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THE IMPACT OBSERVER

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Corporate boards face intensifying expectations around sustainability, long-term risk, and mission stewardship, yet their design remains tethered to a shareholder-centric model optimized for short-term financial performance. Even in hybrid or mission-driven firms, no internal governance role is expressly charged with monitoring whether stated public-benefit or stakeholder commitments endure once growth pressures escalate. This misalignment has generated a persistent institutional gap: fiduciary directors hold legal authority, but no actor is structurally positioned to track mission fidelity, surface long-horizon risks, or introduce principled dissent.

This Article introduces the impact observer: a contractually appointed participant whose fiduciary status remains fact dependent rather than automatic, who sits inside the boardroom to identify mission drift, elevate long-term and ethical risks, and broaden the cognitive frame of deliberation. Without voting power or statutory duties, observers offer insight unburdened by liability, enabling candid questioning and early detection of reputational, sustainability, and strategic risks. Their "liability-light" posture—carefully bounded by shadow-director doctrine, antitrust constraints, and privilege protocols—preserves influence without triggering control.

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Drawing on new empirical data from surveys administered at the ABA Business Law Section, the Grunin Center at New York University School of Law, and the National Venture Capital Association CFO Working Group, we show that observers already play meaningful roles in high-growth and mission-aligned firms, though their governance function remains undertheorized. Practitioners report that observers enhance informational diversity and risk awareness yet worry about symbolic deployment or unclear accountability. This Article addresses these concerns through a comparative analysis of Delaware, UK, Israeli, Australian, and EU frameworks.

Building on these findings, we advance a detailed governance blueprint, the Impact Governance Stack, which integrates contractual mandate clarity, alignment with investor-stewardship norms, outcome-linked reporting through International Sustainability Standards Board (ISSB), Sustainability Accounting Standards Board (SASB), and Corporate Sustainability Reporting Directive (CSRD) systems, and professional training to institutionalize structured, mission-centered dissent. By converting informal presence into a principled governance function, the impact observer offers boards a scalable mechanism for safeguarding purpose in practice rather than merely in disclosure.

Introduction

Corporate governance is being renegotiated in real time. As BlackRock, State Street, and other asset managers signal stronger environmental, social, and governance (ESG) expectations, and the EU sustainability directives—particularly the Corporate Sustainability Due Diligence Directive (CS3D)—impose mandatory due diligence obligations on firms operating in the European market, corporate governance frameworks are increasingly shaped by transnational regulatory pressures.[1] Even so, one dimension remains largely static: who speaks in the

1. Luca Enriques, Matteo Gatti & Roy Shapira, *How the EU Sustainability Due Diligence Directive Could Reshape Corporate America*, 78 Stan. L. Rev. 241 (2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5083571 [https://review.law.stanford.edu/wp-content/uploads/sites/3/2026/02/Enriques-et-al.-78-Stan.-L.-Rev.-241.pdf] (explaining how the EU's sustainability directives, particularly the CS3D and CSRD, that also extend to non-EU firms, are poised to reshape corporate governance and disclosure practices globally, including by compelling large American companies to adopt tailored due diligence and ESG reporting frameworks to remain compliant in the EU market).

boardroom.[2] Most boards still concentrate decision-making in fiduciaries structurally tethered to shareholder primacy, even as hybrid legal forms,[3] together with shifting stakeholder expectations, push in a different direction.[4] The gap between quarterly performance and long-horizon purpose has never been wider. In this widening gap, the need for governance actors who can identify long-horizon risks—including resilience, enterprise value, capital allocation, and reputational exposure—becomes urgent, not as lofty rhetoric, but as a practical safeguard within board deliberations.

Consider, for example, a mission-driven climate tech company with B Corp certification, a private designation for firms that commit to meeting verified social and environmental performance standards. Investors are demanding quarterly growth. The public expects decarbonization. Yet the company's board has no formal obligation to weigh long-term carbon lock-in over short-term returns. Who, in the room, flags the risk before mission gives way to margin? This Article argues that the most practical route to reconcile financial performance with long-term enterprise resilience is not to redefine fiduciary duty, but

2. As the first wave of CSRD disclosures shows, companies across Europe are increasingly appointing sustainability committees and integrating ESG metrics into core strategy. Yet the structural absence of independent, non-fiduciary boardroom voices persists. *See, e.g.*, Simon Toms et al., ESG in 2025: A Midyear Review 2 (Skadden, Arps, Slate, Meagher & Flom LLP, June 25, 2025), https://www.skadden.com/-/media/files/publications/2025/06/esg_in_2025_a_midyear_review.pdf?rev=084d748c30ef41b19364c7182fa950c6 [https://perma.cc/9DHS-DECA] (noting that while ESG strategy is increasingly embedded at the board level, there could be more integration into business strategy, mission alignment or long-term stakeholder concerns). *See generally* John C. Coffee, Jr., Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. REV. 301 (2004) (explaining how corporate gatekeepers often fail to constrain managerial opportunism, underscoring that need).

3. Legislatures from Delaware to Singapore are experimenting with hybrid legal forms that enshrine public benefit in charter language. *See* DEL. CODE ANN. tit. 8, § 362 (2025) (defining Delaware's public-benefit-corporation form); *id.* § 365 (2025) (obliging directors of a public benefit corporation to balance shareholder and stakeholder interests).

4. Inside most boardrooms the basic architecture remains unchanged: voting power is concentrated in a handful of directors who must satisfy traditional Caremark oversight standards, and information still travels through channels optimized for quarterly earnings rather than decadal externalities. *See, e.g.*, Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2573–86 (2021) (explaining how corporate governance structures and intermediaries reinforce standardized, market-oriented metrics and exhibit institutional inertia).

to redesign who gets to speak and listen in the boardroom. We offer a concrete mechanism: the impact observer. Appointed purely by contract, an impact observer receives the same materials as directors, attends meetings, and is tasked with sounding the alarm on mission drift, climate risk, or other long-horizon concerns. Crucially, the observer casts no vote and arguably does not automatically assume statutory fiduciary duties by virtue of attendance alone. The observer contributes not by making decisions, but by serving as a sentinel—shaping what becomes visible, discussable, or contestable in the boardroom. Throughout this Article, we use "observer" as the formal term; occasional references to conscience-keeping or contrarian voice are intended as illustrations, not alternative categories. The concept has roots in the "board-visitation" clauses venture capitalists began inserting into term sheets in the 1980s.[5] But it has received much more attention in recent years, as it is also associated with the migration of observers into public companies, benefit corporations, and even national-security mitigation agreements.[6]

To determine whether market actors actually want such a role, we generated three original data sets. The first is a mini-survey of American Bar Association (ABA) deal lawyers on shadow-director risk. The second is a bar-coded mini-survey administered at the Grunin Center for Law & Social Entrepreneurship at New York University School of Law in June 2025, which captured about a dozen legal and investment professionals. Most of the survey takers believed that an impact observer would detect mission-alignment problems sooner than the sitting directors, while a few feared the role would be cosmetic

5. *See* John Mark Zeberkiewicz, *Considerations in Drafting Board Observer Arrangements*, A.B.A.: Bus. L. Today (Apr. 22, 2014), https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-april/considerations-in-drafting-board-observer-arrangements/ [https://perma.cc/FU3M-MVWG] (explaining that board observers may attend meetings, receive information, and provide input but typically lack voting authority); Yokum, *What Are Board Observer Rights?*, Startup Company Law. (Dec. 1, 2007), https://www.startupcompanylawyer.com/2007/12/01/what-are-board-observer-rights/ [https://perma.cc/N9EC-UVEG] (noting that observer rights are typically contractual, often set forth in side letters, and do not include voting authority).

6. *Desktop Metal, Inc. v. Nano Dimension Ltd.*, Consol. C.A. No. 2024-1303-KSJM, at 2-3, 38 (Del. Ch. Mar. 24, 2025) (McCormick, C.) (post-trial memorandum opinion) (noting that stockholder-appointed board observers spoke during merger-related board deliberations and that a draft CFIUS national security agreement contemplated the inclusion of a non-voting board observer), https://courts.delaware.gov/Opinions/Download.aspx?id=377230.

"green window-dressing."[7] The third is a module fielded within the National Venture Capital Association's (NVCA) CFO Working-Group Survey (Q4 2023) that found that 82% of U.S. venture funds already deploy observers, and every fund with assets above $500 million cites "information depth without fiduciary drag" as a primary advantage of observers.[8] These surveys, however, are exploratory and based on small, self-selected samples, so they should be read as directional rather than statistically representative.

USAGE OF BOARD OBSERVERS AMOBG 46 VCS AND AVCS SURVEYED

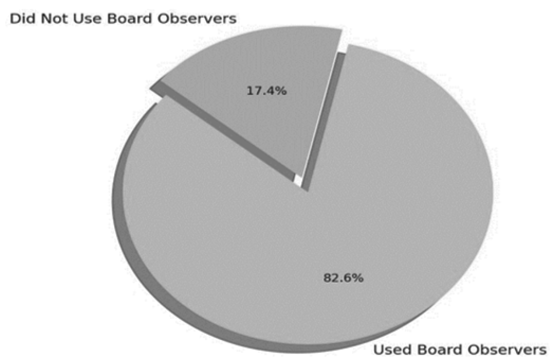

FIGURE 1—U.S. VENTURE FUNDS ALREADY DEPLOYING OBSERVERS

Of course, access without accountability can morph into control. Most common-law jurisdictions police that boundary through the shadow-director doctrine, reclassifying any outsider whose instructions directors "are accustomed to act" upon.[9] Delaware similarly imposes fiduciary duties where a stockholder exercises actual control over the corporation or its board.[10] Antitrust law adds a second tripwire: even a non-voting

7. Author data on file (explaining respondents' ex-ante expectations, not retrospective performance).

8. Nizan Geslevich Packin & Anat Alon-Beck, *Board Observers*, 2025 U. ILL. L. REV. 1507 (2025) (reporting that approximately 82% of venture capital entities employ board observers and that all surveyed entities with over $500 million in assets under management adopt this governance mechanism).

9. Companies Act 2006, c. 46, § 251(1) (U.K.), https://www.legislation.gov.uk/ukpga/2006/46/section/251 [https://perma.cc/6M8Q-T29J] (explaining statutory definition of shadow director).

10. *In re Puda Coal, Inc. S'holders Litig.*, No. 6476-CS, at 15-16 (Del. Ch. Feb 6, 2013), https://www.delawarelitigation.com/files/2013/02/puda-case.

seat can violate Clayton Act Section 8 if it creates an interlocking directorate that facilitates competitively sensitive information flow.[11] Our analysis shows that tailored mandate clauses, information firewalls, and privilege protocols can keep observers on the safe side of both lines.

The Article makes three contributions. First, it supplies a comparative doctrinal mapping of observer liability across Delaware and jurisdictions, including the United Kingdom, Israel, and Australia, and demonstrates that carefully drafted contracts and purpose-conscious structural safeguards can avoid shadow-director classification across diverse legal systems. This analysis clarifies the boundary between influence and control in corporate governance law and offers firms and regulators a viable framework for enabling participation without triggering fiduciary exposure. Second, it enriches the empirical literature on board composition and ESG governance with novel survey evidence quantifying investor appetite for observers—particularly in hybrid entities, mission-driven companies, resilience, and enterprise value-focused ventures where traditional governance tools may fall short. Third, it advances a four-layer Impact Governance Stack comprising statutory embedding, investor-stewardship alignment, International Sustainability Standards Board (ISSB) and Sustainability Accounting Standards Board (SASB)-style disclosure, and professional training. This stack operationalizes the observer as a formally recognized, nonvoting, and legally insulated governance actor. Unlike specialist directors, who trigger heightened fiduciary expectations, the observer's utility lies in

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pdf (Strine, C.) (denying dismissal where directors allegedly abdicated oversight and "quit," leaving the corporation under the "sole dominion" of a suspected wrongdoer, illustrating that fiduciary liability may arise when directors permit unchecked control over corporate affairs; *see id.* (explaining that directors may face fiduciary liability when they abdicate oversight and allow insiders to exercise unchecked control over the corporation); *see also Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994) (explaining that fiduciary duties attach where a stockholder, even if a minority, exercises actual control over the corporation); *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014) (explaining that a minority stockholder is deemed a controller only if it actually controls the board's decisions regarding the challenged transaction).

11. Statement of Interest of the U.S. and Federal Trade Commission at 12, *Musk v. Altman*, No. 4:24-cv-04722-YGR (N.D. Cal. Jan. 10, 2025), https://www.justice.gov/atr/media/1383966/dl?inline [https://perma.cc/2QYS-33BG] (explaining that board observers may, in certain circumstances, be treated as directors for purposes of Section 8 and cannot be used to evade interlock prohibitions).

their independence and insulation from the legal and reputational constraints that shape director consensus.[12]

Positioned to offer independent insight without the chilling effects of voting responsibility, the observer helps address a classic governance dilemma in democratic and corporate theory, principally how to enable diverse risk assessments and reconcile investor expectations and priorities, including around resilience, risk, and accountability, with long-term enterprise goals.[13] As John Rawls and others have observed, demands for broader representation inevitably raise standpoint diversity—that is, the fact that in modern institutions, actors may assess risks, values, and harms differently depending on their institutional roles and social positions.[14] The observer model responds to this institutional challenge by structurally embedding dissent, institutionalizing independent risk perspectives at the

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12. Sheila Jasanoff, *The Discontents of Truth & Trust in 21st Century America*, DAEDALUS, Fall 2022, at 25, 34 https://www.amacad.org/sites/default/files/daedalus/downloads/Fa22_Daedalus_Institutions-Experts-Loss-of-Trust-Aug_6_24.pdf [https://perma.cc/AQ2H-722K] ("Demands for representation raise a corollary problem that Rawls and other political philosophers have wrestled with: what to do about the dilemma of epistemic pluralism, or the fact that in modern societies, people may see things differently based on their particular interests and standpoints.").

13. By "diverse risk assessments" this Article refers to the intentional inclusion of cognitively diverse perspectives in governance decision-making, drawing from scholarship in behavioral economics and deliberative democracy. *See* HELENE LANDEMORE, DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY (2013) (Landemore explains that the very elements that make collective decision-making superior also build a strong case for democracy. Landemore's theory is fundamentally pluralist epistemologically as in her view, the mechanisms and procedures of democratic governance function as a kind of collective intelligence, one that draws on the knowledge of the many, balances competing perspectives, and reduces the influence of individual error—making it more likely that the outcomes reached by a broad group will be sounder than those produced by a small, concentrated few.); Stephen Turner, *Political Epistemology, Experts and the Aggregation of Knowledge*, 1 SPONTANEOUS GENERATIONS 36 (2007), https://spontaneousgenerations.library.utoronto.ca/index.php/SpontaneousGenerations/article/view/2970 [https://doi.org/10.4245/sponge.v1i1.2970] (listing mechanisms of knowledge aggregation).

14. Perihan Elif Ekmekci & Berna Arda, *Enhancing John Rawls's Theory of Justice to Cover Health and Social Determinants of Health*, 21 ACTA BIOETHICA 227, 229–31 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4915381/ [http://dx.doi.org/10.4067/S1726-569X2015000200009] (explaining that Rawlsian justice must account for inequalities arising from social and institutional conditions that shape individuals' positions); *see also* THOMAS NAGEL, THE VIEW FROM NOWHERE (1986) (developing the distinction between objective and subjective perspectives in evaluating value and experience).

level of governance input and offering a channel for dissenting, long-term risk and performance perspectives to inform board deliberation without fracturing strategic coherence or exposing firms to legal ambiguity.

The discussion unfolds in six parts. Part I explains why legacy fiduciary doctrine leaves a governance gap for hybrid and mission-driven firms and surveys the statutory landscape of benefit-and-other hybrid corporations. Part II examines board architecture, contrasting the impact of observers with that of specialist directors and mapping the liability frontier. Part III analyzes investor-stewardship regimes and capital-market enforcement that condition observer effectiveness. Part IV turns to metrics, assurance, and disclosure frameworks needed to make observer insights auditable. Part V presents comparative case studies and our original empirical evidence from the ABA, Grunin Center, and NVCA surveys. Part VI advances a forward-looking policy agenda and reform package. A brief Conclusion follows, and the Appendices reproduce the survey instruments and empirical visuals.

By converting silent information asymmetries into structured, mission-focused oversight—without rewriting fiduciary duty—the impact observer furnishes boards with the cognitive diversity and long-term perspective that twenty-first-century stakeholder capitalism demands.

I.
Fiduciary Duty & Hybrid Forms—Why Traditional Doctrine Leaves a Gap

To understand the governance significance of observers, this Part examines how traditional fiduciary frameworks, as developed in Delaware corporate law, constrain governance innovation in hybrid and mission-driven firms.[15] Despite

15. The proliferation of technology firms adopting public-benefit-corporation charters reflects a related structural shift toward mission-driven governance. *See, e.g.*, *OpenAI Charter*, OpenAI, https://openai.com/charter [https://perma.cc/88LD-T2RH] (last visited Feb. 8, 2026) (stating that OpenAI's "primary fiduciary duty is to humanity"); *Our Mission*, xAI, https://x.ai/company [https://perma.cc/MCR9-Q2CZ] (last visited Feb. 8, 2026) (describing a mission to advance collective understanding through AI development); Cal. Corp. Code § 14620 (Deering 2025) (defining stakeholder-oriented duties of benefit-corporation directors under California law); Del. Code Ann. tit. 8, § 365 (requiring directors of public benefit corporations to balance stockholder interests with stakeholder and public benefit

proliferating legal forms that gesture toward stakeholder values, doctrinal gaps persist where fiduciary clarity fails to accommodate non-shareholder interests.

A. *Beyond Profit and Philanthropy: Fiduciary Duties in the Age of Impact Capital*

Impact investing occupies an increasingly prominent space in the global capital markets, situated between the traditional pursuit of profit maximization and the philanthropic commitment to non-reciprocal giving. Unlike conventional investors, who focus exclusively on financial returns, or philanthropists, who prioritize social and environmental objectives without seeking repayment, impact investors intentionally seek to generate both measurable financial returns and demonstrable social or environmental benefits.[16]

Several features distinguish impact investors as a category. First, intentionality is paramount: capital is deployed with a clearly articulated aim to achieve socially desirable outcomes, such as reducing greenhouse gas (GHG) emissions, improving access to healthcare, or promoting financial inclusion.[17] Second, measurability is critical: investors track, assess, and report the non-financial impact of their investments through evolving standards such as IRIS+, GIIRS, or related ESG frameworks.[18] Third, expected returns set impact investing apart from pure philanthropy: certain approaches tolerate sub-market outcomes, while others seek market-level performance, narrowing the divide between conventional finance and mission-oriented capital. In addition, the range of asset classes highlights its scope: impact strategies now span venture and private equity, fixed-income products, real estate, and, with growing frequency, public equities.

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considerations); *see also* MORRISON & FOERSTER LLP, LEGAL REFORM AS A CATALYST FOR SOCIAL ENTERPRISE: AN INTERNATIONAL SOCIAL ENTERPRISE LAW & POLICY REPORT (2022), https://www.lexmundiprobono.org/wp-content/uploads/2022/01/Lex_Mundi_ProBono_A4_Report_INTERACTIVE_2022.pdf [https://perma.cc/YYB8-PAJ9] (surveying global adoption of hybrid governance structures).

16. *What You Need to Know About Impact Investing*, GLOBAL IMPACT INVESTING NETWORK (Jan. 24, 2025), https://thegiin.org/publication/post/about-impact-investing/ [https://perma.cc/77CB-YJWN].

17. *See* ANTONY BUGG-LEVINE & JED EMERSON, IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE 9–14 (2011).

18. *Id.*

For corporate law, the central puzzle of impact investing is its fit with fiduciary duty. Pension funds, endowments, and foundations are legally bound to act with loyalty and prudence toward their beneficiaries.[19] Critics warn that diverting assets toward social or environmental aims places ideology ahead of financial obligation.[20] Supporters and advocates counter that ESG integration strengthens fiduciary performance by managing risk, preserving long-term value, and absorbing external costs.[21] Nowhere is this tension sharper than in the United States, where fiduciary rules are split between state corporate law, especially Delaware, and federal regimes such as ERISA, and where the validity of ESG-driven strategies is under active political and judicial attack.[22] The question, then, is whether fiduciaries can lawfully pursue "dual returns", both economic and social, without violating their duty to maximize beneficiary value.[23] The answer remains unsettled, touching not only on the meaning of fiduciary duty but also on the contested role of the corporation in contemporary society.[24]

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19. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 77–78 (A.L.I. 2007) (articulating duties of prudence and loyalty); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(a)(1).

20. *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 386–90 (2020) (explaining that ESG investing can indeed violate fiduciary duty if it is pursued for collateral benefits).

21. *See, e.g.,* Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future,* at 3–6 (Oct. 3, 2019), https://ssrn.com/abstract=3461924 (explaining that long-term investors internalize environmental and social costs and benefit from sustainable corporate practices); Dorothy S. Lund, *Corporate Finance for Social Good,* 121 Colum. L. Rev. 1617, 1630–35 (2021) (explaining that governance structures incorporating stakeholder considerations can enhance long-term firm value and reduce risk).

22. *See* Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock*, 76 BUS. LAW. 397, 402–10 (2021) (discussing Delaware fiduciary law's primacy in corporate governance).

23. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest,* 80 N.Y.U. L. REV. 733, 738–39 (2005) (arguing corporate law permits managers to consider social objectives even at the expense of short-term profit).

24. *See also McRitchie v. Zuckerberg,* 315 A.3d 518 (Del. Ch. 2024) (explaining that Delaware courts continue to interpret fiduciary duties narrowly, even for mission-driven entities); ANDY GUAN ET AL., GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, THE STATE OF SOCIAL ENTERPRISE AND THE LAW, 2024–2025, (reporting continued stagnation in U.S. hybrid-form legislation and

Feature	**Traditional Investors**	**Impact Investors**	**Philanthropists/ Donors**
Primary Goal	Maximize financial return	Generate financial return and positive social/environmental impact	Maximize social/environmental impact
Intentionality	Profit-driven	Dual goals: profit & measurable impact	Altruistic/social mission only
Financial Return	Market-rate expected	Market-rate / below-market accepted, depending on strategy	None expected
Impact Measurement	Rarely measured or incidental	Central: tracked and reported using metrics/standards	Not required (success judged by mission outcomes)
Risk Tolerance	Determined by financial risk/return profile	Willing to accept different risk-return tradeoffs for impact	Irrelevant (no financial return expected)
Fiduciary Duties	Narrowly interpreted as maximizing shareholder/ investor value	Broader interpretation: integrate ESG/impact factors consistent with long-term value and beneficiary preferences	Not bound by fiduciary duty (funds given away, not invested)
Examples	Hedge funds, mutual funds, private equity	Renewable energy funds, microfinance, social enterprise VC	Charities, foundations, NGO grants

FIGURE 2—INVESTOR TYPES: FINANCIAL RETURN, IMPACT, AND GOVERNANCE

reinforcing that fiduciary doctrine, rather than statutory innovation, drives governance evolution), https://www.law.nyu.edu/sites/default/files/2025-11/The%20State%20of%20Social%20Enterprise%20and%20the%20Law%20-%202024-25.pdf [https://perma.cc/4689-HT59].

B. *Balancing on a Single Fiduciary Support*

Modern hybrid entities, such as public-benefit corporations in Delaware, or "benefit companies" under Europe's new CSRD, ask directors to square a circle: maximize long-run enterprise value and deliver verifiable social or environmental outcomes.[25] Delaware codifies the expectation most explicitly. Delaware General Corporation Law (DGCL) Section 365 instructs benefit-corporation directors to "balance" three variables: (i) stockholder pecuniary interests, (ii) the specific public benefit stated in the charter, and (iii) the interests of stakeholders materially affected by the company's conduct.[26] Parallel language appears in at least thirty-seven U.S. jurisdictions and is echoed (though not identically) in Article 15 of the 2024 EU CSRD, which obliges large issuers to disclose how board decisions align with "sustainability matters" for the short, medium, and long term.[27] By contrast, U.S. jurisdictions

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25. *See, e.g.*, Enriques, Gatti & Shapira, *supra* note 1 (discussing how the CSDDD imposes binding due diligence obligations relating to human rights and environmental harms, thereby integrating sustainability considerations into corporate risk management and governance processes); Hadar Jabotinsky & Roee Sarel, A*ttitudes Toward the Corporate Sustainability Due Diligence Directive: Survey Evidence*, 4–5 (June 19, 2025), https://ssrn.com/abstract=5312055 [http://dx.doi.org/10.2139/ssrn.5312055] (presenting survey evidence on public support for enforcement mechanisms and corporate responsibility under the CSDDD); DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS (2017) (arguing that legal frameworks can align investor incentives with public-benefit objectives in hybrid enterprises); Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 247–61 (2021) (examining tensions in corporate law regarding corporate rights, accountability, and broader social responsibility).

26. Delaware codifies this expectation most explicitly. Section 365 of the Delaware General Corporation Law instructs directors of public benefit corporations to balance stockholder pecuniary interests, the specific public benefit identified in the charter, and the interests of stakeholders materially affected by the corporation's conduct. *See* DEL. CODE ANN. tit. 8, § 365 (2025) (mandating that directors balance stockholder pecuniary interests, stakeholder interests, and the corporation's specified public benefit); *see also Amoral Drift in AI Corporate Governance*, 138 HARV. L. REV. 1633 (2025) (analyzing how AI-focused firms, including OpenAI, have shifted from mission-oriented governance toward profit-maximization, highlighting tensions in sustaining dual-purpose mandates over time).

27. Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive 2019/1937 and Regulation 2023/2859, 2024 O.J. (L 1760) (EU); *Cf.* DEL. CODE ANN. tit. 8, § 365 (2025) (requiring directors of Delaware benefit corporations to balance stockholder pecuniary interests, stated public

continue to rely on voluntary benefit-corporation statutes and fiduciary-balancing provisions, which impose no comparable disclosure mandate.[28] This Article does not, however, focus on benefit corporations; that analysis is reserved for a separate, forthcoming paper. Here, our emphasis remains on nonprofit structures as the primary site for examining observer roles.[29] While nonprofits illustrate the challenge in its starkest form, the primary relevance of the observer model lies in for-profit and hybrid entities, where investor oversight intersects with mission commitments.

In practice, classic fiduciary doctrine equips boards with just two levers: the duty of loyalty (avoid self-dealing) and the duty of care (make an informed decision).[30] Both levers evolved to maximize shareholder wealth more than public goods. That tension produces what commentators have referred to as a "governance misalignment problem."[31] To address these problems,

benefits, and stakeholder interests but imposing no parallel disclosure duty); H.B. 4083, 193d Gen. Ct., Reg. Sess. (Mass. 2023–2024); H.B. 1212, 2024 Gen. Assemb., 446th Sess. (Md. 2024) (proposing hybrid-form legislation emphasizing fiduciary balance rather than transparency).

28. *Cf.* DEL. CODE ANN. tit. 8, § 365 (2025) (requiring directors of benefit corporations to balance shareholder pecuniary interests, stated public benefits, and stakeholder interests, without mandating public disclosure); H.B. 4083, 2024 Gen. Assemb., Reg. Sess. (Mass. 2024); H.B. 1212, 2024 Gen. Assemb., Reg. Sess. (Md. 2024) (proposing governance-related reforms without establishing mandatory public disclosure comparable to EU-style regimes); S.B. 2782, 2024 Gen. Assemb., Reg. Sess. (R.I. 2024) (repealing the low-profit limited-liability-company statute).

29. *See* Nizan Geslevich Packin & Anat Alon-Beck, Artificial Loyalty (unpublished manuscript) (on file with author).

30. *See* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 106–130 (2008) (discussing how classic fiduciary duties of care and loyalty function as core governance tools oriented toward shareholder wealth maximization); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance,* 97 NW. U. L. REV. 547 (2003) (explaining the director primacy model, the board's institutional authority over shareholders and managers, its relationship to the nexus of contracts theory, and the efficiency rationale for centralized corporate decision-making).

31. David J. Berger, *The "Corporate Governance Misalignment" Problem,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 23, 2017), https://corpgov.law.harvard.edu/2017/03/23/the-corporate-governance-misalignment-problem/ [https://perma.cc/6M65-9R6N] (explaining that contemporary corporate governance rules and incentive structures remain oriented toward shareholder primacy, creating a structural misalignment that impedes boards from meaningfully integrating employee, community, and environmental interests absent mechanisms that reframe such considerations as advancing shareholder value).

a variety of solutions have been proposed to align shareholder incentives with social aim.[32] Categories of proposed solutions include external solutions, government interventions, and public ownership.[33] Moreover, "absent a major paradigm shift, advocacy pushing corporations to consider the interests of employees, communities, and the environment will likely fail if such effort is not framed as advancing shareholder interests."[34] Primacy has been given to shareholders' interests,[35] not to the environment, workers, or communities of operation.[36]

C. *The Enforcement Gap*

Most statutes temper the balancing mandate with liability shields. Delaware insulates directors from monetary damages absent bad faith (Section 365(c)).[37] Colorado and Oregon require only that the board consider public benefit, not that it actually succeed.[38] Scholars call this "mission-optional"

32. *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991) (arguing that American corporate governance structures are deeply shaped by political choices, not just efficiency).

33. *See* Aneil Kovvali & Joshua C. Macey, *Private Profits and Public Business*, 103 TEX. L. REV. 711 (2025) (arguing that breakdowns in shareholder primacy justify alternative governance mechanisms, including external regulation, direct governance interventions, and public or hybrid ownership models).

34. Lund & Pollman, *supra* note 4 (describing "a complex governance system in the United States composed of law, institutions, and culture that orients corporate decisionmaking toward shareholders").

35. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993), https://www.aei.org/research-products/book/the-genius-of-american-corporate-law/ (generally discussing American corporate law, incentives, and its adaptive, enabling structure).

36. *See* Leo E. Strine Jr. & Michael W. Klain, *Stakeholder Capitalism's Greatest Challenge: Reshaping a Public Consensus to Govern a Global Economy*, 47 SEATTLE U. L. REV. 329, 336 (2024).

37. *See* Kevin C. Logue, Kevin P. Broughel & Zachary Melvin, *Delaware Court of Chancery Dismisses Duty of Oversight and Care Claims Against Directors*, PAUL HASTINGS CLIENT ALERT (Mar. 13, 2023), https://www.paulhastings.com/insights/client-alerts/delaware-court-of-chancery-dismisses-duty-of-oversight-and-care-claims [https://perma.cc/3UGY-R3YG] (analyzing a Chancery decision that enforced § 365(c)'s threshold by dismissing oversight and care claims for lack of bad-faith allegation).

38. *Business as a force for good? B-Corps and Benefit Corporations*, BIZSTARTS, https://bizstarts.com/b-corps-and-benefit-corporations [https://perma.cc/SU2D-LBB9] (last visited Aug. 11, 2025) (explaining that benefit corporations, unlike traditional corporations, must consider public benefit alongside profitability, but are not required to achieve a specific outcome); *Public*

governance.[39] Some jurisdictions add a benefit-enforcement proceeding (BEP) that grants shareholders standing to sue for mission drift,[40] yet such actions appear to be rarely brought in practice, and the mechanism remains largely untested in courts. In Europe, CSRD emphasizes disclosure but leaves substantive enforcement to national regulators still drafting the details.[41]

What emerges is an enforcement gap: corporate law expands the range of recognized social objectives without developing equally robust mechanisms to enforce them, leaving boards to default to measurable financial metrics while social commitments remain largely aspirational.[42]

D. *Why Impact Observers Fill the Gap*

A contract-based impact observer can narrow that gap from inside the boardroom without rewriting fiduciary duty.

benefit corporations, COLO. SEC'Y OF STATE: BUS. FAQS, https://www.sos.state.co.us/pubs/business/FAQs/pbc.html [https://perma.cc/2FNP-29UZ] (last visited Aug. 11, 2025) (stating that under Colo. Rev. Stat. § 7-101-503(2), directors of a public benefit corporation must consider the public benefit in decision-making, but success in achieving it is not mandated); *Benefit Companies FAQ*, OR. SEC'Y OF STATE, https://sos.oregon.gov/business/Pages/benefit-company-faq.aspx [https://perma.cc/A7HZ-PJE9] (last visited Aug. 11, 2025) (explaining that Oregon law requires benefit companies to create a general public benefit but measures compliance through consideration and reporting, not by compelling success in delivering the benefit); *A Guide to Nonprofit Board Service in Oregon*, OR. DEP'T OF JUST., (2025), https://www.doj.state.or.us/wp-content/uploads/2022/06/guide-nonprofit-board-service.pdf [https://perma.cc/MF7C-4ALL] (noting that Oregon nonprofit directors must act in furtherance of a charitable/public purpose and safeguard assets for that mission, illustrating the focus on process and stewardship rather than guaranteed substantive outcomes).

39. Dana Brakman Reiser & Steven Dean, *For-Profit Philanthropy*, 101 B.U. L. REV. 1891, 1907–12 (2021) (explaining enforcement deficit in hybrid regimes).

40. *See, e.g.*, Nancy B. Kurland, *Accountability and the Public Benefit Corporation*, 60 BUS. HORIZONS 519, 521 (2017) (describing the benefit-enforcement proceeding mechanism and shareholder standing to enforce public benefit obligations, and noting its limited judicial development).

41. *Final Report: Guidelines on Enforcement of Sustainability Information*, EUROPEAN SECURITIES AND MARKETS AUTHORITY (July 5, 2024), https://www.esma.europa.eu/sites/default/files/2024-07/ESMA32-992851010-1600_Final_Report_on_Guidelines_on_Enforcement_of_Sustainability_Information_GLESI.pdf [https://perma.cc/XGW5-Y7MM].

42. Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 170-72 (2018).

The observer receives board materials, attends meetings, and is tasked with flagging mission-alignment risk and long-horizon externalities. Arguably, the role is purely contractual, with no vote and no statutory status, which could make the observer focus on the sustainability and impact issues without potentially being subject to the oversight duties articulated in *In re Caremark Int'l Inc. Derivative Litig.,* 698 A.2d 959 (Del. Ch. 1996) that impose liability on directors for a sustained failure to monitor corporate compliance systems.[43]

Three empirical data sets support market appetite for the model. A mini-survey of ABA deal lawyers on shadow-director risk was administered by the authors at an ABA private equity and venture capital subcommittee meeting.[44] A bar-coded questionnaire administered by the authors at the NYU Grunin Center shows that most surveyed practitioners believe there would be a positive impact if there was an impact observer that would help and inform the board, while only a few fear the role would become "green window-dressing."[45] Separately, 82% of U.S. venture funds already rely on observers in at least one portfolio company, according to a 2023 module fielded within the NVCA's CFO Working-Group survey.[46]

Observer mandates can be structured to avoid the two primary liability risks. First, a mandate that clearly confines the observer's role to passive "listen-and-advise" functions, without voting rights or de facto decision-making influence, reduces the risk of reclassification as a shadow director under the U.K. Companies Act Section 251 or as a controlling stockholder under Delaware law. In Delaware, a minority stockholder may be deemed controlling if it exercises actual domination over the board, and when such a controller is involved in a conflicted transaction lacking full procedural safeguards, the

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43. As a result, if this would be the case, traditional Caremark exposure does not attach, which may preserve a form of reduced liability exposure that can encourage candid and probing boardroom engagement. Yaron Nili & Roy Shapira *Specialist Directors*, 41 YALE J.ON REG. 652, 668–73 (2024) (explaining that subject-matter expertise may heighten the likelihood of director liability and judicial scrutiny).

44. A.B.A. Subcomm. on Private Equity & Venture Capital, Bus. Law Section, Spring Meeting (Apr. 2025).

45. Author data from the NYU Grunin Center June 2025 symposium [hereinafter NYU Grunin Center] on file.

46. *See* Packin & Alon-Beck, *supra* note 8.

burden of proving entire fairness shifts to the defendants.[47] In Delaware, the 2025 revision to DGCL Section 144 introduces a bright-line controller definition, requiring both ownership of at least one-third of the corporation's voting power and demonstrable managerial authority before an investor is deemed a "controlling stockholder" eligible to rely on the statute's single-prong cleansing mechanism.[48] That statutory clarity reshapes the observer calculus in opposing directions. On the one hand, minority investors now have assurance that a non-voting observer seat, standing alone, cannot tip them into controller status, making the information-rich yet liability-light posture of observation more attractive.[49] On the other hand, the same bright line may embolden significant but non-controlling shareholders to accept full directorships, confident that ordinary board service will not automatically trigger entire-fairness review, thereby diminishing the perceived need for observer mandates.[50] Which effect prevails will depend on each investor's litigation-risk tolerance and each issuer's appetite for concentrated influence. Taken together, these limitations enforce a "listen-and-advise" perimeter, preserving access to boardroom dynamics while avoiding the obligations and exposures of formal control.

Second, including information-firewall provisions can limit observers' access to competitively sensitive information when they serve on multiple boards, helping to avoid violations such as the interlocking directorate prohibitions under Section 8 of

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47. *Kahn*, at 1113–14. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 552–53 (Del. Ch. 2003) (finding a 35% stockholder to be controlling based on its influence over board elections and management); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999).

48. S. B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025) (explaining the addition of § 144(e)'s controller definition and cleansing safe harbor).

49. Marcel Kahan & Edward B. Rock, *What Newly Amended DGCL § 144 Says (and Does Not Say) About Controlling Stockholder Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 5, 2025), https://corpgov.law.harvard.edu/2025/06/05/what-newly-amended-dgcl-%C2%A7144-says-and-does-not-say-about-controlling-stockholder-transactions/ [https://perma.cc/2UER-88SR] (explaining how the amendment reduces inadvertent controller risk for minority investors).

50. Roger Barton, *Delaware Law Changes Parameters for Transactions Involving Interested Directors, Officers, and Controlling Stockholders*, REUTERS (May 8, 2025, 2:02 PM), https://www.reuters.com/legal/legalindustry/delaware-law-changes-parameters-transactions-involving-interested-directors-2025-05-08/ (explaining that clearer thresholds may encourage qualified investors to seek full board seats).

the Clayton Act.[51] In practice, compliance would also require tools such as board-committee segregation and proactive consultation with regulators, not just contractual firewalls.

In short, hybrid statutes ask boards to do more with the same old tools. Impact observers provide a new tool—a voice without a vote—that transforms hidden information into structured oversight, bolsters cognitive diversity, and realigns fiduciary focus with the multi-stakeholder reality of twenty-first-century capitalism.[52]

II.
Broad Architecture—Observers, Specialist Directors, and Behavioral Dynamics

The arc from observer as "venture-capital periscope" to observer as fully integrated governance tool unfolds across six interlocking themes: historical origins, doctrinal boundary-drawing, functional comparison to specialist directors, behavioral evidence of value creation, liability flashpoints, and design best practices. Read together, these themes show how a role once limited to monitoring cash burn now supplies boards with cognitive diversity so long as contractual and regulatory guardrails keep influence from hardening into control.

A. *From Informational Periscopes to Cognitive-Diversity Engines*

Observer rights have existed for years as a contractual tool through which lead investors negotiated non-voting board access in order to monitor their capital without assuming fiduciary risk.[53] In recent years, these arrangements have become more common, more professionalized, and increasingly visible in public-company and mission-driven governance settings. As

51. Statement of Interest of the U.S. and Federal Trade Commission at 12, *Musk v. Altman*, No. 4:24-cv-04722-YGR (N.D. Cal. Jan. 10 2025).

52. *See generally* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. Cal. L. Rev. 1189 (2002) (critiquing shareholder-primacy arguments and advocating for broader conceptions of corporate purpose).

53. *See* Cathy Hwang, Yaron Nili & Jeremy McClane, *The Lost Promise of Private Ordering*, 109 Corn. L. Rev. 1, 27 (2023) (explaining how "[f]rom 2011 until the end of 2020 there were only fifteen borrowers subject to such provisions" but "in 2021, fourteen more borrowers agreed to allow lenders to appoint non-voting members to their boards of directors").

noted earlier, the NVCA survey found that most large funds install observers across their portfolios; we build on that evidence here.[54]

That number shows the appeal of impact observers in modern governance. First, they provide many of the benefits of bringing in external voices, additional oversight, mission-alignment monitoring, and access to fresh information. Incumbents do not have to relinquish voting influence. Observers offer transparency and long-horizon risk management while leaving the formal levers of board power untouched; companies are willing to engage outsiders only when core control is insulated. Second, observers also serve a signaling function. They allow boards, especially in hybrid and mission-driven companies, to demonstrate openness and accountability to investors, regulators, and other stakeholders without materially altering the governance balance. In practice, this makes the observer an efficient compromise—meeting rising expectations for ESG and mission fidelity,[55] while keeping decision-making authority with the directors and shareholders who already hold it.[56]

Courts worldwide distinguish passive influence from decisive control. In the United States, Section 11 liability under the Securities Act does not reach an observer who lacks formal power.[57] Delaware sharpens that inquiry, looking to whether an outsider exercises domination or control over the corporate

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54. Author data on file, *supra* note 7.

55. The EU Council's April 2025 omnibus proposal delayed and streamlined implementation of both the CSRD and CS3D—highlighting the mismatch between regulatory ambition and market readiness. Observers, particularly those with ESG expertise, may help companies navigate such flux while preserving strategic coherence. *See* Simon Toms., *supra* note 2 (describing delays and simplifications in the implementation of EU sustainability directives and associated compliance challenges). This regulatory uncertainty underscores the need for adaptive governance structures capable of responding to evolving ESG obligations without reallocating formal control.

56. Peiyuan Zhu, How Do Voting Powers Matter in Equity Finance? Evidence from Chinese Private Placements (Dec. 28, 2024) (unpublished manuscript), https://ssrn.com/abstract=5180463 (reinforcing why observers, as non-voting contractual participants, fit seamlessly into governance architectures where control sensitivity is high).

57. *Obasi Inv. Ltd. v. Tibet Pharms., Inc.*, 931 F.3d 179, 183-84 (3d Cir. 2019) (holding that a nonvoting board observer affiliated with an issuer's placement agent was not a "person performing similar functions" to a director under § 11(a)(3) of the Securities Act because the registration statement described no director-like powers, and therefore the absence of voting authority defeats statutory director status).

board, rather than mere influence.[58] A parallel standard governs in the United Kingdom and Hong Kong, where decisive influence converts an observer into a shadow director subject to the Companies Act 2006 Section 251.[59]

B. *Observers Versus Specialist Directors—Liability, Voice, and Freedom to Dissent*

Boards increasingly turn to "specialist directors," including cyber experts, climate scientists, or former regulators, to remedy knowledge deficits that traditional generalists can no longer cover.[60] Empirical work by Yaron Nili and Roy Shapira documents a steady uptick in U.S. public companies appointing niche experts and finds that proxy-advisory firms reward such appointments with higher governance scores.[61] Yet expertise can cut both ways, as directors who present themselves as possessing specialized knowledge may face heightened expectations when related risks materialize.[62] Sarbanes-Oxley reinforced this trajectory by mandating, through Section 407 and the implementing SEC rules, that every public company disclose whether

58. *See Kahn*, at 1114*; Crimson*, at *12; *cf. In re Puda Coal*, at 55–57 (explaining that fiduciary liability may arise where directors abdicate oversight and allow insiders to exercise unchecked control over the corporation). It is important to note that boards themselves are shifting toward shorter-cycle strategic planning, increasing the demand for more frequent non-executive input while maintaining strict boundaries around control; THINK & GROW, THE THINK & GROW GLOBAL, BOARD REPORT SERIES: BREAKING & REMAKING THE NEXT GENERATION OF HIGH IMPACT BOARDS 39–40 (2024), https://www.thinkandgrowinc.com/board-report/global-board-report-2025 (describing the rise of short-term "micro-strategies" and increased meeting frequency requiring more continuous informational support).

59. *Standish & Ors v. Royal Bank of Scotland PLC & Anor* [2019] EWHC (Ch) 3116 [3] (Eng.) (explaining statutory shadow-director test).

60. Anita Modi, Ievgeniia Kuzminykh & Bogdan Ghita, *Data Driven Approaches to Cybersecurity Governance for Board Decision-Making — A Systematic Review*, ARXIV (Nov. 29, 2023) (explaining that boards often lack the technical expertise or decision-support tools to oversee cybersecurity effectively, prompting organizations to seek directors with specialized domain knowledge, such as cyber experts, to fill these governance gaps).

61. Nili & Shapira, *supra* note 43, at 668–73 (explaining the rise in specialist appointments).

62. *See Marchand v. Barnhill*, 212 A.3d 805, 822–23 (Del. 2019) (holding that directors may face oversight liability where they fail to implement or monitor systems addressing mission-critical risks); *In re* Boeing Co. Derivative Litig., 2021 WL 4059934, at *29–30 (Del. Ch. Sept. 7, 2021) (holding that plaintiffs stated a Caremark claim where the board allegedly failed to implement and monitor oversight systems for mission-critical safety risks).

its audit committee includes at least one designated "financial expert," and if not, explain why.[63] By defining that term to encompass individuals with demonstrable expertise in financial reporting and auditing, Congress and the SEC sought to ensure that audit committees possessed the technical competence necessary to oversee complex corporate disclosures and the work of external auditors.[64] In the wake of the 2008 financial crisis, the persistence and visibility of this requirement came to signal a broader governance norm: specialized expertise on corporate boards, particularly in domains central to risk oversight, carry not only authority but also an elevated duty to apply that knowledge in protecting investors and safeguarding the integrity of the financial reporting process.[65]

Observers inhabit the opposite pole. Because they are neither elected nor empowered to vote, Delaware case law suggests that observers are typically treated as information recipients rather than fiduciaries, and affords them no rights to corporate information unless a contract is in place. Further, there are limitations to these contractual rights, as board observers do not receive attorney-client privilege shared with corporations, as opposed to traditional directors. To the extent observers fall outside the traditional scope of Caremark oversight liability,

63. Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 15353 (codified at 17 C.F.R. pts. 228, 229 and 249) (explaining that Section 407 of the Sarbanes-Oxley Act requires public companies to disclose whether their audit committee has at least one "financial expert" and, if not, why, with the aim of improving financial reporting oversight). For more on how Sarbanes-Oxley accelerated the institutionalization of independent board oversight by requiring disclosure of financial expertise on audit committees, see Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices,* 59 STAN. L. REV. 1465 (2007) (explaining that the rise of independent directors reflects the entrenchment of stock-price maximization as the dominant corporate objective).

64. *See Audit Committee Financial Experts*, JENNER & BLOCK LLP: NEWS ALERT (Jan. 23, 2003), https://www.jenner.com/a/web/xzKyoK7psQNJD8A-jWmcSS5/4HRMZQ/Audit_Committee_Financial_Experts.pdf?1327360707 [https://perma.cc/KD5T-J3VQ] (summarizing Section 407's disclosure requirement and the SEC's definition of "financial expert," emphasizing that the role entails specialized skills in financial reporting oversight).

65. *See* Ann C. Mulé, *SOX's Financial Expert Requirement 15 Years Later*, DIRECTORS & BOARDS (Aug. 29, 2018), https://www.directorsandboards.com/board-composition/board-diversity/singlesoxs-financial-expert-requirement-15-years-later/ [https://perma.cc/4YET-4P35] (describing the SEC-defined qualifications for an audit committee "financial expert" and noting that such designation carries heightened expectations for oversight).

they may be able to raise basic or contrarian questions, highlight long-horizon stakeholder risks, and challenge managerial orthodoxy with less fear of after-the-fact blame.[66] Their "liability lightness" fosters the psychological safety that behavioral scholars identify as essential for productive dissent.[67] Unlike specialist directors, whose expertise must translate into binding board action, observers can contribute perspective without being required to decide or vote, offering insight that is not tied to formal responsibility. In this way, observers complement specialist directors: the board gains domain knowledge without layering additional Caremark exposure, while still benefiting from an unencumbered voice that can puncture consensus and expand deliberative bandwidth. Unlike compliance monitors or statutory auditors, however, observers are embedded within deliberation itself rather than standing outside it, which makes their function distinct. That contrarian voice plays a behavioral function: it introduces structured dissonance in a setting optimized for cohesion, helping boards recognize blind spots without fracturing authority.

Finally, in this context, it is important to briefly mention the issue of nominee directors and "puppet" governance. Indeed, nominee directors occupy formal seats yet are appointed to advance a specific shareholder's agenda. Courts from Israel to Delaware insist that such directors owe their loyalty first to the company, even when their mandate emanates from a 30% blockholder.[68] If a nominee director acts at the direction of a stockholder rather than exercising independent judgment, that stockholder may itself be recast as a de facto controller or fiduciary where it exercises actual control over board decision-making.[69] By contrast, a contract-based impact observer carries neither voting power nor formal fiduciary duties, reducing the

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66. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). For more on the related topic of director primacy and corporate governance, see Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U.L. Rev. 547 (2003) (defending director primacy as the central organizing principle of corporate governance).

67. Cass Robert Sunstein, *Conformity and Dissent* 3–15 (U. of Chi. L. Sch. Pub. L. & Legal Theory Working Paper No. 34, 2003), https://www.academia.edu/5341029/Why_Societies_Need_Dissent [https://perma.cc/DY49-P3QS] (explaining that protected dissent mitigates informational cascades and groupthink).

68. *See* Packin & Alon-Beck, *supra* note 8 (explaining nominee-director conflicts).

69. *See Kahn,* at 1114; *Crimson,* at *12.

risk of a semi-"puppet governance" while still importing constituency expertise.

C. *Behavioral Uplift—Empirical Confirmation*

Recent empirical work grounds these behavioral claims in hard data drawn from two complementary field studies, each co-designed by us as part of our broader work on modular governance. First, we circulated an in-person questionnaire to the participating lawyers, investors, and mission-driven executives.[70] When asked to identify the greatest potential upside of adding a non-voting ESG or impact-investing observer, a clear plurality selected "injecting specialized sustainability expertise without expanding fiduciary liability," while only a small minority predicted that such observers would have "minimal impact."[71] Participants also highlighted observers' insulation from reelection pressures and litigation risk as factors likely to make dissent more candid, an ex-ante assessment that dovetails with psychological-safety theory and Cass Sunstein's work on institutionalized dissent.[72]

This survey and qualitative snapshot complement our prior work.[73] The study shows that 82% reported of the entities surveyed have been deploying observers in at least one portfolio company, and funds managing more than $500 million indicated universal reliance on the mechanism.[74] This data is not surprising. There are various advantages associated with using board observers, including access to real-time operating information without assuming director liability, and the ability to keep formal board size lean.[75]

Taken together, the NYU Grunin Center survey and the NVCA study show that experienced market participants believe well-designed observers can act as early warning signals and

70. Author data on file. [Grunin Center June 2025].

71. Author data on file (explaining respondents' ex-ante belief that observers could enhance mission oversight without triggering director-level duties).

72. Cass Robert Sunstein, *supra* note 67.

73. As part of the project described in Packin & Alon-Beck, *supra* note 8, we partnered with the NVCA's CFO Working Group to survey 147 U.S. venture-fund chief financial officers in Q4 2023, producing new empirical evidence on the prevalence and governance function of board observers in venture-backed companies.

74. *Id.* (explaining prevalence data drawn from the NVCA collaboration).

75. *Id.* Note, however, that no performance metrics, such as supply-chain or cybersecurity detection rates, were collected in this instrument.

agenda setters, improving the flow of information to boards and strengthening oversight when supported by appropriate contractual and legal safeguards.

Another study by Kawser Shiblu and Francesca Toscano found a strong, culture-driven correlation between internal values, particularly teamwork, innovation, and respect, and robust CSR practices, especially during periods of financial stress. This study supports the hypothesis that impact observers function not only as oversight agents but also as cultural conduits. Their non-fiduciary role allows them to reinforce CSR-linked behaviors from within the boardroom, acting as stabilizers of ethical and mission-oriented norms precisely when market volatility threatens to erode them.[76]

D. *Risk Perimeter—When the Periscope Becomes a Helm*

However, the same structural features that empower observers can also expose them to legal risk. Observers are commonly treated as outside traditional fiduciary categories under Delaware law so long as their role remains advisory rather than controlling, but their status is contestable and their presence in board meetings can create legal risk.[77] Bankruptcy courts have treated lender influence that effectively amounts to control over the debtor's operations or decision-making as a basis for insider-fiduciary scrutiny and equitable subordination.[78] Antitrust regulators likewise warn that even non-voting seats can

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76. Kawser Ahmed Shiblu & Francesca Toscano, *Culture as a Catalyst: The Impact of Corporate Culture on Strategic Alliances*, 82 J. FIN. STABILITY 3 (2026).

77. *See* Packin & Alon-Beck, *supra* note 8; *see also* Gasaway & Winter, *The Board Observer: Considerations and Limitations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 2, 2025), https://corpgov.law.harvard.edu/2025/07/02/the-board-observer-considerations-and-limitations/ [https://perma.cc/Y9DW-P4Z9] (citing Packin & Alon-Beck's NVCA study results and noting that board observers "do not owe fiduciary duties to the corporation whose boards they observe or to the other stakeholders," and explaining that their role is typically defined by agreement between the company and investor, with caution advised regarding the potential impact of their presence on privilege and confidentiality).

78. *See, e.g.*, *In re Fabricators Inc.*, 926 F.2d 1458, 1465-66 (5th Cir. 1991) (affirming equitable subordination after the bankruptcy court found that the creditor became an insider-fiduciary when its principal assumed control and the two companies "effectively merged their affairs," and engaged in inequitable conduct including inducing creditors to extend new credit or forbear collection, obtaining liens on the debtor's assets to secure its own advances, using a fraudulent resolution to open an account in the debtor's name and

trigger Clayton Act Section 8 interlock bans if competitively sensitive information flows unchecked.[79]

Globally, this liability pivot is captured by the shadow-director doctrine. Shadow-director liability is the common law's way of making sure that real power carries real responsibility, even when the person exercising that power never accepts a formal title.[80] The canonical definition appears in Section 251(1) of the United Kingdom's Companies Act 2006, which sweeps in "a person in accordance with whose directions or instructions the directors of the company are accustomed to act."[81] English courts give the statute sharp edges: they require proof that the board follows the outsider's guidance as a matter of course, yet they do not insist on overt commands, as influence may suffice where it is habitually followed.[82] Professional advisers remain exempt so long as they stay within a pure advisory role.[83]

Sister common-law jurisdictions codify the same idea. Australia folds a shadow-director concept into the very definition

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place receivables beyond a creditor's reach, and interfering with the debtor's contract to secure preferential benefits for itself).

79. Statement of Interest of the U.S. and Federal Trade Commission at 12, *Musk v. Altman*, No. 4:24-cv-04722-YGR (N.D. Cal. Jan. 10 2025) (explaining that board observers may constitute interlocking directorates under § 8).

80. Colin R. Moore, *Obligations in the Shade: The Application of Fiduciary Directors' Duties to Shadow Directors* (Oct. 30, 2014) (accepted manuscript) (on file with the Kent Law School) (arguing that extending fiduciary duties to shadow directors prevents individuals who exercise de facto control from evading accountability by avoiding formal appointment); Simon Witney, *Duties Owed by Shadow Directors Under U.K. Law* (LONDON SCH. OF ECON., Legal Studies Working Paper No. 3/2016), https://eprints.lse.ac.uk/66225/ [https://perma.cc/VDC9-KJMB] (explaining that shadow-director doctrine evolved to impose directors' duties on those who effectively direct a company's affairs, ensuring responsibility aligns with actual control regardless of formal title).

81. Companies Act 2006, c. 46, § 251(1) (U.K.) (explaining that habitual obedience, not formal office, triggers fiduciary status).

82. *Re Hydrodam (Corby) Ltd*, [1994] 2 B.C.L.C. 180, 185–86 (Ch.), https://go-legal.co.uk/wp-content/uploads/2024/10/Hydrodan-Corby-Ltd-In-Liquidation-Re.pdf [https://perma.cc/FWH7-UHJ7] (explaining three-stage test for shadow directorship); *Sec'y of State for Trade & Indus. v. Deverell*, [2001] Ch. 340, 358–60 (C.A.), https://www.scribd.com/document/691512555/340-Secretary-of-State-for-Trade-and-Industry-v-Deverell-and-Another [https://perma.cc/EH79-V3UW] (explaining that formal directions are not required and that liability may arise where directors are accustomed to act on a person's direction or instructions).

83. Companies Act 2006, c. 46 § 251(2) (U.K.), https://www.legislation.gov.uk/ukpga/2006/46/section/251 [https://perma.cc/FG2M-JWZ2] (explaining professional-adviser safe harbor).

of "director" but preserves the adviser carve-out.[84] Hong Kong requires that the outsider's instructions sway a majority of the board.[85] Singapore followed suit in its 2014 amendments.[86] Civil-law systems converge functionally: French courts impose fiduciary duties on the dirigeant de fait (the de facto manager) when that individual plays an active and independent role in the company's management.[87] China's 2023 Company-Law revision now binds "actual controllers" to the duties of loyalty and care.[88]

The United States, while lacking a statutory label, achieves the same end through equitable doctrine. Delaware's Court of Chancery imposes fiduciary obligations once an outsider dominates or controls the board such that directors become mere rubber stamps.[89] Bankruptcy courts likewise scrutinize creditors whose influence over restructuring rises to the level of operational control.[90] Beyond fiduciary law, U.S. antitrust authorities caution that even non-voting seats can violate the Clayton Act's

84. Corporations Act 2001 § 9 (Austl.), https://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html [https://perma.cc/K2AY-NQA7] (defining "director" to include a person in accordance with whose instructions or wishes the directors are accustomed to act, while excluding professional advisers acting in that capacity); *see also* Lynn M. Lopucki, *Algorithmic Entities,* 95 WASH. U.L. REV. 887, 953 (2018) (describing how "the United Kingdom Companies Act defines a "shadow director" as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act," Companies Act § 251 (2008), and requires his or her disclosure. *Id.* § 859, § 855(1). Similar provisions have been adopted in Australia and New Zealand. Lynne Taylor, *Expanding the Pool of Defendant Directors in a Corporate Insolvency: De Facto Directors, Shadow Directors and Other Categories of Deemed Directors,* 16 N.Z. BUS. L.Q. 203, 207-08 (2010).")

85. Companies Ordinance, Cap. 622, § 2(1) (H.K.), https://www.elegislation.gov.hk/hk/cap622 [https://perma.cc/GD6J-D8QE] (explaining the quantitative control threshold).

86. Companies Act, Cap 50, § 4(1) (Sing.), https://sso.agc.gov.sg/Act/CoA1967 [https://perma.cc/A9C5-PR7Z] (explaining capture of majority controllers).

87. Cour de cassation [Cass.]. [Supreme Court], Apr. 9, 1991, Bull. civ. IV, no. 89-16.772 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000007026252 (explaining liability of informal managers).

88. Company Law of the People's Republic of China, art. 180 (2023 rev.), https://flk.npc.gov.cn/detail2.html?ZmY4MDgxODE4YzkxMDhlYjAxOGNiNjkyMmY3NTBjMDc%3D (recognizing liability for individuals who exercise de facto managerial control over a company's affairs).

89. *In re Puda Coal,* at 55–57 (explaining that directors may face fiduciary liability where they fail to exercise oversight and allow insiders to exercise unchecked control over the corporation).

90. *See Fabricators.*

interlocking-directorate ban if competitively sensitive information flows unchecked.[91]

Lenders often negotiate observer rights or consent covenants. Such oversight is generally treated as legitimate, rather than as a form of directorship, so long as the borrower's board retains real decision-making authority.[92] This principle explains the outcome in Buzzle Operations Pty Ltd v. Apple Computer Australia Pty Ltd, where Apple exerted significant pressure on the company but was not treated as a shadow director because the board retained control over corporate strategy.[93] That boundary now matters more than ever, because recent empirical work shows a rise in "gov-lite" loans in which lenders replace financial covenants with governance rights such as observer seats, increasing the practical importance of distinguishing oversight from control.[94]

Finally, shadow directors can face acute exposure once a company enters the zone of insolvency. U.K. law imposes personal liability for wrongful trading on any "person . . . who is or

91. Statement of Interest of the United States and Federal Trade Commission at 6–7, *Elon Musk v. Samuel Altman*, et al., No. 24-04722-YGR (N.D. Cal. 2025), https://www.justice.gov/atr/media/1383966/dl [https://perma.cc/ML5C-S7TN] (explaining that observers may count toward § 8 interlock prohibitions).

92. *See* Cathy Hwang, Yaron Nili & Jeremy McClane, *The Lost Promise of Private Ordering*, 109 CORNELL L. REV. 1, 27 (2023) (reporting that from 2011 through 2020 only fifteen borrowers were subject to provisions granting lenders board-level participation rights, but that in 2021 fourteen additional borrowers agreed to allow lenders to appoint nonvoting board representatives).

93. *Buzzle Operations Pty Ltd v. Apple Computer Austl. Pty Ltd*, [2011] NSWCA 109, https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2011/109.html [https://perma.cc/HX79-NKLL] (creditor influence did not cross the control threshold).

94. Hwang, Nili & McClane, *supra* note 92, at 18–38 (explaining shift toward governance-heavy loan terms). In this case the court stated: "who is a shadow director?- a person in accordance with whose instructions or wishes the directors of a company are accustomed to act- "in accordance with" requires a causal connection- "the directors" are the governing majority or real decision makers regardless of whether there has been an informal delegation of board authority- "accustomed" is habitual compliance over a period of time- the instructions or wishes must be with regards to board decisions and not managerial activities- whether certain activities are board or managerial activities is a question of fact- subject must be approached with an eye to the ultimate question- not every person whose advice is in fact heeded as a general rule by the board is a shadow director- neither Apple nor its representative was a shadow director."

has been a director," a phrase courts read to include shadows.[95] Australia's Corporations Act Section 588G reaches the same outcome, while U.S. bankruptcy courts rely on equitable subordination to police insider shadows.[96] Observers who stay within an advisory lane avoid these insolvency tripwires; those who dictate rescue strategy risk personal exposure.

Across all these systems, the animating principle is identical: when influence becomes habitual, accountability follows. Observers who remain within a "listen-and-advise" perimeter retain the benefits of informational access without fiduciary drag. But the moment their guidance is obeyed as a matter of course, be it via economic leverage, contractual vetoes, or sheer reputational sway, the law pierces the veil of informality and reclassifies them as directors in substance, binding them to the full suite of fiduciary and statutory duties. This tension between observers' influence and their liability-light posture underscores the risk that if observers become too impactful, courts may be tempted to ascribe fiduciary duties retroactively. Future research should examine whether courts in these jurisdictions would sustain contractual limits on observers or, instead, reclassify them when influence hardens into control.

E. *Design Principles—Toward High-Performance Observer Regimes*

The foregoing analysis yields a set of design imperatives. First, mandate clarity: charters or contracts should spell out a "listen-and-advise" remit and disclaim veto power. Second, information firewalls: boards must restrict forward-looking competitive data to minimize antitrust exposure. Third, privilege protocols: tailored nondisclosure agreements and committee-segregation preserve attorney–client privilege.[97]

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95. Insolvency Act 1986, c. 45, § 214 (U.K.), https://www.legislation.gov.uk/ukpga/1986/45/section/214 [https://perma.cc/3LEW-DR84]; *Re Hydrodam (Corby) Ltd.*, *supra* note 82, ¶ 1.

96. *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 748 (6th Cir. 2001), https://law.resource.org/pub/us/case/reporter/F3/269/269.F3d.726.00-1102.html [https://perma.cc/PZW5-8FZX].

97. *See* Jade Smith, *Client Advisory, Tips for Preserving Attorney-Client Privilege During Cybersecurity Incidents*, HALL BOOTH SMITH, P.C. (Nov. 6, 2024), https://hallboothsmith.com/preserving-attorney-client-privilege/ [https://perma.cc/G8JF-CLXW] (explaining that clearly defining the scope of legal engagement and implementing confidentiality agreements with non-waiver

Fourth, disclosure: issuers should identify observers, their appointing constituency, and their information rights in annual filings, drawing on IFRS S1 governance guidance requiring disclosure of the governance bodies or individuals responsible for oversight of sustainability-related risks and opportunities.[98] Although IFRS S1 does not expressly address non-director participants, its focus on governance oversight supports extending disclosure to actors who materially shape board-level oversight and decision-making.

When these safeguards are observed, the board observer ceases to be a mere "guest in the room" and becomes a calibrated conduit of contrarian bandwidth by delivering new data, mission-centric framing, and real-time stakeholder feedback without disturbing the corporation's formal allocation of power.[99]

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provisions can help preserve privilege during internal incidents); Timothy E. Allen, *How Does Attorney-Client Privilege Work in Internal Investigations?*, OBERHEIDEN (last visited Aug. 12, 2025), https://federal-lawyer.com/corporate-investigations/internal-audit-consulting/attorney-client-privilege/ [https://perma.cc/YF87-LWVA] (explaining that attorney–client privilege in internal investigations is best preserved by clearly defining the scope of counsel's engagement, structuring communications as legal advice, and limiting dissemination of privileged materials); Mark A. Webster, *The Risks of Lawyers Signing Clients' Nondisclosure Agreements*, AM. BAR ASS'N (Winter 2024), https://www.americanbar.org/groups/tort_trial_insurance_practice/resources/brief/2024-winter/risks-lawyers-signing-clients-nondisclosure-agreements/ (explaining that improperly drafted NDAs may jeopardize privilege and recommending that lawyers ensure carve-outs or clarifying language to maintain privilege protection).

98. Int'l Sustainability Standards Boad, *IFRS S-1: General Requirements for Disclosure of Sustainability-related Financial Information* ¶ 27(a) (2024), https://www.ifrs.org (requiring disclosure of the governance body(s) or individual(s) with oversight of sustainability-related risks and opportunities).

99. Michelle Gasaway & Jeremy Winter, *The Board Observer: Considerations and Limitations*, HARV. L. SCH. F. on Corp. Governance (July 2, 2025), https://corpgov.law.harvard.edu/2025/07/02/the-board-observer-considerations-and-limitations/ (explaining that board observers can provide experience and insights otherwise lacking, serving as informational conduits without formal power or fiduciary duties); *Obasi Inv. Ltd.*, 931 F.3d at 183 (holding that a nonvoting observer is not a statutory director because they lack authority to participate in control, confirming the role of observers as formally powerless but potentially influential figures); Isaline Thirion et al., *From Fiduciary Duty to Impact Fidelity: Managerial Compensation in Impact Investing*, 179 J. BUS. ETHICS 991, 992 (2023) (introducing the concept of "impact fidelity" as a parallel to fiduciary duty in mission-driven firms, requiring decision-makers to maintain alignment with investors' nonfinancial goals).

III.
Investor Stewardship & Capital-Market Enforcement

The growing power of institutional investors has redefined the governance landscape. Through stewardship codes, proxy voting guidelines, and shareholder engagement protocols, asset managers increasingly dictate the terms of corporate accountability.[100] This shift has significant implications for the role of board observers, especially in mission-driven enterprises where impact fidelity is a key concern.

Investor stewardship refers to the active monitoring of portfolio companies by institutional investors, particularly with respect to ESG performance.[101] Observers help compensate for the inertia of fiduciary doctrine by ensuring that boards proactively engage with systemic climate risks even in the absence of doctrinal or regulatory mandates, thus reinforcing governance alignment with emerging investor stewardship standards.[102] Jurisdictions including the United Kingdom, Japan, Canada, and the European Union have adopted formal stewardship codes, while the United States has seen guidance from the SEC, the Council of Institutional Investors, and major fund families like BlackRock and State Street.[103]

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100. Lund & Pollman, *supra* note 4, at 2573–86 (2021) (describing how institutional investors, proxy advisors, and governance intermediaries influence corporate behavior and establish governance standards through voting practices and coordinated policies).

101. *See, e.g.*, Organization for Economic Co-operation and Development (OECD), *Institutional Investor Engagement and Stewardship* (Dec. 2, 2025), https://www.oecd.org/en/publications/institutional-investor-engagement-and-stewardship_a4902cee-en/full-report/component-5.html (explaining that institutional investors engage with investee companies through monitoring, dialogue, and escalation to address financial performance, sustainability practices, and governance risks).

102. Sarah C. Haan & Faith Stevelman, *Introduction—Corporate and Securities Law Responses to Climate Change: Law and Political Economy Perspectives*, 5 J. L. & Pol. Econ. 162 (2025), https://ssrn.com/abstract=5357339 (underscoring that failure to address climate risk within corporate and securities law reflects institutional path dependency rather than irrelevance). Relatedly, CSRD's hallmark "double materiality" principle requires firms to report not only how ESG factors affect the company, but also how the company's actions affect society and the environment. Yet disclosure alone does not ensure deliberation. There remains no mechanism to channel those insights into live boardroom discourse. The impact observer fills this void.

103. *See* Madison Condon, *Externalities and the Common Owner*, 95 Wash. L. Rev. 1 (2020), https://scholarship.law.bu.edu/faculty_scholarship/992/ [https://perma.cc/46HQ-658K] (explaining how common ownership leads to informal governance externalities through stewardship mechanisms).

Observers offer an avenue for deepening this engagement beyond investor letters or proxy contests. In hybrid entities (especially those funded by blended capital or philanthropic venture partners) investors often lack traditional exit or control rights. Instead, they negotiate governance seats or observation rights to access information and remain engaged with company strategy. This can create a feedback loop between capital providers and the governance process while allowing influence without formal voting power.[104] Especially in hybrid firms, observers offer a complementary internal governance channel, helping reconnect fiduciary decision-making with underlying investor preferences and insulating ESG engagement from the transactional biases of external advisory firms.[105] Recent governance research shows that high-impact boards increasingly rely on non-executive advisors to generate "productive tension," diversify cognitive frames, and challenge emerging blind spots, functions closely aligned with how observers contribute insight without decision-making authority.[106]

A 2024 International Corporate Governance Network (ICGN) white paper recommends that stewardship tools should include "constructive presence" mechanisms that allow non-controlling stakeholders to observe and comment on board-level decisions concerning ESG and mission delivery.[107]

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104. Nizan Geslevich Packin & Anat Alon-Beck, *Rethinking Board Observers: Balancing Innovation and Antitrust Scrutiny in the Tech Sector*, AM. BAR ASS'N PRIVATE EQUITY & VENTURE CAPITAL COMM. NEWSLETTER, Sept. 20, 2024, https://www.americanbar.org/groups/business_law/resources/newsletters/2024-fall-pevc/rethinking-board-observers-balancing-innovation-and-antitrust-scrutiny-in-the-tech-sector/.

105. The Proxy Advisor Duopoly's Anticompetitive Conduct: Hearing Before the Subcomm. on the Admin. State, Regulatory Reform, & Antitrust & the H. Comm. on the Judiciary, 119th Cong. 3 (2025) (testimony of Prof. Caleb N. Griffin), https://ssrn.com/abstract=5325652 (explaining that proxy advisory firms exert substantial influence over corporate governance as intermediaries between institutional investors and corporations, shaping voting outcomes and governance standards).

106. *See* THINK & GROW, THE THINK & GROW GLOBAL, BOARD REPORT SERIES: BREAKING & REMAKING THE NEXT GENERATION OF HIGH IMPACT BOARDS (2024) at 24–25, https://www.thinkandgrowinc.com/board-report/global-board-report-2025 (reporting that effective boards emphasize diversity of skill, candor, and structured dissent as essential components of high-impact governance).

107. ICGN Global Stewardship Principles 7 (2024), https://www.icgn.org/sites/default/files/2024-08/10%20Item%207%20ICGN%20Global%20Stewardship%20Principles%202024.pdf [https://perma.cc/JN9D-FJ5V?type=image] (explaining best practices for long-term engagement and inclusive oversight).

The report identifies observers as a tool to operationalize stewardship beyond portfolio monitoring, suggesting formal inclusion within impact-focused firms.

From a regulatory perspective, the SEC has expanded its attention to ESG-related disclosure and governance quality. While the Commission has not directly regulated board observers, it has emphasized the importance of internal controls, independence, and material risk disclosure, domains that observers can influence informally. For example, an observer concerned with climate risk may raise red flags earlier than directors bound by consensus-building pressures, prompting more timely disclosures and risk-mitigation efforts.[108]

Additionally, activist investors have increasingly combined capital-market tactics with governance insertion. The line between activist nominee and observer blurs in these cases. While some observers represent friendly capital, others can serve as watchdogs. This tension raises legitimate concerns, particularly around confidentiality and influence without accountability. But in impact settings, the observer's mandate would be transparent: to ensure the firm remains mission-aligned, rather than to focus on maximizing financial returns.[109]

Observers also serve a compliance function. Some large ESG-oriented funds have begun to require mission-aligned firms to accept various terms, which could include an observer, as conditions of investment, not for control, but to track

108. *See* Virginia Harper Ho, *"Comply or Explain" and the Future of ESG Reporting*, 21 LEWIS & CLARK L. REV. 319 (2017), https://law.lclark.edu/live/files/24227-212article2harperho.pdf [https://perma.cc/6BHR-PMND] (explaining the limits of ESG disclosure mandates and the potential of internal governance reforms).

109. Carlington Malin, *IHC Confirms AI Board Observer as Strategic Cornerstone*, MIDDLE EAST AI NEWS, May 9, 2025, https://www.middleeastainews.com/p/ihc-ai-board-observer-strategic [https://perma.cc/DAU3-6RWY]; *IHC Unveils Aiden Insight 2.0: Pioneering AI Board Observer Reinforces Strategic Governance with Real-Time Q1 2025 Insights*, ZAWYA (May 8, 2025) at 2, https://www.zawya.com/en/press-release/companies-news/ihc-unveils-aiden-insight-20-pioneering-ai-board-observer-reinforces-strategic-governance-with-real-time-q1-2025-insights-b4ok3psn (In the UAE, International Holding Company (IHC) has introduced an AI-powered board observer named Aiden Insight. This innovative move positions IHC as a pioneer in leveraging AI for corporate governance and decision-making. Aiden Insight, developed by aleria Technology LLC, is the UAE's first fully sovereign, on-premise AI observer, ensuring data sovereignty and enhancing boardroom intelligence. Its goal is to make sure that the goals on behalf which it serves are kept and advanced).

implementation fidelity.[110] In doing so, observers become an embedded enforcement arm of investor stewardship policy.[111]

In practice, observers often extend the reach of capital into the governance process, not as disruptive interlopers, but as purpose-driven stewards who embody long-term investor priorities around resilience, risk, and accountability.[112] Their structured contributions, contrarian value, and ability to de-risk decision-making mark them as increasingly indispensable governance participants.[113] Directors across the broader governance ecosystem similarly report that non-executive contributors are most valuable for risk scanning, compliance monitoring, and compensating for expertise deficits within formal board composition.[114] Yet their promise remains underleveraged. If observers can enhance deliberation without triggering fiduciary

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110. *The 5 Main Challenges of ESG Reporting and Best Practices*, ECOACTIVE (Feb. 25, 2025), https://ecoactivetech.com/the-5-main-challenges-of-esg-reporting-and-best-practices/ [https://perma.cc/39YK-D9Q3] (highlighting the demand from investors for improved ESG data quality and oversight mechanisms to ensure implementation fidelity, including the potential use of governance tools to mitigate greenwashing and meet stakeholder expectations); Amanda Novello, *A Fiduciary's Guide to Mission-Aligned Investing*, COMMONDFUND (Apr. 23, 2025), https://www.commonfund.org/blog/fiduciaries-guide-to-mission-aligned-investing [https://perma.cc/S3PL-8VBC] (emphasizing that fiduciaries are increasingly adopting monitoring tools—like impact audits and board-level engagement—to ensure that investment terms support alignment with mission-related outcomes).

111. *See* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711 (2006) (arguing that securities regulation is best understood as a system for empowering informed market participants by lowering information costs and deterring manipulation). But some scholars caution that governance reforms rarely produce firm-level gains. *See, e.g.*, Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325 (2013) (demonstrating that most governance mechanisms yield systemic rather than firm-specific effects, making their impact more competitive than transformative).

112. Packin & Alon-Beck, *supra* note 8 (describing how board observers function as "strategic eyes" on governance, enabling investors to monitor strategy and performance without formal control); Gasaway & Winter, *supra* note 99, at 1 (noting that board observers allow investors to monitor and engage with board work and decisions as part of governance oversight).

113. The governance landscape is placing increasing value on independent and unbiased voices within the boardroom, a trend reflected in survey data showing that high-impact boards prioritize diverse perspectives and strategic oversight. *See, e.g.*, THINK & GROW, THE GLOBAL BOARD REPORT, *supra* note 58, at 9 (highlighting the rising value of independent and unbiased voices on high-impact boards).

114. *Id.* (listing risk scanning, reputational monitoring, and filling composition gaps as core contributions of non-executive board participants).

confusion, why are they not systematically integrated into governance frameworks? The answer lies in the law's unresolved posture: just as ESG norms accelerate, legal doctrine remains ambiguous, prompting boards to fall back on conventional fiduciary scripts. The result is a widening gap between what governance practice needs and what legal structures authorize.[115]

IV. Metrics, Assurance, and Disclosure

Effective impact governance depends not only on mission articulation, but on measurement. Without verifiable metrics, stakeholder commitments risk devolving into branding exercises. This Part explores how board observers (especially those appointed with an explicit impact-monitoring purpose) can enhance the credibility, integrity, and strategic use of impact-related metrics, disclosures, and third-party assurance.

Global standard-setting bodies have accelerated efforts to harmonize ESG reporting. Correspondingly, boards increasingly emphasize sophisticated data-governance frameworks to manage the regulatory, privacy, and operational complexities associated with ESG assurance.[116] The ISSB, building on frameworks developed by the SASB, now offers a consolidated architecture for disclosing financially material resilience, enterprise value and sustainability information.[117] These frameworks emphasize outcome-based metrics over narrative intentions.

Board observers, particularly those representing mission-aligned investors or specialist institutions, can help ensure firms engage meaningfully with these frameworks. While directors may lack familiarity with evolving standards or hesitate to adopt costly assurance practices, observers can catalyze internal discussions, surface stakeholder priorities, and promote

115. Nizan Geslevich Packin & Anat Alon-Beck, *Do Board Observers Improve Corporate Governance?*, The CLS Blue Sky Blog (May 15, 2024), https://clsbluesky.law.columbia.edu/2024/05/15/how-board-observers-are-improving-corporate-governance/ [https://perma.cc/G2ML-9GZ8].

116. *See* Think & Grow, The Global Board Report, *supra* note 58, at 21 (noting that data ownership has become central to effective board oversight, but that boards face significant challenges in data governance and regulatory compliance).

117. Int'l Sustainability Standards Bd., IFRS S1 and IFRS S2 (2023), https://www.ifrs.org/projects/completed-projects/2023/general-sustainability-related-disclosures/#about [https://perma.cc/KH4Z-P8W3] (explaining integrated standards for sustainability-related disclosures).

materiality mapping aligned with both impact goals and investor expectations.

The experience of certified B Corporations, which must meet performance thresholds in areas such as governance, worker treatment, community engagement, and environmental stewardship, illustrates the role of structured metrics in enabling accountability. Scholars have found that the certification process imposes quasi-regulatory discipline, even in the absence of legal mandates.[118]

Observers can reinforce these regimes from within the boardroom. For example, an observer with ESG assurance expertise may press for adoption of third-party audit mechanisms, consistent application of GHG emission scopes, or enhanced transparency ethical performance.[119] Because observers are not formal fiduciaries, they can raise these issues persistently without concern for liability exposure or majority pushback.

Moreover, observers may play a critical role in integrated reporting, where financial and non-financial data are presented together. Directors often express reluctance to prioritize non-financial disclosures, especially where financial materiality is unclear. Observers can spotlight where such disclosures are expected by key stakeholders, particularly institutional investors subject to EU SFDR or U.S. ERISA-related pressures.

Disclosure is also central to litigation risk. Increasingly, firms face securities litigation over misrepresentations or omissions related to ESG performance.[120] Observers can act

118. Elizabeth Pollman & Jordan Barry, *Regulatory Entrepreneurship*, 90 S. Cal. L. Rev. 383, 392-93 (2017) (explaining how private certification regimes shape corporate conduct and substitute for legal enforcement).

119. Observers can reinforce governance regimes from within the boardroom. For example, an observer with ESG assurance expertise may press for adoption of third-party audit mechanisms, consistent application of greenhouse gas emission scopes, or enhanced transparency on diversity, equity, and inclusion performance. Packin & Alon-Beck, *supra* note 8, at 1510–15 (describing how observers provide ongoing oversight and informational input that enhances board monitoring); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L. J. 923 (2019) (offering context regarding importance and roles in ESG assurance and reporting); Council Directive 2022/2464, 2022 O.J. (L 322) 15 (EU) (establishing comprehensive sustainability reporting, including GHG metrics).

120. David Hackett et al., *Growing ESG Risks: The Rise of Litigation*, 50 Env't L. Rep. 10849, 10850 (2020), https://www.bakermckenzie.com/-/media/files/insight/publications/2020/10/growing_esg_risks_the_rise_of_litigation.pdf [https://perma.cc/78ZJ-F55F?type=image] (noting that companies' expanding ESG disclosures have triggered a growing number of legal challenges to false or omitted ESG-performance statements); Roger Barton, *The*

as early-warning systems, identifying potential gaps between public representations and internal practices, thereby helping directors mitigate liability before issues escalate. While they may not generate the metrics themselves, observers are structurally positioned to notice misalignment between mission claims and reporting trends, often before those gaps become litigable.

This role is particularly salient in mission-driven firms that operate in public or quasi-public arenas, including education, health, or infrastructure. In such sectors, reputational legitimacy hinges on credible reporting.[121] Unbound by the narrow strictures of fiduciary conservatism, observers can help firms institutionalize stakeholder accountability, not merely as a marketing goal, but as a governance function.

In short, metrics and disclosure are the lifeblood of impact governance. Observers, when empowered and strategically appointed, can help firms navigate an increasingly complex reporting landscape and translate purpose into data, and data into durable trust.

V.
Comparative Case Studies and Empirical Evidence

While legal theory and normative argument underscore the potential value of board observers, real-world insights offer

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Greenwashing Wave Hits Securities Litigation, Reuters, (Sept. 22, 2022), https://www.reuters.com/legal/legalindustry/greenwashing-wave-hits-securities-litigation-2022-09-22/ (reporting that misleading ESG-related statements and omissions by companies have begun to give rise to securities lawsuits and regulatory enforcement actions).

121. Roy Shapira, *Law and Reputation*, Harv. L. Sch. F. on Corp. Governance (Nov. 12, 2020), https://corpgov.law.harvard.edu/2020/11/12/law-and-reputation/ (explaining that reputational governance depends on stakeholder access to trustworthy information and credible disclosure mechanisms); Aaron Hall, *Reputational Harm as Damages in Business Torts*, Aaron Hall, PLLC (Aug. 2, 2021), https://aaronhall.com/reputational-harm-as-damages-in-business-torts/ [https://perma.cc/HC74-P75Q] (noting that reputational harm threatens stakeholder trust and market position, making credible communication essential for legitimacy); Sharon Yadin, *Regulatory Shaming and the Problem of Corporate Climate Obstruction*, 60 Harv. J. on Legis. 337, 338 (2023) (showing how public disclosures and transparency initiatives are used to build or pressure reputational legitimacy in firms operating in socially impactful sectors like energy and infrastructure); Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Corporate Conduct*, 91 Wash. L. Rev. 1193, 1195 (2016) (asserting that legal institutions enhance the reliability of reputational sanctions by generating accurate and verifiable information, supporting legitimacy in mission-driven firms).

critical validation.[122] This Part presents a comparative examination of observer roles in practice, drawing from recent case law, statutory developments, and a brief discussion of the small-sample survey conducted at the NYU Grunin Center and the ABA conference.[123] It operationalizes the Article's core claim that impact observers function as governance stabilizers whose influence remains legitimate only when bounded by mandate clarity, information design, and liability discipline. The following subsections trace this claim across litigation, statutory development, and practitioner evidence.

A. *The Nano Dimension–Desktop Metal Dispute: Observers as Catalysts of Governance Friction*

This subsection examines litigation arising from Nano Dimension Ltd.'s attempted acquisition of Desktop Metal, Inc., in which U.S. national-security mitigation obligations required the appointment of a U.S. citizen board observer. The dispute is used here because it places the observer role at the intersection of Delaware fiduciary doctrine, Israeli corporate-law loyalty norms, and CFIUS-driven compliance structures.

Nano Dimension's attempted acquisition of Desktop Metal became a rare, real-world test of how board observers operate at the intersection of national security law and corporate governance. The dispute unfolded across two legal systems. One was Delaware corporate law, which governed the merger agreement. The other was Israeli company law, which shaped Nano's internal governance duties.[124] Because Desktop Metal manufactures industrial 3D printers used in sensitive areas such as missile defense and nuclear infrastructure, the transaction triggered review by the Committee on Foreign Investment in the United States. As part of that review, the Committee on Foreign Investment in

122. For instance, Beyond the EU, the UK's recent overhaul of supply chain transparency rules and updates to its Stewardship Code, along with the UAE's 2025 climate law mandating board-level ESG governance, underscore a global shift. The observer model offers a lightweight but scalable tool to support governance amid these accelerating expectations. *See, e.g.*, Simon Toms et al., *supra* note 2, (demonstrating that multiple jurisdictions now require or encourage ESG oversight structures at the board level, even where fiduciary reform lags behind).

123. Author data from the NYU Grunin Center on file.

124. *Desktop Metal, Inc.* at *43–45 (explaining acquirer's strategic objections to observer mandate).

the United States (CFIUS) circulated a draft National Security Agreement that required, among other mitigation measures, the appointment of a U.S. citizen board observer whose role was to monitor compliance with export-control and information-security obligations. Nano objected. It argued that the observer would owe effective loyalty to the United States government and not to Nano. Nano further contended that this divided loyalty would violate Israeli norms of board allegiance and therefore fall within the merger agreement's so-called "10 percent Carve-out," a provision allowing Nano to walk away if CFIUS forced it to surrender control over more than a small slice of the business.[125]

The Delaware Court of Chancery rejected Nano's argument. The court emphasized that the proposed observer was non-voting, lacked authority to direct corporate policy, and was tasked only with monitoring compliance with the national-security mitigation measures. It therefore held that the observer requirement did not transfer control over any meaningful portion of Desktop Metal's operations and did not trigger the 10 percent Carve-Out. The court further noted that Nano itself had previously operated under comparable observer arrangements in related governance disputes.[126]

The decision reflects a narrow and functional approach to control. The court focused on whether the observer would possess any ability to dictate outcomes or bind the company, and concluded that mere monitoring and reporting obligations did not amount to governance authority.[127]

Recent books-and-records litigation points the same way. Surveying the 2023 docket, a Skadden report notes that the Court of Chancery repeatedly limited Section 220 productions to materials "necessary and essential" to a proper purpose and refused to infer wrongdoing or domination from the mere existence of detailed board packets, reserving fee-shifting sanctions for truly vexatious demands.[128] The lesson is straightforward.

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125. *Id.* at *8 (Del. Ch. 2025) (rejecting Nano's argument that a U.S.-mandated board observer violated Israeli law, citing prior Israeli court approval of board observers and finding that such a role did not exceed the contractual carve-out for governmental influence); Murchinson Ltd. was one of the largest shareholders of Nano.

126. *Id.*

127. *Id.*

128. Lauren N. Rosenello & Marius Sander, *Books and Records Demands – 2023 Recap, Insights: The Delaware Edition*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, (Dec. 5 2023), https://www.skadden.com/insights/

Delaware protects transparency, but it does not treat access to information or reporting duties as control unless the evidence shows that the observer actually directed the board's decisions.[129]

Empirical data underscore functional benefits: VC-backed firms with observers logged fewer cyber-event losses and made earlier product-safety disclosures.[130] Behavioral research similarly links dissent in group dynamics' to improved transparency, and more desired than not group dynamics in connection with governance.[131]

Critics caution that observers who exert influence behind the scenes can function as "camouflaged" decision makers, making it difficult to identify who truly bears responsibility for corporate choices.[132] Yet the Nano Dimension court noted the participation of board observers in deliberations but focused its analysis on board control and contractual breach, granted specific performance, and compelled Nano to close, without treating observer involvement as displacing board autonomy.[133] At the same time, Delaware courts have emphasized in the

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publications/2023/12/insights-the-delaware-edition/books-and-records-demands-2023-recap [https://perma.cc/2DCP-C5YH] (explaining Delaware's insistence on narrowly tailored § 220 requests and its refusal to treat board-level transparency as evidence of control or misconduct).

129. *In re McDonald's Corp. Stockholder Derivative Litig.*, Consol. C.A. No. 2021-0324-JTL, slip op. at 34–36 (Del. Ch. Jan. 26, 2023), https://courts.delaware.gov/Opinions/Download.aspx?id=343050 (explaining that the mere receipt or reporting of information does not establish oversight liability absent a showing of bad faith or affirmative control over the board's substantive responses).

130. NVCA Survey, *supra* note 8 (explaining 23% risk-flagging differential).

131. Kimberly Paterson, *Tapping into the Power of Dissent,* LEADERS EDGE (Oct. 18, 2023), https://www.leadersedge.com/brokerage-ops/tapping-into-the-power-of-dissent [https://perma.cc/2A7P-HRCC] (arguing that productive dissent reduces groupthink, improves risk analysis, and correlates with enhanced corporate transparency, innovation, and financial performance); Marie Gould, *Corporate Dissenters,* EBSCO Research Starters: Sociology (2021), https://www.ebsco.com/research-starters/social-sciences-and-humanities/corporate-dissenters [https://perma.cc/UW6S-MN3Y] (defining articulated dissent as a positive form of internal critique that fosters ethical accountability and leads to greater corporate transparency; highlighting legal frameworks that protect dissent as a governance mechanism).

132. Lucian Arye Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 140–141 (2020), https://papers.ssrn.com/abstract_id=3544978 (explaining that diffuse oversight dilutes director liability discipline).

133. *Desktop Metal, Inc.* at *2–4, *70–72.

benefit-corporation context that structural experimentation does not, by itself, rewrite fiduciary obligations, reinforcing the idea that governance innovations are acceptable only so long as they leave the fiduciary core intact.[134] In conclusion, this episode demonstrates how observer mandates can create legally cognizable governance tension without reallocating control.

B. *Israeli Developments and Shadow Governance—Toward a Functional, Observer-Centric Middle Path*

This subsection turns to Israeli corporate jurisprudence and regulatory practice, where courts and ministries routinely appoint compliance and technical observers without statutory codification. The Israeli experience is examined because it reflects a functional rather than formal approach to fiduciary classification.

Israeli Companies Law Sections 252 and 253 enshrine care and loyalty but say nothing about observers.[135] Courts instead use a functional approach: under which fiduciary duties may arise where outsiders exercise substantial influence over corporate decision-making.[136]

During Nano's parallel Israeli litigation, the Tel Aviv District Court appointed certain individuals as observers, indicating that such roles may involve participation without conferring full director status or formal control.[137] Regulators

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134. *See McRitchie v. Zuckerberg,* 315 A.3d 518 (Del. Ch. 2024) (holding that directors of Delaware benefit corporations owe traditional fiduciary duties to stockholders absent express charter expansion of purpose); DEL. CODE ANN. tit. 8, § 365(c) (2025) (providing liability shield for benefit-corporation directors absent bad faith); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (establishing shareholder-value maximization as the default rule); *cf.* TEX. BUS. ORGS. CODE ANN. § 21.401 (West 2024); NEV. REV. STAT. § 78.138 (2024) (adopting constituency statutes allowing consideration of non-shareholder interests without altering fiduciary hierarchy).

135. Companies Law, 5759—1999 (Isr.) https://www.icnl.org/wp-content/uploads/Israel_CompaniesLaw.pdf [https://perma.cc/GSB2-59Q8] (explaining statutory silence on non-director roles).

136. *Desktop Metal, Inc.* at *75-89 (rejecting the claim that a U.S.-mandated board observer would violate Israeli law by functioning as a shadow director, preferring the opinion that Israeli law does not prohibit board observers and only imposes fiduciary duties when an individual effectively exercises director-level control).

137. *Murchinson Ltd. v. Nano Dimension Ltd.*, Tel Aviv Dist. Ct. 57198-03-23, ¶ 56 (May 10, 2023) (Isr.) *aff'd*, Isr. S. Ct. 3104/23 (explaining that court-appointed observers enhance transparency without control).

likewise rely on observer-type oversight mechanisms: Israeli law permits the appointment of government-designated observers to protect public or national interests, while innovation frameworks employ ongoing monitoring and reporting structures that functionally resemble observer roles in grant-funded start-ups.[138]

Academic commentary frames observers as a "middle-path" device, more transparent than shadow influence, yet less chilling than full fiduciary liability.[139] Critics, however, note extraterritorial and privilege risks, as foreign companies that install U.S.-mandated observers may trigger conflicts with home-country fiduciary law and complicate the treatment of confidential board communications.[140]

Israeli policy reform is trending toward disclosure rather than prohibition. The Israel Securities Authority's recent disclosure-reform initiative emphasizes enhanced transparency regarding governance structures and reporting obligations, thereby institutionalizing disclosure while preserving structural flexibility.[141]

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138. *See* Kobi Kastiel, Expert Report at 8–10, Desktop Metal, Inc. v. Nano Dimension Ltd., C.A. No. 2024-1303-KSJM (Del. Ch. Feb. 17, 2025) (explaining that Israeli law permits the appointment of observers, including by courts and government actors, to monitor corporate activity without conferring managerial or operational powers; noting that observers may participate in meetings, receive information, and report to relevant authorities); Government Companies Law, 1975, § 59K (Isr.) (authorizing appointment of government observers to attend board meetings, receive information, and report to ministers).

139. Nili & Shapira, *supra* note 43, at 715 (explaining that modular observers expand bandwidth without deterring candid advice).

140. *See Desktop Metal, Inc.* (discussing expert testimony by Professor Hamdani raising concerns that a U.S. national security observer could create tension with Israeli fiduciary duties under Companies Law §§ 252–253 by introducing competing loyalties, while ultimately treating such concerns as part of the broader cross-border governance complexities rather than adopting them as dispositive).

141. *See* ISRAEL SECURITIES AUTHORITY, CORPORATIONS DEPARTMENT, *Emphases for Reporting Corporations Ahead of the Publication of the 2025 Annual Reports and the Expected Activity of the Corporations Department in 2026* (Jan. 20, 2026), https://www.goldfarb.com/wp-content/uploads/2026/01/letter26.pdf (describing a broad review of periodic and immediate disclosure requirements and emphasizing transparency and regulatory certainty for investors); Goldfarb Gross Seligman, *Emphases for Reporting Corporations Ahead of the Publication of the Annual Reports* (Heb.), https://www.goldfarb.com/he/%D7%93%D7%92%D7%A9%D7%99%D7%9D-%D7%9C%D7%AA%D7%90%D7%92%D7%99%D7%93%D7%99%D7%9D-%D7%94%D7%9E%D7%93%D7%95%D7%95%D7%97

In sum, Delaware's *Nano Dimension* ruling and Israel's functional jurisprudence validate observers as lawful, value-adding components of board architecture so long as influence never hardens into command. The comparative evidence supports a governance equilibrium in which observers supply contrarian expertise and compliance assurance, yet remain cabined by explicit mandate, disclosure, and the ever-looming possibility that courts will reclassify influence as control should the balance tip too far.

The Israeli pattern reinforces the Article's position that observer legitimacy depends on functional influence rather than title. This jurisprudence underwrites the Impact Governance Stack's emphasis on mandate specificity and disclosure as mechanisms that can preserve advisory status while enabling real governance presence.

C. *Empirical Data from Surveys*

1. *Empirical Data from NYU Grunin Center Survey*

This subsection reports data collected from a targeted in-person survey of legal and investment professionals attending the 2025 conference at the NYU Grunin Center on impact investing and entrepreneurship. The dataset is included because these respondents advise mission-driven firms at formative governance stages. Results from eleven respondents are presented below in Figures 3 through 6 and analyzed accordingly.

%D7%99%D7%9D-%D7%9C%D7%A7%D7%A8%D7%90%D7%AA-%D7%A4%D7%A8%D7%A1%D7%95%D7%9D-%D7%94/ (same).

1. Who should have the primary right to nominate an ESG / Sustainability, and Impact Investing board observer?

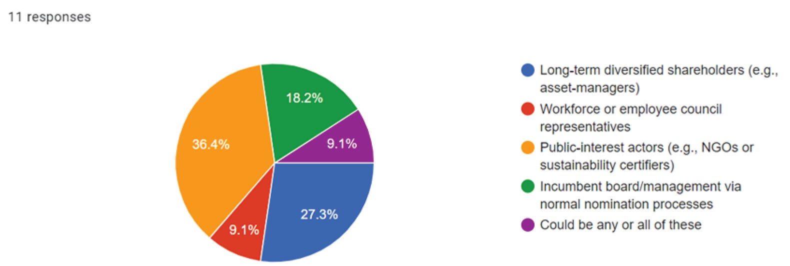

Figure 3—Nomination Rights for ESG and Impact Observers

When asked about Nomination Rights for ESG and Impact Observers, expert practitioners were asked the following question: "Who should have the primary right to nominate an ESG, Sustainability, and Impact Investing board observer?" The practitioners replied as follows—

- Public-interest actors (e.g., NGOs or sustainability certifiers): 36.4%
- Long-term diversified shareholders (e.g., asset managers): 27.3%
- Incumbent board/management via normal nomination processes: 18.2%
- Workforce or employee council representatives: 9.1%
- Could be any or all of these: 9.1%

The most frequently selected response was public-interest actors (36.4%), suggesting that legal experts envision a meaningful role for civil society or mission-aligned third parties in shaping board-level sustainability oversight. The second-most preferred group was long-term diversified shareholders (27.3%), which reflects confidence in investors with enduring capital exposure to responsibly nominate ESG observers. Only a minority endorsed traditional nominating channels: just 18.2% supported board-led nomination, and 9.1% favored employee representation or a pluralistic "any-of-the-above" approach.

This distribution signals a willingness among legal practitioners to move beyond traditional shareholder primacy in favor of stakeholder-aligned nominating mechanisms, so long as the role is appropriately scoped and the appointing entities are mission-relevant and credible. It also reveals skepticism about leaving this function entirely to incumbent management or dispersed internal processes.

2. What do you consider the *greatest upside* of adding a non-voting ESG, Sustainability, and Impact Investing observer?

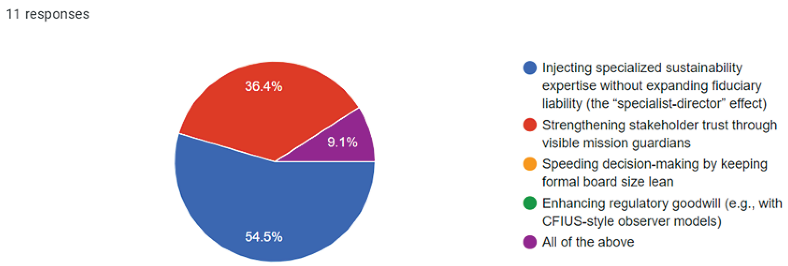

FIGURE 4—GREATEST UPSIDE OF A NON-VOTING ESG, SUSTAINABILITY AND IMPACT INVESTING OBSERVER

When asked about Nomination Rights for ESG and Impact Observers, practitioners were asked the following question: "What do you consider the greatest upside of adding a non-voting ESG, Sustainability, and Impact Investing observer?**"** Most respondents (54.5%) identified the primary benefit of ESG observers as the ability to inject specialized sustainability expertise into boardroom deliberations without expanding fiduciary liability. This highlights a preference for an "expert-advisory" function where observers offer technical insight or normative perspective, particularly on environmental or social issues, but do so without complicating director duties under corporate law. In effect, observers are seen as a way to professionalize ESG input while sidestepping the risks that come with board seats or fiduciary status.

A significant minority (36.4%) selected stakeholder trust as the greatest upside, indicating that legal experts also recognize the symbolic and reputational function of visibly incorporating ESG perspectives, particularly as a signal to employees, consumers, or advocacy groups. However, the lack of support for regulatory appeasement or operational streamlining (both receiving 0%) reveals that practitioners do not see ESG observers as compliance-oriented or efficiency-maximizing figures, nor do they endorse vague or catch-all justifications (as reflected by only 9.1% choosing "all of the above").

Taken together, the data points to a careful delineation of the observer role: practitioners value observers for their targeted, non-binding expertise and legitimacy, but expect this to be functionally grounded, not rhetorically expansive. The observer's role is not to reduce complexity, but to enrich decision-making with focused input that is otherwise absent from the traditional board composition.

3. What is your *primary concern* about institutionalizing ESG, Sustainability, and Impact Investing observers?

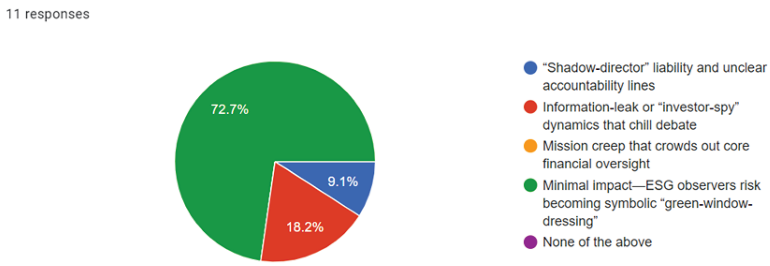

FIGURE 5—PRIMARY CONCERN WITH INSTITUTIONALIZING ESG, SUSTAINABILITY, AND IMPACT INVESTING OBSERVERS

When asked about Nomination Rights for ESG and Impact Observers, practitioners were asked the following question: "What is your primary concern about institutionalizing ESG, Sustainability, and Impact Investing observers?" The survey expert practitioners replied as follows—

While multiple potential risks were presented, the dominant concern cited by respondents (72.7%) was that ESG observers may lack real influence and become largely symbolic—a form of "green-window-dressing." This suggests that institutional ineffectiveness, rather than legal overreach, is viewed as the more immediate challenge. That said, the presence of other concerns—including information leakage or "investor-spy" dynamics (18.2%) and shadow-director liability (9.1%)—indicates that practitioners remain attentive to governance and legal exposure, even if those risks are perceived as secondary. Rather than rejecting legal or structural concerns outright, the data suggests that a failure to meaningfully integrate the role into deliberative governance processes is seen as the greatest obstacle to the observer model's legitimacy.

4. If regulators were to act, which approach should they take toward ESG, Sustainability, and Impact Investing - focused board observers in public corporations?

11 responses

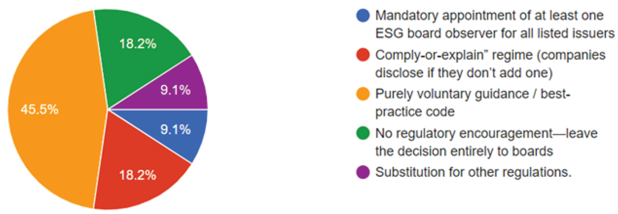

FIGURE 6—REGULATORY APPROACH TOWARD ESG, SUSTAINABILITY, AND IMPACT INVESTING

When asked about Nomination Rights for ESG and Impact Observers, practitioners were asked the following question: "If regulators were to act, which approach should they take toward ESG, Sustainability, and Impact Investing-focused board observers in public corporations?" The survey expert practitioners replied as follows—

- Purely voluntary guidance / best-practice code: 45.5%
- Comply-or-explain regime (companies disclose if they don't add one): 18.2%
- No regulatory encouragement—leave the decision entirely to boards: 18.2%
- Mandatory appointment of at least one ESG board observer: 9.1%
- Substitution for other regulations: 9.1%

Respondents expressed a strong preference for soft-law approaches.[142] A plurality (45.5%) supported voluntary frameworks such as best-practice codes or inclusion in stewardship guidance. Equal minority segments supported comply-or-explain models and non-interventionist approaches (18.2%

142. Soft law refers to governance tools that shape behavior through guidance rather than coercion. These instruments lack formal legal force but exert practical influence through norms, expectations, and market pressure. Examples include best-practice codes, voluntary standards, stewardship principles, disclosure frameworks, and comply-or-explain regimes.

each), while only one respondent endorsed a mandatory observer rule. Another respondent viewed observer appointment as a possible substitute for more onerous ESG regulation.

Therefore, based on the research, it seems that legal experts appear to favor regulatory modesty in this domain. Rather than impose structural mandates, they prefer mechanisms that enable companies and investors to experiment with observer roles organically, guided by reputational and market-based incentives rather than statutory obligation.

Taken together, the survey results demonstrate a measured but constructive openness among legal practitioners to the introduction of ESG and impact board observers. The prevailing view supports their integration as non-fiduciary specialists, capable of adding domain-specific insight and enhancing mission fidelity without triggering legal liability or governance disruption. At the same time, respondents caution against poorly defined or performative deployments, emphasizing that observers must be meaningfully empowered and appropriately selected to avoid becoming mere symbolic gestures.

The data might also suggest that legal and regulatory innovation in this area could be pursued effectively through soft guidance, contractual mechanisms, and stakeholder-driven experimentation rather than hard mandates. Observers hold promise as tools of mission preservation and pluralistic governance, but their value ultimately hinges on careful institutional design and role legitimacy.

While the sample size is small and self-selected, these results suggest that observers play an increasingly norm-setting role in the boardroom, particularly in firms without deep in-house ESG expertise or external enforcement.

These findings demonstrate practitioner openness to observer integration paired with concern that the role risks symbolic deployment. The data substantiate the Article's thesis that observer effectiveness turns on institutional design rather than mere appointment.

2. *Practitioner Perspectives from the ABA Business Law Section Survey*

This subsection analyzes questionnaire data collected from private-equity and venture-capital attorneys at the ABA Business Law Section Spring Meeting, a population selected because these lawyers operationalize shadow-director doctrine in real-time deal structuring.[143] The survey yielded twenty-two completed questionnaires, and the full instrument appears in Appendix B.

Nearly 32% of respondents reported encountering shadow-director issues at least occasionally, yet only 9% believed their management clients moderately or mostly understood the associated liability. Figure 7 presents the frequency distribution, and Figure 8 reports perceived levels of management understanding. Although exploratory, these results mirror patterns observed in the NYU Grunin Center and NVCA surveys, indicating that shadow-director risk is more prevalent than it is understood. This gap strengthens the case for a contract-based observer who can flag emerging control risks before functional influence hardens into fiduciary exposure.[144] Nearly two-thirds of respondents also supported statutory safe harbors for bona fide observers,[145] aligning with the policy framework advanced in Section VI.

1. How frequently, if at all, have you encountered questions or concerns relating to shadow directors in your practice?

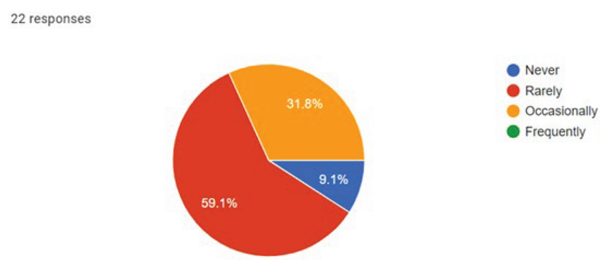

FIGURE 7 —FREQUENCY ENCOUNTERING SHADOW DIRECTOR ISSUES

143. Spring Meeting (New Orleans, 25 Apr 2025), see https://www.americanbar.org/news/abanews/aba-news-archives/2025/04/aba-business-law-spring-meeting-new-orleans/.

144. *See*, *e.g.*, INT'L CORP. GOVERNANCE NETWORK, STEWARDSHIP PRINCIPLES (2024) (outlining voluntary investor-stewardship standards for ESG governance); U.K. Fin. Reporting Council, UK STEWARDSHIP CODE (2020) (setting best-practice expectations for institutional investors); WORLD ECON. FORUM, THE STATE OF SOCIAL ENTERPRISE: A REVIEW OF GLOBAL DATA 2013–2023 (Apr. 2024) (compiling international social-enterprise metrics and disclosure trends).

145. (Survey Q7).

2. In your experience, how clearly do company management teams understand the concept of shadow directorship and associated risks?

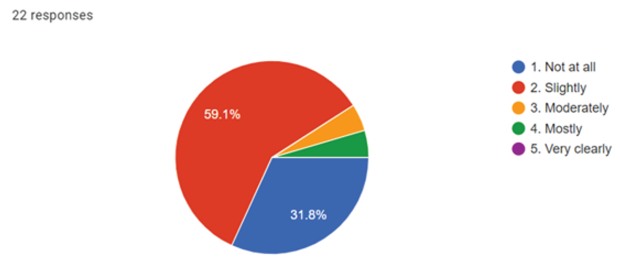

FIGURE 8—PERCEIVED CLARITY OF MANAGEMENT UNDERSTANDING

D. *Behavioral Anchoring and Contrarian Voice*

This subsection integrates behavioral-science research showing that structured dissent improves forecasting accuracy and governance calibration, providing a non-doctrinal rationale for embedding observers within board deliberations. Practitioners surveyed for this project described observers as "conscience-keepers" who redirect attention to long-term stakeholder consequences when agendas drift toward short-term earnings optics.

This account aligns with research on "smart contrarians." Chengwei Liu identifies four organizational traps, dominant logic, elitism, stereotyping, and self-reinforcing culture, that cause teams to filter out disconfirming information and overweight conformist cues.[146] A strategically positioned dissenting voice can counter these traps by surfacing neglected data, broadening mental models, and stress-testing premature consensus. Observers are particularly effective in this role because, lacking formal voting power, they can raise undiplomatic questions or restate sidelined impact metrics without threatening managerial authority. Boards that integrate such structured

146. Chengwei Liu, *How to Be a Smart Contrarian*, HARV. BUS. REV. (Sept. 22, 2021), https://hbr.org/2021/09/how-to-be-a-smart-contrarian (explaining the four behavioral traps that block long-term value creation and showing how contrarian perspectives disrupt informational cascades).

dissent outperform peers on forecasting accuracy and risk calibration, two foundations of mission integrity.[147]

Quantitative evidence reinforces this behavioral account. A June 2022 Harvard Business School working paper that tracked millions of U.S. brokerage trades finds that retail investors often buy "loser" stocks and sell "winners" immediately after large earnings surprises.[148] Those contrarian flows are strong enough to reshape post-earnings-announcement drift and the broader momentum effect, demonstrating that even a small cohort of dissenters can meaningfully alter collective price discovery.[149] Earlier foundational work shows that long-term "value" (i.e., contrarian) portfolios outperform glamour stocks because they exploit systematic investor over-extrapolation rather than bearing higher risk.[150]

Collectively, these findings underscore both the empirical value of dissent and the structural blind spots in governance systems that fail to accommodate it. The problem is not a lack of examples but a lack of design: observers remain institutionally fragile not because their contributions are marginal,

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147. Nizan Geslevich Packin, *It's (Not) All About the Money: Using Behavioral Economics to Improve Regulation of Risk Management in Financial Institutions*, 15 U. PA. J. BUS. L. 419 (2013), https://scholarship.law.upenn.edu/jbl/vol15/iss2/3 [perma.cc/WC4F-RH9H] (explaining how behavioral economics can improve risk governance in connection with board activity); Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCHOL. REV. 23 (1986), https://doi.org/10.1037/0033-295X.93.1.23 (demonstrating that consistent minority dissent stimulates divergent thinking, creativity, and more accurate group decisions than majority consensus); Lones Smith, Peter Norman Sørensen & Jianrong Tian, *Informational Herding, Optimal Experimentation, and Contrarianism,* 88 REV. ECON. STUD. 2527 (2021), https://doi.org/10.1093/restud/rdab001 (modeling how contrarian behavior improves group learning by resisting premature consensus in environments prone to informational cascades); Stefan Schulz-Hardt et al., *Group Decision Making in Hidden Profile Situations: Dissent as a Facilitator for Decision Quality*, 91 J. PERS. & SOC. PSYCHOL. 1080 (2006), https://doi.org/10.1037/0022-3514.91.6.1080 (finding that dissent improves group problem-solving by encouraging the sharing of unique, privately-held data in complex environments).

148. Cheng (Patrick) Luo et al., *Retail Investors' Contrarian Behavior Around News, Attention, and the Momentum Effect*, HARV. BUS. SCH. WORKING PAPER NO. 62561, (June 2022), https://www.hbs.edu/faculty/Pages/item.aspx?-num=62561 (explaining that intensifying retail contrarian trades drive both post-earnings-announcement drift and momentum).

149. *Id.*

150. Josef Lakonishok, Andrei Shleifer & Robert W. Vishny, *Contrarian Investment, Extrapolation, and Risk*, 49 J. FIN. 1541 (1994), https://www.jstor.org/stable/2329262?seq=1 (explaining that value-oriented contrarian strategies outperform because they exploit investor misjudgment, not additional risk exposure).

but because their presence has not been conceptually integrated. To move beyond workarounds, governance must begin to treat observation not as peripheral or anomalous, but as a core modality of board-level sensemaking. The framework that follows reimagines observation as a deliberate governance function rooted in principle rather than expedience. It begins with a shift in perspective, from defending the observer's place within existing constraints to reimagining a governance ecosystem in which observation plays a generative, even normative, role. If observation is to be cultivated rather than merely tolerated, it must be embedded in institutional logics that reward structured contribution, protect principled dissent, and treat proximity not as a threat but as a form of ethical engagement.

In conclusion, the litigation record, comparative jurisprudence, and practitioner evidence establish a single proposition. Impact observers can contribute durable governance value when their presence is formalized through mandate clarity, disclosure discipline, and liability boundaries. The empirical record therefore functions as the evidentiary spine for the Impact Governance Stack advanced in Part VI. The next Part sketches this shift not as technocratic reform, but as a governance ethos.

VI.
Toward a Framework for Risk-Sensitive Governance: Reimagining the Role of the Observer

The prior discussion suggests a need to reposition observation not as an anomaly within governance, but perhaps as a category deserving conceptual autonomy. Unlike fiduciary oversight, which is rooted in legal authority and enforceable obligations, observation offers a structurally proximate yet formally powerless mode of presence.[151] This form of engagement enables a pluralization of structured inputs into board deliberation without triggering control-based liability. Its value lies not in substituting for decision-making, but in deepening the informational and normative bandwidth of governance itself.

151. This distinction mirrors contemporary governance practice differentiating legally empowered boards of directors from advisory bodies that provide structured guidance without carrying fiduciary duties. *See* The Think & Grow Global, Board Report, *supra* note 58, at 42–43 (explaining that a board of directors is a "governing body with legal power and responsibility," whereas an advisory board offers guidance "without legal authority," despite often playing a critical role in organizational success).

If the twenty-first-century corporation is to remain both agile and accountable, it must move beyond traditional hierarchies of command and compliance. It must pursue purpose without weakening governance. The board observer, often dismissed as peripheral, can support this shift. The observer is not bound by fiduciary duty and is not excluded from deliberations. This position allows fresh perspectives. It also enables the observer to raise concerns and to encourage long-term thinking when conventional incentives fall short. Their distance from fiduciary authority is precisely what makes this possible. Insiders may lack the structure or incentives to surface such questions. This role is not accidental. It reflects a deeper change in governance. Impact does not arise from control alone. It also comes from proximity, presence, and principled attention. To realize this potential, institutions must be designed for observers rather than merely tolerating them. This task is not only technical. It is ethical and architectural. A core step is legal recognition of mission-driven observation as a legitimate governance practice. Fiduciary duties reflect loyalty and care. Modern governance must also recognize the value of dissent when it seeks to realign rather than obstruct. Safe harbor protections for observers appointed by philanthropic investors, public interest actors, or purpose-aligned stakeholders would mark a meaningful shift. Such protections would affirm that candid engagement without de facto control strengthens governance rather than threatening it.

Law alone is not enough. Governance culture and structure must follow. Bylaws, charters, and shareholder agreements should treat observation as a core element of impact oversight. They should specify who has access, on what terms, and with what responsibilities. This clarification does not bureaucratize the role. It dignifies it. When observers are built into board design, their presence no longer signals suspicion. It reflects institutional maturity.

Disclosure plays a complementary role. Naming the observer in proxy statements, ESG filings, or public benefit reports is not an act of regulatory compliance, but instead a gesture of democratic transparency. Stakeholders have the right to know who sits at the governance table and what values they carry. As ESG metrics become proxies for legitimacy in capital markets, the presence of trusted, non-fiduciary stewards may prove a quiet asset in credibility's ledger.

This architecture need not be parochial. Soft-law regimes already shape investor behavior via norms, not mandates. These frameworks should expand their horizons to include observation as a recognized modality of engagement. The logic is simple: if engagement is a form of responsibility and observation a means of listening, then formalizing the latter enhances, rather than dilutes, the former. Doing so would elevate observers from informal appendages to intentional participants in global stewardship culture.

Yet architecture without cultivation is hollow. As with directors, observers must be educated—not only in governance mechanics but in regulatory obligations and market expectations. The ability to pose the uncomfortable question, to resist consensus drift, or to read the long arc of mission against the pull of quarterly pressures is not innate. It is learned. Mission-oriented institutions such as B Lab or the ICGN could curate training programs that equip observers to walk the line between presence and intervention, dissent and respect, alertness and restraint. A parallel can be drawn to Sarbanes-Oxley's "financial expert" designation for audit committees, which formalized expertise through a simple statutory hook.

Law must evolve, too. Hybrid legal forms like public benefit corporations, low-profit LLCs, and social-purpose entities have gestured toward stakeholder governance while leaving its mechanics undertheorized. These frameworks should explicitly authorize observation—not as an afterthought, but as a core design feature. Just as statutes articulate fiduciary duties, so too can they specify roles for those who serve the mission from within the room but outside the chain of command.

And if law and culture align, resources must follow. Governments and philanthropic ecosystems that claim to value accountability should back it with incentives. Modest funding for observer infrastructure (e.g., through tax credits, grants, or co-financing of training) can nurture a generation of hybrid firms that take observation seriously, not as optics, but as operational ethics.

To imagine such a world is not to romanticize the observer. It is to recover a broader vision of governance—one that prizes attentiveness as much as authority, and that understands stewardship not as surveillance, but as shared regulatory obligations and market expectations-related labor. The observer is not a watchdog, nor a whisperer. They are, at best, a conscience: embedded yet independent, invested yet unbeholden. Their promise lies not in perfect foresight or superior judgment, but in their capacity to slow the rush of certainty, and in doing so, hold open the possibility that purpose is not a destination, but a discipline.

Conclusion

Board observers first emerged in the shadows of venture capital, contractual tools negotiated to ensure that lead investors could monitor capital efficiency and strategic alignment without assuming fiduciary obligations. Over time, what began as a workaround has matured into a widely accepted governance mechanism. Observers are now routinely embedded in startups, growth-stage companies, and even regulated financial entities.[152] Yet their legal architecture has remained underdeveloped, and their strategic potential undertheorized. As this Article has shown, the impact observer is more than a passive witness. Done right, it is a functional node in the evolving governance network—a means of bringing long-term, stakeholder-centered insight into decision-making processes that remain otherwise bound by short-term fiduciary logic.

Our empirical findings confirm both the prevalence of observer use and the appetite for more mission-oriented applications. Across our ABA and NYU Grunin Center surveys, practitioners and investors identified the observer role as a low-friction way to spot mission drift, flag ESG misalignment, and raise internal red flags before reputational or regulatory crises erupt. At the same time, responses surfaced key concerns: that observers may devolve into "green window-dressing," or that without proper guardrails, their presence could create ambiguity in governance duties. These concerns underscore the importance of codifying the observer role with precision. Just as legal scholarship has focused on the risks of shadow directors and specialist directors, so too must it reckon with the underexplored terrain of observer liability, legitimacy, and leverage.

To that end, we propose the Impact Governance Stack: a layered regulatory and institutional approach to make impact observers both useful and safe. Statutory recognition would reduce ambiguity around observers' legal standing and reinforce their legitimate presence in hybrid and mission-driven firms. Alignment with investor stewardship codes would ensure that observers are integrated into the governance expectations of large asset managers and fiduciaries. Outcome-linked disclosure, modeled on evolving ISSB, SASB, and CSRD frameworks, would create transparency about the observer's role and its relationship

152. *See Desktop Metal, Inc.* (explaining CFIUS-mandated observer in a defense-tech merger).

to ESG performance. Finally, a professional training and credentialing pipeline would help standardize observer practices, build a recognized field of practice, and avoid missteps that could trigger reclassification as fiduciaries or de facto directors.

Developments in 2025 only amplify the urgency of this reform. For instance, the first wave of CSRD reports reveals companies grappling with double materiality, boardroom sustainability integration, and intensified stakeholder scrutiny.[153] Simultaneously, jurisdictions like the UK and UAE are updating stewardship codes, transparency mandates, and climate governance regimes—often outpacing the boardroom's structural capacity to respond. Observers, especially those trained and institutionally recognized, may offer a flexible response: a modular governance tool that brings critical outside-in perspective without disrupting corporate hierarchies. Still, these empirical findings are preliminary and should not be read as universal; they offer suggestive patterns rather than definitive proof.

Ultimately, the observer is not a substitute for fiduciary duty or board reform. But it is a vital supplement—a governance instrument designed for an era when mission and margin cannot be neatly separated.[154] By giving structure to what was once informal and purpose to what was once reactive, the impact observer can transform passive observation into principled engagement. In doing so, it helps bridge the distance between ESG aspiration and boardroom accountability. As a modular role, the observer can be flexibly inserted into diverse governance systems—bridging purpose and process without overhauling foundational power structures. If stakeholder capitalism is to have real substance rather than rhetorical flair, governance innovation must begin not only with new laws, but with new roles.[155] The observer is one such role—waiting to be institutionalized, professionalized, and scaled.[156]

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153. SIMON TOMS ET AL, *supra* note 2.

154. This role would enable persons to raise contrarian or long-horizon concerns with minimal chilling effect—a dynamic that behavioral scholars deem essential for healthy dissent. *See* Cass Robert Sunstein, *supra* note 67 (explaining dissent's role in avoiding informational cascades).

155. Reinier Kraakman & Henry Hansmann, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (suggesting that corporate law globally has converged on a shareholder-oriented model, limiting structural alternatives).

156. *See* Nili & Shapira, *supra* note 43, at 668–73 (explaining expertise-driven duty expansion); *see also* DEL. CODE ANN. tit. 8, § 141(a) (2024) (vesting boards with plenary management authority); Brett McDonnell, *The Corrosion Critique of Benefit Corporations*, 101 B.U. L. REV. 1421 (2021) (discussing tensions in corporate purpose and governance design).

Appendix A — NYU Grunin Survey Instrument (Index #1)

Survey: NYU - June 3-4, 2025

Instructions for Completion:

Thank you for participating in this survey. Your responses will help us assess current legal practices and awareness regarding shadow directorship. The survey should take approximately 2-3 minutes to complete.

- Please answer each question based on your professional experience.
- Where applicable, provide brief explanations to offer context to your responses.
- Your input will remain confidential and will be used to inform discussions within the subcommittee. By clicking on the "I AGREE" button below, you give consent to participate in the survey.

Participant Profile - Role: (Select all that apply)

- In-house legal counsel
- Corporate attorney (law firm)
- Other (please specify)
- Other…

Participant Profile - Jurisdiction(s) of practice:

1. Who should have the primary right to nominate an ESG/ Sustainability and Impact Investing board observer?

- Long-term diversified shareholders (e.g., asset-managers)
- Workforce or employee council representatives
- Public-interest actors (e.g., NGOs or sustainability certifiers)
- Incumbent board/management via normal nomination processes
- Other…

2. What do you consider the greatest upside of adding a non-voting ESG, Sustainability, and Impact Investing observer?

- Injecting specialized sustainability expertise without expanding fiduciary liability (the "specialist-director" effect)

- Strengthening stakeholder trust through visible mission guardians
- Speeding decision-making by keeping formal board size lean
- Enhancing regulatory goodwill (e.g., with CFIUS-style observer models)
- Other…

3. What is your primary concern about institutionalizing ESG, Sustainability, and Impact Investing observers?

- "Shadow-director" liability and unclear accountability lines
- Information-leak or "investor-spy" dynamics that chill debate
- Mission creep that crowds out core financial oversight
- Minimal impact—ESG observers risk becoming symbolic "green-window-dressing."
- None of the above

4. If regulators were to act, which approach should they take toward ESG, Sustainability, and Impact Investing -focused board observers in public corporations?

- Mandatory appointment of at least one ESG board observer for all listed issuers
- Comply-or-explain" regime (companies disclose if they don't add one)
- Purely voluntary guidance / best-practice code
- No regulatory encouragement—leave the decision entirely to boards
- Other…

APPENDIX B — ABA SURVEY INSTRUMENT

Survey: ABA Subcommittee on Private Equity and Venture Capital

Business Law Spring Meeting 2025 – April 24-26, New Orleans

Instructions for Completion

Thank you for participating in this survey. Your responses will help us assess current legal practices and awareness regarding shadow directorship. The survey should take approximately 2-3 minutes to complete.

- Please answer each question based on your professional experience.
- Where applicable, provide brief explanations to offer context to your responses.
- Your input will remain confidential and will be used to inform discussions within the subcommittee.

By clicking on the "I AGREE" button below, you give consent to participate in the survey.

Participant Profile - Role: (Select all that apply)

- Question Type
- In-house legal counsel
- Corporate attorney (law firm)
- Other (please specify)

Participant Profile - Jurisdiction(s) of practice:

1. How frequently, if at all, have you encountered questions or concerns relating to shadow directors in your practice?

- Never
- Rarely
- Occasionally
- Frequently

2. In your experience, how clearly do company management teams understand the concept of shadow directorship and associated risks?

(Rate on a scale from 1 to 5, where 1 = Not at all and 5 = Very clearly)

- Not at all
- Slightly
- Moderately
- Mostly
- Very clearly

3. Have you ever advised clients specifically regarding shadow director liabilities in insolvency contexts?

- Yes
- No

4. If you answered YES to Question 3 ("Have you ever advised clients specifically regarding shadow director liabilities in insolvency contexts?"), please briefly explain the circumstances

5. In your experience, do corporate board participants typically recognize when they are receiving instructions that could lead them to become a "shadow director"?

- Yes
- No
- Not sure

6. Do you believe that current laws in your jurisdiction are sufficient to deter inappropriate influence by shadow directors?

(Please briefly explain why or why not.)

7. Would you support clearer statutory definitions or expanded safe harbor provisions concerning shadow directorship?

- Yes
- No

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COMMENTARY ON *THE IMPACT OBSERVER*

ROSEMARY ADDIS AM*

This Commentary responds to the proposal by Professors Nizan Packin and Anat Alon-Beck for impact observers in the boardroom.

The analysis outlines major structural shifts defining the landscape in which boards are operating and how governance needs to respond. It references growing dialogue and experimentation that indicate prevailing models and practices of governance are not operating fit for purpose.

In that context, this Commentary acknowledges impact observers may have a role to play and sets out some key considerations to ensure their mandate is clear and effective in its orientation to purpose and impact. This includes elements of existing soft law that could frame the nature of the role and inform its substance.

This Commentary concludes that impact observers with an appropriate mandate could be a lever to advise and assist transition. However, they cannot obviate the need for boards to confront, interrogate, and anticipate non-financial factors beyond the balance sheet and take a longer-term view.

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INTRODUCTION

This Commentary responds to the proposal by Professors Nizan Packin and Anat Alon-Beck for impact observers in the boardroom.

The starting point is the increasingly complex landscape and changing expectations for boards. This Commentary looks further at the major structural shifts defining that landscape and how governance needs to respond. It argues that to deliver responsible value creation in the twenty-first century, boards increasingly need to confront, interrogate, and anticipate non-financial factors beyond the balance sheet and take a longer-term view.

Innovation and experimentation may be needed to shift dominant practice, and that could include a role for impact observers. This Commentary identifies how their mandate can be shaped to enhance effectiveness in helping boards shape a future-fit manifestation of governance.

As the article's authors caution: "the observer is not a substitute for fiduciary duty or board reform."[1] Every board will have to confront and learn to navigate contemporary complexities and transitioning economies.

I.
NEW GOVERNANCE REALITIES

The familiarity with which we recite megatrends of climate change and inequality, technological change and geopolitical tensions belie their real impact.[2]

A growing range of circumstances no longer fit the twentieth-century economic paradigm. The combined effects of an unstable climate, social unrest, artificial intelligence and political volatility are reshaping markets and society.[3] Leading economists including Michael Porter, Joseph Stiglitz, Kate

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1. Nizan Packin & Anat Alon-Beck, *The Impact Observer*, 22 N.Y.U. J. L. & BUS. 2, 363 (2026).

2. For context on global megatrends, *see, e.g.*, COMMONWEALTH SCI. & INDUS. RSCH. ORG., *OUR FUTURE WORLD: GLOBAL MEGATRENDS IMPACTING THE WAY WE LIVE OVER THE COMING DECADE* (2022), https://www.csiro.au/en/research/technology-space/data/our-future-world.

3. *See, e.g.*, VIKTOR SCHVETS, THE TWILIGHT BEFORE THE STORM: HOW TO AVOID A WORLD ON FIRE (2024); LINDSAY HOOPER & PAUL GILDING, UNIV. OF CAMBRIDGE INST. FOR SUSTAINABILITY LEADERSHIP, *COMPETING IN THE AGE OF DISRUPTION* (2025), https://www.cisl.cam.ac.uk/news-and-resources/

Rayworth, and Marianna Mazzucato identify misalignment of social, environmental and economic factors as a central insight of modern economics.[4]

The changing conditions will not wait for boards to be ready. As leading sustainability researcher Ioannis Ioannou put it: "If your board doesn't understand sustainability as a strategic concern, you have a structural vulnerability."[5]

A. *Difficult Terrain for Boards*

Many boards are grappling with the current-day complexity, regulatory reactions, and diverse, and sometimes divergent, stakeholder expectations.

Anticipating what matters most for the organization in the short, medium and longer term becomes a survival skill.[6] Floods become property damage and displacement for customers and employees, disrupted distribution networks become capital expenses. There are consequences including higher insurance premiums and lost productivity and revenue, which also flow through to shareholders.

The stakes are high. PWC's 2024 Global CEO Survey found 45% of chief executive officers do not believe their company will be viable in a decade on their current trajectory.[7] Boards need to engage actively with the issues and evidence to understand the environmental constraints, social imperatives, and

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publications/competing-age-disruption; SANDRINE DIXSON-DECLÈVE ET AL., CLUB OF ROME, *EARTH FOR ALL*: A SURVIVAL GUIDE FOR HUMANITY (2022).

4. *See, e.g.*, Michel E. Porter & Mark R. Kramer, *Creating Shared Value,* 89 HARV. BUS. REV. 2, 2–17 (2011), https://hbr.org/2011/01/the-big-idea-creating-shared-value; MARIANA MAZZUCATO, MISSION ECONOMY: A MOONSHOT GUIDE TO CHANGING CAPITALISM (2021); KATE RAYWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST-CENTURY ECONOMIST (2017); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (W.W. Norton & Company 2d ed. 2012); Joseph E. Stiglitz, *Facebook does not understand the marketplace of ideas,* FIN. TIMES (Jan. 17, 2020), https://www.ft.com/content/d4419bd8-3860-11ea-ac3c-f68c10993b04.

5. IOANNIS IOANNOU, HOLDING THE LINE: A PLAYBOOK FOR SUSTAINABILITY LEADERSHIP IN HOSTILE TERRAIN 4 (2025), https://www.london.edu/think/holding-the-line-sustainability-leadership.

6. *See, e.g.*, NASSIM N. TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2010) (introducing the concept of anti-fragile systems as a means of building fitness to respond to shocks).

7. PWC, PWC'S 28TH ANNUAL GLOBAL CEO SURVEY: REINVENTION ON THE EDGE OF TOMORROW 11 (2025), https://www.pwc.com/mk/en/news/pwc-2025-global-ceo-survey.html.

their implications for the organization: What are the physical risks? How might supply and distribution chains be affected? What does this mean for jobs, for consumers, for affordability of products? How will these factors affect asset values?

Failing to engage can leave value on the table. 88% of companies participating in the 2025 Morgan Stanley survey reported that their sustainability measures create net value, an increase from 2024.[8] As impacts of societal factors are better understood,[9] insights can drive innovation, including new products, services and business models. [10]

B. *Renegotiating Twenty-First Century Governance*

The relationship between markets and society has always been a dynamic process of negotiation.[11] When momentum builds around societal issues, expectations can shift rapidly. Consider consumer boycotts in the anti-apartheid movement, investor responses to the destruction of sacred sites at Juukan Gorge to make way for mining,[12] and pressure on markets in the face of Russian aggression in Ukraine.[13] Governance evolves too as a function of societal expectations. This influences what is expected of boards, including the interpretation of applicable duties at law.

Speaking on contemporary ideas and debates in corporate governance, Justice Michelle Gordon said that the central questions arising in debates around directors' duties and corporate governance are not novel: "what is the purpose of the corporation; what kinds of interests and consequences should directors

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8. MORGAN STANLEY INSTITUTE FOR SUSTAINABLE INVESTING, SUSTAINABILITY SIGNALS: CORPORATES 2025, AT 2 (2025), https://www.morganstanley.com/insights/articles/corporate-sustainability-signals-report-2025.

9. Porter & Kramer, *supra* note 4, at 5.

10. *See id.* at 7; HOOPER & GILDING, *supra* note 3.

11. BEN YEOH CHATS: *Jérǒme Tagger: Sustainability, ESG as a Negotiation, Impact, Investing, Preventable Surprises*, at 09:39 (Apple Podcasts, Nov. 2, 2022); Jack Smith, *ESG Now Needs to Prove Its Worth, Argues ESG Champion and Historian*, TOP 1000 FUNDS (Oct. 25, 2022), https://www.top1000funds.com/2022/10/esg-now-needs-to-prove-its-worth-argues-esg-champion-and-historian (citing a discussion with David Wood).

12. *Juukan Gorge: Rio Tinto Investors in Pay Revolt Over Sacred Cave Blast*, BBC (May 6, 2021), https://www.bbc.com/news/business-57018473.

13. Alessandro Parodi & Alexander Marrow, *Foreign Firms' Losses From Exiting Russia Top $107 Billion*, REUTERS (Mar. 28, 2024), https://www.reuters.com/markets/europe/foreign-firms-losses-exiting-russia-top-107-billion-2024-03-28/.

consider when making decisions; and how far ahead should they look?"[14] However, new and different answers emerge as a function of changing conditions and expectations. Her Honor stressed that today this goes beyond 'ESG'[15] to "raise broader and deeper questions about corporate purpose and corporate governance."[16]

The structural transformation underway will profoundly reshape expectations of directors and the organizations they govern. Already, the United Kingdom, a reference point for many common law countries, has reshaped fiduciary duties of directors to require directors "to promote the success of the company for the benefit of its members as a whole," which includes considering the likely consequences of decisions on the community and environment in the long term.[17]

Recent prudential guidance outlines the role of boards and governance of banks and insurers[18] to embed climate risks in strategy, risk appetite, and decision-making. This is cast as part of broader expectations that they "run their business prudently, consistent with the firm's own safety and soundness and the continuing stability of the financial system."[19]

Whether you start from a position that boards need to expand their focus to social and environmental matters to deliver financial value and manage risk or expect more jurisdictions to expand the legislative expression of directors' duties, the geography of the boardroom is shifting.

14. Hon. Michelle Gordon AC, Harold Ford Memorial Lecture 2023 at Melbourne Law School: *Corporate Governance – Big Ideas and Debates?* 2 (May 24, 2023), https://law.unimelb.edu.au/centres/mccl/research/research-programs/corporate-law-and-financial-regulation/engagement/the-harold-ford-memorial-lecture/2023-harold-ford-lecture.

15. ESG is the acronym used to describe environmental, social and governance factors and has its origins in a 2004 United Nations initiative. UNITED NATIONS GLOB. COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD ii (2004), https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/280911488968799581.

16. Gordon, *supra* note 14, at 2.

17. Companies Act 2006, c. 46, § 172(1) (UK).

18. Bank of England Prudential Regulatory Authority, *Supervisory Statement 5/25 – Enhancing Banks' and Insurers' Approaches to Managing Climate Related Risks*, 2025/5, at 2 (Dec. 2025) (UK), https://www.bankofengland.co.uk/prudential-regulation/publication/2025/december/enhancing-banks-and-insurers-approaches-to-managing-climate-related-risks-ss.

19. *Id.* at 12.

II.
Ushering in a New Paradigm

The imperative for directors is to build new decision-making muscles and chart a course for their organisations. The starting point is not uniformly strong performance or effective boards. Research critiquing boardroom practice has called it time to get "back to the drawing board",[20] declared "boards aren't working",[21] and asked "what's wrong with boards?"[22]

Against this backdrop, more of the same or adding things onto an already complex agenda is unlikely to deliver what is needed. Boards will need to do some things differently and do some different things.

Researchers and commentators are suggesting a range of interventions, for example: appointed contrarians to provide constructive challenge,[23] an "Office of the Board" to support directors with research, analysis, and insight, transparency around director workloads, and observers, including impact observers. Industry bodies report growth in organizations utilising advisory mechanisms as part of integrated governance structures.[24]

Whatever the merits of the different interventions, the growing dialogue and experimentation indicate a broader sense that prevailing models and practice of governance are not operating in a way that is fit for their purpose.

A. *Trusted Advisers on Purpose*

In this context, the proposal for impact observers is one potential lever for change. A central thesis is that impact observers can provide 'insight unburdened by liability.'[25] The

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20. Meena Thuraisingham, Identity, Power and Influence in the Boardroom 134 (2020) (citing Colin B. Carter & Jay W. Lorsch, Back to the Drawing Board 1 (2004)).

21. *Id.* at 169 (citing Dominic Barton & Mark Wiseman, *Where Boards Fall Short*, 93 Harv. Bus. Rev. 99, 100 (2015), https://hbr.org/2015/01/where-boards-fall-short).

22. Fred Hilmer, What's Wrong With Boards? Rethinking Corporate Governance (2022); *see* Thuraisingham, *supra* note 20 at 169–170.

23. *See, e.g.*, Dana Brakman Reiser & Claire Hill, *Why Boards Should Have Rotating Contrarians, 20* Ohio State Bus. L. J. (2026).

24. Advisory Board Centre, 2025-2027 State of the Market: Exploring the Art and Science of Advisory Board Best Practice 33 (2025), https://www.advisoryboardcentre.com/our-research/state-of-the-market/.

25. *Id.*

question is: what would be needed for them to be effective? The answer includes capacity and a mandate to bring purpose and impact into frame for decision-making.

Walking the line of meaningful influence and accountability is a point of constructive tension, at law and in practice.[26] Fiduciary duties are fundamentally obligations of trust. They arise in different shapes and circumstances, in equity and under statute.[27] Impact observers will need to be capable of navigating, and even facilitating, the nuanced and dynamic nature of this level of trust-based engagement. Stockholders, regulators or other stakeholders may pursue legal action to test the legal principles or exert pressure, even if no liability is ultimately held to exist.

Greater clarity around who appoints impact observers would assist in setting the frame for the interests for which they are expected to act: Are they to be nominated by investors as part of broader stewardship measures or initiated and appointed by the company? Contractual arrangements can be designed to then set out a mandate with appropriate clarity.

Statutory recognition of impact observers could reduce ambiguity and provide legitimacy in law. However, care would be needed to ensure regulatory measures provide a safe harbor without obscuring or forestalling progress on structural gaps in fiduciary duty and board practice.

If appointing an observer becomes a compliance exercise, it may be seen as a box to tick rather than inviting challenge to interrogate the strategic risks and opportunities. Further, regulatory change is often hard won. Putting energy into recognition of observers in law may delay or deflect the debate around whether directors' fiduciary duties are future fit. Advocacy and resources for statutory change may be better placed toward seeking similar change in other jurisdictions. These factors may help explain the preference practitioners expressed for "soft guidance, contractual mechanisms, and stakeholder-driven experimentation, rather than hard mandates."[28]

Soft law, which is already a feature of the corporate governance landscape, includes structured practice and ethical

26. *See, e.g.*, Tamar Frankel, *The Rise of Fiduciary Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2018), https://corpgov.law.harvard.edu/2018/09/10/the-rise-of-fiduciary-law/.
27. *Id.*
28. Packin & Alon-Beck, *supra* note 1, at 410.

frameworks for advisory boards. The elements are useful to putting guard rails on the role for impact observers: independence, clarity of scope, measurement, fitness for purpose, and structure and discipline of relationship between the adviser and formal governance structures.[29]

The practitioner survey cited in the original article[30] sounds a cautionary note around avoiding symbolic deployment or unclear accountability. This is well-founded.[31] Impact observers need to have the confidence of the board and meaningful avenues for engaging with its functions. They will be more effective when they are seen as a strategic partner who understands the board's role and challenges, and can operate from the experience and credibility of being a peer.[32] Lessons in practice for role design and the sensibility of appropriate appointees can also be taken from research on what makes for successful trusted advisers.[33]

The mandate needs to be responsive to the fundamental governance challenges with which boards are grappling. Whether the organization's purpose measures up to the challenges and opportunities of the context in which the board is operating is a necessary starting point to advance that purpose over the near, mid and long term in ways that drive performance. A central question impact observers will need to assist boards ask and answer is: "Have we (re)evaluated our purpose in the context of a changing set of factors and how is that (re) revaluation shifting (internal and external) norms and expectations for our organisation?"[34]

29. Advisory Board Centre, *supra* note 24, at 14; Advisory Board Centre, ABF101 Advisory Board Best Practice Framework 3 (2024) [hereinafter ABC Best Practice Framework], https://www.advisoryboardcentre.com/our-research/abf101-best-practice-framework/.

30. Packin & Alon-Beck, *supra* note 1, at 367–68.

31. ABC Best Practice Framework, *supra* note 29.

32. Advisory Board Centre, *supra* note 24, at 5, 6 (explaining that "[36%] of board-level professionals now hold both governance and specialized advisory board credentials to support their participation in an integrated environment").

33. *See, e.g.*, David H. Maister et al., The Trusted Adviser 28 (1st ed. 2001).

34. *See* Mondiale Impact, Boards with Impact: Going Beyond the Playbook to Navigate Turbulent Times 4 (2025), https://mondialeimpact.com/boards-with-impact-going-beyond-the-playbook-to-navigate-turbulent-times/.

B. *Oriented for Impact*

Purpose provides one focal point. To bring the "proximity, presence, and principled attention"[35] to impact proposed, observers also need to be oriented for impact. This goes beyond ESG and requirements of ISSB/SASB/CSRD.[36] These are primarily oriented to compliance and reporting and do not routinely inform decisions or strategic consideration of future performance.[37]

An impact-oriented mandate for impact observers will build practice and supportive governance to set strategy and manage impact, strengthening structural capacity and governance to stewarding purpose and impact through a period of significant transition.

Soft law frameworks for embedding impact management in practice exist to shape the role. This includes United Nations Development Programme SDG Impact Standards and related International Standards Organization guidelines.[38] These provide an architecture for impact observers to bring focus to "expectations of behaviour, how decisions are made and how the organization holds itself and others accountable for their decisions and actions in accordance with its values, principles, and policies."[39] Training has been developed under the auspices of the United Nations and is available globally.[40]

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35. Packin & Alon-Beck, *supra* note 1, at 415.

36. *See, e.g.*, Elizabeth Polman, *The Making and Meaning of ESG,* 14 Harv. Bus. L. Rev. 403, 420–21 (2024); Michael E. Porter, *Where ESG Fails,* INSTITUTIONAL INVESTOR (Oct. 16, 2019), https://www.institutionalinvestor.com/article/2bswdin8nvg922puxdzwg/opinion/where-esg-fails; RONALD M. COHEN, IMPACT 5 (2020).

37. Porter, *supra* note 36.

38. *See* United Nations Development Programme, SDG Impact Standards for Enterprises (2021), https://sdgprivatefinance.undp.org/sites/default/files/resource-documents/SDG-Impact-Standards-for-Enterprises-Version1-EN.pdf; International Organization for Standardization, Guidelines for Contributing to the United Nations Sustainable Development Goals (SDGs) (2024), https://www.iso.org/standard/87945.html; United Nations Development Programme, About the SDG Impact Standards 4 (May 2023) [hereinafter United Nations Development Programme, About SDGs], https://sdgprivatefinance.undp.org/sites/default/files/resource-documents/20230502-about-the-sdg-impact-standards.pdf.

39. United Nations Development Programme, About SDGs, *supra* note 38, at 4.

40. *SDG Impact Standards Accreditation Program,* SOC. VALUE INT'L, https://www.socialvalueint.org/sdg-impact-standards-tot (last visited Mar. 3, 2026).

These standards embed and operationalize impact norms[41] developed through a process of global consensus. Brought into the board agenda and deliberations by experienced advisers, these norms and related practice inform new questions. These questions assist boards to probe the consequences of decisions, including whether they result in positive or negative impacts and which impacts are most material.

Oriented through impact practice, observers can encourage and support board engagement with central questions, including:

- "What are the big social and environmental challenges, shifts and potential disruptions we need to be prepared to respond to—over the next 1 to 3 and 5 to 10 years?";
- "Do we have a complete picture of the potential consequences of the decisions to act and not act in light of the changing context we have identified?"; and
- "Are our goals ambitious enough?"[42]

CONCLUSION

Companies and their performance cannot readily be separated from their context, especially when the issues are pressing and critical.[43] As boards grapple with significant complexity, focused support from appropriately qualified and experienced impact observers could assist boards to chart a course towards transition, better anticipate risks, and identify opportunities.

Whether impact observers prove an innovative experiment or become part of a more dynamic governance landscape over time, the objective needs to be clear: building and strengthening board fitness to respond to the shifts taking place and evolving impact-informed governance fit for the twenty-first century.

41. *Impact Management Norms*, https://impactfrontiers.org/norms/ (last visited Mar. 3, 2026).
42. MONDIALE IMPACT, *supra* note 34.
43. Hooper & Gilding, *supra* note 3.