Brooklyn Law Review

Volume 79 | Issue 4 Article 5

2014

ESSAY: J.P. Morgan: An Anatomy of Corporate Publicness

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INTRODUCTION

Although corporations work to control their images, their carefully orchestrated and calibrated statements and documents can fall apart in the face of public scrutiny. This essay explores the public focus on J.P. Morgan (the Company) in the aftermath of the "London Whale," a trading incident that escalated into a significant loss of both revenues and reputation for the Company and its CEO. Indeed, in the wake of the Whale, J.P. Morgan and its Chief Executive Officer, Jamie Dimon, went from being a post-financial crisis "poster child" and media darlings, to punching bags. I argue here that my previously developed theory of publicness is both the cause and the result.

This essay proceeds as follows. After a brief introduction, I lay the groundwork for understanding publicness in the context of corporate governance. In Part II, I tell the story of J.P. Morgan, laying out how a badly handled trading problem developed into its own crisis and scandal from which the Company is still attempting to recover. In Part III, I spin out the ways in which the public response to the trades and the Company's handling of them has affected the Company's future. I conclude by offering further thoughts on publicness outside the context of J.P. Morgan.

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I. PUBLICNESS AND CORPORATIONS: AN INTRODUCTION

Legally, corporations are creatures of "private" law.[1] In fact, however, corporations are public actors. Indeed, even though corporations are termed "private," the choices that these entities and their officers and directors make, and the impact of those choices, are often very public. The choices become public in many ways. For example, in today's world, publicly held corporations, or those that are traded on an exchange, must file public documents and, even those that are not required to file specific documents, make public statements on an ongoing basis.[2] These documents and statements, such as earnings calls, press releases, and public announcements, are the stories corporations tell to the world at large.

Through these releases and stories, corporations necessarily move from the private to the public—whether they like it or not. Corporations vet and frame these communications to attain a desired effect. Once released, however, all of these stories are the subject of exploration and vetting by the "outside" parties that examine corporations, including, of course, government regulators, but going well beyond regulators to include the media, bloggers, and the citizens of "Main Street." These outside parties do more than listen; they reframe and often critique the stories, in ways that may force corporations to alter their preferred governance structure—regardless of their legal status as private or public.

The interplay between the insiders who develop and release the stories and the outside actors who report on and recap the material is what I have previously termed publicness.[3] Publicness in the governance structure develops as follows. Corporations make choices, including, for example, choices about how the company handles certain events and how officers, directors, and shareholders interact with each other and the public. Once corporations communicate these choices to the world, the public develops an understanding of how the

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[1] *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (West 2014).

[2] *See, e.g.*, 17 C.F.R. § 240.13a-14, .15d-14 (2012) (requiring certification of certain disclosures required in 10-K reports); *see also* Standard Instructions for Filing Forms Under Securities Act of 1933, Securities Exchange Act of 1934, and Energy Policy and Conservation Act of 1975, Regulation S-K, 17 C.F.R. § 229.10(b)(2) (2012) (dividing 10-K disclosures into "Items," including disclosures about environmental programs and pending litigation).

[3] *See* Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013-14 (2013); Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137, 141 (2011).

corporations have chosen to delegate power and responsibilities, as well as about where the gaps and weaknesses in governance might be. When public actors outside of the corporation reframe and retell the stories, those actors come to play a role in the corporation. Arguably, these outside actors can even become part of the governance rubric, creating pressure for changes in the decision-making structure or the allocation of power within the corporation. Indeed, as this essay explores, multiple parties intervened in the J.P. Morgan story to shift the nature of the Company's governance.

Publicness is therefore a public-private dialectic that derives from the increasingly visible nature of corporations. In today's world, companies are subject to constant scrutiny. The media cycle is 24/7, and the old saying that "bad news travels fast" is far more potent in the age of electronic media. The failure to understand this dynamic can result in corporate challenges and corporate failures. Publicness is one of the reasons why outcomes may be different from what a company intended. Moreover, publicness may force companies to be more public—in the form of increased visibility and responsiveness to outside critiques.

As a result, my theory of publicness reveals that corporate governance has shifted from the legally defined set of actors—the shareholders, officers, and directors described in more detail below—to a larger set of actors.[4] An understanding of publicness and its impact requires thoughtfulness about these non-traditional corporate actors. Non-regulators, in particular, can play a significant role in constraining the choices of corporate actors, both through pressure for increased regulation and pressure for governance changes.[5] Understanding publicness and its role in governance is therefore key to understanding governance more generally. Moreover, as the J.P. Morgan story reveals, shareholders, officers, and directors must understand publicness in order to manage governance effectively.

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[4] *See generally* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337 (2013) (positing that when the incentive structures in corporations generate risks that impact the public, they also generate public responses like legislation).

[5] *See id.*

A. *The Traditional Corporate Governance Story*

Before considering J.P. Morgan's publicness, a brief discussion of the traditional corporate governance model is in order. Corporate governance is a term used to describe the relationships, rules, rights, responsibilities, and practices that govern the internal relationships of the corporation.[6] Although federal laws and regulations play an increasing role in defining some of these relationships,[7] state law is still the domain of much of corporate governance.[8] The states have chosen to leave decisions regarding corporate governance largely in the hands of corporate actors. This is a policy choice known as private ordering.

Consider the traditional view of corporate governance. It is described as a set of principles that balance and apportion the rights and responsibilities for corporate management and control among three groups: officers, shareholders, and directors.[9] Officers run the corporation on a day-to-day basis. Indeed, the power to do so is delegated to them. State law enables directors to make this choice.[10] Although officers often also hold stock in the company, they are not "shareholders" for the purposes of the corporate governance equation.

Shareholders generally play a small role in the corporate governance scheme. They have only three powers: voting,

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[6] Sale, *Public Governance*, *supra* note 3, at 1013.

[7] *See* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1821 (2011) ("Like their predecessors in [Sarbanes-Oxley], the six key corporate governance provisions of Dodd-Frank . . . displac[e] state regulation with federal law."); Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 VAND. L. REV. 859, 904 (2003) (noting that, as the federal disclosure obligations have increased, they resemble the duty of care obligations that were the province of state law); *see also* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 635 (2003) ("[a]bsent a constitutional bar to federal involvement in corporate affairs, the federal government can determine, has determined, and will determine many critical elements of corporate governance" at the expense of historical state control).

[8] *See* Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."); *see also* Roberta S. Karmel, *Is it Time for a Federal Corporation Law?*, 57 BROOK. L. REV. 55, 76-78 (1991) (discussing how the Supreme Court has applied the principle that, in general, state law governs the internal affairs of corporations).

[9] *See* Arthur R. Pinto, *An Overview of United States Corporate Governance in Publicly Traded Corporations*, 58 AM. J. COMP. L. 257, 265 (2010) ("The legal model allocates to directors and officers the authority to manage while it provides the shareholders, as owners, with some ability to protect their investment and monitor the managers' performance."); *see also* Thompson & Sale, *supra* note 7, at 864.

[10] *See, e.g.*, DEL. CODE ANN. tit. 8, § 142(a) (West 2014).

selling, and suing.[11] Further, these powers are accessible only in limited doses. State law generally prohibits shareholders from being involved in the day-to-day operations of the company. Thus, despite their role as company owners, shareholders have little power in the traditional governance scheme. There are many explanations for why state law has made this choice. For the purposes of this essay, the key point is to recognize that it is a choice. It is not foreordained or inviolate.

In economic terms, this separation of powers between the shareholders/owners and the officers who are managing the corporation creates the possibility of opportunistic behavior on the part of the officers. The larger the corporation, the less likely it is that the shareholders will monitor the officers' choices on an ongoing basis. Instead, the corporate governance scheme assigns that role to the directors.[12] Their role is to oversee the officers and, thus, to mediate the inherent conflict between the officers and the absentee shareholders.

These three roles are not without limits. The most significant limit is that the decisions of officers and directors must be made with shareholder interests in mind. These interests are generally defined in terms of corporate value or profits, and directors and officers are allowed to balance short- and long-term goals regarding that value when making decisions.[13] Law polices these obligations by imposing fiduciary duties on both directors and officers.

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[11] Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 216 (1999).

[12] *See, e.g.*, DEL. CODE ANN. tit. 8 § 141(a) (West 2014).

[13] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 312-13 (1976) (discussing the agency costs generated between managers and outside shareholders); *see, e.g.*, Lucian Arye Bebchuk & Christine Jolls, *Managerial Value Diversion and Shareholder Wealth*, 15 J.L. ECON. & ORG. 487 (1999) (finding reduction in shareholder wealth by studying, in principal-agent model, effects of diverting value to shareholders' delegated agents); *see also* Adolf A. Berle, Jr. & Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY 66 (Adolf A. Berle ed., 1968) (discussing divorce of ownership and control over corporate wealth); *see generally* Stephen M. Bainbridge, § 1.5 CORPORATION LAW AND ECONOMICS (2002) (discussing agents, costs, and theory of firm); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1441-42 (1993) (explaining that the business judgment rule alleviates agency costs and only protects decisions that benefit shareholders); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32-33.

Directors are not, however, expected to be involved in daily corporate decision-making. Instead, their role is to consult with officers on some issues and otherwise ensure they have a strategy in place to achieve desired outcomes. The academic literature on the contours of directors' oversight role and the balance of power between directors and officers is considerable.[14] The theory, however, is simple. Directors hire officers, who are in charge of the corporation on a day-to-day basis and then oversee the strategy, risk-taking, and decision-making of those officers. Shareholders have only an indirect say in corporate management and decision-making because they vote for the directors. There are three groups, each with assigned roles.

The reality, of course, is not that simple. Indeed, as the J.P. Morgan story makes clear, corporate governance is a dynamic concept—one that necessarily grows, evolves, and *reacts* to the environments in which corporations operate.[15] Once information becomes public, other parties intervene in the decision-making structure. These new parties encroach on the space traditionally reserved to the officers, shareholders, and directors. The parties to whom the corporation must answer and respond grow and shift. As a result, internal governance practices adjust, shift, and change.

B. The Publicness of Corporate Governance

This shift, or the "occupation" of governance roles by new parties, is what I call *publicness*. I have previously developed the theory of publicness to explore the way in which the interests to which corporations must respond have grown and changed.[16] Publicness therefore sets forth my theory about the increasingly dynamic nature of the regulation and governance of corporations and the new roles that non-regulators play in corporate decision-

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[14] Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003); Stephen M. Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, 57 VAND. L. REV. 83 (2004); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Victor Brudney & Marvin A. Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974); William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953 (2003); Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087 (1996); Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456 (2004).

[15] *See* Sale, *The New "Public" Corporation*, *supra* note 3, at 137.

[16] Sale, *Public Governance*, *supra* note 3, at 1013-14.; Sale, *The New "Public" Corporation*, *supra* note 3, at 141.

making. These outside actors are not defined by law. State lawmakers do not allocate power to them, nor does federal regulation cover them. Further, these outside actors are not "private" actors in the way that officers, directors, and shareholders—the prescribed state-law actors—are.

Publicness therefore makes clear that the "private status" of corporate governance is subject to change, and has in fact changed. The private nature of corporations is not foreordained. Instead, it is a privilege, not a right. It is a choice. Choices, of course, can and do change. Publicness has played a role in making those changes.

Publicness is different from the question of whether a corporation is a "public" company.[17] Legally, a "public" corporation is one traded on an exchange. In addition to state law, those public corporations are subject to stock exchange rules, federal regulations promulgated by the U.S. Securities and Exchange Commission, and, in the case of publicly held banks like J.P. Morgan, federal banking regulations as well. As the J.P. Morgan story reveals, however, publicly held corporations are not just creatures of state law, federal law, or Wall Street stock exchange norms. They are also creatures of Main Street, the media, and bloggers.[18] Publicness acknowledges all of these actors and the ways they interact.

Thus, publicness is a theory of the corporation that emphasizes the ways both privately and publicly held corporations operate in a public sphere with obligations that change over time and in response to forces beyond those created by the legally defined corporate governance actors. These changes can grow out of the decisions corporate actors make. They can also grow out of the failure of corporate actors to make decisions. Indeed, when company officers and directors fail to understand their publicness and fail to govern in light of it, the result can lead to publicness of various forms, including: increased media and government scrutiny, exposure of internal choices and privileges, increased government regulation (which is a form of publicness I have previously termed "public governance"),[19] and a shrinking

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17 Sale, *The New "Public" Corporation*, *supra* note 3, at 148.
18 *Id.* at 137.
19 *See* Sale, *Public Governance*, *supra* note 3.

conception of the corporation's "private" space. J.P. Morgan's story illustrates all of these aspects of publicness.

II. J.P. MORGAN'S PUBLICNESS

The contrast between J.P. Morgan and Jaime Dimon before and after the London Whale trading scandal reveals the powerful effect of publicness. J.P. Morgan and Jaime Dimon emerged from the 2008 financial crisis strong and with reputations intact. In contrast to many of his peers, Dimon was the banking leader with moral courage and a strong bank. He was the one that the public heard about in positive terms. Congress respected him and the media loved him. As a result, the public gave him much freedom within which to operate.

Then, suddenly, it changed. Publicness ensnarled him and the bank. Notably, this is a positive description, not a normative one. Should their freedom have been limited? I submit that the answer to that question is an unknown. Given the public information on the Whale losses and ensuing events, however, it is reasonable to conclude that Dimon did not fully appreciate the bank's vulnerability to publicness. As a result, he actually played a role in increasing the publicness of the Company.

A. *The Background of the J.P. Morgan Whale*

Let's start with some facts about J.P. Morgan and the London Whale trades, so named because they occurred in the London offices of the Company. J.P. Morgan Chase & Company "is the largest financial holding company in the [U.S.]."[20] "J.P. Morgan Chase Bank is the largest U.S. bank."[21] "It is also the largest derivatives dealer in the world, and the largest single participant in world credit derivative markets."[22] The Company is categorized as a systemically important financial institution, a post-financial crisis regulatory term and reality. As a result, it is subject to high levels of regulatory and media scrutiny. And, the London Whale trades were so large that they "roiled

[20] U.S. SENATE PERM. SUBCOMM. ON INVESTIGATIONS, JPMORGAN CHASE WHALE TRADES: A CASE HISTORY OF DERIVATIVE RISKS AND ABUSES 18 (2013), *available at* http://www.hsgac.senate.gov/download/report-jpmorgan-chase-whale-trades-a-case-history-of-derivatives-risks-and-abuses-march-15-2013 [hereinafter "SPECIAL REPORT"].

[21] *Id.*

[22] *Id.*

world credit markets."[23] Losses "doubled, and then tripled," with effects seen globally.[24]

The London Whale was a series of trades in derivatives, one of the key culprits of the 2008 financial crisis.[25] The Company had a Synthetic Credit Portfolio (the Portfolio) in which it traded synthetic credit derivatives.[26] These are complex derivative financial securities that are, generally, bets on the performance of another security rather than on an actual security. The purpose of the Portfolio is unclear. The Company publicly stated that the Portfolio was designed to provide a hedge, or insurance, against other investments and was not a proprietary trading desk.[27] The original documentation for the Portfolio supports those statements, but there is no further documentation indicating that the Portfolio actually functioned that way in the five years between the Portfolio's creation and the Whale.[28] Instead, some evidence from the Whale investigation indicated that the Company treated the Portfolio differently than as initially portrayed.[29]

The Company started this trading in 2006, but named it the Synthetic Credit Portfolio in 2008.[30] The Portfolio existed over several years, and in the key timeframe, 2011 to 2012, its size increased dramatically. "In 2011, its net notional size jumped from $4 billion to $51 billion,"[31] a very large increase.

Like other banks, J.P. Morgan is subject to regulatory capital requirements. These requirements exist to prevent banks from taking on too much debt, or leverage, and, thereby, becoming

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[23] *Id.*

[24] *Id.*

[25] In simple terms, derivatives are securities with a price that depends on the underlying assets. The classic example is a futures contract, which is just an agreement to buy or sell a specific asset in the future, but at a price agreed upon today. Both parties to such a contract are making bets on the direction of the price of the asset on that future date. The assets can be commodities or financial products. *Id.* at 3.

[26] *Id.*

[27] SPECIAL REPORT, *supra* note 20, at 4. Interestingly, the Volcker Rule, which would ban proprietary trading, received reinvigorated support in the aftermath of the Whale. *See infra* note 110 and accompanying text.

[28] SPECIAL REPORT, *supra* note 20, at 4.

[29] *Id.*

[30] *Id.* at 3.

[31] *Id.*

insolvent.[32] Put differently, the requirements are there to ensure capital adequacy and to prevent banks from risking all of their capital at one time. Capital adequacy is measured in relation to risk-weighted assets. As risky assets increase, the capital on hand must also increase.[33] Capital adequacy requirements, then, are a form of prudential regulation. The idea is to provide some measure of safety and soundness in the banking system.

In 2011, the Portfolio's dramatic growth over a short period of time imperiled the Company's ability to meet regulatory capital requirements.[34] In order to maintain compliance, the Company needed either to increase its capital levels or decrease the risk it held in the Portfolio.[35] It chose the latter. In December of that year, management instructed the Company's Chief Investment Office, which oversaw the portfolio, to reduce the risk-weighted assets,[36] which would decrease the bank's capital requirements.[37] In an attempt to do so, the office adopted a new trading strategy of offsetting short derivative positions with long derivative purchases.[38] If this plan had worked, it would have decreased the risk-weighted assets and, thereby, the Company's capital requirements. In fact, however, the plan produced a larger portfolio with more, rather than less, risk.[39] The new strategy also "eliminated the hedging protections" that were part of the rationale for the Portfolio in the first place.[40]

By early 2012, the size of the Portfolio increased from $51 billion to $157 billion.[41] The trading strategy was not working as planned, so the traders doubled down, risking more.[42] They apparently hoped the risk would pay off with gains that would allow them to achieve the required balance.

The risk of this bet was very high. A price increase would produce the hoped-for outcome of high returns. "A small drop in

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[32] Jim Puzzanghera, *Federal Reserve Adopts Tougher Capital Requirements for Banks*, L.A. TIMES (July 2, 2013), http://www.latimes.com/business/money/la-fi-mo-federal-reserve-basel-banks-20130702,0,2058025.story#axzz2pFkbJCiT.

[33] Press Release, Fed. Reserve Bd., Federal Reserve Board Approves Final Rule to Help Ensure Banks Maintain Strong Capital Positions (July 2, 2013), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20130702a.htm.

[34] SPECIAL REPORT, *supra* note 20, at 3 (noting that in 2011, the Portfolio size jumped from $4 billion to $51 billion).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 3-4.

[40] *Id.* at 3.

[41] *Id.*

[42] *Id.*

price," however, could turn "into massive losses."[43] In fact, prices did drop, and the Portfolio quickly began to lose value.[44] It lost $100 million in January 2012.[45] It lost $69 million in February and a massive $550 million in March, for a total of $719 million in a few months.[46] It was at that point that Ina Drew, head of the Chief Investment Office, told the traders to stop.[47]

B. Context Matters

The story might end here. A key lesson of publicness, however, is that context matters. The context of the choices that led to the Whale trades was the wake of the financial crisis. In 2012, this type of risk and loss was subject to greater public scrutiny than before the financial crisis. Thus, in April 2012, the "London Whale" stories began.[48] The losses also continued to mount.[49] By April, the loss total was up to $2.1 billion. By June, it was $4.4 billion. Then, by September, the Company had both sustained additional losses and restated earlier numbers resulting in a total loss of $6.2 billion.[50]

The investigation into the Whale trades also revealed several facts that, although not public until later, became an important part of the context. For example, in 2012, when the losses began to pile up, the traders adopted a new valuation practice for the Portfolio.[51] Past practice had been to mark the credit derivatives in the Portfolio at or near the midpoint market price of the daily bid-ask spread.[52] The traders abandoned that scheme and began to select other pricing points. The former system created pricing that presented an arguably objective measure of fair value. The new approach allowed the traders to pick price points that presented the losses in a better light. The result was that the losses appeared smaller than they were.[53]

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[43] *Id.*
[44] *Id.* at 4.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 87.
[51] *Id.*
[52] *Id.*
[53] *Id.*

Each month, the traders picked a new and more favorable price point.[54] The documents reveal that the traders knew what they were doing and were troubled by it.[55] They also created shadow profit and loss documents, revealing that the accounting changes were false and intentional.[56]

The Whale incident and the accompanying losses had considerable media and public traction. There are lots of reasons why. First, the bank said the Portfolio was supposed to be only for hedging, or insurance, but it appears it was used for proprietary trading. Thus, it was not what the bank portrayed to the public. Second, the decision to double down resulted in significant losses. Third, the losses occurred in the wake of the financial crisis, when distrust of banks and the economy were stronger. Fourth, Company employees deliberately recorded the transactions in a manner designed to cover up the size of the losses. Fifth, the Company and its leadership mistakenly determined that the losses and the accounting changes were not material and chose to downplay both when confronted by the media and regulators. Arguably, this last choice is the one that provoked the most publicness.

Let's examine the facts around this decision in more detail. The Company leadership became aware of the Whale problem and the Company's losses and accounting changes in March 2012.[57] Yet it took several months for them to correct the "mismarking."[58] Then, even when they addressed the issue internally, they resisted publicly "owning up" to the corrections and restating revenues. Instead, they claimed that the total losses were not "material."[59] It turns out, however, that materiality is subject to context. In other words, materiality can be a matter of publicness.[60]

Indeed, although the Company portrayed the losses as small and the changes as immaterial, the public disagreed. Consider Dimon's early public statement on the trades. In April 2012, he referred to the reaction to the incident as a "tempest

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[54] *Id.*

[55] *Id.* For example, the head trader in charge of the Portfolio remarked to a junior trader, "I can't keep this going . . . . I think what he's [their supervisor, Javier Martin-Artajo] expecting is a re-marking at the end of the month . . . . I don't know where he wants to stop, but it's getting idiotic." *Id.*

[56] *Id.*

[57] *Id.* at 96.

[58] *Id.* at 97.

[59] *Id.* at 6.

[60] Indeed, as a matter of securities law, the term "materiality" is rarely treated as an absolute. Instead, it is based on what a reasonable investor would consider when buying or selling securities and in the context of surrounding information.

in a teapot."[61] This statement grossly underestimated the public's reaction to the trades, and Dimon has been criticized repeatedly for making that statement. The Senate investigation into the trades accused him of actually "mischaracterizing" the incident,[62] concluding that Dimon had enough information by the time of the statement in April of 2012 to know otherwise. This conclusion is more than just a criticism of Dimon. Mischaracterizations are, in effect, misstatements, the classic hallmark of a securities fraud claim.

The repeated focus on the "tempest in a teapot" comment is evidence of the publicness of the Whale incident.[63] It is also evidence of the interrelationship between context and publicness. Consider the $6.2 billion loss. Like most numbers, $6.2 billion is meaningless in a vacuum. The Company understood that, so in its April 2013 annual letter to shareholders,[64] it compared the loss to its 2012 revenues of $97 billion.[65] Although the losses are not insignificant in comparison to the revenues (6%), this comparison was the most favorable one for the company.[66] Presumably, the Company used this statistic to attempt to shape the public's response to the trades.

Now consider some other, less favorable, comparisons. For example, the losses could be compared to profits rather than revenues. The Company's 2012 net income was $21.3 billion.[67] The $6.2 billion Whale loss is 28% of net income, or more than

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[61] David Benoit, *J.P Morgan Conference Call Highlights*, WALL ST. J. (Apr. 13, 2012, 10:35 AM), http://blogs.wsj.com/deals/2012/04/13/j-p-morgan-conference-call-highlights.

[62] SPECIAL REPORT, *supra* note 20, at 11.

[63] One year after his tempest-in-a-teapot comment, Dimon said that the Whale incident was "the stupidest and most embarrassing situation I have ever been a part of." Jamie Dimon, ANNUAL LETTER TO SHAREHOLDERS 10 (Apr. 10, 2013), *available at* http://files.shareholder.com/downloads/ONE/2415483377x0x652198/c54d05da-1acb-4cca-ab7a-9b80f9465199/JPMC_2012_AR_CEOletter.pdf. [hereinafter "2013 ANNUAL LETTER"]. A month later, Dimon appeared on NBC's Meet the Press and said of the incident, "We made a terrible, egregious mistake" and, "[t]here's almost no excuse for it." Jessica Silver-Greenberg, *Dimon Says JPMorgan Made an 'Egregious Mistake'*, N.Y. TIMES (May 13, 2012), http://www.nytimes.com/2012/05/14/business/dimon-says-jpmorgan-made-an-egregious-mistake.html?_r=0. Dimon later said at a Special Committee hearing that he "[couldn't] publicly defend the trade." Maureen Farrell, *Dimon: I Can't Publicly Defend the Trade*, CNNMONEY (June 13, 2012 6:44 PM), http://money.cnn.com/2012/06/13/investing/jpmorgan-jamie-dimon/.

[64] 2013 ANNUAL LETTER, *supra* note 63 at 4-5.

[65] *Id.*

[66] The press reported this number many times.

[67] SPECIAL REPORT, *supra* note 20, at 18.

four times the 6% revenue comparison. Another number that the Company released in connection with the Whale incident was the $100 million in compensation clawed back from those responsible for the losses.[68] In comparison to the pay of many Americans, $100 million is a large number. It is, however, a small number, only 1.6%, in relation to the $6.2 billion in Whale losses.

Of course, risks and profits go together. Indeed, risk for profit is one of the cornerstone rationales for the business judgment rule and the significant protection it provides to corporate directors. Yet, the issue for directors and officers is really how much risk is appropriate and, in light of publicness, how that risk will affect a corporation's image and ability to operate without increased scrutiny and regulation. After the financial crisis, risk-taking, especially by banks, is particularly salient, requiring consideration and deliberation by the board.[69] The point is not that the board or the company cannot take risks. Instead, the point is that the board has to understand the risks and their consequences. It also means that the board has to be ready and willing to address both positive and negative outcomes.

With hindsight, it is easy to argue that Dimon and the board underestimated the Whale incident's salience. To be clear, I am not focused on J.P. Morgan's traditional risk management assessment and processes. Instead, I am arguing that the Company underestimated the shareholder, public, and media response to the Whale trades. That response, a form of publicness, must be taken into account as a cost of doing business. In this situation, the Company's failure to appreciate the Whale incident's publicness arguably resulted in more scrutiny, more costs, and more publicness for the Company.

III. THE WHALE AS A CATALYST FOR PUBLICNESS

Let's consider in more detail how the Whale incident developed J.P. Morgan's publicness. One serious result of the incident and the Company's response was a Senate investigation that resulted in an extensive report released on March 15, 2013. A quick look at the footnotes in this essay reveals just a slice of the information and facts included in that report. Yet, the report is only one consequence of the incident. There are many others

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[68] 2013 ANNUAL LETTER, *supra* note 63, at 11.

[69] In a twist of irony, JPMorgan received an IR Magazine award for "best crisis management" (second time in three years). Anton Troianovski, *For J.P. Morgan, Lemons to Lemonade*, WALL ST. J. (Mar. 22, 2013, 6:57 PM), http://online.wsj.com/news/articles/SB10001424127887324373204578376752686093648.

that grew out of the crisis, gained traction, and increased the publicness of the Company. These can be generally categorized as shareholder-driven consequences concerning governance and broader ongoing consequences.

A. Governance Outcomes

Shareholder pressure on the Company increased after the Whale incident. Groups of shareholders pushed for both a change in the Company's leadership structure and a change in the members of the board of directors.[70] In the end, neither the proposal to separate the roles of CEO and the chair of the board nor the campaign to remove certain directors from the board were approved by a majority of shareholders. Yet, both proposals had financial and reputational impacts on the Company, Dimon, and the board. Further, the Company made changes after its 2013 annual shareholder meeting that, in a back-door way, achieved much of what the shareholder proposals had demanded.

1. Separation of CEO and Chair

Consider the first proposal of separating the roles of CEO and chair of the board.[71] As at many corporations, Dimon served both as CEO and as board chair. Evaluating the merits of this governance structure is beyond the scope of this essay. It is sufficient to acknowledge that some governance advocates prefer a structure in which someone other than the CEO chairs the board of directors. Whether the two roles are separated is a common metric of assessing the independence of the board from the CEO.[72] Many companies, including other financial

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[70] J.P. MORGAN CHASE & CO., CURRENT REPORT (FORM 8-K) (May 23, 2013), *available at* http://files.shareholder.com/downloads/ONE/2712039922x0xS19617%2D13%2D311/19617/filing.pdf [hereinafter "MAY 23, 2013 8-K"].

[71] *See, e.g.*, Stephen M. Davidoff, *Dispute at JPMorgan Grows, for All the Wrong Reasons*, N.Y. TIMES (May 14, 2013, 4:52 PM), http://dealbook.nytimes.com/2013/05/14/dispute-at-jpmorgan-grows-for-all-the-wrong-reasons/.

[72] *See, e.g.*, James Copeland et al., *Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism*, PROXY MONITOR 23 (Fall 2012), http://www.proxymonitor.org/pdf/pmr_04.pdf. ISS tends to recommend separating the positions (about 2/3 of the time). *Id.*

services companies like Citigroup and Bank of America,[73] had previously separated the two offices.[74] Arguably, then, J.P. Morgan was out of step with its peers on this issue.

The decision about whether the chair and CEO seats are occupied by the same person is not a decision that shareholders control. In our corporate governance system, this is an issue on which shareholders may opine but which they do not have the power to decide. Shareholders can vote, but the vote is non-binding.[75] Nevertheless, as a matter of publicness, significant shareholder votes on issues like this one can create pressure for change—even when they fail to attract a majority vote.[76] Indeed, at J.P. Morgan, shareholders voted on such a proposal two years in a row, and both times the proposal failed to garner a majority.[77] Yet, the board later changed the governance structure anyway. Why?

To answer this question, we need to look at the shareholder proposal in a wider context, the context of how shareholder voting works and what it means and does not mean. J.P. Morgan's most recent annual meeting was on May 21, 2013,[78] just over a year after the Whale incident.[79] Dimon avoided a shareholder vote supporting the separation of the two roles,[80] as the proposal garnered only 32% in favor. Indeed, the percentage of the vote in support of the proposal in 2013

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[73] Susanne Craig & Jessica Silver-Greenberg, *JPMorgan Works to Avert Split of Chief and Chairman Roles*, N.Y. TIMES DEALBOOK (Apr. 5, 2013, 6:07 PM), http://dealbook.nytimes.com/2013/04/05/behind-the-scenes-jpmorgan-works-to-sway-shareholders-on-dimon-vote/.

[74] Jeffrey A. Sonnenfield, *The Jamie Dimon Witch Hunt*, N.Y. TIMES (May 8, 2013), http://www.nytimes.com/2013/05/09/opinion/the-jamie-dimon-witch-hunt.html. Interestingly, in 2012, there were 56 companies with this issue on the ballot, and the shareholders voted to split the two offices in only four of them. Tim Catts, *Boeing Holders Vote on CEO-Chairman Split Amid 787 Woes*, BLOOMBERG (Mar. 1, 2013), http://www.bloomberg.com/news/2013-03-01/boeing-holders-vote-on-ceo-chairman-split-amid-787-woes.html. In 2013, the issue was on 38 ballots, according to Proxy Monitor. *See 2013 Score Card*, PROXY MONITOR, http://www.proxymonitor.org/ScoreCard2013.aspx (last visited Feb. 24, 2014).

[75] Susanne Craig & Jessica Silver-Greenberg, *Shareholders Denied Access to JPMorgan Vote Results*, N.Y. TIMES (May 15, 2013, 9:00 PM), http://dealbook.nytimes.com/2013/05/15/jpmorgan-voters-are-denied-access-to-results/.

[76] Sale, *The New "Public" Corporation*, *supra* note 3, at 138; Sale, *Public Governance*, *supra* note 3, at 1029-32.

[77] MAY 23, 2013 8-K, *supra* note 70.

[78] Jessica Silver-Greenberg & Susanne Craig, *Strong Lobbying Helps Dimon Thwart a Shareholder Challenge*, N.Y. TIMES (May 21, 2013, 8:48 AM), http://dealbook.nytimes.com/2013/05/21/jpmorgan-seen-to-defeat-effort-to-split-top-2-jobs-at-bank/.

[79] Jessica Silver-Greenberg & Peter Eavis, *JPMorgan Discloses $2 Billion in Trading Losses*, N.Y. TIMES DEALBOOK (May 10, 2012, 10:11 PM), http://dealbook.nytimes.com/2012/05/10/jpmorgan-discloses-significant-losses-in-trading-group/.

[80] In fact, stock price rose 1.4% upon news that the shareholder proposal was defeated ($53.02) (up 19% on the year). William Alden, *How Dimon Won*, N.Y. TIMES DEALBOOK (May 22, 2013, 8:06 AM), http://dealbook.nytimes.com/2013/05/22/how-dimon-won/.

was lower than the vote supporting a similar proposal in 2012, which received 40.03% in favor.[81]

In the world of shareholder votes, however, 32% is actually significant. To be sure, it is less than a majority, but it is still much higher than the usual vote on proposals of this type. According to Proxy Monitor, in 2013 the average shareholder vote on this issue was 27.96%.[82] The vote at Wells Fargo was only 21.83%, and at U.S. Bancorp it was 22.13%.[83] In that context, the vote at J.P. Morgan was high.

The vote was also expensive. Of course, we do not know how much it cost. We do know, however, that the Company spent resources and time lobbying against the proposal. The media coverage of both the proposal and the efforts to defeat it was extensive.[84] Every minute that people at the Company spent fighting the shareholder proposal was time not spent running the Company or increasing shareholder revenues.

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[81] MAY 23, 2013 8-K, *supra* note 70.

[82] *See 2013 Score Card*, *supra* note 74; *see also* Deloitte, *Five Proxy Season Hot Topics and Other Governance Issues*, WALL ST. J. RISK & COMPLIANCE JOURNAL (Oct. 5, 2013, 4:00 PM), http://deloitte.wsj.com/riskandcompliance/2013/08/15/five-proxy-season-hot-topics-and-other-governance-issues/.

[83] *List of Proxy Voting Results*, PROXY MONITOR, http://www.proxymonitor.org/Results.aspx (last visited Jan. 2, 2014). At CitiGroup in 2008, 17.32%; at Morgan Stanley in 2010, the vote was 26.95%; at Goldman Sachs in 2010, 19.07%; and at Bank of New York Mellon in 2012, 32.19%. *Id.*

[84] *See generally* Tom Braithwaite et al., *Dimon Escapes but Directors Feel Force of Investor Anger*, FIN. TIMES (May 21, 2013, 10:49 PM), http://www.ft.com/intl/cms/s/0/178cfea0-c252-11e2-ab66-00144feab7de.html#axzz2ghmZUcZm; Susanne Craig & Jessica Silver-Greenberg, *JPMorgan Works to Avert Split of Chief and Chairman Roles*, N.Y. TIMES (Apr. 6, 2013), http://dealbook.nytimes.com/2013/04/05/behind-the-scenes-jpmorgan-works-to-sway-shareholders-on-dimon-vote/; Dan Fitzpatrick & JoAnn Lublin, *Dimon Looks to Keep Reins*, WALL ST. J. (May 7, 2013), http://online.wsj.com/news/articles/SB10001424127887323826804578468550506200288?KEYWORDS=jamie+dimon; Dan Fitzpatrick et al., *Vote Strengthens Dimon's Grip*, WALL ST. J. (May 21, 2013), http://online.wsj.com/news/articles/SB1000142412788732478700457849681428649335; Jena McGregor, *Should JPMorgan Shareholders Have Split Jamie Dimon's Roles?*, WASH. POST (May 21, 2013), http://www.washingtonpost.com/blogs/on-leadership/wp/2013/05/21/should-jpmorgan-shareholders-have-split-jamie-dimons-roles/; Chris Newlands, *Pressure Mounts on JPMorgan's Jamie Dimon*, FIN. TIMES (May 12, 2013, 4:48 PM), http://www.ft.com/cms/s/0/2f679ecc-b97e-11e2-bc57-00144feabdc0.html#axzz2tiPQe7A6; Phil Rosenthal, *Rosenthal: Jamie Dimon Survives a Scare*, CHI. TRIB. (May 22, 2013), http://articles.chicagotribune.com/2013-05-22/business/ct-biz-0522-phil-20130522_1_jamie-dimon-jpmorgan-annual-shareholder-meeting-jpmorgan-chase; Jessica Silver-Greenberg, *JPMorgan Board Confirms Dual Role for Dimon*, N.Y. TIMES (Mar. 23, 2013), http://dealbook.nytimes.com/2013/03/22/jpmorgan-board-says-dimon-should-remain-as-c-e-o-and-chairman/.

Those are opportunity costs above and beyond any actual dollars spent to fight the proposal.[85]

The vote also revealed a potentially serious governance issue at J.P. Morgan in addition to that of board independence. Dimon opposed the separation of the two roles. According to the media, the board feared that he would leave in the face of such a change.[86] CEOs, of course, can be replaced, but according to news accounts, it appeared that the board did not have a good succession plan in place.[87] Thus, concern about Dimon's potential departure may well have fueled the board's desire to prevent this vote from gaining traction. Succession, however, is a key board responsibility. It is extremely important to a corporation's long run success and value. Thus, the shareholder proposal revealed problems with the Company's succession plans—arguably a more worrisome issue than the matter on the ballot.[88] The exposure of and discussion on this issue was yet another form of publicness.

Finally, even though their proposal garnered less than a majority, the shareholders arguably won the issue in the end. Five months after the annual meeting, the board acted to change the governance structure. It announced that a sitting director, Lee Raymond, would have expanded powers as the lead independent director.[89] Although this choice is not the same as what the shareholders had proposed, it is a move in the direction of separateness. It is therefore, arguably, a capitulation to publicness.

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[85] Alden, *supra* note 80. And some of the tactics raised very interesting questions about the voting process. For example, J.P. Morgan decided to deny the sponsors of the proposal access to the vote tally. This is an unusual move that attracted media attention. The shareholders argued that it was impossible for them to know when or where to deploy additional resources in the heat of the battle. They described the situation as changing the rules of the game as it's being played: "It's like playing a game where only the home team gets to know the score." Craig & Silver-Greenberg, *supra* note 75.

[86] Craig & Silver-Greenberg, *supra* note 84.

[87] *Id.*; David Benoit, *The Dimon Dilemma: Who Could Replace Him?*, WALL ST. J. (May 22, 2013, 3:54 PM), http://blogs.wsj.com/moneybeat/2013/05/22/the-dimon-dilemma-who-could-replace-him/.

[88] *See* Vidham K. Goyal & Chul W. Park, *Board Leadership Structure and CEO Turnover*, 8 J. CORP. FIN. 49, 65 (2002) (concluding that corporate boards with a combined CEO and chair position are less likely to be able to remove poorly performing officers or independently determine who should be CEO); *see also* Charles K. Whitehead, *Why Not A CEO Term Limit?*, 91 B.U. L. REV. 1263, 1288 (2011).

[89] Dan Fitzpatrick & Joann S. Lublin, *J.P. Morgan Juices Up Director's Job*, WALL ST. J. (Sept. 9, 2013, 7:53 PM), http://online.wsj.com/article/SB10001424127887323864604579064941840914528.html.

2. Shareholders Push to Remove Directors

The second key governance issue on the ballot at the Company's 2013 annual meeting was opposition to several sitting directors on the J.P. Morgan board. Again, context is important here. The Company's policy states that it requires a majority vote for its directors in uncontested elections.[90] As noted earlier in this essay, voting is one of the key roles of shareholders in the corporate governance system. As previously discussed, much of the legal system that delegates decision-making to directors and officers is premised on the notion that shareholders have the power to elect directors to represent them. If the shareholders are unhappy with the direction of a corporation or the choices of its board, the shareholders can vote against the directors. In reality, however, this power is far less direct than portrayed.

A few shareholder voting basics are in order. The default shareholder-voting rule is that directors are elected with a plurality of the votes,[91] meaning that the director candidates who receive the most votes win. Yet, corporate boards decide the number of nominees and usually nominate only as many candidates as there are seats open. Thus, all of the directors are elected if they receive at least one vote. Presumably, all directors would cast that vote for themselves.[92]

Some companies have adopted strict majority-voting requirements on their own initiative. These requirements mean that director candidates need to receive more than 50% of the votes cast in order to be elected or to retain their seats. Other companies, like J.P. Morgan, have a majority vote policy for director reelections, but the policy is non-binding. Under this scheme, directors who do not receive a majority of votes must tender resignations to the board. The board can then

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[90] JPMORGAN CHASE & CO., BY-LAWS OF JPMORGAN CHASE & CO. (effective Sept. 17, 2013) 15-16, *available at* http://www.jpmorganchase.com/corporate/About-JPMC/document/235721_2013-09-17_By-Laws_ada.pdf [hereinafter JPMORGAN BY-LAWS].

[91] *See generally* DEL. CODE ANN. tit. 8, § 216 (West 2014).

[92] An early version of Dodd Frank included a proposal that would have eliminated plurality voting. It attracted strong opposition. James B. Stewart, *Bad Directors and Why They Aren't Thrown Out*, N.Y. TIMES (Mar. 29, 2013), http://www.nytimes.com/2013/03/30/business/why-bad-directors-arent-thrown-out.html.

decide whether to accept or reject the resignation.[93] Directors who do not get a majority vote therefore can still serve. It is up to their fellow board members to decide whether to let them stay.[94] Most boards do, making it reasonable to conclude that these majority voting policies can be illusory.[95]

At J.P. Morgan, in the wake of the Whale losses, the proxy advisory groups Institutional Shareholders Services (ISS) and Glass Lewis, along with several groups of investors, decided to oppose the reelection of the directors on the board's risk management committee, recommending negative votes on the three directors.[96] All three in fact received majority votes. People at J.P. Morgan worked hard and spent resources to make that happen even though the vote was not binding. Ellen Futter's vote was 53.1%; James Crown's was 57.4%; and David Cote's was 59.3%.[97]

These are, of course, majority votes. Nevertheless, they were not positive outcomes for the Company or the directors involved. In the world of director elections, these percentages are very low and are arguably "no" votes for at least three reasons. First, in the prior year, these three directors each received between 86% and 97% of the vote,[98] all significantly higher than the votes they received in 2013. Second, in 2013, all of the other directors at J.P. Morgan received more than 90% of shareholders' votes for reelection.[99] Third, at the time of the J.P. Morgan vote, the average support for board nominees at S&P 500 companies (as of May 21) was 96.9%.[100] Indeed, at the time of the J.P. Morgan vote, there had been 2,127 people elected to 237 boards, and only six had failed to receive more than 60% of the votes cast.[101] J.P. Morgan's three directors increased that total from six

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[93] JPMORGAN BY-LAWS, *supra* note 90, at 15-16.

[94] *Id.*

[95] For example, in 2012, there were 17,081 director nominees. Only 61, or .36%, failed to get majority votes. Yet, only six stepped down or were asked to resign. Fifty-one were still in place as of spring 2013 proxy filings. James B. Stewart, *Bad Directors and Why They Aren't Thrown Out*, N.Y. TIMES (Mar. 29, 2013), http://www.nytimes.com/2013/03/30/business/why-bad-directors-arent-thrown-out.html.

[96] Jessica Silver-Greenberg, *2 JPMorgan Directors Resign*, N.Y. TIMES (July 19, 2013, 12:52 PM), http://dealbook.nytimes.com/2013/07/19/2-jpmorgan-directors-resign/; Braithwaite et al., *supra* note 84. *Dimon Escapes But Directors Feel Force of Investor Anger*, FIN. TIMES (May 21, 2013, 10:49 PM), http://www.ft.com/intl/cms/s/0/178cfea0-c252-11e2-ab66-00144feab7de.html#axzz2ghmZUcZm.

[97] *See* MAY 23, 2013 8-K, *supra* note 70 (figures calculated by author).

[98] *See* J.P. MORGAN CHASE & CO., CURRENT REPORT (FORM 8-K) (May 18, 2012), *available at* http://investor.shareholder.com/jpmorganchase/secfiling.cfm?filingID=19617-12-243 [hereinafter "MAY 18, 2012 8-K"].

[99] *See* MAY 23, 2013 8-K, *supra* note 70.

[100] Braithwaite et al., *supra* note 84.

[101] *Id.*

to nine, explaining why the *New York Times* described the shareholder support for the directors as "lackluster."[102]

Further, like the vote on the proposal to separate the chair and CEO roles, the shareholder vote was not the end of the story. According to the media, at the time of the meeting, at least two of the targeted directors were debating whether to step down from the board.[103] Presumably, the calls to vote against them were affecting their relationship with the Company. Directors generally hold other positions, and their reputations matter. Reportedly, though, Dimon urged all three directors to stick it out,[104] arguing that their resignations would divert attention from the Company's victory in keeping the roles of the CEO and chair united.[105] So the directors stayed—for a few months. Then, in the summer of 2013, after the media coverage died down, two directors announced their resignations.

This outcome is arguably a classic example of publicness. These directors are people for whom the scrutiny was problematic. David Cote is the Chair and CEO at Honeywell.[106] He was criticized in the media for lacking the experience necessary for a bank risk committee.[107] Such press is certainly not the type that a CEO like Cote wants or is used to receiving. It is also not the type of press that the board of Honeywell would want its CEO to receive. Ellen Futter is the President of the American Museum of Natural History and had been on the J.P. Morgan board for 16 years.[108] According to the media, Futter was concerned that the negative publicity "clouding her service" at J.P. Morgan would "divert attention from" her work at both the Company and the Museum.[109] Although the Company's shareholders could not directly remove these directors, they indirectly did so through media and other pressure. That is publicness.

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[102] Silver-Greenberg, *supra* note 96.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* Ironically, some executives within the bank had supported Futter arguing that "while [she] was not a banker, she did bring perspective on reputational risk."

B. Non-Governance Outcomes

The implications of the Whale incident go beyond the shareholder votes, and well beyond the context of J.P. Morgan. For example, it led to a reinvigoration of support for the Volcker Rule.[110] The Volcker Rule was included in the Dodd-Frank legislation that came out of the financial crisis.[111] The banks' dislike for the Volcker Rule was quite public and their lobbying efforts against it had been covered by the press. Dimon himself had been working for years to tamp down the Volcker Rule. He had credibility and was seemingly making progress on this front, until the Whale surfaced.

As media coverage about the Whale incident gained traction, so did support for the Volcker Rule. Indeed, Dimon publicly acknowledged as much in the Company's quarterly call following the incident. When asked about the Volcker Rule, Dimon stated, "this [loss] is very unfortunate, it plays into the hands of a bunch of pundits out there, but that's life."[112] In hindsight, this comment is certainly an understatement. It is also a misunderstanding of the power of publicness and how it can force change. After all, publicness created pressure for the Volker Rule's initial proposal and reinvigorated it when the rule was in limbo.

The Whale incident and the Company's response to it undercut the Company's image and fueled suspicions about the overall integrity of the banking industry. As previously discussed, the investigation of the incident revealed that the Company's traders were manipulating their trade pricing methods in order to mask the mounting losses.[113] This information revealed dishonesty and fraud.[114] Indeed, on August 14, 2013, federal authorities charged two individuals in connection with the trades.[115] In announcing the indictment, prosecutors made very

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[110] SPECIAL REPORT, *supra* note 20 at 17.

[111] *See* 12 U.S.C. § 1851(b)(2) (2012).

[112] Matt Levine, *Whale Sushi On The Menu At JPMorgan Executive Lunchroom For Next Few Months*, DEALBREAKER (May 10, 2012, 6:21 PM), http://dealbreaker.com/2012/05/whale-sushi-on-the-menu-at-jpmorgan-executive-lunchroom-for-next-few-months/.

[113] SPECIAL REPORT, *supra* note 20 at 14.

[114] *See* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992).

[115] Dan Fitzpatrick, Jean Eaglesham & Devlin Barrett, *Two Charged in J.P. Morgan 'Whale' Trades*, WALL ST. J. (Aug. 14, 2013), http://online.wsj.com/news/articles/SB10001424127887324823804579012550859130222.

strong comments about the bank's oversight failures.[116] In turn, the defendant employees later claimed that the Company's senior management approved the decisions to change the accounting protocols.[117] This information is certainly problematic for the Company. Here, though, the fact that all of this information not only exists, but also is available for public scrutiny and for this essay is itself a form of publicness.

Publicness operated in several other ways as well. A year after making the "tempest in a teapot" statement, Dimon acknowledged the seriousness of the Whale incident. He described it as the "stupidest and most embarrassing situation I have ever been a part of," adding statements like, "[w]e made a terrible, egregious mistake"; "[t]here's almost no excuse for it"; and the incident was "something I cannot publicly defend."[118] This series of comments was a real change from his tone with the media one year earlier. It is a sign that he had begun to feel the pressure of publicness, to understand the effect of publicness, and even to acknowledge his publicness.

Then, Dimon changed his approach to and relationship with regulators. When he was the strong banker with the sterling reputation, Dimon was willing to push back on the regulators and challenge them. He lost the ability to do so with the Whale incident. By spring of 2013, the Company was under investigation by at least eight agencies.[119] Some regulators referred to the Company as a bully.[120] Regulators from the Federal Reserve and the Office of the Comptroller of the Currency said that they were

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[116] Ben Protess & Jessica Silver-Greenberg, *Charges Against 2 Traders Fault JPMorgan for Lack of Oversight*, N.Y. TIMES DEALBOOK (Aug. 15, 2013, 10:00 PM), http://dealbook.nytimes.com/2013/08/14/government-charges-two-former-jpmorgan-employees/.

[117] *Id.*

[118] 2013 ANNUAL LETTER, *supra* note 63 at 10; Farrell, *supra* note 63; Silver-Greenberg, *supra* note 63.

[119] Jessica Silver-Greenberg & Ben Protess, *JPMorgan Chase Faces Full-Court Press of Federal Investigation*, N.Y. TIMES (Mar. 27, 2013), http://dealbook.nytimes.com/2013/03/26/jpmorgan-chase-faces-full-court-press-of-federal-investigations/.

[120] Danielle Douglas, *JPMorgan Bullied Bank Regulators, Report Says*, WASH. POST (Mar. 15, 2013), http://articles.washingtonpost.com/2013-03-15/business/37745159_1_jpmorgan-executives-jpmorgan-unit-regulators.

losing patience with the Company.[121] Others said that the Company had resisted scrutiny of the Whale incident.[122]

Then, on July 30, 2013, the *New York Times* reported that J.P. Morgan had adopted a "new and conciliatory approach [which was] a departure for the bank and its leader, Jamie Dimon, who generally has taken a hard line with the authorities."[123] The paper also reported that the Company was "quietly courting officials from the SEC," which was investigating the Whale situation.[124] Such courting was initially rough going, with officials noting that they had been "stung by the bank's past displays of hubris" and might well push for larger settlements or resist settlement overtures altogether.[125] According to the media, the Company nevertheless persisted because insiders now understood that the bank was losing credibility—another example of publicness.[126]

Dimon took several other steps to repair relationships with regulatory authorities, all of which are examples of publicness caused by the Company's publicness problem. He convened a town hall meeting with examiners and stressed the Company's willingness to respond to the examiners' concerns.[127] He had a meeting with the head of the Comptroller of the Currency to mend their relationship.[128] He also apologized to the Company's shareholders for letting the regulators down, and he made a commitment to improving compliance, including devoting resources for internal controls. Then, the Company stated it would hire 3,000 people for internal compliance,[129] likely an area on which the Company did not want to spend money because, of course, it is not a profit center. It appears, however, that the Company did not have a choice.[130]

The Company's publicness continued when it began reaching settlement agreements with regulators and paying out very large sums. The Chief Financial Officer announced a $1.5

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[121] Jessica Silver-Greenberg & Ben Protess, *JPMorgan Looks to Pay to Settle U.S. Inquiries*, N.Y. TIMES (July 31, 2013, 8:57 AM), http://dealbook.nytimes.com/2013/07/30/jpmorgan-to-pay-410-million-in-power-market-manipulation-case/.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Dawn Kopecki, *JPMorgan Raises Legal Reserve by at Least $1.5 Billion*, BLOOMBERG (Sept. 10, 2013, 12:00 PM), http://www.bloomberg.com/news/2013-09-09/jpmorgan-raises-legal-reserve-by-at-least-1-5-billion.html.

[130] *Id.*

billion increase in legal reserves for litigation and settlements, stating that "there had been a crescendo of activity in past weeks."[131] The first large settlement announced by the Company was an energy commission fine of $410 million, larger by a huge margin than the next largest fine ($1.6 million) paid by other companies.[132] In addition to the cash settlement, J.P. Morgan must also make annual reports to the Energy Commission, providing details of the Company's U.S. power business.[133] This reporting requirement is yet another way in which J.P. Morgan's private status has declined.

The Company has brokered quite a few other settlements and is trying to broker even more. J.P. Morgan is paying a penalty related to mortgage securities the Company sold to the government.[134] It is facing a probe into its anti-money laundering safeguard, an investigation of its foreclosures, and another into its credit-card collections.[135] There is also an investigation into its hiring of Chinese elites to ease business in China.[136] And the list continues to grow. The fact is that a year and a half after the Whale incident, the publicness of the Company continues to develop. It is still present in the media and at the nub of many of the other investigations.[137] Thus, despite the statements and

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131 *Id.*

132 Jessica Silver-Greenberg & Ben Protess, *JPMorgan Looks to Pay to Settle U.S. Inquiries*, N.Y. TIMES (July 31, 2013, 8:57 AM), http://dealbook.nytimes.com/2013/07/30/jpmorgan-to-pay-410-million-in-power-market-manipulation-case/.

133 *Id.*

134 *Id.*

135 Dawn Kopecki, *JPMorgan Raises Legal Reserve by at Least $1.5 Billion*, BLOOMBERG (Sept. 10, 2013, 12:00 AM), http://www.bloomberg.com/news/2013-09-09/jpmorgan-raises-legal-reserve-by-at-least-1-5-billion.html.

136 Jessica Silver-Greenberg & Ben Protess, *JPMorgan Hiring put China's Elite on an Easy Track*, N.Y. TIMES (Aug. 29, 2013, 10:00 PM), http://dealbook.nytimes.com/2013/08/29/jpmorgan-hiring-put-chinas-elite-on-an-easy-track/.

137 *See, e.g.*, Danielle Douglas, *Are JPMorgan Shareholders Getting the Shaft?*, WASHINGTON POST (Oct. 23, 2013), http://www.washingtonpost.com/business/economy/are-jpmorgan-shareholders-getting-the-shaft/2013/10/23/2ac7da28-3aa5-11e3-b6a9-da62c264f40e_story.html; Danielle Douglas, *CEO Jamie Dimon to FDIC: JPMorgan Chase's Fight Over Washington Mutual is Far From Over*, WASHINGTON POST (Nov. 20, 2013) http://www.washingtonpost.com/business/economy/ceo-jamie-dimon-to-fdic-jpmorgan-chases-fight-over-washington-mutual-is-far-from-over/2013/11/20/b74d1864-51f7-11e3-a7f0-b790929232e1_story.html; Danielle Douglas, *JPMorgan to Pay $100 Million to CFTC Over Trading Losses*, WASHINGTON POST (Oct. 16, 2013), http://www.washingtonpost.com/business/economy/jpmorgan-to-pay-100-million-to-cftc-over-trading-losses/2013/10/16/692cde1a-367e-11e3-80c6-7e6dd8d22d8f_story.html; Peter J. Henning, *The True Accountability in the JPMorgan Settlement*, N.Y. TIMES (Nov. 20,

efforts to resolve issues and put the various investigations behind it, the pressure of publicness and its outcomes is still being felt.

J.P. Morgan and the Whale incident, then, provide an opportunity to develop the theory of publicness and its effect on the Company, corporate governance, and the larger industry. The context in which the Whale incident occurred and expanded are tied to its publicness. To be sure, the key context is the financial crisis of 2008-2009 and the resulting unemployment and economic drag. The slow economic recovery has kept the crisis, and the role of the banks in that crisis, in the top of the mind for many people. That salience results in more media coverage and awareness, leading to greater scrutiny when a bank missteps or worse. The result is publicness for companies like J.P. Morgan.

Yet, as the above analysis of publicness and the Volcker Rule reveals, J.P. Morgan is not the only bank or entity to receive greater scrutiny or feel the impact of publicness. The deferential approach to corporate form and function under state law erodes when crises occur.[138] The erosion leads to global increases in regulation, as with Dodd-Frank. It also leads to more company-by-company regulation through settlements and internal responses.

When federal law and regulators step in, deference to private choices decreases and can even disappear. This happens, in part, because the federal level mobilizes in response to a crisis and media pressure. Publicness creates pressure for action. The media acts as an agent of publicness, and the J.P. Morgan story reveals just how powerful the media and the pressure it creates can be.

2013), http://dealbook.nytimes.com/2013/11/20/the-true-accountability-in-the-jpmorgan-settlement; *JPMorgan Reaches Record $13B Settlement with DOJ: Here's How the Money Will be Spent*, WASHINGTON POST (Nov. 19, 2013), http://www.washingtonpost.com/business/economy/jpmorgan-reaches-record-13b-settlement-with-doj-heres-how-the-money-will-be-spent/2013/11/19/5e1761e8-515a-11e3-9fe0-fd2ca728e67c_story.html; Jessica Silver-Greenberg & Ben Protess, *Criminal Action Is Expected for JPMorgan in Madoff Case*, N.Y. TIMES (Dec. 11, 2013), http://dealbook.nytimes.com/2013/12/11/criminal-action-is-expected-for-jpmorgan-in-madoff-case/; Silver-Greenberg & Protess, *supra* note 132; Jessica Silver-Greenberg & Ben Protess, *On Defensive, JPMorgan Hired China's Elite*, N.Y. TIMES (Dec. 29, 2013), http://dealbook.nytimes.com/2013/12/29/on-defensive-jpmorgan-hired-chinas-elite/.

[138] *See generally* John C. Coffee Jr., *A Theory of Corporate Scandals: Why the U.S. and Europe Differ* 21 OXFORD REV. ECON. POL'Y 198 (2005), *available at* http://ssrn.com/abstract=694581 (working paper version); John C. Coffee, *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012); Sale, *Public Governance*, *supra* note 3, at 1013-14; Sale, *The New "Public" Corporation*, *supra* note 3, at 141; Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 VAND. L. REV. 859 (2003).

Congress also acts as an agent of publicness. Importantly, however, when Congress gets involved in the corporate realm, it produces outcomes very different from the traditional crafters of corporate law. The people in Delaware who are charged with statutory changes for corporate law and the members of the American Bar Association Committee on Corporate Laws are all corporate law experts, members of the bar, and academics who work in this legal realm all of the time. As a group, however, members of Congress have neither expertise about the laws and regulations for corporations, nor do they answer just to the people who live in Delaware and who benefit from corporate franchise taxes. Instead, they answer to a broad range of constituents, many of whom were personally impacted by the financial crisis. Thus, the pressure for change and the resulting publicness can both be large.

CONCLUSION

J.P. Morgan's story is a powerful one for exploring the theory of publicness and its power. The situation reveals the erosion of the space for corporate decision makers and the freedom they have enjoyed, both in the traditional governance realm (shareholder voting, for example) and in the larger context (choices about whether and when to hire compliance staff). Instead, publicness takes hold, both as a process and an outcome. Of course, publicness grows in response to greed or cheating, but it also develops in response to failures of a far less venal nature. When corporate actors lose sight of the fact that the companies they run and the decisions they make impact not just shareholders but society more generally, exposure and examination occur. The scrutiny is a form of publicness. Then, the demand and pressure for reform grows. The result is more changes, and they, too, are a form of publicness.

Publicness is multiplicative. Indeed, as the J.P. Morgan story reveals, when corporate actors fail to manage their publicness, they are exposed to more publicness. Furthermore, scrutiny and the increase in publicness that results from it can shed light on the aspects of governance or the decision-making spaces still left to private ordering. Exposure of those zones can create pressure for more reforms and more change. And, in the end, the private continues to erode and the public expands.