Exec. Order No. 12,674, 54 Fed. Reg. 15159 (Apr. 12, 1989) (as modified by Exec. Order 12,731, 55 Fed. Reg. 42547 (Oct 17, 1990)). The ethical principles were later codified in 5 C.F.R. § 2635.101(b) (2020). *See also Employee Standards of Conduct*, U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/Web/OGE.nsf/Employee+Standards+of+Conduct [https://perma.cc/GSH4-43WS] (explaining that Executive Order 12,371 modified Executive Order 12,674, which provides fourteen principles of ethical conduct for executive branch employees).

198. Exec. Order No. 12,731 §§ 201(a), 55 Fed. Reg. 42547 (Oct 17, 1990).

principles above private gain.[199]

2. Prohibiting employees from holding financial interests that conflict with their performance of duty.[200]
3. Prohibiting employees from engaging in financial transactions using nonpublic information or allowing the improper use of such information to further any private interests.[201]
4. Prohibiting employees, except as specifically allowed by other regulation, from soliciting or accepting any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's organization.[202]
5. Requiring employees to put forth honest effort in the performance of their duties.[203]
6. Prohibiting employees from using their position for private gain.[204]
7. Requiring employees to protect and conserve property and not use it for other than authorized activities.[205]
8. Prohibiting employees from engaging in outside employment or activities, including seeking or negotiating for employment, that conflict with that officer's official duties and responsibilities.[206]
9. Requiring employees to disclose waste, fraud, abuse, and corruption to appropriate authorities.[207]
10. Requiring employees to endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards.[208]

These principles serve as the backdrop to more detailed ethics standards that reinforce and implement the key ideas behind the principles.

C. Standards of Ethical Conduct for Employees of the Executive Branch

In order to provide guidance to the executive branch agencies on implementing the principles of ethical conduct outlined above, the OGE published in August 1992, the Standards of Ethical Conduct for Employees

199. 5 C.F.R. § 2635.101(b)(1) (2020).
200. *Id.* § 2635.101(b)(2).
201. *Id.* § 2635.101(b)(3).
202. *Id.* § 2635.101(b)(4).
203. *Id.* § 2635.101(b)(5).
204. *Id.* § 2635.101(b)(7).
205. *Id.* § 2635.101(b)(9).
206. *Id.* § 2635.101(b)(10).
207. *Id.* § 2635.10(b)(11).
208. *Id.* § 2635.101(b)(14).

of the Executive Branch as codified in 5 C.F.R. Part 2635 ("OGE Standards").[209] All employees of the executive branch are required to adhere to the OGE Standards and "make ethical conduct the hallmark of government service."[210] The OGE Standards are categorized into eight subparts.[211] The first subpart is a restatement of the fourteen principles of ethical conduct as discussed above.[212] The other subparts include rules on gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing duties, outside employment, misuse of official position, and rules regarding activities outside of employment.[213] All of the ethical conduct standards discussed below could be transferred and applied to corporate officers.

1. Gifts from Outside Sources

Subpart B of OGE Standards generally prohibit employees from soliciting or accepting gifts given to that employee as a result of that employee's official position or received from an otherwise "prohibited source."[214] The definition of a gift is quite broad, comprising anything of market value including a "gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value."[215]

The definition is purposefully inclusive because the exceptions to the definitions of a gift are narrow. For example, the term "gift" does not include modest items of food and non-alcoholic drinks, greeting cards, or presentation items such as certificates or plaques.[216] The definition also does not include items generally available to the public such as loans from financial institutions, discounts available to the public or a class of

209. 5 C.F.R. § 2635 (2017); *see also Employee Standards of Conduct*, U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/Employee%20Standards%20of%20Conduct [https://perma.cc/3R9L-94FA] (last visited Aug. 30, 2019) (explaining that the OGE published the Standards of Ethical Conduct for Employees of the Executive Branch to replace individual agency standards of conduct with a uniform standard).

210. 5 C.F.R. § 2638.102 (2017).

211. Standards of Ethical Conduct for Employees of The Executive Branch, 5 C.F.R. § 2635 (2017).

212. *See supra* Section III(B) (discussing the ethical principles of conduct that all executive branch employees must follow).

213. *Id.*; *see also Employee Standards of Conduct*, U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/Web/OGE.nsf/Employee+Standards+of+Conduct [https://perma.cc/GSH4-43WS] (providing summaries of each subpart of the OGE Standards).

214. 5 C.F.R. § 2635.202(a)–(b) (2020). *See* 5 C.F.R. § 2635.203(d) (defining "prohibited source").

215. 5 C.F.R. § 2635.203(b) (2020).

216. *Id.* § 2635.203(b)(1)–(2).

employees, random prizes given in contests or events open to the public, or free attendance at events for which the employee's presence is required as part of their official duties.[217]

The outside-source gift rule also contains modest exceptions for certain types of items, which are otherwise defined as a gift. Some examples include allowing an employee to accept a gift of $20 or less from one source on one occasion—not to exceed $50 per calendar year,[218] gifts given based on personal relationships (family or personal friendships) and not given because of the employee's official position,[219] awards of recognition,[220] or gifts given based on the employee's outside business or employment relationships.[221]

2. Gifts Between Employees

Subpart C of the OGE Standards generally prohibit an employee from giving a gift to an official superior of that employee, and prohibit employees from accepting a gifts from other employees making less money than themselves, unless otherwise excluded.[222] The definition of a gift is the same as defined in Subpart B.[223]

Exceptions include non-cash gifts of less than $10 per occasion, shared food and beverages, personal hospitality at a residence, or gifts given to celebrate a special, infrequent occasion, such as a marriage, birth or adoption of a child, or the termination of a superior-subordinate relationship through retirement, transfer, or resignation.[224] Employees may also ask other employees for voluntary contributions of nominal amounts to pool into a group gift for such special, infrequent occasions.[225]

3. Conflicting Financial Interests

Subparts D-F of the OGE Standards pertain to avoiding conflicting

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217. *See generally id.* § 2635.203(b)(3)-(8) (listing items that are excluded from the definition of "gift").

218. 5 C.F.R. § 2635.204(a) (2020).

219. *Id.* § 2635.204(b).

220. *Id.* § 2635.204(d).

221. *Id.* § 2635.204(e). There are a number of other gift exceptions such as attendance at widely-attended gathering events, social invitations, meals and entertainment in foreign areas, and gifts authorized by supplemental agency regulation or statute. 5 C.F.R. § 2635.204(g)-(m) (2020). The level of detail within the rule is indicative of the seriousness placed on outside gifts as a source of potential ethical problems.

222. General Standards, 5 C.F.R. § 2635.302.

223. Definitions, 5 C.F.R. § 2635.203(b).

224. Exceptions, 5 C.F.R. § 2635.304(a).

225. *Id.* § 2635.304(c).

financial interests in a variety of circumstances. These include disqualifying employees from certain duties that would create financial conflicts, prohibiting financial interests that create conflicts, avoiding financial interests that could contribute to the appearance of a conflict as viewed by a reasonable outside person, and rules on seeking contemporaneous or future employment that might create conflicts with the employee's present agency.

a. Disqualifying and Prohibited Financial Interests

Subpart D of the OGE Standards contains two related provisions designed to avoid conflicting financial interests. The first provision pertains to disqualification of an employee from participating in government matters, the outcome of which would have a "direct and predictable" interest on that employee's financial interests.[226] The accompanying rules related to this provision are designed to prevent employees from violating the prohibitions of 18 U.S.C. § 208(a), which prohibit executive agency employees from performing certain official acts that affect their personal financial interest.[227]

The second provision is the prohibition on holding or acquiring particular financial interests that an executive agency deems would create a conflict of interest.[228] Each agency has the discretion to define such prohibitions by agency regulation, along with its determination that an employee holding such interests would result in a substantial conflict of interest with that employee's duties or the agency's mission.[229] Under these rules, the financial interests of certain other persons are imputed to the employee as if they were the employee's own. These include the financial interests of an employee's spouse, minor child, general partner, an additional employer of the same employee, or a potential future employer of the employee currently being negotiated.[230]

b. Avoidance of the Appearances of Financial Conflicts of Interest

Subpart E of the OGE Standards are related to the Subpart D

226. Overview, 5 C.F.R. § 2635.401.

227. *See* Disqualifying Financial Interests, 5 C.F.R. § 2635.402 (citing Acts Affecting a Personal Financial Interest, 18 U.S.C. § 208(a)). Among the exemptions from this requirement are those acts exempted by OGE regulation as being "too remote or inconsequential to affect the integrity of the services" of the employee. 18 U.S.C. § 208(b)(2).

228. Prohibited Financial Interests, 5 C.F.R. § 2635.403.

229. 5 C.F.R. § 2635.403(b).

230. 5 C.F.R. § 2635.402(b)(2).

requirements. The rules require impartiality when performing official acts as an employee in general and prohibit an employee from participating in certain matters that would affect the financial interests of members of that employee's household (and certain other persons) if a reasonable person with knowledge of the facts would question that employee's impartiality.[231] In essence, these rules are designed so an employee avoids even the appearance of impartiality in the performance of their duties.[232]

c. Seeking Other Employment

Rules on seeking outside employment are contained in Subpart F of the OGE Standards. Among these, are rules that prohibit an employee from participating personally and substantially in matters that could affect the financial interests of a future employer—also a violation of 18 U.S.C. § 208(a).[233] The rules also require employees who are required to file annual financial disclosures to notify the U.S. government within three days of their beginning of any negotiation for other employment, and to seek recusal in writing from involvement in any government matter that would create a conflict of interest, or the appearance of a conflict of interest.[234]

4. Misuse of Position

The last significant section of the OGE Standards that could be made directly transferable to corporate officers would be Subpart G, which contains provisions regarding the misuse of the employee's official position.[235] These include using the office of the employee for their own private gain, or the gain of friends and relatives,[236] engaging in personal financial transactions using nonpublic information,[237] creating an affirmative duty of the employee to protect government property and to use it only for official purposes,[238] and prohibiting the use of official work time for any endeavor other than an honest effort to perform the employee's official duties or responsibilities.[239]

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231. Impartiality in Performing Official Duties, 5 C.F.R. § 2635.501(a).
232. *Id.*
233. Acts Affecting a Personal Financial Interest, 18 U.S.C. § 208(a).
234. Seeking Other Employment, 5 C.F.R. § 2635.601.
235. Misuse of Position, 5 C.F.R. § 2635.701(a).
236. Use of Public Office for Private Gain, 5 C.F.R. § 2635.702.
237. Use of Nonpublic Information, 5 C.F.R. § 2635.703.
238. Use of Government Property, 5 C.F.R. § 2635.704.
239. Use of Official Time, 5 C.F.R. § 2635.705.

D. OGE's Ethics Enforcement System

As previously noted, ethics requirements are monitored by designated ethics officials within the executive branch agencies.[240] Each agency appoints a Designated Agency Ethics Official ("DAEO").[241] Among the responsibilities of the DAEO are the execution of the agency's employee financial disclosure program,[242] and the appointment of "deputy ethics officials" from the agency who assist in carrying out the functions of the agency's ethics program.[243]

Once ethics officials become aware of possible violations of criminal or civil statutes, or of a violation of the OGE Standards by an employee of the agency, the evidence may be referred to the appropriate office or agency for review and possible action.[244] Suspected violations of criminal or civil statutes are referred to the DOJ.[245] A violation of the OGE Standards may be referred for investigation and possible disciplinary action against the employee by the employee's relevant agency.[246]

The OGE Standards encourage employees to seek ethics advice from designated ethics agency officials and prohibit an agency from taking disciplinary action against an employee who does, provided the employee disclosed all the relevant circumstances to the ethics officials and relied on the advice of the ethics official in good faith.[247]

1. OGE Standards of Conduct Subject to Criminal Sanction

Violation of the OGE Standards are subject to a number of criminal

240. *See infra* Section III(A) and accompanying notes. *See also* Definitions, 5 C.F.R. § 2635.102(c) (describing that designated agency ethics officials have been delegated authority to assist in carrying out their responsibilities).

241. Appointment of a Designated Agency Ethics Officials, 5 C.F.R. § 2638.104(a).

242. Responsibilities of the Designated Agency Ethics Official, 5 C.F.R. § 2638.104(c)(8).

243. Program Support by Additional Ethics Officials and Other Individuals, 5 C.F.R. § 2638.104(e).

244. Violations of Criminal Provisions Related To Government Ethics, 5 C.F.R. § 2638.502; *see also Enforcement*, U.S. OFFICE OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/enforcement [https://perma.cc/F8AB-7TWN] (last visited Aug. 30, 2019) ("When ethics officials find evidence that an employee has violated an ethics criminal statute or regulation, they must refer that evidence to the appropriate authority for action.").

245. *Enforcement*, *supra* note 244.

246. Disciplinary and Corrective Action, 5 C.F.R. § 2635.106; *see also* 5 C.F.R. § 2638.504 (outlining investigative and hearing procedures involving employees suspected of violating noncriminal OGE Standards).

247. Ethics Advice, 5 C.F.R. § 2635.107.

statutes. Among these is the bribery and illegal gratuities statute[248] and a series of statutes referred to as the "criminal conflict of interest statutes."[249] This set of statutes is tailored for government employees, and though a few might be less adaptable to application to corporate officers,[250] others could be modified as needed.[251]

Additionally, there are numerous other criminal and noncriminal statutes related to OGE Standards.[252] Of the criminal prohibitions, a sampling includes fraud or false statements with regard to government matters,[253] concealing or destroying public records,[254] failing to account for public money,[255] or prohibiting the disclosure of proprietary or certain confidential information.[256] These statutes might also be made applicable to corporate officers.

2. Sanctions for Violation of OGE Noncriminal Standards

a. Civil Penalties

Violations of OGE Standards not subject to criminal sanction are subject to civil, disciplinary, or corrective actions.[257] As an example, senior level executive branch employees who violate certain prohibitions on outside earned income and employment are subject to civil penalties.[258] Civil penalty rules include prohibiting senior employees from receiving more than fifteen percent of their annual government salary from outside earned income,[259] receiving compensation for practicing or performing outside professional

248. 18 U.S.C. § 201.

249. These are 18 U.S.C. §§ 202–209. *Statutes*, U.S. OFFICE. OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/Statutes [https://perma.cc/DU22-4MU9] (last visited Sept. 9, 2019).

250. *See, e.g.*, 18 U.S.C. § 207 (containing restrictions on activities of certain individuals after they leave government service); 18 U.S.C. § 205 (prohibiting compensation for representational activities in which the U.S. is a party).

251. For example, 18 U.S.C. § 205 prohibits executive branch employees from participating "personally and substantially" in a particular government matter that would affect their personal financial interests. This statute could be modified to corporate officers participating in corporate matters that would affect the corporate officers' personal financial interests.

252. A list of these is contained in 5 C.F.R. § 2635.902.

253. 18 U.S.C. § 1001.

254. 18 U.S.C. § 2071.

255. 18 U.S.C. § 643.

256. 18 U.S.C. § 1905.

257. Civil, Disciplinary and Other Action, 5 C.F.R. § 2636.104.

258. Civil, Disciplinary and Other Action, 5 C.F.R. § 2636.104(a).

259. *See* The 15 Percent Limitation on Outside Earned Income, 5 C.F.R. § 2636.304(a) (implementing 5 U.S.C. app. § 501(a)(2)).

duties that involve a fiduciary relationship,[260] or receiving any compensation for serving as an officer or member of an outside board, corporation, of other entity.[261] In case of such violation, the employee is subject to civil penalties of up to $10 thousand or the amount of the outside compensation earned, whichever is greater.[262]

b. Corrective Actions

Violations of OGE Standards are also subject to corrective action, which is defined as "any action necessary to remedy a past violation or prevent a continuing violation" of the OGE Standards.[263] Remedies include changing the employee's assignment, ordering the employee to divest conflicting assets, terminating the offending activity, and/or counseling.[264] It may also include restitution by the employee.[265] Corrective action responses may be fairly characterized as non-punitive in nature and intended to prevent the violation from occurring in the future. Although it is the responsibility of the employee's agency to initiate disciplinary or corrective action, corrective action may be ordered by the OGE under its own authority.[266]

Procedurally, the OGE, after becoming aware of a non-criminal violation of OGE standards by an executive branch employee, may consult with the agency and the employee as necessary to ensure compliance with the OGE Standards at issue.[267] This may include recommending that the agency investigate the matter and consider taking disciplinary or corrective action against their employee.[268] If the agency does not then undertake the recommendation within a reasonable time, the OGE reports the matter to the President[269] and may initiate investigative proceedings on its own.[270]

260. Compensation and Other Restrictions Relating to Professions Involving A Fiduciary Relationship, 5 C.F.R. § 2636.305(a) (implementing 5 U.S.C. app. § 502(a)(1) and (a)(3)).

261. *See* Compensation Restriction Applicable to Service as an Officer or Member of a Board, 5 C.F.R. § 2636.306(a) (implementing 5 U.S.C. app. § 502(a)(4)).

262. Civil Penalties, 5 U.S.C. app. § 504.

263. *See* 5 CFR § 2635.102(e) (defining "corrective action").

264. *Id.*

265. Civil, Disciplinary and Other Action, 5 C.F.R. § 2636.104(b).

266. 5 C.F.R. § 2636.104(b); *see also* Disciplinary and Corrective Action, 5 C.F.R. § 2635.106(b) (stating that the Director of the OGE may order corrective action).

267. Recommendations and Advice to Employees and Agencies, 5 C.F.R. § 2638.503.

268. *Id.*

269. Violations of Noncriminal Provisions Related to Government Ethics, 5 C.F.R. § 2635.504(a).

270. 5 C.F.R. § 2635.504(b). The OGE notifies the employee that it is considering an order for the employee to take specific action to terminate an ongoing violation of the OGE standard. The employee is then provided a reasonable opportunity to respond before a final

c. Disciplinary Actions

Disciplinary actions are agency actions taken against executive branch employees that include reprimands, suspensions, demotions, and removal (termination).[271] Within this range of actions are "lesser disciplinary actions" that include warnings, counseling, and job suspensions of fourteen days or less, and "more severe adverse actions," which are suspensions of more than fourteen days, reductions in pay, demotions, and termination (i.e., removals).[272]

The requirements and procedures pertaining to the more severe adverse actions of suspension, reduction in pay, demotion, and removal are statutory, with the statutory language providing agency requirements and due process procedures for the employees.[273] These actions are taken to "promote the efficiency of the service."[274]

In sum, the U.S. government has ample legal tools and resources to monitor the ethical behavior of individual executive branch employees, correct ethical mistakes and lapses, and enforce ethical responsibilities through corrective actions and disciplinary measures. Enforcing individual responsibility for proper ethical conduct is vital for the system to function.[275]

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decision or order occurs. 5 C.F.R. § 2638.504 (outlining investigative and hearing procedures involving employees suspected of violating noncriminal OGE Standards).

271. *See* Definitions, 5 C.F.R. § 2635.102(g) (2019) (describing possible disciplinary actions).

272. *See Managing Federal Employees' Performance Issues Or Misconduct*, U.S. OFFICE OF PERSONNEL MGMT., at 11, https://www.opm.gov/policy-data-oversight/employee-relations/reference-materials/managing-federal-employees%E2%80%99-performance-issues-or-misconduct.pdf [https://perma.cc/VH2R-W3PW] (last visited Sept. 21, 2019) (addressing the management of federal employees' performance issues or misconduct). An agency may also define disciplinary actions as "informal," such as oral admonishments or written warnings or counselings, and "formal," such as letters of reprimand, suspensions, and removals. *Administrative Instruction 8* § 3.1, at 7, U.S DEP'T OF DEF. (Dec. 16, 2016), https://fas.org/irp/doddir/dod/ai-8.pdf [https://perma.cc/JR72-BTT8] (last visited Sept. 19, 2019).

273. *See* 5 U.S.C., Chapter 75 (describing adverse actions).

274. 5 U.S.C. § 7503(a) (2019); 5 U.S.C. § 7513(a) (2012). The action must be taken "for such cause as will promote the efficiency of the service." The statutory procedures vary slightly depending on whether the proposed disciplinary action is a suspension for 14 days or less. In such cases, among other options, the employee is entitled to 14 days advance written notice and a reasonable time to respond orally or in writing. 5 U.S.C. § 7503(b) (2012). For longer suspensions, demotions, reductions in pay, and removal actions, employees are entitled to 30-days advance notice and a reasonable time to respond of not less than seven days. 5 U.S.C. § 7513(b) (2012).

275. *See* Adam Welinsky, *Individual and Moral Responsibility In Criminal Law*, 77 CORNELL L. REV. 1067, 1067 (1992) (arguing that individual responsibility does not just apply to what is commonly thought of as criminal law, rather it is individual responsibility to a "fundamental social code" to refrain from malign action). Avoiding ethical misbehaviors

A similar monitoring and enforcement system is sadly lacking with regard to corporate officer ethics accountability.

E. Structure of the Office of Government Ethics

The OGE is a small executive branch agency of approximately seventy-five employees.[276] Created by the Ethics in Government Act,[277] the OGE is led by a Senate-confirmed Director for a five-year term.[278] It has an annual budget of approximately $17 million.[279] The primary purpose of the OGE and the executive branch ethics program is prevention.[280] The OGE has four major divisions and eight subdivisions.[281]

For example, the OGE's Program Counsel Division conducts outreach to the OGE's stakeholders and the public and supports and trains executive branch agency ethics officials.[282] The Agency Assistance Branch provides direct advice to agency ethics officials in response to ethics questions or emerging ethics issues such officials may have.[283] The Ethics Law and Policy Branch develops and issues ethics regulations and authorizes executive agencies to supplement those regulations with additional ethics guidance specific to them.[284] It also publishes legal advisories, assists stakeholders in resolving complex ethics issues, and supports enforcement authorities, such as the DOJ and agency Inspectors General with consistent application of ethics laws and regulations.[285] The Compliance Division has two branches: the Program Review Branch and the Financial Disclosure Branch.[286] The Program Review Branch reviews agency ethics programs,

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would certainly fall within this paradigm.

276. *See* U.S. OFFICE OF GOV'T ETHICS, AGENCY PROFILE: PREVENTING CONFLICTS OF INTEREST, at 8, https://www.oge.gov/web/oge.nsf/0/3B02C6409E90E0C185258082005E6D8E/$FILE/OGE%20Agency%20Profile%20Book%20Single%20Page%20View.pdf [https://perma.cc/K7YC-WL8H] (last visited Oct. 26, 2019) (stating that the number of employees is around seventy-five); *see also Mission and Responsibilities*, *supra* note 185 (describing the mission and responsibilities of the agency).

277. Ethics in Government Act of 1978, Pub. L. No. 95-52, 92 Stat. 1824 (1978) (codified as amended at 5 U.S.C. App. §§101–505).

278. AGENCY PROFILE, *supra* note 276, at 9.

279. *Mission and Responsibilities*, *supra* note 185.

280. AGENCY PROFILE, *supra* note 276, at 6.

281. AGENCY PROFILE, *supra* note 276, at 18.

282. AGENCY PROFILE, *supra* note 276, at 15 (listing the responsibilities of the OGE's Program Counsel).

283. AGENCY PROFILE, *supra* note 276, at 15.

284. *See* AGENCY PROFILE, *supra* note 276, at 16 (describing the duties of the Ethics Law and Policy Branch).

285. AGENCY PROFILE, *supra* note 276, at 16.

286. AGENCY PROFILE, *supra* note 276, at 17.

tracks individual compliance with ethics agreements, and provides criminal referrals to the DOJ.[287] Lastly, the Financial Disclosure Branch monitors conflicts of interest through its management of the financial disclosure requirements for certain executive branch employees.[288] As noted below, several of these divisions could be adapted for use within a U.S. Office of Corporate Ethics.[289]

1. Agency Ethics Officials

There are currently about five thousand agency ethics officials who work at the various executive branch agencies.[290] Each executive branch head designates a Designated Agency Ethics Official ("DAEO") for that particular executive branch.[291] The DAEO then designates additional professional ethics officials ("ethics officers") to assist as needed.[292] The DAEO ensures that ethics officers have the training and skills necessary to perform their assigned duties and carry out the functions of the agency's ethics program.[293] Each agency DAEO, along with assisting ethics officers, have a number of key responsibilities. Among them are to liaise with the OGE; provide advice and counsel to prospective, current, and former agency employees regarding government ethics laws and regulations (collectively, "ethics rules"); carry out the agency's financial disclosure program; assist the agency with enforcement of ethics rules through disciplinary or corrective action and other means, as well as appropriate referrals to the DOJ; provide the IGs with advice on ethics rules; and provide ethics training to designated agency leaders.[294]

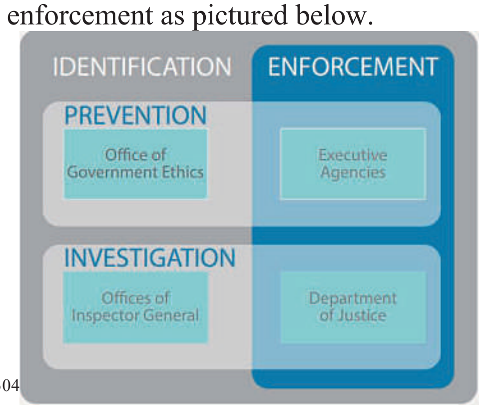
2. The Inspectors General

As noted previously, investigations of potential ethics violations within executive agencies are primarily performed by various Inspectors General staff members across the executive branch.[295] In accordance with the IG Act,

287. AGENCY PROFILE, *supra* note 276, at 17.
288. AGENCY PROFILE, *supra* note 276, at 17.
289. *See infra* Section IV(A)(2).
290. *See Mission and Responsibilities*, *supra* note 185 (stating that there are nearly five thousand ethics officials).
291. Government Ethics Responsibilities of Agency Ethics Officials, 5 C.F.R. § 2638.104(a) (2019).
292. 5 C.F.R. § 2638.104(e) (2019).
293. *Id.*
294. 5 C.F.R.§ 2638.104(c) (2019).
295. *See supra*, note 194 and accompanying text.

IGs have wide-ranging authority to audit and investigate.[296] Agency IGs are appointed by the President without regard to political affiliation.[297] The President may not remove or transfer an IG without notifying Congress in writing at least thirty days prior.[298] To maintain independence, IGs report to and are supervised directly by the heads of the agency involved[299] and are required to have direct and timely access to the agency head when necessary to perform IG functions.[300] IGs are also required to keep both Congress and the relevant agency head fully informed about agency deficiencies.[301]

Although the IG's mandate is broad,[302] with regard specifically to ethics matters, the IG investigates "suspected violations of conflict of interest laws and other government ethics laws and regulations," supports OGE requests for ethics investigations, and keeps OGE informed of IG referrals of ethics violations to the DOJ.[303] Thus, the IGs, OGE, DAEOs and their respective supporting staffs operate together for ethics violation prevention, investigation, and enforcement as pictured below.



[304]

While there are inherent differences between government service and serving as an officer or director of a publicly traded company, there are similarities in the standards of ethics applicable to each. In each situation,

296. IG Act § 4(a). For a concise discussion of IG authorities and responsibilities, see THE INSPECTORS GENERAL, COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY (July 14, 2014), https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf [https://perma.cc/6HAU-37VM].
297. IG Act § 3(a).
298. IG Act § 3(b).
299. IG Act § 3(a).
300. IG Act § 6(a)(6).
301. IG Act § 4(a)(5).
302. The IG Act's purposes also include audits, investigations, and recommendations regarding the effectiveness and efficiency of government programs. IG Act § 2.
303. Government Ethics Responsibilities of Inspectors General, 5 C.F.R. § 2638.106 (2019).
304. AGENCY PROFILE, *supra* note 277, at 7.

individuals are expected to put the interest of the organization over their own and to comport with standards of conduct applicable to one in a position of trust. Indeed, this is the theoretical basis of fiduciary standards in state corporate law, though these standards simply are not enforced.[305] We argue that with some modification, to take into account the differences between publicly held corporations and the government, a U.S. Office of Corporate Ethics modeled on these OGE standards would give much needed individual accountability in the area of corporate management.

IV. THE U.S. OFFICE OF CORPORATE ETHICS

"Ethics without regulation won't cut it."[306] That conclusion, conveyed over a decade ago by one commentator is clearly an idea whose time has come.[307] What is not needed are more "ethical codes and self-regulation, but schemes of tighter regulation, greater oversight, and dire consequences for those who breach them."[308] Simply put, lack of ethical behavior by corporate officers must have individual consequences in order for significant change in corporate behavior overall to improve.

In our view, a much more effective way to monitor and ensure ethical compliance by corporations than the current patchwork of tools and practices would be through creation of a U.S. Office of Corporate Ethics ("OCE") modeled after the U.S. Office of Government Ethics. The focus of the OCE would be on individual ethics training, monitoring, and compliance. As will be discussed below, much of the OGE's structure, as well as its ethics monitoring, compliance, and enforcement systems could effectively be adapted for ethics oversight of corporations and corporate officers in the OCE.

Naturally, any suggestion of the creation of a U.S. government agency will be met with resistance and, without doubt, the legislative foundations, cost, and complexity of creating agency structures and enabling them to function are significant.[309] Nonetheless, given the current state of ongoing

305. *See* discussion *supra* Section I(B) (discussing shareholder derivative litigation and the unenforced fiduciary standard in corporate law).

306. James Saft, *Ethics without regulation won't cut it,* REUTERS (Jan. 30, 2009), http://blogs.reuters.com/great-debate/2009/01/30/ethics-without-regulation-will-not-cut-it/ [https://perma.cc/SW2U-6H9V].

307. *Id.*

308. *Id.*

309. *See, e.g.*, Kurt Schacht, *The SEC's Budget Shows Just How Outgunned it is,* THE HILL (Apr. 13, 2019, 2:00:00 PM), https://thehill.com/opinion/finance/438651-the-secs-budget-shows-just-how-outgunned-it-is [https://perma.cc/F7M9-WNHA] (writing that Mr. Schacht, the managing director of the advocacy division of the CFA Institute, notes that the SEC's

ethical lapses by corporations and the tremendous effect such lapses are having not only on the corporation and its stakeholders, but the public as well, the authors view the creation of an OCE as a viable, effective tool. It is one that would result in more ethics oversight of corporate decision-making and establish effective ethics training of corporate officials. Importantly, it would provide more effective compliance and disciplinary tools for holding corporate officers personally accountable.

The purpose of this section of the paper is not to prescribe in detail what our proposed OCE should look like, including such issues as its detailed structure or authority, nor to provide a comprehensive outline of the specific ethics rules that should be applicable to corporate officers. To do so would be presumptive and undermine the careful political process that would need to occur to effectuate the ideas in this section. Rather, in proposing an OCE, we seek to introduce concepts for consideration and offer some ideas for modeling of an OCE after the OGE such that it could be created more quickly.

A. Proposed Structure and Function of the Office of Corporate Ethics

1. Leadership Structure

Professor Steven Ramirez has previously argued for the creation of a "Federal Reserve of Corporate Governance" to set corporate governance standards for publicly traded companies.[310] His recommendation provides an excellent basic structure for the OCE we recommend, which would provide many of the same benefits as his proposed corporate governance agency. The Federal Reserve ("Fed") was structured in a particular way to attempt to shield it from both political and special interests.[311] Key structural aspects that help give the Fed independence to carry out its mission are lengthy terms of office only subject to removal for cause, staggered terms so no one President will have outsized control, post-employment job restrictions, competitive salaries, and self-funding to insulate the Fed from the political appropriations process.[312]

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budget request for FY 2020 was $1.746 billion, which he argues is inadequate to provide proper supervision of the United States' large capital markets).

310. Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 350–51 (2007).

311. *Id.* at 350 (noting that the Fed structure "was created so that the Fed could exercise its prodigious power over monetary policy in accordance 'with the general public interest' and not 'the majority of special interests'") (internal citations omitted).

312. *Id.*

The goal of this legal structure is to de-politicize monetary policy by making it difficult for politicians to affect the Fed's decision-making on a day-to-day basis.[313] While this can lead to arguments that this makes the Fed's power unchecked, there is still restraint placed on the Fed by the fact that Congress could statutorily modify its structure or even abolish it altogether.[314] Depoliticized monetary policy has become the standard in modern industrialized economies and so far has operated relatively well, or at least better than any alternative that has been devised.[315]

We argue that issues of corporate governance and ethics, like monetary policy, need to be managed in a de-politicized manner, and thus a structure similar to that of the Fed or other independent agencies is needed. Many corporate leaders wield significant power due to the wealth that they command, and this power gives them the ability to curry favor with politicians. Because the OCE we propose would be involved in setting standards and policing the ethical conduct of these high-level officials, independence is important to this job being done well. This principle is well recognized in our current regulatory structure, as most of our federal agencies and commissions that regulate the economy are given some measure of independence.[316]

The ideal OCE would be similarly structured, with an odd number of commissioners with staggered terms, from different political parties, restricted in their financial holdings and outside employment, and subject to removal only for cause. As with other administrative agencies, the OCE

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313. *Id.*

314. *Id.*

315. *Id.* at 351 (noting "[d]epoliticized monetary policy has stood the test of time: Financial markets essentially demand it, and politicians acquiesce to it"); *see also* Eric S. Rosengren, *Central Bank Independence: What it Is, What it Isn't – and the Importance of Accountability*, FED. RESERVE BANK OF BOSTON (July 19, 2019), https://www.bostonfed.org/news-and-events/speeches/2019/central-bank-independence.aspx [https://perma.cc/BCZ6-MPEK] (last visited Jan. 1, 2020) (noting that studies have found "that countries with more independent central banks, such as the U.S., have lower inflation rates than those with less independent central banks").

316. *See, e.g.*, 15 U.S.C. § 78d(a) (2019) (establishing the Securities and Exchange Commission with five Commissioners that serve five-year staggered terms, with no more than three Commissioners belonging to the same party); *see also, e.g.*, 15 U.S.C. § 41 (2019) (establishing the Federal Trade Commission, and requiring that it be composed of five Commissioners, with no more than three being members of the same political party, serving staggered terms, subject to various outside employment and financial interest requirements, and only able to be removed by the President for "inefficiency, neglect of duty, or malfeasance in office"); *see also, e.g.*, 47 U.S.C. § 154 (a)–(c) (2019) (establishing the Federal Communications Commission, and requiring that it be composed of five Commissioners, with no more than three being members of the same political party, and subject to various outside employment and financial interest requirements).

should have rulemaking authority to pass rules and regulations to carry out its statutory mandate.[317]

2. Funding

An important issue for the formation of an OCE is funding. Should the agency be self-funded or subject to the congressional appropriations process? We argue that optimally, the OCE should be a self-funded agency and be required to fund its operations through the collection of fees and fines. While determining the exact method and amount of funding necessary for such an agency is outside the scope of this article, the concept of self-funding of administrative agencies in whole or in part, particularly of agencies that regulate economic and financial matters, is not unprecedented.[318] Commentators have argued that self-funding is an important aspect of making an agency independent.[319] Indeed, after the most recent financial crisis, there was a push by the SEC chairman and others for the SEC to be self-funded, so it could better regulate financial markets, but ultimately self-funding was not approved as a part of Dodd-Frank.[320] Since that time, commentators have asserted that the SEC has continued to be underfunded given the scope of financial market issues it has to regulate.[321]

317. *See, e.g.*, 47 U.S.C. § 154(i) (2019) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

318. *See, e.g.*, 47 U.S.C. § 159(a)(1) (2019) (giving the Federal Communications Commission the authority to collect regulatory fees to help cover its operating costs); *see also, e.g.*, 12 U.S.C. § 5497 (a) (2019) (providing for the Consumer Financial Protection Bureau to be self-funded through a transfer of funds from the Board of Governors of the Federal Reserve System, which is also self-funded, primarily through interest on government securities).

319. *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) (writing that "[s]everal of the financial independent agencies have funding sources, usually from uses and industry, which frees them from dependence on congressional appropriations and annual budgets developed by the executive branch"); *see also* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 589 (2000) ("Funding is key to independence.").

320. *See* Ronald D. Orol, *Five SEC Chairmen and Schumer Push for Self-Funded SEC,* MARKETWATCH (Apr. 15, 2010, 3:50:00 PM), https://www.marketwatch.com/story/five-sec-chairs-and-schumer-want-self-funded-sec-2010-04-15 [https://perma.cc/3R7F-YL9U] (noting that the current SEC chairman and several past chairmen argued that the SEC needed to be self-funded to keep up with the regulation of financial markets); *see also* Bruce Carton, *Same Old, Same Old with SEC Budget Process*, COMPLIANCE WEEK (June 19, 2015, 7:45:00 AM), https://www.complianceweek.com/same-old-same-old-with-sec-budget-process/12123.article [https://perma.cc/Y7ER-MMWM] (noting that self-funding was not approved as a part of Dodd-Frank, and the SEC continues to be underfunded as a part of the Congressional budget process).

321. Carton, *supra* note 320. *See also* Kurt Schacht, *The SEC's Budget Shows Just How*

We believe that self-funding could have numerous potential benefits for the OCE. First, as previously indicated, it would insulate the OCE from the politics of the budgeting process, noted as an important aspect of independence. Second, it would encourage it to operate in an efficient manner while still giving it the opportunity to generate adequate funds to carry out is mission. Just like the corporations that it oversees, it would have to carefully monitor its own income and expenditures. However, it could adjust fees to increase its budget if necessary.

Third, in line with our argument of treating business managers as quasi-professionals, we contend that such a structure could give the individuals governed by the OCE more of a feeling of pride and ownership in the OCE and likewise aid the OCE in connecting with the group it regulates.[322] The SEC is closely integrated with the private sector that it regulates through the utilization of "self-regulatory organizations" like the stock exchanges and the Financial Industry Regulatory Authority.[323] These organizations are private and serve a quasi-regulatory function with oversight from the SEC.[324] While there are certainly potential hazards with such a structure, such as conflicts of interest and regulatory capture, there are benefits as well.[325]

Professional associations operate in a similar independent manner. For example, the Texas Bar Association is a government agency authorized by statute.[326] It is overseen by the Supreme Court of Texas.[327] However, its day-to-day affairs are largely run by the members of the state bar itself through officers and the board of directors, which are elected by the members of the state bar.[328] Although it is a government agency, it is does not receive state tax dollars and is not part of the budget appropriations process.[329] This

Outgunned it is, THE HILL (Apr. 13, 2019, 2:00:00 PM), https://thehill.com/opinion/finance/438651-the-secs-budget-shows-just-how-outgunned-it-is [https://perma.cc/F7M9-WNHA] (arguing that the SEC's budget is inadequate to provide proper supervision of the United States' large capital markets).

322. *See* Bressman & Thompson, *supra* note 319, at 614 (noting how the SEC's utilization of self-regulatory organizations ("SROs") helps it stay in touch with the securities markets and craft effective policy).

323. Bressman & Thompson, *supra* note 319, at 614.

324. Bressman & Thompson, *supra* note 319, at 614.

325. *See* Bressman & Thompson, *supra* note 319, at 615 (noting the benefits of SROs, including practical information, self-discipline of the regulated parties, and the potential for voluntary compliance through the industry policing its own).

326. TEX. GOV'T. CODE ANN. § 81.011(a) (West 2019) ("The state bar is a public corporation and an administrative agency of the judicial department of government.").

327. *Id.* § 81.011(c) ("The Supreme Court of Texas, on behalf of the judicial department, shall exercise administrative control over the state bar under this chapter.").

328. *Id.* §§ 81.019-020 (establishing officers of the state bar and the board of directors of the state bar).

329. *Frequently Asked Questions*, STATE BAR OF TEX., https://www.texasbar.com/Conten

gives the members of the state bar a distinct feeling of ownership, pride, and self-regulation of their own profession, even though the ultimate authority is the government. We would not argue that the OCE should have the same degree of self-determination as a state bar, as we have admitted there are important differences between the learned professions and business managers.[330] However, we do believe that the OCE would function optimally if officers and directors embraced it as a quasi-professional organization that they are proud to be a part of and sets them apart as being willing to be held to a high standard of ethics due to the power and prestige of their positions as corporate managers. To at least some degree, self-funding through fees and assessments and a degree of independence from the political branches of government could help accomplish this. While the hazard of inadequate regulation can always manifest with independence, the ultimate oversight of congressional removal or modification of the enabling legislation would also always be present.

3. Administrative Structure

Administratively, the OCE could be structured similarly to the OGE in certain key respects. It need only have a relatively modest number of employees to administer the OCE's overall mission.[331] The OGE's divisional structure could be readily adapted to the OCE since its functions would substantially overlap.[332] Instead of agency ethics officials scattered throughout the executive branch as employees of their particular agency, the OCE could appoint designated corporate ethics officials ("DCEOs") who are employees of the individual corporation with concurrent duties to oversee the OCE mandate.[333] The duties of DCEO's would be similar to those of OGE DAEOs.

These duties would include liaising with the OCE; providing advice and counsel to prospective, current, and former corporate officers regarding

t/NavigationMenu/ForThePublic/FAQ/default.htm#taxes [https://perma.cc/7JXX-KQVW] (last visited Jan. 6, 2020) (explaining that the State Bar of Texas is funded through means such as membership fees and advertising income and does not receive tax dollars).

330. *See* discussion *supra* Part II (distinguishing corporate management from learned professions, such as law and medicine, and their knowledge, certification, and ethical requirements).

331. *See supra* Section III(E) (noting that the OGE consists of just seventy-five employees).

332. *See supra* Section III(E) (listing the four main divisions of the OGE and their responsibilities).

333. *See supra* Section III(E)(1) (discussing the various ethics responsibilities of executive agency DAEOs and ethics officials).

ethics laws and regulations; carrying out a required financial disclosure program for corporate officers to detect potential conflicts of interest; assisting the OCE with enforcement of ethics rules through the recommendation of disciplinary or corrective action or other means, as well as appropriate referrals to the DOJ; and providing corporate officers with advice on ethics rules and training.[334]

The issue of how to conduct oversight and investigations of ethics issues involving corporate officials outside of current SEC and DOJ authority would have to be carefully considered. While some officials with investigatory power may be necessary, we think creating a large number of investigating officials similar to the U.S. government's IG program is unnecessary.[335] Instead, DCEOs within each corporation could be empowered by law to conduct appropriate investigations and recommend actions as needed within their particular corporation.

4. Responsibilities of the OCE

The proposed OCE would have two primary responsibilities: 1) preventing ethics lapses by corporations and their officers and directors; and 2) holding corporations and their officers and directors individually accountable for ethics violations.

a. Prevention

A key responsibility of the OCE should be, first and foremost, prevention. To that end, we propose that the OCE has the statutory responsibility to provide ethics guidance, training, and monitoring to designated corporate ethics officials (DCEOs) regarding ethics principles, rules, and their application. DCEOs would be employees of the corporation. As with executive branch DAEOs, DCEOs would need many of the same responsibilities as DAEOs.[336] This would include being authorized to be assisted by corporate ethics advisors in carrying out the DCEO's ethics responsibilities.[337]

The DCEO and assisting corporate ethics advisors would be responsible for providing guidance to corporate officers on all relevant ethics matters. Similar to existing OGE procedures, corporate officers could seek ethics

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334. Ethics Responsibilities of DAEOs, 5 C.F.R. § 2638.104(c) (2019).

335. *See* discussion *supra* Section III(E)(2) (noting that government IGs have many additional duties outside of investigating ethics violations).

336. *See* 5 C.F.R. § 2638.104(c) for a full list of the duties of agency ethics officials.

337. 5 C.F.R. § 2638.104(e).

advice on matters involving questions of ethics compliance and if having done so, receive a level of personal immunity from adverse actions in implementing the ethics advisor's advice, should that occur.[338]

The OCE would also have a training responsibility similar to the OGE. This would include the responsibility to provide detailed ethics training to DCEOs and their staffs.[339] Additionally, OCE legal authority should require that corporate officers receive ethics training initially, periodically (at least annually), and under other circumstances as necessary while undertaking their duties. These ethics training requirements should be very robust and could be tailored from the government's ethics education requirements.[340] This training would be tailored depending on the roles and responsibilities of the corporate officers. Certainly, all senior corporate officers, as well as corporate officers involved in finance or other corporate areas with a high risk for conflicts of interest would be required to have more extensive and frequent training.[341]

DCEOs and ethics advisors also need the authority to monitor ethics compliance by corporate officers. This would require legal authority to access the information necessary to assist corporate officials with their ethical duties by providing advice, as well as allow ethics advisors to detect potential ethics violations. The authorizing legislation should also mandate execution of a financial disclosure program covering senior corporate officers and high-risk conflict of interest positions.[342] A byproduct of the OCE's monitoring authority would be to deter unethical behavior and encourage corporate officers to seek ethics advice, especially for areas where ethics issues may be complex. In sum, the fundamental statutory goal of the OCE's legal authority should be the prevention of ethics violations through

338. Ethics Advice Rule, 5 C.F.R. § 2635.107 (2019).

339. 5 C.F.R. § 2638.104(e).

340. *See* Initial Ethics Training, 5 C.F.R. § 2638.304 (2019) (requiring that ethics training consist of a presentation on specified ethics laws and regulations as well as additional written materials).

341. This proposed requirement is somewhat similar to ethics education rules for senior agency leaders and those required to file annual financial disclosure information. *See* Ethics Briefing for Agency Leaders, 5 C.F.R. § 2638.305 (2019) (mandating additional disclosure of any newly-acquired financial interests by certain agency heads).

342. This could be similar to existing executive branch rules mandating persons required to file financial disclosure information. *See* Confidential Financial Disclosure Reports, 5 C.F.R. § 2638.205 (2019) (establishing procedures for the collection of confidential financial reports from executive branch employees). The OCE could be organized to have a division similar to the OGE Financial Disclosure Branch with responsibility for executing and monitoring the program. *See* AGENCY PROFILE, *supra* note 276, at 17 ("[FDB] ensures that senior government leaders are free of conflicts of interest by reviewing and analyzing their public financial disclosure reports following certification by agency ethics officials.").

advice, training, and monitoring such that the OCE's secondary goal of accountability would ideally only need to be executed sparingly.

b. Personal Accountability

As has been noted, individual accountability is the critical component of a successful ethics enforcement system.[343] As such, the OCE should be empowered to conduct ethics investigations as necessary to determine whether corporate officers have violated ethics rules. This, of course, would not entail any duties already the legal responsibility of the Department of Justice.[344] We do not propose creation of corporate inspectors general with similar responsibilities to government IGs, as the responsibilities of government IGs are too broad.[345] Instead, most routine investigations could be conducted by corporate DCEO's and ethics advisors; the same advisors whose primary responsibility is prevention.[346]

Although there are many ways in which a system of investigation and accountability for corporate ethics violations might be designed and structured, one option would be to enable a corporation's ethics advisors to investigate routine ethics matters internally, with the results of such investigations provided to the DCEO. Each DCEO would then be empowered to make recommendations on whether an ethics violation occurred and recommend an appropriate disciplinary remedy. Depending on the case, the DCEO would be authorized to turn the matter over to an appropriate senior corporate officer for action, or in the case where a senior corporate officer is involved in an ethics violation, turn the matter over directly to the OCE. Cases involving violations of criminal law would be required to be reported to the Department of Justice for action.[347] Given the high risk of conflicts of interest in corporations reporting their own officers' ethics violations, DCEOs would need statutory protections preventing

343. *See* Saft, *supra* note 306 and accompanying text (emphasizing the need for ethics regulations in the financial sector and "dire consequences for those who breach them" in order to effectively limit self-interest).

344. *See Enforcement*, *supra* note 195 (listing the DOJ's enforcement powers over violations of ethics statutes and regulations, including criminal prosecution and disciplinary actions).

345. The IG Act's purposes also include audits, investigations, and recommendations regarding the effectiveness and efficiency of government programs. IG Act § 2. This paper does not advocate any OCE responsibility for similar purposes, as the free market typically serves the purpose of effectuating effective and efficient corporate operations.

346. *See supra* Section IV(A)(4)(a) (discussing DCEOs' roles in preventing ethics lapses by corporations and their officers and directors).

347. *Enforcement*, *supra* note 195.

reprisals against them in cases of reporting outside corporate channels.[348] Certain firewalls and other structural and legal protections would need to be available to DCEOs to maintain their independence, avoid conflicts of interest, and prevent retaliation. Importantly, mechanisms that would prevent incentivizing DCEOs and their staffs from *not* investigating would be critical. Ideas might include creating certain compensation rules for these individuals. Lastly, mechanisms allowing OCE ethics officials to directly investigate in cases referred to it by DCEOs would be critical. As such, investigators from an investigation branch within the OCE could lead and conduct investigations requiring a higher level of scrutiny or involving high-level corporate officers.

We do not argue that every corporate employee would be personally monitored by and accountable to the OCE. Given the number of publicly traded companies and their employees, such an undertaking is unnecessary and unwieldy. The accountable individuals should only be higher-level officers and directors, those "quasi-professional" managers that we argue should be held personally accountable for ethical conduct.[349] The current SEC definitions of "executive officer" and "director" provide workable definitions for the types of individuals who could be held accountable for ethical violations under the OCE.[350] The goal of the OCE would be to help improve ethical management of publicly held companies, not to ensure that every employee of every publicly held company behaves ethically.

348. A number of current statutes protect individuals who report fraud or violations of the law by a corporation or corporate official. *See e.g.*, Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A (2016) (providing an anti-retaliation provision for whistleblowers who report suspected legal violations by their employers); False Claims Act, 31 U.S.C. § 3730(h) (2012) (protecting employees and contractors who oppose a company's fraudulent claims from retaliatory or discriminatory employment actions). *See also* 18 U.S.C. § 1513(e) (making retaliation against a whistleblower a criminal offense).

349. *See* discussion *supra* Section II(D) (maintaining that officers and directors of influential public companies should be regulated by ethics standards similar to those of learned professions).

350. *See* Regulation D Terms, 17 C.F.R. § 230.501(f) (2019) ("Executive officer shall mean the president, any vice president 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 issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer."). *See also* SEC Definitions, 17 C.F.R. § 230.405 (2019) ("[D]irector means any director of a corporation or any person performing similar functions with respect to any organization whether incorporated or unincorporated.").

c. Corrective and Disciplinary Actions

Most corrective and disciplinary actions against corporate officers for ethics violation could be structured in a manner similar to those available to government agencies.[351] Options include the use of non-punitive corrective actions similar to those authorized under existing OGE regulations, such as changing the employee's assignment, ordering the employee to divest conflicting assets, terminating the offending activity, counseling, or restitution by the employee.[352] As with OGE corrective action, corrective actions responses would be intended to prevent the violation from occurring in the future.[353]

Also similarly to the OGE's approach, disciplinary actions against corporate officers for ethics violations could be established by regulation and include reprimands, suspensions, demotions, and removal (i.e., termination).[354] The corporation would make corporate officers and employees aware of these options as part of the corporation's overall ethics training efforts. With regard to terminations specifically, although traditional "at-will" doctrine allows for termination regardless of the existing of any accompanying statutory or regulatory authority,[355] the creation of specific authority in this area, including procedural due process standards, could serve to insulate the DCEO and the corporations against potential litigation liability for wrongful termination.[356]

One way in which an OCE should be different than the OGE is that corrective and disciplinary action should also include potential penalties similar to those found in the securities laws. This would include: 1) the imposition of fines; and 2) injunctive relief, namely a permanent or temporary bar from serving as an officer or director of a publicly traded

351. *See* discussion *supra* Section III(D)(2) (listing the sanctions for violating OGE standards, including civil penalties, corrective actions, and disciplinary actions).

352. *See supra* Section III(D)(2)(b) (discussing the procedures for corrective action responses).

353. *See supra* Section III(D)(2)(b) (citing the statutory definition of "corrective action" as an action necessary to "prevent a continuing violation" of the OGE Standards).

354. *See supra* Section III(D)(2)(c) (noting that disciplinary actions can range from "lesser disciplinary actions" to "more severe adverse actions").

355. *Employment at Will,* BLACK'S LAW DICTIONARY (6th ed. 1990).

356. *See At-Will Employment and Wrongful Termination*, FINDLAW (Dec. 5, 2018), https://employment.findlaw.com/losing-a-job/at-will-employment-and-wrongful-termination.html [https://perma.cc/58YW-XU5N] ("[W]rongful termination includes terminations that violate a state's public policy, terminations after an implied contract for employment has been established, and terminations in violation of the implied covenant of good faith and fair dealing. Wrongful termination also includes terminations in violation of federal, state, or local anti-discrimination laws.").

company.[357] Unlike most government employees, most officers and directors of publicly traded companies earn substantial incomes for their efforts. Thus, an important deterrent is monetary penalties for particularly egregious behaviors that violate the ethical standards set by the OCE.

In line with the focus on individual accountability, we also recommend that such penalties be expressly non-indemnifiable by the corporation. For true accountability, it is important that the bad actors themselves bear the cost of their actions and not the corporation and its shareholders. The ultimate deterrent the OCE should possess is the officer and director bar. An important aspect of professional regulation is the potential to lose your ability to practice that profession if you are found to be unfit to do so.[358] For very wealthy and highly paid individuals, the potential sanction of being prevented from continuing to operate as an officer or director is a very important deterrent to unethical conduct.

d. No Private Cause of Action

Ideally, no private causes of action would be created under the OCE. The goal of the OCE would be to provide a mechanism for ethical behavior to be adequately policed, not to compensate victims. Sufficient private causes of actions already exist for most of the harms that might occur, and to create a private cause of action under any OCE statute or regulation would run the risk of simply encouraging enterprising plaintiff's lawyers to attempt to sue executives for any conduct they deem to be unethical. Such a structure follows the quasi-professional formulation that we advocate. For example, a doctor can be sued by his clients under general tort law if he commits malpractice. However, any professional sanctions related to competency would be determined by the board under which he is licensed. Similarly, while we envision an OCE that could have a mechanism for private individuals to contact the OCE to report allegedly unethical conduct that

357. *See* 15 U.S.C. § 78u-3(f) (2012) (providing for a temporary or permanent officer and director bar for violations of section 78j(b) of the Exchange Act or any of its rules or regulations). *See also id.* § 78u-2(a) (giving the SEC authority to assess money penalties in administrative proceedings); *id.* § 78ff(c) (providing for various monetary penalties for violations of securities laws).

358. *See* Rakesh Khurana, Nitin Nohria & Daniel Penrice, *Is Business Management a Profession?*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Feb. 21, 2005), https://hbswk.hbs.edu/item/is-business-management-a-profession [https://perma.cc/7SZ2-52SJ] ("A governing body, composed of respected members of the profession, oversees adherence to the code by establishing monitoring mechanisms, reviewing complaints, and administering sanctions—including the ultimate sanction of revoking an individual's license to operate as a professional.").

might violate OCE regulations or to even file a grievance with the OCE, we do not believe that a private cause of action seeking damages would be a productive way to police ethical behavior.

5. Standards of Conduct for U.S. Corporate Officers

As was noted earlier, many of the basic obligations of public service of executive branch employees are directly applicable and easily transferable to the ethical obligations of corporate officers.[359] It is, nonetheless, worthwhile to list the principles substituting the words "corporate officer" for the existing word "employee":

1. Requiring corporate officers to place loyalty to the law and ethical principles above private gain;
2. Prohibiting corporate officers from holding financial interests that conflict with their performance of duty;
3. Prohibiting corporate officers from engaging in financial transactions using nonpublic information or allowing the improper use of such information to further any private interests;
4. Prohibiting corporate officers, except as specifically allowed by other regulation, from soliciting or accepting any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's organization;
5. Requiring corporate officers to put forth honest effort in the performance of their duties;
6. Prohibiting corporate officers from using their position for private gain;
7. Requiring corporate officers to protect and conserve property and not use it for other than authorized activities;
8. Prohibiting corporate officers from engaging in outside employment or activities, including seeking or negotiating for employment, that conflict with that officer's official duties and responsibilities;
9. Requiring corporate officers to disclose waste, fraud, abuse, and corruption to appropriate authorities; and
10. Requiring corporate officers to endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards.[360]

359. Obligation Public Service, 5 C.F.R. § 2635.101(b)(1)–(5), (7), (9)–(11), (14) (2019).
360. *Id.*

Additionally, in order to implement these principles, a set of Standards of Ethical Conduct for U.S. Corporate Officers could be created by rulemaking. These could be the subset of the standards of ethical conduct for executive branch employees discussed above[361] and would, among other potential rules, include those dealing with conflicts of financial interests, gifts, impartiality in advancing corporate interests, and corporate officer misuse of position and corporate information for personal gain.[362]

In-line with the quasi-professional regulatory nature of our proposed OCE, we propose that the ethical standards used expressly incorporate the numerous criminal and civil statutes applicable to corporate officers and directors as a "catch-all" for ethical behavior. It is difficult to argue that ethical business management does not encompass following applicable laws. However, as previously discussed, many of the laws that have been passed that regulate corporate governance and ethical management issues do not have adequate enforcement mechanisms for individual accountability.[363] By incorporating relevant existing legal violations into standards of behavior under the OCE, the OCE can give much needed teeth to existing violations.

To illustrate how this might work, we can return to a previous example of an executive accused of a pattern of sexual harassment.[364] Suppose that the corporation has continued to either pay judgments or confidential settlements on behalf of the executive. If an OCE investigator is allowed to investigate and use its enforcement powers related to the same conduct and considers the conduct to be a violation of ethical management standards, there is actual personal accountability at stake. Now the OCE could either fine the executive himself or temporarily or permanently bar the executive from serving as an officer or director of a publicly traded company. This would treat corporate officers and directors similarly to other professionals who can be deemed unfit to practice their profession due to certain violations of the law.[365]

361. See *supra* Section III(C) for a full discussion of OGE ethics standards that could be made applicable to corporate officers and employees.

362. *See supra* Section III(C) (discussing specified ethical conduct requirements listed in the OGE Standards). *See also* 5 C.F.R. § 2635.

363. *See* discussion *supra* Part I (discussing the inadequacy of current securities and corporate governance laws with respect to policing corporate ethics at the individual level).

364. *See Uber to pay $1.9M for sexual harassment claims*, *supra* note 4 (reporting on several sexual harassment and discrimination claims against Uber brought by fifty-six current and former employees).

365. *See generally* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. B, § 1.06(CC) (West 2018) (defining "professional misconduct" as including conviction of a "serious crime" or an "intentional crime").

6. Implementation of an OCE

Creation of an OCE as this paper describes is a substantial task. One option for consideration would be to create and legally authorize the OCE structure and authorities and then phase in corporations for legal coverage, starting with the largest public corporations, or at least a subset of them. How this would be decided would be subject to debate, but one option would be to first phase in corporations in the Fortune 500[366] or Fortune 1000.[367]

The OCE itself need not be a sizeable government agency. OCE legislation should require each corporation covered by the legislation to have a DCEO with direct reporting responsibilities to the OCE. Just as with OGE DAEOs and ethics advisors, who are employees of the executive agencies, a DCEO could be hired by each corporation with overall responsibility for leading and managing the corporation's ethics program efforts. This would include coordinating ethics oversight, training, and compliance within the corporation. Careful thought of potential conflicts of interest with DCEOs due to their status as corporate employees would need to be undertaken with a view to creating mitigation mechanisms. Protection of DCEOs from corporate reprisals is critical. Most importantly, corporate buy-in is vital.

V. CONCLUSION

Current corporate statements about their commitment to ethics are legion.[368] Support of ethics beyond mere phrases by top-level corporate

366. Fortune magazine ranks the top 500 U.S. companies (public and private) by total revenue based on their 10-K filings. Adam Hayes, *Fortune 500*, INVESTOPEDIA (Jun. 25, 2019), https://www.investopedia.com/terms/f/fortune500.asp [https://perma.cc/BBN8-RER3].

367. This list by Fortune magazine ranks US public corporations based on revenues generated from core operations, discounted operations, and consolidated subsidiaries. The Fortune 500 list is more often used because of the rapid turnover of companies near the bottom of the Fortune 1000 list. James Chen, *Fortune 1000*, INVESTOPEDIA (Sept. 22, 2019), https://www.investopedia.com/terms/f/fortune-1000.asp#:~:targetText=The%20Fortune%201000%20is%20an,discounted%20operations%2C%20and%20consolidated%20subsidiaries [https://perma.cc/S5BB-MWSL].

368. *See, e.g.*, Internal Policy, Facebook, Code of Conduct 1 (June 10, 2019), https://s21.q4cdn.com/399680738/files/doc_downloads/governance_documents/2019/Code-of-Conduct-(June-10-2019).pdf [https://perma.cc/JL83-4WD6] ("Employees of Facebook, Inc., or any of its affiliates or subsidiaries ("Facebook") . . . are expected to act lawfully, honestly, ethically, and in the best interests of the company while performing duties on behalf of Facebook."); Internal Policy, Bank of Am. Corp., Code of Ethics ii. (Dec. 2013), https://www.banktrack.org/download/code_of_ethics_20/190318code_of_ethics_dec2013.pdf [https://perma.cc/3XJ6-D65D] ("Each of us is accountable for upholding the highest ethical standards as we execute our responsibilities. Managers and leaders are also responsible for

executives is a must and should be demonstrated by action.[369] While the internal support of ethical conduct by corporate leaders is valuable, if the stated commitment to ethics of most corporations is genuine, corporate leaders should be able to see the long-term value of improving it: value to their reputation, value to their stockholders and customers, and value to their profitability. Knee-jerk reactions against change belie this stated commitment. The authors hope to avoid such reactions with this proposal—not minimizing the task creating an OCE would entail but engendering real conversation about a genuine problem.

It is always easier to continue the status quo. There is little doubt this proposal will be met with resistance. Substantial political will is going to be necessary. This paper makes the case that corporate ethical behavior is rapidly going in the wrong direction. Current attacks on the corporate system are only further enabled by the seemingly endless ethical malfeasance by many corporations and the inability of the current system to hold corporations and corporate officers individually accountable. The de facto ineffectiveness of stockholder enforcement options and the rapid decline of criminal prosecution of corporations and its officers has led to the current

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establishing and nurturing a culture in which employees feel fully empowered, supported and obligated to do the right thing."). *See also* Sean T. Johnston, *Ford Named One of the World's Most Ethical Companies for Eighth Straight* Year, FORD: FORDSOCIAL, https://social.ford.com/en_US/story/ford-community/awards/ford-named-one-the-worlds-most-ethical-companies-for-eighth-straight-year.html [https://perma.cc/BYM8-LAVW] (last visited Jan. 2, 2020) ("'Strong ethics and corporate citizenship are the foundation of our business philosophy, which demonstrates to our customers what we stand for as a company,' said Bill Ford, Ford Motor Company Executive Chairman.").

369. Many possible steps and activities to demonstrate corporate officer commitment are possible. Among the actions one author lists actions are:

> 1) Integration of ethics and compliance at business meetings; 2) Specific decision where a CEO or senior executives explain that ethical principles transcend short-term financial gain from a business opportunity; 3) Commitment to training and certifications by volunteering to complete training before other managers and employees; 4) Speaking before small groups (e.g. new employee orientation to emphasize importance of ethics and compliance; 5) Written newsletters, videos, postings on the intranet portal, and updated materials (more than once a year) explaining importance of ethics and compliance and commitment to hearing and responding to employee concerns, questions, and comments; 6) Symbolic acts of commitment to ethics and compliance such as small group meetings to listen to employee concerns, follow up on issues learned from employees, and communications of efforts to address employee concerns; [and] 7) Familiarity with the company's code of conduct, citation of provisions in company meetings and statements of support.

Michael Volkov, *Walking the Walk and Talking the Talk–A CEO's Commitment to Ethics and Compliance*, VOLKOV (Feb. 6, 2017), https://blog.volkovlaw.com/2017/02/walking-walk-talking-talk-ceos-commitment-ethics-compliance/ [https://perma.cc/W588-D3KR].

practice of opening up the corporate checkbook. The paying of penalties and fines with stockholder assets and the creation of attendant tax consequences to the U.S. taxpayers are not the answer. Neither is the current focus of corporate self-regulation of its own ethical behavior.

Although President John F. Kennedy in his famous 1962 speech at Rice University specifically addressed the moon landing program, his words are apropos here: "We choose to . . . do the other things, not because they are easy, but because they are hard."[370] Creating a U.S. Office of Corporate Ethics will be hard. But it is a visionary endeavor that if done right, would be well worth the effort and cost in terms of its benefits to stabilizing and creating an enduring corporate free market system less subject to criticism and attack and more responsive to the needs of stockholders, stakeholders, and the public.

370. President John F. Kennedy, Address at Rice University on the Nation's Space Effort (Sept. 12, 1962).