

JOHN L. WEINBERG DISTINGUISHED LECTURE

“Speaking Out on Hot Button Topics: How Boards Can Steer CEOs and Companies in Choppy Waters”

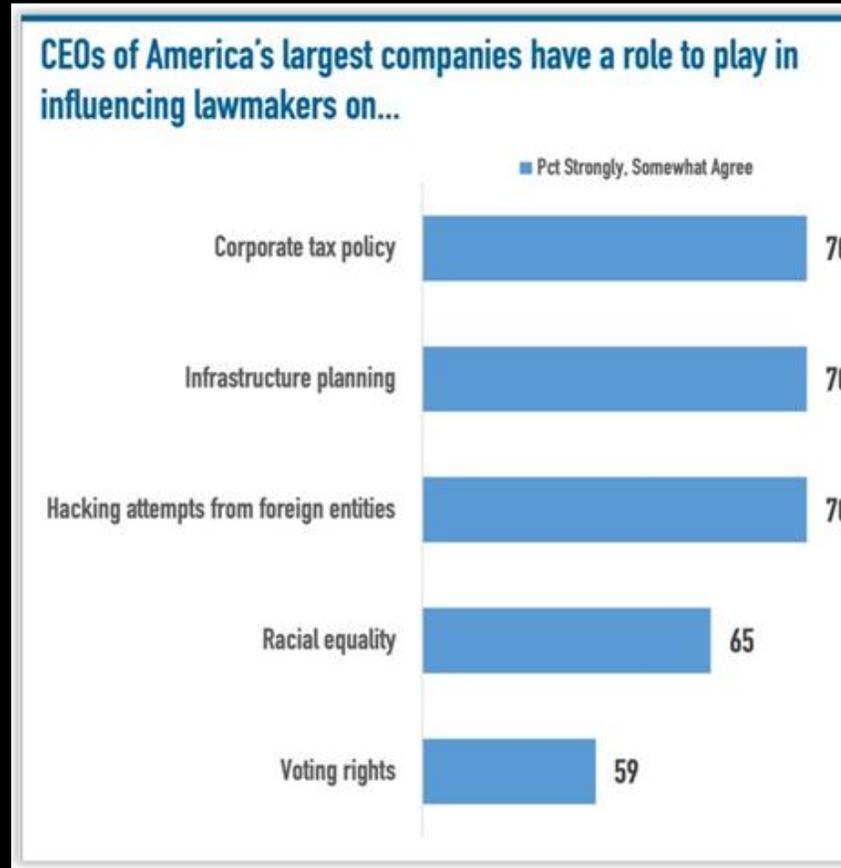
Lawrence A. Cunningham
April 11, 2024



UNIVERSITY OF DELAWARE
**WEINBERG CENTER FOR
CORPORATE GOVERNANCE**

Data on CEOs Speaking Out

CEOs HAVE ROLE TO PLAY



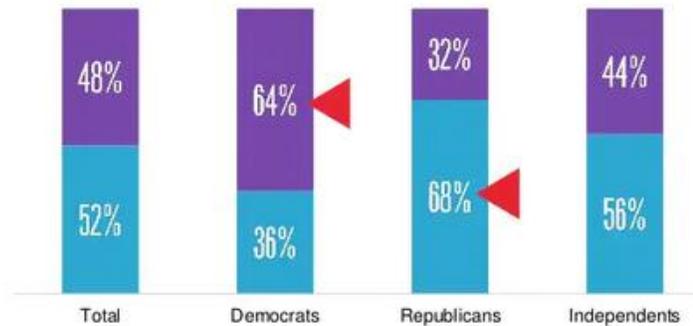
DIVISION OVER SPEAKING OUT

SHOULD COMPANIES TAKE POSITIONS OR STICK TO BUSINESS? AMERICANS ARE NEARLY EVENLY DIVIDED

Democrats are significantly more likely than Republicans and Independents to say companies should take positions. Republicans are significantly more likely to say they should stick to business.

COMPANIES SHOULD... (% TOTAL AMERICANS)

- Take positions on social issues that they consider important to their workforce and to society, even if they are not directly related to their business
- Stick to conducting their business and not take positions on social issues
- Significantly higher than comparative sub-groups



INHERENT RISK

AMERICANS IDENTIFY RISK OF CEOs SPEAKING OUT VS. STAYING SILENT – RISK OF SPEAKING OUT IS GREATER THAN SILENCE BUT DOUBLE EDGED SWORD

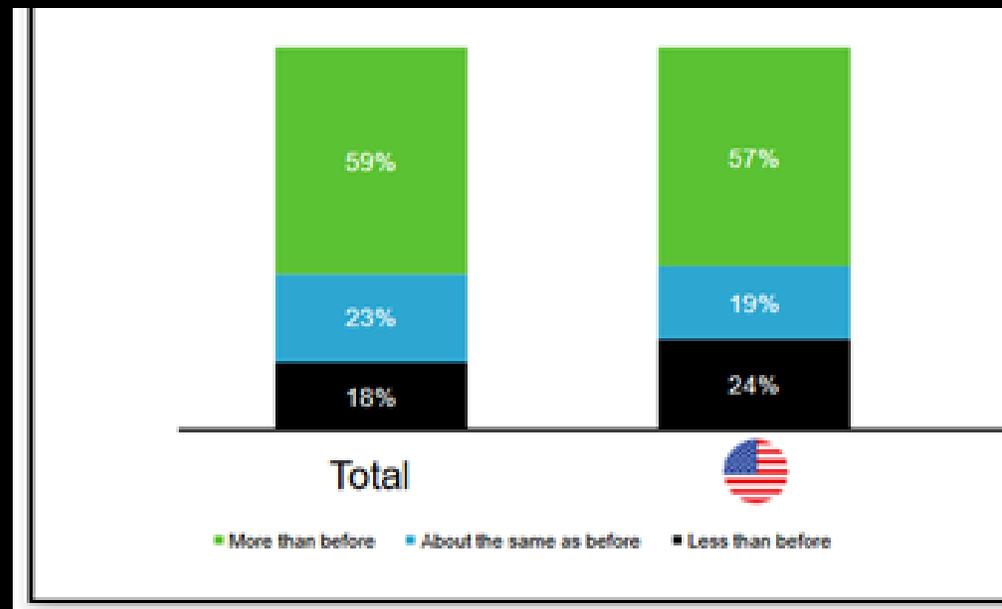
RISKS OF CEOs SPEAKING OUT ON HOTLY DEBATED CURRENT ISSUES	TOTAL AMERICANS
Any Risk	89%
Criticism from customers	60%
Criticism in social media	59%
Company could be hurt financially	57%
Criticism from employees	51%
Boycotts	51%
Criticism from traditional media	50%
Employees quitting	39%
Potential job candidates not applying	38%
Criticism from the government	27%
Instigation of a march or rally	24%
There are no risks	1%
Don't know	10%

RISKS OF CEOs NOT SPEAKING OUT ON HOTLY DEBATED CURRENT ISSUES	TOTAL AMERICANS
Any Risk	61%
Criticism in social media	35%
Criticism from customers	30%
Criticism from employees	29%
Criticism from traditional media	28%
Company could be hurt financially	22%
Boycotts	20%
Employees quitting	17%
Potential job candidates not applying	16%
Criticism from the government	12%
Instigation of a march or rally	12%
There are no risks	22%
Don't know	17%

16

INTERNAL DISCUSSION

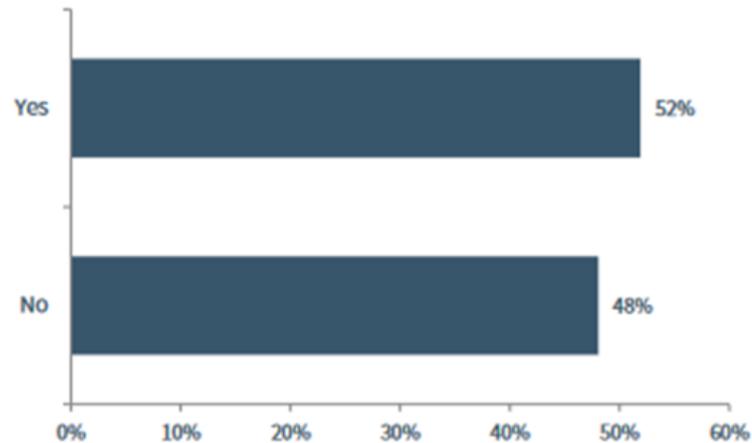
Change in frequency among PR officers discussing whether CEO should speak out on public policy debate.



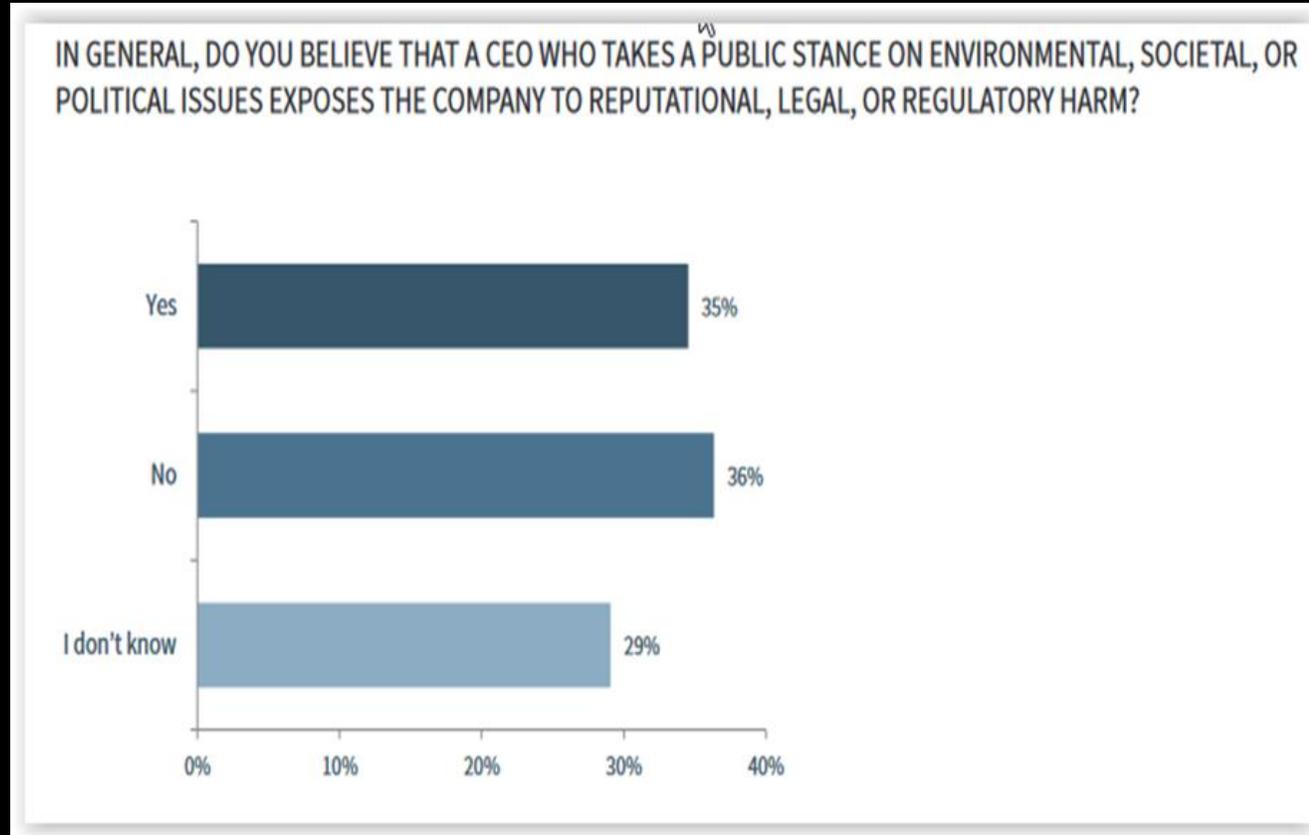
GENERAL COUNSELS ALSO SPLIT

RECENTLY, A COMPANY MADE A PUBLIC STATEMENT THAT IT WOULD NOT ENGAGE IN CAUSES NOT DIRECTLY RELATED TO ITS STRATEGIC AND FINANCIAL MISSION, INCLUDING PUBLIC POLICY ISSUES, SOCIETAL ISSUES, AND POLITICAL CAUSES. IT WOULD INSTEAD FOCUS EXCLUSIVELY ON ITS STRATEGIC AND FINANCIAL MISSION AND ONLY ENGAGE IN POLICY ISSUES DIRECTLY RELATED TO THAT MISSION.

IN GENERAL, WOULD YOU RECOMMEND A SIMILAR POLICY TO THE CEO AND BOARD OF YOUR COMPANY?

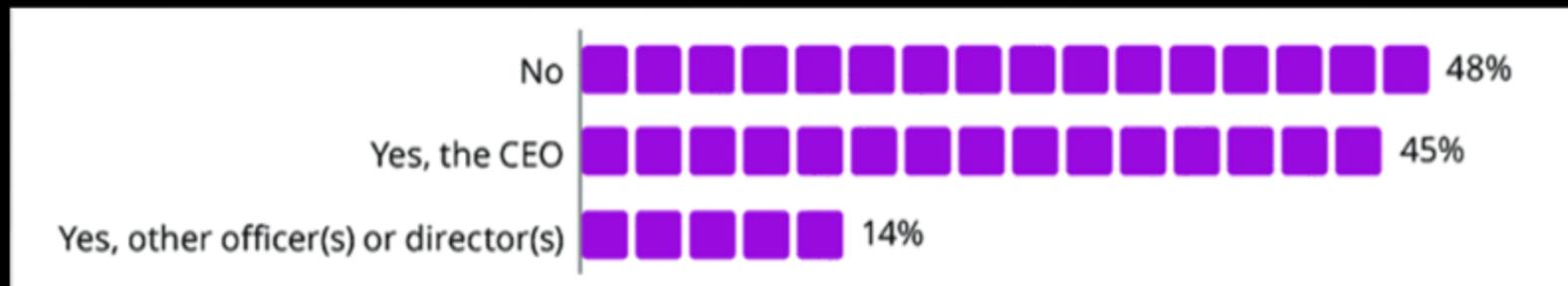


GENERAL COUNSELS UNSURE OR DIVIDED

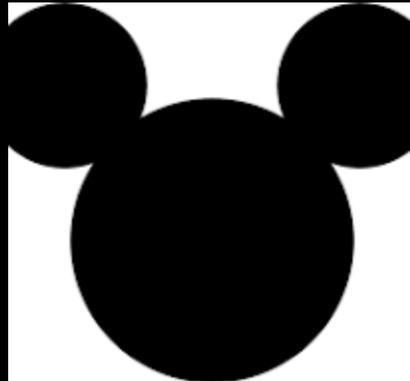


FREQUENCY

In the past year, has your CEO or other official spoken out on a public policy debate?



Stakes, Forces and Counterforces



FACTORS DRIVING CEOs TO SPEAK OUT

Structural

1. Dominance of index funds over stock pickers
2. Business Roundtable stakeholder purpose
3. Stakeholder and advocates responded with calls to action

Trust

4. Decline of trust in government, including COVID snafus
5. Increased trust in corporations, especially CEOs

Civic

6. BLM | #MeToo
7. Climate change awareness
8. Prioritizing personal values in workplace, consumer markets, investing

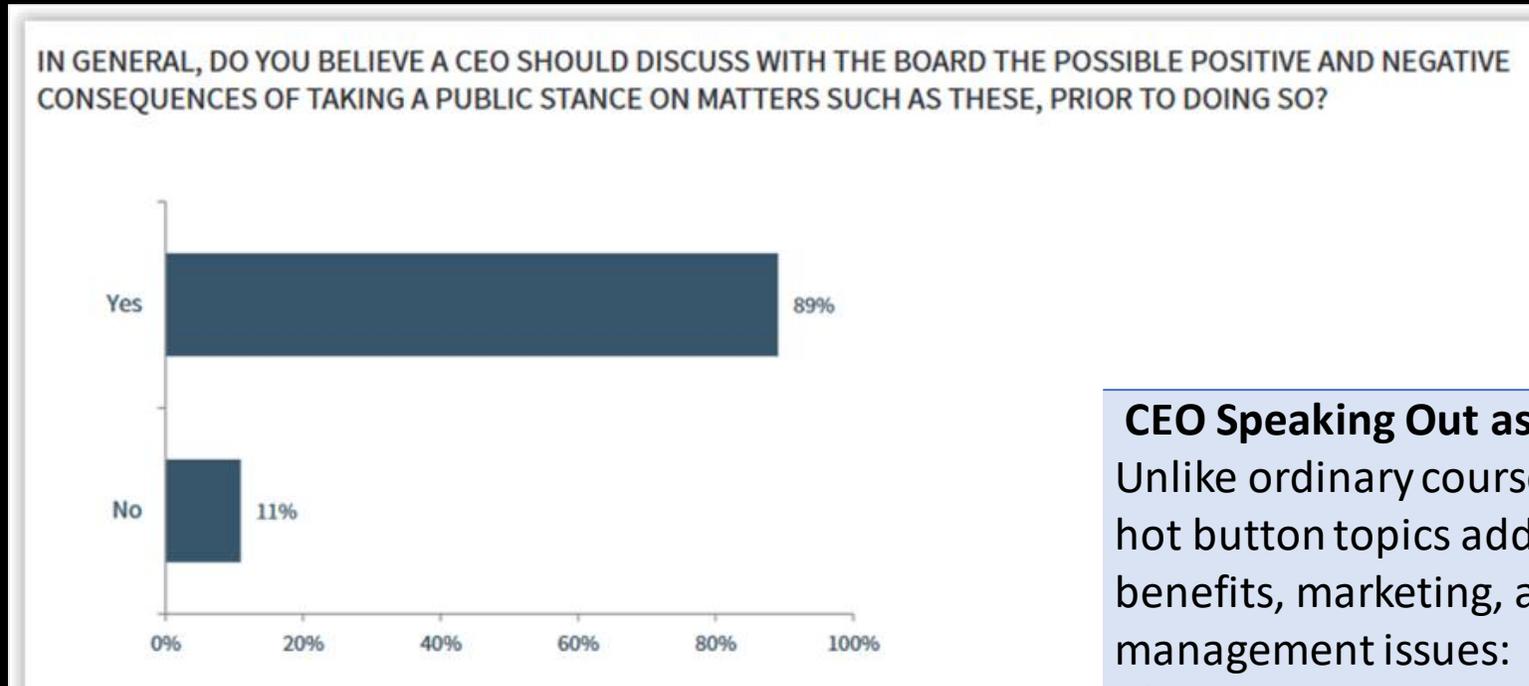
Social Media

9. Social media empowers coordination of coalitions

COUNTERFORCES

Duty	Accountability	Debates
1. Fiduciary duties to the corporation and its shareholders.	4. Shareholders elect directors and can sue them for breach.	7. Corporate purpose.
2. Must put corporate interest above personal interest, including on social and political topics.	5. "Stakeholders" do not elect directors, cannot sue them and are not beneficiaries of duty.	8. Corporate social responsibility.
3. Protected by the business judgment rule.	6. Federal securities disclosure laws counsel prudence.	9. Corporate constituencies.

CEO SPEAKING OUT AS A BOARD ISSUE



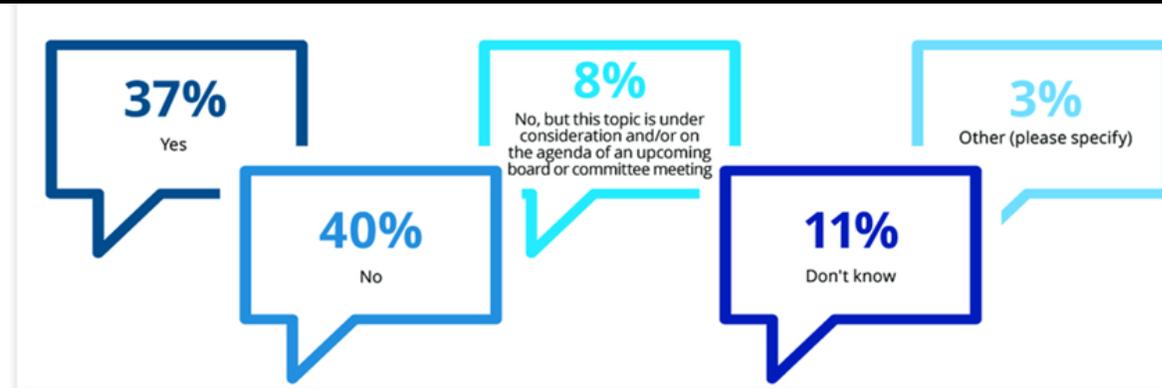
CEO Speaking Out as Board Issue

Unlike ordinary course corporate encounters with hot button topics addressed via employee benefits, marketing, and lobbying, which are management issues:

- * purpose is to draw attention to position (creating or mitigating risk)
- * uses and shapes CEO public persona
- * CEO selection and oversight is top board job

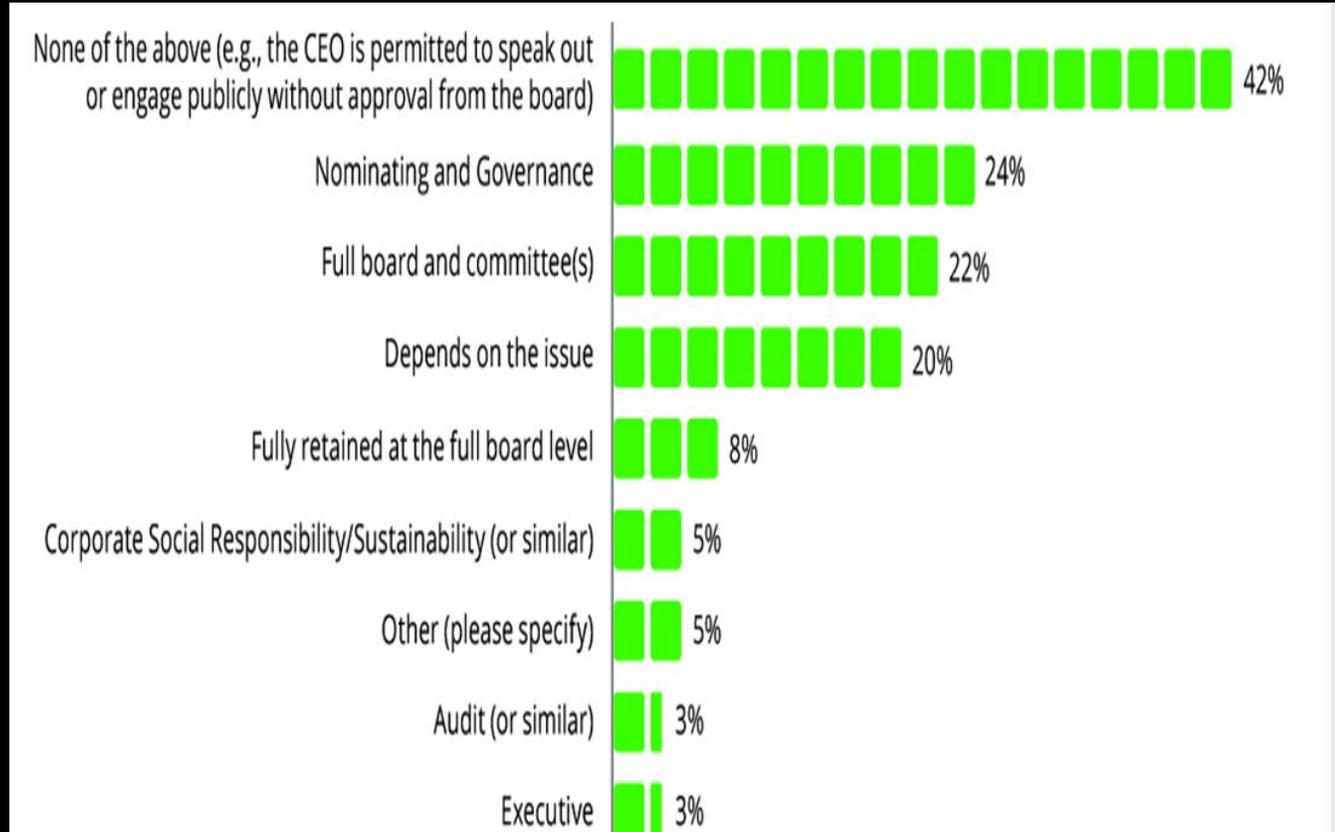
BOARD CONSIDERATION

In the past year, has your board discussed whether the CEO or other official should speak out on a public policy debate?



BOARD OVERSIGHT

Which of the listed committees, or full board, oversees the CEO or other official speaking out on public policy debates?



BOARD POLICIES

What document/policy governs whether the CEO or other official may speak out on a public policy debate?



Company-specific framework



We do not document



Code of Ethics



Corporate Governance Guidelines



We do not document but this is under consideration



The document/policy is board-approved



Other (please specify)



Don't know



The document/policy addresses board involvement (e.g., whether the board or a committee must preapprove whether or how public statements are made)

BOARDROOM CULTURE: LEGAL

Fundamental Legal Commitment

The corporation and its shareholders

Board determines what's "good," "desirable," "beneficial" (*Brechem v. Eisner*)

"Good faith" and "reasonableness" not rigid rules or "best practices" (*Caremark et al.*)

Less legal risk (*Simeone v. Disney*) than time, reputation, electability

BOARDROOM CULTURE: SOCIAL

Practical Social Realities

Balance CEO-board roles

Dynamics vary

Cooperative and collaborative

SAMPLE BOARD-CEO FRAMEWORK

Total CEO discretion	Hot topics within the company's business	Hot topics outside company's business	Off limits
	{-----Consider referring to / working with business/trade groups-----}		
Wages/employee relations generally	Pandemic screening for airlines (Delta, United), hotels (Hilton, Marriot)	Federal travel ban targeting Muslim-majority countries	Recommending given candidates for office
Prices/customer relations generally	Soda tax legislation for beverage companies (Coca-Cola, Pepsi)	Federal gun laws to reduce mass shootings	Endorsing or opposing specific political parties or platforms
Earnings/shareholder relations generally	Fast fashion (H&M, Zara)	Abortion (the <i>Dobbs</i> decision)	Campaigning for contributions to candidates or parties
Community and charitable relations	Book bans for publishers (Random House)	Voting laws (Georgia)	
		Transgender rights/teachings (Florida law/Catholic church)	

FLESHING OUT THE FRAMEWORK: GENERAL GUIDANCE

Polarized	<i>greatest risk</i> is with most divisive topics—those closest to a 50-50 split
Nexus	<i>lower risk</i> on topics closely related to the business, such as employment policies directly affecting company employees
Authenticity	least risk when CEO comment is authentic and accurate, neither artificial nor contrived
Consistency	least risk when comment is consistent with established practices and disclosures
Customers	consumers spend more on products that align with their values—know those values and whether CEO comments will align
Employees	can strengthen or alienate employees depending on whether an employee agrees or disagrees—know your employees
Investors	mixed results on any relation between CEO public comments and investor relations or returns

CORPORATE PURPOSE DEBATES

Longstanding and Ongoing Debates

- * Economic or social institutions? (Berle-Dodd 1930s)
- * Market or regulatory discipline? (Friedman-Nader 1960s-70s)
economic profits v. “taming” corporations to meet “public needs”
- * Shareholder-value or “other constituencies”? (Raiders-Targets 1980s)
- * “Corporate Social Responsibility” (1990s)
the economic value of social responsibility
- * “Environmental, Social and Governance” (“ESG”) (U.N. 2005)
challenges: definitional, technical, ethical, political . . .

plus ça change, plus c'est la même chose

CORPORATE CHARTERING DEBATES

Delaware Is Trying Hard to Drive Away Corporations

A flirtation with ESG is jeopardizing its status as a preferred destination for corporate headquarters.

By William P. Barr and Jonathan Berry
Nov. 24, 2023 3:12 pm ET

Barr-Berry: Delaware risks preeminence by “falling in” with ESG/stakeholder approach

OPINION | LETTERS [Follow](#)

Delaware Won't Fully Adopt the ESG Agenda

Its jurisprudence remains shareholder-centric.

Nov. 28, 2023 5:27 pm ET

Cunningham: Delaware remains a stockholder primacy state—“the gold standard”—protecting other interests when rationally related to stockholder interests

Barr and Berry Reply on Delaware and ESG

‘Politicians blinkered by ideology are liable to make costly mistakes for their states.’

Dec. 4, 2023 5:12 pm ET

Barr-Berry: concern is “cloaking stakeholder politics in the garb of long-term stockholder value”

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SENIOR THESIS

STATUS AND FUNCTIONS
OF
CORPORATE DIRECTORS
* * *
John L. Weinberg

JOHN L. WEINBERG

“The complex and unresolved problem now existing is the reconciliation of private enterprise and freedom of action with the smooth functioning of a democratic society, including justice for all groups – stockholders, executives, employees, creditors, and the public at large.”

SENIOR THESIS

STATUS AND FUNCTIONS OF CORPORATE DIRECTORS

By
John L. Weinberg, '47

Submitted to
PRINCETON UNIVERSITY
Department of Economics and Social Institutions
In Partial Fulfillment of Requirements for the
Degree of Bachelor of Arts
April, 1948

“This broad concept [of social responsibility] is, however, not only often overlooked, but it is scarcely recognized by the courts who officially still hold the board of directors to the narrow path of securing maximum profits for the stockholders.”

“Although the directors are selected by the stockholders of the corporation, their task is to [oversee] the business in the interest of the investors, employees, [and] customers in accordance with public policy as expressed in the laws of the land.”

“To make a profit is basic. There can be no joint benefit if the corporation fails. However, after survival, the harmony of interest must occur.”

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