# ARE AGENCY COSTS UNIVERSAL? COMPARATIVE BIASES IN RISK FACTOR DISCLOSURE

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## INTRODUCTION

An investment in Facebook is at least partly an investment in Mark Zuckerberg. As *The New York Times* recently described, "Facebook's founder, chief executive, chairman and most powerful shareholder . . . has become too big to fail."[1] Facebook acknowledges that Zuckerberg "has the ability to control the outcome of matters submitted to our stockholders for approval, including the election of directors and any merger."[2] Some investors may reasonably find this concerning; if Zuckerberg falters (or continues to falter) as CEO, his control of the board would make it difficult, if not impossible, to fire him. Others, however, may

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1 Farhad Manjoo, *How Mark Zuckerberg Became Too Big To Fail*, N.Y. TIMES (Nov. 1, 2018), http://www.nytimes.com/2018/11/01/technology/mark-zuckerberg-facebook.html.

2 Facebook, Inc., Annual Report (Form 10-K) (Feb. 1, 2018), http://www.sec.gov/Archives/edgar/data/1326801/000132680118000009/fb-12312017x10k.htm.

consider Zuckerberg's control reassuring. As founder of one of the largest and most innovative companies in the world, only Zuckerberg has the talent and insight to shepherd Facebook through this difficult period for the company.[3]

In many respects, the Facebook dilemma speaks to a fundamental and ongoing debate in corporate law: are controlling shareholders good for company value? The strongest argument for controlling shareholders is that they have an increased incentive for monitoring. Dispersed shareholders each owning a small part of a company will have rational apathy, or minimal financial incentive, to take on the costs of monitoring managers and becoming informed voters. Mark Zuckerberg, however, has clear incentive to take on these costs given his large, undiversified stake. As one group of scholars and industry leaders put it, "Shareholders exercise their voting rights far more effectively when a single large 'controlling shareholder' holds all or most of the company's voting shares, than when share ownership is widely dispersed."[4]

These monitoring and non-diversification costs presumably come at a price. Ronald Gilson and Jeffrey Gordon suggest that "some private benefits of control may be necessary to induce a party to play that [controlling shareholder] role."[5] Facebook recognizes that Zuckerberg is "entitled to vote his shares . . . in his own interests, which may not always be in the interests of our stockholders generally."[6] Beyond voting shares in their own interest, controlling shareholders may extract other private benefits of control through related party transactions and, more generally, the prestige of ownership.

While the parameters of the debate are clear, the empirical effects of a controlling shareholder remain unresolved. The authors of *The Modern Corporation Statement on Company Law* found "no substantial empirical evidence indicat[ing] that one pattern of . . . shareholder political rights is necessarily superior to the other."[7] Even Henry Hansmann and Reinier Kraakman, authors of the controversial paper *The End of History for Corporate Law*, portray both concentrated and dispersed ownership structures as consistent with the shareholder primacy model for corporate law "for their ability to advance shareholder interests in the face of serious agency problems."[8]

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[3] For a more thorough discussion of this argument, see Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560 (2015).

[4] Lynn A. Stout et al., *Statement on Company Law*, THE MODERN CORPORATION 2 (Oct. 6, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848833.

[5] Ronald J. Gilson & Jeffrey N. Gordon, *Doctrines and Markets*, 152 U. PA. L. REV. 785, 785 (2003).

[6] Facebook, Inc., Annual Report, *supra* note 2.

[7] Stout et al., *supra* note 4, at 2; *see also* Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53 (2018).

[8] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 443 (2001).

These agency problems seem to reflect universal concerns among shareholders. Yet scholars in recent decades have recognized that ownership patterns vary tremendously by geography, and the "twentieth century saw polarization of corporate structure between two rival systems of corporate governance" in dispersed and concentrated ownership.[9] Indeed, while corporate control is concentrated globally, the United States is a clear outlier in that most U.S. corporations are widely held. Various theories attempt to explain this divergence, perhaps most controversially that of Rafael La Porta et al., who contend that common law countries have "better investor protection, which in turn is associated with . . . higher ownership dispersion."[10] Whatever the cause, geographic disparities in ownership patterns are abundantly clear.

In this paper, we will find that there are not only differences in actual ownership patterns across countries, but also perceptions of the dangers associated with given patterns. In order to assess these perceptions, we will review the disclosure of material risk factors in public company filings in the United States and Brazil. These two countries have drastically different patterns of ownership and, perhaps unsurprisingly, perspectives regarding the risks associated with particular ownership structures. U.S. companies with a controlling shareholder consistently disclosed this structure as a material risk; alternatively, not a single widely held U.S. company disclosed a corporate governance risk regarding shareholder dispersion. In Brazil, widely held companies on the Nova Mercado, a recently established stock exchange with more exacting listing requirements, consistently disclosed risks associated with dispersed ownership. Part II of this paper will discuss the risk factor disclosure requirement and present the data gathered in each country in full detail.

In Part III, we will consider three potential explanations of the disclosure disparity. First, we will question whether risk factor disclosures actually reflect the reality of companies' and investors' perceptions. This criticism comports with general attitudes towards risk factor disclosure, which is often seen as boilerplate and non-informative. Second, we will examine whether the disclosure disparity simply reflects underlying comparative biases. Companies may instinctively treat the unusual as dangerous. Third, and most promisingly, we will challenge the assumption that agency costs apply universally. Rather, particular legal, economic, and social contexts make it such that dispersed ownership may in fact be a material risk in Brazil but not in the United States. Put another way, the companies are getting their disclosures right.

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[9] John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 3 (2001).

[10] Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 298 (2008).

In Part IV, we will conclude and consider the policy implications of these findings. For one, companies in both countries, but particularly the United States, can meaningfully improve the quantity and quality of disclosure of ownership risks. Moreover, we will observe that the empirical findings have significant implications for essential debates in comparative corporate law, such as the persistence of divergence in ownership structures as well as the bonding hypothesis.

## I. EMPIRICAL FINDINGS

### *A. Risk Factor Disclosure in the United States and Brazil*

Securities regulation in the United States relies heavily on disclosures rather than imposing mandatory substantive rules, thereby deferring to the wisdom of an informed market. For example, on the highly controversial issue of dual-class share structures, a Securities and Exchange Commission ("SEC") subcommittee recommends that the SEC "continu[e] to scrutinize disclosure documents filed by companies with such structures, commenting on such documents so as to enhance the salience and detail of disclosures of risks related to such structures."[11] While courts are clear that there is "not [] a system of continuous disclosure," companies must provide quarterly, annual, and event-specific disclosures to investors.[12]

The SEC imposes a broad disclosure requirement on public companies to provide a "concise and organized" discussion of "the most significant factors that make the offering speculative or risky."[13] These disclosures comprise roughly 11% of the total words in an average company's annual report.[14] There is relatively minimal litigation assessing the meaning of "most significant factors." Three cases from the Southern District of New York, a common venue for securities litigation, provide three distinct standards. For the sake of simplicity, one judge presumed that Item 503 disclosures "track Rule 10b-5 violations" and therefore applied "the familiar materiality standard."[15] Alternatively, a more recent holding in the same

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[11] SECURITIES AND EXCHANGE COMMISSION, INVESTOR ADVISORY COMMITTEE, RECOMMENDATION OF THE INVESTOR ADVISORY COMMITTEE: DUAL CLASS AND OTHER ENTRENCHING GOVERNANCE STRUCTURES IN PUBLIC COMPANIES (2018), http://www.sec.gov/spotlight/investor-advisory-committee-2012/iac030818-investor-as-owner-subcommittee-recommendation.pdf [hereinafter INVESTOR ADVISORY COMMITTEE].

[12] Gallagher v. Abbot Labs., 269 F.3d 806, 808 (7th Cir. 2001).

[13] 17 C.F.R. § 229.503(c). The text and placement in Subpart 500 appear to indicate that the requirement only applies to offering documents. However, in 2005 the SEC extended the requirement to all periodic reporting requirements on Form 10. Securities Offering Reform, 70 Fed. Reg. 44,722 (Aug. 3, 2005).

[14] John L. Campbell et al., *The Information Content of Mandatory Risk Factor Disclosures in Corporate Filings*, 19 REV. ACCT. STUD. 396 (2014).

[15] City of Roseville Emps. Ret. Sys. v. EnergySolutions Inc., 814 F. Supp. 2d 395, 426 (S.D.N.Y. 2011).

court found that concededly material omissions did not "rise to the considerably higher 'most significant factors' standard."[16] Finally, given the "scant caselaw," one judge simply asked whether the disclosures were "accurate and sufficiently candid."[17]

Whichever standard courts ultimately employ, the SEC continues to implore companies to give careful thought to risk factor disclosures. The rule itself demands that companies "not present risks that could apply to any issuer or offering."[18] A recent rule proposal seeks to eliminate the current suggested types of risk factors, which includes examples like lack of an operating history and the company's financial position. The SEC contends that "eliminating the examples would encourage registrants to focus on their own risk identification processes."[19] Despite ongoing criticisms that companies repeat boilerplate, generic risks in their disclosures, there is substantial evidence that the market reacts to risk factor disclosures, as discussed further *infra* Section III.A.

The Comissão de Valores Mobiliários ("CVM") imposes similar requirements on Brazilian public companies. Per CVM Instruction No. 480, Brazilian companies must disclose on their annual Reference Forms "risk factors that may influence the investment decision, in special those related to . . . (b) [i]ts direct or indirect shareholder or controlling group [and] (c) [i]ts shareholders."[20] Companies should additionally describe "expected reduction or increase in the issuer's exposure to such risks."[21] While there are no formal comparisons of the judicial treatment of each country's disclosure requirement, the rules appear functionally similar.

### *B. Methodology*

In order to assess risk factor disclosures regarding ownership structures, we will look at three distinct groups of companies. First, we will review data from the public disclosures of the one hundred largest U.S. public companies by market capitalization.[22] For each of these companies, we will determine whether the company has a controlling shareholder or dispersed shareholders, the disclosed the risk of either, and a few other key characteristics. The largest one hundred

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[16] *In re* BHP Billiton Ltd. Sec. Litig., 276 F. Supp. 3d 65, 89 (S.D.N.Y. 2017).

[17] Christine Asia Co., Ltd. v. Alibaba Grp. Holding Ltd., 192 F. Supp. 3d 456, 477 (S.D.N.Y. 2016) (quoting *City of Roseville Emps. Ret. Sys.* 814 F. Supp. 2d at 426), *rev'd sub nom. on other grounds by* Christine Asia Co. v. Yun Ma, 718 Fed. Appx. 20 (2d Cir. 2017).

[18] 17 C.F.R. § 229.105 (2019).

[19] FAST Act Modernization and Simplification of Regulation S-K, 82 Fed. Reg. 50988 (proposed Nov. 2, 2017). The proposed rule would also move Item 503(c) to Subpart 100, which governs disclosure beyond offering-related documents.

[20] Instruçáo CVM 480/2009, annex 24 § 4.1.

[21] Instruçáo CVM 480/2009, annex 24 § 4.2.

[22] Annex 1.

companies cover a broad array of industries and ownership structures and together comprise a substantial portion of the U.S. public equity market.

One key challenge to this methodology is that U.S. companies have incentive not to disclose the existence of a controlling shareholder. In our dataset of one hundred companies, only six disclosed a controlling shareholder, though the number of controlled companies is certainly higher in reality. For example, Oracle Corporation did not disclose Larry Ellison as a controlling shareholder despite his 28% voting power and a recent Delaware decision that virtually established him as a controlling shareholder.[23] For companies like Oracle, disclosing a controlling shareholder on Form 10-K is likely to bind the company to this admission during future litigation. Furthermore, and as argued by Ronald Gilson, the controlling / widely held dichotomy is realistically "much too coarse to allow a deeper understanding of the diversity of ownership structures in different national capital markets."[24]

However, the objective of this paper is not to determine the number of American companies with a controlling shareholder. Nor is it to assess the numerous variations of the basic concept of a controlling shareholder.[25] Rather, given the objective of assessing risk factor disclosure, assessing disclosure of those companies that formally acknowledge the existence of a controlling shareholder is sufficient. Studies which select control thresholds based on voting power, alternatively, are certainly subject to Gilson's critique. We will examine disclosure when the existence of a controlling shareholder, or lack thereof, is obvious while remaining keenly aware of the challenges to this simple dichotomy.

Second, we will look at large market-capitalization companies in Brazil, all of which have filed Form 20-F filings as foreign issuers with the SEC. Of nine companies in this group, each has a controlling shareholder, and the group includes familiar names such as Banco Santander and Petrobras.[26] These companies also each had market capitalizations over $10 billion as of November 2018, though some have since fallen below that threshold.[27]

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[23] *In re* Oracle Corp. Derivative Litig., C.A. No. 2017-0337-SG, 2018 Del. Ch. LEXIS 92 (Del. Ch. Mar. 19, 2018).

[24] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1643 (2006).

[25] *See, e.g.*, Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019).

[26] Annex 2. Vale S.A. recently listed on the Novo Mercado. However, per its most recent Form 20-F, major shareholders entered into a shareholder agreement that effectively allowed them to retain control. Vale S.A., Annual Report (Form 20-F) (Apr. 13, 2018), http://www.sec.gov/Archives/edgar/data/917851/000104746918002777/a2234766z20-f.htm.

[27] NASDAQ, COMPANIES IN BRAZIL: LARGE-CAP, http://old.nasdaq.com/screening/companies-by-industry.aspx?region=South+America&country=Brazil&marketcap=Mid-cap. Since this research was conducted, the market capitalizations of Braskem S.A., Gol Linhas Aereas Inteligentes S.A.,

Third, and finally, are twelve members of Brazil's relatively new listing segment, Novo Mercado. Per Érica Gorga, all twelve companies are widely held, lacking a shareholder with greater than 10% of the company's voting power. [28] While 10% is again a somewhat arbitrary threshold, this group of clearly widely held companies provides sufficient breadth for the purposes of this paper's analysis. Evidently, less Brazilian companies than American companies are included in the dataset. However, given the consistencies in ownership structures in the respective groups, and the consistencies in disclosures discussed below, we can be confident that these companies serve as a sufficient sample for observation.

### *C. Findings*

While much of this paper will focus on the differing perceptions of risk, or the disclosure disparity, there is one core area of consistency: controlling shareholders are perceived as material risks in both the United States and Brazil. As indicated in Table 1 below, every company (15 total) that acknowledged the existence of a controlling shareholder also disclosed a controlling shareholder risk.

**TABLE 1 – CONTROL RISK**

| **COUNTRY** (group) | **CONTROLLING SHAREHOLDER** | **CONTROL RISK** |
|---|---|---|
| United States (Top 100) | 6% (6/100) | 6% (6/100)[29] |
| Brazil (Large Cap) | 100% (9/9) | 100% (9/9) |
| Brazil (Novo Mercado) | 0% (0/13) | 0% (0/13) |

As noted above, the Brazil (Large Cap) disclosures are found in Forms 20-F, which are directed towards American investors. Therefore, despite the predominance of concentrated ownership in Brazil, these companies are potentially copying their American counterparts when speaking to American investors. Regardless, the consistency of the disclosure certainly stands in direct contrast to the notion that a controlling shareholder may decrease overall agency costs.

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and Fibria Celulose S.A. have fallen below $10 billion, causing them to be considered Mid-Cap companies.

[28] Annex 3. There is reasonable dispute over the extent to which these companies are truly widely held, as shareholders continue to form voting blocks in the face of dispersion. *See* Érica Gorga, *Corporate Control & Governance After a Decade from 'Novo Mercado': Changes in Ownership Structures and Shareholder Power in Brazil*, John M. Olin Center for Studies in Law, Economics, and Public Policy Research Paper No. 502, at 28-30 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473832.

[29] These are the same six companies which identified the existence of a controlling shareholder.

The contents of the disclosures are also similar. For example, Las Vegas Sands Corporation, controlled by billionaire mogul Sheldon Adelson, discloses that Adelson "exercises significant influence over our business policies and affairs" and "the interests of Mr. Adelson may differ from your interests."[30] Banco Santander S.A. similarly discloses that its controlling shareholder, Santander Spain, "has the power to control us and our subsidiaries" and its interests "may differ from the interests of our other shareholders."[31] Beyond these general statements, the disclosures often provide particular examples of controlling shareholder powers, including the ability to elect a majority of directors and executive officers, sell the company, and prevent sale of the company.

There are, however, two distinguishing features of the Brazilian company disclosures, as indicated below in Table 2. First, large capitalization Brazilian companies with a controlling shareholder consistently (7/9) disclose the risk of related party transactions ("RPTs"). The companies frame this concern as an ability of the controlling shareholder to take actions on behalf of all shareholders "including transactions with related parties."[32] All companies must disclose, per CVM Instruction 480 § 16, their policies regarding RPTs and actual transactions with related parties.[33] These seven companies, however, additionally disclose the possibility of related party transactions as a material risk.

Second, two large capitalization Brazilian companies disclose the risk of the Brazilian government as a controlling or quasi-controlling (*i.e.*, golden share) shareholder. Petrobras specifically discloses the possibility that the Brazilian government, as controlling shareholder, will "pursue certain macroeconomic and social objectives through [Petrobras]."[34] Petrobras identifies precisely the risk of "policy channeling" discussed by Curtis Milhaupt and Mariana Pargendler.[35] Though the Brazilian government does not formally control Vale S.A., it does

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30 Las Vegas Sands Corp., Annual Report (Form 10-K) (Feb. 23, 2018).

31 Banco Santander (Brasil) S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Apr. 9, 2018), http://www.sec.gov/Archives/edgar/data/1471055/000095010318004611/dp88531_20f.htm.

32 Fibria Celulose S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Feb. 27, 2018), http://www.sec.gov/Archives/edgar/data/1110649/000110465918012854/a18-2311_ 120 f.htm.

33 Instruçáo CVM 480/2009, annex 24 § 16.

34 Petróleo Brasileiro S.A.—Petrobras, Annual and Transition Report of Foreign Private Issuers (Form 20-F) 26 (Apr. 18, 2018), http://www.sec.gov/Archives/edgar/data/1119639/000119312518 120259/d521855d20f.htm.

35 Curtis J. Milhaupt & Mariana Pargendler, *RPTs in SOEs: Tunneling, Propping, and Policy Channeling* (Stanford Law and Econ. Olin, Working Paper No. 517, 2018), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119164.

possess golden shares "granting it limited veto power over certain company actions," a risk acknowledged in Vale's Form 20-F.[36]

| TABLE 2 - BRAZIL LARGE CAP | | |
|---|---|---|
| **COMPANY** | **RPT RISK** | **GOVERNMENT CONTROL RISK** |
| Banco Bradesco S.A. | YES | NO |
| Banco Santander S.A. | YES | NO |
| Braskem S.A. | YES | NO |
| Fibria Celulose S.A. | YES | NO |
| Gol Linhas Aereas Inteligentes S.A. | YES | NO |
| Itau Unibanco Banco Holding SA | YES | NO |
| Petroleo Brasileiro S.A. - Petrobras | YES | YES |
| Telefonica Brasil S.A. | NO | NO |
| Vale S.A. | NO | YES |
| **TOTAL** | **78% (7/9)** | **22% (2/9)** |

While there is consistent disclosure of controlling shareholder risk, treatment of dispersed shareholders varies tremendously between the United States and Brazil. As indicated in Table 3 below, despite ostensibly 94 companies having dispersed shareholders, zero U.S. companies in our dataset recognized this material risk. Alternatively, of the 12 Brazilian companies with dispersed shareholders, 11 (92%) recognized their ownership structure as a material risk meriting disclosure.

| TABLE 3 – DISPERE RISK | | |
|---|---|---|
| **COUNTRY** (group) | **DISPERSED SHAREHOLDER** | **DISPERSE RISK** |
| United States (Top 100) | 94% (94/100) | 0% (0/100) |
| Brazil (Large Cap) | 0% (0/9) | 0% (0/9) |
| Brazil (Novo Mercado) | 100% (12/12) | 92% (11/12) |

Widely held companies on the Novo Mercado typically identified three risks of a dispersed ownership structure. First, given quorum requirements in Brazil (discussed further *infra* Section III.C), the dispersion "may create difficulties for the approval of certain matters."[37] Second, and reflecting common dispersion

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[36] Vale S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) 27 (Apr. 13, 2018), http://www.sec.gov/Archives/edgar/data/917851/000104746918002777/a2234766z20-f.htm.

[37] Cia.Hering, Formulário de Referência 14 (Jan. 17, 2019) (transl.), https://ri.ciahering.com.br/documentos-cvm/formulario-de-referencia/2018.

concerns, "given the lack of control, [the company] cannot assure you that [it] will be able to respond effectively to any sudden or unexpected changes in [its] Management, [] corporate policy, or strategic direction."[38] Both the quorum and strategic risks reflect potential shareholder apathy, the fundamental ownership agency cost of a widely held company.

Third, widely held Brazilian companies identify the risk of an eventual controlling shareholder. As one company describes it, "In the event a controlling group is formed and decides to exercise its controlling power over our company, we may be subject to unexpected changes in our corporate governance . . . . Additionally, we may be more vulnerable to a hostile takeover bid."[39] This risk is not described in the same way as the control risks identified above; rather, the concern is that a controlling shareholder may change the direction of the company contrary to shareholders' current expectations.

The widely held Brazilian companies identify plausible risks of dispersed ownership consistent with current theories in corporate law. Yet not a single American company in the dataset has followed suit. The American dataset includes companies that have suffered clear oversight failures, such as Wells Fargo & Co.[40] and Goldman Sachs Co.,[41] and who could potentially benefit from the increased monitoring incentives of a controlling shareholder. Wells Fargo acknowledges that its "risk management framework is also dependent on ensuring that effective operational controls and a sound culture exist throughout the Company."[42] However, Wells Fargo never suggests that its ownership structure has any relation to the effectiveness of operational controls.

There are two additional empirical findings worth mentioning regarding the U.S. companies, both discussed further *infra* Section III.C. First, U.S. companies with controlling shareholders were far more likely to disclose the risk of losing named key personnel.[43] Only 9% (9/100) of companies in the American

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38 *Id.*

39 Gafisa S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) 21 (Apr. 30, 2018), http://www.sec.gov/Archives/edgar/data/1389207/000095010318005402/dp89950_20f.htm.

40 *See, e.g.*, Emily Glazer, *Wells Fargo's Year of Scandal Stretches On*, WALL ST. J. (Sept. 8, 2017), http://www.wsj.com/articles/wells-fargos-year-of-scandal-stretches-on-1504863001.

41 *See, e.g.*, Alexandra Stevenson & Sharon Tan, *Malaysia Files Criminal Charges Against Goldman Sachs Over 1MDB Scandal*, N.Y. TIMES (Dec. 17, 2018), http://www.nytimes.com/2018/12/17/business/goldman-sachs-malaysia-criminal-charges-1mdb.html.

42 WELLS FARGO & COMPANY, 2017 ANNUAL REPORT 133 (2018), http://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2017-annual-report.pdf. Wells Fargo incorporated the risk factors identified in its 2017 Annual Report into its Form 10-K. Wells Fargo & Company, Annual Report (Form 10-K) (Mar. 1, 2018), http://www.sec.gov/Archives/edgar/data/72971/000007297118000272/wfc-12312017x10k.htm.

43 Most companies generically disclose the risk of retaining and recruiting key personnel, including senior management. Table 4 and Annex 4 include only companies which identify individuals by name, typically that of the controlling shareholder.

dataset identified key personnel by name. Of companies with controlling shareholders, however, 66% (4/6) did so. Moreover, when including companies like Oracle and Amazon who may have controlling shareholders (U.S. Controlling Shareholders*), 44% (7/16) recognize this risk. In most instances, the key personnel is himself the controlling shareholder. Therefore, it appears that companies with controlling shareholders are significantly more dependent on particular individuals for their success.

| TABLE 4 - KEY PERSONNEL | |
|---|---|
| **GROUP** | **KEY PERSONNEL RISK** |
| United States (Top 100) | 9% (9/100) |
| U.S. Controlling Shareholders | 66% (4/6) |
| U.S. Controlling Shareholders*[44] | 44% (7/16) |

Finally, American companies commonly disclosed risks associated with takeover defenses, typically the existence of a poison pill. Naturally, takeovers are more difficult when a controlling shareholder can simply choose not to sell, and all six controlled companies identified this risk. Moreover, the possibility (or lack thereof) of a takeover is certainly a significant factor for minority investors. However, eleven undoubtedly widely held companies disclosed this risk despite the fact that the formal existence of a poison pill is virtually meaningless.[45] As Marcel Kahan & Edward Rock explain, "As any corporate lawyer worth her salt can tell you, it is both legally and practically irrelevant whether a company has a poison pill in place when a hostile bid is made."[46]

| TABLE 5 - TAKEOVER DEFENSE | |
|---|---|
| **GROUP** | **TAKEOVER DEENSE RISK** |
| United States (Top 100) | 21% (21/100) |
| U.S. Controlling Shareholders | 100% (6/6) |
| U.S. Controlling Shareholders* | 63% (10/16) |

[44] The asterisk group (16 companies) includes both companies that disclose a controlling shareholder and those that plausibly have but do not disclose a controlling shareholder.
[45] *See* Memorandum from David A. Katz & Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, Corporate Governance Update: Poison Pills – Maintain Flexibility in Takeover Defense, 3 (2006) (noting that boards can adopt a poison pill within 24 hours if necessary).
[46] Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2001 (2014). For further detail, see Annex 5.

Overall, there is broad agreement that controlling shareholders constitute a material risk requiring disclosure. This is true despite the ongoing theoretical and empirical debate over the effect of a controlling shareholder. However, large-cap Brazilian companies identify distinct elements, namely RPTs and government control, when explaining this risk. Finally, there is clear disagreement as to the risk of a dispersed ownership structure. The remainder of the paper attempts to explain these findings and suggests a potential path forward.

## II. EXPLAINING THE DISCLOSURE DISPARITY

### *A. Risk Factors as Boilerplate Legalisms*

This paper makes the claim that risk factor disclosures reflect companies' actual perceptions of risk. This argument stands in direct contrast to the common view of risk factor disclosures as boilerplate legalisms that offer minimal substantive value. Therefore, an initial explanation of the disclosure disparity is simply that it is meaningless. Companies are writing whatever their lawyers deem necessary to avoid litigation, and companies with controlling shareholders are virtually copying the disclosures of their controlled peers.[47]

There is certainly meaningful evidence for this theory. The SEC has for years been attempting to improve the quality of risk factor disclosures, especially in the wake of the 2008 financial crisis, where risk was systematically underappreciated.[48] Yet a recent Concept Release noted that, in quarterly reports, "it is not unusual for registrants to repeat the entire risk factor discussion from their previously filed reports, even though registrants are required to disclose only material changes from previously disclosed risks."[49] A review of disclosures by the Investor Responsibility Research Center Institute found that "disclosures often are generic and do not provide clear, concise and insightful information."[50] Finally, the

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47 There is substantial evidence that companies review the disclosures of industry peers when writing risk factor disclosures. *See, e.g.*, Stephen V. Brown et al., *The Spillover Effect of SEC Comment Letters on Qualitative Corporate Disclosure Evidence from the Risk Factor Disclosure*, 35 CONTEMP. ACCT. RES. 622 (2018), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551451.

48 SEC Updated Staff Legal Bulletin No. 7 (June 7, 1999), http://www.sec.gov/interps/legal/cfslb7a.htm.

49 Business and Financial Disclosure Required by Regulation S-K, Release No. 33-10064, SEC Concept Release 151 (Apr. 13, 2016) [hereinafter SEC Concept Release], http://www.sec.gov/rules/concept/2016/33-10064.pdf.

50 INV'R RESPONSIBILITY RESEARCH CTR. INST., THE CORPORATE RISK FACTOR DISCLOSURE MANDATE (Jan. 2016), https://www.ey.com/Publication/vwLUAssets/ey-disclosure-effectiveness-in-action-companies-make-great-strides/$FILE/ey-disclosure-effectiveness-in-action-companies-make-great-strides.pdf.

disclosures are getting significantly longer over time, suggesting that companies increasingly add risks without considering the value of the particular disclosure.[51]

Despite the appeal of these sentiments, there are three persuasive reasons to reject the notion that risk factor disclosures do not reflect actual perceptions of risk. First, and most critically, there is substantial evidence that the market reacts to risk factor disclosure. As even the SEC recognized while lamenting the quality of disclosures, "[A]cademic studies find that risk factor disclosure is informative and that the public availability of this information decreases information asymmetry among investors."[52] Multiple empirical studies have found, albeit with variation, market reaction to unexpected risk factor disclosures.[53] Qualitative evidence supports these studies; a summary of working dinners sponsored by EY found that risk factor disclosures are indeed too boilerplate but remain important and deserving of attention.[54] Moreover, activists frequently utilize risk factor disclosure as a mechanism for demonstrating the importance of an under-appreciated challenge, like cybersecurity, climate change, and even artificial intelligence.[55]

Second, companies face real risk of litigation and SEC action if their risk factor disclosures are not accurate. Some suggest that this is precisely the problem; a comment from Davis Polk & Wardwell LLP on the SEC's Disclosure Effectiveness Initiative noted that "efforts to limit potential litigation contribute to lengthy risk factor disclosure as registrants may at times seek to provide investors with every conceivable factor that could . . . adversely affect the registrant."[56] While certainly contributing to length, the risk of litigation also requires exhaustion

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[51] Anne Beatty et al., *Are Risk Factor Disclosures Still Relevant? Evidence from Market Reaction to Risk Factor Disclosures Before and After the Financial Crisis*, CONTEMP. ACCT. RES. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186589 (finding a 50% increase in risk factor word count from 2006-2014, compared to only 10% for other 10-K sections).

[52] SEC Concept Release, *supra* note 49.

[53] *See, e.g.*, John L. Campbell et al., *The Information Content of Mandatory Risk Factor Disclosures in Corporate Filings*, 19 REV. ACCT. STUD. 396 (2014); Ole-Kristian Hope et al., *The Benefits of Specific Risk-Factor Disclosure*, 21 REV. ACCT. STUD. 1005 (2016).

[54] EY, DISCLOSURE EFFECTIVENESS: WHAT INVESTORS, COMPANY EXECUTIVES AND OTHER STAKEHOLDERS ARE SAYING (Nov. 2014), https://www.eyjapan.jp/library/issue/us/gaap-weekly-update/pdf/GAAP-2014-11-25-03.pdf.

[55] Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Release Nos. 33-10459; 34-82746, 83 Fed. Reg. 8166 (Feb. 26, 2018); Kevin L. Doran & Elias L. Quinn, *Climate Change Risk Disclosure: A Sector by Sector Analysis of SEC 10-K Filings from 1995-2008*, 34 N.C.J. INT'L L. & COM. REG. 721 (2009); Becky Yerak, *More Companies Flag a New Risk: Artificial Intelligence*, THE WALL ST. J. (Jan. 9, 2019), http://www.wsj.com/articles/more-companies-flag-a-new-risk-artificial-intelligence-11547035202.

[56] Comment Letter from Davis Polk & Wardwell LLP to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission (July 22, 2016), http://www.sec.gov/comments/s7-06-16/s70616-313.pdf.

of actual risks; the failure to disclose the risk of dispersed ownership therefore stands out in light of this trend.

Finally, the findings presented in Section II.C demonstrate clear regional variation in risk factor disclosures. It is implausible that Brazilian firms simply have a heightened sense of litigation risk and therefore disclose the risk of dispersed ownership. Moreover, Brazilian firms with controlling shareholders uniquely disclose risks particular to them, specifically RPTs and government ownership. Even among the American companies, there is variation in disclosure of key personnel and takeover defense risks, demonstrating careful consideration.

Unquestionably, risk factor disclosures often read as the boilerplate work of overly cautious attorneys. Consider, for example, the consistently disclosed risk that "Global and regional economic conditions could materially adversely affect the Company," or that global markets are "highly competitive."[57] While these risks are legitimate, they hardly provide useful information to the market. Yet the market clearly reacts to disclosures, and evidence from this paper indicates that, on the spectrum from completely generic to usefully individualized, companies put thought into their disclosure of corporate governance risks.

### *B. Risk Factors and Comparative Biases*

A second plausible explanation for this paper's findings is that companies are only disclosing abnormal ownership risks. After all, better the devil you know. Randall Morck explains in his introduction to Concentrated Corporate Ownership that "[i]n most countries . . . widely held firms are either unknown or the rarest of curiosities."[58] In Brazil, before the Novo Mercado, the common ownership structure "featured the simultaneous presence of a controlling shareholder and a thoroughly disenfranchised set of public shareholders."[59] Alternatively, widely held firms clearly predominate in the United States, where individuals' savings generally enter the public equity market.[60]

There is some evidence for this claim in the disclosures themselves. Widely held Brazilian firm Gafisa S.A. acknowledged in its disclosure that "[t]here is no guidance in Brazilian corporate law for publicly-held companies without an

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[57] Apple Inc., Annual Report (Form 10-K) (Nov. 11, 2018), http://www.sec.gov/Archives/edgar/data/320193/000032019318000145/a10-k20189292018.htm; The Coca-Cola Co., Annual Report (Form 10-K) (Feb. 23, 2018), http://www.sec.gov/Archives/edgar/data/21344/000002134418000008/a2017123110-k.htm.

[58] Randall K. Morck, *Introduction* to CONCENTRATED CORPORATE OWNERSHIP 1, 1 (Randall K. Morck ed., 2000).

[59] Ronald J. Gilson et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 490 (2011).

[60] *See* Mark J. Roe, *Some Differences in Company Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993).

identified controlling shareholder."[61] As noted in Section II.C, controlled U.S. companies disclosed the risk of losing key personnel, typically the controlling shareholder, at a far higher rate than widely held companies. This disclosure can reasonably be viewed as an attempt to mitigate the apparent risk of an abnormal ownership structure by positively identifying the controlling shareholder's value to the company. Comparative biases undoubtedly play a role in explaining the disclosure disparity, but they likely do not explain the full picture.

First, there is no evidence that companies generally disclose only unexpected or abnormal risks. Indeed, as discussed above in Section III.A, companies are frequently faulted for disclosing generic risks. Companies must disclose all significant risk factors per SEC Item 503(c); there is no safe harbor for commonly known risks, though some commenters have proposed such an idea.[62]

Second, there is conflicting evidence within the findings of this paper. All Brazilian large-cap firms with controlling shareholders disclosed the risk of concentrated ownership in their filings, despite this being the typical structure in Brazil. If anything, the evidence demonstrates a consistent bias against controlling shareholders across the United States and Brazil. Arguably, as mentioned above, these Brazilian companies are responding to American investor expectations in their SEC Form 20-F filings. However, there is no evidence of a discrepancy between these companies' Form 20-F filings and Reference Forms. Moreover, widely held Gafisa S.A. also filed a Form 20-F and disclosed the risk of dispersed ownership, despite the apparent assumption of dispersed ownership in the United States.

There certainly may be comparative biases in public company risk factor disclosure. Companies can reasonably believe that what is different, such as controlling shareholders in the United States, deserves mention to investors. However, the findings of this paper at least indicate that this explanation is not fully satisfying. Rather, and as discussed further below, these disclosures may accurately reflect risk due to the differing legal and social contexts in the United States and Brazil.

### *C. Risk Factors and Comparative Context*

Entire legal systems are not easily transplanted. This is a fundamental recognition of modern comparative corporate law. When attempted, the "standard policy prescription" of legal transplantation has "not produced the desired

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[61] Gafisa S.A., *supra* note 39 at 23.

[62] Comment Letter from Davis Polk & Wardwell LLP, *supra* note 56. The Private Securities Litigation Reform Act does, however, offers a generic safe harbor for forward-looking statements. 15 U.S.C. § 77z-2 (2018).

results."[63] As Bernard Black and Reinier Kraakman have discussed, "[E]ffective corporate law is context-specific, even if the problems it must address are universal."[64] Certainly, this essential logic applies to the question of concentrated ownership, one of the fundamental areas of dispute in comparative corporate law.

Substantive legal and economic differences between the United States and Brazil provide the most convincing explanation for the empirical findings identified in Part II. First, in both the United States and Brazil, all companies acknowledging a controlling shareholder identified this concentrated ownership as a material risk. This disclosure comports with the reality faced by minority shareholders in both countries given the fundamental concern that controlling shareholders will "maximize their utility, not the value of the shares they hold," and especially not the value of minority shares.[65]

In the United States, a substantial portion of corporate law dilemmas concern the fiduciary duty and legal obligations of controlling shareholders. Delaware courts, recognizing this reality, have consistently applied the higher standard of entire fairness review to change of control transactions initiated by controlling shareholders.[66] The "liability risk" for controlling shareholders is in fact "highest in U.S. jurisdiction."[67] As disclosed in the various filings referenced in Part II, controlling shareholders may exercise their powers in a manner adverse to minority shareholders. Disclosure of this as a significant risk factor is completely logical and consistent with universal theories of corporate law.

While controlling shareholders are common in Brazil, the position of a minority shareholder in a controlled Brazilian company is even more precarious than the position of his or her counterpart in a controlled American company. The fundamental agency costs present in the United States continue to apply, but unique circumstances in Brazil create further cause for concern. For one, the Brazilian public equity market is in a transformative moment due to new listing segments: in recent years, roughly 80% of IPOs have taken place on the Novo Mercado or

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[63] Katharina Pistor & Chenggang Xu, *Governing Emerging Stock Markets: Legal vs Administrative Governance*, 13 CORP. GOVERNANCE 5, 5 (2005); *see also* Lucian Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263 (2009); Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

[64] Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1914 (1996).

[65] Morck, *supra* note 58, at 11.

[66] *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). *But see* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014) (applying business judgment rule where various pre-conditions are met).

[67] Luca Enriques et al., *Related-Party Transactions*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 145, 162 (Reinier Kraakman et al. eds., Oxford Univ. Press 3d ed. 2017) (2004) [hereinafter ANATOMY OF CORPORATE LAW].

Bovespa Mais.[68] However, controlling shareholders continue to retain immense discretion compared with the United States; the basic question of "whether a conflicted controlling shareholder can vote to approve a related-party transaction is controversial and remains unsettled."[69] On the whole, controlling shareholders enjoy much more discretion, and therefore minority shareholders face much greater risk, in Brazil than in the United States.

This is particularly evident when it comes to RPTs. Empirical evidence suggests that the majority-minority shareholder agency problem is particularly severe in Brazil, where the private benefits of control in the 1990s were "extraordinarily large."[70] Various reforms, including appointment rights for minority shareholders and additional disclosure requirements for RPTs,[71] have certainly mitigated these agency costs. Yet Brazilian law remains "lax in policing related-party transactions involving . . . controlling shareholders."[72] These findings generally comport with controlled Brazilian firms' distinctive disclosure of RPT risks.

Moreover, it may be difficult for investors in Brazilian companies to identify and hold accountable the controlling shareholder due to the use of pyramidal ownership structures. International investors encounter difficult understanding and internalizing the agency costs associated with such structures.[73] Studies have demonstrated that a substantial portion of Brazilian companies are controlled through pyramidal structures.[74] Pyramids can also recreate some of the agency costs associated with dispersed ownership, most notably the separation of ownership and control.[75]

Even when minority shareholders do observe malfeasance by an identifiable controlling shareholder, they are less likely to obtain compensation in Brazil than in the United States. The United States is a friendly venue for shareholder litigation, and so "[w]hen it comes to *ex post* enforcement, the

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[68] CVM Proceeding No. RJ2013-5993, Interested party: Azul S.A. (Jan. 31, 2014), http://www.cvm.gov.br/export/sites/cvm/decisoes/anexos/0010/8923-3.pdf.

[69] ANATOMY OF CORPORATE LAW, *supra* note 67, at 157.

[70] Luca Enriques et al., *The Basic Governance Structure of Minority Shareholders and Non-Shareholder Constituencies*, *in* ANATOMY OF CORPORATE LAW 79, 103 (2017).

[71] ANATOMY OF CORPORATE LAW, *supra* note 67, at 169 (noting that there has been "tightening, at least on the books, of regulations of related-party transactions").

[72] *Id.* at 167.

[73] Susan Perkins et al., *Innocents Abroad: The Hazards of International Joint Ventures with Pyramidal Group Firms*, 4 GLOBAL STRAT. J. 310 (2014); *see also* Érica Gorga, *Changing the Paradigm of Stock Ownership from Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries*, 29 NW. J. INT'L L. & BUS. 439 (2009).

[74] Gorga, *supra* note 73, at 469.

[75] For a discussion of the challenges (and benefits) associated with pyramids generally, see Randall K. Morck, *The Riddle of the Great Pyramids*, *in* THE OXFORD HANDBOOK OF BUSINESS GROUPS 602 (Asli M. Colpan et al. eds., Oxford University Press 2010).

machinery is still much more effective in the U.S. than elsewhere."[76] Indeed, Érica Gorga's study of litigation in both the United States and Brazil concerning the same underlying facts revealed that "only U.S. investors were able to obtain financial recoveries" because there are "no appropriate legal mechanisms in Brazil that enable direct investor indemnification."[77] Gorga goes on to argue that, in fact, the U.S. investors' recovery actually took further value from the Brazilian investors.[78]

It is worth noting that in some instances, minority investors in Brazil actually have *stronger* rights than those in the United States. Mariana Pargendler, who has written extensively on issues in comparative corporate law, provides multiple examples of these rights when discussing the dwindling of corporate attributes in Brazil.[79] However, these privileges, such as minority withdrawal and partial dissolution rights, are often effectively limited to closely held corporations and potentially come at the expense of other risks, such as unlimited liability. In addition, some seemingly strong minority shareholder rights, such as the mandatory bid rule, may actually harm minority shareholders by unnecessarily increasing the price of acquisition.[80] Evidently, despite the norm of ownership concentration, various unique features of Brazilian corporate law and economic history create material risks for minority shareholders in controlled corporations.

Shareholders in widely held Brazilian companies continue to face discrete risks unique to Brazil, particularly the risks of quorum formation and shareholder agreements. Widely held Brazilian companies listed on the Novo Mercado consistently disclose the risk that dispersion "may create difficulties for the approval of certain relevant matters, especially because the minimum quorum required by law . . . may not be achieved."[81] Generally, Brazilian corporate law requires that a general meeting only be opened on first call if 1/4th of voting capital is present; on second call, any number is sufficient to establish a quorum.[82] This requirement compares favorably to Delaware corporate law, which requires a minimum of 1/3rd of voting shares to establish a quorum. However, for various critical decisions, including issuance of preferred shares, altering share privileges, and mergers, Brazil requires a quorum of one-half of shareholders.[83] Therefore, the

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[76] ANATOMY OF CORPORATE LAW, *supra* note 67, at 151.

[77] Érica Gorga, *The Impact of the Financial Crisis on Nonfinancial Firms: The Case of Brazilian Corporations and the "Double Circularity" Problem in Transnational Securities Litigation*, 16 THEORETICAL INQUIRIES L. 131, 136 (2015).

[78] *Id.* at 137.

[79] Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil* (Feb. 20, 2018), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126838.

[80] *Id.* at 36.

[81] Cia.Hering, Formulário de Referência, *supra* note 37.

[82] Lei No. 6.404, de 15 dezembro de 1976, D.O.U. de 17.12.1976, art. 115 (Braz.).

[83] *Id.* art. 136. Per Paragraph 2 of Article 136, the CVM may decrease this quorum in the case of a widely held corporation where the quorum was met for three consecutive general meetings.

agency cost of shareholder apathy is exacerbated in Brazil where certain important decisions require a larger quorum. Érica Gorga notes that many Novo Mercado companies "face the challenge of achieving collective action at the shareholder meeting."[84]

The extensive utilization of shareholder agreements further complicates the position of minority shareholders in widely held Brazilian companies. As Érica Gorga describes, shareholder agreements are now used to "align the interests of non-related minority shareholders who do not have enough ownership to separately exercise majority control."[85] Widely held Brazilian companies in the dataset consistently disclosed the risk of "future alliances or agreements between [] shareholders."[86] While shareholder agreements certainly occur in the United States, these groups (or "wolfpacks") are likely to be consolidated for the purposes of securities regulation and corporate law.[87] Distinct from the typical concern of shareholder apathy, shareholder groups create the risk of shadow governance and "previous meetings" in which eventual company decisions are privately resolved.[88] For this reason, in addition to the universal danger of shareholder apathy, the risk of dispersed ownership is correctly disclosed in Brazil.

Every widely held American company in the dataset, however, failed to disclose their ownership structure as a risk. One can argue that various institutional structures mitigate the risk of shareholder apathy in the United States. Despite apparent dispersion, American investors hold shares through investment companies like BlackRock, Vanguard, and State Street. The combination of these "Big Three" shareholders would constitute the largest shareholder in 88% of S&P 500 firms.[89] While this creates unique risks of horizontal ownership,[90] these companies devote resources towards monitoring their investments and rely on the expertise of proxy advisory firms like Institutional Shareholder Services and Glass Lewis.[91]

Even when there is genuine dispersion, risk is further mitigated through Delaware's board-centric model of corporate law. Per Section 141(a) of the

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84 Gorga, *supra* note 28, at 3.

85 *Id.* at 12.

86 Gafisa S.A., *supra* note 39.

87 *See generally* Carmen X.W. Lu, Comment, *Unpacking Wolf Packs*, 125 YALE L.J. 772 (2016).

88 Gorga, *supra* note 28, at 13.

89 Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 298 (2017).

90 *See, e.g.*, José Azar et al., *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018).

91 For a discussion of the argument that the "Big Three" shareholders do not adequately invest in monitoring their investments and devote minimal employees to the task, see M. Todd Henderson & Dorothy S. Lund, *Index Funds Are Great for Investors, Risky for Corporate Governance,* WALL ST. J. (June 22, 2017), http://www.wsj.com/articles/index-funds-are-great-for-investors-risky-for-corporate-governance-1498170623; *see also* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018).

Delaware General Corporation Law, "The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."[92] Delaware courts have consistently recognized the "central premise of [Delaware] law, which vests managerial power over the corporation in the board, and not in the stockholders."[93] Critically, this central premise holds even in the face of a controlling shareholder, who can effectively select board members but still has "no inalienable right to usurp the authority of boards of directors that they elect."[94] In Brazil, alternatively, boards "are very rarely an effective locus for the defense of minority shareholders' rights."[95]

The above arguments demonstrate that, at least to some extent, the agency costs faced by shareholders in widely held companies may be less significant in the United States than in Brazil. These agency costs are certainly present, however, and it is difficult to explain the lack of disclosure beyond the general assumption that shareholder dispersion is the norm. Multiple companies who have clearly suffered oversight failures nevertheless fail to recognize their dispersed ownership structure as a material risk. Legal and institutional contexts provide some explanation for this failure, but comparative biases may also be at work.

## CONCLUSION AND PATHS FORWARD

### *A. Improving Disclosures*

A fundamental premise of this paper is that disclosure matters. This is consistent with the SEC's perspective that "[o]nly through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions."[96] Henry Hu, founding Director of the SEC's Division of Economic and Risk Analysis, has suggested that the federal government's "totemic philosophy as to markets and corporation has been to help ensure a robust informational foundation for private decision makers."[97] As discussed *supra*

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[92] DEL. GEN. CORP. L. § 141(a).

[93] Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 387 (Del. Ch. 2004). For further discussion of Delaware's board-centric model, see J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 BUS. LAWYER 33, 35-38 (2014).

[94] *Id.*

[95] Flavio Marcilio Rabelo & Luciano Coutinho, OECD Development Centre, *Corporate Governance in Brazil* 45 (Apr. 2001), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.621.1058&rep=rep1&type=pdf.

[96] *What We Do*, Sec. & Exch. Comm'n, http://www.sec.gov/Article/whatwedo.html (last visited Jan. 6, 2019). For a defense of the disclosure regime, see Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983). For a criticism of the disclosure regime, see George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. BUS. 117 (1964).

[97] Henry T.C. Hu, *Too Complex To Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601, 1606 (2012).

Section III.A, there is meaningful evidence that the market in fact reacts to risk factor disclosure. Yet this paper demonstrates that disclosure of ownership structure risks remains inadequate, denying the market an opportunity to properly price these essential agency costs. If anything, this paper's findings suggest that Brazilian companies provide more effective disclosure than their American counterparts.

Companies in both the United States and Brazil with a controlling shareholder consistently disclosed the shareholder as a material risk. The contents of these disclosures, furthermore, are consistent with standard theories of agency costs between controlling and minority shareholders. Brazilian companies additionally disclose the particular risks of RPTs and government control. U.S. companies simply disclose the generic possibility that a controlling shareholders' interests may be adverse to those of a minority shareholder.

U.S. and Brazilian companies can significantly enhance the quality of these disclosures by clarifying the level of control held by the controlling shareholder. Companies should at a minimum disclose the actual voting power of the controlling shareholder.[98] This disclosure is particularly critical with regard to dual class shares, such that investors can internalize the "wedge" between equity interests and voting power.[99] Lucian Bebchuk and Kobi Kastiel have made this exact recommendation after finding that "determining the current and future levels of a controller's equity stake requires significant research and calculation, as this information does not appear in standard datasets."[100] While this paper has utilized the simple dichotomy of controlling / widely held company, controlling shareholders come in all shapes and sizes, and the specific mechanism and extent of control merits disclosure.[101] Effective disclosure allows investors to price the control costs of Larry Ellison compared with those of Mark Zuckerberg.

For widely held companies, there is a substantial disclosure disparity, with consistent risk disclosure in Brazil and complete non-disclosure in the United States. Section III.C demonstrates that a shareholder in a Brazilian company may face additional risks. However, lack of monitoring incentive and separation of ownership and control remain fundamental agency costs and concerns in corporate law, at least since the publication of The Modern Corporation and Private Property

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[98] Some companies, such as Alphabet, do currently disclose this information. Alphabet Inc, Annual Report (Form 10-K) (Feb. 5, 2018), http://www.sec.gov/Archives/edgar/data/1652044/000165204418000007/goog10-kq42017.htm.

[99] INVESTOR ADVISORY COMMITTEE, *supra* note 11.

[100] *See, e.g.*, Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 43 (2019).

[101] *See generally* Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1643 (2006).

by Berle and Means.[102] The notion that this is not a significant risk, while a controlling shareholder is, stands at odds with basic theories of corporate law. Widely held U.S. companies should disclose the risks associated with their ownership structure.

### *B. Disclosure and Persistence*

Though the primary beneficiaries of disclosure are investors, there are broader concerns at play. The comparative biases present in current disclosures, particularly the failure of widely held U.S. companies to disclose ownership risk, contribute to persistent divergence in corporate governance. Much ink has been spilled and theories offered on the lack of convergence in ownership structures. As Lucian Bebchuk and Mark Roe note, "[N]otwithstanding the forces of globalization and efficiency, some key differences in corporate structures among countries have persisted."[103] To the extent that risk factor disclosure serves to genuinely inform the market as to corporate governance risks, comparative biases will result in agency costs mispricing skewed in favor of the status quo.

Given the numerous factors contributing to the persistence of divergence, we certainly cannot claim that disclosure will result in universal governance structures. Disclosure can, however, grease the wheels of convergence. The current comparative bias is a prime example of "corporate governance plate tectonics, in which the demands of current circumstances grind against the influence of initial conditions."[104] Bebchuk and Roe already recognize "network externalities" such that there is "an advantage to using the dominant form in the economy and the one with which players are most familiar."[105] The treatment of widely held companies as the norm and not worthy of mention as a significant risk cements these biases into investor perceptions. While this is presumably not a concerted entrenchment effort by widely held companies, as described by the *Olson problem*,[106] this disclosure bias certainly exacerbates the factors already favoring persistence.

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[102] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[103] Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 137 (1999).

[104] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 336 (2001).

[105] Bebchuk & Roe, *supra* note 103, at 141.

[106] MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION AND SOCIAL RIGIDITIES (1982). For a description of the "Olson problem," see Gilson et al., *supra* note 59, at 478.

### *C. Brazil and the Bonding Hypothesis*

Finally, this paper demonstrates that, at least with regard to ownership structure risk factors, Brazilian companies have more effective disclosure. Controlled Brazilian companies identified the risk of concentrated ownership and provided specific detail regarding the risk (RPTs and government ownership). Widely held Brazilian companies actually disclosed the structural risk and described the challenges dispersion may cause. Given the prestige and renowned enforcement capabilities of the SEC, this may come as a surprise.

However, these findings are fully consistent with the bonding hypothesis. John C. Coffee, Jr. has argued that firms cross-list on U.S. stock exchanges in order to "commit[] the listing firm to respect minority investor rights and to provide fuller disclosure."[107] Coffee's version of the bonding hypothesis involved bonding to U.S. listing requirements and reputational bonding through U.S. intermediaries (*e.g.*, underwriters). While Coffee was writing in 2002, prior to the success of the Novo Mercado, he suggested that the relative success of the Neuer Markt "may show that there is a market for 'high disclosure.'"[108]

Widely held companies on the Novo Mercado face clear challenges gaining the trust and confidence of Brazilian investors. Disclosure may genuinely matter more for these companies, whereas U.S. companies may only disclose to the extent necessary to avoid SEC action or litigation. There is a concerning implication to this finding, worthy of future research. For one, the finding places enormous pressure on the SEC and private litigation to ensure adequate disclosure by large companies in the United States. This further suggests that the need for government enforcement of disclosure may actually be less critical in developing countries, where there is stronger market incentive for disclosure of material risks.

This paper has empirically demonstrated a significant disclosure disparity between the United States and Brazil. In both countries, companies view concentrated ownership as a significant risk, consistent with the realities faced by minority investors in such companies. Among widely held companies, however, only Brazilian firms disclose risks associated with dispersed ownership. Beyond connecting biases in actual ownership patterns to perceptions of risk associated with those patterns, we have seen how comparative biases and legal contexts can explain the disclosure disparity. A shareholder in a widely held Brazilian company faces corporate governance agency costs and risks distinct from their American counterpart, though there is certainly some common ground meriting universal disclosure. These findings shed further light on core issues in comparative

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[107] John C. Coffee, Jr., *Racing Towards the Top: The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1780 (2002).
[108] *Id.* at 1808.

corporate governance, namely the lack of governance convergence and the bonding hypothesis.

## **ANNEX 1** (UNITED STATES – TOP 100)[109]

| COMPANY | CONTROLLING SHAREHOLDER | CONTROL RISK | DISPERSE RISK |
|---|---|---|---|
| Apple Inc. | NO | NO | NO |
| Alphabet Inc. | YES | YES | NO |
| Microsoft Corporation | NO | NO | NO |
| Amazon.com, Inc.* | NO | NO | NO |
| Berkshire Hathaway Inc.* | NO | NO | NO |
| Facebook Inc. | YES | YES | NO |
| JP Morgan Chase & Co. | NO | NO | NO |
| Johnson & Johnson | NO | NO | NO |
| Exxon Mobil Corp. | NO | NO | NO |
| Bank of America Corporation | NO | NO | NO |
| Visa Inc. | NO | NO | NO |
| Walmart Inc.* | NO | NO | NO |
| Intel Corporation | NO | NO | NO |
| Wells Fargo & Co. | NO | NO | NO |
| Chevron Corporation | NO | NO | NO |
| UnitedHealth Group Inc. | NO | NO | NO |
| AT&T Inc. | NO | NO | NO |
| Pfizer Inc. | NO | NO | NO |
| Cisco Systems, Inc. | NO | NO | NO |
| Verizon Communications, Inc. | NO | NO | NO |
| The Home Depot Inc. | NO | NO | NO |
| The Boeing Company | NO | NO | NO |
| The Procter & Gamble Company | NO | NO | NO |
| The Coca-Cola Company | NO | NO | NO |
| Oracle Corporation* | NO | NO | NO |
| Mastercard Incorporated | NO | NO | NO |

[109] Annex 1 is listed in order of market capitalization. As discussed above in Part II, asterisks denote companies with the existence of a potential or likely, but undisclosed, controlling shareholder.

| COMPANY | CONTROLLING SHAREHOLDER | CONTROL RISK | DISPERSE RISK |
|---|---|---|---|
| Citigroup Inc. | NO | NO | NO |
| Philip Morris International Inc. | NO | NO | NO |
| Merck & Co. | NO | NO | NO |
| The Dow Chemical Company | NO | NO | NO |
| PepsiCo, Inc. | NO | NO | NO |
| Comcast Corporation* | NO | NO | NO |
| The Walt Disney Company | NO | NO | NO |
| AbbVie Inc. | NO | NO | NO |
| International Business Machines Corporation | NO | NO | NO |
| Netflix, Inc. | NO | NO | NO |
| NVIDIA Corporation | NO | NO | NO |
| The 3M Company | NO | NO | NO |
| McDonald's Corp | NO | NO | NO |
| Altria Group, Inc. | NO | NO | NO |
| General Electric Co. | NO | NO | NO |
| Amgen Inc. | NO | NO | NO |
| Adobe Inc. | NO | NO | NO |
| Honeywell International Inc. | NO | NO | NO |
| Nike, Inc.* | NO | NO | NO |
| Union Pacific Corporation | NO | NO | NO |
| Abbott Laboratories | NO | NO | NO |
| Booking Holdings Inc. | NO | NO | NO |
| Texas Instruments Inc. | NO | NO | NO |
| Lockheed Martin Corporation | NO | NO | NO |
| United Technologies Corporation | NO | NO | NO |
| Gilead Sciences, Inc. | NO | NO | NO |
| The Goldman Sachs Group, Inc. | NO | NO | NO |
| Schlumberger Limited | NO | NO | NO |
| PayPal Holdings, Inc. | NO | NO | NO |
| Morgan Stanley | NO | NO | NO |
| United Parcel Service, Inc. | NO | NO | NO |
| Caterpillar Inc. | NO | NO | NO |
| Salesforce.com, Inc. | NO | NO | NO |
| Thermo Fisher Scientific Inc. | NO | NO | NO |
| Eli Lilly and Company | NO | NO | NO |

| COMPANY | CONTROLLING SHAREHOLDER | CONTROL RISK | DISPERSE RISK |
|---|---|---|---|
| Costco Wholesale Corporation | NO | NO | NO |
| Bristol-Myers Squibb Company | NO | NO | NO |
| BlackRock, Inc.* | NO | NO | NO |
| U.S. Bancorp | NO | NO | NO |
| Starbucks Corporation | NO | NO | NO |
| Qualcomm Incorporated | NO | NO | NO |
| The American Express Company | NO | NO | NO |
| ConocoPhillips | NO | NO | NO |
| NextEra Energy, Inc. | NO | NO | NO |
| Time Warner Inc. | NO | NO | NO |
| The Kraft Heinz Company | YES | YES | NO |
| Charter Communications, Inc.* | NO | NO | NO |
| The Charles Schwab Corporation | NO | NO | NO |
| Lowe's Companies, Inc. | NO | NO | NO |
| Danaher Corporation | NO | NO | NO |
| Twenty-First Century Fox, Inc.* | NO | NO | NO |
| Celgene Corporation | NO | NO | NO |
| CVS Health Corporation | NO | NO | NO |
| FedEx Corporation | NO | NO | NO |
| PNC Financial Services Group, Inc. | NO | NO | NO |
| General Dynamics Corporation | NO | NO | NO |
| The Raytheon Company | NO | NO | NO |
| Walgreens Boots Alliance, Inc.* | NO | NO | NO |
| EOG Resources, Inc. | NO | NO | NO |
| Colgate-Palmolive Company | NO | NO | NO |
| American Tower Corporation | NO | NO | NO |
| Mondelez International, Inc. | NO | NO | NO |
| Becton, Dickinson and Company | NO | NO | NO |
| Northrop Grumman Corporation | NO | NO | NO |
| Stryker Corporation | NO | NO | NO |
| Applied Materials, Inc. | NO | NO | NO |
| Micron Technology, Inc. | NO | NO | NO |
| Anthem, Inc. | NO | NO | NO |
| Dell Technologies Inc. | YES | YES | NO |
| Las Vegas Sands Corporation | YES | YES | NO |

| COMPANY | CONTROLLING SHAREHOLDER | CONTROL RISK | DISPERSE RISK |
|---|---|---|---|
| Aetna Inc. | NO | NO | NO |
| Occidental Petroleum Corporation | NO | NO | NO |
| Duke Energy Corporation | NO | NO | NO |
| The Estee Lauder Companies Inc. | YES | YES | NO |
| TOTAL | 6% (6/100) | 6% (6/100) | 0% (0/100) |

## **ANNEX 2** (BRAZIL – LARGE CAP)

| COMPANY | CONTROLLING SHAREHOLDER | CONTROL RISK |
|---|---|---|
| Banco Bradesco Sa | YES | YES |
| Banco Santander SA | YES | YES |
| Braskem S.A. | YES | YES |
| Fibria Celulose S.A. | YES | YES |
| Gol Linhas Aereas Inteligentes S.A. | YES | YES |
| Itau Unibanco Banco Holding SA | YES | YES |
| Petrobras | YES | YES |
| Telefonica Brasil S.A. | YES | YES |
| Vale S.A. | YES | YES |
| **TOTAL** | **100% (9/9)** | **100% (9/9)** |

## **ANNEX 3** (BRAZIL – NOVO MERCADO)

| COMPANY | DISPERSE RISK |
|---|---|
| Kroton Educacional S.A. | YES |
| Valid Solucoes e Servicos de Seguranca em Meios de Pagamento e Identificacao S.A. | YES |
| Rossi Residencial S.A. | YES |
| Embraer S.A. | YES |
| PDG Realty S.A. | YES |
| Localiza Rent a Car S.A | NO |
| Cia Hering | YES |
| Iochpe Maxion S.A. | YES |

| COMPANY | DISPERSE RISK |
|---|---|
| BM&F Bovespa S.A. - Bolsa e Valores, Mercadoris e Futuros | YES |
| Brasil Insurance | YES |
| Gafisa S.A. | YES |
| BR Malls Participacoes S.A. | YES |
| **TOTAL** | **92% (11/12)** |

## **ANNEX 4** (UNITED STATES – KEY PERSONNEL)[110]

| COMPANY | CONTROLLING SHAREHOLDER | KEY PERSONNEL |
|---|---|---|
| Apple Inc. | NO | YES |
| Alphabet Inc. | YES | YES |
| Microsoft Corporation | NO | NO |
| Amazon.com, Inc.* | NO | YES |
| Berkshire Hathaway Inc.* | NO | YES |
| Facebook Inc. | YES | YES |
| JP Morgan Chase & Co. | NO | NO |
| Johnson & Johnson | NO | NO |
| Exxon Mobil Corp. | NO | NO |
| Bank of America Corporation | NO | NO |
| Visa Inc. | NO | NO |
| Walmart Inc.* | NO | NO |
| Intel Corporation | NO | NO |
| Wells Fargo & Co. | NO | NO |
| Chevron Corporation | NO | NO |
| UnitedHealth Group Inc. | NO | NO |
| AT&T Inc. | NO | NO |
| Pfizer Inc. | NO | NO |
| Cisco Systems, Inc. | NO | NO |
| Verizon Communications, Inc. | NO | NO |

[110] As discussed above in Part II, asterisks denote companies with the existence of a potential or likely, but undisclosed, controlling shareholder. Only those companies that specifically named key personnel are listed as “YES” in the Key Personnel column.

| COMPANY | CONTROLLING SHAREHOLDER | KEY PERSONNEL |
|---|---|---|
| The Home Depot Inc. | NO | NO |
| The Boeing Company | NO | NO |
| The Procter & Gamble Company | NO | NO |
| The Coca-Cola Company | NO | NO |
| Oracle Corporation* | NO | YES |
| Mastercard Incorporated | NO | NO |
| Citigroup Inc. | NO | NO |
| Philip Morris International Inc. | NO | NO |
| Merck & Co. | NO | NO |
| The Dow Chemical Company | NO | NO |
| PepsiCo, Inc. | NO | NO |
| Comcast Corporation* | NO | NO |
| The Walt Disney Company | NO | NO |
| AbbVie Inc. | NO | NO |
| International Business Machines Corporation | NO | NO |
| Netflix, Inc. | NO | YES |
| NVIDIA Corporation | NO | NO |
| The 3M Company | NO | NO |
| McDonald's Corp | NO | NO |
| Altria Group, Inc. | NO | NO |
| General Electric Co. | NO | NO |
| Amgen Inc. | NO | NO |
| Adobe Inc. | NO | NO |
| Honeywell International Inc. | NO | NO |
| Nike, Inc.* | NO | NO |
| Union Pacific Corporation | NO | NO |
| Abbott Laboratories | NO | NO |
| Booking Holdings Inc. | NO | NO |
| Texas Instruments Inc. | NO | NO |
| Lockheed Martin Corporation | NO | NO |
| United Technologies Corporation | NO | NO |
| Gilead Sciences, Inc. | NO | NO |
| The Goldman Sachs Group, Inc. | NO | NO |
| Schlumberger Limited | NO | NO |
| PayPal Holdings, Inc. | NO | NO |

| COMPANY | CONTROLLING SHAREHOLDER | KEY PERSONNEL |
|---|---|---|
| Morgan Stanley | NO | NO |
| United Parcel Service, Inc. | NO | NO |
| Caterpillar Inc. | NO | NO |
| Salesforce.com, Inc. | NO | NO |
| Thermo Fisher Scientific Inc. | NO | NO |
| Eli Lilly and Company | NO | NO |
| Costco Wholesale Corporation | NO | NO |
| Bristol-Myers Squibb Company | NO | NO |
| BlackRock, Inc.* | NO | NO |
| U.S. Bancorp | NO | NO |
| Starbucks Corporation | NO | NO |
| Qualcomm Incorporated | NO | NO |
| The American Express Company | NO | NO |
| ConocoPhillips | NO | NO |
| NextEra Energy, Inc. | NO | NO |
| Time Warner Inc. | NO | NO |
| The Kraft Heinz Company | YES | NO |
| Charter Communications, Inc.* | NO | NO |
| The Charles Schwab Corporation | NO | NO |
| Lowe's Companies, Inc. | NO | NO |
| Danaher Corporation | NO | NO |
| Twenty-First Century Fox, Inc.* | NO | NO |
| Celgene Corporation | NO | NO |
| CVS Health Corporation | NO | NO |
| FedEx Corporation | NO | NO |
| PNC Financial Services Group, Inc. | NO | NO |
| General Dynamics Corporation | NO | NO |
| The Raytheon Company | NO | NO |
| Walgreens Boots Alliance, Inc.* | NO | NO |
| EOG Resources, Inc. | NO | NO |
| Colgate-Palmolive Company | NO | NO |
| American Tower Corporation | NO | NO |
| Mondelez International, Inc. | NO | NO |
| Becton, Dickinson and Company | NO | NO |
| Northrop Grumman Corporation | NO | NO |

| COMPANY | CONTROLLING SHAREHOLDER | KEY PERSONNEL |
|---|---|---|
| Stryker Corporation | NO | NO |
| Applied Materials, Inc. | NO | NO |
| Micron Technology, Inc. | NO | NO |
| Anthem, Inc. | NO | NO |
| Dell Technologies Inc. | YES | YES |
| Las Vegas Sands Corporation | YES | YES |
| Aetna Inc. | NO | NO |
| Occidental Petroleum Corporation | NO | NO |
| Duke Energy Corporation | NO | NO |
| The Estee Lauder Companies Inc. | YES | NO |
| TOTAL | 6% (6/100) | 9% (9/100) |
| TOTAL W/ CONTROLLING SHAREHOLDER | N/A | 44% (4/9) |

## **ANNEX 5** (UNITED STATES – TAKEOVER DEFENSE)

| COMPANY | CONTROLLING SHAREHOLDER | TAKEOVER DEFENSE |
|---|---|---|
| Apple Inc. | NO | NO |
| Alphabet Inc. | YES | YES |
| Microsoft Corporation | NO | NO |
| Amazon.com, Inc.* | NO | NO |
| Berkshire Hathaway Inc.* | NO | NO |
| Facebook Inc. | YES | YES |
| JP Morgan Chase & Co. | NO | NO |
| Johnson & Johnson | NO | NO |
| Exxon Mobil Corp. | NO | NO |
| Bank of America Corporation | NO | NO |
| Visa Inc. | NO | YES |
| Walmart Inc.* | NO | NO |
| Intel Corporation | NO | NO |
| Wells Fargo & Co. | NO | NO |
| Chevron Corporation | NO | NO |
| UnitedHealth Group Inc. | NO | NO |

| COMPANY | CONTROLLING SHAREHOLDER | TAKEOVER DEFENSE |
|---|---|---|
| AT&T Inc. | NO | NO |
| Pfizer Inc. | NO | NO |
| Cisco Systems, Inc. | NO | NO |
| Verizon Communications, Inc. | NO | NO |
| The Home Depot Inc. | NO | NO |
| The Boeing Company | NO | NO |
| The Procter & Gamble Company | NO | NO |
| The Coca-Cola Company | NO | NO |
| Oracle Corporation* | NO | NO |
| Mastercard Incorporated | NO | YES |
| Citigroup Inc. | NO | NO |
| Philip Morris International Inc. | NO | NO |
| Merck & Co. | NO | NO |
| The Dow Chemical Company | NO | NO |
| PepsiCo, Inc. | NO | NO |
| Comcast Corporation* | NO | NO |
| The Walt Disney Company | NO | NO |
| AbbVie Inc. | NO | YES |
| International Business Machines Corporation | NO | NO |
| Netflix, Inc. | NO | YES |
| NVIDIA Corporation | NO | YES |
| The 3M Company | NO | NO |
| McDonald's Corp | NO | NO |
| Altria Group, Inc. | NO | NO |
| General Electric Co. | NO | NO |
| Amgen Inc. | NO | NO |
| Adobe Inc. | NO | NO |
| Honeywell International Inc. | NO | NO |
| Nike, Inc.* | NO | YES |
| Union Pacific Corporation | NO | NO |
| Abbott Laboratories | NO | NO |
| Booking Holdings Inc. | NO | NO |
| Texas Instruments Inc. | NO | NO |
| Lockheed Martin Corporation | NO | NO |
| United Technologies Corporation | NO | NO |

| COMPANY | CONTROLLING SHAREHOLDER | TAKEOVER DEFENSE |
|---|---|---|
| Gilead Sciences, Inc. | NO | NO |
| The Goldman Sachs Group, Inc. | NO | NO |
| Schlumberger Limited | NO | NO |
| PayPal Holdings, Inc. | NO | YES |
| Morgan Stanley | NO | NO |
| United Parcel Service, Inc. | NO | NO |
| Caterpillar Inc. | NO | NO |
| Salesforce.com, Inc. | NO | YES |
| Thermo Fisher Scientific Inc. | NO | NO |
| Eli Lilly and Company | NO | NO |
| Costco Wholesale Corporation | NO | NO |
| Bristol-Myers Squibb Company | NO | NO |
| BlackRock, Inc.* | NO | YES |
| U.S. Bancorp | NO | NO |
| Starbucks Corporation | NO | NO |
| Qualcomm Incorporated | NO | NO |
| The American Express Company | NO | NO |
| ConocoPhillips | NO | NO |
| NextEra Energy, Inc. | NO | NO |
| Time Warner Inc. | NO | NO |
| The Kraft Heinz Company | YES | YES |
| Charter Communications, Inc.* | NO | YES |
| The Charles Schwab Corporation | NO | NO |
| Lowe's Companies, Inc. | NO | NO |
| Danaher Corporation | NO | NO |
| Twenty-First Century Fox, Inc.* | NO | NO |
| Celgene Corporation | NO | YES |
| CVS Health Corporation | NO | YES |
| FedEx Corporation | NO | NO |
| PNC Financial Services Group, Inc. | NO | NO |
| General Dynamics Corporation | NO | NO |
| The Raytheon Company | NO | NO |
| Walgreens Boots Alliance, Inc.* | NO | YES |
| EOG Resources, Inc. | NO | NO |
| Colgate-Palmolive Company | NO | NO |

| COMPANY | CONTROLLING SHAREHOLDER | TAKEOVER DEFENSE |
|---|---|---|
| American Tower Corporation | NO | NO |
| Mondelez International, Inc. | NO | NO |
| Becton, Dickinson and Company | NO | NO |
| Northrop Grumman Corporation | NO | NO |
| Stryker Corporation | NO | NO |
| Applied Materials, Inc. | NO | NO |
| Micron Technology, Inc. | NO | NO |
| Anthem, Inc. | NO | YES |
| Dell Technologies Inc. | YES | YES |
| Las Vegas Sands Corporation | YES | YES |
| Aetna Inc. | NO | YES |
| Occidental Petroleum Corporation | NO | NO |
| Duke Energy Corporation | NO | NO |
| The Estee Lauder Companies Inc. | YES | YES |
| TOTAL | 6% (6/100) | 21% (21/100) |