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ARTICLE

A COMPARATIVE PERSPECTIVE ON THE LIMITATIONS OF THE DUTY OF OVERSIGHT – A COMMENT ON LISA FAIRFAX

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In her article *Managing Expectations: Does the Directors' Duty to Monitor Promise More than it Can Deliver?*, Professor Lisa Fairfax evaluates the practical limitations of the duty to monitor.[1] Professor Fairfax's point is as unmistakable as it is insightful and provocative: the oversight doctrine offers false hope that enhancing directors' oversight responsibilities can improve corporate governance. The oversight doctrine creates expectations that directors cannot possibly fulfill. In effect, the duty to monitor promises more than it can actually deliver.

Professor Fairfax points to the significance of the duty of oversight, especially in the context of the credit crisis, and its role as "one of the primary causes of the financial crisis."[2] Professor Fairfax underscores that the outcomes of the crisis could have been improved if directors had more rigorously exercised their duty of oversight. However, as she points out, the doctrine of the duty of oversight "may be too immature and incoherent."[3] Without a workable duty of oversight, corporate directors seeking to comply with the oversight duty lack meaningful guidance as to the expected conduct. Combined with a growing and ever more complex modern corporation, it may be "impractical for directors to successfully engage in over-

* Associate Professor, University of St. Thomas School of Law (Minneapolis). This article is a comment on Lisa Fairfax's article *Managing Expectations: Does the Directors' Duty to Monitor Promise More than it Can Deliver*. The author would like to thank Professor Fairfax for her support and feedback during the drafting and editing process. He would also like to thank his colleagues Lyman Johnson and Brett McDonnell for their feedback and insightful comments on earlier drafts. The author would also like to thank research librarian Valerie Aggerbeck for her assistance.

1. Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More than it Can Deliver?*, 10 U. ST. THOMAS L.J. 416 (2012).
2. *Id.* at 417.
3. *Id.* at 418.

sight."[4] Professor Fairfax argues that, because directors serve part-time as outsiders, it may be unreasonable to expect directors to have the knowledge, capacity, and expertise to "effectively monitor the business affairs of large, and increasingly complex, corporations."[5] As a result, Professor Fairfax concludes that attempts to enhance oversight may fail, and an emphasis on improving oversight as a means of enhancing corporate governance could be ill-advised.[6]

Professor Fairfax also notes that in the United States, imposing liability on directors for oversight breaches is nearly impossible.[7] This point is well illustrated in *In re Citigroup Inc. Shareholder Derivative Litigation*.[8] According to the complaint, starting in May 2005, "red flags" pertaining to Citigroup's investments in real estate and credit markets should have alerted the defendants to serious risk of investment loss.[9] By disregarding these warning signs, the defendants allegedly sacrificed the long-term viability of Citigroup for the sake of short-term profits.[10] Shareholder plaintiffs alleged that the directors failed to properly disclose the company's exposure to subprime assets and that they breached their fiduciary duties by failing to properly manage and monitor the risk that Citigroup faced from problems in the subprime lending market.[11] The Delaware Chancery Court found that the duty to monitor for illegal conduct under the *Caremark*[12] line of cases should not be extended to impose oversight liability for business risk.[13] The court therefore upheld the business judgment rule and its protection of directors' business decisions in the face of worldwide economic losses. According to the Delaware Chancery Court, directors' incorrect evaluation of business risk and their inability to predict the future did not violate directors' duty of oversight. Losses alone do not suffice to hold directors personally liable for taking risks that lead to losses because risk is inherent in maximizing shareholder value. However, oversight liability can be established if the plaintiff shows that "the directors knew they were not discharging their fiduciary [duties] or that the directors demonstrated a conscious disregard for their responsibilities . . . ."[14]

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4. *Id.*
5. *Id.*
6. *Id.*
7. Fairfax, *supra* note 1, at 418.
8. *In re* Citigroup, 964 A.2d 106 (Del. Ch. 2009).
9. *Id.* at 114–15.
10. *Id.* at 111.
11. *Id.*
12. *In re* Caremark, 698 A.2d 959, 967 (Del. Ch. 1996) (expanding directors' duty of care to include a duty to monitor for illegal conduct).
13. *See* Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (reaffirming the *Caremark* duties and describing the duty of oversight for liability purposes as a facet of the duty of loyalty).
14. *In re* Citigroup, 964 A.2d 106, 123 (Del. Ch. 2009) (emphasis omitted).

Most importantly, Professor Fairfax explains why, while Delaware law may signal the most appropriate standard of conduct,[15] Delaware's signaling of expected conduct is undermined if it imposes a nearly insurmountable standard for liability in cases involving breaches of the duty of oversight.[16] Supporting Professor Fairfax's argument, Professors Johnson and Garvis show in an empirical study that courts often provide very specific language regarding the appropriate standard of conduct for directors.[17] However, their study highlights that lawyers do not sufficiently communicate to directors what conduct is expected of them.[18] Inadequately informed directors may underestimate their personal liability exposure and engage in more risky behavior than is desirable for the company itself.

I. A Comparative Perspective on the Duty to Monitor

Professor Fairfax makes important arguments suggesting that the duty of oversight in the United States promises more than it can actually deliver. In particular, the nearly insurmountable standard for liability in oversight cases and its effect on signaling the expected standard of conduct could have long-term implications for corporate law in the United States. Other countries, however, have stricter liability standards.

Compared to the United States, Germany has taken a stricter approach to cases involving a breach of the duty of oversight. The German business judgment rule[19] requires a showing of the same elements as the American business judgment rule.[20] However, the application of the German business judgment rule is much less clear in an environment of increased systemic risk, such as the recent credit crisis.[21] After evaluating legal liability rules in

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15. Fairfax, *supra* note 1, at 427.

16. *Id.* at 428.

17. *See* Lyman P. Q. Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?* 64 Bus. Law. 1105, 1111–17 (2009) (discussing the methodology and results of the empirical survey); *see also* Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 Mich. St. L. Rev. 847, 866 (2009) (stating that lawyers do not sufficiently advise directors).

18. *See, e.g.*, Johnson & Garvis, *supra* note 17, at 1110 ("Overall, officers appear to be somewhat under-advised about fiduciary duties . . . at least to the extent liability rules shape conduct.").

19. The German business judgment rule was introduced in 2005 as part of the Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) and implemented in § 93(1)–(2) of the German Stock Corporation Act. *See* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, Bundesgesetzblatt, Teil I [BGBL. I.] at 1089, § 93(1)–(2) (Ger.).

20. The basic elements of the business judgment rule in both the United States and Germany are: a decision by management, for the benefit of the corporation, based on sufficient information, and with no conflicts of interest. See *id.* for a description of the German elements of the business judgment rule. *See also, In re* Walt Disney, 906 A.2d 27 (Del. 2006) (explaining the business judgment rule applies to decisions of directors who perform their duties (1) in good faith, (2) with care of an ordinarily prudent person, and (3) in the best interests of the corporation).

21. Wulf A. Kaal & Richard W. Painter, *Initial Reflections on an Evolving Standard: Constraints on Risk Taking by Directors and Officers in Germany and the United States*, 40 Seton Hall L. Rev. 1433, 1465 (2010).

the aftermath of the financial crisis, German commentators[22] concluded that managers do not act reasonably in terms of the German business judgment rule if risks taken on behalf of the corporation result in the demise of the corporation.[23] In its *ARAG/Garmenbeck* decision, the Bundesgerichtshof (BGH), Germany's highest court in civil matters, explained that if the "business risk was inappropriately excessive," directors' business decisions are not protected under the German business judgment rule.[24] This holding is diametrically opposed to the holding in *In re Citigroup*, where the Delaware Chancery Court declared that directors' incorrect evaluation of business risk did not violate directors' duty of oversight.[25]

In another case, *In re Walt Disney Company Derivative Litigation* ("*Disney*"),[26] the Delaware Chancery Court and the Delaware Supreme Court both held that the directors were not liable for awarding $130 million to Michael Ovitz for serving only one year as the number two executive at Disney. Over the course of almost a decade, this litigation spawned five published opinions by Delaware courts—two from the Delaware Supreme Court and three from the Delaware Chancery Court.[27] The Delaware Chancery Court initially viewed the payout to Michael Ovitz as an unremarkable exercise of business judgment. On appeal, however, the Delaware Supreme Court opined that Disney's disorderly board processes and the size of the payout rendered the outcome on both the waste and process claims a close case.[28] Although the Delaware Supreme Court affirmed the dismissal of plaintiffs' claim on the grounds of deficient pleading, it advised the Chancery Court to grant the plaintiffs leave to amend.

By contrast, the BGH determined in *Mannesmann*[29] that the directors of the German Mannesmann AG breached their fiduciary duty to the company by awarding a bonus of approximately $17 million to the Mannesmann CEO whose tenure at Mannesmann resulted in a substantial increase of shareholder value. In the 1990s, Mannesmann's CEO, Klaus Esser, suc-

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22. Contrary to their counterparts in the United States, German courts rely heavily on the expertise of commentators.

23. Marcus Lutter, *Die Business Judgment Rule und Ihre Praktische Anwendung*, 18 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] [J. BUS. L.] 841, 843–45 (2007) (Ger.); AktG at § 93(1)–(2) (providing the five core elements of the German business judgment rule: (1) a business decision by management, (2) for the benefit of the corporation, (3) no conflict of interest, (4) based on sufficient information, and (5) no "hazard" decision or no excessive risk taking).

24. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 21, 1997, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1926, 1997 (Ger.).

25. *In re* Citigroup, 964 A.2d 106, 131 (Del. Ch. 2009).

26. *In re* Walt Disney, 907 A.2d 693 (Del. Ch. 2005), *aff'd* 906 A.2d 75 (Del. 2006).

27. *See id.* Three earlier published court opinions pertain to the same litigation: *In re* Walt Disney, 731 A.2d 342, 353 (Del. Ch. 1998) (dismissing complaint); Brehm v. Eisner, 746 A.2d 244, 267 (Del. 2000) (affirming dismissal but granting Plaintiff leave to amend); *In re* Walt Disney, 825 A.2d 275, 286 (Del. Ch. 2003) (declining motion to dismiss amended complaint).

28. *Brehm*, 746 A.2d at 249.

29. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 21, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 522, 2006 (Ger.).

cessfully turned the company from a German company with a focus on heavy machinery into an international conglomerate operating a successful cell phone network. In November 1999, Esser successfully negotiated Vodafone's friendly takeover of Mannesmann. The final merger agreement valued Mannesmann's stock at €360 per share. Compared to the initial offer rejected by Esser, the deal negotiated by Esser increased the value for Mannesmann stockholders by more than €63 billion. However, when Mannesmann's compensation committee awarded Esser a bonus of $17 million in recognition of his extraordinary accomplishments, the majority of the German public and press reacted negatively. On March 7, 2000, an attorney representing smaller German companies filed criminal charges against the members of Mannesmann's compensation committee, among others, for breach of trust (Untreue – Section 266 of the German Penal Code). Defendants agreed to pay €5.8 million and the case was settled.[30]

Comparative corporate law research is challenging and may include inaccuracies as a result of countries' different legal histories, legal origins, and legal cultures. Comparing *Disney* and *Mannesmann* is challenging and inexact, but like the comparison between *In re Citigroup* and *ARAG*, it underscores the differences between Delaware and German law regarding the allocation of liability. Both comparisons are based on cases involving extreme facts, placing the cases at the cusp of culpable conduct, and both cases take place in different contexts. *Disney* involves a termination under an employment contract while *Mannesmann* addresses a gratuitous bonus. Despite the limitations and inaccuracies in these comparisons, it seems difficult to escape the conclusion that had the two American cases, *In re Citigroup* and *Disney*, been decided in Germany, the liability allocation would have been different. German courts generally seem more willing to second-guess directors' decisions than Delaware courts. The different legal standards for liability allocation in Germany and the United States illustrate their rather different legal and societal attitudes towards managers' risk-taking.

Lowering the standard for liability in oversight cases in the United States could address several of the duty of oversight's shortcomings described above. Delaware's signaling of expected conduct[31] could be dra-

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30. *Id.*

31. Fairfax, *supra* note 1, at 428, n.136; *see also* Lyman Johnson, *Debarring Faithless Corporate and Religious Fiduciaries in Bankruptcy*, 19 AM. BANKR. INST. L. REV. 523, 532, 538 (2011)

> Debarment relief has the advantage of sanctioning misconduct while not depleting the financial resources of companies themselves, whose investor and creditor constituencies may be unaware of and innocent of wrongdoing. This is of particular importance if the misconduct created significant financial distress for the business because government monetary penalties could crowd out private claimants. And, unlike the case with money damages or civil penalties, bar orders are entirely forward looking and can pointedly seek to prevent repeat behavior in a specified setting . . . . The debarment remedy, moreover, does not visit money damages *per se* on the wrongdoer, thereby blunting

matically improved with a moderate standard for liability in cases involving breaches of the duty of oversight. Directors and officers would take their increased personal liability exposure into account and could be incentivized to engage in less risky behavior. Arguably, the outcomes of the last financial crisis could have been improved if directors had more rigorously exercised their duty of oversight because of looming personal liability. With an increase in liability, courts would also have an opportunity to clarify the oversight doctrine. The duty of oversight could, thus, evolve into a mature and coherent doctrine.[32] With a workable duty of oversight, corporate directors would be in a better position to obtain meaningful guidance regarding the expected conduct. Indeed, the complexities of the ever-growing modern corporation would perhaps need to be adjusted to facilitate directors' successful oversight.[33]

Increased liability is no panacea and cannot alone adequately address the central shortcomings of the duty of oversight and corporate governance in the United States that Professor Fairfax identifies.[34] Even if directors face heightened liability, it would probably still be unreasonable to expect directors to have the knowledge, capacity, and expertise to "effectively monitor the business affairs of large, and increasingly complex, corporations."[35] After all, directors serve part-time as outsiders.[36] Moreover, cost increases and path dependencies may make it nearly impossible to relax the close to insurmountable standard for liability in oversight cases. This weighs in favor of Professor Fairfax's conclusion that attempts to enhance oversight in the United States may fail, and an emphasis on improving oversight as a means of enhancing corporate governance could be ill-advised.[37]

II. Dynamic Regulation

Professor Fairfax's critique of the duty of oversight and the role of directors in corporate governance implicates the broader corporate governance framework in the United States.[38] Since 2002, corporate governance in the United States has not just once but twice been substantially upgraded

potential criticisms that it will dissuade persons from serving in senior governance positions or lead to excessive risk averse behavior for fear of personal monetary liability, and it does not penalize the company itself and thereby compete with private creditors for limited organizational funds. Critically, it is forward looking and preventive in its orientation.

32. *Contra* Fairfax, *supra* note 1, at 418 (discussing the incoherency and immaturity of the current doctrine of oversight).

33. *Contra id.* (explaining the complexities of the modern corporation).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Fairfax, *supra* note 1, at 418 (stating that directors serving part-time as outsiders "may make it unreasonable to expect that directors have the expertise, knowledge, and capacity to effectively monitor the business affairs of large, and increasingly complex, corporations.").

after more than seventy years of comparative regulatory inactivity.[39] At the most general level, the Sarbanes-Oxley Act (SOX) aimed to increase board independence, fix the audit process, and improve disclosure and transparency.[40] Only eight years later, Congress again overhauled the corporate governance regime in the Dodd-Frank Act (Dodd-Frank).[41] Although some may argue that the Sarbanes-Oxley Act and the Dodd-Frank Act addressed different regulatory concerns precipitated by different causes in different market environments and different economic conditions, a noteworthy common denominator between SOX and Dodd-Frank and other reform proposals is the use of a top-down regulatory approach (i.e., direct regulatory intervention with stable and supposedly optimal rules).

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39. Wulf A. Kaal, *Zwangswandelanleihen als Dynamische Regulierung der Finanzmarktindustrie*, *in* FESTSCHRIFT KIRCHNER (Wulf Kaal, Andreas Schwartze, Matthias Schmidt & Ulrich Ehricke eds., 2013).

40. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529–43 (2005) (providing an evaluation of the substantive corporate governance mandates of the Sarbanes-Oxley Act of 2002); Stephen M. Bainbridge, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS (2012); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 11–18 (2002) (reviewing some of the reforms in the Sarbanes-Oxley Act and discussing how these reforms purportedly respond to the problems discussed in the first part of the article); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policy Makers Too*, 22 GA. ST. U. L. REV. 251, 251 (2005) (This paper "presents a synthetic overview of the numerous reforms, which at the most general level aim to fix the audit process, increase board independence, and improve disclosure and transparency."); John C. Coates IV, *The Goals and Promise of the Sarbanes-Oxley Act*, 21 J. ECON. PERSP. 91, 91 (2007) ("At its core, the Sarbanes-Oxley legislation was designed to fix auditing of U.S. public companies, which is consistent with the official name of the law: the Public Company Accounting Reform and Investor Protection Act of 2002 . . . . Sarbanes-Oxley created a unique, quasi-public institution to oversee and regulate auditing, the Public Company Accounting Oversight Board (PCAOB)."); Bernhard Kuschnik, *The Sarbanes-Oxley Act: "Big Brother Is Watching You" or Adequate Measures of Corporate Governance Regulation?*, 5 RUTGERS BUS. L.J. 64, 69–89 (2008) (reviewing SOX corporate governance provisions); J. Robert Brown Jr., *Criticizing the Critics: Sarbanes-Oxley and Quack Corporate Governance*, 90 MARQ. L. REV. 309, 309 (2006) ("SOX, named after its putative sponsors, sought to improve corporate disclosure by increasing the gatekeeper function of outside accounting firms and heightening the supervisory role of top officers and the board."); Paula J. Dalley, *Public Company Corporate Governance Under the Sarbanes-Oxley Act of 2002*, 28 OKLA. CITY U. L. REV. 185 (2003) (explaining the SOA's "mechanism for affecting corporate governance is primarily through mandating disclosure of governance practices and policies."); Lawrence E. Mitchell, *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, 48 VILL. L. REV. 1189, 1189–90 (2003) ("The Act makes three specific changes in the way we think about corporate governance: first, it brings into the realm of internal governance the gatekeepers that once stood outside the box, including auditors, analysts and lawyers. Second, it significantly enhances the legal status of, and centrality of corporate governance to, the chief executive officer and the audit committee, two constituents that have received very little recognition in the law and its literature. Third, both in doing this and in other respects (like the prohibition of loans to officers and certain other conflict of interest transactions), it federalizes an important dimension of the internal laws of corporate governance, creating a new (albeit arguably narrow) duty of care for the CEO and audit committee and reintroducing serious prohibitions on conflict of interest transactions that have eroded to nothingness in the hands of the Delaware judiciary and legislature.").

41. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 §§ 951–956, 124 Stat. 1376, 1899–1903 (2010).

Governance adjustments via stable rules in reaction to a systemic shock can result in suboptimal governance outcomes, market volatility, and economic loss. While a comprehensive evaluation is beyond the scope of this comment, some initial observations include the following: corporate governance reforms are often enacted as a response to a particular lack of oversight that resulted in a crisis. Governance adjustments are often enacted merely to address the then-perceived problem in the given market environment and in the then-existing economic conditions, without regard to possible future developments.[42] Worse yet, following the enactment, governance adjustments are often later repealed or diluted.[43] Anticipation of future developments and preemption of possible future crises do not play a significant role in the top-down approach to regulation.[44] However, the economic conditions and the corresponding requirements for optimal and stable rules are constantly evolving. Financial innovation, the globalization of markets, transnationalism, ethical challenges, and the bounded rationality of humans, among many other factors, are likely to create and perhaps increase future challenges that may require additional and perhaps more extensive governance adjustments.

The shortcomings of inflexible rules, especially the perpetual need for rule enactment and revision, could justify a supplemental, dynamic approach to regulating the financial industry.[45] Dynamic Regulation would not replace the established regulatory framework but could enhance and extend it.[46] While a detailed evaluation and justification for this regulatory approach is beyond the scope of this comment,[47] Dynamic Regulation as a regulatory approach may be summarized with several core elements: (1) Dynamic Regulation suggests an adapting governance mechanism that is constantly evolving and adjusting to the given market environment, financial innovation, and the given regulatory environment; (2) Dynamic Regu-

42. Lyman Johnson, *Beyond the Inevitable and Inadequate Regulation of Bankers: A Comment on Painter*, 8 U. St. Thomas L.J. 29, 30 (2010) ("The pattern goes like this: a perceived problem, originating in the private business realm, is thought to have sufficiently dire social consequences that some form of new regulation is proposed. A predictable debate ensues as to whether regulation is needed at all and, if so, as to whether the particular proposal is the right kind of regulation.").

43. John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 Cornell L. Rev. 1019, 1076–78 (2012).

44. *See* Ronald J. Gilson & Reinier Kraakman, *Market Efficiency After the Financial Crisis: It's Still a Matter of Information Costs* 48 (2012) (unpublished manuscript), *available at* http://www.law.umn.edu/uploads/12/d7/12d77c902205da28b32a345e4497654e/CLEAN-EMCH-4-1-12-2-2-Kraakman.pdf (arguing that legal rules are not intended to anticipate earthquakes in the financial industry); Ronald J. Gilson & Reinier Kraakman, *Market Efficiency After the Fall: Where Do We Stand Following the Financial Crisis*, *in* Research Handbook on the Economics of Corporate Law 456 (Claire A. Hill & Brett H. McDonnell, eds., 2012).

45. Wulf A. Kaal, *Dynamic Regulation of the Financial Services Industry*, 49 Wake Forest L. Rev. (forthcoming 2013) [hereinafter Kaal, *Dynamic*].

46. *Id.*

47. *See id.*

lation may help avoid the regulatory sine curve[48] and its negative and costly consequences; (3) Dynamic Regulation could provide a self-enforcement mechanism, independent from the existing regulatory structure and agency enforcement; and (4) Dynamic Regulation may enable regulators to anticipate future changes and challenges and adapt stable rules accordingly.[49]

A dynamic approach is worth exploring in the context of Professor Fairfax's critique of the duty of oversight and the role of directors in corporate governance. As Professor Fairfax points out, directors are outsiders working part-time, and the increasing complexities of modern corporations could make it unreasonable to expect directors to comply with increased oversight responsibilities.[50] Using court decisions and stable rules to make "the oversight role more robust to ensure that directors pay greater attention to their monitoring responsibilities"[51] could be insufficient. By contrast, contractual and quasi law forms of dynamic governance could help improve the duty of oversight. Corporate Integrity Agreements (CIAs), for instance, could be one form of dynamic governance that may be able to temporarily increase fiduciary duties as a form of quasi law.[52] CIAs may be seen as an adapting governance mechanism that is constantly evolving and adjusting to the specific ethical challenges of the respective corporations.[53] A more in-depth evaluation of dynamic approaches and their potential for corporate governance improvements is beyond the scope of this comment. More research may be needed to understand how dynamic forms of governance could help improve directors' adherence to fiduciary duties and the quality of corporate governance.

48. Coffee, *supra* note 43, at 1029–30.
49. Kaal, *Dynamic*, *supra* note 45.
50. Fairfax, *supra* note 1, at 418.
51. *Id.* at 3.
52. Wulf A. Kaal & Elizabeth R. Malay, *Corporate Integrity Agreements as Quasi Fiduciary Duties* (arguing that corporate integrity agreements could increase fiduciary duties as quasi law) (unpublished manuscript) (on file with author).
53. *Id.*