Mandatory Public Reason-Giving in Corporate Governance

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ABSTRACT: Since the late 1970s, corporate governance law has incorporated a growing number of mandates that require corporate boards to explain to their shareholders the reasons behind their decision-making. These mandates do more than merely require boards to disclose certain decisions. They compel boards to publicly state why they have made a particular choice.

Public reason-giving is a core democratic value that recognizes the accountability of a representative body to its constituents. It provides a basis for constituents to assess the quality of leaders' decision-making and to engage with that decision-making in effective ways. In corporations, public reason-giving facilitates the shareholder's exercise of the vote; it also provides key tools for shareholders to contest decisions with which they disagree, while encouraging boards to employ care and deliberation around controversial issues that are likely to generate dissent among stakeholders.

This Essay describes the trend in favor of public reason-giving and situates it in relation to the "democratic turn" in public company governance. It also assesses the merits of the trend. The Essay argues that public reason-giving mandates have the potential to move boards beyond superficial or politically motivated decision-making to reach reasoned decisions that will hold up under scrutiny and contestation. Mandatory public reason-giving can be useful for mitigating polarization and thus could play a constructive role in board decision-making related to climate risk. Indeed, the SEC's climate risk disclosure rule included some reason-giving requirements, and investors demanded more reason-giving than the final rule prescribed. The Essay concludes that regulators should continue to experiment with reason-giving mandates, and investors should continue asking for them and, if possible, use private ordering to get them.

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INTRODUCTION

Public reason-giving is a core feature of representative democracy. When leaders are obligated to publicly explain their reasons for decision-making, democratic governance works more effectively.[1]

At least since the 1970s, public reason-giving mandates have been found in corporate governance. These mandates require corporations or their boards to publicly state the reasons that justify a corporate decision, such as how to structure the corporation's leadership or whether to have an ethics policy for senior executives. Formal reason-giving mandates are found in comply-or-explain rules and in Securities and Exchange Commission ("SEC") regulations requiring boards to explain changes to the methodologies used to calculate pay versus performance. Informal reason-giving mandates are found in voting guidelines published by proxy advisors and in companies' own voluntary commitments.

This Essay provides a timeline of the reason-giving trend and shows that it has been accelerating since the turn of the twenty-first century. Though some might criticize public reason-giving mandates as burdensome regulation, this Essay argues that they make a valuable contribution to corporate governance. Reason-giving mandates fit squarely within the conventional design of American corporate democracy and reinforce existing relationships of accountability. They help shareholders protect their interests in a legal

1. For a discussion of reason-giving, which the author describes as one of the "four elements of democracy," see Joshua Ulan Galperin, *A Restatement of Democracy*, 69 VILL. L. REV. 55, 87–93 (2024).

landscape in which officers' and directors' duties of care are difficult to enforce and corporate elections present shareholders with an increasing selection of potentially value-enhancing options.

Reason-giving is an acknowledgement that elected corporate officials (directors) owe an explanation for important decisions to those who elect them, on whose behalf they act. In addition, public reasoning acknowledges the right of the organization's constituents (shareholders) to independently evaluate the reasons offered by the board for its decision-making, reinforcing the board's accountability to its residual claimants. Shareholders' evaluations of reasons matter when shareholders vote in director elections. Laws requiring reason-giving also provide a basis for shareholders to contest board decision-making with rigor. Indeed, the Disney proxy fight in 2024 exemplified how director candidates in a contested election engage with previous statements by corporate leaders explaining the reasons behind their policy and strategy decisions.

This Essay shows that the trend in favor of public reason-giving in corporate governance tracks a "democratic turn" in American corporate law. It also shows that reason-giving mandates are used in relation to both governance and environmental, social, and governance ("ESG") decision-making. Congress requires the board to publicly explain its reasons for making one of its members both CEO and board chair, instead of separating those roles, for example.[2] The SEC mandates that the corporation's managers must explain their reasons for recommending (or recommending against) a merger or acquisition via a tender offer, or a going-private transaction.[3] SEC rules also require managers to disclose their reasons for changing the methodology they use to calculate the CEO pay ratio.[4] These and other examples show that the reason-giving trend stands apart from the ESG movement.

Part I presents mandatory public reason-giving as a democratic value. Part II provides a history of mandatory public reason-giving in American corporate law. It shows that the rise of public reason-giving mandates—in federal securities law and regulation and in self-regulating organizations' rules—tracks the power shift in favor of shareholders in American corporate governance, which the Essay describes as a "democratic turn" in corporate governance. Part III assesses the merits of this trend. It argues that reason-giving mandates reinforce the traditional relationship that makes boards accountable to the corporation's shareholders and that the growing importance

2. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 972, 124 Stat. 1376, 1915 (2010) (codified at 15 U.S.C. § 78n-2 (2018)) ("Disclosures Regarding Chairman and CEO Structures").

3. *See generally* Going Private Transactions by Public Companies, Exchange Act Release No. 34-16075, 1979 WL 195252 (Aug. 2, 1979) (codified at 17 C.F.R. § 240.13e-3 (2024)) [hereinafter Exchange Act Release No. 34-16075] (providing rules on going-private transactions); Tender Offers, Exchange Act Release No. 34-16384, 44 Fed. Reg. 70326 (Dec. 6, 1979) (codified at 17 C.F.R. § 240.14e-2) [hereinafter Exchange Act Release No. 34-16384] (providing rules on tender offers).

4. *See infra* notes 81–82 and accompanying text.

of corporate elections—including a recent surge in contested corporate elections—suggests that reason-giving will continue to be an important board function. It also connects reason-giving to the "information governance" model of board governance, suggesting that boards can augment firm value via reason-giving processes.

Part III also argues that mandatory public reason-giving may be particularly useful in helping corporate boards overcome biases when they make decisions related to polarizing issues, such as political spending, climate risk, and human capital management. By focusing boards on the reasons for high-level corporate policy decisions, public reason-giving requirements force them to move beyond superficial or biased decision-making to reach defensible, reasoned choices.

I. PUBLIC REASON-GIVING AS A DEMOCRATIC VALUE

Public reason-giving is a long-established democratic value that finds expression in American political governance. The judicial branch employs a deep praxis of reason-giving, as do administrative agencies.[5] Americans demand reasons from their elected leaders and react to those reasons in politics. This Part explores mandatory public reason-giving as a democratic value. It explains how reason-giving relates to self-government, reinforces democratic relationships of power and accountability, protects against autocratic governance, and promotes virtuous decision-making practices.

Public reason-giving is an acknowledgement that officials owe an explanation for their decisions to those who are governed by the decisions. This idea embodies a core principle of democracy: that governing power must be legitimized by the consent of the governed.[6] Such consent—authentic, deliberate, knowing consent—arguably cannot be obtained unless the reasons for decisions are disclosed and accepted. Reason-giving conveys authority to the decision by increasing the likelihood that individuals subject to the decision will respect it.[7] In *un*democratic relationships, such as parent–child or principal–agent, reasons are not owed; the child and the agent are expected merely to accept and comply with the parent's and the principal's choices. Reason-giving mandates discourage the autocratic exercise of power associated with these sorts of relationships by requiring something of leaders beyond whim or fiat.[8]

The leader's obligation to disclose reasons addresses the practical need to operationalize representative democracy through elections. Voters must be

5. *See, e.g.*, Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813–17 (2012) (administrative reason-giving); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 638 (1995) (judicial reason-giving).

6. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 217 (1993).

7. *See* Mathilde Cohen, *Reasons for Reasons*, *in* APPROACHES TO LEGAL RATIONALITY 119, 124 (Dov M. Gabbay, Patrice Canivez, Shahid Rahman & Alexandre Thiercelin eds., 2010) ("Reasons are primarily designed to guide, but to do so, they must first be recognized as good, valid reasons.").

8. Schauer, *supra* note 5, at 636–37 ("The act of giving a reason is the antithesis of authority. When the voice of authority fails, the voice of reason emerges.").

able to evaluate the quality of their leaders' decisions in order to decide whom to elect to office; in some situations, voters may respond to leaders' poor decision-making by removing them from office. Reason-giving produces a continuous, "collective practice" among elected officials and the persons who elect them.[9] Reasons are given, then evaluated. Rather than merely vindicating a majority's preexisting interests, reason-giving promotes interchange among leaders and constituents by "summon[ing] emergent will from constant social interactions," i.e., from the back-and-forth that occurs when leaders explain their reasons and constituents react to those reasons.[10] Such practices make representative democracy more faithful to the will of voters and enhance public confidence in the governing process.[11]

Laws requiring public reason-giving also provide a basis for contestation because constituents can use reasons to contest their leaders' decision-making with rigor. As Mathilde Cohen puts it, "[g]iving reasons for a decision greatly contributes to making the decision a possible object of discussion and of criticism."[12] Once reasons are provided, the audience can examine the reasons on the merits. Reason-giving can reveal the priority of values employed in decision-making; voters can discern whether their leaders' values reflect the voters' own values. Reason-giving can also reveal whether decision-making is informed, rational, and intelligent. Voters might compare the reasons offered for a decision to the outcome of the decision: Did the reasons track the real-world consequences of the decision? Are there lessons to be learned from such a comparison? Reason-giving "allows the decider and the public to assess the reasons and determine if there are better, newer, or alternative reasons for action."[13] Voters are then empowered to act on those determinations and to participate actively in governance by contesting decisions based on faulty or insufficient reasons.

Even false reasons have their own kind of value to add. A decision-maker might offer false reasons, "but at least in having reasons there is a possibility of discovering the misdirection."[14] Dishonesty about the reasons for a decision can be a tip-off of a conflict of interest or corruption; it raises questions about the dishonest official's motives and character. Voters may view dishonesty, standing alone, as a sufficient reason to replace an official.

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9. *See* Galperin, *supra* note 1, at 88 ("[R]easons let communities see themselves in a collective practice," the project of governance); *accord* Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1465 (2006) ("'Public reason' is the common reason of a political society; it is the shared capacity of citizens to engage in political deliberation.").

10. *See* Galperin, *supra* note 1, at 89.

11. EDWARD STIGLITZ, THE REASONING STATE 98 (2022). As Frederick Schauer explained, "[t]o have a reason for a decision is to have a good reason, and what some might think a bad reason is simply no reason at all." Schauer, *supra* note 5, at 635 (emphasis omitted).

12. Cohen, *supra* note 7, at 125.

13. Galperin, *supra* note 1, at 89.

14. *Id.*

Scholars of democracy often emphasize that reason-giving can improve the quality of decision-making itself.[15] Reason-giving requires officials to show they act with reasons, not on impulse or coin flips.[16] "When a decision-maker must articulate and compile her reasons, she is likely to spend more time deliberating, pay more attention to the choice's parameters, and seek out expert input," writes Ashley Deeks.[17] Reason-giving can discourage bias and related cognitive heuristics that skew decisions or make them unfair.

Mandatory reason-giving has long been embedded in administrative law.[18] The Administrative Procedures Act ("APA"), which was enacted by Congress in 1946, has been interpreted to require administrative agencies to engage in a number of reason-giving practices.[19] By law, agencies must make public the reasons for their decision-making, and they must allow citizens to engage in deliberative processes leading to agency decision-making, such as by providing comments on proposed rules and by contesting agency rulemaking. Reason-giving in this context serves to reinforce relationships of accountability and to limit judicial power when courts review agency action.[20]

The APA does not apply to corporate decision-making, and as explained in the next Part, mandatory public reason-giving for corporate boards appeared only in the late 1970s. Nonetheless, it is reasonable to think that administrative law's attention to reason-giving may have laid the groundwork for a legal shift in favor of reason-giving in corporate law at the end of the twentieth century.

II. PUBLIC REASON-GIVING IN THE BOARD ROOM

In corporate law, the earliest reason-giving mandates date to the late 1970s, following the rise of reason-giving in democratic governance; according to

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15. *See, e.g.*, Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 667–70 (2020); Cohen, *supra* note 7, at 120 ("[A]n extensive literature on this issue of whether or not the mere fact of giving reasons for a decision increases the quality of the decision.").

16. *See* Galperin, *supra* note 1, at 88 ("When there is a reason, an action is not arbitrary.").

17. Deeks, *supra* note 15, at 627.

18. Congress included a reason-giving requirement for the Interstate Commerce Commission in the Hepburn Act of 1906. Hepburn Act of 1906, ch. 3591, Pub. L. No. 59-337, 34 Stat. 584, 595; *see* STIGLITZ, *supra* note 11, at 87.

19. *See* 5 U.S.C. § 706(2)(A) (stating agency action can be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *id.* § 553(c) (explaining that when engaged in informal rulemaking, the agency must make public "a concise general statement of [the informal rule's] basis and purpose"); Deeks, *supra* note 15, at 620–21 (discussing the APA as "the primary statutory source of agencies' obligations to give public reasons"); Donald J. Kochan, *The "Reason-Giving" Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEO. J. LEGAL ETHICS 261, 275 (2013) ("The reason-giving requirement in administrative law is rather complicated but is now a long-established, fundamental, and basic part of administrative law.").

20. *See* sources cited *supra* note 19; *see also* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (stating a court reviewing agency action "must judge the propriety of such action solely by the grounds invoked by the agency"). *But see generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (rejecting *Chevron* deference).

Jerry Mashaw, "[t]he special role of reasons and reason-giving in legitimating agency action emerged in the 1970s."[21] As this Part shows, the trend in favor of corporate reason-giving has been an accelerating one, and it has not emerged in linear fashion. Rather, it has found expression in piecemeal requirements addressing a variety of subjects and made by an assortment of actors who are empowered to demand things of boards.

The trend loosely corresponds to a democratic turn in American corporate governance over the last two or three decades. This democratic turn involved legal and regulatory changes that empowered shareholders and enhanced the democratic features of corporate governance, especially corporate elections. For example, in 2003 the SEC required mutual funds to disclose their voting records to their clients for the first time, revealing to beneficial holders how their investment dollars were being voted.[22] The SEC also required funds to make public their voting policies.[23] That same year, the New York Stock Exchange ("NYSE") prohibited brokers from voting uninstructed proxies on matters of executive compensation.[24] And the SEC requested comments on a proposed proxy access rule.[25] Although the SEC declined to adopt the rule at that time, it returned to proxy access in 2009, keeping the issue in play for years.[26] Between 2005 and 2007, a majority of S&P 500 companies shifted to a majority vote standard in director elections, with a requirement that any director receiving less than a majority of votes must submit a resignation to the board.[27] As Jeffrey Gordon put it in 2008, "shareholder voting now matters for the large U.S. public firm in ways it has not for seventy-five years."[28]

In 2009, the NYSE amended Rule 452 to prohibit broker nonvotes for all director elections.[29] The following year, the Dodd-Frank Act also included restrictions on broker discretionary voting, and it created Say-on-Pay, giving

21. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 31 (2018).

22. *See generally* Disclosure of Proxy Voting Policies, Exchange Act Release No. 34-47304, 2003 WL 215451 (Jan. 31, 2003) (requiring investment management companies to disclose how they vote proxies).

23. Burton Rothberg & Steven Lilien, *Mutual Funds and Proxy Voting: New Evidence on Corporate Governance*, 1 J. BUS. & TECH. L. 157, 159 (2006).

24. *See generally* Order Approving NYSE and Nasdaq Proposed Rule Changes, Exchange Act Release No. 34-48108, 2003 WL 21488831 (June 30, 2003).

25. Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1353–54 (2011); *see also* Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 303 (2009).

26. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56668 (Sept. 16, 2010). The rule was subsequently vacated by *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

27. *See* Concept Release on the U.S. Proxy System, Exchange Act Release No. 34-62495, 2010 WL 2779423, at *3 n.12 (July 14, 2010).

28. Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 477 (2008).

29. *See* Order Approving Proposed Rule Change to Amend NYSE Rule 452, Exchange Act Release No. 34-60215, 74 Fed. Reg. 33293 (July 1, 2009).

shareholders an advisory vote on executive pay.[30] The universal proxy was proposed by the SEC in 2016, but not formalized in a rule until 2022. It went into effect in time for the 2023 proxy season. In the two proxy seasons that have taken place since the universal proxy was required, commentators have noted an uptick in contested election activity.[31] As a result of these and other changes, corporate governance has come to embrace a form of democratic responsiveness that was missing in the past, and corporate leaders grapple with a practical need to get shareholders on their side. The reason-giving trend fits these new power dynamics.

This Part sketches a history of mandatory reason-giving in corporate governance, including "soft law" requirements of large asset managers and proxy advisors that effectively regulate public companies even if they do not have the force of law. The Part shows, among other things, that reason-giving mandates appear in corporate governance across a range of decision types, including not only ESG-related decisions on polarized subjects such as climate risk, but also ordinary business decisions. Overall, the picture sketched here is one in which public reason-giving has become more highly valued by, and more useful to, investors, and more normalized as part of a board's general duties.

A. *Reasons for Board Recommendations About Tender Offers and Going-Private Transactions*

The origin of board reason-giving mandates can be found in amendments made by the SEC in 1979 to its rules implementing the Williams Act. Congress enacted the Williams Act in 1968 to regulate some aspects of tender offers.[32] Eleven years later, the SEC amended its rules to create Rule 14e-2: "Position of subject company with respect to a tender offer."[33] The rule, which is still in force today, requires a company facing a tender offer to publicly "disclose to security holders its position with respect to the tender offer and the reasons therefor."[34] Under the rule, a board facing a tender offer must tell its shareholders whether it recommends for or against the tender offer or takes no position, and give the "reason(s) for [its] position" or its lack of position.[35]

The same year, the SEC implemented a similar reason-giving mandate for going-private transactions.[36] The SEC's rules require a company undergoing a going-private transaction to disclose "the reasons for the structure of the

30. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 951, 957; 124 Stat. 1376, 1899 (codified at 15 U.S.C. § 78n-1).

31. Eric T. Juergens, Benjamin R. Pedersen, Maeve O'Connor & William D. Regner, *2024 Proxy Season in Review*, DEBEVOISE & PLIMPTON (Aug. 20, 2024), https://www.debevoise.com/insights/publications/2024/08/2024-proxy-season-in-review [https://perma.cc/WN9U-CCLJ].

32. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f)).

33. 17 C.F.R. § 240.14e-2 (2024); *see also id.* § 240.14d-9(f)(3).

34. *See* Exchange Act Release No. 34-16384, *supra* note 3, at 70327.

35. 17 C.F.R. § 240.14e-2; s*ee also id.* § 240.14d-9(e)(3).

36. *See generally* Exchange Act Release No. 34-16075, *supra* note 3 (providing rules on going-private transactions).

[going-private] transaction and for undertaking the transaction at this time."[37] They also require the corporation to disclose the basis for the board's determination that the going-private transaction is fair (or unfair) to unaffiliated security holders and to disclose the identity of any director dissenting or abstaining from this determination and "the reasons for the dissent or abstention."[38]

B. Reasons for Excluding Shareholder Proposals

In the 1990s, the SEC's decision to post certain corporate documents to the internet had the effect of making companies' communications to the SEC public, including communications in which a company explains its reasons for seeking a "no-action" letter. Today, particularly where a no-action letter is sought by a company for its exclusion of a shareholder proposal, this process has become a de facto public reason-giving mandate. Any person can go the SEC's website and find a company's own explanation of the reasons for omitting a shareholder proposal from its proxy statement.

The shareholder proposal rule, originally adopted by the SEC in 1942, went into effect in January 1943 as Regulation X-14A. In December 1952, the SEC amended the rule to make a proposal excludable if it was "submitted primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."[39] Over the years, the SEC has increased the number of exclusions and amended some exclusions. Today there are "at least thirteen substantive or procedural reasons why a company may decide to exclude" a proposal submitted by a shareholder of the company.[40]

A company that wishes to exclude a shareholder's proposal from its proxy statement can request a no-action letter from the SEC's Division of Corporation Finance.[41] Under this process, the issuer "must file its reasons" for excluding the proposal with the SEC, including "an explanation of why the company believes that it may exclude the proposal" and "a supporting opinion of counsel when such reasons are based on matters of state or foreign law."[42] For many years, only parties to an exclusion dispute had access to the

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37. 17 C.F.R. § 229.1013(c) ("(Item 1013) Purposes, alternatives, reasons and effects in a going-private transaction.").

38. *Id.* § 229.1014 ("(Item 1014) Fairness of the going-private transaction").

39. Amendment of Proxy Rules, Exchange Act Release No. 4775, 1952 SEC LEXIS 121, at *2 (Dec. 11, 1952).

40. Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230, 2024 WL 4784358, at *3 (5th Cir. Nov. 14, 2024).

41. *See* 17 C.F.R. §§ 202.1(d), 202.2, 240.14a-8(j); *Requests for No-Action, Interpretive, Exemptive, and Waiver Letters*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/forms/corp_fin_noaction [https://perma.cc/9NED-7BJ7].

42. 17 C.F.R. § 240.14a-8(j); *see also* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39093, [1993-2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,961 (Sept. 18, 1997) ("If the company intends to omit the proposal from its proxy materials, it must first submit its reasons to the Commission.").

documents. As a result, the reasons a company offered for excluding a proposal generally were not publicly disclosed.

In the early 2000s, this changed. The SEC created its main public database, the Electronic Data Gathering and Retrieval Service ("EDGAR"), in April 1993,[43] though corporate filings were not initially available online. Instead, they had to be obtained from a reading room in Washington, D.C., which meant they were still out of reach to most shareholders and not easily accessible by the public.[44] At the end of 1993, however, the SEC began putting corporate filings on the internet, in response to pressure from the Taxpayer Assets Project, a consumer group.[45] More years passed, however, before the SEC began its current practice of posting a full set of no-action correspondence on the SEC's website.[46] The earliest such set available today on the SEC's website dates to October 2007. It concerns a no-action request in which JPMorgan Chase & Co. sought to exclude a shareholder proposal on the ground that the proposal and supporting statement exceeded the SEC's five-hundred-word limit.[47]

Once the SEC began posting companies' no-action-seeking correspondence to the SEC's website, it became possible for any citizen to easily obtain the corporation's reasons for seeking to exclude a shareholder's proposal from the corporate ballot. As those who are familiar with the shareholder proposal process know, corporate no-action letter requests have become advocacy documents. Though corporations are not mandated to explain their reasons for rejecting a proposal—a corporation can choose not to seek a no-action letter, exclude the proposal, and wait to get sued[48]—many do so, producing a large body of reasons offered by corporations for exclusion, which scholars and investors have studied.[49] To the extent that shareholders have been able to improve their proposals as a result, reason-giving in this context may facilitate better overall corporate governance. The SEC's move to place no-

43. Ross Kerber, *Researchers at SEC See Technology Nipping at Their Jobs*, AUSTIN AM.-STATESMAN (Aug. 21, 1993), https://www.newspapers.com/newspage/356746252 [https://perma.cc/33HD-NRAB].

44. *Id.*

45. Bloomberg Business News, *Project Puts SEC on the Internet*, ST. LOUIS POST-DISPATCH (Oct. 24, 1993), https://www.newspapers.com/image/141619333 [https://perma.cc/4U3C-LATG] ("'The SEC fought this every step of the way,' said James Love, director of the group.").

46. Such documents can be found on the SEC website. *See 2024-2025 No-Action Responses Issued Under Exchange Act Rule 14a-8*, U.S. SEC. & EXCH. COMM'N (Jan, 29, 2025), https://www.sec.gov/rules-regulations/shareholder-proposals/2024-2025-no-action-responses-issued-under-exchange-act-rule-14a-8 [https://perma.cc/G7KQ-GGC2].

47. Letter from Jonathan A. Ingram, Deputy Chief Counsel, SEC, to Anthony J. Horan, Corporate Secretary, JPMorgan Chase & Co. (Oct. 2, 2007), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2007/jpmorganchase100207-14a8.pdf [https://perma.cc/8T47-PVYU].

48. *See Shareholder Proposal*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/forms/shareholder-proposal [https://perma.cc/D7KL-2Z3A] (SEC's online form for requesting a no-action letter).

49. Emily Strauss, *Climate Change and Shareholder Lawsuits*, 20 N.Y.U. J.L. & BUS. 95, 129 (2023) (noting that the most common reasons offered for excluding shareholder proposals "were that these proposals were not relevant to, or sought to micromanage, the business").

action requests on the internet has provided an important example of the trend in favor of public reason-giving by corporations.

C. Comply or Explain Your Reasons

The next major development in public reason-giving involved "comply-or-explain" regulation. Comply-or-explain mandates originated in the United Kingdom in the 1990s and "regulators outside the United States have widely embraced" the idea since then.[50] Under the comply-or-explain approach,

> [c]ompanies can comply with the code directly, by implementing some or all of the code's provisions, or by explaining why they have elected not to do so. In some cases, comply-or-explain rules can be satisfied by providing a statement of compliance or an explanation of deviation on the company's website, but most regulators require the disclosures to be made in the company's annual reporting.[51]

Congress imported comply-or-explain regulation for U.S. corporate governance in 2002, when it enacted the Sarbanes-Oxley Act. Section 406 of that law required public companies to disclose their code of ethics for senior financial officers or explain why they do not have one.[52] As one scholar observed, "since section 406 was enacted, nearly all firms have adopted an ethics code, so the rule had essentially the same effect as a direct mandate."[53] This is likely because few good reasons could be offered to justify a board's decision *not* to have a code of ethics for senior financial officers, and the reason-giving requirement would expose faulty reasoning.

More recently, in 2021, Nasdaq adopted a comply-or-explain rule for board diversity: Rule 5605.[54] Nasdaq's rule required listed companies to have a certain number of "diverse" board members or explain why they do not.[55] The rule was invalidated in December 2024, when a divided Fifth Circuit Court of Appeals vacated the SEC's order approving it.[56] The court's opinion included some criticism of what it called the "explanation requirement."[57] The requirement, the court wrote:

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50. Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 321 (2017); Iain MacNeil & Irene-marié Esser, *The Emergence of 'Comply or Explain' as a Global Model for Corporate Governance Codes*, 33 EUR. BUS. L. REV. 1, 1–3 (2022).

51. Ho, *supra* note 50, at 329 (footnote omitted).

52. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 406(a)–(b), 116 Stat. 745, 789 (codified at 15 U.S.C. § 7264).

53. Ho, *supra* note 50, at 335.

54. *See generally* Self-Regulatory Organizations, Exchange Act Release No. 34-90574, 2020 WL 7226158 (Dec. 4, 2020) (describing Rule 5605 in an SEC notice). *See* Cindy A. Schipani, Terry Morehead Dworkin & Bettina C.K. Binder, *Women in Power: Clearing Pathways for Women to Rise to Positions of Organizational Leadership*, 26 U. PA. J. BUS. L. 138, 147–49 (2023) (describing the rule and subsequent legal challenges to it).

55. Exchange Act Release No. 34-90574, *supra* note 54, at 5.

56. All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 185 (5th Cir. 2024).

57. *Id.* at 179.

> would serve the goal of investor protection only if there were some link between the reason for the lack of racial, gender, and sexual diversity on a company's board and the quality of its governance. That is, Nasdaq would have to show a corporate-governance delta between (A) non-diverse boards that have no explanation for their non-diversity and (B) non-diverse boards that have "good" reasons for their non-diversity.[58]

This passage suggests a judicial misunderstanding about the value and purpose of public reason-giving mandates. The shareholder vote is one of the most robust "investor protection" mechanisms in corporate law. As discussed above in Part I, reason-giving requirements provide a basis for shareholders to evaluate the quality of their leaders' decision-making—a basis that is independent from the outcome of the decision. False reasons, irrational reasons, and poorly supported reasons all have informational value to shareholders in connection with corporate elections, regardless of the correctness of the decision itself. (Indeed, corporate law has long been attentive to differences between the substance of a board decision and the steps the board took to reach it.)

Certainly, it is true that the goal of comply-or-explain rules is to push companies toward compliance with an industry best practice, but under basic principles of corporate democracy, an "explanation requirement" can be justified solely on its informational value to voters, whose main protection against mismanagement is the corporate election.[59]

D. Reasons for Governance Choices

Public reason-giving mandates began accelerating in the twenty-first century. In late 2009, at a time when Congress was working on The Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC adopted amendments to Regulation S-K that included reason-giving mandates, anticipating some reason-giving requirements that Congress would soon enact into law.

Item 401 of Regulation S-K was amended to help shareholders determine "whether and why a director or nominee is an appropriate choice for a particular company."[60] The SEC explained that "[t]he final rules require companies to disclose for each director and any nominee for director the particular experience, qualifications, attributes or skills that led the board to conclude that the person should serve as a director for the company as of the time that

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58. *Id.* (emphasis omitted).

59. *See* Johnson A. Salisbury, Jr., Comment, *To Have or Have Not: The Limits of Comply-or-Explain Governance in an American Exchange*, 72 EMORY L.J. 1485, 1511 (2023) ("When a firm complies by explaining its non-adoption, enforcement occurs through shareholders assessing the adequacy of the company's explanation.").

60. Proxy Disclosure Enhancements, Exchange Act Release No. 34-61175, 74 Fed. Reg. 68334, 68342 (Dec. 23, 2009).

a filing containing this disclosure is made with the Commission."[61] The SEC further explained in a footnote: "[W]e are focusing on the reasons for the decision that the person should serve as a director."[62] The purpose of the rule is, obviously, to provide the corporation's shareholders, who will vote to elect the board, with enhanced information about why the board has nominated these particular individuals to lead the corporation.

In the same amendments, the SEC revised Item 407 of Regulation S-K, stating that its goal was to require a company to disclose its leadership structure "and the reasons why they believe that it is an appropriate structure for the company."[63] In the final rulemaking release, the SEC explained that "[d]isclosure of a company's board leadership structure and the reasons the company believes that its board leadership structure is appropriate will increase the transparency for investors as to how the board functions."[64] Though the benefits of this transparency were not enumerated in the SEC's release, they presumably included educating shareholders about board leadership issues that are relevant to the shareholder vote.

When Congress enacted the Dodd-Frank Act in July 2010, it codified a reason-giving mandate regarding board structure. The Dodd-Frank Act required annual proxy disclosure of the reasons justifying the company's choice to have a unitary board chair/CEO or to separate those roles and assign them to different individuals.[65] The law required the SEC to issue rules requiring disclosure of "the reasons why the [company] has chosen—(1) the same person to serve as chairman of the board of directors and chief executive officer . . . or (2) different individuals to serve" in the two roles.[66]

By this time, however, the SEC had already adopted its disclosure rule, which was worded in a narrower way than the reason-giving mandate Congress later passed into law. The SEC's rule requires a reporting company to "[b]riefly describe the leadership structure of the [company's] board" and, "[i]f one person serves as both principal executive officer and chairman of the board," the company must disclose some details about whether the company has a lead independent director.[67] "This disclosure should indicate why the [company] has determined that its leadership structure is appropriate given the specific characteristics or circumstances of the [company]," the next sentence states.[68] In other words, the SEC rule appears to require reasons only if the company has chosen to make one individual both CEO and board chair.

61. *Id.*

62. *Id.* at 68342 n.105.

63. *Id.* at 68344.

64. *Id.* at 68345.

65. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 972; 124 Stat. 1376, 1915 (2010) (codified at 15 U.S.C. § 78n-2).

66. 15 U.S.C. § 78n-2.

67. 17 C.F.R. § 229.407(h) (2024).

68. *Id.*

This arguably turned the rule into a comply-or-explain mandate; it appears inconsistent with the statutory text.

In the Dodd-Frank Act, Congress also imposed new requirements for clawbacks of incentive-based compensation paid to executives based on financial reporting that was later restated.[69] The SEC did not propose rules to implement this law until 2015, and it did not adopt rules until 2022.[70] When it did so, it amended Item 402 of Regulation S-K to require disclosure of reasons in certain situations.[71] "If the aggregate dollar amount of erroneously awarded compensation has not yet been determined," the SEC instructs to "disclose this fact [and] explain the reason(s)."[72] If recovery of erroneously awarded compensation would be "impracticable," the company must provide "a brief description of the reason" it decided not to pursue recovery.[73] Both requirements call for companies to produce reasons for failing to claw back incentive pay in the face of accounting improprieties.

E. Reasons for a Methodological Change

The Dodd-Frank Act also included a number of disclosure mandates that required actors to first calculate, and then disclose, a particular metric using a quantitative procedure or methodology.[74] To guard against year-to-year changes in methodology that might distort investors' understanding of trends in the data, Congress specified in the statute that statistical rating organizations that change their methodology from year to year must provide the reasons for the change.[75]

Borrowing from this approach, the SEC added reason-giving requirements to its rules implementing the Dodd-Frank Act's disclosures related to executive compensation.[76] Congress had required disclosure of "information that shows the relationship between executive compensation actually paid and the financial performance of the issuer."[77] And Congress had also included in the Dodd-Frank Act a new required disclosure of "the median of the annual

69. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 954 (codified at 15 U.S.C. § 78j-4).

70. *See* U.S. SEC. & EXCH. COMM'N, RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION 1, https://www.sec.gov/files/33-11126-fact-sheet.pdf [https://perma.cc/AC5X-Q6VA]; Listing Standards for Recovery of Erroneously Awarded Compensation, SEC Release Nos. 33-11126; 34-96159 (Oct. 26, 2022).

71. (Item 402) Executive Compensation, 17 C.F.R. § 229.402.

72. *Id.* § 229.402(w)(1)(i)(E).

73. *Id.* § 229.402(w)(1)(ii).

74. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929Z (codified at 15 U.S.C. § 78o).

75. *See, e.g.*, *id.* § 932(r)(2) ("[T]o ensure that when material changes to credit rating procedures and methodologies (including changes to qualitative and quantitative data and models) are made, that . . . the nationally recognized statistical rating organization publicly discloses the reason for the change . . . .").

76. *Id.* § 953(a) (codified at 15 U.S.C. § 78n).

77. *Id.*

total compensation of all employees of the issuer" (other than the CEO); "the annual total compensation of the [CEO]"; and the ratio of the former to the latter.[78]

The SEC employed a reason-giving mandate in its instructions for Item 402(v), "Pay versus performance," regarding a methodological change.[79] The SEC specifies that "[i]f the registrant selects or otherwise uses a different peer group from the peer group used by it for the immediately preceding fiscal year, explain, in a footnote, the reason(s) for this change and compare the registrant's cumulative total return with that of both the newly selected peer group and the peer group used in the immediately preceding fiscal year."[80]

Per Item 402(u), which implements the CEO pay ratio disclosure, a company that changes its "methodology or its material assumptions, adjustments, or estimates from those used in its pay ratio disclosure for the prior fiscal year," must explain its reasons for changing the methodology.[81] In its final rulemaking release, the SEC wrote that

> [i]f . . . a registrant changes the determination date from the prior year, we believe it should disclose the reason for the change. Under the final rule, therefore, if a registrant changes the date it uses to identify the median employee, the registrant must disclose the change and provide a brief explanation about the reason or reasons for the change.[82]

F. *Reasons Required to Satisfy Proxy Advisors*

Proxy advisors are "soft" regulators of corporations because their voting recommendations are highly influential with their clients, which include major institutional investors.[83] Proxy advisors issue voting guidelines that articulate governance standards for public companies.[84] Public reason-giving mandates can be found in these governance standards and are used by proxy advisors to make company-by-company voting recommendations. Proxy advisors are in a particularly good position to evaluate boards' given reasons and to make voting recommendations to their clients on the basis of those reasons. For example, Institutional Shareholder Services' ("ISS") U.S. proxy voting guidelines specify that it will recommend a vote against an incumbent

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78. *Id.* § 953(b) (instructing the SEC to amend 17 C.F.R. § 229.402 (2024)).

79. 17 C.F.R. § 229.402(v)(2)(iv).

80. *Id.*

81. Instruction 4(5) to Item 402(u), 17 C.F.R. § 229.402(u); Dodd-Frank Wall Street Reform and Consumer Protection Act, § 953(b); *see also* Pay Ratio Disclosure, Exchange Act Release No. 34-75610, 80 Fed. Reg. 50104, 50141 (Aug. 18, 2015) [hereinafter Exchange Act Release No. 34-75610].

82. Exchange Act Release No. 34-75610, *supra* note 81, at 50119.

83. *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2594–96 (2021) (describing the influence of proxy advisors).

84. *Id.* at 2595–96 (describing how "[m]any companies proactively adopt governance policies that mesh with ISS and Glass Lewis recommendations" in their voting guidelines).

director who has attended less than seventy-five percent of board and committee meetings over the director's tenure, "unless an acceptable reason for absences is disclosed in the proxy or another SEC filing."[85] ISS then provides a short list of "[a]cceptable reasons for director absences": (1) "[m]edical issues/illness;" (2) "[f]amily emergencies; and" (3) "[m]issing only one meeting (when the total [number of] meetings is three or fewer)."[86] It is worth emphasizing here that ISS has the power to demand private disclosures of reasons from companies, yet ISS's voting guidelines specify that it expects the reasons for director absences to be made public.[87] Glass Lewis's benchmark policy guidelines use different language; they tend to state that a company "should disclose why" it has made a particular choice.[88] Nonetheless, the use of the word "disclose" suggests public disclosure, and the use of the word "why" invokes reason-giving.

According to ISS's U.S. voting guidelines, top considerations for their voting recommendations include companies' reasons for proposing to reincorporate in a different jurisdiction, to recapitalize, or to form a holding company.[89] In contrast, ISS does not list the company's reasons as a basis for its recommendation on a proposal to do a spin-off or a bankruptcy.[90]

Regarding executive compensation, Glass Lewis's benchmark voting guidelines provide some detail on their expectations of public reason-giving:

> Where management has received significant short-term incentive payments but overall performance . . . appears to be poor or negative, we believe *the company should provide a clear explanation of why* these significant short-term payments were made. We also believe any significant changes to the program structure should be accompanied by *rationalizing disclosure*. Further, where a company has applied upward discretion, which includes lowering goals mid-year, increasing calculated payouts or retroactively pro-rating performance periods, we expect *a robust discussion of why the decision was necessary*.[91]

Though the wording differs from that used by ISS, the meaning is clear: The proxy advisory firm is demanding more public reason-giving than securities regulation currently requires.

85. ISS, UNITED STATES PROXY VOTING GUIDELINES 12 (2025), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/AQ4J-GZLJ].

86. *Id.*

87. *Id.*

88. For example, Glass Lewis's *2024 Benchmark Guidelines* for U.S. companies state that "we believe companies should disclose why the specific performance metrics were selected" in relation to pay versus performance. GLASS LEWIS, 2024 BENCHMARK POLICY GUIDELINES 51, https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf [https://perma.cc/G5YY-G7UL].

89. ISS, *supra* note 85, at 33, 38, 41–42.

90. *Id.* at 45–46.

91. GLASS LEWIS, *supra* note 88, at 55–56 (emphasis added).

G. Voluntary Public Reason-Giving

The popularity of reason-giving in corporate governance has caused some companies to adopt voluntary reason-giving practices. For example, a casual review of proxy statements suggests that a common subject of voluntary public reason-giving involves board decisions to reject the resignation of a director who has lost a corporate election under a majority vote standard. Such a decision could be controversial among shareholders, who have used their franchise to communicate a lack of support for the director. In addition, in a 2010 case, *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, the Delaware Supreme Court suggested that a shareholder might be unable to show a "proper purpose" under Delaware General Corporation Law section 220 when seeking documents that would help explain a board's decision to reject a director's resignation following a corporate election.[92] After that case, in at least some circumstances, shareholders might reasonably question an unexplained decision of the board to defy the shareholders' will by rejecting a director's resignation. Thus, some companies have adopted voluntary reason-giving practices.

Norfolk Southern Corporation, for example, tells its shareholders in its proxy statement that it "will publicly disclose the Board of Directors' decision [about whether to accept or reject a director's resignation] within four business days, including a full explanation of the process by which the decision was reached and, if applicable, the reasons why the Board rejected the director's resignation."[93] This commitment is more extensive than the one found in Norfolk Southern's bylaws, which do not require public disclosure of the board's decision to reject a director's resignation under these circumstances.[94] Though neither Delaware law nor the company's bylaws require public reason-giving, the *democratic* pressures of corporate governance likely caused Norfolk Southern's leaders to view such reason-giving as necessary.

The 2024 Disney proxy fight provides another example. Consistent with trends in corporate governance that have made corporate elections more competitive, Disney's 2024 directors election involved an incumbent slate and two insurgent slates nominated by two hedge funds.[95] During the hotly

92. City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc., 1 A.3d 281, 289 (Del. 2010). In the case, Axcelis's board had adopted a "Pfizer-style" or "plurality-plus" policy which required a director to submit a letter of resignation if he or she received more "withheld" votes than "for" votes in a director election. *Id.* at 284 n.4. The policy did not adopt a majority standard for election of directors. *Id.* at 283–84; *see also* DEL. CODE ANN. tit. 8, § 220 (West 2025) (giving stockholders the right to inspect business records "for any proper purpose").

93. NORFOLK S. CORP., 2024 NOTICE OF THE ANNUAL MEETING OF SHAREHOLDERS AND PROXY STATEMENT 39 (2024), https://filecache.investorroom.com/mr5ir_nscorp/927/NSC%20Proxy%202024.pdf [https://perma.cc/X7TT-ESR6].

94. *See* BYLAWS OF NORFOLK SOUTHERN CORPORATION, art. II, § 2 (2023), https://norfolksouthern.investorroom.com/image/NSC-bylaws.pdf [https://perma.cc/8YNK-VXPW].

95. *See* Alex Sherman, *Disney Wins Proxy Fight Against Activist Investor Nelson Peltz, as Shareholders Reelect Full Board*, CNBC (Apr. 3, 2024 3:19 PM), https://www.cnbc.com/2024/04/0

contested election cycle, Disney's incumbent leaders were forced to revisit criticized previous decisions about CEO succession.[96] In the end, the Disney incumbents satisfied investors with their explanations, and the insurgent slates were defeated.[97] However, the rise in Disney's stock price following the unsuccessful proxy fight has been interpreted to suggest that forcing the company's management to reassess its past decisions and their bases enhanced the company's governance and unlocked value for shareholders.[98]

H. Reasons for Choices Related to Climate Risk Disclosure

The SEC's 2024 final climate risk disclosure rule, which became mired in litigation and was never implemented, also incorporated reason-giving mandates.[99] For example, the rule required a company that "use[d] more than one internal carbon price to evaluate and manage a material climate-related risk" to "disclose its reasons for using different prices."[100] The rule also required disclosure of reasons related to estimates used in measuring greenhouse gas ("GHG") emissions. As the rulemaking release explained, "a registrant may use reasonable estimates when disclosing its GHG emissions as long as it also describes the assumptions underlying, and its reasons for using, the estimates."[101]

The SEC also encouraged companies to use scenario analysis to assess climate risk and to disclose information about its methodology, amounting to a reason-giving requirement.[102] The SEC explained that:

> [I]f a registrant uses scenario analysis to assess the impact of climate-related risks on its business, results of operations, or financial condition, and if, based on the results of scenario analysis, a registrant determines that a climate-related risk is reasonably likely to have a material impact on its business, results of operation, or financial condition, then the registrant must describe each such scenario,

3/disney-annual-meeting-shareholders-vote-on-nelson-peltz-and-bob-iger.html [https://perma.cc/WF44-67WM].

96. *See* Alexandra Canal, *Disney CEO Bob Iger: Sucesssion Is Board's 'No. 1 Priority' Post-Proxy Fight Win*, YAHOO FIN. (Apr. 4, 2024), https://finance.yahoo.com/news/disney-ceo-bob-iger-succession-is-boards-no-1-priority-post-proxy-fight-win-160431110.html [https://perma.cc/7QAF-A5LD].

97. *See id.*

98. *See id.*

99. *See* Matthew Goldstein, *S.E.C. Moves to Kill Climate Disclosure Rule*, N.Y. TIMES (Feb. 11, 2025), https://www.nytimes.com/2025/02/11/us/politics/sec-climate-disclosure-rule.html (on file with the *Iowa Law Review*). Such mandates are described in more detail in Part III.

100. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Exchange Act Release No. 34-99678, 89 Fed. Reg. 21668, 21709 (Mar. 28, 2024) [hereinafter Exchange Act Release No. 34-99678].

101. *Id.* at 21735; *see also id.* at 21859 ("The final rules also permit the disclosure of reasonable estimates for Scope 1 and 2 emissions provided that such estimates are accompanied by disclosure of underlying assumptions and reasons for using estimates, which will help investors better understand the metrics that registrants are disclosing.")

102. *See* Madison Condon, *Corporate Scenarios: Drawing Lessons from History*, 48 SEATTLE U. L. REV. 277, 278–80 (2025); Exchange Act Release No. 34-99678, *supra* note 100, at 21707.

> including a brief description of the parameters, assumptions, and analytical choices used, as well as the expected material impacts, including financial impacts, on the registrant under each such scenario.[103]

The reason-giving requirement is implicit: If a company uses scenario analysis and the results of the analysis reveal that a material impact is "reasonably likely," then parameters, assumptions, and choices must be disclosed. In essence, the company must explain why it employed *this* scenario—and the reasons why it has concluded that a material impact is reasonably likely.

Comments submitted during the rulemaking process reveal that investors sought more reason-giving mandates than appear in the final rule. For example, some "commenters recommended that the Commission require a registrant that does not currently use scenario analysis to explain why it does not do so," but the SEC declined to do this.[104] In addition, commenters recommended that a company "that has not set a [GHG reduction] target or goal" be required "to explain why it has not done so," but the SEC declined to do this.[105]

* * *

In sum, reason-giving mandates first emerged in the late 1970s and have since become increasingly common. They arise in relation to a corporation's governance decisions, as well as to ESG matters. A wide variety of actors have formally embedded them in securities law and regulation: Congress, the SEC, and self-regulatory organizations ("SROs") like Nasdaq. In addition, proxy advisors have imposed "soft law" demands for more public reason-giving, generally in relation to ordinary governance matters. Finally, investors appear to value reason-giving mandates, whether created through formal rule-making or private ordering, and have used the administrative rulemaking process to ask for more of them.

III. PUBLIC REASON-GIVING ON THE MERITS

As the corporate economy has grown, corporations have exercised increasing sovereignty over the lives of most Americans.[106] Corporate decisions

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103. Exchange Act Release No. 34-99678, *supra* note 100, at 21707 (emphasis omitted) (footnotes omitted).

104. *Id.* at 21706.

105. *Id.* at 21722.

106. *See, e.g.*, NIALL FITZGERALD & MANDY CORMACK, THE ROLE OF BUSINESS IN SOCIETY 8 (2006), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/report_12_CGI+Role+of+Business+in+Society+Report+FINAL+10-03-06.pdf [https://perma.cc/W5UE-689U] ("Company leaders are not only leaders of business but leaders within society."); Mason Marks, *Biosupremacy: Big Data, Antitrust, and Monopolistic Power over Human Behavior*, 55 U.C. DAVIS L. REV. 513, 516 (2021) (discussing tech companies' power to "monitor billions of people" and "nudge their behavior through personalized choice architecture"); ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT), at xxii (2019); Richard Warner & Robert H. Sloan, *Self, Privacy, and Power: Is It All Over?*, 17 TUL.

are, in many ways, as far-reaching and coercive as decisions made by political institutions. Many writers argue that large, public companies are quasi-political institutions, while their heads—men like Elon Musk, Jeff Bezos, and Mark Zuckerberg—blur the line between corporate and political leadership.[107] To the extent that corporations exercise political power in our democratic system, it makes sense for their own governance to reflect democratic values and practices. Indeed, the legitimacy of a democratic system in which corporations play a dominant political role may depend upon corporations' willingness to adopt those values and practices. Thus, we start from the proposition that corporate reason-giving may be a response to the deepening intersection between political and corporate governance. Particularly since it has become functionally difficult to discern one company's shareholders from the broader public, reason-giving likely serves democratic interests as well as corporate ones. A mandate can signal to the company (the reason-giver), the shareholders (the audience), and the public (another audience) that a particular decision is societally important or broadly related to public interests. By making reasons broadly available to the investing public, it acknowledges the public as a source of the corporation's authority.

Yet any evaluation of public reason-giving must acknowledge that it fits squarely within conventional corporate theory. Under longstanding principles of corporate law, a corporation's leaders are chosen at the ballot box and are accountable to its voting constituents, the shareholders.[108] "Reasons contribute to majoritarianism," even on a one-share-one-vote basis.[109] Elections are "more informed if there are express reasons attached to a representative's choices," in other words, "if the voter understands not just the yea or nay but the reasons for the representative's action."[110] Mandatory public reason-giving helps shareholders evaluate a corporation's leaders and vote in an informed way in corporate elections. It thus serves traditional corporate law objectives: protecting investors, promoting efficiency, and reducing agency costs. Reason-giving fits squarely within the existing framework of American corporate governance and helps assure firm-specific success.

The highest purpose of corporate governance, according to many, is the efficient or welfare-maximizing allocation of society's resources.[111] Advocates of this view readily admit that efficiencies can only be achieved if corporate

J. TECH. & INTELL. PROP. 61, 88 (2014) (noting that private businesses have the power to "determine the distribution of goods, services, and employment").

107. *See, e.g.*, Quinn Slobodian, *Elon Musk's Hostile Takeover*, NEW STATESMAN (Jan. 15, 2025), https://www.newstatesman.com/world/americas/north-america/us/2025/01/elon-musks-hostile-takeover [https://perma.cc/3KLT-9WEC]. *See generally* David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 139 (2013).

108. DEL. CODE ANN. tit. 8, §§ 211–233 (West 2006).

109. Galperin, *supra* note 1 at 88.

110. *Id.* at 88–89.

111. *See, e.g.*, Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441–42 (2001); *see also* William W. Bratton, *Framing a Purpose for Corporate Law*, 39 J. CORP. L. 713, 721 (2014) (discussing academic debate on this subject).

governance encourages well-reasoned (i.e., *rational*) decision-making.[112] If this is true, society needs shareholders to police corporate decision-making to ensure that it is rational, and it needs corporate law to incentivize optimal decision-making practices. In fact, some kinds of reasons that are routinely used to justify political decisions, such as group affinity, hope, and patriotism, should be off limits in corporate governance. The high value of efficiency in corporate law might suggest a special and particularly rigorous requirement for reason-giving in corporate governance.

Reason-giving also offers some unique benefits to corporate governance. One is the usefulness of public reason-giving to shareholders monitoring officers' and directors' satisfaction of the duty of care in light of legal developments that started in the 1980s. A second is the power of public reason-giving to encourage board decision-making practices that transcend polarization on particularly controversial issues involving corporate activity, such as climate change.

In previous work with Faith Stevelman, I have argued that the "monitoring board" is being replaced by a new paradigm, "information governance."[113] Corporate "boards engage in information governance [through] the deliberative construction of the firm's internal data gathering, reporting, and communications architecture,"[114] a practice that informs board decision-making and includes reason-giving. A key insight of information governance theory is that public company boards no longer merely monitor the value-creating work of others for the purpose of reducing agency costs, but also create value through information-based, deliberative processes that produce corporate action. In other words, *boards create value through public reason-giving*. Reason-giving mandates form part of the "supportive scaffolding" that encourages boards to invest in information governance, and thus are viewed by boards and shareholders as value-enhancing—not burdens on managers' or corporations' expressive rights.[115] The value-creating potential of reason-giving, within a broader system of information-based board governance, provides yet another reason for supporting reason-giving mandates.

A. *Benefits of Public Reason-Giving to Public Company Boards*

Public reason-giving acknowledges that corporate officials (directors) are accountable for their decisions to the corporation's voting constituents, its shareholders. Directors owe the corporation's shareholders fiduciary duties, but where reason-giving mandates apply, they also owe them an explanation

112. *See generally* Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1 (2022).

113. Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 182–87 (2020); *see also id.* at 190 (the monitoring board failed because it squandered "the value that might have accrued if experienced directors had commanded robust systems of information-gathering and reporting within the firm, and then invested themselves in deliberating over, discussing, and following up on the information that was produced").

114. *Id.* at 184.

115. *Id.* at 186.

for their decisions. The obligation to explain "why" is found, in many cases, outside of fiduciary duty, and it is more consistent with the representative nature of board governance than with the principal–agent model. Corporations are not autocracies. They are representative democracies in which shareholders delegate their authority to a representative board of directors to make decisions on the shareholders' behalf.

Public reason-giving thus affirms the fundamental relationship of power between directors and shareholders, but it is also practical: It helps shareholders evaluate the quality of the corporation's leaders. Reasons help shareholders assess decisions made by corporate leaders on their behalf. Are the board's decisions well informed? Are they intelligent and rational? Are they based on *good* reasons? Were reasons justifying a different decision refuted or ignored? Shareholders' assessments of the quality of management's decision-making get impounded into the stock price; they are the shareholders' primary means of self-protection from careless or negligent management. It allows shareholders to safeguard the value of the enterprise and to direct their capital toward the best-managed companies.

Courts have interpreted the duty of care to focus on process rather than substance, limiting the ability of judges to police bad business judgments made by corporate leaders.[116] The reason-giving trend gives shareholders the ability to do what judges cannot: to consider the *substance* of a decision, too. Taking reasons into account means going beyond process (was the proper information gathered, was enough time spent on the decision, etc.) to evaluate whether the reasoning that produced the decision was *sound*. Reason-giving thus reinforces the differing roles of courts and shareholders in corporate oversight, and helps shareholders move beyond the crabbed version of the duty of care that courts use, albeit for good reason, but which need not constrain *them*. At the end of the day, shareholders care about the process used to reach a decision, but they also care about the reasons for corporate management's action, and if they find the latter unsatisfactory, shareholders are in a position to do something about it.

Because reason-giving provides a basis for rigorous contestation of decisions, the trend toward public reason-giving promotes active shareholder participation in governance. Shareholders evaluate the reasons *independently* from the decision's outcome. They can dig deeply into the reasons to challenge a decision. They can challenge the reasons for a decision even if the decision turns out well. Even if the board will not (or cannot) reverse a decision, a shareholder challenge might influence the board's future decision-making. By embedding shareholders inside processes that produce key corporate decisions, reason-giving adds heft to stewardship and makes it more meaningful.

116. *See* R. Franklin Balotti, Charles M. Elson & J. Travis Laster, *Equity Ownership and the Duty of Care: Convergence, Revolution, or Evolution?*, 55 BUS. LAW. 661, 663 (2000) ("In policing directors' behavior for compliance with" the duty of care, "Delaware courts have adopted a procedural approach that emphasizes the process followed by the directors and the information available to them, rather than the substantive merits of the decision reached.").

False reasons offered by corporate officials are useful to shareholders. Certainly, there are avenues for redress of false reasons in corporate law—for example, a board that offers false reasons might violate securities laws that prohibit materially false or misleading securities disclosures—but some false communications may fall short of the materiality standard. Either way, shareholders' knowledge of the misdirection might influence their votes or motivate an information request under state corporate law.

The bottom line is that reason-giving has value in corporate governance for many of the same reasons that it has value in political governance. However, as the next two sections show, there are some unique benefits of reason-giving to corporate governance.

B. *PUBLIC REASON-GIVING AND THE DUTY OF CARE*

Mandatory public reason-giving provides a means for shareholders to evaluate the care that a corporate board brings to its duties. In corporate law, directors owe fiduciary duties to the corporation and its shareholders, typically presented as the duty of care and the duty of loyalty.[117] The duty of care, as its name suggests, requires directors to bring a minimum level of care to their jobs.[118] Under current corporate law doctrine, the duty of care is not violated unless the board acts with gross negligence—a very high bar to shareholder recovery.[119] A shareholder lawsuit will not lie unless gross negligence can be alleged.[120] Of course, most shareholders would want recourse against directors who act with gross negligence. But should shareholders be satisfied with a director who acts with ordinary negligence? Must investors tolerate widespread negligence in corporate leadership, thanks to the business judgment rule?

The problem is actually a bit worse than this. Since 1986, when Delaware's legislature enacted section 102(b)(7) of its General Corporation Law, shareholders' remedies have been limited even when a board acted with gross negligence.[121] Section 102(b)(7) exculpates directors for monetary damages for a breach of the duty of care, effectively insulating boards from lawsuits where gross negligence could be proved.[122] Exculpation has been wildly popular with public companies and was extended to officers of Delaware corporations in a statutory amendment in 2022.[123] Holger Spamann has described the "efficiency rationale" for this legal framework: It is a cost-benefit

117. *See* Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985).

118. *Id.*

119. *Id.*; Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

120. *Van Gorkom*, 488 A.2d at 872–73.

121. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2022).

122. *Id.*

123. *See* Neil McCarthy, G. Michael Weiksner & James Palmiter, *From Directors to Officers: How Fortune 1000 Companies Are Embracing Delaware's New Legal Armor*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 26, 2024), https://corpgov.law.harvard.edu/2024/09/26/from-directors-to-officers-how-fortune-1000-companies-are-embracing-delawares-new-legal-armor [https://perma.cc/D96E-PCVH].

trade-off that takes into account both the high costs of fiduciary duty litigation and the difficulty courts have in evaluating business decisions.[124] Under existing law, in many cases, officers and directors can make negligent and even grossly negligent decisions without worrying that they will have to pay monetary damages to help the corporation recoup its losses.

None of this addresses the shareholders' need to remove a negligent or grossly negligent corporate leader by replacing that person with a better decision-maker. Though corporate law long assumed that shareholders would exit a company with bad managers, the current prevalence of passive investment strategies, such as index investing, have reduced exit as an option and made removal/replacement more important. Fiduciary duty lawsuits do not serve this purpose; even if the shareholder wins, the defendants often remain in their leadership positions. Shareholders must police the board at the ballot box; they must evaluate corporate leaders' decision-making as part of their overall determination about how to vote in a corporate election. On top of this, some asset managers make voting determinations under the shadow of their own fiduciary duties. All of this makes reason-giving more valuable to shareholders, who need some basis for evaluating corporate decisions. And as we have seen, a recent democratic turn in American corporate governance has increased the ability of shareholders to use their votes to force directors out, nominate competing candidates for the board, and replace directors in contested elections.

When directors are required to provide reasons, shareholders can evaluate the reasons, object to poorly reasoned decisions, and challenge the decision-makers informally or via the annual election. Thus, for example, shareholders might oppose the reelection of a director who has chaired a board committee that acted negligently in originating or approving a bad decision. On the other hand, shareholders might give a pass to a committee chair responsible for a bad decision that was made for good reasons. Public reasons provide shareholders with a basis for disciplining unreasonable boards, but they also offer a defense for unlucky boards. In essence, they encourage rigorous board decision-making and active, engaged shareholder oversight.

C. *Public Reason-Giving and Polarization*

Corporate decision-making extends to many issues that are politically controversial and, in the current political landscape, deeply polarized.[125] Such issues include climate change and climate risk.[126] Given the significant role

124. Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEGAL ANALYSIS 337, 338, 340 (2016).

125. On polarization generally, see Kati Kish Bar-On, Eugen Dimant, Yphtach Lelkes & David G. Rand, *Unraveling Polarization: Insights into Individual and Collective Dynamics*, 3 PNAS NEXUS 426 (2024).

126. *See* Cale Jaffe, *Melting the Polarization Around Climate Change Politics*, 30 GEO. ENV'T L. REV. 455, 456 (2018) (describing the current discussion about climate change in the United States as characterized by "seemingly intractable polarization").

corporations have played in generating greenhouse gas emissions, their dominant role across the global economy, and their active role in U.S. politics, corporate decision-making is a vital subject for climate action and reform. Improving corporate decision-making on climate may be one of the most important projects of this century.[127]

Mandatory public reason-giving can be a potent tool to fight polarization in board decision-making by forcing boards to engage deeply with the factors going into a decision and to consider alternate perspectives and arguments.[128] Requiring parties to dig beneath surface-level partisan affiliations to engage in analytical reasoning can help move the parties beyond gut-level instinct and glib sound bites, and result in higher-quality decisions. It also promises to help boards reach the kind of reasoned decisions that will hold up under scrutiny and contestation. Therefore, more research is needed to assess the impact of reason-giving mandates on board decision-making, particularly in relation to climate change and other corporate decisions that touch on controversial subjects, such as workers' rights, political spending, reproductive rights, and diversity.

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Capital market participants will likely view mandatory reason-giving as appropriate only for a subset of corporate decisions. In administrative law, reason-giving is sometimes presented as a constraint on abrupt change, one that fosters stability and promotes predictability in policy development.[129] Although stability and predictability might be desirable in agency policymaking, they will not always be desirable in the domain of corporate action. Sometimes, nimble decision-making, course reversals, and abrupt changes are value-creating and reflect the best practices of market actors. As of this writing, only a small number of board decisions are subject to reason-giving mandates. It makes sense to use the strategy sparingly.

Based on the analysis presented here, reason-giving mandates are probably most useful in corporate and securities law when they relate to decisions that significantly impact firm value; decisions that affect the shareholder franchise;

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127. *See, e.g.*, Susan S. Kuo & Benjamin Means, *Climate Change Compliance*, 107 IOWA L. REV. 2135, 2137 (2022) ("Unless corporations prioritize climate change mitigation, efforts to control global warming will fail."); Barnali Choudhury, *Climate Change as Systemic Risk*, 18 BERKELEY BUS. L.J. 52, 56 (2021) ("Indeed, the risks posed by climate change to the economy have the potential to be so far-reaching that climate change is, in effect, a systemic risk."); Ali A. Zaidi, *Mandates for Action: Corporate Governance Meets Climate Change*, 72 STAN. L. REV. ONLINE 122, 133 (2020) ("For leaders charged with corporate governance, the crisis presented by climate change demands action not tomorrow—but today."); Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140–41 (2019) ("Firm managers make decisions with profound environmental consequences long before pollution comes out of a pipe or smokestack as an externality.").

128. *See, e.g.*, Cass R. Sunstein, *Arbitrariness Review and Climate Change*, 170 U. PA. L. REV. 991, 1000 (2022) ("Reason-giving requires genuine deliberation, in which science and economics are taken seriously, competing arguments are engaged, counterarguments are explored, and alternatives are given serious consideration.").

129. Albert C. Lin, *Climate Policy Buffers*, 39 YALE J. ON REGUL. 699, 722–23 (2022).

decisions related to polarized, controversial topics where reason-giving strategies might offset biases and promote rational decision-making; and decisions with a significant effect on the public interest.

CONCLUSION

This Essay has identified a new trend in American corporate governance law: the rise of public reason-giving mandates directed at corporate boards. It has shown that since the late 1970s, regulators of public companies, including Congress, the SEC, and SROs like Nasdaq, have all begun requiring corporate boards to explain to their shareholders the reasons behind certain decisions. Such mandates are a break from past practices, in which corporate board decision-making was treated as private and protected from public scrutiny—even, to some extent, from judicial scrutiny. The existence of the trend, as well as its timing, is noteworthy in relation to a democratic turn in American corporate governance that began at the end of the twentieth century. The Essay has argued that mandatory public reason-giving checks the power of corporate managers over the enterprise by providing shareholders with the means to evaluate decision-making quality and to rigorously contest decisions with which they disagree.

This Essay has sketched a history of the various reason-giving mandates that have sprung up in law, regulation, and SRO rules over the past forty years. The mandates are not concentrated in one area but apply to core governance decisions, such as how to evaluate a takeover, as well as to decisions on a range of ESG matters. Evidence suggests that shareholders value this trend and have sought more reason-giving than existing rules require. Evidence also suggests that institutional investors make use of companies' disclosures of reasons as part of their stewardship activities.

Though public reason-giving is associated with political democracy, the Essay has highlighted two unique roles for reason-giving in corporate governance. First, mandatory public reason-giving provides a means for shareholders to identify (and act on) unsound decision-making by officers and directors, even when a company has exculpated its officers and directors for monetary damages for breaches of the duty of care. Before the rise of exculpation provisions in corporate charters, shareholder litigation provided a means for shareholders to investigate poor board decision-making; since exculpation provisions have become commonplace, shareholders have had fewer avenues to examine the reasoning behind a bad decision. Obviously, shareholders still have strong incentives to monitor directors for gross and ordinary negligence and to use the corporate election to replace directors who produce poorly reasoned decisions.

Second, public reason-giving can help fight polarization in board decision-making on highly charged matters such as climate change. By encouraging directors to dig beneath surface-level partisan affiliations and to make well-reasoned, fact-based decisions, reason-giving mandates promote better decision-making. Given the possibility that public reason-giving rules can produce higher-quality board decisions related to climate risk in particular—and given the significant role that large corporations play in creating environmental externalities—this Essay has recommended further study of how public reason-giving mandates can be used in board governance.

If used sparingly, reason-giving mandates can advance both corporate and democratic objectives. Reason-giving mandates are probably most useful in corporate and securities law when they relate to decisions that significantly impact firm value; decisions that affect the shareholder franchise; decisions related to polarized, controversial topics where reason-giving can promote rational decision-making; and decisions with significant effect on the public interest. Though reason-giving mandates create costs for companies, the costs may be offset by better decision-making.