Toward Fair and Sustainable Capitalism

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FAIR AND SUSTAINABLE CAPITALISM PROPOSAL

The American corporate governance system has failed to encourage long-term investment, sustainable business practices, and fair pay for workers. We have made public companies more responsive to the stock market's desires. Declines in gainsharing of corporate profits with workers, a large increase in stock buybacks, skyrocketing CEO pay, and growing inequality have resulted.

Despite the fact that our current corporate governance system is short-term oriented and does not work for all, the investment horizon of the ultimate source of most companies' funding—human beings saving for retirement and education—is long. That long-term horizon is much more aligned with what it takes to run a real business than the horizon of companies' direct stockholders, money managers under strong pressure to deliver immediate returns at all times. As diversified investors whose holdings track the overall economy, human investors do not benefit when companies offload the costs of their activities, such as carbon emissions and other pollution, onto others. And as people who breathe air, consume products, and depend on a job, human investors suffer when companies harm the environment, defraud or injure consumers, or offshore jobs to countries with low wages and few worker protections.

Human investors owe their wealth to their jobs. This is true not only for the poorer half of Americans; it is true for 99% of Americans. Human investors need companies to do business in a way that provides Americans with access to good jobs, sustainable wage growth, and a fair share of the wealth that businesses generate.

But, companies have increasingly failed to deliver on that promise. For about two and a half decades starting in the late 1940s, workers and investors shared in the wealth generated by a strong, growing economy. Since the 1970s, that social compact has frayed. Worker productivity has risen by about 70%, but hourly pay has grown by only 12%. Meanwhile, corporate profits have hit record highs.

American workers are more educated, more skilled, and are creating more corporate profits than ever, but have shared far less in the fruits of their labor.

And the COVID-19 pandemic only makes fairness and economic security for American workers a more urgent concern. Although American corporations had benefited from a 10-year economic expansion and substantial tax cuts, within days of the COVID-related shutdowns, corporations began to furlough thousands of workers because they did not have the reserves to maintain employment, even for a short while. Admittedly, even if our corporate governance system had encouraged companies to maintain sensible reserves, the pandemic would still have caused enormous harm to many businesses and their workers. But, the sharp tilt in our system toward risk and pleasing the stock market's desires for short-term returns left major corporations in far worse shape than needed to be the case.

The lack of fair gainsharing has been reflected in the data about the pay of the workers essential to keeping our society functioning, workers who on average are paid much less than most. That those taking on greater personal risk to keep us functioning through a crisis are not fairly paid for their work is something that a conscientious society must address. And the pandemic underscored the profound racial inequality in our economy. The pandemic hit Black Americans hardest as they suffered from higher unemployment and death rates compared to others and, for those likely enough to remain employed, were more likely to occupy the risky, but essential low-paid jobs.

The expenditures to address the pandemic have done nothing to address the deep inequities in our economy. We cannot allow the pandemic to postpone the reforms and investment needed to overcome them; we must instead pursue an even bolder agenda to better prepare for future shocks and make our economy operate on a fairer and more inclusive and sustainable basis. Those most important to making a fair capitalist economy function — its workers — must be at the forefront of that positive agenda for change.

PROPOSALS TO ACHIEVE A FAIR AND SUSTAINABLE CAPITALISM

To redress these problems, workers must be given more voice within the corporate boardroom. Companies should have board-level committees that ensure quality wages and fair worker treatment. A fundamental responsibility of that committee should be to guarantee that employees are again equitably rewarded when they help the company improve its profitability, to ensure that workplaces are safe for employees, and to oversee company policies promoting racial and gender pay equity and inclusive, harassment- and discrimination-free workplaces. Complementary labor law reforms making it easier for employees to join a union and bargain over wages are essential to restoring a fair American economy. That should be coupled with authority for companies to create European-style works councils under the workforce committee, to amplify worker voice at all American companies, improve worker well-being, and support and supplement the vital role unions play in protecting workers. And all bargaining and wage setting must occur against the strong backdrop of a living wage. Likewise, to hold companies accountable for how they treat their workers, how they treat their consumers, and whether they operate in an ethical, sustainable, environmentally responsible manner, the public and investors deserve better information about company performance on these critical dimensions.

The bailout of corporate America required by the pandemic reminds us that corporations only thrive with the support of our nation, the communities in which they operate, and the sacrifices of their workers, and that they should be managed with that reality in mind. To begin changing corporate governance to require respect of all stakeholders, large companies (whether publicly listed, or owned by a private equity firm or a rich family) receiving federal bailout money should be required to become a benefit corporation under state law. This form of for-profit corporation imposes a "shall" not "may" duty on the board of directors to treat employees and all company stakeholders fairly and with respect, not just the stockholders. This is a just condition of help, and will create a stimulus for

this more sensible model of corporate governance to become standard. This form of governance would go a long way to ensure that corporations are run in a sustainable fashion—producing strong returns for stockholders and workers while maintaining reserves to weather an economic crisis.

Nor can we ignore the role of institutional investors in pushing for immediate returns and the poor incentives that pressure puts on companies. Institutional investors wield over 75% of stockholder voting power, all but dictating corporate policy through their voting clout. And most middle-class Americans fortunate enough to be invested in the stock market are forced capitalists, who must save for retirement by turning over a portion of every paycheck to a mutual fund family chosen by their employer. Although reforms to how corporations are governed is crucial to ensuring our capitalist system once again works for everyone, corporations will not give more thoughtful consideration to their employees and social responsibility unless the institutional investors who elect corporate boards support doing so. Our imbalanced corporate governance system can be fixed only by aligning institutional investors' incentives with the interests of their end investors: human beings saving for retirement and their children's college education. To do so, the institutional investors who control most human investors' money must vote with their investors' needs in mind. Index funds should tailor their voting policies to the fact that they are invested for the long haul. To be fair, some institutional investors have started to consider environmental, social, and governance, or "ESG," factors. But if we want companies to operate in a sustainable, socially responsible manner, then all institutional investors who manage human investors' money need to factor EESG considerations into their investing and voting decisions, and emphasize the vital missing "E"—the interests of companies' employees.

If companies are spending too much on stock buybacks, taking environmental shortcuts, or failing to adequately compensate and invest in their workforce, that is likely because their stockholders—i.e., institutional investors—have exerted pressures on companies that encouraged this state of affairs. If the goal is to increase the gainsharing among corporations and their other stakeholders—workers, consumers, and society—that can be achieved only by aligning those doing the voting—institutional

investors—with the interests of their flesh and blood worker-investors who need not just sustainable corporate profits, but also good jobs, clean air, and safe products.

Other complementary measures would help promote sustainable, long-term economic growth that benefits all. We must reform counterproductive tax and accounting policies creating incentives for speculation and rapid portfolio turnover, rather than sound long-term investing. And our nation has economic challenges that must be addressed by public investment. A huge infrastructure and basic research gap is eroding our competitiveness and diminishing our quality of life. We need to supercharge our efforts to address climate change. With investments in basic research, cleaner, more efficient infrastructure, and worker training, we can create jobs in the United States, tackle climate change, help workers in carbon-intensive industries transition to new jobs, reduce racial inequality, revitalize struggling rural regions and urban cities, and enhance the competitiveness of American companies. By implementing tax policy that puts a price on behavior we want to have less of — and making corporations pay their fair share for infrastructure that supports them — we can finance investments in the future to create good jobs that cannot be sent overseas. These ideas would work well along with a responsible approach to carbon and wealth taxation to create a more progressive and socially productive tax system.

Finally, we must address legal changes that have given corporate elites an unfair advantage over working Americans, including Supreme Court and regulatory decisions that have undermined labor unions, deprived Americans of their day in court and fueled a massive growth in unchecked corporate political spending.

America's corporations are not playthings. They create jobs, produce goods and services that consumers depend on, affect the environment we live in, and build wealth for human investors to save for retirement and their kids' education. Corporations are societally chartered institutions of enormous importance. Those who govern them ought to be accountable for the generation of durable wealth for workers, consumers, and human investors. A new accountability system that supports wealth creation within a system of enlightened capitalism—one that aligns the interests of

institutional investors and corporations with those of the human beings whose capital they control—is needed. With some modest sacrifice by every interest that wields economic power, we can make our economy work better for all. This Proposal to promote Fair and Sustainable Capitalism would help make that goal a reality.

ENHANCING DISCLOSURE AND ACCOUNTABILITY FOR OPERATING COMPANIES ON EMPLOYEE, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE MATTERS TO PROMOTE SUSTAINABLE, LONG-TERM GROWTH AND GAINSHARING WITH WORKERS

Reforming our corporate governance system starts with operating companies. If companies do not make sustainable profits by selling useful products and services and treating their workforces well, our economy will not work. For institutional investors to support companies that behave in a socially responsible manner, they need the right information to hold companies accountable if they don't. And all Americans deserve quality information about how influential businesses treat their workers and consumers, and respect our environment, laws, and ethical standards. The Fair and Sustainable Capitalism Proposal therefore would:

- **Require large, socially important companies to annually report on their businesses' impact on workers, consumers, communities, the environment, and our nation.**
    - Under the Proposal, any company with more than $1 billion in annual sales must report its effect on employee, environmental, social, and governance matters ("EESG," with an extra "E" for employees), including climate change. The Securities and Exchange Commission ("SEC") would develop rules, in consultation with the Department of Labor ("DOL"), the Department of Commerce, the Department of Justice, and the Environmental Protection Agency, to standardize disclosure so that it is useful to investors, workers, consumers,

communities within which the companies operate, and other stakeholders, as well as regulators who protect the public. Reporting obligations would *not* be conditioned on whether the company's stock is publicly traded, avoiding the perverse effect of encouraging companies to go private or discouraging emerging companies from going public.

- **Require the boards of large, socially important companies to create workforce committees to address workforce issues at the board level.**
  - Union membership has declined from its peak of around 28% of the workforce in the 1950s to less than 11% today. And for those working in the private sector, union membership has become even rarer with only 6% of private sector workers represented by unions today, compared to 25% in 1975. Essentially, it has become harder for workers to bargain for fair wages, training that assures them continued employment, and a safe and inclusive workplace. In other countries, such as Germany, workers have the right to be represented on the company's board of directors through "codetermination." but foreign workers typically do not get the vote and it is not clear that codetermination fits with our economy. But many capitalist nations, even those without board-level codetermination, require that all large companies have a works' council requiring ongoing consultation with workers. The U.S. system stands out for its lack of corporate governance rules that require consideration of worker concerns.
  - To make sure that companies give board level consideration to worker concerns, the Proposal requires the SEC, the DOL, and the National Labor Relations Board to develop rules requiring the boards of companies with more than $1 billion in annual sales to have a committee focused on workforce concerns. By requiring these committees at all large corporations, not just public corporations, more accountability would be imposed on large private companies, such as those owned by private equity firms, to treat their workforce fairly. These workforce committees would focus on fair gainsharing between workers and investors, training that assures continued employment, and maintaining a safe, inclusive, and tolerant workplace. Workforce committees would also consider whether the company uses substitute forms of labor—such as contractors—to fulfill important corporate needs,

and whether those contractors pay their workers fairly and provide safe working conditions, and are not simply being used to unfairly inflate corporate profits. For public companies, integrating the concerns of workers into their existing—and mandated—compensation committee would shift the board's focus away from just the senior management's compensation to broader discussions around the company's strategy regarding fair gainsharing amongst all its workers and stockholders. Instead of proliferating another board committee, this Proposal suggests expanding the scope of the existing compensation committee to encompass all workers, and consider their pay levels relative to each other and their peers, race and gender pay equity, and the appropriate—and fair—gainsharing taking place between the companies' workers at all levels and its stockholders. By this means, companies will likely better constrain soaring top executive compensation and recognize the contributions of the entire workforce. The reconceived compensation committee will also be charged with ensuring that executive compensation is based in material part on how the company succeeds in meeting its EESG goals, and in fostering a racially and gender-inclusive, diverse, and discrimination- and harassment-free workplace. Offering a middle-ground between the current system and board-level, "codetermination"-style worker representation, the committees would be required to develop and disclose a plan for consulting directly with the company's workers about important workforce matters such as compensation and benefits, opportunities for advancement, and training.

- To that end, the National Labor Relations Act would be amended to permit companies to consult with their workers without running afoul of the Act's prohibition on "dominating" labor organizations, provided that the company doesn't interfere with, restrain, or coerce employees in the exercise of their rights to collective bargaining and self-organization. In essence, this would allow for European-style works councils. To further ensure that this reform amplifies and improves worker voice, and does not undercut unions or worker leverage, the required workforce committee would have to approve and oversee the company's use of these councils.

- **Change accounting rules to treat investments in human capital like other long-term investments and require companies to disclose more information in narrative form about their human capital investments.**
    - Accounting rules treat human capital investments as a cost expensed immediately instead of a long-term investment expensed over time. Given financial markets' focus on short-term results, this can lead corporate managers to underinvest in human capital. Providing similar accounting treatment to human capital investments as other long-term corporate investments would encourage companies to invest in their workforces. The Proposal requires the SEC to instruct the Financial Accounting Standards Board to treat investments in human capital as capital expenditures like investments in plants, property, and equipment, and the Commission to require additional narrative disclosure by companies about their investments in human capital.
- **Require companies to release basic information about their workforces so that there is a genuine basis for holding companies accountability for how they treat their workforce.**
    - The SEC has taken the admirable step of focusing more on the importance of workers to companies and requiring disclosures of investments in human capital. But, there is a risk that if the approach taken allows companies too much discretion in determining what to disclose, the public will not have the information to determine if companies are actually treating their workforces with respect (and any information won't be comparable across different companies). Therefore, certain baseline information should be disclosed by all companies, including information like total labor compensation, broken down between their domestic and foreign workforce, the total cost of each company's workforce (including wages, benefits and other payments), workforce turnover, workforce diversity, and similar information for workers who regularly provide services for the company through contractors.[1]

[1] Human Capital Management Coalition's May 1, 2020 letter to SEC Chairman Jay Clayton.

- **Require companies releasing quarterly earnings guidance to situate that guidance in the context of a long-term plan.**
    - No rational person believes that corporations can deliver consistent, quarter-to-quarter earnings growth nor that corporations should be managed with that objective in mind. Quarterly earnings estimates contribute to managing to the market in an unproductive way. Isolated company restraint is of little utility as competitive realities lead to a collective lack of discipline because CEOs fear the loss of analyst coverage if they refuse to feed the market beast and their competitors continue to do so.
    - Under the Proposal, the SEC must require any company that issues quarterly guidance to make public and keep current a long-term plan of at least four years for earnings growth and situate any quarterly guidance within the context of that long-term plan. By requiring companies to disclose long-term plans along with their forward-looking quarterly estimates, managers would focus more on long-term corporate growth and less on meeting short-term expectations, and institutional investors would have a roadmap to hold corporations accountable for sustainable performance.
- **Make it easier for large corporations to become benefit corporations and commit to fair treatment of their workers, consumers, society, and the environment.**
    - The Business Roundtable made a promising statement recognizing that businesses have a responsibility to treat all their stakeholders well. Skepticism exists about whether that statement is just talk. One way business leaders can move from rhetoric to real action is for the BRT to support having their corporations adopt the Benefit Corporation model. This model imposes on the board a "shall" duty to treat all stakeholders, and not just stockholders, with respect, even in a sale of the corporation. The model is conservative in that the only constituency with a vote remains the stockholders, and their support for social responsibility is what keeps the board accountable. The public benefit corporation model preserves all the protections against management self-dealing and fraud that are important to stockholders and other corporate stakeholders. Not only that, it requires the company to commit to being a responsible corporate citizen, having a positive statement of purpose, and doing business in an ethical, sustainable manner. The company must

disclose information about its fidelity to its stakeholders and purpose. The model authorizes enforcement suits for remedial action if a stockholder, such as a socially responsible investment fund, a pension fund, or a labor-affiliated fund, believes that the board is not living up to its required duties to stakeholders or society.

  - Unreasonable barriers to moving to this sensible model must be removed that require a supermajority vote or create a right to appraisal if an existing corporation is to merge into an existing Benefit Corporation. There is no principled basis for this discrimination against Benefit Corporations. A majority vote should be enough. The Proposal encourages state legislatures to amend their existing benefit corporation statutes to make it easier for corporations to convert to this sensible for-profit corporate model. And, if the BRT and institutional investors get behind this approach, entrepreneurs would have less reason to argue for giving themselves stock with special voting power to protect other stakeholders, because a one-share, one-vote model would exist that requires fair treatment of stakeholders.

- **Require companies that receive federal bailout money to convert to benefit corporations.**
  - The pandemic again highlights the reality that American corporations depend on support from their nation, states, local communities, and their workers. Government rescues of firms and company pension funds have been common in recent decades, and so too has the insistence on corporations of receiving large subsidies to keep plants operating or open new ones, shifting more of the state and local tax base from corporations to ordinary Americans.
  - It is time to recognize that companies themselves have a duty to all their stakeholders, and not just their stockholders. To create accountability for being helped by our nation and to set our corporate governance system on a more productive footing going forward, all large companies receiving federal bailout money should be required to become a public benefit corporation under state law, regardless of whether their shares are publicly listed.

STRENGTHENING INSITUTIONAL INVESTORS' OBLIGATIONS TO PROMOTE SUSTAINABLE, LONG-TERM GROWTH AND SERVE THE INTERESTS OF HUMAN INVESTORS

Companies cannot concentrate on creating long-term sustainable value for workers, investors, and other stakeholders if those who elect the board and vote on management's compensation care more about the next quarter than the company's ability to generate durable returns. Institutional investors dominate the governance of public corporations and must use their voting power in a way that is aligned with the interests of the worker-investors whose retirement and college savings they control.

But requiring institutional investors to account for the investment objectives and human realities of their worker-investors is not enough if they do not have information about the other investors—typically activist investors—making proposals to change a company's strategic direction. Requiring activist investors to disclose more information about their positions and the nature of their capital is necessary for the corporate electorate to make an informed vote. And hedge and private equity funds are able to escape giving full disclosure to investors, despite taking money from pension funds that many Americans rely on for retirement and from universities and charities that advance important, publicly subsidized purposes.

The Fair and Sustainable Capitalism Proposal would:

- **Require institutional investors to consider their ultimate beneficiaries' investment objectives and horizons, such as saving for retirement or education, as part of their fiduciary duties, and empower institutional investors to consider their ultimate beneficiaries' economic and human interest in having companies create quality jobs and act responsibly toward their consumers and the environment.**
    - Fiduciary duties must impose additional accountability upon institutional investors and free them to consider their beneficiaries' interests as human beings who are not just investors, but workers, parents, breathers of air, and citizens. Institutions do not have to vote in a way tailored to the specific investment objectives of their funds and their investors. Instead of considering the particular investment horizon or financial needs of the investors in each fund, the funds in the same fund family (*e.g.*, BlackRock, Vanguard, Fidelity, etc.) all tend to vote the same way. Most worker-investors are rational index fund investors and index funds do not exit until the portfolio stock leaves the index. But, index funds do not vote based on this unique stuck-in perspective. Rather, the index funds often vote the same way as the actively traded funds in the fund complex, even though active funds do not hold their investments for the long-term, and regardless of key factors such as whether the issue on the table is a stock-for-stock merger in which the index fund holds both the acquirer and the target. This situation must change.
    - Under the Proposal, institutional investors who take human investors' money, including mutual funds and pension funds, would be required to consider the investment objectives and horizons of their ultimate beneficiaries, such as saving for retirement, saving for their children's education, or investing in a socially responsible manner, when making voting and other stewardship decisions. Specific obligations would be imposed on index and pension funds to consider their investors' interests in sustainable, long-term growth and the diversified nature of their portfolios.
    - Likewise, institutional investors must not rely on proxy advisory firms unless the proxy advisor's recommendations are tailored to the fund's investment style and horizon. This would create incentives for proxy advisory firms to do better; and in particular, encourage

them to develop voting recommendations and policies tailored to index investors, who depend on economy-wide, sustainable wealth creation.

  - Critically, any institutional investor would be authorized to consider their ultimate beneficiaries' overall economic and human welfare, in determining how to prudently invest their funds for sustainable, ethical portfolio growth. This plain authorization for investment funds to consider EESG factors will eliminate any fear, heightened by the Trump Administration DOL's recent actions, that institutional investors cannot take into account the moral and ethical factors that human investors can consider.

- **Require institutional investors to explain how their voting policies and other stewardship practices ensure the faithful discharge of their new fiduciary duties and take into account the new information reported by large companies on employee, environmental, social, and governance matters.**
  - If we want operating companies to act in a sustainable and ethical fashion, then the institutional investors who wield voting power over them must make consideration of key EESG issues a central factor in their approach to overall stewardship of their portfolios and their investors and the public deserve information to determine if they are doing so.
  - Accordingly, the Proposal requires the SEC and the DOL, in consultation with other relevant agencies, to require institutional investors to disclose how their voting policies and other stewardship practices: (i) comply with the Proposal's newly imposed fiduciary duties; (ii) take into account the information that the Proposal would require large companies to disclose about their worker, environmental, social, and governance effect; and (iii) address the specific objectives of the institutional investors' ultimate beneficiaries. This requirement would parallel the EESG disclosure obligations imposed on companies, but be shorter and focused on how institutions factor these issues into their stewardship decisions.

- **Close loopholes so that activist hedge funds must make a full and timely disclosure of their economic interests in the companies they seek to influence.**
  - Institutional investors need up-to-date information about those making proposals affecting corporations' business plans and corporate governance rules. In the past,

shareholders did not often seek to pressure companies to take actions that changed fundamental corporate strategies in a way that affected other shareholders and, most important, employees. But today, shareholders—typically activist hedge funds— seek to do just that. Activists pose substantial risks for other shareholders, especially those with a long-term focus. Activists affect the interest of company employees, whose livelihood can be put in danger by proposals to pump up immediate profits in an unsustainable way. The entire corporate electorate must consider the proposals of activists, but cannot do so wisely without timely information on activist investors' incentives, economic interests, capital position, and holding periods.

- Activists must make a "Schedule 13D" filing with the Securities and Exchange Commission once they acquire 5% of the company's stock so their interest in the company is known to other investors. But loopholes allow activist investors to avoid making full and timely disclosure. More information about how the activists' economic interests align with the interests of the company's long-term investors is needed. If, for example, an activist is arguing for a company to cut its capital expenditures and pay a special dividend, but the activist is contractually required to sell its stock in three years because its fund must liquidate, other shareholders are entitled to know that. The current disclosure regime dates from the 1960s and does not address the market developments that allow—through techniques such as derivatives and all-day trading—the purchase of influential blocks of stock before the public knows what is going on. The rules must be changed to prevent activists from gaining creeping control without paying a control premium before disclosing their proposal to management and other investors. This will bring the United States current with other capitalist markets.
- The Proposal requires the SEC to revise its rules governing Schedule 13D disclosure so that: (i) the definition of beneficial ownership includes ownership of any derivative instrument that provides the opportunity to profit from an increase in the value of the subject security and any contract or device that allows the person to control the voting power of the equity security; (ii) disclosures of any short interest or ownership of a derivative instrument that allows the investor to profit from a decrease in the security's value are required; (iii) 13D

filers could not acquire additional shares (or derivatives) once the investor crosses the 5% threshold (for large-cap companies) or a 10% threshold (for smaller companies) until a 13D has been filed and available to the public for 24 hours; and (iv) disclosure is required of contractual or other arrangements that affect the filer's commitment or ability to hold the subject security, including the ability of the filer's investors, if any, to redeem or withdrawal their capital. Additionally, the "investment-only" exception to the Hart—Scott—Rodino filing requirements would be revised so that HSR filings do not function as a substitute for 13D and 13G filings for transactions that do not pose meaningful antitrust concerns.

- **Require an SEC study on the investor protection risks from private funds that are subject to only limited disclosure requirements.**
  - Hedge funds and private equity funds may now take funds from any "accredited investor" without providing standardized disclosure about past performance or other risks. This was intended as a "Thurston Howell" exception, because that iconic figure from Gilligan's Island was the sort of rich person policymakers believed could proceed at his own risk. That exception was never intended to allow funds on which Americans depend for their pensions, universities that educate our children, or charitable institutions to put money in risky investments not backed up by appropriate disclosures and standards of integrity. But pension funds, university endowments, and charities now qualify as accredited investors (and "qualified purchasers," effectively "super" accredited investors). They have been harmed by investing in opaque private equity and hedge funds. These losses hurt workers and society and can require taxpayers to fill the resulting holes. Hedge funds should not be required to disclose proprietary information about their trading strategies to the public. But pension funds and charities need enough reliable information to prudently assess whether the investment is appropriate for their portfolio on both a risk-return basis and on a cost basis.
  - The Proposal requires the SEC to submit a study to Congress on the investor protection risks of hedge and private equity funds subject to limited disclosure requirements. This study would assess: (i) the adequacy of the disclosures that private funds provide investors; (ii) whether fund managers adequately disclose their performance history; (iii) the fees charged

by these investment managers and whether certain classes of investors are paying more to access investments; (iv) whether fund managers offer superior investment terms to favored investors and whether disclosure about those favorable terms is available to other investors; and (v) whether the universe of accredited investors and qualified purchasers is appropriately defined to include only sophisticated investors who can fend for themselves. The study would also include recommendations about whether additional regulation is needed to address these concerns.

REFORMING THE CORPORATE ELECTORAL SYSTEM TO PROMOTE SUSTAINABLE, LONG-TERM GROWTH

Reforms at the company and institutional investor level must be supported by corporate electoral reform. We must reduce the continual mini-referendums and the huge number of votes shareholders must cast each year, which encourage companies to manage to the whims of the stock market and institutions to outsource voting decisions to proxy advisory firms. With fewer but more meaningful votes, we can have a vibrant accountability system better focused on whether corporations are producing profits in a responsible manner. To that end, the Fair and Sustainable Capitalism Proposal would:

- **Change the "say-on-pay" voting system to promote more thoughtful voting by requiring companies to hold shareholder votes on executive compensation once every four years (or sooner upon any material change in executive compensation) and present shareholders with a four-year plan for each vote.**
    - One impediment to thoughtful voting is the number of "say-on-pay" votes on executive compensation—over 2,000 per year—that institutional investors must cast at U.S. public companies. No one who cares about America's worker-investors believes that corporate executives should be paid based on year-to-year incentives. Management should be rewarded for creating sustainable corporate profits, and their pay contracts should therefore be long term in nature. But instead of voting on long-term pay plans on a sensible schedule, say-on-pay votes are held annually, and likely because of the

overwhelming number of these annual say-on-pay votes, academic research has found that institutional investors often rely heavily on proxy advisory firms in their voting on these resolutions.[2] CEO pay continues to rise faster than the pay of company employees overall, and annual say-on-pay voting isn't closing that gap.

- To allow more thoughtful voting by institutional investors, companies would be required to hold a say-on-pay vote every four years based on a pay plan covering at least the next four-year period, with a requirement that stockholders would have to approve any material amendment to the plan during that time period. The SEC would establish a schedule so that approximately 25% of public companies have a pay vote each year, allowing for informed voting on a four-year track record related to sustainable performance. This would realize the vision that Congress originally had for meaningful say-on-pay votes.
- Quadrennial voting would be consistent with and allow for more effective implementation of other innovative ideas to rationalize top executive pay. By having pay plans cover a four year period, boards and institutional investors will necessarily have to think longer term. If, in addition, top executive pay were simplified by, for example, requiring that top executives by paid in two forms of compensation, salary and bonuses, and that compensation take the form solely of either cash or restricted stock, it would be easier to evaluate the fairness of the pay plan and to ensure that top executive pay was tied to sustainable performance. Senator Warren's Accountable Capitalism Act has useful ideas along this line. As important, top executive compensation should not be based primarily

[2] *See* Yonca Ertimur, Fabrizio Ferri & David Oesch, *Shareholder Votes and Proxy Advisors: Evidence from Say on Pay*, 51 J. Acct'ing Research 951 (2013) ("[Proxy Advisor] recommendations are the key determinant of [say-on-pay] voting outcomes."); Nadya Malenko & Yao Shen, *The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design*, 29 Rev. Fin. Stud. 3394 (2016) ("Our analysis shows a strong effect of ISS recommendations on say-on-pay voting outcomes: we found that relative to positive recommendations, negative ISS recommendations lead to a 25 percentage point decrease in voting support for say-on-pay proposals from 2010 to 2011. In other words, ISS moves about a quarter of the votes in our sample."); Timothy M. Doyle, *The Realities of Robo-Voting* (American Council for Capital Formation, Nov. 2018), http://accf.org/wp-content/uploads/2018/11/ACCF-RoboVoting-Report_11_8_FINAL.pdf (finding "that 175 asset managers with more than $5 trillion in assets under management have historically voted with ISS on both management and shareholder proposals more than 95% of the time").

on total stock return, but must have as a key consideration the attainment of important EESG goals, such as environmental responsibility, legal compliance, and fair treatment of the work force.

- **Modify the SEC's shareholder proposal rule to require proponents of economic shareholder proposals to have a genuine stake in the company and modestly increase resubmissions thresholds so that economic proposals that repeatedly fail by large margins cannot continually be on the ballot.**
    - Modest changes to the rules governing shareholder proposals would increase the benefit to cost ratio of corporate voting. Although the SEC's shareholder proposal rule plays a salutary role overall, recent academic research has found that some proponents—especially small-stakes proponents making economic proposals—have been less than thoughtful in deciding which companies to target for proposals.[3] That finding is unsurprising: how actual worker-investors or corporate performance are aided by having hundreds of poorly targeted votes each year is difficult to understand. But what is certain is that institutional investors cannot rationally focus on all of them, limiting their ability to spend attention on legitimate proposals that may benefit the corporation.
    - These burdensome proposals are facilitated by outdated law, which allows a shareholder holding as little as $2,000 in the company's stock to make a proposal and have the company (and thus other shareholders and constituents like company employees) pay for the substantial costs of including the proposal on the corporate ballot and responding to it, generating too many proposals by shareholders with little stake in the company's future and overwhelming the capacity of the investors voting to inform themselves as to the

[3] *See* Yaron Nili & Kobi Kastiel, *The Giant Shadow of Corporate Gadflies*, 94 S. Cal. L. Rev (Forthcoming 2020) (finding that corporate gadflies—individual investors with little capital invested in the company—make up the vast majority of shareholder proposals and "tend to sponsor shareholder proposals at much larger companies, mostly those in the S&P 500, which may attract and be more sensitive to public opinion"); Tara Bhandari, Peter Iliev & Jonathan Kalodimos, *Governance Changes through Shareholder Initiatives: The Cost of Proxy Access* (Working Paper, Sept. 1, 2016), https://business.unl.edu/academic-programs/departments/finance/about/seminar-series/documents/Iliev.pdf (finding that proxy access proposals were not targeted at poorly governed companies but rather were most prevalent in large, well-governed companies).

proposals' merits. This should not be so. In most states, candidates for public office have to pay a reasonable filing fee. And, California requires a $2,000 filing fee for ballot initiatives. It is fair to ask the same of investors who seek to change the strategy or governance of a company.

- Accordingly, the Proposal requires the Securities and Exchange Commission to revise its shareholder proposal rule so that shareholders seeking to make an "economic" shareholder proposal, such as a proposal requesting the removal of takeover defenses, at company expense would need to hold the *lesser* of $2 million or 1% of the company's stock (with proponents having the option to aggregate their shares with any other shareholders willing to join in the proposal). This is an achievable number that shows that the proponents have a serious enough stake to justify the costs the proposal will have for others. It is like the requirement in states like California to get support from at least 5% of voters before a ballot initiative goes forward, but far easier and less costly to achieve. The Proposal would require a proponent of an economic proposal to pay a $2,000 fee to have the proposal placed on the corporate ballot. The Proposal also modestly increases the thresholds at which economic proposals that fail to gain a meaningful share of the vote can be excluded in later years. Currently, a proposal that gets as little as 3% of the vote can still be included in later years; under the Proposal, a proposal would be excludable if it fails to gain 5% in the first year, 10% in the second year, or 20% in the third year. This clock would reset after five years. This change would help investors focus more on the merits of economic proposals that are likely to gain wide support, and prevent repeatedly costing other shareholders corporate constituents time and money over proposals that have not garnered any substantial level of support. Importantly, these new requirements would *not* apply to EESG proposals, such as resolutions encouraging action on climate change, political spending, or fair worker treatment would be exempt from the new eligibility requirements. They apply strictly to profit-oriented economic proposals.

- **Require shareholders attempting to change a company's corporate governance—either by making shareholder proposals or soliciting proxies—to disclose their economic interest in the company.**
    - Activists seeking changes in a company's business plans or a breakup of the business have a huge effect on company employees and other shareholders. Institutional investors representing American worker-investors cannot fully consider an activist's proposal if they do not know whether the activist making the proposal has a genuine, long-term interest in the company's sustainable profitability.
    - To that end, the Proposal requires those making shareholder proposals or soliciting proxies to disclose in a clear and standard form their net beneficial ownership interest in the company's securities. Disclosure of their beneficial ownership interest would include any short interest or ownership of any derivative instrument or any contract or device that allows the person to control the voting power of the equity security.

UPDATING OUR TAX SYSTEM TO REDUCE SPECULATION, ADDRESS CLIMATE CHANGE, AND PROMOTE SUSTAINABLE GROWTH, INNOVATION, AND JOB CREATION

Any effective reform of our corporate governance system must include reforming the tax system to provide incentives for companies and investors to focus on sustainable wealth creation. A sensible fractional trading tax on all securities transactions ("FTT"), including transactions by 401(k) investors, and capital gains reform to make eligibility for the preferential long-term rate dependent on long-term investment would help investors focus more on sustainable returns. Taxes like these also discourage unproductive and destabilizing speculation of the kind that contributed to the financial crisis. Tax changes applicable to hedge fund managers' compensation can place everyone on the same playing field, ensure that the labor income produced by private equity and hedge fund executives is

taxed on the same basis as the sweat put in by other American workers, and help ensure that Wall Street pays its fair share of taxes. A substantial portion of these revenues, plus revenues from a requirement for all large companies to contribute 1% of their equity value over three years through a special assessment, should create an Infrastructure, Innovation, and Human Capital Fund to tackle climate change, secure America's position as a global leader in innovation and industries of the future, and create quality jobs to make our economy fairer and more racially inclusive. To work alongside appropriately designed carbon and wealth taxes to create a more progressive and socially productive tax system, the Fair and Sustainable Capitalism Proposal would:

- **Change the holding period for long-term capital gains from one year to five.**
    - Currently, an investment needs to be held for only one year to be considered "long term," which allows short-term investors to take advantage of the preferential low tax rate for genuine, long-term capital gains. The Proposal would change this to five years, promoting long-term investment and discouraging harmful speculation.
- **Establish a financial transactions tax.**
    - The Proposal would impose a modest tax on the trading of stocks, mutual funds, bonds, and derivatives. This small tax would moderate excessive speculation, curb high-frequency trading with no fundamental investment rationale that can contribute to financial system instability, encourage thoughtful long-term investing, and discourage irrational fund-hopping. These incentives will help institutional investors as well as mutual funds better concentrate on stable investment strategies focused on sustainable growth—the kind that allows for fair gainsharing with company workers and provides funds for investors when they retire. Estimated to generate over $2 trillion over 10 years, this tax should be used as a down-payment on important, long-term investments in sustainable growth. An FTT is supported by leading economists such as Nobel Prize winner Joseph Stiglitz.
    - The rate for this tax would be 0.5% for equity securities, 0.1% for bonds, and 0.005% for derivatives. Even at lower rates than this, an FTT would raise meaningful funds for reinvestment in our economy, dampen short-term speculation, and promote a longer-term investment perspective.

- **Close the carried interest loophole.**
    - Hedge and private equity managers pay a lower tax rate than average Americans because the bulk of their income is taxed at the preferential 20% long-term capital gains tax rate as so-called "carried interest," rather than at the ordinary income tax rate of 37%, even though they are effectively being paid for their labor. Because the Tax Cuts and Jobs Act of 2017 gave the majority of its tax breaks to wealthier Americans and increased the federal deficit substantially, closing the carried interest loophole is a fair way to restore some equity to the Tax Code, while helping to reduce the deficit and provide for other important national needs. The Proposal would close the carried interest loophole by requiring fund managers' compensation—in whatever form—be taxed as income, not as capital gains.
- **Create an Infrastructure, Innovation, and Human Capital Trust Fund With The Resulting Funds And Require Large Companies To Support The Fund With Contributions Over A Special, Three-Year Period.**
    - Our nation lags in infrastructure and research spending, hurting the ability of American businesses to compete globally and our economy's ability to create quality jobs.
    - The Proposal would transfer all the revenue raised by the FTT into an Infrastructure, Innovation, and Human Capital Trust Fund. Congress could spend capital in the Trust Fund on only basic research and development, revitalizing our nation's infrastructure in an environmentally responsible way that helps us redress climate change, and workplace training. In particular, as the United States transitions to less carbon-intensive energy production, those in carbon-intensive industries will require help transitioning their high-quality skills to the evolving skills needed to work with these new energy technologies. To that end, the funds in the Infrastructure, Innovation, and Human Capital Trust Fund could be used to provide training, support, and other assistance to help employees in carbon-intensive industries transition to quality employment in industries generating energy in non-carbon-intensive ways and to other emerging industries. This $2 trillion investment over the next 10 years can help create a sustainable, carbon-efficient transportation system and electrical grid, and aid the development of next-generation energy solutions, among other long-term, sustainable projects, while creating thousands

of well-paying jobs that cannot be shipped overseas. Importantly, the Fund should be required to make substantial investments in underserved communities, to require contractors to make special efforts to include Black people in training and employment opportunities, and pay all workers the prevailing wage.

- As a way to build an initial endowment and enable bolder action, the Fund should be increased in size by requiring large corporations to contribute 1% of their equity value during a special three-year period to the Fund in the form of cash or company shares. This would be a fair contribution to pay for the transportation, telecommunications, and other infrastructure so vital to corporate success. The Fund could take the form of an infrastructure bank to allow for companies to receive shares in the bank in exchange and thus to reduce any negative balance sheet effect for them. By this means, we would improve the fairness of our corporate governance system by shifting some of the responsibility for paying for critical infrastructure to the businesses that benefit from it.

CURBING CORPORATE POWER AND LEVELING THE PLAYING FIELD FOR WORKERS, CONSUMERS, AND INVESTORS

The power of workers declined during the last four decades. As unionization has diminished and minimum wage laws have not kept pace with the increased cost of living, worker pay has stagnated. The growing power of institutional investors and the stock market over companies has pressured companies to shrink the share of corporate profits that workers get and to transfer that value to stockholders. To help reverse these negative trends, corporations must pay all workers a living wage and negotiate with other higher waged workers against this floor. Instead of a minimum wage—which has a "set it and forget it" feature to it that reduces its purchasing power over time—a national commitment to a living wage should involve automatic annual revisions to ensure that forty hours of work per week are enough to make sure a family is above the poverty line.

We must also address challenges created in no small part by the United States Supreme Court, which have amplified corporate power at the expense of American workers, consumers, and human investors. *Citizens United v. Federal Election Commission* struck down the Bipartisan Campaign Reform Act, unleashing a massive growth in corporate political spending. And in a series of decisions blessing the increased use of forced arbitration, the Supreme Court has allowed businesses to deny workers, consumers, and human investors their day in court and has blocked states from exercising their sovereign right to decide how best to enforce their own laws. Recent decisions such as *Harris v. Quinn* and *Janus v. American Federation of State, County, and Municipal Employees, Council 31* have added to the difficulties for American workers seeking to exercise their right to form a union and collectively bargain. These adverse decisions came on top of existing statutory roadblocks to a majority of workers being able to seek greater gainsharing through collective bargaining.

Other proposals, such as the Do No Harm Act, should be enacted to correct the diminution in the rights of working people to receive minimum federally guaranteed benefits of employment, wrongly condoned by *Burwell v. Hobby Lobby*. But, to address the problems identified above, the Fair and Sustainable Capitalism Proposal would:

- **Require companies to pay a living wage to all workers**
  - To ensure that no one working to create value for our society is living in poverty, we must set and maintain a national living wage standard to ensure that the hourly wage companies must pay guarantees that a family of four is out of poverty. This means a minimum wage of at least $15 per hour, with annual automatic adjustments to keep it current with the cost of living. The problem with $15 is not that it is too high anywhere, the problem is that amount is too low in many places. Thus, any national floor should continue to allow state and local governments to adopt higher living wages, so that those working in high costs areas are not in effective poverty because they are paid only the national living wage.
- **Prohibit public companies from spending money on politics without the consent of 75% of their shareholders.**
  - Human investors do not invest their money for corporations to spend it on politics. Corporate political spending harms human investors seeking long-term sustainable

earnings. Businesses that have to lobby and rent-seek to get ahead are less profitable. Because human investors invest through index funds, any benefit that does accrue to one company through political lobbying is offset by harms to another and washes out for the index investor who holds the market. Worker-investors are taxpayers and it hits their economic bottom line if businesses externalize costs of unethical, unsustainable ways of doing business to the public in the form of environmental harm that must be cleaned up or injured workers or consumers.

  - The Proposal bars public companies from making any disbursement for a political purpose without first obtaining the consent, either for that specific disbursement or under a policy allowing disbursements of that type, of at least 75% of their shareholders. This provision tracks a proposal by the late John Bogle, the respected founder of the fund giant Vanguard.

- **Enhance fairness and restore state sovereignty over the enforceability of forced arbitration clauses.**
  - The United States Supreme Court has broadened the reach of the Federal Arbitration Act to cover disputes to which it was not intended to apply, thereby denying American workers and consumers their day in court by funneling them into secretive arbitration proceedings and denying them a fair opportunity to join together in a class action to seek redress. This interpretation of the FAA has also been applied to suits arising under state law, blocking the states from determining how to best enforce their own laws.
  - The Fair and Sustainable Capitalism Proposal would amend the FAA so that: (i) for employment, consumer, antitrust, securities, internal affairs, and civil rights disputes that arise under federal law, forced arbitration clauses would be enforceable only if applicable federal law other than the FAA (such as the Fair Labor Standards Act or other substantive law) makes them enforceable; and (ii) for employment, consumer, antitrust, securities, internal affairs, and civil rights disputes that arise under state law, forced arbitration clauses would be enforceable only if applicable state law makes them enforceable.

- **Reform the union election progress by adopting the Pro Act and authorizing sectoral bargaining to make it easier and more effective for workers to organize and collectively bargain with their employers.**
    - Giving more leverage to workers within corporate governance is a strong start on the path to increased gainsharing between workers and corporations. But working Americans also need the ability to collectively organize and bargain with their employers. At least since the Reagan Administration, the ability of American workers to use the rights guaranteed by the NLRA has been compromised, contributing to wage stagnation, inequality and a decline in fair gainsharing with workers. Recent decisions of the U.S. Supreme Court treat labor unions in a disfavored manner in comparison to corporations and deny unions the right to obtain fair payments from workers they represent. The Protecting the Right to Organize Act, allowing unions to collect "fair share" fees, facilitating first contracts between employers and newly formed unions to prevent management from stalling negotiations and discouraging the union movement before it can benefit workers, and closing loopholes in existing law that allow management to classify workers as independent contractors, should become law to address this decline in worker leverage. Sectoral bargaining should be promoted, so that companies do not compete on the basis of low wages, but on productivity and the quality of their products. This will help companies do the right thing by workers and operate in tandem with reforms to increase worker voice within the corporate power structure.

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The Fair and Sustainable Capitalism Proposal was influenced by the scholarship and thinking of many distinguished elected officials, public servants, academics, and thought leaders. A debt of gratitude is owed to all of them for their research and thinking on making our economy work better for all. Among the many sources considered and consulted in the preparation of the Proposal were:

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