

**NOVEL CORPORATE GOVERNANCE STRUCTURES**

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ABSTRACT

Artificial Intelligence (“AI”) startups have taken center stage, rapidly disrupting conventional industries at an unprecedented pace with their groundbreaking innovations. Hailed by many as the most significant technological advancement of our era, AI’s profound societal impact has garnered heightened public and governmental scrutiny. The spotlight has recently fallen on OpenAI, the creator of ChatGPT, which weathered a tumultuous period marked by the ouster and subsequent rehiring of CEO Sam Altman, a board reconfiguration, and Altman’s later return to the board. Concerns over AI safety were offered as the rationale for the tandem corporate governance structure of nonprofit and for-profit at OpenAI which led to board friction, a management coup, and superalignment defection. Similarly, concerns over AI safety also underscore the creation of the corporate structures at Anthropic and xAI.

This Article explores the innovative corporate governance models that have emerged from leading AI startups like OpenAI, Anthropic, and xAI, assessing their long-term viability as these companies race against one another in building AI foundation models. Ultimately, it proposes a path forward for improved governance in AI startups by advocating for an amendment to corporate law requiring a board-level AI Safety Committee at AI startups.

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## I. INTRODUCTION

The OpenAI boardroom saga is reminiscent of a movie — replete with intrigue, ousters, political maneuvers, and, ultimately, a return to power for leadership.<sup>1</sup> On November 17, 2023, a week before Thanksgiving, OpenAI fired Chief Executive Officer (“CEO”), co-founder, and board member Sam Altman.<sup>2</sup> OpenAI stated that “it conducted ‘a deliberative review process’ and ‘concluded that he was not consistently candid in his communications with the board, hindering its ability to exercise its responsibilities.’”<sup>3</sup> It further stated, “The board no longer has confidence in his ability to continue leading OpenAI.”<sup>4</sup> At the time of his ouster, Greg Brockman, Ilya Sutskever, Adam D’Angelo, Tasha McCauley, and Helen Toner also served on the board of directors.<sup>5</sup> Greg Brockman, who served as OpenAI President at the time, was not part of the meeting.<sup>6</sup> The company then published a blog post on its website announcing Altman’s ouster.<sup>7</sup> After Altman’s firing, Brockman was dismissed as board chairman, but the company retained him as

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1. See Matt Binder, *Here’s a Timeline of the OpenAI Saga with CEO Sam Altman*, MASHABLE (Nov. 22, 2023), <https://mashable.com/article/openai-sam-altman-saga-timeline> [<https://perma.cc/JFA7-SDVD>] (offering timeline of the events that happened between Altman’s firing and subsequent return to OpenAI); Zoe Kleinman, *Sam Altman: The Extraordinary Firing of an AI Superstar*, BBC NEWS (Nov. 18, 2023), <https://www.bbc.com/news/technology-67461363> [<https://perma.cc/PYC5-9RYL>] (summarizing the events that occurred at the time of Altman’s termination and speculating why Altman was fired).

2. Cade Metz, *OpenAI’s Board Pushes Out Sam Altman, Its High-Profile C.E.O.*, N.Y. TIMES (Nov. 17, 2023), <https://www.nytimes.com/2023/11/17/technology/openai-sam-altman-ousted.html> [<https://perma.cc/ZY4L-Y72B>].

3. Jonathan Vanian, *OpenAI’s Sam Altman Exits as CEO Because ‘Board No Longer Has Confidence’ in His Ability to Lead*, CNBC (Nov. 17, 2023, 3:32 PM), <https://www.cnbc.com/2023/11/17/sam-altman-leaves-openai-mira-murati-appointed-interim-boss.html> [<https://perma.cc/D5QY-DNEK>].

4. *Id.* (internal quotations omitted).

5. Kevin Truong & Joshua Bote, *How OpenAI CEO Sam Altman Was Fired by Rival Board Members*, S.F. STANDARD (Nov. 20, 2023, 3:39 PM), <https://sfstandard.com/2023/11/17/openai-sam-altman-firing-board-members/> [<https://perma.cc/P646-WBHK>].

6. *Id.*

7. *Id.*

president.<sup>8</sup> Brockman quit that same day.<sup>9</sup> According to Brockman, the only member of the management team who knew about Altman's firing in advance was Chief Technology Officer ("CTO") Mira Murati; Murati was named interim CEO in the aftermath of Altman's ouster.<sup>10</sup> On November 19, 2023, Emmett Shear, the former CEO of Amazon's streaming service Twitch, was named as interim CEO, and Murati returned to her post as CTO.<sup>11</sup> One source stated that the board struggles came to a head because of cultural differences, with Altman and Brockman favoring commercialization and Sutskever and his allies favoring OpenAI's nonprofit mission.<sup>12</sup>

On November 18, 2023, however, sources reported that the board wanted Altman and Brockman to return to OpenAI due to pressure the startup received from investors and employees.<sup>13</sup> On November 20, 2023, Microsoft announced that Altman and Brockman would join it to lead a new AI research lab.<sup>14</sup> Microsoft CEO Satya Nadella stated in an X post that Microsoft would remain committed to its partnership with OpenAI and that the new group would "operate as an independent entity within Microsoft."<sup>15</sup> That same day, nearly 670 of OpenAI's 700 employees signed an open letter to OpenAI's board threatening to resign from the company and move to Microsoft if Altman and Brockman were not reinstated and the board did not resign.<sup>16</sup> They also wanted the board to appoint two new lead independent directors and specifically named Bret Taylor and Will Hurd.<sup>17</sup> They stated, "Microsoft has assured us that there are positions for all OpenAI employees at this new subsidiary should we choose to join."<sup>18</sup> The letter characterized the process of Altman's and Brockman's termination as one which "jeopardized all of this work and undermined our mission and company" and stated "[y]our conduct has made it clear you did not have the competence to oversee OpenAI."<sup>19</sup> Furthermore, they stated, "*Your actions have made it obvious that you are incapable of overseeing OpenAI. We*

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8. Sissi Cao, *A Timeline of OpenAI's (Ongoing) Drama with Sam Altman*, OBSERVER (Nov. 20, 2023, 1:18 PM), <https://observer.com/2023/11/openai-sam-altman-leadership-shakeup/> [<https://perma.cc/S2YA-G5QQ>].

9. Greg Brockman (@gdb), X (FORMERLY KNOWN AS TWITTER) (Nov. 17, 2023, 4:09 PM), <https://x.com/gdb/status/1725667410387378559> [<https://perma.cc/TPT3-EE53>].

10. Truong & Bote, *supra* note 5.

11. Cao, *supra* note 8.

12. *See, e.g.*, Truong & Bote, *supra* note 5.

13. Cao, *supra* note 8.

14. *Id.*

15. *Id.*

16. Letter from Mira Murati, Brad Lightcap, Jason Kwon, Wojciech Zaremba, Alec Radford, Anna Makanju et al., to the Bd. of Dir. at OpenAI (Nov. 20, 2023), <https://www.documentcloud.org/documents/24172377-letter-to-the-openai-board> [<https://perma.cc/5S9F-XDFU>].

17. *Id.*

18. *Id.*

19. *Id.*

are unable to work for or with people that lack competence, judgment and care for our mission and employees.”<sup>20</sup> The employees who signed the letter rejected arguments that OpenAI was moving too rapidly without considering the safety implications.<sup>21</sup>

On November 22, 2023, Altman and Brockman were brought back as CEO and President, respectively, and a new board was constituted; neither Altman nor Brockman would get a board seat.<sup>22</sup> OpenAI announced on X, “We have reached an agreement in principle for Sam Altman to return to OpenAI as CEO with a new initial board of Bret Taylor (Chair), Larry Summers, and Adam D’Angelo.”<sup>23</sup> Taylor was the former chairperson of Twitter, and Summers was the former U.S. Treasury Secretary.<sup>24</sup> After five intense days, the boardroom saga was over.<sup>25</sup>

While the OpenAI saga ended with Altman’s return to the helm and a reconfigured board of directors, the fact that it happened in such a public way allowed the world to see firsthand what would typically be addressed out of the public eye. The abrupt and successive leadership changes also raised serious questions about corporate governance and highlighted the tension between the mission-oriented and for-profit arms of the startup. As one pundit noted, there were two tribes: “adherents to the serve-humanity-and-not-shareholders credo and those who subscribed to the more traditional Silicon Valley modus operandi of using investor money to release consumer products into the world as rapidly as possible in hopes of cornering a market and becoming an industry pacesetter.”<sup>26</sup>

As AI transforms into an ever-dominant force in the tech space, and the major tech companies, venture capitalists, and nontraditional investors pour billions into the AI ecosystem, the associated costs — both social and economic — have become more apparent.<sup>27</sup>

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20. *Id.*

21. *See id.*

22. Cao, *supra* note 8.

23. OpenAI (@OpenAI), X (FORMERLY KNOWN AS TWITTER) (Nov. 21, 2023, 10:03 PM), <https://twitter.com/OpenAI/status/1727206187077370115> [<https://perma.cc/W52L-5FFK>].

24. Cao, *supra* note 8.

25. Manish Singh, *Sam Altman to Return as OpenAI CEO*, TECHCRUNCH (Nov. 21, 2023, 10:06 PM), <https://techcrunch.com/2023/11/21/openai-says-sam-altman-to-return-as-ceo/> [<https://perma.cc/ZBW8-7QUZ>].

26. Bobby Allyn, *How OpenAI’s Origins Explain the Sam Altman Drama*, NPR (Nov. 24, 2023, 5:00 AM), <https://www.npr.org/2023/11/24/1215015362/chatgpt-openai-sam-altman-fired-explained> [<https://perma.cc/652S-DL4J>].

27. *See* Jason Karaian, *Musk’s A.I. Firm Raises \$6 Billion in Race with Rivals*, N.Y. TIMES (May 27, 2024), <https://www.nytimes.com/2024/05/27/business/elon-musk-xai-funding.html> [<https://perma.cc/CA2U-44PC>] (“Investors and large tech companies like Google, Meta and Microsoft have poured billions into the businesses developing A.I. systems, looking to profit as they’re integrated into many aspects of business and daily life. These investments also reflect the steep costs of running generative A.I. systems, which require huge amounts of processing power to generate text, sounds and images.”).

Interestingly, AI startups, especially the most dominant ones that will be analyzed in this Article, have also opted to use novel corporate governance structures to address the fact that they (and likely others both inside and outside the startup ecosystem) view themselves as a new breed of startups — AI foundation model startups — based on the nature of their technology. The atypical corporate governance structures also reflect the tension between both the benefits and drawbacks of AI technologies. “Proponents of AI believe the technology has the potential to revolutionize every industry and better humanity in the process.”<sup>28</sup> On the other hand, “it also has the potential to take jobs away from people — 14 million positions could disappear in the next five years, the World Economic Forum warned in April [2023].”<sup>29</sup>

This Article examines the suitability of novel corporate governance structures for AI startups, focusing on foundation models due to their significance in AI. Specifically, it examines whether these structures help or hinder the goals of such companies. By enshrining public good objectives — e.g., benefits to humanity, AI safety, and the advancement of collective understanding of the universe — into their corporate governance frameworks, do AI startups risk neglecting their overall corporate governance practices? Moreover, the Article evaluates if these structures effectively achieve their professed mission-related objectives. Part II provides a brief overview of the current corporate governance norms for startups and illustrates how some leading AI startups are not only pioneering transformative technologies but also challenging existing governance norms within the startup ecosystem. Part III analyzes the novel corporate governance structures adopted by three prominent AI startups — OpenAI, Anthropic, and xAI — and explores the potential societal implications and conflicts of interest of these novel structures. Part IV examines current approaches to AI, including AI safety concerns, and proposes new legislation to govern AI startup governance. The proposed legislation addresses the problems that led to the creation of the conflict-laden novel corporate governance structures.

## II. THE STARTUP CORPORATE GOVERNANCE STRUCTURE AND THE INSULAR WORLD OF AI FOUNDATION MODEL STARTUPS

As the world slowly emerged from the COVID-19 pandemic, it was greeted with the arrival of an AI chatbot called ChatGPT,

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28. David Goldman, *How OpenAI So Royally Screwed Up the Sam Altman Firing*, CNN (Nov. 20, 2023, 7:42 AM), <https://www.cnn.com/2023/11/19/tech/sam-altman-open-ai-firing-board/index.html> [<https://perma.cc/YJU5-PUW2>].

29. *Id.* (noting also that “AI is particularly adept at spreading harmful disinformation” and that “some, including former OpenAI board member Elon Musk, fear the technology will surpass humanity in intelligence and could wipe out life on the planet”).

developed by the startup OpenAI on November 30, 2022.<sup>30</sup> The startup's launch of the product garnered huge success as over one hundred million users signed up within the first two months, ushering it into its status as the fastest-growing consumer product to date.<sup>31</sup> The ChatGPT launch ignited a race among competing AI startups backed by top-tier venture capital ("VC") firms and so-called big tech companies, such as Alphabet, Amazon, Microsoft, and Meta ("Big Tech"). This first Section will discuss the typical VC-backed startup's corporate governance structure before the AI race. The fear of missing out in the AI Age has magnified to irrational proportions: As the race among AI startups intensifies, competition among the VC firms escalates. These VC firms now invest in anything AI or herd behind the lead VC firms in AI investments. In the second Section of this Part, a diagram illustrates the interwoven investments by VCs and Big Tech companies. As these funds pour into AI foundation model startups, they have formed a bubble around this insulated space.

#### *A. Corporate Structure of VC-Backed Startups*

In the world of private ordering, a typical startup that is fortunate enough to receive the backing of one or more VC firms will have investors serve on the board of directors.<sup>32</sup> Simply put, investment in a startup is risky and one concrete way to reduce the risks when purchasing equity in the startup is to insist on board seats.<sup>33</sup> In addition to securing board seats, the VC firms who invest receive preferred shares

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30. Sabrina Ortiz, *What is ChatGPT? How the World's Most Popular AI Chatbot Can Benefit You*, ZDNET (Nov. 13, 2024), <https://www.zdnet.com/article/what-is-chatgpt-how-the-worlds-most-popular-ai-chatbot-can-benefit-you/> [https://perma.cc/AL39-THDK].

31. Dan Millano, *ChatGPT Reaches 100 Million Users Two Months After Launch*, THE GUARDIAN (Feb. 2, 2023), <https://www.theguardian.com/technology/2023/feb/02/chatgpt-100-million-users-open-ai-fastest-growing-app> [https://perma.cc/6B8K-YPRK].

32. *Preferred Stock*, COOLEY GO (May 10, 2021), <https://www.cooleygo.com/glossary/preferred-stock/> [https://perma.cc/42FH-AQL2] (noting that VCs, as preferred stockholders, "often have the ability to elect one or more members of a company's Board of Directors, and to veto certain significant corporate actions"). For comprehensive discussions of corporate governance in VC-backed startups, see Jennifer S. Fan & Xuan-Thao Nguyen, *Founder Worship, Effective Altruism, and Corporate Governance*, 112 KY. L.J. 1, 20–21 (2025); Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 179–80 (2019); Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 583 (2016); Diane Mulcahy, *Six Myths About Venture Capitalists*, HARV. BUS. REV. (May 2013), <https://hbr.org/2013/05/six-myths-about-venture-capitalists> [https://perma.cc/9EM2-WNRQ] (observing that fewer than 1% of U.S. startups received VC financing); see also Tim Vipond, *How VC's Look at Startups and Founders*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/valuation/how-vcs-look-at-startups-and-founders/> [https://perma.cc/Q5F2-2EK6] (observing that startups rarely receive VC investments and the odds of being funded by top VC firms in Silicon Valley like Andreessen Horowitz are "approximately 0.7%").

33. Natee Amornsiripinitich, Paul A. Gompers & Yuhai Xuan, *More Than Money: Venture Capitalists on Board*, J.L. ECON. & ORG., Mar. 2019, at 3.

that come with many privileges and assuage the investors' risks.<sup>34</sup> The board in any VC-backed startup answers to the stockholders, but the stockholders who often own the majority of the voting power in the startup are a group of VC firms/investors.<sup>35</sup> With the control of the board, the preferred investors can influence the direction of the company, including "hiring and firing senior management; approving corporate actions (e.g. compensation, stock options, and budget); and offering guidance on strategic decisions that impact the business longer term" such as selling the company.<sup>36</sup> Also, the preferred investors in early rounds of financing often receive better economic rewards for their risk appetite if the startup does well.<sup>37</sup> That means the investors of early series rounds of funding get paid before others and often at better returns. If the startup fails to grow and scale as planned, a down round or recapitalization may occur, and to entice new investors, the existing preferred stock investors may face conversion to common stock, reduction of their ownership in the startup, and/or the appointment of a new board under the control of the new preferred stock investors.<sup>38</sup>

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34. *What Is Preferred Stock, And How Is It Used By Venture Capital Investors?*, CONFLUENCE, <https://confluence.vc/preferred-stock/> [<https://perma.cc/6TBV-SZGX>] ("Most venture investors looking to fund startups will negotiate for preferred stock or shares so they can gain more privileges and rights. These can be particularly useful for mitigating risk and providing anti-dilution protections.").

35. *See, e.g., Carr v. New Enterprise Associates, Inc.*, No. 2017-0381, 2018 WL 1472336, at \*3 (Del. Ch. Mar. 26, 2018) (stating that the VC investor "NEA obtained nearly 90% of the Series A-2 preferred stock, which, combined with its other equity holdings, resulted in NEA acquiring more than 65% of ACT's stock on an as-converted basis and becoming its controlling stockholder" and NEA controlled the Board). *See also Susai v. Jagadeesh*, No. C 07-00001, 2007 WL 1742870, at \*1 (N.D. Cal. June 14, 2007) (stating that Sequoia VC firm "eventually secured 60% ownership" of the startup NetScaler, Gabriel Venture Partners, L.P. also owned a stake in the startup, and the founder Susai ended up with only 3% ownership in the company).

36. Anu Hariharan, *How to Create and Manage a Board*, Y COMBINATOR, <https://www.ycombinator.com/library/3w-how-to-create-and-manage-a-board> [<https://perma.cc/XJ6H-FDB8>].

37. *See Lead Investment: The Important Role and Responsibilities of the Deal Leader*, CONFLUENCE, <https://confluence.vc/lead-investment/> [<https://perma.cc/T8JT-2EP4>] (internal citation omitted) ("The lead investor usually takes a up a significant amount of the round (30%–80%), they will set economics for the financing round, and they will take a more active role through a board seat or other measures.").

38. *See New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 126–28 (Del. Ch. 2023) (noting two early investors brought suit against new investors who invested in the down round and obtained "preferred stock that carried powerful blocking rights"). The easy money during the COVID-19 pandemic came to a painful halt that led to down rounds in VC financing. *See, e.g., Alon Y. Kapen, Navigating the Downside: The Rise of Down Rounds in 2024 VC Deals*, FARRELL FRITZ (June 10, 2024), <https://www.nyventurehub.com/2024/06/10/navigating-the-downside-the-rise-of-down-rounds-in-2024-vc-deals/> [<https://perma.cc/489J-AHXA>] (stating that startups that had failed "to reduce their cash burn when the fundraising market turned sour in mid-2022 are now facing the prospect of having to raise capital at a discount to their last valuation"); Peter Walker & Kevin Dowd, *State of Private Markets: Q1 2024*, CARTA (May 7, 2024), <https://carta.com/blog/state-of-private-markets-q1-2024/>



Accordingly, all stakeholders involved in a VC-backed startup turn to a set of contractual agreements specifying the terms of the corporate structure along with economic provisions.

The National Venture Capital Association (“NVCA”) provides model legal documents, including the Stock Purchase Agreement and Investors’ Rights Agreement, for investors to use.<sup>39</sup> The uniformity of the agreements both simplifies and instills a well-tested corporate structure in VC-backed startups.<sup>40</sup> Most startups are incorporated as C corporations in Delaware; accordingly, Delaware’s renowned corporate law governs.<sup>41</sup> Deviation from the norms established in the VC sector for startups often invites chaos.<sup>42</sup> Examples of a typical startup’s corporate governance structure abound.

VC investors appoint members to the startup board of directors and gain control over corporate actions. For instance, in 2012, Pierre Naude cofounded nCino to provide cloud-based software to financial institutions.<sup>43</sup> Insight Partners, a known VC firm with \$90 billion in assets under management and the motto “We Help Ambitious Companies Scale Up at Every Stage of Growth” makes investments in high-growth technology, software, and Internet startup companies.<sup>44</sup> In 2015, Insight Partners decided to invest in nCino by pouring \$29 million into its Series B financing round.<sup>45</sup> nCino and Insight entered into an investor rights agreement wherein Insight gained the right to appoint one director to nCino’s board. Jeffrey Horing, Insight managing director and co-

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[<https://perma.cc/M4WW-CVXC>] (“[C]ompanies on Carta closed 1,064 new funding rounds during the first quarter of the year, down 29% compared with the prior quarter. The decline was sharpest at the early stages of the venture lifecycle: Deal count fell by 33% at the seed stage in Q1 and 36% at Series A.”); Lizette Chapman, *Silicon Valley Startups Brace for a Summer of Pain*, BLOOMBERG (Apr. 24, 2023, 7:00 AM), <https://www.bloomberg.com/news/articles/2023-04-24/tech-startups-vcs-brace-for-wave-of-down-rounds-as-downturn-lingers> [<https://perma.cc/CEN5-6Z2L>] (“More than 400 unicorns haven’t raised new funding since 2021; when they do, many will need to consider taking lower valuations.”).

39. *NVCA Model Legal Documents*, NAT’L VENTURE CAP. ASS’NS, <https://nvca.org/model-legal-documents/> [<https://perma.cc/DH7F-EDDR>].

40. Brian P. Slough, Jeffrey P. Bodle, Scott R. Berman, James R. Preston & Lindsay R. Mozdziok, *What’s New in the NVCA Model Legal Documents — And What’s Next?*, MORGAN LEWIS INSIGHTS (Sept. 24, 2024), <https://www.morganlewis.com/pubs/2024/09/whats-new-in-the-nvca-model-legal-documents-and-whats-next> [<https://perma.cc/549D-PWMU>] (“The model documents are widely used in the marketplace — for both very early and late-stage companies.”).

41. BRAD FELD & JASON MENDELSON, *VENTURE DEALS* 284, 293 (4th ed. 2019).

42. Fan & Nguyen, *Founder Worship*, *supra* note 32, at 54–58 (explaining startup chaos when corporate governance is abandoned and suggesting a return to the established board structure and legal compliance).

43. *City of Hialeah Emp. Ret. Sys. v. Insight Venture Partners*, No. 2022-0846, 2023 WL 8948218, at \*1 (Del. Ch. Dec. 28, 2023).

44. *Scale Up, Take Off*, INSIGHT PARTNERS, <https://www.insightpartners.com/> [<https://perma.cc/E6PS-7THR>]; *Insight Partners*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Insight\\_Partners](https://en.wikipedia.org/wiki/Insight_Partners) [<https://perma.cc/T5YF-YND6>].

45. *City of Hialeah Emp. Ret. Sys.*, 2023 WL 8948218, at \*1.

founder, served as nCino's director at all times.<sup>46</sup> nCino met all of its milestones and Insight increased its investments in the startup; by 2018, Insight held more than 50% of the startup's outstanding shares.<sup>47</sup> Two years later in 2020, Insight led nCino through its initial public offering of common stock at a valuation of nearly \$3 billion.<sup>48</sup> In the IPO prospectus, nCino acknowledged Insight's control and the possibility that it could "influence the outcome of corporate actions requiring stockholder approval."<sup>49</sup>

Depending on the amount of investment and ownership in the startup, VC-appointed directors may be outvoted in corporate transactions. FairX, a crypto startup, was founded in 2019 by Neal Brady with the idea of creating a futures exchange.<sup>50</sup> Hyde Park Venture Partners, a venture capital firm focused on early-stage, high-growth, technology startups in the Chicago and Midwest areas, made its early investments in the startup in November 2019 through two separate funds; together the funds owned approximately 15% of the company's equity.<sup>51</sup> Also, in exchange for its equity investment, Hyde Park appointed one director to join the other two directors who were co-founders of the startup.<sup>52</sup> Hyde Park also received its preferred shares.<sup>53</sup> By 2021, FairX was approached by Coinbase for a possible acquisition, and Coinbase subsequently paid almost \$280 million.<sup>54</sup> Though Hyde Park's appointed director opposed the sale, he was outvoted by the other two directors.<sup>55</sup> With only 15% of ownership in the startup, Hyde Park did not have the votes to block the sale.

Attracting new investors in subsequent rounds of funding may lead to changes to both economic and control terms held by existing investors. Fugues, Inc. was a startup founded in 2012 to provide tools to build, deploy, and maintain a cloud infrastructure security platform.<sup>56</sup> Josh Stella, a co-founder, served as its Chief Executive Officer.<sup>57</sup> The

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46. *Id.*

47. *Id.* at \*2.

48. *Id.*

49. *Id.*

50. *DLA Piper Advises FairX in Its Sale to Coinbase*, DLA PIPER (Jan. 14, 2022), <https://www.dlapiper.com/en-us/news/2022/01/dla-piper-advises-fairx-in-its-sale-to-coinbase> [<https://perma.cc/T5UZ-Z93T>].

51. Hyde Park Venture Partners Fund III and Hyde Park Venture Partners Fund III Affiliates v. FairXchange LLC, 292 A.3d 178, 185 (Del. Ch. 2023).

52. *Id.*

53. *Id.*

54. *Coinbase Global, Inc. Acquired FairXchange, Inc. for \$280 Million*, MARKETSCREENER (Feb. 2022), <https://www.marketscreener.com/quote/stock/COINBASE-GLOBAL-INC-121300010/news/Coinbase-Global-Inc-acquired-FairXchange-Inc-for-280-million-41835218/> [<https://perma.cc/7AWU-JEKK>].

55. *FairXchange*, 292 A.3d at 187.

56. *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 128 (Del. Ch. 2023).

57. *Id.*

startup quickly attracted attention from investors in 2013; it obtained a seed round from Capital Partners III, L.P., an investment fund sponsored by Core Capital Partners, a VC firm headquartered in D.C. with more than \$300 million under management across three funds.<sup>58</sup> The startup continued to perform well and was propelled to the next level when it landed an investment from New Enterprises Associates (“NEA”), one of the premier VC firms in the nation.<sup>59</sup> NEA is notable for its forty-seven years of history in the VC sector and immense success with more than \$99 billion under management.<sup>60</sup> As of March 22, 2025, the firm realized over 745 liquidity events that included over 280 portfolio company IPOs and over 465 portfolio company acquisitions.<sup>61</sup> In 2012, NEA closed its fourteenth investment fund with \$2.6 billion of investor capital, one of the largest funds in history at the time.<sup>62</sup> Among the investments made to startups with the capital from the fourteenth fund was Fugues, Inc.<sup>63</sup> In addition, money from NEA Ventures 2014, L.P., and NEA:Seed II, LLC flowed to Fugues.<sup>64</sup> In total, NEA invested a total of \$36.1 million in Fugues compared to the \$1.7 million from Core Capital.<sup>65</sup> Both NEA and Core Capital received shares of preferred stock for their investments and each received the right to appoint one member to Fugues’ five-member board.<sup>66</sup> Unfortunately, Fugues did not fare well, and the startup needed to go through a recapitalization plan as presented by Stella, which the board voted to approve.<sup>67</sup> Before the recapitalization, the preferred stock carried an aggregate liquidation preference of \$74.6 million, with \$37.7 million associated with shares of preferred stock held by NEA and Core Capital.<sup>68</sup> The recapitalization, however, valued the startup’s pre-transaction equity at only \$10 million, and the startup raised only \$8 million in the recapitalization.<sup>69</sup> Worse, to attract new investors to the recapitalization, the then-existing preferred stock was converted into common

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58. *Id.*

59. *Id.*

60. *We’re Company Builders at Our Core.*, NEW ENTER. ASSOCS., <https://www.nea.com/about> [<https://perma.cc/89MB-7S3A>].

61. *Id.*

62. Tomio Geron, *New Enterprise Associates Closes \$2.6 Billion in One of Largest Venture Funds Ever*, FORBES (July 25, 2012), <https://www.forbes.com/sites/tomiogeron/2012/07/25/new-enterprise-associates-closes-2-6-billion-in-one-of-largest-venture-funds-ever/> [<https://perma.cc/ADY4-ZFY6>] (noting NEA dominated the VC sector — its fourteenth venture fund raised in 2012 brought in \$2.6 billion, “one of the largest such funds ever raised”).

63. *New Enter. Assocs. 14, L.P.*, 292 A.3d at 128.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 128–29.

68. *Id.* at 129.

69. *Id.*

stock, and the conversion wiped out the liquidation preference. Consequently, NEA and Core Capital owned common shares along with having their ownership in the startup decline from 32% to 14% and from 3% to less than 1%, respectively.<sup>70</sup> The new investors who participated in the recapitalization gained the preferred stock and 60% of the startup's voting power. Under the new Voting Agreement as part of the recapitalization, the preferred stock investors controlled the board.<sup>71</sup> The new board then unanimously approved an amendment to the startup's certificate of incorporation that increased the number of shares of preferred stock.<sup>72</sup> The board also granted stock options to employees and advisors and subsequently sold the startup through a merger on February 17, 2022.<sup>73</sup>

The three examples above illustrate the corporate governance structure of VC-backed startups. This approach is embraced by all VCs, regardless of their history or prominence, and by all startups regardless of their tech fields. However, when powerful AI models emerged, some startups decided to discard the familiar corporate governance structure as they begin operating in a new AI-dominated startup world.

### *B. The Bubble World of AI Foundation Model Startups*

In the world of AI startups, there is a special group of startups with the talent and technology to develop “foundation models.”<sup>74</sup> Aptly named, these models lay the foundations for everyone “to create new tools, platforms and economic models for virtually every aspect of life.”<sup>75</sup> GPT, Gemini, Claude, and Cohere Command are among the

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70. *Id.*

71. *Id.* at 129–30 (“Because the Rich Entities held approximately 65% of the Preferred Stock, they had the contractual authority to designate the first two of the five directors. Because the Rich Entities controlled 39% of the Company's fully diluted voting power, they had an outsized voice in the selection of the fifth director.”).

72. *Id.* at 131.

73. *Id.* at 133–35.

74. The term was coined by the Center for Research on Foundation Models at the Stanford Institute for Human Centered Artificial Intelligence in August 2021. See *Introducing the Center for Research on Foundation Models (CRFM)*, STAN. HUMAN-CENTERED AI (Aug. 18, 2021), <https://hai.stanford.edu/news/introducing-center-research-foundation-models-crfm> [<https://perma.cc/G7VL-QYJE>]; see also Rishi Bommasani, Drew A. Hudson, Ehsan Adeli, Russ Altman, Simran Arora, Sydney von Arx et al., *On the Opportunities and Risks of Foundation Models*, CTR. FOR RSCH. ON FOUND. MODELS (July 12, 2022), <https://arxiv.org/abs/2108.07258> [<https://perma.cc/7CK9-UDCP>] (“AI is undergoing a paradigm shift with the rise of models (e.g., BERT, DALL-E, GPT-3) that are trained on broad data at scale . . . that can be adapted to a wide range of downstream tasks. We call these models foundation models to underscore their critically central yet incomplete character.”).

75. Dennis Hillemann, *Unlocking the Power of AI Foundation Models: Insights from the LEAM.AI Conference*, MEDIUM (Jan. 24, 2023), <https://dhillemann.medium.com/unlocking-the-power-of-ai-foundation-models-insights-from-the-learn-ai-conference-94321d439d> [<https://perma.cc/X2BH-XME4>].

foundation models.<sup>76</sup> The United States is leading all other countries in the development of foundation models — 73% of all such models have been developed here.<sup>77</sup>

Development of AI foundation models requires:

- (a) the collection and creation of comprehensive training datasets;
- (b) the support of high-quality research in the field of AI;
- (c) providing access to power computing infrastructure;
- (d) constructing organizational structures and processes which will orchestrate an ongoing cycle of model development and improvement;
- (e) integrating the models into the entire ecosystem of innovation; [and]
- (f) developing methods, datasets, and criteria which will ensure ethical standards.<sup>78</sup>

Startups that are in the race to develop foundation models understand that it is cost-prohibitive.<sup>79</sup> That means investments in AI foundation model startups require lots of dry powder for the training datasets and computing infrastructure.<sup>80</sup> The computing cost of

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76. Mark Haranas, *Top 10 AI Foundation Models Ranked: Google, Nvidia, OpenAI Lead Forrester Report*, CRN (June 12, 2024), <https://www.crn.com/news/ai/2024/top-10-ai-foundation-models-ranked-google-nvidia-openai-lead-forrester-report> [https://perma.cc/7WJV-GLGV] (listing the top ten AI Foundation Models for language in Q2 2024).

77. Ben Abbott, *Time for APAC Region to Build Its Own AI Foundation Models, Says CSIRO*, TECHREPUBLIC (Apr. 19, 2024), <https://www.techrepublic.com/article/csiro-apac-ai-foundation-models/> [https://perma.cc/5K9J-FAZP] (“Research conducted in 2023 by the Large European AI Models initiative found 73% of AI foundation models since 2017 were from the U.S. and 15% from China.”).

78. Hillemann, *supra* note 75.

79. See, e.g., STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, A.I. INDEX REP. 2024 5, <https://aiindex.stanford.edu/report/> [https://perma.cc/A99L-LX5Q] (“[T]he training costs of state-of-the-art AI models have reached unprecedented levels. For example, OpenAI’s GPT-4 used an estimated \$78 million worth of compute to train, while Google’s Gemini Ultra cost \$191 million for compute.”).

80. See, e.g., Erin Snodgrass, *CEO of Anthropic — The AI Company Amazon is Betting Billions on — Says It Could Cost \$10 Billion to Train AI in 2 Years*, BUS. INSIDER (Apr. 30, 2024, 9:46 PM), <https://www.businessinsider.com/anthropic-ceo-cost-10-billion-train-ai-years-language-model-2024-4> [https://perma.cc/3JQQ-25HU]; Will Knight, *Intel’s CEO Says AI Training Now Costs Billions*, WIRED (Feb. 22, 2024), <https://link.wired.com/public/34436953> [https://perma.cc/KBP7-ZBTB]; Keach Hagey & Asa Fitch, *Sam Altman Seeks Trillions of Dollars to Reshape Business of Chips and AI*, WALL ST. J. (Feb. 8, 2024, 9:00 PM), <https://www.wsj.com/tech/ai/sam-altman-seeks-trillions-of-dollars-to-reshape-business-of-chips-and-ai-89ab3db0> [https://perma.cc/Z7QW-BXZ3] (“OpenAI chief pursues investors including the U.A.E. for a project possibly requiring up to \$7 trillion.”).

developing OpenAI's foundation model GPT is in the billions.<sup>81</sup> Also, talent — the people who build the AI foundation models — commands high salaries.<sup>82</sup>

OpenAI engineers fetch \$900,000 per year.<sup>83</sup> Even eight years ago, OpenAI had to pay world-renowned AI researchers more than \$1 million on an annual basis.<sup>84</sup> The compensation packages at AI foundation model startups continued to increase as these startups competed for the same small group of talent.<sup>85</sup> By November 2023, OpenAI offered to pay up to \$10 million for top AI researchers from rival firms.<sup>86</sup>

Ultimately, the race among AI foundation model startups will allow the winners to emerge possessing a very dominant role in society: Their models will be what society relies on for all aspects of life itself, all sectors of the economy will be transformed and operated with the models' applications, and all humans will use them regardless of whether they realize the AI models exist.<sup>87</sup> The rewards of being the

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81. See, e.g., Will Henshall, *The Billion-Dollar Price Tag of Building AI*, TIME (June 3, 2024, 4:10 PM), <https://time.com/6984292/cost-artificial-intelligence-compute-epoch-report/> [<https://perma.cc/J3DR-6AHD>] (reporting that a supercomputer built to run AI foundation models at OpenAI will cost \$100 billion).

82. See Benjamin Broomfield, *Zuckerberg is Personally Emailing Google Employees in a Bid to Recruit AI Talent*, HR GRAPEVINE (Mar. 28, 2024), <https://www.hrgrapevine.com/us/content/article/2024-03-28-zuckerberg-is-personally-emailing-google-employees-in-a-bid-to-recruit-ai-talent> [<https://perma.cc/8FSC-G8LQ>]; Emilia David, *Not Even Meta Can Pay AI Talent Enough*, THE VERGE (Mar. 25, 2024, 2:26 PM), <https://www.theverge.com/2024/3/25/24111633/not-even-meta-can-pay-ai-talent-enough> [<https://perma.cc/4S64-Z8WW>] ("Meta has been losing researchers to Google's DeepMind, OpenAI, and Mistral, which was founded by former Meta engineers. One reason could be the salaries AI researchers could earn. Meta reportedly pays AI researchers up to \$2 million, which is less than the \$5 million to \$10 million paid by OpenAI.").

83. Gabrielle Olya, *OpenAI Engineers Earn \$900K per Year: How Does That Compare to Salaries at Other Top Tech Companies?*, GOBANKINGRATES (Apr. 25, 2024), <https://www.gobankingrates.com/money/jobs/openai-engineers-earn-900k-per-year-how-that-compares-to-salaries-other-top-tech-companies/> [<https://perma.cc/ND57-DCEX>].

84. Cade Metz, *AI Researchers Are Making More Than \$1 Million, Even at a Nonprofit*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/technology/artificial-intelligence-salaries-openai.html> [<https://perma.cc/UK56-5382>] ("OpenAI paid its top researcher, Ilya Sutskever, more than \$1.9 million in 2016.").

85. See, e.g., *id.* (stating that the AI researchers expected "salaries at OpenAI to increase"); Josh Steinfeld, Heather Doshay & Mario Espindola, *The AI Salary Surge, Location-Based Pay, and More Tech Talent Trends*, SIGNALFIRE (Dec. 5, 2024), <https://www.signalfire.com/blog/ai-salary-surge-and-tech-talent-trends> [<https://perma.cc/P2DT-LG9Q>] ("[S]tartups were on a hiring spree and paying premium salaries to compete for talent . . . AI engineers are the hot ticket for 2025, commanding a 5% salary premium and a 10-20% equity premium over other engineering roles.").

86. Stephen Council, *Bay Area Tech Company Reportedly Trying to Poach Google Workers with \$10M Pay Packages*, SFGATE (Nov. 13, 2023), <https://www.sfgate.com/tech/article/openai-google-pay-salaries-poach-18489070.php> [<https://perma.cc/68G3-FPRM>].

87. Hillemann, *supra* note 75; see also Bergur Thormundsson, *Artificial Intelligence Market Size Worldwide from 2020–2030*, STATISTA (Nov. 28, 2024), <https://www.statista.com/forecasts/1474143/global-ai-market-size> [<https://perma.cc/6M26-4K8X>] ("The market for artificial intelligence grew beyond 184 billion U.S. dollars in 2024, a considerable

winners tantalize the experts who are currently developing models at AI foundation model startups. The experts who came to work at AI foundation model startups often declined offers that were multiple times the dollar amount they accepted.<sup>88</sup> Instead, they are driven by the idea of building AI foundation models with the assurances that their “powerful AI benefits all humanity.”<sup>89</sup>

The rewards of selecting the AI foundation model startup(s) also appeal to investors who compete among themselves to invest.<sup>90</sup> For instance, investors vied for an opportunity to invest in OpenAI, conferring it a valuation of \$80 billion.<sup>91</sup> ChatGPT generated a great deal of excitement among investors, but the CEO of OpenAI reminded everyone that society has only experienced the very beginning of AI foundation models: OpenAI was still far from attaining Artificial General Intelligence.<sup>92</sup>

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jump of nearly 50 billion compared to 2023. This staggering growth is expected to continue with the market racing past 826 billion U.S. dollars in 2030. . . . Both in productivity and labor changes, the U.S. is likely to be heavily impacted by the adoption of AI.”).

88. Metz, *supra* note 84 (reporting that several researchers turned down “offers for multiple times the dollar amount” they accepted at OpenAI).

89. *Id.*

90. STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, *supra* note 79, at 5 (“Despite a decline in overall AI private investment last year, funding for generative AI surged, nearly octupling from 2022 to reach \$25.2 billion. Major players in the generative AI space, including OpenAI, Anthropic, Hugging Face, and Inflection, reported substantial fundraising rounds.”).

91. Cade Metz & Tripp Mickle, *OpenAI Completes Deal That Values the Company at \$80 Billion*, N.Y. TIMES (Feb. 16, 2024), <https://www.nytimes.com/2024/02/16/technology/openai-artificial-intelligence-deal-valuation.html> [<https://perma.cc/FR7N-6YW5>] (“OpenAI has completed a deal that values the San Francisco artificial intelligence company at \$80 billion or more, nearly tripling its valuation in less than 10 months.”).

92. See Christiaan Hetzner, *OpenAI Tipped to Become the World’s First Trillion-Dollar Privately Held Startup by Former Google China President*, FORTUNE (Mar. 28, 2024, 10:47 AM EDT), <https://fortune.com/asia/2024/03/28/openai-trillion-dollar-valuation-megacap-microsoft-google-china-genai/> [<https://perma.cc/AH64-9MDP>] (noting that investors are bullish on OpenAI’s future); Nisha Talagala, *The OpenAI Drama: What Is AGI And Why Should You Care?*, FORBES (Nov. 21, 2023, 11:31 PM), <https://www.forbes.com/sites/nishatalagala/2023/11/21/the-open-ai-drama-what-is-agi-and-why-should-you-care/> [<https://perma.cc/JZ7G-BL6N>] (discussing AGI and existential risks); Sam Altman *Calls ChatGPT Dumbest, Hints at GPT 6 and Why He is Willing to Spend \$50 bn on AGI*, THE INDIAN EXPRESS (May 5, 2024, 08:42 IST), <https://indianexpress.com/article/technology/artificial-intelligence/sam-altman-on-gpt-5-agi-chatgpt-9304938/> [<https://perma.cc/827S-XP8R>] (reporting on OpenAI’s focus on superintelligence and the future potential of new AI models); Ana Altcheck, *Sam Altman Compares Today’s ChatGPT to a ‘Barely Useful Cell-phone,’* BUS. INSIDER (Feb. 13, 2024, 2:33 PM), <https://www.businessinsider.com/openai-sam-altman-chatgpt-like-early-cellphone-2024-2> [<https://perma.cc/NV5K-TAT8>]; Will Knight, *Some Glimpse AGI in ChatGPT. Others Call It a Mirage*, WIRED (Apr. 18, 2023, 7:00 AM), <https://www.wired.com/story/chatgpt-agi-intelligence/> [<https://perma.cc/6VXP-UJ2G>]; Ruben Aster, *Why ChatGPT Will Never Be an Artificial General Intelligence*, MEDIUM (July 31, 2023), <https://medium.com/@Ruben.Aster/why-chatgpt-will-never-be-an-artificial-general-intelligence-bba7ecfbd9e> [<https://perma.cc/E3XV-KUN2>] (explaining GPT’s inner workings and its difference from AGI).

Because investors do not yet know which startup will emerge as the winner, some of the same investors invest in competing startups.<sup>93</sup> Figure 1 below illustrates the insular world of investors backing competing AI foundation model startups. Figure 2 illustrates Big Tech's interconnectedness with AI foundation model startups. The diagrams also demonstrate that the investors in this race are both premier VC firms and Big Tech. Big Tech invests in AI foundation model startups because they provide the computing power needed by the models.<sup>94</sup>

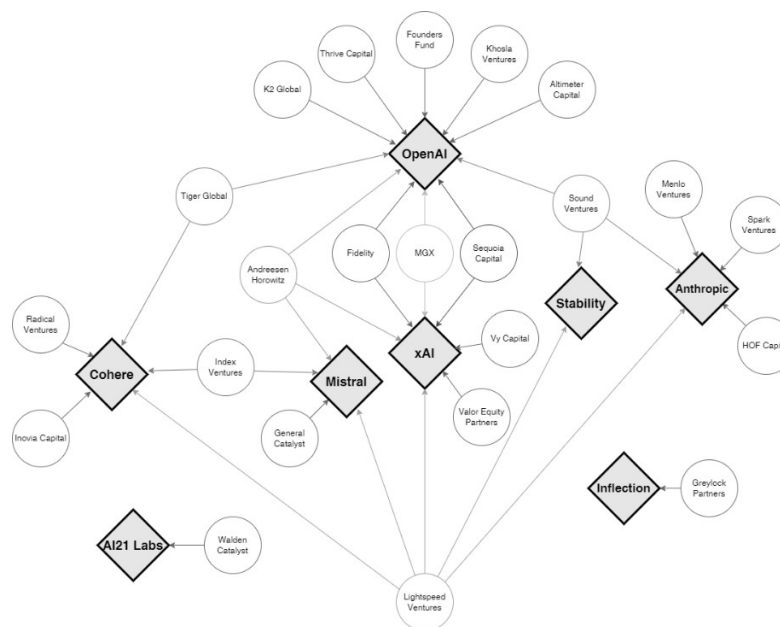


Figure 1: Investors Backing Multiple AI Foundation Model Startups

93. In addition to the usual VC investors, Big Tech companies also compete for strategic corporate investments in AI model startups. See Nick Patience, *Are Generative AI Foundation Models Also Model Businesses?* S&P GLOBAL (Apr. 10, 2024), <https://www.spglobal.com/market-intelligence/en/news-insights/research/are-generative-ai-foundation-models-also-model-businesses> [<https://perma.cc/4ZYJ-BVJD>] (providing a graph of overlapping investments from Big Tech companies in the same group of AI foundation model startups).

94. See, e.g., Cade Metz, Nicole Grant & David McCabe, *Inside Google's Investment in the A.I. Start-Up Anthropic*, N.Y. TIMES (Mar. 1, 2025), <https://www.nytimes.com/2025/03/11/technology/google-investment-anthropic.html> [<https://perma.cc/7A5M-CMS8>] ("To win the artificial intelligence race, Google not only has developed its own technologies, but has also pumped money into prominent A.I. start-ups. And to preserve its competitive edge, Google has kept its ownership stakes in those start-ups a secret.").



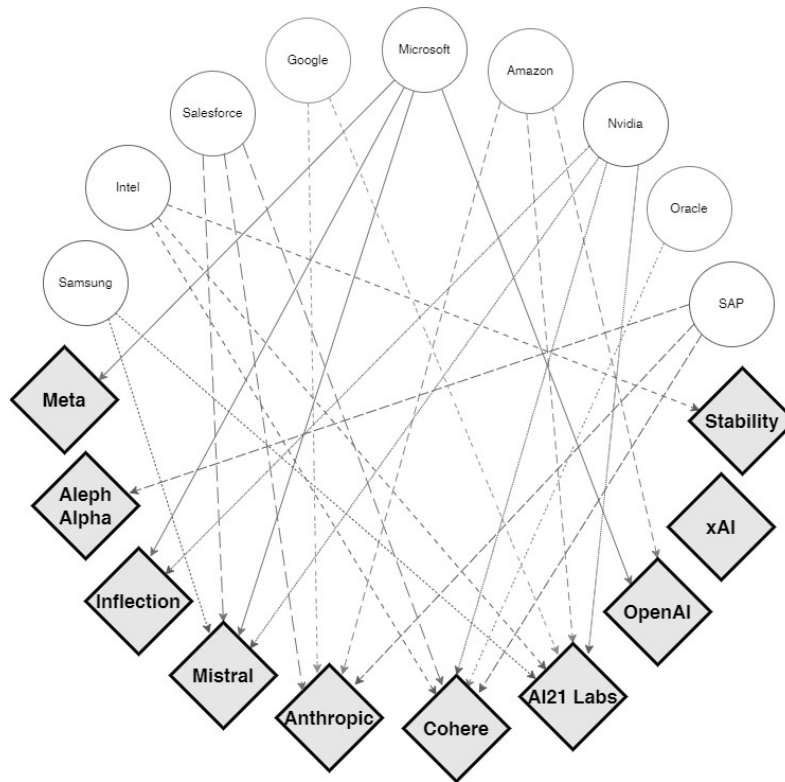


Figure 2: Big Tech's Interconnectedness with AI Foundation Model Startups

AI foundation models stoke both wonder and fear.<sup>95</sup> Because AI is believed to possess both unfathomable benefits and the capability to destroy humanity as it becomes more like humans, a few AI foundation model startups created tandem corporate structures as the key response to these safety concerns. This novel structure, however, differs from the well-established VC-backed corporate governance structure. Part III will examine the distinct tandem corporate structures adopted by OpenAI and Anthropic, as well as xAI's use of the public benefit corporation model.

95. The CEO of OpenAI raised alarm with his quote: "AI will probably most likely lead to the end of the world, but in the meantime, there'll be great companies." Rachel Shin, *Sam Altman, the Man Behind ChatGPT, Is Increasingly Alarmed About What He Unleashed. Here Are 15 Quotes Charting His Descent Into Sleepless Panic*, FORTUNE (June 8, 2023), <https://fortune.com/2023/06/08/sam-altman-openai-chatgpt-worries-15-quotes/> [https://perma.cc/2KBH-QLUF]; see also C-SPAN, *OpenAI CEO Sam Altman: "If This Technology Goes Wrong, It Can Go Quite Wrong."*, YOUTUBE (May 16, 2023), <https://www.youtube.com/watch?v=Pn-W41hC764> [https://perma.cc/3V9E-MC5A].

### III. CASE STUDIES OF CORPORATE GOVERNANCE IN AI STARTUPS

Corporate governance in AI startups — like many non-AI companies — involves a number of factors: board composition, data governance, ethical considerations, regulatory requirements, risk management, stakeholder engagement, and transparency and accountability. However, given the nature of AI’s innovation and its potential impact on society, these startups face some unique challenges.

The following case studies examine the distinctive corporate governance frameworks adopted by three prominent AI startups: OpenAI, Anthropic, and xAI. Each of these companies has embraced a novel governance structure with the stated objective of striking a balance between advancing AI technology and mitigating its potential impact on humanity. OpenAI and Anthropic each have what we term “tandem” corporate governance structures where different entities operate together to achieve the hoped-for objective. Deviating from the conventional structures commonly found in the tech startup ecosystem has both advantages and challenges. By utilizing these three AI startups as case studies, this analysis delves into the implications of employing non-traditional governance structures. Furthermore, it reveals the reality that AI’s development is heavily reliant on a handful of key players within Big Tech, further compounding the corporate governance issues that arise due to potential conflicts of interest as well as exacerbating AI safety concerns.

#### A. *OpenAI*

OpenAI was selected as one of the case studies because of its dominance within the AI space.<sup>96</sup> This Section probes into the inception of OpenAI, its funders, the establishment of its corporate venture capital division, its corporate governance framework, changes in board composition both preceding Altman’s departure and upon his reinstatement, the subsequent inquiry into Altman’s removal, and the improvements in corporate governance that ensued. Additionally, it explores Elon Musk’s engagement with OpenAI, including his legal action against the company and its leadership, highlighting the inherent conflict between mission-driven objectives and financial interests.

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96. Belle Lin, *Open-Source Companies Are Sharing Their AI Free. Can They Crack OpenAI’s Dominance?*, WALL ST. J. (Mar. 21, 2024, 2:10 PM), <https://www.wsj.com/articles/open-source-companies-are-sharing-their-ai-free-can-they-crack-openais-dominance-26149e9c> [https://perma.cc/D5FL-X5RQ] (“OpenAI accounted for nearly 80% of the global generative AI market in 2023.”). In response to the consolidation of the market for AI models “around Microsoft, OpenAI and a handful of other proprietary systems and players, some companies are aiming to compete by offering their AI models free.” *Id.*

## 1. OpenAI's Origins

OpenAI's initial nonprofit structure, designed to prioritize AI safety, proved unsustainable as the organization grew, leading to multiple structural changes and organizational conflicts. In December 2015, Elon Musk, Sam Altman, Peter Thiel, Reid Hoffman, and Jessica Livingston announced the formation of OpenAI, "a nonprofit research venture aimed at developing digital intelligence in the way that is most likely to benefit humanity."<sup>97</sup> This group of investors intended to invest \$1 billion into AI research through OpenAI over a period of time "with all of the results — including research, code, and patents — made public and royalty-free. By doing their work in the open, they hope to counteract the influence of governments and private companies trying to earn money and power from A.I.'s superhuman potential."<sup>98</sup> In deciding upon the nonprofit structure, Altman stated, "We . . . talked about every specific structure and thought this one had the most advantages. . . . [W]e're extremely flexible and unconstrained and entirely focused on the optimal path. It's not like we have a duty to shareholders. We're a true nonprofit and . . . can operate only on what we view is optimal."<sup>99</sup> Altman's early thoughts on the governance structure of OpenAI suggested, "[F]or a governance structure, we should start with 5 people and I'd propose you, [three names redacted] and me."<sup>100</sup> He noted that "[t]he technology would be owned by the foundation and used 'for the good of the world', and in cases where it's not obvious how that should be applied the 5 of us would decide."<sup>101</sup> There were no shareholders to consider, and the benefit was intended to be for all of humankind. However, it was highly unlikely that the founders had the requisite expertise to determine what was optimal for the rest of humanity.<sup>102</sup> As the company evolved, the goal to keep AI safety at the forefront while developing the technology became increasingly difficult.

Altman characterized the concerns over AI safety in two separate areas. "One is the things that are possible today: A.I. systems that are able to guide missiles, or hack into computers or bank accounts."<sup>103</sup> The

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97. Emily Jane Fox, *Sam Altman on His Plan to Keep A.I. Out of the Hands of the "Bad Guys,"* VANITY FAIR (Dec. 15, 2015), <https://www.vanityfair.com/news/2015/12/sam-altman-elon-musk-openai> [<https://perma.cc/MXE3-FJ7F>] (internal quotation omitted).

98. *Id.*

99. *Id.*

100. Manish Singh, *Elon Musk Sues OpenAI and Sam Altman over 'Betrayal' of Nonprofit AI Mission*, TECHCRUNCH, (Mar. 1, 2024, 2:30 AM PST), <https://techcrunch.com/2024/03/01/elon-musk-openai-sam-altman-court/> [<https://perma.cc/FMG9-YMFZ>] (citing to email exchange between Musk and Altman submitted as evidence in Musk's lawsuit).

101. *Id.*

102. *Id.*

103. Fox, *supra* note 97.

other is “the longer-term, science fiction stuff — this sentient evil entity. That is so far away that it’s so hard to talk about right now.”<sup>104</sup> Only Altman and Musk were on the board of OpenAI at its formation. Altman characterized his working relationship with Musk as “good”<sup>105</sup> with Altman noting that he “really trust[s] him.”<sup>106</sup> Altman admitted that he had “very little” experience with nonprofits, so he was “just not sure how it’s going to go.”<sup>107</sup> Altman and Musk’s busy schedules and limited nonprofit governance experience, combined with the concentration of decision-making power over AI safety to a select few, should have raised concerns about OpenAI’s unconventional governance structure from the start.

In 2018, Musk, who had already invested \$50 million into OpenAI, quit the board and effectively ended his financial backing.<sup>108</sup> At the same time, “OpenAI’s leaders grew increasingly aware that developing and maintaining advanced artificial intelligence models required an immense amount of computing power, which was incredibly expensive.”<sup>109</sup> As a result, OpenAI changed its governance structure. In October 2024, when it received its latest and highest round of funding to date in the form of convertible debt — \$6.6 billion at a \$157 billion post-money valuation — it was contingent upon OpenAI changing its governance structure yet again.<sup>110</sup>

## 2. OpenAI’s Funders

OpenAI’s heavy reliance on Big Tech funding has raised significant AI safety concerns, as it potentially compromises the organization’s ability to prioritize ethical safeguards over corporate interests. One prominent example is Microsoft’s multibillion-dollar investment in OpenAI, which highlighted tensions between the need for robust AI safety measures and the commercial pressures to accelerate the development and deployment of cutting-edge AI models. This dynamic is exemplified by Microsoft’s unique \$13.75 billion investment structure, which began with \$1 billion in 2019 and expanded in subsequent

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104. *Id.*

105. *Id.* Altman also acknowledged how he and Musk needed “a way to spend more time on it than we currently have free.” *Id.*

106. *Id.*

107. *Id.* In terms of how he expected the company to evolve in the future, Altman opined, “I don’t think we want a thousand-person organization, ever. . . . I think a smaller group that has the most powerful people in the world that’s aligned and focused is the way to go here. It will certainly get much bigger than it is now.” *Id.*

108. Allyn, *supra* note 26; see also Section III.A.5.iv *infra* (discussing OpenAI’s relationship with Musk).

109. Allyn, *supra* note 26.

110. *New Funding to Scale the Benefits of AI*, OPENAI (Oct. 2, 2024), <https://openai.com/index/scale-the-benefits-of-ai/> [https://perma.cc/SJR2-DSTW].

years.<sup>111</sup> Rather than following standard investment practices, Microsoft's funding takes an unconventional form, with significant portions allocated as cloud computing purchases rather than direct cash investments.<sup>112</sup> This financial dependence has ignited concerns that profit-driven motives could overshadow ethical safeguards which may compromise the long-term safety of AI technologies.

The unusual nature of this arrangement extends to governance and ownership. Despite being OpenAI's largest investor, Microsoft notably lacks a board seat — a departure from standard practice for lead investors.<sup>113</sup> The company even relinquished its board observer role in July 2024 amid growing antitrust scrutiny.<sup>114</sup> Instead of traditional equity ownership, Microsoft stands to receive up to half of OpenAI's financial returns until a certain portion of its investment is repaid, while also maintaining exclusive licensing rights to GPT-3.<sup>115</sup>

This intricate financial relationship with Microsoft, along with investments from other major players including a16z, ARK Investment Management, Altimeter Capital, Fidelity, Flat Capital, Founders Fund, Khosla Ventures, MGX, Nvidia, Tiger Global Management, Sequoia Capital, Softbank, Thrive Capital, and Y Combinator, among others, underscores the potential conflict between OpenAI's original safety-

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111. See Todd Bishop, *Microsoft's Financial Disclosures Show How OpenAI is Fueling Growth — and Taking a Toll on Profits*, GEEKWIRE (Oct. 30, 2024, 6:11 PM), <https://www.geekwire.com/2024/microsofts-financial-disclosures-show-how-openai-is-fueling-growth-and-taking-a-toll-on-profits/> [https://perma.cc/3BUB-68U6]; *Microsoft Invests in and Partners with OpenAI to Support Us Building Beneficial AGI*, OPENAI (July 22, 2019), <https://openai.com/index/microsoft-invests-in-and-partners-with-openai/> [https://perma.cc/5AG7-2X3S].

112. Reed Albergotti, *OpenAI Has Received Just a Fraction of Microsoft's \$10 Billion Investment*, SEMAFOR (Nov. 18, 2023, 12:28 PM), <https://www.semafor.com/article/11/18/2023/openai-has-received-just-a-fraction-of-microsofts-10-billion-investment> [https://perma.cc/7GCE-NRG9] (“It's unclear if OpenAI, which has been racking up expenses as it goes on a hiring spree and pours resources into technological developments, violated its contract with Microsoft by suddenly ousting Altman.”).

113. See Section III.A.4 *infra*.

114. See Mauro Orru & Christian Moess Laursen, *Microsoft Quits OpenAI's Board Amid Antitrust Scrutiny*, WALL ST. J. (July 10, 2024, 2:14 PM), <https://www.wsj.com/tech/ai/microsoft-withdraws-from-openais-board-amid-antitrust-scrutiny-aab6ff1e> [https://perma.cc/3LWA-ESWS].

115. Dina Bass & Leah Nylen, *Microsoft's Answer to OpenAI Inquiry: It Doesn't Own a Stake*, BLOOMBERG (Dec. 8, 2023, 4:16 PM), <https://www.bloomberg.com/news/articles/2023-12-08/microsoft-s-answer-to-openai-inquiry-it-doesn-t-own-a-stake> [https://perma.cc/39LE-GYZV]; Kevin Scott, *Microsoft Teams Up with OpenAI to Exclusively License GPT-3 Language Model*, OFFICIAL MICROSOFT BLOG (Sept. 22, 2020), <https://blogs.microsoft.com/blog/2020/09/22/microsoft-teams-up-with-openai-to-exclusively-license-gpt-3-language-model/> [https://perma.cc/4FBU-9YS3].

focused mission and commercial imperatives.<sup>116</sup> As one industry observer noted, “The new path to the tech kingdom is through artificial intelligence, and for Microsoft, OpenAI holds the key.”<sup>117</sup> This perspective highlights how OpenAI’s deep financial ties to major technology corporations could prioritize competitive advancement over safety considerations in the AI race.

### 3. The OpenAI Startup Fund

OpenAI wields its influence and asserts its dominance over the AI startup ecosystem not solely via its technological advancements but also through its corporate venture capital arm,<sup>118</sup> the OpenAI Startup Fund, established in 2021 to invest in nascent AI enterprises at the early stages.<sup>119</sup> Despite functioning as a corporate venture capital arm, the OpenAI Startup Fund “raises capital from external limited partners, including Microsoft (a close OpenAI partner, investor, and exclusive licensee of GPT-3).”<sup>120</sup> Typically, corporate venture capital arms of companies receive funding from the companies themselves.<sup>121</sup> The fund’s unusual structure — receiving capital from external partners like Microsoft rather than OpenAI itself — creates a complex web of competing interests and presents several concerning conflicts of interest that could compromise AI safety oversight. Most troubling was Sam Altman’s dual role as both OpenAI’s CEO and the fund’s controller until

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116. *Funding and Investors of OpenAI*, TRACXN, [https://tracxn.com/d/companies/openai/\\_kElhSG7uVGfK1i7lCo9-nwFtmtMVT7f-YHMn4TFBg/funding-and-investors](https://tracxn.com/d/companies/openai/_kElhSG7uVGfK1i7lCo9-nwFtmtMVT7f-YHMn4TFBg/funding-and-investors) [<https://perma.cc/R49D-F3JP>]. In the funding that closed in October 2024, returning investors included Khosla Ventures, Thrive Capital, and Microsoft. Nvidia participated for the first time. Altimeter Capital, Fidelity, MGX (Abu Dhabi’s state-run investment firm), and Softbank also participated. See Krystal Hu, *OpenAI Closes \$6.6 Billion Funding Haul with Investment from Microsoft and Nvidia*, REUTERS (Oct. 3, 2024, 1:17 AM EDT), <https://www.reuters.com/technology/artificial-intelligence/openai-closes-66-billion-funding-haul-valuation-157-billion-with-investment-2024-10-02/> [<https://perma.cc/8R9Q-AJEJ>].

117. Alexandra Garfinkle, *Microsoft’s Near-Term Fate is in OpenAI’s Hands — for Better or Worse*, YAHOO FINANCE (Dec. 20, 2023), <https://finance.yahoo.com/news/microsofts-near-term-fate-is-in-openais-hands--for-better-or-worse-205250812.html> [<https://perma.cc/Q4UA-EWM7>]. Another journalist noted, “[S]uccess in Silicon Valley almost always requires massive scale and the concentration of power — something that allowed OpenAI’s biggest funder, Microsoft, to become one of the most valuable companies in the world. It is hard to imagine Microsoft would invest \$13 billion into a company believing it would not one day have an unmovable foothold in the sector.” Allyn, *supra* note 26.

118. Corporate venture capital seeks strategic investments from venture investments, in addition to financial returns. Jennifer S. Fan, *Catching Disruption: Regulating Corporate Venture Capital*, 2018 COLUM. BUS. L. REV. 341, 343 (2018).

119. Marina Temkin, *OpenAI Startup Fund Raises Additional \$5M*, TECHCRUNCH (May 13, 2024, 5:24 PM PDT), <https://techcrunch.com/2024/05/13/openai-startup-fund-raises-additional-5m> [<https://perma.cc/EJH2-ST5M>] (“While the OpenAI Startup Fund functions as a corporate venture capital unit, it raises capital from external limited partners, including Microsoft (a close OpenAI partner and investor).”).

120. *Id.*

121. Fan, *supra* note 118, at 345–46.

2024, despite the fund being technically separate from OpenAI.<sup>122</sup> This arrangement allowed Altman to influence both AI development and its deployment across the startup ecosystem through the fund's significant financial power, which included \$175 million in commitments and \$325 million in gross net asset value by 2023, plus additional millions through special purpose vehicles.<sup>123</sup>

These overlapping interests and concentrated decision-making power raise serious safety concerns. As the fund invests in startups across sensitive sectors like healthcare (Ambiance Healthcare), legal services (Harvey), and robotics (FigureAI), there is a risk that commercial pressures from Microsoft and other external investors could influence investment decisions at the expense of safety considerations.<sup>124</sup> The fund's structure creates incentives to prioritize rapid AI deployment and market dominance over careful safety protocols, potentially accelerating AI development in critical sectors without adequate oversight or risk assessment.

#### 4. OpenAI Corporate Governance Structure

OpenAI's corporate governance structure differs from that of most startups as it is designed to prioritize ethical considerations and responsible AI development over maximizing profit for its investors — in other words, it is a mission-driven startup.<sup>125</sup> Unlike traditional venture-backed companies that primarily focus on financial returns, OpenAI operates under a capped-profit model, aiming to balance innovation

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122. Marina Temkin, *Sam Altman Gives up Control of OpenAI Startup Fund, Resolving Unusual Corporate Venture Structure*, TECHCRUNCH (Apr. 1, 2024, 1:34 PM PDT), <https://techcrunch.com/2024/04/01/sam-altman-gives-up-control-of-openai-startup-fund-resolving-unusual-corporate-venture-structure/> [<https://perma.cc/Q7E5-M6JM>] (“The arrangement could have presented a major issue to the company if he had not been reinstated as OpenAI's CEO following his brief ouster in November. The fund's initial GP structure was intended as a temporary arrangement, and Altman made no personal investment, nor did he have any financial interest.”); see also Kyle Wiggers, *OpenAI Startup Fund Quietly Raises \$15M*, TECHCRUNCH (Apr. 26, 2024, 8:21 AM PDT), <https://techcrunch.com/2024/04/26/openai-startup-fund-quietly-raises-15m/> [<https://perma.cc/D46G-W3UK>] (noting conflict of interest of having Altman as both OpenAI's CEO and as the person who had a “final say in the fund's investments”).

123. Temkin, *supra* note 119. In venture capitalism, special purpose vehicles, or SPVs, “are often used by venture capitalists to consolidate a pool of capital to invest in a startup. . . . SPVs typically make just one investment into a business, whereas an investment fund would make multiple investments over some time.” Adam Hayes, *What Is a Special Purpose Vehicle (SPV), and Why Do Companies Form Them?*, INVESTOPEDIA (June 25, 2024), <https://www.investopedia.com/terms/s/spv.asp> [<https://perma.cc/DRX2-3QQZ>].

124. Wiggers, *supra* note 122; Temkin, *supra* note 119 (noting at least sixteen startups in OpenAI Startup Fund's portfolio).

125. *OpenAI LP*, OPENAI (Mar. 11, 2019), <https://openai.com/blog/openai-lp> [<https://perma.cc/WRZ4-M3P4>]. OpenAI states, “Our mission is to ensure that artificial general intelligence (AGI) benefits all of humanity, primarily by attempting to build safe AGI and share the benefits with the world.” *Id.*

with safety concerns. This approach seeks to develop AI that aligns with societal values, rather than being driven solely by commercial incentives.<sup>126</sup> However, as OpenAI's latest round of funding showed, a nonprofit model no longer works for the type of capital the company needs to develop its technology.

As a result, under the OpenAI model (Figure 3 below), the board of directors governs OpenAI Inc., a nonprofit corporation. OpenAI Inc. owns OpenAI LP, a for-profit limited partnership, which is the majority owner of OpenAI LLC, a for-profit LLC. Microsoft is the minority owner in the LLC. Structuring OpenAI in a manner where the nonprofit had the final say was intended to ensure that charitable purposes and not profits were at the forefront.

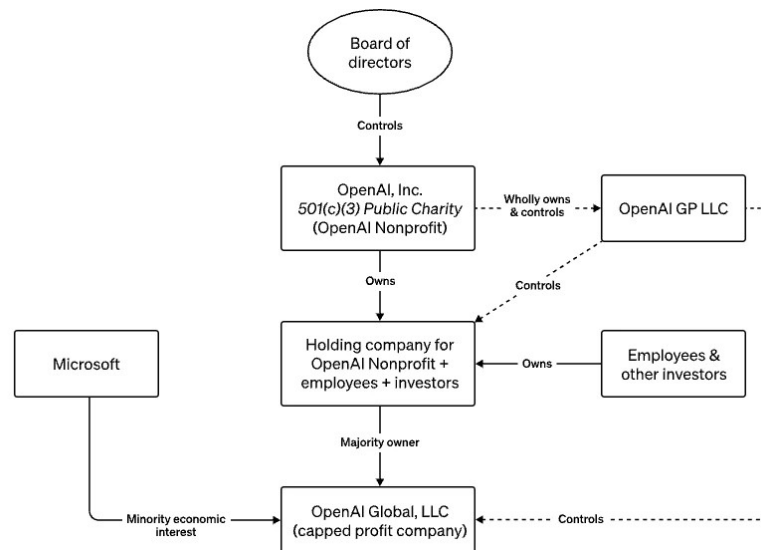


Figure 3: OpenAI's Corporate Governance Structure<sup>127</sup>

On its website, OpenAI acknowledges how it treats its investors differently from the vast majority of startups: "While investors

126. It explains, "We want to increase our ability to raise capital while still serving our mission, and no pre-existing legal structure we know of strikes the right balance. Our solution is to create OpenAI LP as a hybrid of a for-profit and nonprofit — which we are calling a 'capped-profit' company." *Id.* OpenAI describes capped returns as follows: "The fundamental idea of OpenAI LP is that investors and employees can get a capped return if we succeed at our mission, which allows us to raise investment capital and attract employees with startup-like equity. But any returns beyond that amount . . . are owned by the original OpenAI Nonprofit entity." *Id.* Note that this part of the governance structure was implemented in 2019. Allyn, *supra* note 26.

127. *Our Structure*, OPENAI, <https://openai.com/our-structure/> [<https://perma.cc/5J5E-LUJC>].



typically seek financial returns, we saw a path to aligning their motives with our mission.”<sup>128</sup> According to OpenAI, it “achieved this innovation with a few key economic and governance provisions[.]”<sup>129</sup> Specifically, OpenAI established five unique aspects of its corporate structure to align investor interests with its mission. First, the OpenAI Nonprofit maintains control through complete ownership of OpenAI GP LLC, which governs the for-profit subsidiary.<sup>130</sup> Second, the board of directors must prioritize the mission of safe AGI that benefits humanity over investor profits.<sup>131</sup> Third, OpenAI implemented majority independent board oversight from its inception, with independent directors and even CEO Sam Altman holding no direct equity stakes.<sup>132</sup> Fourth, the structure caps profit allocation to investors and employees, including Microsoft, with excess value returning to the Nonprofit. Fifth, the board determines when AGI is achieved — defined as “a highly autonomous system outperform[ing] humans at most economically valuable work — at which point Microsoft’s IP licenses and commercial terms would no longer apply.”<sup>133</sup> OpenAI designed this structure to be adaptable, acknowledging the uncertain path to AGI.<sup>134</sup> According to OpenAI, the governance is left “for the Nonprofit and the rest of humanity.”<sup>135</sup>

Within this framework, Microsoft’s role was deliberately constrained despite its significant investment. It held only a board observer position without voting or control rights, was subject to the profit cap, and had no claims to future AGI technologies.<sup>136</sup> While Microsoft collaborated with OpenAI on their joint safety board for system deployment reviews, recent developments related to antitrust scrutiny suggest this arrangement may be unsustainable — as evidenced by Microsoft

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (“[E]ach director must perform their fiduciary duties in furtherance of its mission — safe AGI that is broadly beneficial. While the for-profit subsidiary is permitted to make and distribute profit, it is subject to this mission. The Nonprofit’s principal beneficiary is humanity, not OpenAI investors.”).

132. *Id.* (“[T]he board remains majority independent. Independent directors do not hold equity in OpenAI. Even OpenAI’s CEO, Sam Altman, does not hold equity directly. His only interest is indirectly through a Y Combinator investment fund that made a small investment in OpenAI before he was full-time.”).

133. *Id.*

134. *Id.* (“We strive to preserve these core governance and economic components of our structure when exploring opportunities to accelerate our work. Indeed, given the path to AGI is uncertain, our structure is designed to be adaptable — we believe this is a feature, not a bug.”).

135. *Id.*

136. *Id.* (noting also that “AGI is explicitly carved out of all commercial and IP licensing agreements [with Microsoft]”).

relinquishing its board observer status.<sup>137</sup> This complex relationship between OpenAI's largest funder and its governance structure is detailed in Figure 4, which outline OpenAI's corporate structure, Microsoft's role and IP ownership, and the distribution of ownership among employees and other investors prior to the October 2024 funding round.

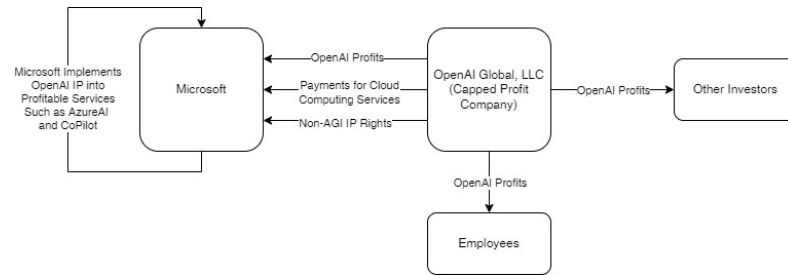


Figure 4: The Relationship Between Microsoft and OpenAI

137. *Id.*; Foo Yun Chee, *Microsoft Ditches OpenAI Board Observer Seat to Stave Off Antitrust Scrutiny*, REUTERS (July 10, 2024, 5:30 PM EDT), <https://www.reuters.com/technology/microsoft-ditches-openai-board-observer-seat-amid-regulatory-scrutiny-2024-07-10/> [<https://perma.cc/6RHX-A9BX>].

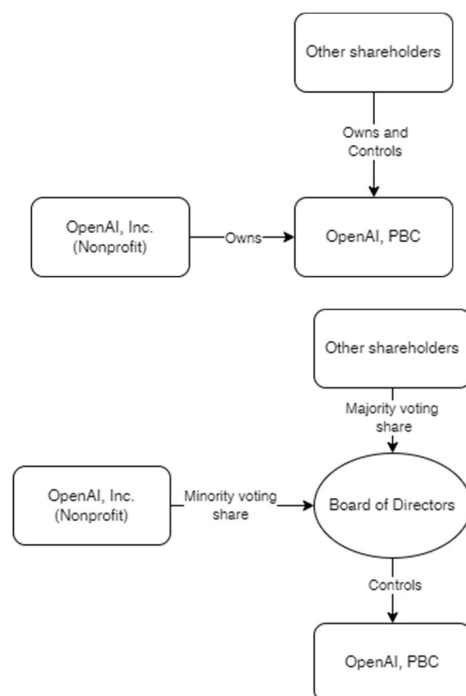


Figure 5: The Proposed New Structure of OpenAI

As part of its latest round of funding, OpenAI agreed to change its corporate governance structure, as illustrated in Figure 5. The funding was structured as convertible notes that would convert to equity upon successfully transitioning to a for-profit structure, removing both the nonprofit board's control and the cap on investor returns; Altman would also receive equity as part of the restructuring. The transition to a for-profit structure would need to occur within a two year timeframe, with the state attorney general's involvement in the process and the state court approving any change in purpose.<sup>138</sup> If the structural changes

138. OpenAI has also reportedly discussed changing its nonprofit to a public benefit corporation. Krystal Hu & Kenrick Cai, *Exclusive: OpenAI's Huge Valuation Hinges on Upending Corporate Structure*, REUTERS (Sept. 14, 2024, 9:20 AM EDT), <https://www.reuters.com/technology/artificial-intelligence/openais-stunning-150-billion-valuation-hinges-upending-corporate-structure-2024-09-14/> [https://perma.cc/YQ9D-Z6BE] (noting the necessity of nonprofit board's approval for transition); Aditya Soni, Arsheeya Bajwa & Krystal Hu, *OpenAI Outlines New For-Profit Structure in Bid to Stay Ahead in Costly AI Race*, REUTERS (Jan. 2, 2025, 3:17 PM EST), <https://www.reuters.com/technology/artificial-intelligence/openai-lays-out-plan-shift-new-for-profit-structure-2024-12-27/> [https://perma.cc/R9CH-WYGE] (noting the transition would occur over two years); Erin

are not implemented within that time, investors could claw back their investment or adjust the valuation.<sup>139</sup> In December 2024, OpenAI announced, “Our plan is to transform our existing for-profit into a Delaware Public Benefit Corporation (PBC) with ordinary shares of stock and the OpenAI mission as its public benefit interest.”<sup>140</sup> It went on to state, “The PBC is a structure used by many others that requires the company to balance shareholder interests, stakeholder interests, and a public benefit interest in its decisionmaking. It will enable us to raise the necessary capital with conventional terms like others in this space.”<sup>141</sup> The nonprofit would be “one of the best resourced non-profits in history. The non-profit’s significant interest in the existing for-profit would take the form of shares in the PBC at a fair valuation determined by independent financial advisors.”<sup>142</sup> OpenAI explained, “The PBC will run and control OpenAI’s operations and business, while the non-profit will hire a leadership team and staff to pursue charitable initiatives in sectors such as health care, education, and science.”<sup>143</sup> Under the Delaware General Corporation Law,

A ‘public benefit corporation’ is a for-profit corporation . . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.<sup>144</sup>

The statement of business or purpose must be identified in a corporation’s certificate of incorporation.<sup>145</sup> Public benefit is defined as “a

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Snodgrass, *OpenAI is Making Moves Toward Becoming a For-Profit Company*, BUS. INSIDER (Nov. 5, 2024, 4:18 PM ET), <https://www.businessinsider.com/openai-one-step-closer-to-becoming-profit-company-report-2024-11> [https://perma.cc/72SM-CWFP] (reporting that OpenAI needed the California State Attorney General’s approval to change to a nonprofit); Rose Chan Loui & Jill Horwitz, *OpenAI Conversion Sheds Nonprofit Purpose Without Justification*, BLOOMBERG L. (Feb. 13, 2025, 4:30 AM EST), <https://news.bloomberglaw.com/us-law-week/openai-conversion-sheds-nonprofit-purpose-without-justification> [https://perma.cc/WM62-6HSG] (noting that “[t]he law allows abandoning nonprofit purposes governing it’s [*sic*] assets only under extraordinary circumstances, which don’t exist here”).

139. Hu & Cai, *supra* note 138.

140. *Why OpenAI’s Structure Must Evolve to Advance Our Mission*, OPENAI (Dec. 27, 2024), <https://openai.com/index/why-our-structure-must-evolve-to-advance-our-mission/> [https://perma.cc/PVD2-C7AA].

141. *Id.*

142. *Id.*

143. *Id.*

144. DEL. CODE ANN. tit. 8, § 362(a) (2024).

145. *Id.* at § 362(a)(1).

positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.”<sup>146</sup> In other words, the benefit of humanity would not be the focus of any decision that the PBC would make but an aspect that would be taken into consideration; the statute does not specify that a certain weight needs to be given to the public benefit and leaves that balancing act to the discretion of the board of the PBC.

The PBC structure does not come without its challenges, however. Traditional agency law relies heavily on financial metrics and clear harm/benefit calculations to monitor agent behavior. However, the novel structure of OpenAI, Anthropic, and xAI introduce metrics that are inherently difficult to measure. How does one quantify progress toward “benefiting humanity” or “ensuring AI safety”? The information asymmetry between agents and principals becomes even more pronounced when dealing with cutting-edge AI technology whose risks and benefits are still poorly understood. Traditional enforcement mechanisms like shareholder litigation may be inadequate when harms are speculative (like potential future AI risks) rather than concrete financial losses. Moreover, who has standing to enforce the public benefit obligations — shareholders, specific stakeholders, or the general public?

## 5. OpenAI’s Board Composition

OpenAI’s governance model, with a nonprofit corporation at the helm, was designed with ambitious goals to ensure the ethical development of AI. However, the company’s board has faced significant challenges in realizing this vision. One major issue has been the frequent turnover in board composition, which has created instability and disrupted decision-making. Internal conflicts have also persisted. Additionally, the influence of effective altruism (“EA”) among certain board members, while aligning with OpenAI’s mission to maximize societal impact, introduced notable downsides. EA’s strong emphasis on longtermism, which prioritizes far-future concerns over immediate, tangible needs, sometimes led to decisions that ignored short-term challenges critical to OpenAI’s success. Moreover, EA’s ideological homogeneity, with its predominance among a small group of like-minded thinkers, limited diversity of perspective in decision-making.<sup>147</sup> Arguably, this

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146. *Id.* at § 362(b).

147. Fan & Nguyen, *supra* note 32, at 13–14 (“The believers of effective altruism are overwhelmingly young, white, and male. . . . The demographics affirm [a] troubling while male savior complex. . . . Additional controversies include effective altruism’s alleged misogyny, heightened focus on longtermism, and misuse of data.”).

may have led to an approach that was less attuned to practical, real-world issues and more focused on abstract ethical ideals. These challenges raised concerns about whether ideological values should take precedence over OpenAI's long-term success and sustainability, highlighting the tension between lofty ethical goals and the practical realities of managing a cutting-edge technology company. Appendix A chronicles the evolution of OpenAI's governing board over time, demonstrating the lack of independence and conflicts of interest of numerous board members.

The revolving door of OpenAI board members reveals several conflicts of interest. First, Adam D'Angelo, who remains on the board, is developing Poe, an AI chat platform that competes with OpenAI.<sup>148</sup> Second, Reid Hoffman had potential conflicts due to his investments and eventually left the board as a result.<sup>149</sup> Third, Holden Karnofsky, Helen Toner, and Tasha McCauley are all adherents of EA, which may have influenced their decision-making.<sup>150</sup> Toner and McCauley, both on the board during Altman's firing, served on the advisory board of the Center for the Governance of AI, described as a "highly ideological AI governance organization."<sup>151</sup> This affiliation raises concerns about their independence and whether ideological commitments influenced board decisions. EA's homogeneity, along with allegations of misogyny, excessive focus on longtermism, and data misuse, further complicates governance.<sup>152</sup> Additionally, Open Philanthropy — linked to both Karnofsky and McCauley — has major ties to Anthropic, a direct

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148. Deepa Seetharaman & Sarah Needleman, *He Fired Sam Altman. Now He Wants to Work with Him.*, WALL ST. J. (Dec. 1, 2023, 11:33 AM ET), <https://www.wsj.com/tech/ai/adam-dangelo-openai-board-19ab00ee> [https://perma.cc/BG3L-Q7NQ]. But see Ivan Mehta, *Quora CEO Adam D'Angelo Talks About AI, Chatbot Platform Poe and Why OpenAI is not a Competitor*, TECHCRUNCH (May 6, 2024, 3:00 AM PDT), <https://techcrunch.com/2024/05/06/adam-dangelo-quora-poe-open-ai/> [https://perma.cc/T5QZ-JYZF] (discussing D'Angelo's characterization of Poe as more of a collaborator rather than a competitor to ChatGPT).

149. Kif Leswing, *Reid Hoffman Steps Down from OpenAI Board to Avoid Potential Conflicts of Interests*, CNBC NEWS (Mar. 3, 2023, 2:20 PM EST), <https://www.cnbc.com/2023/03/03/reid-hoffman-steps-down-from-openai-board-to-avoid-potential-conflicts.html> [https://perma.cc/7XER-7675] (noting that Hoffman was a partner in Greylock, a VC firm and that the firm's portfolio companies may have already been using OpenAI's software).

150. See Appendix B.

151. Loeber, *infra* note 407.

152. Fan & Nguyen, *supra* note 32, at 13–14; Alex Kantrowitz, *Oh, Good, OpenAI's Biggest Rival Has a Weird Structure Too*, THE SLATE GRP. (Dec. 2, 2023, 10:00 AM), <https://slate.com/technology/2023/12/anthropic-openai-board-trust-effective-altruism.html> [https://perma.cc/7J4Q-SKTK] ("Many effective altruists ascribe to a philosophy called longtermism, which holds that the lives of people deep in the future are as valuable as lives today. So they tend to proceed with A.I. development with exceptional caution. . . . [I]ts critics contend that it's hard to predict the state of the world generations from now, leading long-termists to sometimes act rashly.").

OpenAI competitor.<sup>153</sup> These factors suggest that ideological and financial conflicts may have influenced key board decisions, potentially prioritizing personal beliefs over OpenAI's best interests.

*i. Board Composition Prior to Altman's Firing*

The pre-firing OpenAI board was structured to prioritize AI safety, but its effectiveness was undermined by governance weaknesses and internal ideological tensions, particularly those stemming from EA. The board was relatively small and included independent directors with backgrounds in AI ethics, which in theory positioned it to act as a counterbalance to commercial pressures. Its mission was to ensure OpenAI adhered to its founding commitment: developing artificial general intelligence ("AGI") that benefits humanity as a whole rather than being driven purely by profit incentives. However, this structure had significant flaws. The board lacked strong enforcement mechanisms to check the power of a dominant CEO like Sam Altman, and it did not have clear lines of accountability to external stakeholders. These weaknesses became evident when it attempted to remove Altman but ultimately failed to maintain its decision in the face of investor and employee pushback.

At the time immediately prior to Sam Altman's ouster from OpenAI, the startup's board members were Sam Altman,<sup>154</sup> Ilya

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153. Loeber, *infra* note 407; see also Wiggers, *infra* note 385 ("Besides the fact that Anthropic is in part Open Philanthropy-funded, which has a tinge of corporate conflict to it, it's not out of the question that McCauley and Toner are closely ideologically aligned and thus perhaps not as independently-minded on OpenAI's board as it might initially appear.").

154. Sam Altman studied computer science at Stanford but dropped out before completing his degree. He proceeded to found "Loopt, an app that allowed users to share their location with friends." Erik Gregersen, *Sam Altman*, BRITANNICA (June 13, 2024), <https://www.britannica.com/biography/Sam-Altman> [<https://perma.cc/MZ5M-2NSM>]. His company received funding from Y Combinator, a startup accelerator, and was acquired by Green Dot, a banking company. *Id.* He worked at the influential Y Combinator part-time as a partner in 2011 and founded the venture fund Hydrazine Capital in 2012. *Id.* At Y Combinator he attained the coveted president position in 2014; he then left the accelerator in 2019. *Id.* In 2015, Altman became co-chair of OpenAI and provided a part of its original funding. *Id.* Altman became CEO of OpenAI in 2019. Allyn, *supra* note 26.

Sutskever,<sup>155</sup> Adam D'Angelo,<sup>156</sup> Tasha McCauley,<sup>157</sup> and Helen Toner.<sup>158</sup> D'Angelo, McCauley and Toner were the independent directors.<sup>159</sup>

Altman's firing by the OpenAI board took the world by surprise.<sup>160</sup> Indeed, Altman himself was flummoxed by his termination. He wrote on X, "[T]oday was a weird experience in many ways. But one unexpected one is that it has been sorta like reading your own eulogy while you're still alive."<sup>161</sup> Later on, he described himself as "super confused" and "super caught off guard" by his firing.<sup>162</sup> Even Microsoft, OpenAI's most important partner, only found out about Altman's firing "just a minute before the news was shared with the world."<sup>163</sup>

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155. Ilya Sutskever was one of OpenAI's co-founders who served as its chief scientist. He previously worked at Google as a research scientist in natural language processing algorithms; he also worked on TensorFlow, Google's "open-source software library focused on machine learning and AI." Truong & Bote, *supra* note 5. Sutskever, one of the people who allegedly led the push to dismiss Altman, posted on X, "I deeply regret my participation in the board's actions. I never intended to harm OpenAI. I love everything we've built together and I will do everything I can to reunite the company." Ilya Sutskever (@ilyasut), X (FORMERLY KNOWN AS TWITTER) (Nov. 20, 2023, 5:15 AM), <https://x.com/ilyasut/status/1726590052392956028> [<https://perma.cc/6HWC-ATSR>].

156. Adam D'Angelo is the CEO of the question-and-answer site, Quora; prior to that he served as CTO of Facebook. Truong & Bote, *supra* note 5. He has counted Meta CEO, Mark Zuckerberg, as a friend since their time together at the Phillips Exeter Academy. *Id.* He joined the board in 2018. *Id.*

157. Tasha McCauley was the CEO of GeoSim, an Israeli city modeling startup, and is part of the advisory board of the Centre for Governance of AI; she joined the board in 2018. *Id.* She has ties to EA. Fan & Nguyen, *supra* note 32; *see also* Appendix B.

158. Helen Toner works at Georgetown's Center for Security and Emerging Technology as its director of strategy and foundational research grants. Truong & Bote, *supra* note 5. She joined the board in 2021 "with a stated focus on safety and long-term risks and effects of AI." *Id.* Like McCauley, she also serves on the advisory board of the Centre for the Governance of AI and has ties to EA. Fan & Nguyen, *supra* note 32; *see also* Appendix B.

159. Independent directors are not tie-breakers or swing votes. In fact, they play a secondary role to founders and investors who serve on the board of directors. Jennifer S. Fan, *The Landscape of Startup Corporate Governance in the Founder-Friendly Era*, 18 N.Y.U. J. BUS. L. 317, 321 (2022).

160. *See supra* note 1 and accompanying text.

161. Sam Altman (@sama), X (FORMERLY KNOWN AS TWITTER) (Nov. 17, 2023, 9:05 PM), <https://x.com/sama/status/1725742088317534446?lang=en> [<https://perma.cc/A8YE-P8KH>].

162. MacKenzie Sigalos & Ryan Browne, *OpenAI CEO Sam Altman Opens up About Being Fired by the Board: 'Super Caught Off Guard'*, CNBC (Jan. 16, 2024, 11:27 PM EST), <https://www.cnbc.com/2024/01/17/openai-ceo-sam-altman-speaks-out-on-being-fired-by-his-board.html> [<https://perma.cc/RMF2-VR4J>] (internal quotations omitted).

163. Ina Fried, *Microsoft Is a Key Investor in OpenAI. It Was Blindsided by Sam Altman's Exit.*, AXIOS (Nov. 18, 2023), <https://www.axios.com/2023/11/17/microsoft-openai-sam-altman-ouster> [<https://perma.cc/K6DK-AQAQ>].



*ii. Board Composition After Altman's Return*

Altman's firing and rapid rehiring significantly weakened OpenAI's AI safety oversight by demonstrating the limits of board authority under the company's governance structure. It was investor and employee backlash — driven by fears of corporate instability rather than safety priorities — that forced the board to reinstate him, effectively neutering its ability to act independently. This episode signaled that safety concerns could be overridden by business and financial pressures, making it harder to impose necessary safeguards in the future.

In response to the board tumult, Altman did not take a board seat upon his return.<sup>164</sup> Instead, a new board was appointed. It was comprised of Bret Taylor (Chair), Larry Summers, and Adam D'Angelo, who was the only person who had previously served on OpenAI's board.<sup>165</sup> Taylor was the former Salesforce co-CEO, and Summers, an economist, was the former U.S. Treasury Secretary and former president of Harvard.<sup>166</sup> All three directors were independent.<sup>167</sup> Notably, the reconfigured board did not have any women or people of color.<sup>168</sup> In response to this glaring omission, in December 2023, members of the Congressional Black Caucus sent a letter to Altman and the board of OpenAI, stating, "The board of OpenAI, a non-profit public institution created to ensure that AI benefits all of humanity, is now composed exclusively of white men."<sup>169</sup> The letter from the Congressional Black Caucus continued, "It is our hope that you will work [with] us and acknowledge by example the importance of the perspectives and experiences of women and people of color on the future of AI."<sup>170</sup> The Congressional Black Caucus requested that the company "move expeditiously in diversifying its board to be inclusive

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164. Cao, *supra* note 8.

165. OpenAI (@OpenAI), *supra* note 23.

166. Kyle Wiggers, *OpenAI Announces New Board Members, Reinstates CEO Sam Altman*, TECHCRUNCH (Mar. 8, 2024, 2:58 PM PST), <https://techcrunch.com/2024/03/08/openai-announces-new-board-members-reinstates-sam-altman/> [https://perma.cc/FFN3-MQNF]; Lawrence H. Summers, HARV. KENNEDY SCH., <https://www.hks.harvard.edu/faculty/lawrence-h-summers> [https://perma.cc/CS72-ZHNS].

167. Independence in this case is solely tied to the three directors not being employees of OpenAI. One could argue that D'Angelo has a conflict of interest given his ties to Poe. See *supra* note 153 and accompanying text.

168. Dominic-Madori Davis, *Black Representatives in Congress Voice Concerns over Impact of Tech Layoffs on Minority Workers*, TECHCRUNCH (Dec. 22, 2023, 6:48 AM PST), <https://techcrunch.com/2023/12/22/black-senators-voice-concerns-over-impact-of-tech-layoffs-on-minority-workers/> [https://perma.cc/5SGP-BFT3].

169. Dominic-Madori Davis, *OpenAI Responds to Congressional Black Caucus About Lack of Diversity on Its Board*, TECHCRUNCH (Jan. 25, 2024, 2:25 PM PST), <https://techcrunch.com/2024/01/25/openai-responds-to-congressional-black-caucus-about-lack-of-diversity-on-its-board/> [https://perma.cc/H2HP-PQ7D].

170. *Id.*

of subject matter expertise with perspective from the African American community.”<sup>171</sup> *TechCrunch* reported that OpenAI responded by noting that its work on board structure was still in progress and reaffirmed its commitment to addressing harmful AI biases.<sup>172</sup> The company also emphasized that the representation of women and people of color was crucial to the future of AI and expressed its willingness to collaborate with the Congressional Black Caucus in the future.<sup>173</sup> As part of its commitment to diversify the board, OpenAI used an outside search firm.<sup>174</sup> Then, in March 2024, Altman rejoined the board, and three new female board members — Sue Desmond-Hellman, Fidji Simo, and Nicole Seligman — were added.<sup>175</sup> Additionally, Dee Templeton was appointed by Microsoft as a board observer.<sup>176</sup> In June 2024, retired U.S. Army General Paul M. Nakasone, “a leading expert in cybersecurity, technology advancement, and global cyber defense, pivotal in the creation of U.S. Cyber Command, the longest-serving leader of USCYBERCOM” and the former leader of the National Security Agency, was appointed to OpenAI’s board and safety and security committee.<sup>177</sup> In August 2024, Zico Kolter, professor and director of the machine learning department at Carnegie Mellon University whose scholarship focuses on AI safety, was appointed to OpenAI’s board; he is the chair of the independent safety and security committee, which includes Adam D’Angelo, Paul Nakasone, and Nicole Seligman.<sup>178</sup>

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171. Cristiano Lima-Strong, *Black Lawmakers Call on OpenAI to Diversify Its New Board*, WASH. POST: TECH BRIEF (Dec. 14, 2023, 9:10 AM), <https://www.washingtonpost.com/politics/2023/12/14/black-lawmakers-call-openai-diversify-its-new-board/> [https://perma.cc/R5WL-VHR2].

172. Davis, *supra* note 168.

173. *Id.*

174. *Id.*

175. *OpenAI Announces New Members to Board of Directors*, OPENAI (Mar. 8, 2024), <https://openai.com/index/openai-announces-new-members-to-board-of-directors/> [https://perma.cc/G3VR-8EZZ]. The three new board members were: Dr. Sue Desmond-Hellman, former CEO of the Bill and Melinda Gates Foundation and “non-profit leader and physician” who serves on the boards of Pfizer and the President’s Council of Advisors on Science and Technology; Nicole Seligman, former EVP and General Counsel at Sony Corporation and “globally recognized corporate and civic leader and lawyer” who also serves on three other public company boards; and Fidji Simo, CEO and Chair of Instacart and “consumer technology industry veteran” who also serves on the board of Shopify. *Id.*

176. Wiggers, *supra* note 166.

177. *OpenAI Appoints Retired U.S. Army General Paul M. Nakasone to Board of Directors*, OPENAI (June 13, 2024), <https://openai.com/index/openai-appoints-retired-us-army-general/> [https://perma.cc/JAY5-LF3Q].

178. Hayden Field, *OpenAI Announces New Independent Board Oversight Committee Focused on Safety*, CNBC, (Sept. 16, 2024, 5:14 PM EDT), <https://www.cnbc.com/2024/09/16/openai-announces-new-independent-board-oversight-committee-for-safety.html> [https://perma.cc/H49V-NDZV]. Sam Altman and Bret Taylor were part of the committee in August 2024 when Zico Kolter first joined, which led to

*iii. Investigation of Altman's Ouster and Corporate Governance Enhancements*

After Altman was reinstated at OpenAI, a Special Committee of the board retained the law firm WilmerHale to investigate Altman's ouster.<sup>179</sup> The firm "found there was a breakdown in trust between the prior Board and Mr. Altman that precipitated the events of November 17."<sup>180</sup> Furthermore, "the prior Board's decision did not arise out of concerns regarding product safety or security, the pace of development, OpenAI's finances or its statement to investors, customers, or business partners."<sup>181</sup> In addition, "WilmerHale found that the prior Board acted within its broad discretion to terminate Mr. Altman, but also found that his conduct did not mandate removal."<sup>182</sup>

OpenAI also announced that it would enhance its governance structure after the investigation by:

- (1) Adopting a new set of corporate governance guidelines;
- (2) Strengthening OpenAI's Conflict of Interest Policy;
- (3) Creating a whistleblower hotline to serve as an anonymous reporting resource for all OpenAI employees and contractors; and

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questions about how independent and effective the board committee could be given the fact that insiders served on it. Kyle Wiggers, *OpenAI Adds a Carnegie Mellon Professor to Its Board of Directors*, TECHCRUNCH (Aug. 8, 2024, 12:00 PM PDT), <https://techcrunch.com/2024/08/08/openai-adds-a-carnegie-mellon-professor-to-its-board-of-directors/> [<https://perma.cc/DZ48-ZXGA>]. In addition to significant changes to the non-profit board composition, there were also departures at the executive level which coincided with Altman's return. Sutskever and his co-lead for OpenAI's superalignment team, Jan Leike, left their positions to join Anthropic. Kwan Wei Kevin Tan, *Sam Altman Says the OpenAI Board Members Who Ousted Him Left Him with a 'Complete Mess' and a House 'on Fire'*, BUS. INSIDER (Jan. 5, 2025, 9:03 PM ), <https://www.businessinsider.com/sam-altman-previous-openai-board-left-him-with-complete-mess-2025-1> [<https://perma.cc/E7GU-24BB>]. In August 2024, John Schulman, a co-founder who led OpenAI's alignment science efforts, left the company to join Anthropic. *Id.* Then, in September 2024, Mira Murati, OpenAI's chief technology officer, announced her departure. *Id.*

179. *Review Completed & Altman, Brockman to Continue to Lead OpenAI*, OPENAI (Mar. 8, 2024), <https://openai.com/index/review-completed-altman-brockman-to-continue-to-lead-openai/> [<https://perma.cc/B5B2-J4XE>] ("The firm conducted dozens of interviews with members of OpenAI's prior Board, OpenAI executives, advisors to the prior Board, and other pertinent witnesses; reviewed more than 30,000 documents; and evaluated various corporate actions."). Ultimately, "[b]ased on the record developed by WilmerHale and following the recommendation of the Special Committee, the Board expressed its full confidence in Mr. Sam Altman and Mr. Greg Brockman's ongoing leadership of OpenAI." *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

- (4) Creating additional Board committees, including a Mission & Strategy committee focused on implementation and advancement of the core mission of OpenAI.<sup>183</sup>

Although the investigation by WilmerHale did not find that Altman's conduct rose to a level necessitating his termination, his once golden reputation was tarnished. As one headline noted, however, "Sam Altman may be in his villain era, but no one seems to care."<sup>184</sup>

*iv. Elon Musk's Role in OpenAI*

OpenAI's governance and AI safety challenges are exemplified by its complex relationship with Elon Musk. As a co-founder and early financier, Musk played a key role in shaping OpenAI's mission to develop AGI for the benefit of humanity.<sup>185</sup> However, conflicts over control and commercialization soon emerged. When OpenAI considered transitioning into a for-profit structure to secure necessary resources, Musk sought to integrate it into Tesla, believing that OpenAI needed substantial financial backing to compete with Google's DeepMind.<sup>186</sup> In early 2018, Musk proposed that OpenAI should "attach to Tesla as its cash cow," arguing that Tesla was the only viable competitor to Google.<sup>187</sup> When OpenAI's leadership rejected this, Musk left the organization, citing its low probability of success and announcing plans to develop AGI independently within Tesla.<sup>188</sup>

Musk's departure marked a turning point for OpenAI's governance, as his influence had previously served as a counterweight to commercial pressures. Despite donating over \$44 million to OpenAI's nonprofit entity between 2016 and 2020, he later became a vocal critic of its direction, particularly after it deepened its partnership with Microsoft.<sup>189</sup> In a lawsuit filed against OpenAI and Sam Altman, Musk alleged that the company had abandoned its founding commitment to open-source AI development and transformed into "a closed-source *de facto* subsidiary" of Microsoft.<sup>190</sup> The lawsuit argued

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183. *Id.*

184. Madeline Berg, *Sam Altman May Be in his Villain Era, but No One Seems to Care*, BUS. INSIDER (Sept. 14, 2024, 5:52 AM), <https://www.yahoo.com/tech/sam-altman-may-villain-era-095202705.html> [<https://perma.cc/VB3J-K8EU>] (noting that many in the tech realm were still eager to do business with him).

185. Luigi Zingales, *Why Musk Is Right About OpenAI*, PROMARKET (Mar. 5, 2024), <https://www.promarket.org/2024/03/05/why-musk-is-right-about-openai/> [<https://perma.cc/U7G2-AZ8W>].

186. *OpenAI and Elon Musk*, OPENAI (Mar. 5, 2024), <https://openai.com/index/openai-elon-musk> [<https://perma.cc/CLL6-5LKL>].

187. *Id.*

188. *Id.*

189. Singh, *supra* note 100.

190. Complaint at \*8–9, *Musk v. Altman*, 2024 WL 899024 (Cal. Super. Ct. Feb. 29, 2024).

that OpenAI's pursuit of profit directly contradicted its original safety-focused mission, highlighting concerns that commercial incentives were beginning to override long-term AI safety considerations.<sup>191</sup> Musk further criticized Altman's handpicked board, which he claimed lacked expertise in AI governance and ethics and had removed individuals who had been selected for their focus on safety.<sup>192</sup>

Although Musk withdrew his lawsuit in May 2024 without explanation, his evolving stance on OpenAI underscores broader tensions between AI safety and commercial competition.<sup>193</sup> After leaving OpenAI, Musk launched xAI, an AI startup designed to rival OpenAI and Google DeepMind.<sup>194</sup> While he has frequently warned about the existential risks of AI, his pursuit of a competing AGI company raises concerns about conflicts of interest, particularly if his motivations are driven more by competitive positioning than by enforcing rigorous safety standards. Musk's shifting role — from OpenAI co-founder to adversary and competitor — illustrates the governance instability that has plagued OpenAI and highlights the challenge of balancing AI safety with the pressures of technological and corporate rivalry.

### *B. Anthropic*

Dissatisfied with OpenAI's trajectory, several employees departed to establish Anthropic.<sup>195</sup> Akin to OpenAI, Anthropic is a mission-driven enterprise, and its unique corporate governance structure is designed to prioritize its mission in the decision-making process.<sup>196</sup> Intentionally, Anthropic adopted a corporate governance structure distinct from OpenAI's, having observed aspects of OpenAI's structure that they deemed unsatisfactory.<sup>197</sup> It is similar to OpenAI, however, in

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191. *Id.* at \*7.

192. *Id.* at \*24.

193. Jacob Knutson, *Elon Musk Withdraws Lawsuit Against OpenAI and CEO Sam Altman*, AXIOS (June 11, 2024), <https://www.axios.com/2024/06/11/elon-musk-lawsuit-openai-sam-altman> [<https://perma.cc/753U-J5BB>].

194. *See infra* Section III.C. In a separate statement, Musk expressed concerns that the AI products developed by OpenAI and Google exhibit coding biases, which could potentially lead to civilization's downfall. Musk posted on X, "Now imagine if this is programmed, explicitly or implicitly, into super powerful AI — it could end civilization. Now, no need to imagine. It is already programmed into Google Gemini and OpenAI ChatGPT." Elon Musk (@elonmusk), X (FORMERLY KNOWN AS TWITTER) (Apr. 17, 2024), <https://x.com/elonmusk/status/1780659559138496938> [<https://perma.cc/V7GV-JNBC>].

195. Kantrowitz, *supra* note 152.

196. *Id.*

197. *See* Alnoor Ebrahim, *How OpenAI's Nonprofit-Corporate Structure Fueled the Tumult Around CEO Sam Altman's Short-Lived Ouster*, THE CHRON. OF PHILANTHROPY (Nov. 30, 2023), <https://www.philanthropy.com/article/how-openais-nonprofit-corporate-structure-fueled-the-tumult-around-ceo-sam-altmans-short-lived-ouster> [<https://perma.cc/42G3-R4NB>].

that there is a tandem structure. However, as this Section demonstrates, Anthropic's structure comes with its own advantages and challenges. Notably, similar to OpenAI, Anthropic also depended on funding from major technology companies to support the development of its AI technologies.

### 1. Anthropic's Origins

Anthropic, "an AI safety and research company,"<sup>198</sup> was founded by ex-OpenAI employees in late 2020.<sup>199</sup> Led by siblings Dario Amodei, the current CEO, and Daniela Amodei, the current President, it was created "to build AI products that people can rely on and generate research about the opportunities and risks of AI."<sup>200</sup> Dario Amodei describes Anthropic's mission as "AI research and products that put safety at the frontier. The systems [Anthropic is] building are being designed to provide reliable AI services that can positively impact businesses and consumers now and in the future."<sup>201</sup> Anthropic found success almost immediately because of its technical prowess in AI. "[T]he group raised \$7 billion, expanded to around 300 employees, and built Claude, an A.I. chatbot and underlying large language model. Anthropic now works with 70 percent of the largest banks and insurance companies in the U.S. and has high-profile clients including LexisNexis, Slack, and Pfizer."<sup>202</sup> Claude is already on its third release.<sup>203</sup>

### 2. Anthropic's Funders

Similar to OpenAI, Anthropic attracted a multitude of funders. It raised a total of \$4.51 billion between May 2021 and March 2024.<sup>204</sup>

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198. *Anthropic Raises \$124 Million to Build More Reliable, General AI Systems*, ANTHROPIC (May 28, 2021), <https://www.anthropic.com/news/anthropic-raises-124-million-to-build-more-reliable-general-ai-systems> [https://perma.cc/W45U-RDS8].

199. Kantrowitz, *supra* note 152.

200. ANTHROPIC, *supra* note 198 (noting the Amodeis' respective roles in Anthropic); *Anthropic Raises \$450 Million in Series C Funding to Scale Reliable AI Products*, ANTHROPIC (May 23, 2023), <https://www.anthropic.com/news/anthropic-series-c> [https://perma.cc/YD74-67RY].

201. ANTHROPIC, *supra* note 198.

202. Kantrowitz, *supra* note 152.

203. Tharin Pillay, *Anthropic Touts New AI Model as 'Most Intelligent Yet,'* TIME (June 20, 2024, 3:04 PM EDT), <https://time.com/6990358/anthropic-ai-model-claude-3-5-sonnet/> [https://perma.cc/S5H9-3YWA].

204. *Funding and Investors of Anthropic*, TRACXN, <https://tracxn.com/d/companies/anthropic/SzoxXDMin-NK5tKB7ks8yHr6S9Mz68pjVCzFEcGFZ08/funding-and-investors> [https://perma.cc/J39H-E325]; see also Mike Wheatley, *Generative AI Startup Anthropic Raises Another \$300M, Bringing Its Value to \$4.1B*, SILICONANGLE (Mar. 8, 2023, 7:23 PM EST), <https://siliconangle.com/2023/03/08/generative-ai-startup-anthropic-raises-another->

On May 28, 2021, Anthropic announced that it had raised \$124 million in a Series A Preferred Stock financing round.<sup>205</sup> Jaan Tallinn, technology investor and co-founder of Skype, led the round, and James McClave, Dustin Moskowitz, the Center for Emerging Risk Research (“CERR”), and Eric Schmidt, among others, participated as well.<sup>206</sup> On April 29, 2022, Anthropic announced that it had raised \$580 million in a Series B Preferred Stock financing round which included the now-disgraced, former CEO of FTX, Sam Bankman-Fried, as the lead investor, along with Caroline Ellison, Nishad Singh, and many of the prior round investors, including Jaan Tallinn, Jim McClave, and the CERR.<sup>207</sup> Then, in May 2023, Anthropic raised \$450 million in its Series C Preferred Stock financing; Spark Capital was the lead investor, and Google, Salesforce Ventures, Sound Ventures, and other investors also participated in this round of funding.<sup>208</sup> Subsequent closings in the Series C round followed.<sup>209</sup> The funding was intended to support the company’s “continued work developing helpful, harmless, and honest AI systems — including Claude, an AI assistant that can perform a wide variety of conversational and text processing tasks.”<sup>210</sup> Then, in September 2023, Amazon announced that it would invest \$1.25 billion in Anthropic with the option to increase its total investment to \$4 billion.<sup>211</sup> Anthropic agreed to use Amazon Web Services (“AWS”) as a primary cloud provider and AWS Trainium and Inferentia chips to develop its future foundation models as part of the investment agreement.<sup>212</sup> In October 2023, Google committed to “a \$2 billion investment into Anthropic, adding to its \$550 million earlier [in 2023].”<sup>213</sup> Recently, in March 2025, Anthropic announced that it had

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300m-bringing-value-4-1b/ [https://perma.cc/Y8KM-4NM6] (“The sky-high valuation of Anthropic, which generates minimal revenue, reflects the incredible fervor that has been generated by the emergence of so-called generative AI, fueled by the rise of ChatGPT [in 2022]. Generative AI refers to AI algorithms that can generate text, images and other media when prompted to do so by users.”).

205. ANTHROPIC, *supra* note 198.

206. *Id.*

207. *Anthropic Raises Series B to Build Steerable, Interpretable, Robust AI Systems*, ANTHROPIC (Apr. 29, 2022), <https://www.anthropic.com/news/anthropic-raises-series-b-to-build-safe-reliable-ai> [https://perma.cc/9AN6-SB2B].

208. ANTHROPIC, *supra* note 198.

209. TRACXN, *supra* note 204.

210. ANTHROPIC, *supra* note 198.

211. Manish Singh, *Amazon to Invest up to \$4 Billion*, TECHCRUNCH (Sept. 25, 2023, 12:10 AM PDT), <https://techcrunch.com/2023/09/25/amazon-to-invest-up-to-4-billion-in-ai-startup-anthropic> [https://perma.cc/5QK4-Z2QL] (“In Amazon, Anthropic has found a deep-pocketed strategic investor that can also provide it with compute power to build future AI models and then find and help sell the offerings to scores of cloud customers.”).

212. *Id.*

213. *Google Invests in Anthropic for \$2 Billion as AI Race Heats Up*, FORBES (Oct. 31, 2023, 12:40 PM EDT), <https://www.forbes.com/sites/qai/2023/10/31/google-invests-in-anthropic-for-2-billion-as-ai-race-heats-up/> [https://perma.cc/B9Q5-ALW8].

raised \$3.5 billion in a Series E financing round at a \$61.5 billion post-money valuation.<sup>214</sup>

One characterization of the increased frenzy around AI startup investments is that “Big Tech increasingly put[] its eggs into . . . two AI baskets,” OpenAI and Anthropic.<sup>215</sup> The significance of Big Tech’s investment in AI lies in the concentration of funding among a select group of companies which will inevitably shape the future of AI and influence innovation, market structures, regulatory landscapes and ethical considerations. Google stated that “it had made a \$500 million upfront investment in Anthropic and would stump up the remaining \$1.5 billion over time.”<sup>216</sup> Notably, in October 2023, Anthropic had raised nearly \$7 billion between Amazon and Google alone.<sup>217</sup> In January 2024, Anthropic raised \$5 million in a Series D Preferred Stock financing; it was led by MIS, with Qualcomm and Intuit also participating.<sup>218</sup> Later, in March 2024, Amazon exercised its option to invest an additional \$2.75 billion in Anthropic, bringing its total investments to \$4 billion for a minority ownership position in the company.<sup>219</sup> Then, in November 2024, it doubled its investment in Anthropic by committing another \$4 billion that would come in the form of phased, convertible notes; the first one would be at \$1.3 billion.<sup>220</sup> Despite doubling its investment, Amazon still remains a minority stockholder in the company.<sup>221</sup> When Anthropic concluded its latest round of funding in March 2025, the \$3.5 billion round (which

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214. *Anthropic Raises Series E at \$61.5B Post-Money Valuation*, ANTHROPIC (Mar. 3, 2025), <https://www.anthropic.com/news/anthropic-raises-series-e-at-usd61-5b-post-money-valuation> [<https://perma.cc/ZL4M-LKR4>] (reporting that Lightspeed Venture Partners led the round with participation from new and existing investors).

215. FORBES, *supra* note 213.

216. *Id.* (noting also that Anthropic “signed a \$3 billion contract with Google Cloud, though neither party has confirmed it yet”).

217. *Id.*

218. TRACXN, *supra* note 204.

219. Amazon Staff, *Amazon and Anthropic Deepen Their Shared Commitment to Advancing Generative AI*, AMAZON (Mar. 27, 2024), <https://www.aboutamazon.com/news/company-news/amazon-anthropic-ai-investment> [<https://perma.cc/4AK5-M95F>].

220. Arsheeya Bajwa & Krystal Hu, *Amazon Doubles Down on AI Startup Anthropic with Another \$4 Bln*, REUTERS (Nov. 22, 2024, 4:20 PM EST), <https://www.reuters.com/technology/artificial-intelligence/anthropic-receives-4-billion-investment-amazon-makes-aws-official-cloud-provider-2024-11-22/> [<https://perma.cc/WC6S-D26B>] (noting that “Anthropic plans to train and deploy its foundational models on Amazon’s Trainium and Inferentia chips” and that “[the partnership] also allows Amazon to promote its AI services such as leveraging its AI chips for training and inferencing, which Anthropic is using” (internal quotations omitted)).

221. *Id.*



was led by Lightspeed Venture Partners) also included the corporate venture capital arm of another Big Tech company, Salesforce.<sup>222</sup>

### 3. The Anthropic Startup Fund

Like OpenAI, Anthropic also has its own startup fund. In July 2024, together with \$100 million from Menlo Ventures, it launched the Anthology Fund “to accelerate the development of groundbreaking AI applications.”<sup>223</sup> The Anthology Fund is intended to invest in startups that use Anthropic technology with a particular interest in the intersection of AI and education, energy, healthcare, infrastructure, legal services, and scientific research.<sup>224</sup> In addition, the Anthology Fund-backed startups “will gain access to Anthropic products and research, \$25,000 in free credits towards [Anthropic’s] most advanced models, and best in-class venture support from Menlo, among other benefits and resources.”<sup>225</sup> The first cohort of startups was funded in December 2024 when Menlo Ventures announced that eighteen companies had been selected across a variety of sectors.<sup>226</sup> The fund’s structure incentivizes portfolio companies to favor Anthropic’s technology over potentially better alternatives. Companies may feel pressured to use Anthropic’s products even if other AI solutions would be more suitable. As an example, if a portfolio company finds a competitor’s AI model works better for their use case, they might hesitate to switch due to the Anthology Fund relationship. Furthermore, investment decisions could be biased toward companies willing to commit to Anthropic’s technology rather than those with the strongest business fundamentals. In addition, the \$25,000 in credits further influences choices, potentially leading to ecosystem lock-in where startups become dependent on the technology provider. Ultimately, the primary conflict stems from the fund’s dual role as investor and

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222. Hayden Field, *Amazon-Backed AI Firm Anthropic Valued at \$61.5 Billion After Latest Round*, CNBC (Mar. 3, 2025, 12:06 PM EST), <https://www.cnbc.com/2025/03/03/amazon-backed-ai-firm-anthropic-valued-at-61point5-billion-after-latest-round.html> [https://perma.cc/S7GY-ZBUH] (noting that Salesforce Ventures was among the investors).

223. *Anthropic Partners with Menlo Ventures to Launch Anthology Fund*, ANTHROPIC (July 17, 2024), <https://www.anthropic.com/news/anthropic-partners-with-menlo-ventures-to-launch-anthology-fund> [https://perma.cc/LQD8-H2YS]. The Anthology Fund was inspired by the iFund, which was a partnership in 2008 between Apple and Kleiner Perkins, a venture capital firm. Kate Rooney, *Anthropic Launches \$100 Million AI Fund with Menlo Ventures, Ramping Up Competition With OpenAI*, CNBC (July 17, 2024, 8:00 AM EDT), <https://www.cnbc.com/2024/07/17/anthropic-menlo-ventures-launch-100-million-anthology-fund-for-ai.html> [https://perma.cc/YX9A-MM8H].

224. *Id.*

225. *Id.*

226. Matt Murphy, Tim Tully & Deedy Das, *Unveiling the First Cohort of Anthology Fund-Backed AI Startups*, MENLO VENTURES (Dec. 18, 2024), <https://menlovc.com/perspective/unveiling-the-first-cohort-of-anthology-fund-backed-ai-startups/> [https://perma.cc/S2PM-WWLT].

technology provider and may drive decisions based on maintaining relationships rather than selecting the best AI solutions.

#### 4. Anthropic Corporate Governance Structure

Anthropic has an unconventional governance structure for a startup — before OpenAI’s proposed transition to a PBC, it differed from OpenAI in significant aspects. It is a PBC incorporated in Delaware.<sup>227</sup> Under the Delaware General Corporation Law, at least every two years PBCs must provide their stockholders “with a statement as to the corporation’s promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation’s conduct.”<sup>228</sup> Specifically,

The statement shall include: (1) The objectives the board of directors has established to promote such public benefit or public benefits and interests; (2) The standards the board of directors has adopted to measure the corporation’s progress in promoting such public benefit or public benefits and interests; (3) Objective factual information based on those standards regarding the corporation’s success in meeting the objectives for promoting such public benefit or public benefits and interests; and (4) An assessment of the corporation’s success in meeting the objectives and promoting such public benefit or public benefits and interests.<sup>229</sup>

Furthermore, a PBC’s certificate of incorporation or bylaws can mandate that (1) the biennial reports be provided more frequently than every other year; (2) the reports be made public; and (3) a third-party standard and/or third-party certification related to the PBC’s “promotion of the public benefit or public benefits identified in the certificate of incorporation and/or the best interests of those materially affected by the corporation’s conduct” be used.<sup>230</sup>

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227. *The Long-Term Benefit Trust*, ANTHROPIC (Sept. 19, 2023), <https://www.anthropic.com/news/the-long-term-benefit-trust> [https://perma.cc/S2GW-ESP3].

228. DEL. CODE ANN. tit. 8, § 366 (2024).

229. DEL. CODE ANN. tit. 8, § 366(b) (2024).

230. DEL. CODE ANN. tit. 8, § 366(c) (2024).

Anthropic has also created a long-term benefit trust (“LTBT”) that will eventually appoint the majority of its board of directors.<sup>231</sup> Specifically, the LTBT “is an independent body of five financially disinterested members with an authority to select and remove a portion of [Anthropic’s] Board that will grow over time,” ultimately controlling a majority of the board.<sup>232</sup> Similar to OpenAI’s original structure which had the nonprofit as the decision making body, this novel corporate governance structure is rooted in mission-based objectives. Anthropic’s perspective “is that the capacity of corporate governance to produce socially beneficial outcomes depends strongly on non-market externalities.”<sup>233</sup> Anthropic believes that “AI may create unprecedented[] large externalities, ranging from national security risks, to large-scale economic disruption, to fundamental threats to humanity, to enormous benefits to human safety and health.”<sup>234</sup> Furthermore, it contends that most of its daily decisions are “not at odds with commercial success or stockholder returns,” noting that Anthropic does “not expect the LTBT to intervene in these day-to-day decisions or in [its] ordinary commercial strategy.”<sup>235</sup> Instead, the rationale for the type of governance structure Anthropic developed was to address long-term issues, specifically, “the potential for extreme events and the need to handle them with humanity’s interests in mind.”<sup>236</sup> Specifically, the LTBT was intended to incentivize leadership “to carefully evaluate future models for catastrophic risks or ensure they have nation-state level security, rather than prioritizing being the first to market above all other objectives.”<sup>237</sup>

The LTBT structure carries significant risks, particularly regarding trustee turnover, which could undermine governance stability. High

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231. ANTHROPIC, *supra* note 227 (“The Trust is organized as a ‘purpose trust’ under the common law of Delaware, with a purpose that is the same as that of Anthropic. The Trust must use its powers to ensure that Anthropic responsibly balances the financial interests of stockholders with the interests of those affected by Anthropic’s conduct and our public benefit purpose.”). An earlier version of the Trust, called the “Long-Term Benefit Committee,” was included in Anthropic’s Series A document in 2021, but it was not scheduled to appoint its first board member until 2023. Therefore, in the intervening period, Anthropic revised the structure to “red-team and improve the legal structure and to carefully consider candidate selection” which led to the LTBT structure described. *See id.*

232. *Id.* (“Paired with our Public Benefit Corporation status, the LTBT helps to align [Anthropic’s] corporate governance with [its] mission of developing and maintaining advanced AI for the long-term benefit of humanity.”).

233. *Id.*

234. *Id.* (explaining that “[t]he technology is advancing so rapidly that the laws and social norms that constrain other high-externality corporate activities have yet to catch up” and that Anthropic has “invest[ed] in fine-tuning [its] governance to meet the challenge ahead”).

235. *Id.* (noting that the LTBT lacks authority to dismiss Anthropic’s leadership team); *see also* Kantrowitz, *supra* note 152 (“The trust has no direct authority over the CEO, but it can influence the company’s direction, setting up another novel governance structure in an industry now painfully aware of them.”).

236. ANTHROPIC, *supra* note 227.

237. *Id.*

turnover may lead to inconsistent interpretations of long-term benefits, institutional memory loss, and even short-termism in a system intended to protect long-term interests. The PBC board might also become less responsive to trustee preferences, adopting a “wait-and-see” approach to initiatives they oppose, which could weaken oversight of long-term projects. Ultimately, frequent trustee changes could render the governance model formally complex but functionally ineffective.

Another major concern is the trustee-board relationship in Anthropic’s governance structure. Trustees primarily exert influence through their ability to remove and replace board members, yet they cannot directly override specific decisions. This dynamic creates a “shadow governance” effect, where boards may anticipate trustee preferences and adjust their actions accordingly, fostering informal communication channels beyond formal reporting. While trustees must justify removals under trust law, this requirement could create friction between the board’s business judgment protections and the trustees’ legal obligations.<sup>238</sup> Additionally, trustees need monitoring mechanisms to assess board performance against long-term metrics, but this raises complex challenges regarding information access and corporate confidentiality.

Finally, the LTBT structure is vulnerable to conflicts similar to those OpenAI experienced with Altman. As one journalist noted, “Board members will have responsibilities to shareholders, but they won’t easily forget those who nominated them and why they did it. They’ll have to find a way to balance the two.”<sup>239</sup> This tension highlights the broader challenge of ensuring that governance structures effectively balance long-term priorities with the practical realities of corporate power dynamics.

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238. Under Delaware trust law, trustees are bound by fiduciary duties, including the duty of loyalty and the duty of care, which require them to act in the best interests of the beneficiaries. When trustees make decisions, such as the removal of a co-trustee, they must adhere to these fiduciary standards. The Delaware Court of Chancery has the authority to remove a trustee if it determines that such action serves the best interests of the beneficiaries, even in the absence of a breach of trust. *See* DEL. CODE ANN. tit. 12, § 3327 (2024). In contrast, corporate directors are generally protected by the business judgment rule, which presumes that in making business decisions, directors act on an informed basis, in good faith, and in the honest belief that the action taken is in the best interests of the company. This rule shields directors from liability for decisions that result in corporate losses or damages, provided they meet these criteria. *See The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, DELAWARE.GOV, <https://corplaw.delaware.gov/delaware-way-business-judgment/> [<https://perma.cc/U8LZ-YN3R>]. The potential tension arises because trustees, unlike corporate directors, do not enjoy the same breadth of protection under the business judgment rule. Their decisions, including those related to the removal of co-trustees, are subject to stricter scrutiny to ensure compliance with fiduciary duties. Therefore, trustees must carefully justify their removal decisions to demonstrate adherence to trust law standards, balancing their fiduciary obligations against any business considerations.

239. Kantrowitz, *supra* note 152.

Anthropic itself acknowledges the experimental nature of its governance structure and states, “We’re not yet ready to hold this out as an example to emulate; we are empiricists and want to see how it works.”<sup>240</sup> Additionally, a board seat was created to be elected by Series C and subsequent investors.<sup>241</sup> Therefore, while Anthropic will be overseen by its board, by structuring the governance in this way, Anthropic believes that “a majority of the board will ultimately have accountability to the Trust as well as to stockholders, and will . . . have incentives to . . . balance the public benefit with stockholder interests.”<sup>242</sup> Furthermore, “the board will benefit from the insights of Trustees with deep expertise and experience in areas key to Anthropic’s public benefit mission.”<sup>243</sup> Together, Anthropic believes “the insights and incentives supplied by the Trust will result in better decision making when the stakes are highest.”<sup>244</sup> Figure 6 below illustrates the governance structure.

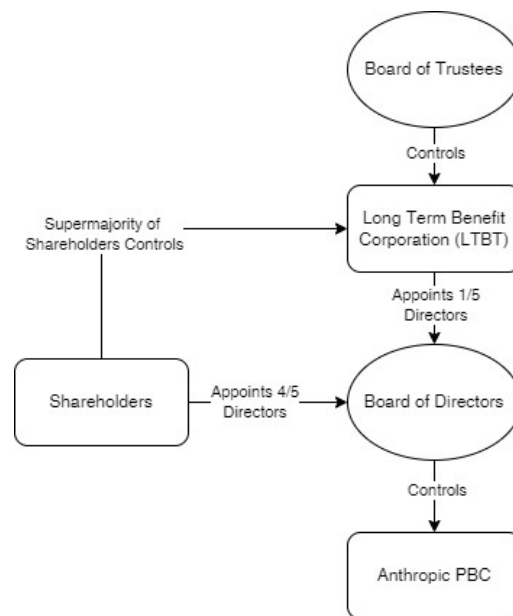


Figure 6: Corporate Governance Structure of Anthropic

Furthermore, Anthropic “designed a process for amendment that carefully balances durability with flexibility. [It] envision[s] that most

240. ANTHROPIC, *supra* note 227.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

adjustments will be made by agreement of the Trustees and Anthropic’s Board, or the Trustees and the other stockholders.”<sup>245</sup> Anthropic also included “failsafe provisions that allow changes to the Trust and its powers without the consent of the Trustees if sufficiently large supermajorities of the stockholders agree.”<sup>246</sup> It also “required supermajorities increase as the Trust’s power phases in, on the theory that [Anthropic will] have more experience — and less need for iteration — as time goes on, and the stakes will become higher.”<sup>247</sup>

### 5. Anthropic’s Board Composition

As of May 29, 2024, Anthropic’s board of directors included Dario Amodei, co-founder and CEO of Anthropic, Daniela Amodei, co-founder and President of Anthropic, Jay Kreps, co-founder and CEO of Confluent, and Yasmin Razavi of Spark Capital. Kreps was appointed to Anthropic’s board by the LTBT.<sup>248</sup> Luke Muehlhauser served on the board previously but stepped down as a board member “to focus on his work at Open Philanthropy.”<sup>249</sup> Notably, Daniela Amodei is married to Holden Karnofsky, who is also affiliated with Open Philanthropy, an EA organization, and who previously served on OpenAI’s board.<sup>250</sup>

As noted earlier, trustees of the LTBT select the members of Anthropic’s board.<sup>251</sup> The trust’s structure was designed with assistance from Professor John Morley of Yale Law School, attorneys at Wilson Sonsini, and Professors Noah Feldman and Seth Berman of Harvard Law School and Ethical Compass Advisors.<sup>252</sup> On its website, Anthropic lists the following individuals as the initial trustees: Kanika Bahl, CEO and President of Evidence Action, Paul Christiano, Founder of the Alignment Research Center, Jason Matheny, CEO of the RAND Corporation, Neil Buddy Shah, CEO of the Clinton Health Access Initiative (Chair), and Zach Robinson, Interim CEO of Effective Ventures US.<sup>253</sup> Trustees are appointed to one-year terms, and future Trustees will be determined by a vote of the Trustees.<sup>254</sup>

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245. *Id.*

246. *Id.*

247. *Id.* (internal quotations omitted).

248. *Jay Kreps Appointed to Anthropic’s Board of Directors*, ANTHROPIC (May 29, 2024), <https://www.anthropic.com/news/jay-kreps-appointed-to-board-of-directors> [https://perma.cc/TWW2-29YL].

249. *Id.*

250. See *supra* note 200 and accompanying text.

251. Kantrowitz, *supra* note 152.

252. ANTHROPIC, *supra* note 227.

253. *Id.*

254. *Id.*

Like the OpenAI board pre-ouster, there are several Anthropic LTBT trustees who have ties to EA.<sup>255</sup> Paul Christiano writes extensively on EA forums and Zach Robinson is the head of a firm that has direct ties to the EA movement.<sup>256</sup> Similar to the adherents of EA affiliated with OpenAI, the trustees may make decisions based on the tenets of EA rather than what is in the best interests of the company and its stockholders.

### C. xAI

Similar to its predecessors in the AI startup realm, OpenAI and Anthropic, xAI introduces a distinctive corporate framework. The impetus behind xAI's inception was Musk's prioritization of AI safety.<sup>257</sup> In contrast to OpenAI and Anthropic, xAI diverges by having only one director — Elon Musk. This Section delves deeper into the interconnectedness among these three AI startup giants and the resulting tensions as they shape foundational AI technology. Furthermore, it elucidates the concerning conflicts of interest Musk has with his other ventures.

#### 1. xAI's Origins and Board Composition

After a public spat with OpenAI about its ties to Microsoft (which eventually culminated in a lawsuit), Musk left OpenAI to found a competing startup, xAI.<sup>258</sup> Musk staunchly believes that Big Tech companies focus on profitability ahead of AI safety; it is for this reason that he wanted to create a different option.<sup>259</sup> As a result, in March 2023, xAI was born; it was incorporated in Nevada.<sup>260</sup> Musk is the sole director, and Jared Brichall, his personal money manager, is the secretary of xAI.<sup>261</sup> Musk recruited researchers from DeepMind, Google, Microsoft, OpenAI, Tesla, and the University of Toronto.<sup>262</sup>

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255. Fan & Nguyen, *supra* note 32; *see also* Appendix B.

256. Kantrowitz, *supra* note 152.

257. Sissi Cao, *Elon Musk Announces xAI: Who's On the 12-Man Founding Team?*, OBSERVER (July 12, 2023, 4:19 PM), <https://observer.com/2023/07/elon-musk-launches-xai/> [<https://perma.cc/SF7G-6SDJ>].

258. *See supra* Section III.A.

259. Cao, *supra* note 257. *But see* Geogrey Hinton, Yoshua Bengio, Demis Hassabis, Sam Altman, Dario Amodei, Dawn Song et. al, *Statement on AI Risk*, CTR. FOR AI SAFETY, <https://www.safe.ai/work/statement-on-ai-risk> [<https://perma.cc/2KPD-KJHV>] (letter signed by many notable figures in the AI community noting that “[m]itigating the risk of extinction from AI should be a global priority alongside other societal-scale risks such as pandemics and nuclear war;” Sam Altman and Dario Amodei were among the signatories of the letter, but Musk was not).

260. Cao, *supra* note 257.

261. *Id.*

262. *Id.*

Dan Hendrycks, who is a machine learning researcher and director at the Center for AI Safety, a nonprofit advocating for proper regulation of AI, advises the team.<sup>263</sup>

On its website, xAI is described as “a company working on building artificial intelligence to accelerate human scientific discovery. [It is] guided by [its] mission to advance our collective understanding of the universe.”<sup>264</sup> Although it was less than a year old, xAI began releasing models at a rapid clip. On November 3, 2023, xAI released the Grok-1 model, a chatbot which sought to compete against ChatGPT.<sup>265</sup> Then, a Grok-1.5 model with long context capability<sup>266</sup> and Grok 1.5V with image understanding<sup>267</sup> were released on March 28, 2024 and April 12, 2024, respectively. Amidst the various developments, X users subscribed to the X Premium+ tier could begin using Grok, the advanced language model, through the X website and mobile applications.<sup>268</sup> In March 2024, Musk also announced that xAI intends to open-source its chatbot Grok.<sup>269</sup> Notably, Grok has not garnered as much interest as either ChatGPT or Claude.<sup>270</sup> Furthermore, “Grok’s news summary feature on X is reported to hallucinate and generate misleading information.”<sup>271</sup>

Much like OpenAI and Anthropic, which have connections to the EA movement, xAI also maintains ties to EA through its affiliation with the Center for AI Safety. Musk has criticized OpenAI’s trajectory, claiming that the company has strayed from its original mission. He has characterized OpenAI as “closed source, and . . . obviously for-profit,

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263. *Id.*

264. *About xAI*, xAI, <https://x.ai/about> [<https://perma.cc/SF5B-WK48>].

265. *Id.*

266. *Announcing Grok-1.5*, xAI: BLOG (Mar. 28, 2024), <https://x.ai/blog/grok-1.5> [<https://perma.cc/945H-9S8H>] (“Grok-1.5 comes with improved reasoning capabilities and a context length of 128,000 tokens.”).

267. On its blog, xAI stated, “Introducing Grok-1.5V, our first-generation multimodal model. In addition to its strong text capabilities, Grok can now process a wide variety of visual information, including documents, diagrams, charts, screenshots, and photographs.” *Grok-1.5 Vision Preview*, xAI: BLOG (Apr. 12, 2024), <https://x.ai/blog/grok-1.5v> [<https://perma.cc/6LPQ-DP6E>]; *Series B Funding Round*, xAI: BLOG (May 26, 2024), <https://x.ai/blog/series-b> [<https://perma.cc/CRB8-QF4C>].

268. xAI, *supra* note 264.

269. Lin, *supra* note 96.

270. *Id.*; see also Eric H. Schwartz, *ChatGPT Might Finally Face Some Real Competition From Grok*, TECHRADAR (Nov. 29, 2024), <https://www.techradar.com/computing/artificial-intelligence/chatgpt-might-finally-face-some-real-competition-from-grok> [<https://perma.cc/NPC4-G9YK>] (noting its lack of interest may stem from Grok’s limited availability and perhaps due to its relationship with X).

271. Ivan Mehta, *Elon Musk’s xAI Raises \$6B From Valor, a16z and Sequoia*, TECHCRUNCH (May 26, 2024, 11:57 PM PDT), <https://techcrunch.com/2024/05/26/elon-musk-xai-raises-6b-from-valor-a16z-and-sequoia/> [<https://perma.cc/4Y6J-36UG>].



and closely allied with Microsoft.”<sup>272</sup> Furthermore, Musk has expressed concerns that AI models were being trained to be “politically correct” and that he wanted to create a “Truth GPT” which would be a “maximum truth-seeking AI.”<sup>273</sup>

## 2. xAI’s Funders

Many of xAI’s funders have connections to Musk’s other companies or have invested in other AI startups. Notably, details regarding xAI’s initial funding were scarce and challenging to obtain.<sup>274</sup> On May 26, 2024, xAI announced that it had completed a \$6 billion Series B Preferred Stock funding round with a pre-money valuation of \$18 billion.<sup>275</sup> Andreessen Horowitz, Sequoia Capital, Fidelity Management & Research Co., Prince Alwaleed Bin Talal and Kingdom Holding Co., Valor Equity Partners, and Vy Capital were among their investors.<sup>276</sup> Numerous investors who helped Musk take X private also have overlapping investments with some of the leading players in the large language model (“LLM”) space.<sup>277</sup> In November 2024, xAI raised an additional \$5 billion at a post-money valuation of \$50 billion from new and prior investors: Andreessen Horowitz, Qatar Investment Authority, Sequoia Capital, and Valor Equity Partners.<sup>278</sup> As of February 2025, Musk was in discussions to raise an additional \$10 billion at a \$75 billion valuation.<sup>279</sup>

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272. Tucker Carlson Tonight, *Elon Musk: I Want a ‘Maximum Truth-Seeking AI,’* FOX NEWS, at 2:38 (Apr. 17, 2023), <https://www.foxnews.com/video/6325292572112> [<https://perma.cc/84PW-L4RC>]; see also Elon Musk (@elonmusk), X (FORMERLY KNOWN AS TWITTER) (Mar. 15, 2023, 9:49 AM), <https://x.com/elonmusk/status/1636047019893481474?s=20> [<https://perma.cc/XY3P-BENW>] (“I’m still confused as to how a non-profit to which I donated ~\$100M somehow became a \$30B market cap for-profit. If this is legal, why doesn’t everyone do it?”).

273. Tucker Carlson Tonight, *supra* note 272 at 3:48.

274. A Google search on June 8, 2024, did not yield any results on funding earlier than the Series B Preferred Stock financing.

275. Mehta, *supra* note 271. xAI has a post-money valuation of \$24 billion as of the close of its Series B funding round. See Chris Metinko, *xAI Makes It Official — Raises \$6B at \$24B Valuation*, CRUNCHBASE (May 28, 2024), <https://news.crunchbase.com/ai/xai-raises-series-b-unicorn-musk/> [<https://perma.cc/4KV7-B2YB>] (noting that OpenAI has an \$86 billion valuation and Anthropic is valued at \$18 billion).

276. Mehta, *supra* note 271.

277. Chris Metinko, *Eye On AI: xAI’s Backers Have a Lot of Other Bets Besides Musk’s LLM*, CRUNCHBASE (May 30, 2024), <https://news.crunchbase.com/ai/musk-xai-investors-scale-openai/> [<https://perma.cc/A5JE-PPGH>].

278. Chris Metinko, *The 10 Biggest Rounds of November: xAI and Anthropic Raise Billions*, CRUNCHBASE (Dec. 5, 2024), <https://news.crunchbase.com/venture/biggest-rounds-november-2024-xai-anthropic/> [<https://perma.cc/52MX-LB73>].

279. Chris Metinko, *xAI Makes It Official — Raises \$6B at \$24B Valuation* (May 28, 2024), <https://news.crunchbase.com/ai/xai-raises-series-b-unicorn-musk/> [<https://perma.cc/D72G-R7YX>].

## 3. xAI's Corporate Governance Structure

Like OpenAI and Anthropic, xAI has a novel corporate governance structure. xAI is a for-profit benefit corporation incorporated in Nevada in March 2023.<sup>280</sup> Similar to Anthropic, which operates as a PBC while still being for-profit, xAI follows a comparable model. However, unlike Anthropic, none of xAI's board of directors are selected by a trust; instead, Elon Musk serves as the sole director. Furthermore, Musk chose to incorporate xAI in Nevada instead of Delaware where the majority of VC funded companies are incorporated.<sup>281</sup>

According to the Nevada Secretary of State, "Benefit corporations are for-profit entities that consider the society and environment in addition to fiduciary goals in their decision-making process, differing from traditional corporations in their purpose, accountability, and transparency."<sup>282</sup> Specifically, "[t]he purpose of a benefit corporation is to create general public benefit, which is defined in AB 89 as 'a material positive impact on society and the environment . . . as assessed against a third-party standard that satisfies certain requirements.'"<sup>283</sup> These benefits are identified in a corporation's articles of incorporation and may include "the following examples:

- (1) Providing low-income or underserved individuals or communities with beneficial products or services,
- (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business,
- (3) Preserving the environment, [and]
- (4) Improving human health and promoting the arts, sciences or the advancement of knowledge."<sup>284</sup>

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280. Reuters, *Elon Musk Launches AI Firm xAI As He Looks to Take on OpenAI*, REUTERS (July 13, 2023, 2:39 PM EDT), <https://www.reuters.com/technology/elon-musks-ai-firm-xai-launches-website-2023-07-12/> [<https://perma.cc/VPJ3-RBNL>].

281. Kellen Luey & Clifford A. DeGroot, *Why Do So Many Startups Form Their Corporations in Delaware?*, DAVIS WRIGHT TREMAINE LLP, <https://www.dwt.com/blogs/startup-law-blog/2020/07/why-do-so-many-startups-form-corporations-delaware> [<https://perma.cc/8B6J-3SBJ>]. Musk's disdain for Delaware is well known as he has threatened to reincorporate Tesla in Texas after an unfavorable ruling from the Delaware Court of Chancery. Mike Leonard, *Move to Change Delaware Law After Musk Attacks Called Knee-Jerk*, BLOOMBERG L. (May 15, 2024, 5:00 AM EDT), <https://news.bloomberglaw.com/esg/move-to-change-delaware-law-after-musk-attacks-called-knee-jerk> [<https://perma.cc/9MGR-DQ7K>].

282. Press Release, Nev. Sec'y of State, Secretary of State's Office Now Accepts Filings for Benefit Corporations: Newest Nevada Entity Type Consider Social and Environmental Impacts Along with Fiscal Objectives (Jan. 3, 2014), <https://www.nvsos.gov/sos/Home/Components/News/News/1419/23?ar%20ch=1&npage=8> [<https://perma.cc/CLZ6-7WCW>].

283. *Id.*

284. *Id.*

Akin to the stakeholder theory of governance, “A benefit corporation requires directors and officers to consider the impacts of any action or proposed action upon certain constituencies, including, without limitation, shareholders, employees, suppliers, subsidiaries, customers who are beneficiaries of the general or specific public benefit purposes of the benefit corporation and the environment.”<sup>285</sup> Figure 7 depicts xAI’s corporate governance structure which is unlike the tandem corporate structures of OpenAI and Anthropic. It still differs from most startups, however, because it is a PBC instead of a for-profit corporation.

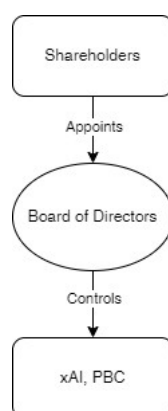


Figure 7: Corporate Governance Structure of xAI

#### 4. Musk’s Conflicts of Interest

Apart from his position at xAI, Elon Musk holds the CEO roles at Tesla, an electric vehicle company, and SpaceX, an aerospace company. He is also the founder of Neuralink, which specializes in brain-computer interfaces, and The Boring Company, which focuses on tunneling ventures. Additionally, he owns X (formerly Twitter).<sup>286</sup> He also has a role as a “special government employee” at the Department of Government Efficiency (“DOGE”) which has raised significant conflict of interest concerns with xAI and Musk’s other companies,

<sup>285.</sup> *Id.*

<sup>286.</sup> Lora Kolodny, *Elon Musk Ordered Nvidia to Ship Thousands of AI chips Reserved for Tesla to X and xAI*, CNBC (June 4, 2024, 9:00 AM), <https://www.cnbc.com/2024/06/04/elon-musk-told-nvidia-to-ship-ai-chips-reserved-for-tesla-to-x-xai.html> [<https://perma.cc/J4PT-XCQL>] (describing Musk’s ventures and noting that he acquired Twitter in late 2022 for \$44 billion).

prompting multiple calls for investigations.<sup>287</sup> Most notably, his access to sensitive government data may give Musk an opportunity to use the data to train Grok, the artificial intelligence system developed through xAI.<sup>288</sup> The conflicts of interest have also spilled into personnel and other business matters. As mentioned earlier, Musk has drawn employees from Tesla to xAI.<sup>289</sup> He has even diverted shipments of thousands of Nvidia's AI chips from Tesla to X and xAI.<sup>290</sup> xAI's website explicitly outlines the partnership between xAI and X.<sup>291</sup> While it might have been more favorable for xAI to explore collaborating with a different company, it is plausible that no alternative options were presented. This situation could even be characterized as a taking of a corporate opportunity by Musk, given his ownership of X, which benefitted from partnership with xAI. Given Musk's oversight of multiple demanding ventures that require attention, resources, and substantial capital, his actions should have raised questions. However, as the sole director of a private entity like xAI, Musk may perceive latitude to act as he sees fit despite the significant conflicts of interest at play. Adding complexity to these conflicts is the interconnected network of funders that support not only xAI, but numerous other AI startups as well.<sup>292</sup> Most recently, xAI acquired X in an all-stock deal

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287. Julia Shapero, *Schiff Presses White House on Musk Conflicts of Interest, Ethics*, THE HILL (Feb. 10, 2025, 11:12 AM ET), <https://thehill.com/business/5136025-elon-musk-conflict-interest/> [<https://perma.cc/K8ZY-QWBH>] (noting Senator Schiff's concerns with Musk's conflicts of interest and his role at DOGE); Christopher Bing, Avi Asher-Sohapiro & Annie Waldman, *Who's Running the DOGE Wrecking Machine: the World's Richest Man or a Little-Known Bureaucrat?*, PROPUBLICA (Mar. 14, 2025, 1:30 PM), <https://www.propublica.org/article/doge-leadership-elon-musk-amy-gleason-trump-ethics-conflict-of-interest> [<https://perma.cc/WT8U-5FGZ>] (investigating Musk's role at DOGE and potential conflicts of interest arising from Musk's companies competing for federal contracts); Peter Stone, *Elon Musk's Conflicts of Interest 'Should Scare Every American', Experts Say*, THE GUARDIAN (Feb. 27, 2025, 7:00 AM EST), <https://www.theguardian.com/us-news/2025/feb/27/elon-musk-conflicts-of-interest> [<https://perma.cc/78ME-5WAW>] (citing examples of "potential financial gains for Musk's businesses as he leads Doge").

288. Allison Stanger, *Efficiency — or Empire? How Elon Musk's Hostile Takeover Could End Government As We Know It*, HARV. ASH CTR. FOR DEMOCRATIC GOVERNANCE AND INNOVATION (Feb. 7, 2025), <https://ash.harvard.edu/articles/efficiency-%E2%88%92-or-empire-how-elon-musk-hostile-takeover-could-end-government-as-we-know-it/> [<https://perma.cc/7SXX-C6R2>] ("[F]unneling the data into Grok . . . which is already connected with the Musk-owned X . . . would create an unparalleled capability for predicting economic shifts, identifying government vulnerabilities and modeling voter behavior.").

289. See *supra* Section III.C.1.

290. Kolodny, *supra* note 286 ("Correspondence from Nvidia staffers also indicates that Musk diverted a sizable shipment of AI processors that had been reserved for Tesla to his social media company X, formerly known as Twitter.").

291. xAI, *supra* note 264 ("We partner closely with X Corp to bring our technology to more than 500 million users of the X app.").

292. See *supra* Figure 2.

in March 2025.<sup>293</sup> The proposed acquisition highlights a structural tension and conflicts of interest between the operational dynamics of X, a social media platform, and the institutional requirements of advanced AI research required by xAI. As an example, even if it was possible under X's terms of service, using X's user data for AI training without user consent raises serious ethical and regulatory risks. Also, it is unclear whether the deal was an arm's length transaction and in the best interest of both companies' shareholders since Musk was on both sides of the transaction. There could be lawsuits for breach of fiduciary duty. Furthermore, the acquisition could also potentially be viewed as anti-competitive due to the vertical integration of data and model development. Without rigorous data safeguards, transparent governance structures, and a clear delineation of corporate objectives, the transaction threatens to compromise the legitimacy and efficacy of both entities.

#### IV. CORPORATE SOLUTION TO AI SAFETY AT AI STARTUPS

The concern about AI security and safety led the founders of OpenAI and Anthropic to create the tandem corporate structure of nonprofit and for-profit entities wherein the board of the nonprofit controls the for-profit entity. Concerns over AI safety also drove the creation of xAI's special PBC. The three case studies reveal these corporate structures produce many shortcomings. Instead of experimenting with novel corporate structures, we propose a new solution to amend corporate law: requiring AI startups to institute a committee of AI Safety at the board level. This Part will first provide a backdrop of three approaches to AI in the United States, revealing the three approaches do not directly address the creation of the corporate tandem structure for AI safety purposes. Next, our proposal offers a corporate solution precisely addressing AI security and safety concerns at the most important level of the AI startup ecosystem.

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293. Greg Bensinger, *Musk's Social Media Firm X Bought by his AI Company, Valued at \$33 Billion*, REUTERS (Mar. 29, 2025, 1:25 AM EDT), <https://www.reuters.com/markets/deals/musks-xai-buys-social-media-platform-x-45-billion-2025-03-28/> [https://perma.cc/7EC2-ZEAJ] (summarizing the value of the deal as "xAI at \$80 billion and X at \$33 billion (\$45B less \$12B debt)" and noting that other specific terms of the deal were not clear, "such as how X's leaders would be integrated in the new firm or whether there would be regulatory scrutiny"); see also Rebecca Bellan, *The xAI-X Merger is a Good Deal — If You're Betting on Musk's Empire*, TECHCRUNCH (Apr. 12, 2025, 7:00 AM PDT), <https://techcrunch.com/2025/04/12/the-xai-x-merger-is-a-good-deal-if-youre-betting-on-musks-empire/> [https://perma.cc/QVX2-4PHJ] ("Investing in any one of his companies isn't about a quick return on investment. It's about buying into the mysticism around Musk and swallowing whole a narrative of success that outpaces the actual numbers. Some call it a grift, pointing to Musk's history of overpromising and underdelivering.").

*A. Three Approaches to AI Regulation*

Experts agree that AI will unleash many new benefits but may pose risks and bring danger to humans. The last major technological change was the Internet, and Congress did not dare to interfere with its growth. Instead, Congress granted an immunity to Internet service providers.<sup>294</sup> Yet as violations of personal data and privacy became rampant in social media, the Federal Trade Commission (“FTC”) began to investigate and bring cases against platforms and websites for violations of data privacy law.<sup>295</sup> Big Tech paid huge fines, apologized for their transgressions,<sup>296</sup> and repeated their wrongdoings.<sup>297</sup> This time in the

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294. See 47 U.S.C. § 230 (2018) (providing broad immunity to Internet service providers for the content that they host); see also *Section 230*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/R4YN-ZK6P>].

Congress recognized that for user speech to thrive on the Internet, it had to protect the services that power users’ speech. . . . That’s why the U.S. Congress passed a law, Section 230 (originally part of the Communications Decency Act), that protects Americans’ freedom of expression online by protecting the intermediaries we all rely on . . . . The law prevents most civil suits against users or services that are based on what others say.

295. See, e.g., Press Release, Fed. Trade Comm’n, *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook* (July 24, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook> [<https://perma.cc/FS8U-KUTY>]; Press Release, Fed. Trade Comm’n, *FTC Will Require Microsoft to Pay \$20 Million over Charges it Illegally Collected Personal Information from Children without Their Parents’ Consent* (June 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-will-require-microsoft-pay-20-million-over-charges-it-illegally-collected-personal-information> [<https://perma.cc/W7X5-MVL5>]; Press Release, Fed. Trade Comm’n, *Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children’s Privacy Law* (Sept. 4, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law> [<https://perma.cc/K4YK-RX78>]; Press Release, Fed. Trade Comm’n, *Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple’s Safari Internet Browser* (Aug. 9, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented-privacy-assurances-users-apples> [<https://perma.cc/C5EL-L5P9>].

296. See, e.g., Sara Salinas, *Mark Zuckerberg Has Been Talking and Apologizing About Privacy Since 2003 — Here’s a Reminder of What He’s Said*, CNBC (Dec. 19, 2018, 12:57 PM EST), <https://www.cnbc.com/2018/12/19/facebook-ceo-mark-zuckerberg-privacy-apologies.html> [<https://perma.cc/2SYU-ZD83>]; Kevin Collier, *T-Mobile CEO Apologizes After Hacker Stole Millions of Users’ Personal Information, The Incident is the Fourth Known Breach at T-Mobile Since 2018, and By Far the Largest*, NBC NEWS (Aug. 27, 2021, 10:56 AM EDT), <https://www.nbcnews.com/tech/security/t-mobile-ceo-apologizes-hacker-stole-millions-users-personal-information-rcna1794> [<https://perma.cc/943S-6EZS>].

297. See, e.g., Suzanne Smalley, *Citing Meta Lawsuit, Khan Says More Aggressive FTC Will Not Turn “Blind Eye” to Big Tech Data Abuses*, THE RECORD (Feb. 9, 2024), <https://the-record.media/ftc-chair-lina-khan-agency-will-not-turn-blind-eye-to-big-tech-data-abuses> [<https://perma.cc/NFA5-AFZ8>] (noting that the FTC has alleged that Meta violated its 2020 consent decree and continued to collect children’s data on its Messenger Kids app); Rae Hodge, *FTC Watchdogs Set Loose on Facebook for “Repeatedly” Violating Kids’ Privacy*

AI dawn, because of AI's dual forces of benefits and destruction, President Biden's administration ("Biden Administration") provided decisive actions. Also, Congress, particularly the Senate, delivered a policy plan for AI legislative action. In addition, litigants turned to century-old laws in their new litigation matters against AI foundation model startups.

#### 1. Executive Order, EO14110, on Safe, Secure, and Trustworthy Artificial Intelligence

Over the last two years, the Biden Administration has taken a number of steps to address AI. Noting "the use[s] of technology, data, and automated systems . . . that threaten the rights of the American public," the White House released a whitepaper titled "Blueprint for an AI Bill of Rights" in October 2022.<sup>298</sup> The whitepaper is a product of public engagement headed by the Office of Science and Technology with the intention to "support the development of policies and practices that protect civil rights and promote democratic values in the building, deployment, and governance of automated systems."<sup>299</sup> The White House obtained voluntary commitments from seven leading companies, namely, OpenAI, Anthropic, Inflection, Microsoft, Google, Meta, and Amazon on July 2023 to drive safe, secure, and trustworthy development of AI.<sup>300</sup> Two months later in September 2023, eight more tech companies — Stability, Scale AI, Cohere, Nvidia, Palantir, Salesforce, and Adobe — joined the original seven.<sup>301</sup> With these

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*for Profit*, SALON (May 4, 2023, 4:42 PM EDT) <https://www.salon.com/2023/05/04/fit-face-book-kids-data-privacy-profit-ban-proposal/> [<https://perma.cc/E7ED-EH97>] (reporting that the FTC "has caught the social media giant [Facebook] violating kids' data privacy for profit — for the third time").

298. *Blueprint for an AI Bill of Rights*, WHITE HOUSE (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> [<https://perma.cc/6NQ4-Z4UM>].

299. *Id.*; see also *Unpacking the White House Blueprint for an AI Bill of Rights*, BROOKINGS (Dec. 5, 2022, 2:00 PM EST), <https://www.brookings.edu/events/unpacking-the-white-house-blueprint-for-an-ai-bill-of-rights/> [<https://perma.cc/5PCP-ZG32>].

300. Press Release, White House, FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI (July 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai> [<https://perma.cc/TF2M-6VWG>] ("Companies that are developing these emerging technologies have a responsibility to ensure their products are safe. . . . [T]he companies have chosen to undertake immediately, underscore three principles that must be fundamental to the future of AI — safety, security, and trust — and mark a critical step toward developing responsible AI.").

301. Press Release, White House, FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Eight Additional Artificial Intelligence Companies to Manage the Risks Posed by AI (Sept. 12, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/12/fact-sheet-biden-harris-administration-secures-volun>

fifteen AI tech leaders on board, on October 30, 2023, Biden signed the Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence.<sup>302</sup>

The Executive Order recognizes that while AI holds “extraordinary potential” for promise, irresponsible use could “exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security.”<sup>303</sup> Harnessing AI benefits requires mitigating its substantial risks that demand a “society-wide effort.”<sup>304</sup> The Executive Order aims to (1) establish a new standard for AI safety and security; (2) protect Americans’ privacy; (3) advance equity and civil rights; (4) stand up for consumers; (5) support workers, (6) promote innovation and competition; and (7) advance American leadership around the world.<sup>305</sup>

We will focus only on the Executive Order’s new standards for AI safety and security that are directly relevant to the scope of this Article. The Executive Order directs the Secretary of Commerce, acting through the Director of the National Institute of Standards and Technology (“NIST”), in coordination with the Secretary of Energy, the Secretary of Homeland Security, and the heads of other relevant agencies as the Secretary of Commerce may deem appropriate to “establish appropriate guidelines . . . procedures and processes,” to enable developers of AI, “especially of dual-use foundation models” to conduct “AI red-teaming tests to enable deployment of safe, secure, and trustworthy systems.”<sup>306</sup>

“Dual-use foundation models” is defined as an “AI model that is trained on broad data; generally uses self-supervision; contains at least tens of billions of parameters; is applicable across a wide range of contexts; and exhibits, or could be easily modified to exhibit, high levels of performance at tasks that pose a serious risk to security, national economic security, national public health or safety, or any combination of those matters.”<sup>307</sup> That means if startups develop foundational models meeting the “tens of billions of parameters,” the startups will be subject to NIST’s guidelines to conduct AI red-teaming tests.<sup>308</sup>

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tary-commitments-from-eight-additional-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/ [https://perma.cc/FN9R-RKA7]; see also Steve Goldstein, *Eight More Companies Including Nvidia and Palantir Agree to White House AI Standards*, MARKETWATCH (Sept. 12, 2023, 6:09 AM ET), <https://www.marketwatch.com/story/eight-more-companies-including-nvidia-and-palantir-agree-to-white-house-ai-standards-8a525995> [https://perma.cc/YGM7-Y5NL].

302. Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

303. *Id.* at § 1.

304. *Id.*

305. *Id.* at § 2.

306. *Id.* at § 4.1.

307. *Id.* at § 3(k).

308. *Id.* at § 4.1(ii) (noting that NIST has 270 days to comply with the Executive Order).



Further, the Executive Order imposes reporting requirements relating to safe and reliable AI under Section 4.2(a). Companies that acquire, develop, or possess “a potential large-scale computing cluster” must report information related to their respective activities, “including the existence and location of these clusters and the amount of total computing power available in each cluster.”<sup>309</sup> Also, AI foundation model startups must adhere to the reporting requirements ensuring safe and reliable AI.<sup>310</sup> For instance, the startups must “provide the Federal Government, on an ongoing basis, with information, reports, or records regarding” any ongoing or planned activities “related to training, developing or producing dual-use foundation models, including the physical and cybersecurity protections taken to assure the integrity of that training process against sophisticated threats.”<sup>311</sup> The Secretary of Commerce is working on how to define the technical conditions for the reporting requirements, and until then the Secretary of Commerce can impose the reporting requirements on startups with any “model that [is] trained using a quantity of computing power greater than  $10^{26}$  integer or floating-point operations, or using primarily biological sequence data and using a quantity of computing power greater than  $10^{23}$  integer or floating-point operations.”<sup>312</sup> That means startups whose foundation models are below the threshold described in the dual-use model are not subject to the disclosure requirements.

Unless the most powerful foundation models today reveal the parameters or computing power they need for training, the public remains in the dark. Consequently, the Executive Order is not sufficient for those who are concerned about the security and safety of AI foundation models. Moreover, President Trump subsequently rescinded Biden’s Executive Order EO14110.<sup>313</sup> The rescission has little impact on the security and safety of AI foundation models because EO14110 covered only very large and advanced models. Also, since Biden signed the Executive Order, no agency implemented rules to require disclosures by existing foundation models.<sup>314</sup>

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309. *Id.* at § 4.2(a)(ii).

310. *Id.*

311. *Id.*

312. *Id.* at § 4.2(b)(i).

313. Bradford J. Kelley, Alice H. Wang & Sean P. O’Brien, *New Executive Order Issued on AI; Prior AI Order Revoked*, LITTLER (Jan. 27, 2025), <https://www.littler.com/publication-press/publication/new-executive-order-issued-ai-prior-ai-order-revoked> [https://perma.cc/6AJ9-PTVN].

314. See *Commerce Department Proposes Reporting Requirements for Certain Artificial Intelligence Models and Computing Clusters*, DORSEY & WHITNEY LLP (Oct. 2, 2024), <https://www.dorsey.com/newsresources/publications/client-alerts/2024/10/ai-models-and-computing-clusters-reporting> [https://perma.cc/7LWF-Y23P]; Pablo E. Carrillo, Martin J. Mackowski, Wolfgang A. Maschek, Beth L. Goldstein, Julia B. Jacobson, Alan L. Friel et. al, *Key Insights on President Trump’s New AI Executive Order and Policy & Regulatory*

## 2. The Senate's AI Public Policy Action Plan

The deliberative process in approaching legislative rule-making is the hallmark of the U.S. Congress. In the past couple of decades, Congress has been known for its failure to work together on passing legislation.<sup>315</sup> The dysfunctional Congress engenders frustration and severely lowers the expectation that meaningful legislation in any areas of importance to society will ever promptly materialize.<sup>316</sup> Yet surprisingly, in the AI area, Congress, and in particular the Senate, has shown a strong desire to tackle legislation pertaining to artificial intelligence.

On May 15, 2024, Senate Majority Leader Chuck Schumer released the first AI Policy Roadmap, the results of the bipartisan Senate AI Working Group comprised of Leader Schumer (D-NY), Senator Mike Rounds (R-SD), Senator Martin Heinrich (D-NM), and Senator Todd Young (R-IN).<sup>317</sup> The Working Group believed that “[n]o technology offers more promise to our modern world than artificial intelligence” but “presents a host of new policy challenges” that require senators from across the aisles to work together.<sup>318</sup> The Working Group held “months of discussion” with “hundreds” of “advocates, critics, academics, labor groups, civil rights leaders, stakeholders, developers,

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*Implications*, SQUIRE PATTON BOGGS (Feb. 2025), <https://www.squirepattonboggs.com/en/in-sights/publications/2025/02/key-insights-on-president-trumps-new-ai-executive-order-and-policy-regulatory-implications> [https://perma.cc/WE7X-E49R].

315. See, e.g., Shauneen Miranda, *Buck: Congress is a “Dysfunctional Place” and He’s “Happy to Move On,”* AXIOS (Mar. 24, 2024), <https://www.axios.com/2024/03/24/ken-buck-republican-party-congress> [https://perma.cc/X8RF-EQLD] (“Since this Congress started, there have been efforts to impeach the secretary of state, the secretary of defense, the chairman of the Joint Chiefs of Staff, the president, the attorney general, the FBI director and, in fact, they did impeach the secretary of Homeland Security.”); Matt Weidinger, *Growing Congressional Dysfunction Will Worsen Our Fiscal Problems*, NAT. REV. (Mar. 7, 2024, 6:30 AM), <https://www.nationalreview.com/2024/03/growing-congressional-dysfunction-will-worsen-our-fiscal-problems/> [https://perma.cc/N4TH-EHUX] (“Congress is losing the sort of policy-making veterans it needs to craft and pass important legislation. Their reasons for leaving vary and often include Congress’s general inability to pass needed legislation. That dysfunction is evident in Congress’s long-standing failure to stem growing deficits and debt — which is now making the job of legislating even harder.”).

316. See Moira Warburton, *Why Congress is Becoming Less Productive*, REUTERS (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/> [https://perma.cc/F2T6-HTW9] (“Reforms to bedrock programs like Medicare and Social Security are desperately needed but no closer to getting passed. . . . One key factor is an increase in polarization . . . [which has] led to a decrease in bipartisanship, a necessary ingredient for bills to pass in a governing body full of checks and balances.”).

317. Press Release, Off. of Sen. Chuck Schumer, Following Historic AI Insight Forums Over The Past Year, Leader Schumer, Senators Rounds, Heinrich, & Young Reveal Bipartisan Roadmap for Artificial Intelligence Policy in The United States Senate (May 15, 2024), <https://www.schumer.senate.gov/newsroom/press-releases/following-historic-ai-insight-forums-over-the-past-year-leader-schumer-senators-rounds-heinrich-and-young-reveal-bipartisan-roadmap-for-artificial-intelligence-policy-in-the-united-states-senate> [https://perma.cc/4CXR-7YFB].

318. *Id.*

and more” to identify “key areas of policy that have bipartisan consensus.”<sup>319</sup> The Senators educated themselves and their colleagues on AI by hosting nine “first-of-their-kind, all-Senator AI Insight Forums.”<sup>320</sup>

The AI policy roadmap is not a legislative proposal; it merely summarizes the Working Group’s “findings and lays out policy topics” that the Group “believes merit bipartisan committee consideration in the 118th Congress and beyond.”<sup>321</sup> In other words, some topics will be immediately taken up by some committees while others will not. It also means that contrary to the European Union’s comprehensive AI Act,<sup>322</sup> the United States may adopt a piecemeal approach using legislation to target specific topics.<sup>323</sup>

Relevant to the confines of this Article is the policy priorities on “ensuring enforcement of existing laws for AI, including ways to address any gaps or unintended harmful bias; prioritizing the development of standards for testing to understand potential AI harms; and developing use case-specific requirements for AI transparency and explainability.”<sup>324</sup> Accordingly, no specific AI law will be passed by Congress; instead, the focus will be on the “enforcement” of “existing laws.”<sup>325</sup> In the comprehensive AI Policy roadmap, senators in the Working Group encouraged “committees to consider ways to support” the efforts of private entities in their “development of the capabilities-focused risk-based approach, the development and standardization of risk testing, and evaluation” by using “the federal procurement system.”<sup>326</sup> In other words, the Working Group confirms that there will be no proposed legislation regarding the standardization of AI risk testing.<sup>327</sup>

The AI Policy Action provides the roadmap, and the path to formulating relevant proposed legislation is up to committees in the Senate. The bipartisan group states that “[n]ow, the work continues with our Committee, Chairmen, and Ranking Members to develop and

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319. *Id.*

320. *Id.*

321. *Id.*

322. The European Union passed the AI Act on March 13, 2024. *See Artificial Intelligence Act: MEPs Adopt Landmark Law*, EUROPEAN PARLIAMENT NEWS (Mar. 13, 2024, 12:25 PM), <https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law> [<https://perma.cc/XM7S-Z3MB>].

323. *See* CHUCK SCHUMER, MIKE ROUNDS, MARTIN HEINRICH & TODD YOUNG, DRIVING U.S. INNOVATION IN ARTIFICIAL INTELLIGENCE: A ROADMAP FOR ARTIFICIAL INTELLIGENCE POLICY IN THE UNITED STATES SENATE (May 2024), [https://www.schumer.senate.gov/imo/media/doc/Roadmap\\_Electronic1.32pm.pdf](https://www.schumer.senate.gov/imo/media/doc/Roadmap_Electronic1.32pm.pdf) [<https://perma.cc/7P2F-MNXM>].

324. CHUCK SCHUMER, MIKE ROUNDS, MARTIN HEINRICH & TODD YOUNG, A ROADMAP FOR ARTIFICIAL INTELLIGENCE POLICY IN THE U.S. SENATE, [https://www.schumer.senate.gov/imo/media/doc/LDOne\\_Pager\\_Roadmap\\_DRAFT\\_Clean\\_MKYDID.pdf](https://www.schumer.senate.gov/imo/media/doc/LDOne_Pager_Roadmap_DRAFT_Clean_MKYDID.pdf) [<https://perma.cc/EBH3-RFZ8>].

325. *See id.*

326. SCHUMER ET AL., *supra* note 323, at 16–17.

327. *See id.*

advance legislation with urgency and humility.”<sup>328</sup> That means time will tell when and what AI-related legislation will be proposed and passed by Congress. One thing is clear: There will be no forthcoming legislation that would hinder AI foundation models, and the startups therefore continue to race against one another at full steam.

### 3. Litigation Against AI Foundation Model Startups and Their Big Tech Backers

The arrival of the Internet and the explosion of growth in all things online remind all of us that Congress passed a very important law to specifically immunize websites from suits brought by users against third-party content posted on the websites.<sup>329</sup> With this immunity, all suits relying on existing laws could not advance. With the arrival of AI, however, Congress has not made promises to grant similar immunity. Consequently, litigants have turned their attention to existing copyright and data privacy protection laws in asserting claims against AI foundation model startups and their investors and business partners. Currently, more than a dozen cases have been filed, and they are slowly moving through the court system; no court has issued decisions on the merits at the present time.

The AI models create outputs identical or substantially similar to copyrighted works.<sup>330</sup> Accordingly, over thirty cases against AI foundation model startups center on copyright infringement and copyright management violation because the models allegedly ingest copyrighted works of authorship without permission for their training data.<sup>331</sup> Courts will apply century-old copyright law to the facts of these cases.<sup>332</sup> AI foundation model startups stand accused of intentional infringements on an unimaginable scale, encompassing photographs, music, literary text, and news articles.

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328. Off. of Sen. Chuck Schumer, *supra* note 317.

329. ELEC. FRONTIER FOUND., *supra* note 294.

330. See Complaint at 5, Concord Music Group, Inc., et al., v. Anthropic PBC, No. 3:23-cv-01092 (M.D. Tenn. Oct. 18, 2023); Complaint at 2, NYT v. Microsoft and OpenAI, No. 1:23-cv-11195 (S.D.N.Y. Dec. 27, 2023).

331. See *Current Edition: Updates on Generative AI Infringement Cases in Media and Entertainment*, MCKOOL SMITH (Feb. 3, 2025), <https://www.mckoolsmith.com/newsroom-ailitigation-8> [<https://perma.cc/826Z-BEG3>]; *Case Tracker: Artificial Intelligence, Copyrights and Class Actions*, BAKERHOSTETLER, <https://www.bakerlaw.com/services/artificial-intelligence-ai/case-tracker-artificial-intelligence-copyrights-and-class-actions/> [<https://perma.cc/ZXY9-R2H8>]; Kevin Madigan, *AI Lawsuit Developments in 2024: A Year in Review*, COPYRIGHT ALLIANCE (Jan. 9, 2025), <https://copyrightalliance.org/ai-lawsuit-developments-2024-review/> [<https://perma.cc/7P47-A9TU>] (stating that “over thirty copyright infringement lawsuits by copyright owners against” generative AI Models).

332. Federal copyright law has been in existence since 1790 and was amended significantly in 1909 and 1976. See *A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/timeline/> [<https://perma.cc/FL3B-54JZ>].

One such lawsuit is *Getty Images v. Stability AI*.<sup>333</sup> The plaintiff, Getty Images, is the preeminent content licensor through its platform and global distribution network of more than twelve million photographs.<sup>334</sup> The photographs enjoy protection under U.S. copyright laws.<sup>335</sup> Getty Images stores all images, associated titles, captions, keywords, authors, and ownership information in its database.<sup>336</sup> To maintain the database, Getty Images invested more than \$200 million.<sup>337</sup> Stability AI, a foundation model startup founded in 2020, gained notoriety with its Stable Diffusion model which allows users to generate images from text prompts.<sup>338</sup> Specifically, Stability AI employs four steps from input to output: (1) Stability AI copies billions of text-and-image pairings — like those available on Getty Images’ websites — for training its Stability Diffusion model; (2) Stability AI then encodes the images and the paired text separately, retaining and storing copies of the encoded images and text as its “essential element” of training the model; (3) Stability AI next adds visual “noise” to the encoded images, i.e. “it further alters the images so that it is incrementally harder to discern what is visually represented because the images have been intentionally degraded in visual quality in order to train” the model to remove the “noise”; and (4) Stability Diffusion “decodes the altered image and teaches itself to remove the noise by comparing the decoded image to the original image and text descriptions that have been copied and stored, and by learning to decode noise, the model learns to deliver images similar to the original without noise.”<sup>339</sup> Getty Images filed its complaint with the federal district court in Delaware, alleging Stability AI accessed Getty Images’ public-facing websites and copied without permission its twelve million photographs along with other associated data in violation of copyright law.<sup>340</sup> Though the amended complaint was filed on March 29, 2023, the court has not issued any ruling on the merits at present.<sup>341</sup>

A group of the world’s leading music publishers decided to bring suit against AI foundation model startups by filing a complaint on October 18, 2023. In *Concord Music Group vs. Anthropic PBC*, the plaintiffs asserted willful copyright infringement and violation of

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333. Amended Complaint, *Getty Images v. Stability AI*, No. 1:23-cv-00135 (D. Del. Mar. 29, 2023).

334. *See id.* ¶¶ 23, 31.

335. *Id.* ¶ 33.

336. *Id.* ¶ 36.

337. *Id.* ¶ 37.

338. *Id.* ¶¶ 45–56.

339. *Id.*

340. *Id.*

341. MCKOOL SMITH, *supra* note 331 (“The parties are currently engaged in jurisdictional discovery related to defendants’ motion to transfer the case to the Northern District of California.”).

copyright management against Anthropic.<sup>342</sup> The plaintiffs own or control the exclusive rights to millions of musical compositions, including lyrics for thousands of the most popular and beloved songs of all time.<sup>343</sup> With the copyright protection accorded to musical compositions, the plaintiffs represent and advocate for songwriters through commercial licensing of their copyrighted works.<sup>344</sup> Without approaching the plaintiffs for permission or attempting to negotiate a license, Anthropic allegedly creates unauthorized copies of plaintiffs' copyrighted lyrics by scraping them from their websites and converting them from text to "tokens" for purposes of training Anthropic's foundational model, Claude.<sup>345</sup> Claude then generates lyrics identical or substantially identical to plaintiffs' copyrighted lyrics without permission when users enter their prompts.<sup>346</sup> According to the plaintiffs, Anthropic "claims to be different" from other AI startups, calling itself an AI "safety and research" company; by training its AI models using what it refers to as "constitution," the startup claims that its systems are more "helpful, honest, and harmless."<sup>347</sup> But Anthropic's willful copyright infringements contradict its principled approach. Plaintiffs demonstrate that Anthropic's Claude model generates identical or nearly identical copies of Publishers' lyrics to songs such as "A Change Is Gonna Come," "God Only Knows," "What a Wonderful World," "Gimme Shelter," "American Pie," "Sweet Home Alabama," "Every Breath You Take," "Life Is a Highway," "Somewhere Only We Know," "Halo," among others.<sup>348</sup> The plaintiffs alleged four causes of action, namely, willful direct copyright infringement, contributory copyright infringement, vicarious copyright infringement, and violation of the copyright management statutory provision related to Anthropic's removal or alteration of song title and author information from the plaintiffs' copyrighted lyrics.<sup>349</sup>

Regarding copyright infringement of fiction and nonfiction works, numerous class actions and individual actions have been filed in the federal courts against OpenAI and Microsoft. For instance, prominent fiction authors such as Jodi Picoult, John Grisham, and Jonathan Franzen, among others, brought two separate class action complaints

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342. Complaint, Concord Music Group, Inc., et al., v. Anthropic PBC, No. 3:23-cv-01092 (M.D. Tenn. Oct. 18, 2023).

343. *Id.* ¶¶ 34, 37.

344. *Id.* ¶ 4.

345. *Id.* ¶ 6.

346. *Id.* ¶ 8.

347. *Id.* ¶ 7.

348. *Id.* ¶ 8.

349. *Id.* ¶¶ 111–53.

against OpenAI and Microsoft for copyright infringement.<sup>350</sup> Pulitzer Prize winners Taylor Branch, Stacy Schiff, and Kai Bird are among the nonfiction authors in a different class action against OpenAI and Microsoft.<sup>351</sup> Other well-known investigative journalists and nonfiction writers filed their own class action complaints against the same defendants.<sup>352</sup> Courts have consolidated some of these class actions.<sup>353</sup>

*The New York Times* joined the fight by bringing its own complaint against OpenAI and Microsoft because “OpenAI’s latest model ChatGPT-4 could reproduce near-verbatim text of entire copyrighted articles when prompted correctly.”<sup>354</sup> In April 2024, *The New York Daily News*, the *Chicago Tribune*, and six other daily newspaper brought their collective complaint against the same defendants for copyright infringements of the copyrighted articles.<sup>355</sup> Their complaint includes output from OpenAI’s ChatGPT models: verbatim excerpts

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350. See Complaint, Authors Guild v. OpenAI Inc., No. 1:23-cv-0829 (S.D.N.Y. Sept. 19, 2023) (class action brought by Authors Guild representing its members); Complaint, Silverman v. OpenAI, Inc., No. 3:23-cv-03416 (N.D. Cal. Jul. 7, 2023) (lawsuit brought by Matt O’Brien, Sarah Silverman, and other novelists); see also Alexandra Alter & Elizabeth A. Harris, *Franzen, Grisham and Other Prominent Authors Sue OpenAI*, N.Y. TIMES (Sept. 20, 2023), <https://www.nytimes.com/2023/09/20/books/authors-openai-lawsuit-chatgpt-copy-right.html> [<https://perma.cc/KX8C-F4RE>]; Keith Romer, Erika Beras, Kenny Malone, Willa Rubin & Sam Yellowhorse Kesler, *The Alleged Theft at the Heart of ChatGPT*, NPR (Nov. 10, 2023, 6:54 PM ET), <https://www.npr.org/2023/11/10/1197954613/openai-chatgpt-author-lawsuit-preston-martin-franzen-picoult> [<https://perma.cc/XDQ2-FWPV>].

351. First Amended Complaint, Alter v. OpenAI Inc., No. 1:23-cv-10211 (S.D.N.Y. Nov. 21, 2023) (class action brought by non-fiction authors); see also Blake Brittain, *Pulitzer-Winning Authors Join OpenAI, Microsoft Copyright Lawsuit*, REUTERS (Dec. 20, 2023, 7:22 PM EST), <https://www.reuters.com/legal/pulitzer-winning-authors-join-openai-microsoft-copy-right-lawsuit-2023-12-20/> [<https://perma.cc/XNS7-WJLQ>].

352. Dan Mangan, *Microsoft, OpenAI Sued for Copyright Infringement by Nonfiction Book Authors in Class Action Claim*, CNBC (Jan. 5, 2024, 3:32 PM EST), <https://www.nbcnews.com/tech/tech-news/microsoft-openai-sued-copyright-infringement-non-fiction-book-authors-rcna132570> [<https://perma.cc/XYX5-AHL7>] (reporting that the putative class action complaint “alleged that the defendants ‘simply stole’ the writers’ copyrighted works to help build a billion-dollar [AI] system”); Isaiah Poritz, *OpenAI Hit With Another Copyright Site From Pair of Journalists*, BLOOMBERG L. (Jan. 5, 2024, 1:42 PM EST), <https://news.bloomberglaw.com/ip-law/openai-hit-with-another-copyright-suit-from-pair-of-journalists> [<https://perma.cc/Q8XZ-N6QZ>] (reporting that investigative journalist Nicholas Gage and author Nicholas Basbanes brought a copyright infringement action against OpenAI and Microsoft for using their works to train AI models without their permission); Olafimihan Oshin, *Nonfiction Authors Sue OpenAI, Microsoft for Copyright Infringement*, THE HILL (Nov. 22, 2023, 7:46 PM ET), <https://thehill.com/homenews/4324297-nonfiction-authors-sue-openai-microsoft-copyright-infringement/> [<https://perma.cc/9UV9-VF3K>] (reporting non-fiction author Julian Sancton is the lead plaintiff in the class action).

353. Order, No. 24-cv-84 (S.D.N.Y. Feb. 6, 2024) (ordering the consolidation of *Basbanes v. Microsoft* with *Authors Guild v. Open AI Inc.* and *Alter v. Open AI Inc.*). The three putative class actions, *Tremblay v. OpenAI, Inc.*, *Silverman v. OpenAI, Inc.*, and *Chabon v. OpenAI, Inc.*, have been consolidated into In re: OpenAI ChatGPT Litigation Master File, No. 3:23-cv-03223-AMO. See Pre-Trial Order No. 1, *Tremblay v. OpenAI, Inc.*, No. 3:23-cv-03223 (N.D. Cal. Nov. 9, 2023).

354. Poritz, *supra* note 352.

355. Complaint, Daily News, LP v. Microsoft Corp., No. 1:24-cv-03285 (S.D.N.Y. Apr. 30, 2024).

from the plaintiffs' original articles.<sup>356</sup> The defendants stole copyrighted stories from the newspapers "with impunity" and never sought permission or payment for the use of millions of their copyrighted articles.<sup>357</sup> In February 2024, other lesser-known media companies such as *The Intercept Media* and *Raw Story Media* alleged that OpenAI intentionally removed all copyright information, such as titles and author names associated with news articles, and then used the stripped articles in OpenAI's training dataset to develop its foundational model GPT.<sup>358</sup> These media companies asserted that OpenAI's conduct violates the Digital Millennium Copyright Act ("DMCA").<sup>359</sup>

In addition to the cases brought under copyright laws against AI foundation model startups, there is a consumer data privacy class action against OpenAI. The putative class action was filed in September 2023 and the lawyers for the plaintiffs rely on the California Invasion of Privacy Act, among other federal laws.<sup>360</sup> The plaintiffs demonstrate in the complaint how OpenAI scraped personal data from hundreds of millions of Internet users, and in fact "since commercialization, OpenAI used five different datasets to train ChatGPT and each of these datasets performs massive data collection, effectively scraping the whole Internet."<sup>361</sup>

At present, none of the copyright infringement, DMCA violation, and consumer privacy suits have been decided on the merits. The slow speed of litigation as cases move through the adversary system means litigants must wait patiently unless they decide to settle their cases out of court. Even if a decision is rendered on merit today, the legal issues decided in copyright infringement, DMCA violation, and consumer

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356. *Id.* ¶¶ 99, 101, 103, 105, 107, 109, 111–12.

357. Bobby Allyn, *Eight Newspapers Sue OpenAI, Microsoft for Copyright Infringement*, NPR (Apr. 30, 2024, 3:13 PM ET), <https://www.npr.org/2024/04/30/1248141220/lawsuit-openai-microsoft-copyright-infringement-newspaper-tribune-post> [<https://perma.cc/HQ92-KZF2>].

358. Complaint, *The Intercept Media, Inc. v. OpenAI Inc.*, No. 1:24-cv-01515 (S.D.N.Y. Feb. 28, 2024); Complaint, *Raw Story Media, Inc., v. OpenAI Inc.*, No. 1:24-cv-01514 (S.D.N.Y. Feb. 28, 2024).

359. The DMCA, according to *The Intercept Media* and *Raw Story Media*, "prohibits the removal of author, title, copyright, and terms of use information from protected works where there is reason to know that it would induce, enable, facilitate, or conceal a copyright infringement." Complaint at ¶ 3, *Intercept Media, Inc.*, No. 1:24-cv-01515; Complaint at ¶ 3, *Raw Story Media, Inc.*, No. 1:24-cv-01514; see also Alison Frankel, *The Latest ChatGPT Lawsuits Highlight Backup Legal Theory Against AI Platforms*, REUTERS (Feb. 29, 2024, 5:20 PM EST) <https://www.reuters.com/legal/transactional/column-latest-chatgpt-lawsuits-highlight-backup-legal-theory-against-ai-2024-02-29/> [<https://perma.cc/EV7U-9YMH>] (reporting that the causes of action under the DMCA are alternative legal theories against AI startups).

360. Andy Yang, *Five Key Points from the Invasion of Privacy Lawsuit Against OpenAI*, IPWATCHDOG (Oct. 5, 2023, 7:15 AM), <https://ipwatchdog.com/2023/10/05/five-key-points-invasion-privacy-lawsuit-openai/id=167838/> [<https://perma.cc/MPP3-79PF>].

361. *Id.*



privacy breach are not relevant to the tandem novel corporate structure created by AI foundation model startups.

In summary, Biden's Executive Order, the Senate's AI Policy Action, and the dozens of current AI-related disputes seem to indicate that although there are strong concerns about AI's destructive harm to humanity, the desire for rapid AI innovation dictates the absence of federal regulations of AI safety. That means no specific new laws or regulations for AI models for now. Whatever laws currently exist — such as copyright and the DMCA — will be applied to address new intellectual property infringement issues arising from AI models. The three approaches do not squarely address the reasons for the creation of the tandem novel corporate structure.

*B. Mandatory Board of Directors Committee on Security and Safety in AI Startups*

Many experts who have been working on building AI foundation models express their concerns that AI, especially Artificial General Intelligence, will be of grave danger to humans if there is no guardrail mechanism in place at the AI startups.<sup>362</sup> In fact, AI safety has been a divisive issue at OpenAI from the early days, and the problems persist. AI safety concerns drove Dario and Daniela Amodei, former OpenAI researchers, to leave the company in 2020 to start their own AI startup, Anthropic, with other former OpenAI employees.<sup>363</sup> Even after the infamous coup of November 2023 at OpenAI, the experts' AI safety concerns did not subside. Instead, their concerns grew and forced them to quit OpenAI in May 2024 because they believed that the startup had repeatedly failed to address their concerns.<sup>364</sup> Worse, they are the experts who came to work at OpenAI to ensure AI safety.<sup>365</sup> They were the key members of the Superalignment team created by the startup in 2023.<sup>366</sup> Ilya Sutskever and Jan Leike, the Superalignment team leaders, resigned in May 2024, six months after “several OpenAI staff members have left the company that were either outspoken about AI safety or worked on key safety teams.”<sup>367</sup> The departure of key leaders and staffers at OpenAI over safety concerns suggests that the tandem structure for corporate governance is ineffective.

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362. See CTR. FOR AI SAFETY, *supra* note 259.

363. See *supra* Section III.B.1; Maxwell Zeff, *OpenAI Staffers Who Are Supposed to Make Sure AI Doesn't Go Rogue Are Jumping Ship Fast*, QUARTZ (May 16, 2024), <https://qz.com/openai-safety-staffers-quit-sam-altman-1851482644> [<https://perma.cc/VAY7-YAU3>].

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.* (reporting the six staffers who left are Andrej Karpathy, William Saunders, Daniel Kokotajlo, Cullen O'Keefe, Leopold Aschenbrenner, and Pavel Izmailov).

To better ensure that AI companies prioritize safety, we propose that state corporate law should be amended to require a mandatory Board of Directors Committee on AI Safety. Before we explain in greater detail about the AI Safety Committee, we will direct attention to existing regulations on mandatory committees for corporate governance as illustrative examples and as support that our proposal is consistent with established laws.

For publicly traded companies, the Securities Exchange Commission (“SEC”) promulgates specific regulations on corporate governance. Under 17 C.F.R. § 229.407, the majority of the board of directors must be independent, and the standards to evaluate independence are specified under the regulation.<sup>368</sup> There are three standing committees at the board level: the Audit, Nominating, and Compensation committees.<sup>369</sup> If any members of the three committees are not independent, the companies must disclose them.<sup>370</sup> The Audit Committee is at least comprised of an “audit committee finance expert” among its members.<sup>371</sup> The Audit Committee performs extensive responsibilities, including, “overseeing the integrity of the company’s financial statements and its internal audit function, and preapproving all audit and non-audit services,” reviewing “interim and annual financial statements and related disclosures with management and the auditors and recommend to the Board the inclusion of the audited financial statements” in the company’s annual report, and establishing and managing “a whistleblower policy and procedures for receiving and handling complaints received by the company regarding accounting, internal accounting controls or auditing matter.”<sup>372</sup> The Compensation Committee is charged with the responsibilities of developing compensation policies and practices for executive officers, reviewing the company’s disclosures of its compensation practices, and determining what to recommend to the Board for inclusion in the company’s annual report.<sup>373</sup> The Nominating Committee identifies individuals as candidates to serve on the Board, selects the qualified

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368. See 17 C.F.R. § 229.407(a)(1)(i) (detailing laws for determining independent board members).

369. See 17 C.F.R. § 229.407(b)(3) (“State whether or not the registrant has standing audit, nominating and compensation committees of the board of directors, or committees performing similar functions.”).

370. See 17 C.F.R. § 229.407(a) (“In addition, if such independence standards contain independence requirements for committees of the board of directors, identify each director that is a member of the compensation, nominating or audit committee that is not independent under such committee independence standards.”).

371. 17 C.F.R. § 229.407(d).

372. Bill Hughes, Jaime Evans, Albert Vanderlaan & Marsha Mogilevich, *IPO Insights: Assembling Your Public Company Board of Directors*, ORRICK (Sept. 29, 2023), <https://www.orrick.com/Insights/2018/06/Assembling-Your-Public-Company-Board-of-Directors> [<https://perma.cc/H2E4-GV98>].

373. *Id.*; see also 17 C.F.R. § 229.407(e).

candidates, and recommends director nominees for the next shareholders' annual meeting.<sup>374</sup> The Nominating Committee must disclose its process for identifying and evaluating nominees for directors.<sup>375</sup>

Taking a page from the SEC's regulations requiring publicly traded companies to have three standing committees of Audit, Compensation, and Nominating, we suggest that an AI Safety Committee should be required for AI startups to address the paramount concerns about AI security and safety. While it is true that the SEC's three committee requirements are only imposed on publicly traded companies that are resource-rich and able to meet the disclosure requirements, we believe that our requirements on AI startups are not too onerous. We recognize that our mandatory rule will impose costs on AI startups who typically need all the money they can secure to build and scale their AI models in the intensively competitive space of the VC-backed startup ecosystem. But AI safety is of such enormous concern that we must and should acknowledge it here in corporate law.

Like the Audit, Compensation, and Nominating Committees, the AI Safety Committee should comprise three members, and they should all be independent directors. The Committee members should be AI safety experts drawing from AI researchers in academia, AI labs, and private sectors. Given that the VC ecosystem is a tight-knit community where everyone knows of each other, a list of AI researchers who would like to be considered as candidates for the AI Safety Committee at AI startups perhaps should be made available and frequently updated on NVCA's website. The AI Safety Committee will have enhanced responsibilities regarding superalignment and safety audits similar to those of the Audit Committee. By instituting a board-level committee,

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374. See 17 C.F.R. § 229.407(c)(2)(ii) ("If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, provide a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders."); *id.* § 229.407(c)(2)(v) ("Describe any specific minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the registrant's board of directors, and describe any specific qualities or skills that the nominating committee believes are necessary for one or more of the registrant's directors to possess.").

375. 17 C.F.R. § 229.407(c)(2)(vi):

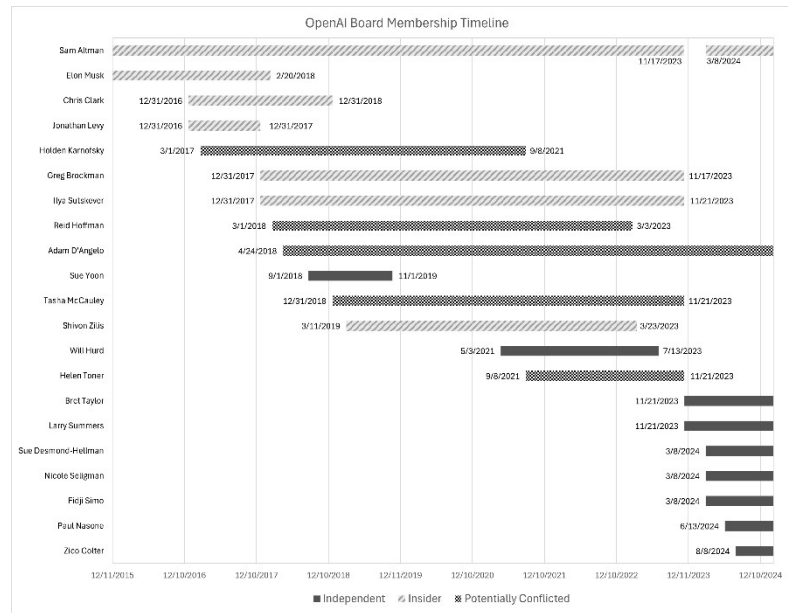
Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder, and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.

AI startups return to the corporate governance structure where AI safety is a key priority of the board for the benefit of the shareholders.

Specifically, the Committee will regularly update their understanding of AI's potential risks and benefits to the corporation. The Committee will rely on in-house and outside experts to keep abreast of AI's risks and benefits. The Committee will review and recommend to the Board a comprehensive compliance framework and require periodic audits. To hold management accountable to the compliance framework, the Committee will create an oversight structure vertically and horizontally.

## V. CONCLUSION

The case studies of three influential foundational AI startups reveal that their novel corporate governance structures, designed to balance mission and profit, are not immune to the age-old challenges plaguing conventional boards. Conflicts, board dynamics, and adherence to processes remain pertinent concerns. In fact, these conflicts may be amplified by the interconnected web of influential players within the AI startup ecosystem and the influence of ideological tenets such as EA. Ultimately, mandating an AI Safety Committee comprised of independent directors for AI startup boards could help navigate these issues and, ideally, safeguard humanity's interests.

APPENDIX A: TIMELINE OF OPENAI BOARD MEMBERS<sup>376</sup>

On December 11, 2015, OpenAI was founded, and Elon Musk and Sam Altman both served as directors and co-chairs of the board of directors.<sup>377</sup> Based on OpenAI's Form 990 public filing for the calendar year ending 2016 ("2016 Form 990"), there were five voting members of the governing body, four of whom were independent; however, only four directors were listed, and not all four of them were independent.<sup>378</sup> The 2016 Form 990 also reported that Elon Musk, Sam Altman, Chris Clark (Chief Operating Officer of OpenAI), and Jonathan Levy were directors or trustees, but the Form 990 did not include the director title next to Jonathan Levy's name as the other directors; he was listed as Secretary and Treasurer, so it is unclear whether he was a director or not.<sup>379</sup> In March 2017, OpenAI received a \$30 million donation from Open Philanthropy, an organization with ties to EA,<sup>380</sup> the founder of

376. The start dates of Clark, Levy, Brockman, Sutskever, and McCauley are listed as December 31 of the year in which they are first identified as Directors in OpenAI's IRS Form 990 public filings. The actual start dates are unknown.

377. Loeber, *infra* note 407.

378. IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2016), <https://projects.propublica.org/nonprofits/organizations/810861541/201703459349300445/full> [https://perma.cc/BF9H-77NN].

379. *Id.*

380. *OpenAI — General Support*, OPEN PHILANTHROPY (Mar. 2017), <https://www.openphilanthropy.org/grants/openai-general-support/> [https://perma.cc/2WMN-DQ87]; Fan & Nguyen, *supra* note 32; see also Appendix B.

Open Philanthropy, Holden Karnofsky, joined OpenAI's board and, along with an unidentified board member, oversaw "OpenAI's safety and governance work."<sup>381</sup>

According to OpenAI's Form 990 public filing for the calendar year ending 2017 ("2017 Form 990"), there were eight members of the governing body, two of whom were independent.<sup>382</sup> However, only six directors were listed and it is unclear who was independent: Elon Musk, Sam Altman, Chris Clark (Chief Operating Officer and Treasurer), Holden Karnofsky, Gregory Brockman (CTO), and Ilya Sutskever (Research Director).<sup>383</sup> Then, on February 20, 2018, "Elon Musk [was] removed from the Board. The official press release proclaims a departure to avoid potential conflicts, but journalists report[ed] leadership disagreements culminating in [Musk] proposing a takeover and being rebuked."<sup>384</sup> Reid Hoffman joined the OpenAI board in 2018.<sup>385</sup> Then, on April 24, 2018, Adam D'Angelo announced on X that he had joined OpenAI's board.<sup>386</sup> In September 2018, Sue Yoon, who worked at First Round as an expert in residence, joined the board.<sup>387</sup> OpenAI's Form 990 for the calendar year ending 2018 ("2018 Form 990") reported that it had eight voting members in its governing body and that six of them were independent.<sup>388</sup> However, based on the 2018 Form 990, it appears that there were only seven members of the board at the time of the report, since Elon Musk resigned on February 21, 2018 — Sam Altman (President), Sue Yoon, Holden Karnofsky, Greg Brockman (CTO), Ilya Sutskever (Research Director), Adam D'Angelo, and Tasha

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381. *Id.*

382. IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2017), <https://projects.propublica.org/nonprofits/organizations/810861541/201920719349300822/full> [<https://perma.cc/45FD-ERJB>].

383. *Id.*

384. Loeber, *infra* note 407 (reporting that Brockman, Ilya Sutskever, Karnofsky, and Altman are on the board and that Clark was removed at some point). It does not appear from the Form 990 that Sutskever was on the board but he is listed as a research director and the box for individual trustee and director is checked off. IRS Form 990, *supra* note 382.

385. Kyle Wiggers, *A Brief Look at the History of OpenAI's Board*, TECHCRUNCH (Nov. 21, 2023, 10:04 AM PST), <https://techcrunch.com/2023/11/21/a-brief-look-at-the-history-of-openais-board/> [<https://perma.cc/P6HR-XGW7>]. Hoffman is the founder of LinkedIn and a partner at Greylock; the dates of his service on the OpenAI board are noted on his LinkedIn profile. Loeber, *infra* note 407.

386. Adam D'Angelo (@adamdangelo), X (FORMERLY KNOWN AS TWITTER) (Apr. 24, 2018, 3:15 PM), <https://x.com/adamdangelo/status/988859015315701760?lang=en> [<https://perma.cc/Q2ZH-3TEU>].

387. Sue Yoon, LINKEDIN, <https://www.linkedin.com/in/sue-yoon-8b35a214/> [<https://perma.cc/UCY2-UUHQ>].

388. IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2018), <https://projects.propublica.org/nonprofits/organizations/810861541/201943199349318399/full> [<https://perma.cc/62JR-E3G7>].

McCauley — only four of whom were independent because they did not work for the company.<sup>389</sup>

On March 11, 2019, the company posted a blog listing the following individuals as directors of the nonprofit board: “OpenAI LP employees Greg Brockman (Chairman & CTO), Ilya Sutskever (Chief Scientist), and Sam Altman (CEO), and non-employees Adam D’Angelo, Holden Karnofsky, Reid Hoffman, Shimon Zilis, and Tasha McCauley.”<sup>390</sup> As one commentator observed, “Note the unannounced elevation of Shimon Zilis (previously an advisor) and the unannounced departure of Sue Yoon. Weirder yet, OpenAI published its new homepage just that day, still listing Sue Yoon as a Board Director, and not Shimon Zilis.”<sup>391</sup> According to OpenAI’s Form 990 for the calendar year ending December 31, 2019 (“2019 Form 990”), the following individuals were directors: Ilya Sutskever (Research Director), Greg Brockman (CTO), Sam Altman (President), Reid Hoffman, Sue Yoon, Holden Karnofsky, Adam D’Angelo, and Tasha McCauley.<sup>392</sup>

In the Form 990 filed for the calendar year ending December 31, 2020 (“2020 Form 990”), it reported that Ilya Sutskever, Greg Brockman, Sam Altman, Reid Hoffman, Shimon Zilis, Holden Karnofsky, Adam D’Angelo, and Tasha McCauley served on the board of directors.<sup>393</sup> Notably, five of the eight directors are independent (Zilis, Hoffman, Karnofsky, D’Angelo, and McCauley) although the 2020 Form 990 indicates that only four of the eight directors are independent.<sup>394</sup> Will Hurd, a Republican member of the House of Representatives, and

389. *Id.* Again, Ilya Sutskever is checked off as a director, but unlike the other directors, he does not have a director title next to his name but is noted as Research Director.

390. OPENAI, *supra* note 125.

391. Loeber, *infra* note 407. According to Sue Yoon’s LinkedIn profile, she left OpenAI’s board in November 2019. *Id.* Reportedly, Shimon Zilis is also the mother of four of Elon Musk’s children (he has fourteen children in total as of March 2025). Milan Sehmbi, *Elon Musk and Neuralink Exec Shimon Zilis Welcome Fourth Child Together* (Mar. 1, 2025, 8:02 AM ET), <https://www.businessinsider.com/elon-musk-neuralink-exec-shimon-zilis-welcome-4th-child-2025-3> [<https://perma.cc/47VA-EGNA>].

392. IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2019), <https://projects.propublica.org/nonprofits/organizations/810861541/201943199349318399/full> [<https://perma.cc/VXE8-CL24>]. Although Ilya Sutskever is checked off as a director or trustee, his title is Research Director, which differs from his role as a member of the board of directors. *Id.* Note that the Form 990 indicates that there are eight members of the governing body, six of whom are independent. *Id.* There are eight people if one counts Sutskever but it is still unclear how more than five of them could be independent directors because only five of the eight are not employees. Also, Shimon Zilis, who was noted as a director in a blog post, is not mentioned. Compare *id.* (the Form 990) with Loeber, *infra* note 407 (blog post mentioning Zilis).

393. IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2020), <https://projects.propublica.org/nonprofits/organizations/810861541/202103199349322970/full> [<https://perma.cc/G8WH-E94K>] (noting that Sutskever is listed only as Research Director, not Director like Altman and Brockman, although the column indicating that the individual is a director is checked off).

394. *Id.*

Helen Toner, Director of Strategy at Georgetown’s Center for Security and Emerging Technologies, joined the board on May 3, 2021<sup>395</sup> and September 8, 2021,<sup>396</sup> respectively. Then, in the fall of 2021, “Karnofsky resign[ed] from the Board, citing a potential conflict because his wife, Daniela Amodei, [was] helping start Anthropic, a major OpenAI competitor, with her brother Dario Amodei.”<sup>397</sup>

The Form 990 filed for the year ending December 31, 2021 (“2021 Form 990”), stated that there were eight members of the governing body, four of whom were independent: Ilya Sutskever (Research Director), Shivon Zilis, Greg Brockman (CTO), Will Hurd, Sam Altman (President and CEO), Reid Hoffman, Holden Karnofsky, Adam D’Angelo, Tasha McCauley, and Helen Toner.<sup>398</sup> Although ten people were listed as board members in the 2021 Form 990, some of them may have left the board earlier in 2021.<sup>399</sup> The Form 990 for the year ending December 31, 2022, reported that there were nine voting members of the board and that six of them were independent (“2022 Form 990”).<sup>400</sup> It listed the following individuals as directors: Ilya Sutskever, Greg Brockman, Shivon Zilis, Will Hurd, Sam Altman (President and CEO), Reid Hoffman, Adam D’Angelo, Tasha McCauley, and Helen Toner.<sup>401</sup>

In March 2023, Bloomberg reported that Reid Hoffman had resigned from the OpenAI board due to the need to “avoid potential conflicts with his investments.”<sup>402</sup> Then, on March 23, 2023, Shivon Zilis left the board.<sup>403</sup> Later, on July 13, 2023, Will Hurd stepped down from

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395. *Will Hurd Joins OpenAI’s Board of Directors*, OPENAI (May 3, 2021), <https://openai.com/index/will-hurd-joins/> [https://perma.cc/KBH4-YTXC].

396. *Helen Toner Joins OpenAI’s Board of Directors*, OPENAI (Sept. 8, 2021), <https://openai.com/index/helen-toner-joins/> [https://perma.cc/496F-XDYU]. Toner previously worked at Open Philanthropy. Loeber, *infra* note 407.

397. Loeber, *infra* note 407.

398. IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2021), <https://projects.propublica.org/nonprofits/organizations/810861541/202243199349314989/full> [https://perma.cc/MNF7-8TEH].

399. *Id.* Again, Ilya Sutskever is only listed as Research Director and not Director like the rest of the Directors even though the box is checked off designating him as a director or trustee. *Id.*

400. IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2022), <https://projects.propublica.org/nonprofits/organizations/810861541/202323199349330997/full> [https://perma.cc/2JV9-95BC].

401. *Id.* Only Brockman is listed as an officer in the 2022 Form 990; it is unclear who is considered independent versus not. *Id.*

402. Dina Bass, *LinkedIn Co-Founder Hoffman Stepping Down From OpenAI Board*, BLOOMBERG (Mar. 3, 2023, 1:13 PM), <https://www.bloomberg.com/news/articles/2023-03-03/linkedin-co-founder-hoffman-stepping-down-from-openai-board> [https://perma.cc/N8Q6-R5TC]. See also Loeber, *infra* note 407.

403. Becky Peterson, *Shivon Zilis, Musk Associate, Leaves OpenAI Board*, THE INFO. (May 23, 2023, 8:22 AM PDT), <https://www.theinformation.com/articles/shivon-zilis-musk-associate-leaves-openai-board> [https://perma.cc/E2JV-ETT9]. Zilis also has ties to Elon Musk as he is the father of her twins. *Id.*



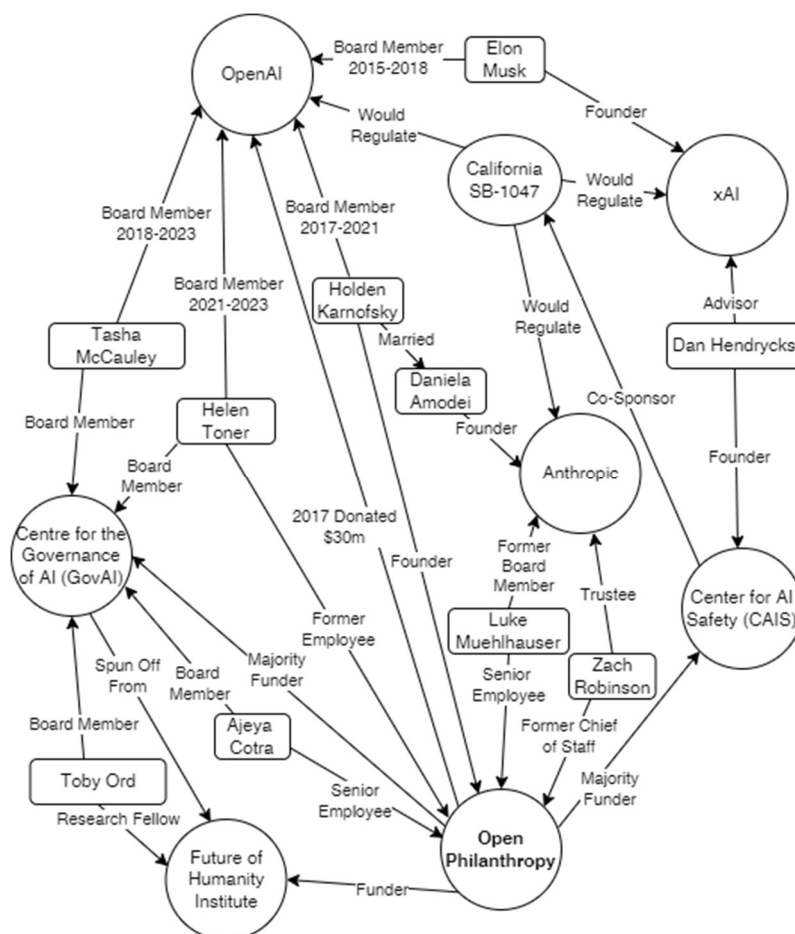
the board due to his 2024 presidential campaign.<sup>404</sup> On November 17, 2023, Altman was ousted from the OpenAI board.<sup>405</sup> That same day, Brockman was removed from the board and as board chairman, leaving it with four members: Adam D'Angelo, Helen Toner, Tasha McCauley, and Ilya Sutskever.<sup>406</sup>

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404. Biz Carson, *OpenAI Loses Third Board Member with Exit of Presidential Candidate Will Hurd*, BLOOMBERG (July 13, 2023), <https://www.bloomberg.com/news/articles/2023-07-13/republican-presidential-hopeful-will-hurd-leaves-board-of-openai> [https://perma.cc/SN83-M2KZ].

405. Loeber, *infra* note 407.

406. *Id.*

APPENDIX B: EFFECTIVE ALTRUISM'S INTERCONNECTEDNESS  
WITH AI FOUNDATION MODEL STARTUPS<sup>407</sup>

407. John Loeber, *A Timeline of the OpenAI Board*, SUBSTACK (Nov. 18, 2023), <https://loeber.substack.com/p/a-timeline-of-the-openai-board> [https://perma.cc/FM6Q-WWUS]; George Hammond, *Elon Musk launches xAI in challenge to dominance of ChatGPT owner*, FINANCIAL TIMES (July 12, 2023), <https://www.ft.com/content/19c4e4b5-b2dd-4c1e-a109-b500e504dbb6> [https://perma.cc/TD96-RWFS]; *SB 1047: Safe and Secure Innovation for Frontier Artificial Intelligence Models Act*, DIGITAL DEMOCRACY, [https://calmatters.digitaldemocracy.org/bills/ca\\_202320240sb1047](https://calmatters.digitaldemocracy.org/bills/ca_202320240sb1047) [https://perma.cc/8KBE-E93W]; Will Henshall, *Dan Hendrycks*, TIME (Sep. 7, 2023), <https://time.com/collection/time100-ai/6309050/dan-hendrycks/> [https://perma.cc/7FR8-YSZE]; *People*, CENTRE FOR THE GOVERNANCE OF AI, <https://www.governance.ai/people> [https://perma.cc/2T3K-J2RG]; Robert McMillan & Deepa Seetharaman, *How a Fervent Belief Split Silicon Valley—and*

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