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## FIVE YEARS AFTER #METOO GOES MAINSTREAM

*In the past five years the authors have seen investors continue to demand corporate accountability for sexual harassment. They discuss the cases making up this trend. They then turn to the Biden Agenda for Women and the SEC, which, they find, has made board diversity one of its top priorities. They close anticipating that securities litigation will remain a strong and effective tool in enabling investors to compel companies to meaningfully address sexual harassment and other forms of workplace misconduct.*

By Rebecca Boon and Brittney Balser \*

After Congress expanded the scope of the U.S. Foreign Corrupt Practices Act (the “FCPA”) in 1998, the U.S. Department of Justice (the “DOJ”) and the U.S. Securities and Exchange Commission (the “SEC”) actively began using the FCPA to combat overseas bribery. In recent years, a number of other nations have improved or expanded their own anti-corruption efforts (e.g., Argentina, Brazil, France, Mexico, South Korea, and Vietnam). Many countries now are working with the United States and independently to investigate and prosecute bribery and corruption, which presents a number of challenges to multinational companies trying to ensure compliance with the FCPA and other applicable anti-corruption laws.

Five years ago, the MeToo movement founded by Tarana Burke went mainstream when Alyssa Milano asked people to tweet #MeToo if they had been sexually harassed or assaulted. By October 2017, #MeToo had reached 85 countries with 1.7 million tweets.<sup>1</sup> As millions of people came forward across industries with

their personal accounts of misconduct, investors were listening.

Over the past half-decade, we have seen investors continue to demand corporate accountability for sexual harassment and other workplace misconduct. We have also seen boards of directors, for the first time, acknowledge that sexual harassment harms companies and that addressing sexual harassment culture is required as part of the fiduciary duties that boards owe to their shareholders. Investors have created and employed new methods to achieve meaningful corporate governance reforms through shareholder derivative lawsuits, direct securities fraud class actions, and proxy proposals from activist investors. Going forward, we expect this momentum to continue as shareholders demand progress and U.S. regulators, like the Securities and Exchange Commission, begin to meaningfully tackle ESG issues for the first time.

In the first successful case of its kind, investors brought a derivative lawsuit against the board of directors of Twenty-First Century Fox in the Delaware Court of Chancery to address allegations of sexual harassment perpetrated by Fox News’ long-time CEO,

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<sup>1</sup> <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/>.

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Roger Ailes.<sup>2</sup> Through their investigation, investors uncovered an alleged widespread and damaging sexual harassment culture at Fox News that was not limited to one man, or a handful of instances, or an isolated period. After a year of litigation, shareholders resolved the case for \$90 million, and together with the company implemented governance reforms designed to directly address the sexual harassment culture at Fox News. Most notably, the creation of the Fox News Workplace Professionalism and Inclusion Council brought together and empowered industry experts, together with company insiders, to identify and solve the problems at the company. Importantly, the Council publishes reports twice a year which Fox is obligated to post on its website for investors (and the world) to see, including minority reports if needed. The Council's broad powers and mandate ensure that change at the company will not be superficial and minimize the risk of regression. It has since served as a model for other companies' boards as they confront and work to fix these issues.

Investors also prosecuted the first successful securities fraud class action involving #MeToo allegations of sexual harassment against Signet Jewelers in the Southern District of New York.<sup>3</sup> In that case, hundreds of women had submitted declarations describing a pervasive culture of *quid pro quo* sexual harassment. Among other harrowing accounts, former employees who sought help or reported abuse through the company's existing internal hotline were often verbally attacked or terminated. Like Fox, Signet's CEO, Mark Light, was directly implicated in the misconduct. Light and other key executives were accused of promoting women based on whether they would accede to sexual demands, not merit, as the company falsely assured investors. Following more than a year of hard-fought litigation, plaintiffs ultimately reached a \$240 million settlement of the claims. The settlement is notable because not only is it one of the 100 largest

securities litigation settlements of all time,<sup>4</sup> but it was also the first successful prosecution of sexual harassment allegations through a securities class action litigation.

Building off the success of these #MeToo securities cases, investors have continued to use their power to hold corporations accountable and demand change. As one example, shareholders brought a derivative lawsuit against Alphabet (Google) in three jurisdictions alleging that Alphabet's board violated its fiduciary duties by allowing executives to sexually harass and discriminate against women.<sup>5</sup> Shareholders resolved the case for \$310 million, and like Fox, achieved significant governance reforms, including the creation of a Diversity, Equity, and Inclusion ("DEI") Advisory Council responsible for overseeing the creation and implementation of DEI initiatives mandated by the settlement.

Most recently, shareholders successfully resolved claims against L Brands – the parent company of The Limited, Victoria's Secret, and Abercrombie & Fitch, in the Southern District of Ohio. There, an investigation into connections between the L Brands' founder and Jeffrey Epstein ultimately revealed alleged systemic sexual harassment and misconduct at the company.<sup>6</sup> Left unchecked for years, these problems allegedly resulted in a hostile, abusive culture that irreparably harmed L Brands. Investors resolved the case for \$90 million and implemented significant governance reforms, including a DEI Council that would enhance training, invest in diverse communities, and audit the effectiveness of initiatives.

Similarly, investors have continued to prosecute direct securities fraud class actions involving #MeToo issues. For example, investors recently settled a securities fraud class action against CBS Corp. arising out of the Les Moonves scandal for millions of dollars

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<sup>2</sup> *City of Monroe Employs. Ret. Sys. v. Murdoch*, C.A. No.: 2017-0833-AGB, Del. Chan.

<sup>3</sup> *In re Signet Jewelers Ltd. Sec. Litig.*, No.: 16-cv-6728 (S.D.N.Y.).

<sup>4</sup> ISS-SCAS, *The Top 100 U.S. Class Action Settlements of All-Time*, December 31, 2021.

<sup>5</sup> *In re Alphabet Inc. Shareholder Deriv. Litig.*, 19CV341522, (Cal. Super. Santa Clara Cnty.).

<sup>6</sup> *Rudi v. Wexner*, No. 20-cv-3068 (S.D. Oh.).

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(settlement pending final court approval).<sup>7</sup> Investors are also currently prosecuting a securities fraud class action against Activision after dozens of current and former employees spoke out about alleged abuse and sexism, and the California Department of Fair Employment and Housing filed a lawsuit against the company based on similar misconduct.<sup>8</sup> Among other things, the DFEH complaint alleges that Activision management allowed and encouraged sexual misconduct toward women employees, that the company maintained a “frat boy” culture, and that the company’s hiring and employment practices discriminated against women.

These shareholder actions underscore that sexual harassment harms companies. A recent academic study found that companies with high incidences of sexual harassment claims underperformed the U.S. stock market by nearly 20% the subsequent year.<sup>9</sup> Additionally, a *Harvard Business Review* study found that a single sexual harassment claim can lower public perception of a company more dramatically than allegations of financial misconduct or fraud.<sup>10</sup>

As a result, we have also seen a recent increase in the role that activist investors are taking in combatting ESG issues, including #MeToo issues and allegations of sexual harassment. In late 2021, Microsoft came under intense scrutiny following allegations of sexual misconduct by founder and former-CEO Bill Gates. In response, activist investor group Arjuna Capital put forward a shareholder proposal asking Microsoft to transparently address the sexual harassment claims. Despite Microsoft’s opposition, Arjuna Capital was able to achieve a majority shareholder vote on the proposal, and Microsoft hired a law firm to review its sexual harassment policies.<sup>11</sup> A public report of its findings is due later this year.

The Biden administration has also made ESG issues a top priority. Indeed, as part of his campaign platform, President Biden promised “an aggressive and comprehensive plan to further women’s economic and physical security, and ensure that women can fully exercise their civil rights.”<sup>12</sup> And the SEC is focused on ESG through its ESG Task Force and recently proposed rulemaking on climate-related risk disclosures. The SEC has made board diversity and workplace diversity one of its top priorities. On August 6, 2021, the SEC approved Nasdaq’s proposed rule changes related to board diversity and disclosure, which state that each Nasdaq-listed company must have at least two diverse board members or explain why it does not.<sup>13</sup> The standards will also require disclosure of information on the voluntary self-identified, gender, racial characteristics, and LGBTQ+ status of the company’s board. As Commissioners Allison Herren Lee and Caroline A. Crenshaw stated, “We support the proposal because it represents a step forward for investors on board diversity.”<sup>14</sup>

It is clear that combatting sexual harassment and promoting board diversity have become important and motivating issues for investors and regulators alike. In the past five years since #MeToo went mainstream, investors have successfully used securities litigation as a vehicle to enact much needed corporate governance reforms on multiple occasions. We anticipate the continued involvement of activist investors pursuing ESG-focused proposals following corporate misconduct and increased focus by the SEC on these issues, and we expect that securities litigation will remain a strong and effective tool in enabling investors to compel companies to meaningfully address sexual harassment and other forms of workplace misconduct. ■

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<sup>7</sup> *Construction Laborers Pension Trust for Southern California, et al. v. CBS Corporation, et al.*, No. 18-cv-07796 (S.D.N.Y.).

<sup>8</sup> *Cheng v. Activision Blizzard, Inc.*, No. 21-cv-6240 (C.D. Cal.).

<sup>9</sup> *The Real Cost of Workplace Sexual Harassment to Business*, The Conversation (September 2, 2019).

<sup>10</sup> *Research: How Sexual Harassment Affects a Company’s Public Image*, Harvard Business Review (June 11, 2018).

<sup>11</sup> Sexual Harassment Proposal, Arjuna Capital (June 2021), [https://static1.squarespace.com/static/5bc65db67d0c9102cca54b74/t/61a68b553ed02a77d1bdba2c/1638304597581/Sexual+Harassment+Proposal\\_Microsoft\\_2021\\_Arjuna+Capital.pdf](https://static1.squarespace.com/static/5bc65db67d0c9102cca54b74/t/61a68b553ed02a77d1bdba2c/1638304597581/Sexual+Harassment+Proposal_Microsoft_2021_Arjuna+Capital.pdf).

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<sup>12</sup> The Biden Agenda for Women, <https://joebiden.com/womens-agenda/>.

<sup>13</sup> Securities and Exchange Commission, Release No. 34-92590 (August 6, 2021).

<sup>14</sup> *Statement on Nasdaq’s Diversity Proposals – A Positive First Step for Investors*, Securities and Exchange Commission (August 6, 2021).