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MYOPIC MADNESS:

BREAKING THE STRANGLEHOLD OF SHAREHOLDER SHORT-TERMISM TO ADDRESS CLIMATE CHANGE AND BUILD A SUSTAINABLE ECONOMY

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Abstract

This paper analyzes the impact of short-term shareholder profit maximization on environmental issues. The obsessive focus on quarterly returns at the expense of long-term investments produces perverse outcomes. These negative outcomes include often discussed economic issues such as increased income inequality and a lack of investment in research and development. Short-termism, however, also drives negative environmental externalities and prevents companies from adequately investing in reducing their environmental footprints. Finding that short-termism constitutes one of the primary impediments to building a sustainable economy, the author recommends three reforms to corporate and securities law: (1) require all businesses to become social benefit corporations, (2) mandate climate stress testing, and (3) allow new classes of shares that reward long-term investors.

I. Introduction

Since the 1970s, the idea that the primary focus of a corporation should be the maximization of profits for its shareholders has become embedded within legal and economic business norms.[1] However, as the impacts of climate change, as well as other environmental and social crises, become difficult to ignore, the idea of "sustainability," or "corporate social responsibility," has also emerged as part of the business dialogue.[2] Today, an increasing number of investors screen investments for environmental, social, and governance (often referred to as "ESG") factors, while both mainstream and boutique investment firms offer sustainable

[1] *See* Beate Sjafjell et al., *Shareholder Primacy: the Main Barrier to Sustainable Companies, in* COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 81-82 (Beate Sjafjell & Benjamin Richardson eds., 2015); Sarah E. Light, *The Law of the Corporation as Environmental Law,* 71 STAN. L. REV. 137, 139 (2019). This idea has been largely adopted from the work of Milton Friedman who argued "In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible . . . ." Milton Friedman, *A Friedman Doctrine–The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 33.

[2] *See* TURNING POINT: PROGRESS ON THE CERES ROADMAP FOR SUSTAINABILITY, EXECUTIVE SUMMARY, CERES (2018), https://www.ceres.org/resources/roadmap-for-sustainability/resources/executive-summary-0 [hereinafter Turning Point]. These days the term "sustainability" is used so frequently that its meaning may be unclear. Here and throughout this paper, I am referring to the management of environmental and social risks and opportunities in order to ensure long-term economic success. One might also see this definition as synonymous with the definition of sustainable development: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." GRO HARLEM BRUNDTLAND ET AL., OUR COMMON FUTURE: THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

investment product lines to consumers.[3] Likewise, businesses—feeling some pressure from consumers, investors, and employees—are developing strategies to disclose their environmental impacts and sustainability practices.[4]

Unfortunately, the existing programs are not at a scale or ambition large enough to address issues such as climate change.[5] Virtually all corporate sustainability initiatives in the United States are voluntary.[6] This voluntary nature leaves them subject to the chopping block if shareholders demand cost-cutting strategies to increase quarterly dividends.[7] Furthermore, shareholder primacy, with its focus on short-term returns, leaves companies hesitant to invest in sustainability initiatives that lack immediate payouts.[8]

This paper will explore the challenges of building a sustainable economy while corporations continue to prioritize short-term returns over long-term investments. Part I of this paper will explore how short-termism drives environmental, social, and economic harm, as well as how the law underpins the current short-term, investor-focused paradigm. Part II of this paper will consist of two case studies, designed to illustrate how short-termism undercuts sustainability efforts. Finally, Part III of this paper argues for moving to a corporate model focused on long-term sustainability by implementing legal reforms such as requiring the adoption of social benefit corporation principles by all corporate

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[3] *See* REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 1, U.S. Forum for Sustainable & Responsible Inv. (2018), https://www.ussif.org/files/Trends/Trends%202018%20executive%20summary%20FINAL.pdf ("Sustainable, responsible and impact (SRI) investing in the United States continues to expand at a healthy pace. The total US-domiciled assets under management using SRI strategies grew from \$8.7 trillion at the start of 2016 to \$12.0 trillion at the start of 2018, an increase of 38 percent. This represents 26 percent—or 1 in 4 dollars—of the \$46.6 trillion in total US assets under professional management.").

[4] Turning Point, *supra* note 2.

[5] *See id.* For example, Ceres found that, of the 600 largest publicly traded companies in the United States, 64% have commitments to reduce greenhouse gas. However, only 36% set time-bound, quantitative targets to reduce GHG emissions, and only 9% have targets equivalent to reducing GHGs 25% below a 2005 baseline.

[6] *See* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L. J. 923, 944–45 (2019) (discussing the voluntary nature of corporate sustainability disclosures in the United States).

[7] *See id.* at 948 (discussing the practice of greenwashing and the tendency for companies to focus on sustainability in areas where they are already highly sustainable while ignoring the areas where they struggle); *see also* James W. Coleman, *How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations with Their Securities Disclosures*, 40 HARV. ENVTL. L. REV. 47, 70–74 (2016) (demonstrating how companies send inconsistent messages depending on the audience with which they are communicating; in particular, companies look to assuage investors' concerns by minimizing potential regulatory risks).

[8] *See* Emeka Duruigbo, *Tackling Shareholder Short-Termism and Managerial Myopia*, 100 KY. L.J. 531, 531 (2012) ("[C]orporate managers, responding to pressure from investors or acting to bolster their own position, advert their attention and exert their energies to achieving short-term profitability, virtually eschewing longer-term considerations."); David Millon, *Shareholder Social Responsibility*, 36 SEATTLE U. L. REV. 911, 911–12 (2013) (explaining how corporate responsibility efforts are threatened by short-termism among shareholders).

forms, mandatory climate stress testing, and new ownership shares that reward long-term investors.

A. The Problem: Short-termism

Short-term thinking is a problem that plagues modern capitalism.[9] The drive for short-term financial gains results in sacrificing the long-term investment and planning that is essential to a sustainable economy.[10] This section will discuss the current short-term paradigm. Part A of this section will seek to define short-termism. Part B of this section will examine how short-termism contributes to social and environmental harm. Part C of this section will describe how the law reinforces the current short-term, investor-focused paradigm.

1. Short-termism: A definition

Short-termism is the disproportionate focus on near-term results, such as quarterly earnings, at the expense of long-term planning and performance.[11] Short-termism grew out of the transition from manager-owned companies to investor-owned companies.[12] As Steven Rosenblum describes, the emergence of a professional management class produced concerns that these managers would pursue their own interests at the expense of the interests of the owner-shareholders.[13] Consequently, the later part of the Twentieth Century saw the rise of shareholder primacy.[14]

Unfortunately, shareholders' interests do not always align with the long-term sustainability of the companies they hold.[15] Many investors, especially hedge

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[9] *See* Steven A. Rosenblum, *Hedge Fund Activism, Short-Termism, and A New Paradigm of Corporate Governance*, 126 YALE L.J. F. 538, 538–39 (2017) ("Short-term pressures that suppress investment in research and development, productive assets and future business opportunities are hurting our corporations and our broader economy."); *see also* Duruigbo, *supra* note 8.

[10] *See* Millon, *supra* note 8, at 917–19 (discussing how a focus on short-term returns jeopardizes long-term sustainability).

[11] Duruigbo, *supra* note 8, at 536 ("Short-termism has been defined as 'a preference for actions in the near-term without due consideration of the long-term consequences.' The Business Roundtable describes it as 'the excessive focus of some corporate leaders, investors, and analysts on short-term, quarterly earnings and a lack of attention to the strategy, fundamentals, and conventional approaches to long-term value creation.'").

[12] Rosenblum, *supra* note 13, at 540 ("The problem of short-termism in the modern public company is an outgrowth of the evolution of the structure and nature of equity ownership.").

[13] *Id.* ("As corporations grew in size and complexity, owner-managers gave way to professional management in larger companies. Academics who studied this phenomenon referred to it as the 'separation of ownership from management.' They posited that the central issue for the modern corporate form was the 'agency problem,' i.e., the concern that professional manager-agents would pursue their own self-interest at the expense of the shareholder-principals.").

[14] *See id.* at 541 ("[Concerns about management] led the academic literature to latch on to hostile takeovers, and then to ever-increasing shareholder powers and rights, as the means to address the agency problem and to "discipline" potentially wayward manager-agents.").

[15] *See id.* at 543 ("Although it is overly simplistic to lump all hedge fund activism in a single bucket, the typical activist hedge fund playbook focuses on short-term financial engineering—such as taking on debt and buying back stock or paying special dividends, selling or spinning off a division, or selling the company as a whole. These steps generally do nothing to enhance the long-term business

fund money managers, receive compensation based on short-term stock performance.[16] Furthermore, many money managers make buying and selling decisions based solely on stock price with only limited investigation into the company.[17] As a result, shareholders with short-term horizons often pressure corporate management to pursue strategies that raise near-term stock prices, such as share buyback programs.[18]

Although most often associated with investors, short-termism infects corporate management practices as well.[19] Managers describe concerns that missing the quarterly earnings estimates developed by shareholders will result in a large-scale sell-off of shares, which in turn will produce a decline in stock prices, which will ultimately cost them their jobs.[20] Moreover, the practice of linking executive compensation to stock prices creates a personal incentive for management to focus on stock performance at the expense of investing in other aspects of the business.[21] Other factors—including reputation, fending off hostile takeovers, as well as "widespread acceptance of short-termism"—undoubtedly

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operations of a company. Indeed, they tend to undermine long-term investment in research and development, productive assets, and future business enterprises. This misplaced focus runs the risk of diverting companies from what should be their central goal—the sustainable production of goods and services that people desire and use."). This is certainly not true of all shareholders, some of whom develop deliberate strategies focused on maximizing long-term returns. *See* Millon, *supra* note 8, at 914 ("Not all institutions subscribe to short-term investment philosophies. Some invest with the goal of realizing long-term value. Bushee calls these the ""dedicated"—patient—investors. Others are passive indexers who build portfolios that mirror the stock market as a whole and engage in trading only infrequently. Nevertheless, there is broad agreement that short-termism is widespread in the current investment landscape.").

[16] *See* Rosenblum, *supra* note 13, at 542. ("Money managers are often evaluated and compensated based on short-term performance and, consequently, have incentives to invest with a short-term time horizon."); *see also* Duruigbo, *supra* note 8, at 539 ("Because many of these institutions engage in quarterly evaluation of their fund managers' performance, the fund managers have little option than to deploy their efforts into delivery of short-term returns, often necessitating putting pressure on investee companies to focus on maximizing near-term profits.").

[17] *See* Millon, *supra* note 8, at 913 ("Traders respond to share price movements and are largely unconcerned with underlying company fundamentals and possible differences between current share price and long-run value.").

[18] *See* Duruigbo, *supra* note 8, at 536–38 ("Shareholder short-termism is said to manifest in two major ways, namely 'pressure' and 'walk.' Some shareholders' penchant for quick returns on investment puts pressure on corporate managers to be fixated on short-term results, even at the expense of long-run performance. Besides, shareholders have a tendency to prefer "exit" to "voice." That is, they would rather sell their stock if dissatisfied with corporate management than stay in and affect direction of corporate policy.").

[19] *Id.* at 536 ("Short-termism may exist both in investing and in corporate management . . ."); *see also* Millon, *supra* note 8, at 913–17 (describing how short-termism manifests among both investors and managers).

[20] *See* Millon, *supra* note 8, at 915 (describing how CEOs and others in upper management are likely to be fired if they miss their quarterly earnings targets).

[21] *Id.* at 916 ("Executive compensation arrangements typically include a significant equity component in the form of stock grants or stock options. This gives managers a personal stake in stock price movements.").

contribute to management's short-term focus.[22] Regardless of the cause, this mixture of manager and investor short-termism produces a corporate culture that far too often overlooks critical long-term risks and opportunities in favor of a myopic focus on the next quarter.[23]

2. Short-termism: An environmental & economic trap

Since 1988, just 100 companies are responsible for approximately 71% of the world's greenhouse gas emissions, and more than half of global industrial emissions can be traced to just 25 corporate and state-owned entities.[24] In 2015, publicly listed companies were responsible for at least 20% of global greenhouse gas emissions.[25] Some of the highest emitters among investor-owned companies are the so-called "oil majors"—ExxonMobil, Shell, BP, and Chevron.[26] Yet, if fossil fuel companies continue to extract at the same rate as they have been over the past three decades, the global average temperature is expected to increase by at least 4°C by the end of the century.[27]

The results of this "business as usual" emissions pathway would be catastrophic.[28] Four degrees Celsius is twice the upper bound for global average temperature increases established by the Paris Climate Agreement and more than twice the 1.5°C set as the aspirational goal of the Agreement.[29] As the Intergovernmental Panel on Climate Change's (IPCC) Report on 1.5°C indicated, anything more than a 1.5°C increase in global average temperature risks triggering feedback loops that could forever alter human society and decimate global biodiversity.[30]

Despite this knowledge few companies have committed to a binding strategy for reducing greenhouse gas emissions.[31] This is largely due to a corporate focus on short-term pressures at the expense of long-term investments.[32] While progress has occurred in areas such as energy efficiency, where reducing

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[22] *Id.*
[23] *Id.* at 917 ("The consequence of this shared outlook is a tendency for corporations to sacrifice long-run value for short-term stock price performance.").
[24] PAUL GRIFFIN, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 8 (2017), https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772.
[25] *Id.* at 10.
[26] *Id.* at 8.
[27] *Id.* at 7.
[28] *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014, IMPACTS, ADAPTATION, AND VULNERABILITY, PART A: GLOBAL AND SECTORAL ASPECTS 13–14 (Working Group II ed., 2014) https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf.
[29] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.
[30] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS, 7–11 (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf.
[31] Turning Point, *supra* note 2.
[32] *See* Millon, *supra* note 8, at 928–29 (discussing how short-term focused shareholders perceive to corporate sustainability initiatives).

greenhouse gas emissions can lead to relatively immediate cost savings, many deep mitigation strategies, which may appear as an expense on the balance sheet for years at a time, have not yet been adopted. Companies looking to maximize investor returns each quarter are often unwilling to wait much longer than that for a return on their investment.[33]

Short-termism is not just bad for the environment, it is a poor economic strategy and detrimental to society.[34] Since the 1980s the primacy of investors and corporate America's focus on maximizing quarterly dividends has produced perverse results. Today economic inequality has reached an all-time high.[35] This is driven in large part by stagnated wages while investment incomes have soared.[36] Rather than invest in workers or research and development, companies use profits to organize share buyback programs which artificially inflate investor returns.[37] As investors come to expect these inflated returns, they demand them from the companies they hold, further limiting a company's ability to make investments necessary for the long-term.[38]

In the face of climate change the risks of continuing to focus on the next quarter's profits are increasingly clear to everyone but corporations. The drumbeat

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[33] *See id*. at 912 ("Whether undertaken for strategic or ethical reasons, spending money to promote nonshareholder interests reduces current earnings. Even if there is the prospect of a net financial benefit to the corporation, it will not come to pass, if it does at all, until some future time. Meanwhile, investors have lost value. Thus, short-termism not only jeopardizes research and development, capital investment, and the like, but also impedes expenditures on CSR initiatives.").

[34] *See* Matteo Tonello, THE CONFERENCE BD., Revisiting Stock Market Short-Termism 7 (2006) ("On a macro-economic level, short-term visions are the cause for market volatility and the instability of financial institutions. From the micro-economic standpoint, they undermine management continuity and expose a public company to the risk of losing sight of its strategic business model, compromising its competitiveness. In addition, the pressure to meet short-term numbers may induce senior managers to search for a number of business costs (i.e. the cost of a state-of-the-art pollution control system) to externalize, often to the detriment of the environment and future generations."); *see also* Rosenblum, *supra* note 13.

[35] Taylor Telford, *Income inequality in America is the highest it's been since Census Bureau started tracking it, data shows*, WASH. POST (Sept. 26, 2019, 12:57 PM MST), https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/.

[36] Michael Nau, *Economic Elites, Investments, and Income Inequality*, 92 SOCIAL FORCES 437, 437 (2013).

[37] *See* Annie Lowrey, *Are Stock Buybacks Starving the Economy?*, ATLANTIC MONTHLY (July 31, 2018), https://www.theatlantic.com/ideas/archive/2018/07/are-stock-buybacks-starving-the-economy/566387/ ("Federal Reserve data show that buybacks are now equivalent to 4 percent of annual economic output, up from zero percent in the 1990s. Companies spent roughly $7 trillion on their own shares from 2004 to 2014, and have spent hundreds of billions of dollars on buybacks in the past six months alone."). If the money used for stock buybacks were given instead spent on raises, workers would see thousands of extra dollars in their bank accounts. *See id.* ("How much might workers have benefited if companies had devoted their financial resources to them rather than to shareholders? Lowe's, CVS, and Home Depot could have provided each of their workers a raise of $18,000 a year . . . Starbucks could have given each of its employees $7,000 a year, and McDonald's could have given $4,000 to each of its nearly 2 million employees.").

[38] *See* Duruigbo, *supra* note 8.

of climate action has led to the emergence of mainstream concerns about stranded fossil fuel assets and calls for oil and gas companies to manage their transition to renewable energy companies.[39] However, other than some symbolic actions, few meaningful changes to the way fossil fuel companies operate have materialized.[40] Instead, corporate boards and shareholders seem largely content to try to squeeze out as much profit as possible, while delaying significant changes to business practices.[41]

3. Short-termism: Imbedded in law & norms

Unfortunately, corporate and securities law, more often than not, has been interpreted to support the norms of short-termism and shareholder primacy. For example, the Securities and Exchange Commission (SEC) spent years resisting attempts to incorporate specific sustainability disclosure requirements into corporate financial filings.[42] Since the 1970s, the SEC has maintained the position that companies need only disclose economically relevant information to investors.[43] While the SEC has come to recognize that some environmental issues

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[39] *See* Jean-François Mercure et al., *Macroeconomic impact of stranded fossil fuel assets*, 8 NATURE CLIMATE CHANGE, 588, 588 (2018) ("[T]he magnitude of the loss from [stranded fossil fuel assets] may amount to a discounted global wealth loss of US $1–4 trillion . . ."); *see also* Coral Davenport, *Climate Change Poses Major Risks to Financial Markets, Regulator Warns*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/climate/climate-financial-market-risk.html (reporting on efforts by a commissioner of the Commodity Futures Trading Commission to raise awareness about the potential for a climate change-caused market collapse).

[40] *See* Griffin, *supra* note 32 (discussing fossil fuel companies' continued focus on extraction). Despite some oil companies publicly voicing support for policy initiatives such as the Paris Agreement, in the three years following the Agreement's enactment, the five largest publicly traded oil companies have spent $1 billion opposing action on climate change mitigation policy. INFLUENCEMAP, BIG OIL'S REAL AGENDA ON CLIMATE CHANGE (Mar. 2019), https://influencemap.org/report/How-Big-Oil-Continues-to-Oppose-the-Paris-Agreement-38212275958aa21196dae3b76220bddc.

[41] *See* Millon, *supra* note 8, at 27–28 and accompanying text.

[42] Fisch, *supra* note 6, at 934–38 (discussing the SEC's approach to sustainability reporting).

[43] *Id.* In 1971, the SEC rejected a rulemaking petition by the Natural Resources Defenses Council and Project on Corporate Responsibility seeking specific environmental and civil rights disclosures. Nat. Res. Def. Council, Inc. v. SEC (*NRDC I*), 389 F. Supp. 689, 694 (D.D.C. 1974). Embedded in this decision is the idea the environmental issues are not materially relevant for business or investors. *See* Nat. Res. Def. Council, Inc. v. SEC (*NRDC II*), 606 F.2d 1031, 1049, 1056-57 (D.D.C. 1979) (dismissing NRDC's case because "environmental concerns to some extent run counter to the SEC's primary mandate of financial protection of investors"). The SEC defines what is economically relevant based upon the Supreme Court's discussion of "materiality" in *TSC Indus., Inc. v. Northway*. *See* TSC Indus., Inc. v. Northway, 426 U.S. 438, 449 (1976) (defining materiality as producing "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"). This definition leaves what is material up to one's interpretation of what a reasonable investor would be interested in. Thus, if one's reasonable investor is focused only on short-term profit maximization, sustainability issues might not reach the materiality threshold. *See* Light, *supra* note 1, at 169–70 ("Silence on a matter is not actionable unless there is a specific duty to disclose information, or if the failure to disclose creates a misleading impression. Thus, what the 'reasonable investor' cares about is paramount.").

are economically material, progress in developing adequate disclosure requirements has stalled under the Trump administration.[44]

Additionally, a key component of corporate law is the principle that corporate directors owe a fiduciary duty to corporate shareholders.[45] Although some debate exists about how this duty impacts corporate directors' ability to account for non-shareholder interests, the case law does not broadly support those academics who contend that directors can make decisions opposed to short-term profit maximizing interests without fear of litigation.[46] For example, in *Dodge v. Ford Motor Co.*, the Michigan Supreme Court sided with shareholders, declaring that the Board's decision to forgo paying dividends, in order to invest in the company's employees and operations, constituted a breach of the directors' fiduciary duty to the company's investors.[47]

Furthermore, one of the central norms of corporate America is the equal treatment of all shares of the same class.[48] This norm does not reflect the reality

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[44] *See* Fisch, *supra* note 6, at 937–38 (describing the SEC's approach to climate change disclosures). In 2010, the SEC released formal guidance advising companies to disclose material climate impacts as part of their Regulation S–K disclosures. Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 61,469, 75 Fed. Reg. 6289, 6290 (Feb. 8, 2010). However, even under the Obama Administration, enforcement in line with this guidance was perfunctory, and has proven to be non-existent under the Trump Administration. *See* Robert Repetto, *It's Time the SEC Enforced its Climate Disclosure Rules*, INT'L INST. FOR SUSTAINABLE DEV. (Mar. 23, 2016), https://www.iisd.org/blog/it-s-time-sec-enforced-its-climate-disclosure-rules (calling for the SEC to increase enforcement); Alexandra Semenova, *SEC Stops Prodding Companies to Detail Climate Change Impacts*, BLOOMBERG LAW (July 16, 2018, 2:31 AM), https://perma.cc/NS4Q-HDJB (reporting that SEC "last issued a climate change-related public comment letter in September 2016").

[45] *See* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) ("[D]irectors owe fiduciary duties of care and loyalty to the corporation and its shareholders."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 26 (Del. Ch. 2010) ("All directors of Delaware corporations are fiduciaries of the corporations' stockholders."); *see also* Christopher Geczy, et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 75 (2015) ("[A] a corporate board's duty is to maximize shareholder value . . . is a popular and influential view supported de jure through case law and de facto through the assignment of votes exclusively to shareholders.").

[46] *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (finding corporate directors breached fiduciary duty when they refused to issue special shareholder dividends); *eBay Domestic Holdings, Inc.*, 16 A.3d at 33 (holding Craigslist could not adopt measures to protect the "corporate culture" unless "[p]romoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders."). For discussion of business judgement rule as a "safe harbor," *see* Light, *supra* note 1, at 181–85 (describing the business judgement rule as insulating directors from shareholder litigation if they choose to forgo short-term shareholder profits in an effort to promote long-term value).

[47] *See Dodge*, 170 N.W. at 684 ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.").

[48] *See* Duruigbo, *supra* note 8, at 566 ("The equal treatment of shares of the same class is considered a bedrock principle of American corporate culture.").

that not all investors are equally valuable to a company. Academic studies indicate that for companies to successfully pursue long-term objectives, they require a core group of investors committed to holding the stock for the long-term.[49] In today's stock market, where the average share is held for just six months, it is difficult for publicly traded companies to establish this core constituency.[50] If companies are going to build a base of long-term shareholders, companies must abandon the norm of treating shares equally, no matter if those shares have been held for a month, a year, or a decade; instead, companies must reward long-time stock owners.[51]

II. Case Studies

To illustrate the way short-termism undermines corporate responsibility efforts including those efforts of companies actively trying to transition to more sustainable business practices, this paper offers two case studies. Part A of this section is a case study of NRG, an independent energy producer whose efforts to divest from fossil fuels and reinvest in renewable energy was hampered by investor demand for quarterly dividends.[52] Part B of this section is a case study of the major U.S. banks and how their environmental finance goals are undermined by ongoing lending to fossil fuel companies.[53]

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[49] John H. Matheson & Brent A. Olson, *Corporate Law and the Longterm Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313, 1371-72 (1992) (observing that a core base of long-term investors is vital to a corporation's implementation of a long-term mandate).

[50] *See* P. Alexander Quimby, *Addressing Corporate Short-Termism Through Loyalty Shares*, 40 FLA. ST. U. L. REV. 389, 395 (2013) ("In 2009, the average stock turnover appears to have exceeded 250% (changed hands two and a half times), compared to 78% a decade ago, and 21% barely 30 years ago. Mutual funds—which are the primary 401(k) contribution investors for Americans—turn over 117% of their stock portfolio a year, while hedge funds turn over 300% annually. The presence of short-termism from other vantage points is also readily apparent. The stockholder base of public companies now turns over nearly 100% every year. On the New York Stock Exchange, stocks were held for—on average—between five and nine years from 1945 to 1975, for three years by 1980, and for less than one year by 2005. Overall, the average holding period for United States equities is just six months.").

[51] *See* Duruigbo, *supra* note 8, at 567-68 ("[T]he chances of getting that core of shareholders are miniscule without a change in the structure of the corporation to really empower shareholders in return for their loyalty."); *see also* Quimby, *supra* note 58 at 400 (promoting the idea of loyalty shares and enhanced voting rights for long-term shareholders); Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541 (2016) (calling for time-phased voting in which long-term shareholders get more votes than short-term shareholders). While in some jurisdictions abandoning the norm will require legislation, in others, such as Delaware, corporate directors could make this change on their own. *See* Duruigbo, *supra* note 8, at 566 ("Delaware law only requires fair, but not necessarily equal, treatment of all shares by the directors. Where there is a corporate benefit behind the treatment, the fairness requirement is satisfied. An argument could be made that unequal treatment is permissible in circumstances where the object is the protection of the company and shareholders from serious damage by other shareholders.").

[52] *See infra* notes 62–82 as well as accompanying text.

[53] *See infra* notes 83–92 as well as accompanying text.

A. NRG: Hedge fund takeovers

NRG is an independent power producer (IPP).[54] IPPs, unlike utilities, do not own electricity or gas transportation systems—i.e. wires or pipelines. Instead, IPPs own electricity generation infrastructure and sell the power they produce on the open market to utilities, businesses, and individuals. NRG is one of the largest IPPs in the country, with approximately 23,000 MW of generation in its portfolio and 3.1 million customers across the United States.[55]

NRG's CEO David Crane was fired for trying to transition one the nation's largest greenhouse gas polluters into a leading renewable energy generator.[56] In early 2014, Crane wrote a letter to NRG shareholders that outlined the company's role in climate change and laid out a vision for the transformation of NRG to a "distributed generation" company built around home solar and battery backup.[57] Crane wrote: "The day is coming when our children sit us down in our dotage, look us straight in the eye, with an acute sense of betrayal and disappointment in theirs, and whisper to us, 'You knew . . . and you didn't do anything about it. Why?'"[58]

While investors tolerated his proposals for a few years, when the rubber met the road in 2016, Crane was fired.[59] Investors and the NRG board of directors could not fathom what a transition would entail, and were not willing to wait out the transformation process.[60] They wanted returns now.[61]

The story does not end there, however. Crane was replaced as CEO by his COO, Mauricio Gutierrez, and for much of 2016 the transition laid out by Crane continued in a less aggressive form.[62] Then, in 2017, two hedge funds, Elliott

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[54] *Our Story*, NRG, https://www.nrg.com/about/our-story.html (last visited December 1, 2019) [hereinafter NRG].
[55] *Id.*
[56] David Whitford, *The Green Evangelist Who Scared The Energy Business Straight*, VANITY FAIR: HIVE (Feb. 21, 2017), https://www.vanityfair.com/news/2017/02/david-crane-nrg-energy.
[57] *Id.*
[58] *Id.*
[59] *See* Rebecca Smith, *NRG Energy CEO David Crane Resigns*, WALL STREET J. (Dec. 3, 2015) https://www.wsj.com/articles/nrg-energy-ceo-david-crane-resigns-1449151435.
[60] *See* Whitford, *supra* note 64 ("Investors will say they want companies to disrupt themselves before they get disrupted, but shareholders, executives, employees, and board members rarely want to volunteer for the short-term sacrifices needed to make change happen."); *see also* David Crane, *If I was right, why was I fired?*, GreenBiz (Jan. 12, 2016), https://www.greenbiz.com/article/if-i-was-right-why-was-i-fired ("CEOs' attempts at internal transformation—even when essential—often end badly. . . . this lack of investor appetite for internal transformation is a dangerous inhibitor to corporate change—change which, in NRG's case, was both essential to its long-term viability and highly desirable from a societal perspective.").
[61] *See* Whitford, *supra* note 64 ("Things came to a head during NRG's second-quarter earnings call that August, dominated by growing concerns from analysts about NRG's sinking share price. Stephen Byrd from Morgan Stanley asked pointedly about the "cash drag" from home solar, and Greg Gordon of Evercore ISI wondered if maybe it wasn't time to consider separating brown from green. Crane had lost the faith of analysts and shareholders. He was about to learn that he also had lost the faith of his board.").
[62] *See* NRG, *supra* note 62 (describing how the company is building "sustainability solutions").

Associates LP (Elliott) and Bluescape Energy Partners LLC (Bluescape), collaborated to purchase a combined 9.4% stake in NRG.[63] Their rationale for buying nearly 10% of the company's stock was to increase shareholder value by forcing "operational and financial improvements as well as [changes to] strategic initiatives."[64] The company's board capitulated in less than a month. Pursuant to the terms of the cooperation agreements reached with Elliott and Bluescape, two board members (including the Board Chair) retired.[65] C. John Wilder, Bluescape Energy Partners' Executive Chairman, and Barry Smitherman, former Chair of the Public Utility Commission of Texas, were appointed to the Board.[66]

Additionally, at the request of Elliott and Bluescape, NRG formed a five-person ad hoc committee of the Board—the Business Review Committee.[67] The Committee was chartered to review and make specific recommendations regarding changes in four key areas: "(1) Operational and cost excellence initiatives; (2) Potential portfolio and/or asset de-consolidations, dispositions, and optimization; (3) Capital structure and allocation; (4) Broader strategic initiatives."[68] The Committee was chaired by Wilder and consisted of four other members: Smitherman, Gutierrez, Paul Hobby, and Anne Schaumburg.[69] As part of the final recommendation to the Board, the Committee called for divestment of 50-100% of NRG's interest in NRG Yield, the company's leading renewables platform.[70]

On August 31, 2018, NRG finalized the sale of NRG Yield to Global Infrastructure Partners (GPI).[71] As a result of the sale, NRG completely divested all of its interest in NRG Yield, and the NRG Yield was renamed Clearway Energy.[72] NRG grossed $1.348 billion from the sale of its renewable energy platform.[73] As part of the press release announcing the sale, NRG's CEO, Mauricio

[63] Cassandra Sweet & Anne Steele, *Elliott Pushes for Changes at NRG Energy*, WALL STREET J. (Jan. 17, 2017), https://www.wsj.com/articles/elliott-discloses-6-9-stake-in-nrg-energy-1484670092.
[64] *Id*.
[65] Joshua Mann, *NRG shakes up board of directors on activist investment, chairman resigns*, HOUS. BUS. J. (Feb. 13, 2017, 1:28 PM EST), https://www.bizjournals.com/houston/news/2017/02/13/nrg-shakes-up-board-of-directors-on-activist.html.
[66] *Id*.
[67] Press Release, NRG Energy, Inc., NRG Announces Cooperation Agreement with Elliott Management and Bluescape Energy Partners(Feb. 13, 2017), https://www.businesswire.com/news/home/20170213005541/en/NRG-Announces-Cooperation-Agreement-Elliott-Management-Bluescape.
[68] *Id*.
[69] *Id*.
[70] Press Release, NRG Energy, Inc., NRG Energy Launches Transformation Plan (Feb. 13, 2017), https://www.businesswire.com/news/home/20170712005570/en/NRG-Energy-Launches-Transformation-Plan.
[71] NRG Yield, Inc., NRG Yield Announces Completion of New Sponsorship with Global Infrastructure Partners (Aug. 31, 2018), https://www.businesswire.com/news/home/20180831005226/en/NRG-Yield-Announces-Completion-New-Sponsorship-Global.
[72] *Id.*
[73] Press Release, NRG Energy, Inc., NRG Closes on Sale of its Interest in NRG Yield and the NRG Renewables Platform, (Aug. 31, 2018), https://www.nrg.com/about/newsroom/2018/2365679.html.

Gutierrez, announced that the company would move forward with a share buyback program.[74]

B. Bank financing of fossil fuel projects

In the lead up to the Paris Climate Negotiations, a number of large U.S. banks began making environmental finance commitments.[75] Today, virtually all of the large U.S. commercial banks have some sort of environmental finance goal.[76] The four largest U.S. banks—J.P. Morgan Chase, Bank of America, Wells Fargo, and Citigroup—have pledged a combined $800 billion in environmental financing by 2030.[77] These commitments should be praised, but they are unfortunately dwarfed by the banks' fossil fuel investments and lending portfolios.

According to analysis by the World Resources Institute, J.P. Morgan has an annualized sustainable finance commitment of $22.22 billion but averages $65.22 billion in fossil fuel finance annually.[78] Bank of America, the bank with the best "green to brown" finance ratio, has an annualized sustainable finance commitment of $27.27 billion while averaging $36.56 billion in fossil fuel finance annually.[79] Citigroup has an annualized sustainable finance commitment of $10 billion but averages $43.16 billion in fossil fuel finance annually.[80] And Wells Fargo has an annualized sustainable finance commitment of $15.38 billion but averages $50.53 billion in fossil fuel finance annually.[81] Together, these four banks have provided approximately $583 billion in financing for fossil fuel projects over the past three years.[82]

Unfortunately, this is not a passing trend. Bank financing of fossil fuel projects has increased every year since the Paris Climate Agreement.[83] Financing

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[74] *Id.*
[75] *See, e.g.*, *Environmental Sustainability and Commitment*, BANK OF AM., https://about.bankofamerica.com/en-us/what-guides-us/environmental-sustainability.html#fbid=WVnur0fK9Fi (last visited December 2, 2019) (discussing Bank of America's increasing its environmental finance goal to $125 billion in 2015); *$100 Billion Environmental Finance Goal*, CITI, https://www.citigroup.com/citi/sustainability/100billion.htm (last visited December 2, 2019) (describing the $100 billion environmental finance goal set by the bank in 2014).
[76] *Green Targets: A Tool To Compare Private Sector Banks' Sustainable Finance Commitments*, WORLD RES. INST., https://www.wri.org/finance/banks-sustainable-finance-commitments/ (last visited December 2, 2019) (analyzing the environmental finance commitments of J.P. Morgan Chase, Bank of America, Wells Fargo, and Citigroup, along with the commitments, or lack of commitments, of the 50 largest private sector banks globally).
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *See* RAINFOREST ACTION NETWORK ET AL., BANKING ON CLIMATE CHANGE: FOSSIL FUEL FINANCE 2019 REPORT CARD 9 (2019), https://www.ran.org/wp-

the fossil fuel industry locks in infrastructure for decades, and diverts money from critical projects that could build a more sustainable economy.[84] If the banking sector is going to take the lead in combating climate change it must begin to phase out fossil fuel financing, even if that means turning down potentially profitable lending and investment opportunities.

III. Ending the Myopia: Reforming the law

Fortunately, just as current laws encourage short-termism, legal reforms can be designed and implemented to support long-term planning and sustainability among corporations and investors. This section proposes three possible reforms. Part A of this section addresses the need to change the corporate form to reduce shareholder primacy and require companies to act, at least in part, for the social good. Part B recommends mandatory climate stress tests in line with the recommendations of the Financial Stability Board's Taskforce on Climate-Related Financial Disclosures to imbed long-term planning into corporate boardrooms and to ensure actionable, company specific climate information is available to stakeholders. Finally, Part C calls for the development of a new class of shares which would favor investors who hold company shares for multiple years over short-term hedge funds that game the market through rapid buying and selling.

A. Changing the corporate form

The ghost of Milton Friedman, and his contention that a company's only responsibility is to its shareholder, will continue to haunt reformers until the law requires corporations to take responsibility for a broader swath of stakeholders.[85] Therefore, a primary aim of those wishing to end short-termism and shareholder primacy must be to persuade state legislatures to require all incorporated for-profits to transition to benefit corporations.

Benefit corporations require businesses to deliver multiple public benefits beyond profits for its investors.[86] The directors of benefit corporations must consider multiple stakeholders—including, but not limited to, employees, the

content/uploads/2019/03/Banking_on_Climate_Change_2019_vFINAL1.pdf (explaining that from 2016–2018 bank financing of fossil fuel projects has increased by $50 billion).

[84] *See id.* at 6 ("Reckless expansion of fossil fuels threatens to further lock in our fossil fuel dependence, and lowers fossil fuel prices . . . The cheaper fossil fuels are, the harder it will be to ensure their rapid replacement by clean alternatives. Moreover, a just transition for the workers and communities that are currently dependent on fossil fuel extraction is far more likely under a managed decline of mining and drilling, rather than allowing these industries to face sudden closures due to policy changes, market failure, or climate catastrophe.").

[85] *See* Friedman, *supra* note 1.

[86] *See* Dana Brakman Reiser, *Benefit Corporations-A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 598–99 (2011) (explaining that the benefit corporation form is meant to free directors to pursue "social mission achievement over profit-maximization"); *see also* Light, *supra* note 1, at 185–86 (explaining that benefit corporation structure insulates directors from shareholder litigation which might otherwise arise should they pursue environmental or social goals at the expense of shareholder value).

community, and the environment—when determining what is in the best interest of the business.[87]

As described in B-Lab's model benefit corporation legislation, a general public benefit means a "material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard."[88] A benefit corporation may also be required to, or have the option to, adopt a "specific public benefit" which could include: providing low-income or underserved individuals with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; protecting or restoring the environment; improving human health; promoting the arts, sciences, or advancement of knowledge; and, increasing the flow of capital to entities with a purpose to benefit society or the environment.[89]

Thirty-six states currently allow companies to incorporate as a benefit corporation.[90] However, a more effective model would require the elements of benefit corporations within every corporate charter no matter the ownership model (investor owned, LLC, or co-op).[91] In the era of climate change driven in large part by corporate linked industrial emissions, we cannot afford two sets of business: One that thinks about its impact on the community and one that focuses only on maximizing the next quarter's profits. We must compel all businesses to act as responsible corporate citizens.

B. Mandating climate stress testing

There is an old business adage that one manages what they measure. Similarly, it is true that one does what they disclose. Disclosure is a key driver of

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[87] *See* Brakman, *supra* note 98 (explaining that benefit corporation legislation requires directors to consider the effect of their decisions on a range of stakeholders). The directors of benefit corporations are not required to prioritize the interest of any particular group of stakeholders, instead they have broad discretion to consider a variety of stakeholder interests. *Id*. *See, e.g.*, N.J. Stat. Ann. §§ 14A:18-6(b)-(c) (West 2011); Vt. Stat. Ann. tit. 11A, §§ 21.09(a)(2)-(3) (2011); Va. Code Ann. § 13.1-788(A)(3) (2011).

[88] MODEL BENEFIT CORP. LEGISLATION § 102 (B LAB 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf.

[89] *Id*. For an example of enacted legislation review Md. Code Ann., Corps. & Ass'ns §§ 5-6C-01(c), 5-6C-06(A) (LexisNexis 2011).

[90] *See* BENEFIT CORP., STATE BY STATE STATUS OF LEGISLATION, https://benefitcorp.net/policymakers/state-by-state-status (last visited December 2, 2019) (stating that an additional five state legislatures are considering benefit corporation legislation).

[91] Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 Geo. Wash. L. Rev. 121, 172–78 (2016) (criticizing the benefit corporation as not addressing the systemic issue of shareholder primacy within corporate law and instead reinforcing the idea that normal corporations must maximize profit and cannot jettison short-term investor interest for long-term sustainability).

performance. Publicly available data forces decision makers to confront the impacts of their actions and can galvanize stakeholders to demand improved performance.[92] Of course, this assumes companies are providing meaningful, "decision useful" disclosures.[93] There is currently a significant gap between the voluntary disclosure most companies produce and the decision useful information stakeholders need to ensure a company is managing for sustainability.[94] In response to this gap, as well as concerns that climate change poses a significant risk to the global economy, the Financial Stability Board developed the Taskforce on Climate-related Financial Disclosures (TCFD).[95] The TCFD recommended a disclosure regime designed to be adopted as part of the existing financial disclosure frameworks of G20 countries.[96]

The TCFD recommendations included guidance on disclosing climate governance systems, risk management, strategy, and mitigation targets.[97] An essential part of these recommendations is that companies must stress test their businesses against different climate scenarios.[98] These stress tests should capture both the impacts of climate change and the risk of stranded assets.[99]

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[92] Light, *supra* note 1, at 149 ("Stronger mandates in securities regulation to disclose environmental risks, even in the absence of a showing of financial materiality, could shed clearer light on firms' environmental decision making, with the potential to provide incentives for more positive environmental behavior."); Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 Envtl. L. 1, 54–57 (2017) (arguing that increased corporate sustainability disclosures will contribute to better environmental management practices).

[93] CERES, DISCLOSE WHAT MATTERS: BRIDGING THE GAP BETWEEN INVESTOR NEEDS AND COMPANY DISCLOSURES ON SUSTAINABILITY 1 (2018), https://www.ceres.org/sites/default/files/reports/2018-08/Ceres_DiscloseWhatMatters_Final.pdf (advocating for the corporate disclosures that will help sustainably focused investors make better decisions which companies are "walking the talk").

[94] PWC, INVESTOR SURVEY: Sustainability Goes Mainstream: Insights Into Investor Views 7 (May 2014), https://www.pwc.com/us/en/pwc-investor-resource-institute/publications/assets/pwc-sustainability-goes-mainstream-investor-views.pdf (finding high rates of investor dissatisfaction with the quality and contents of corporate sustainability reports). In fact, 61% of U.S. investors surveyed reported being dissatisfied. *Id.*

[95] TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, PHASE I REPORT OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 7-11 (Mar. 31, 2016), https://www.fsb-tcfd.org/wp-content/uploads/2016/03/Phase_I_Report_v15.pdf [hereinafter TCFD PHASE I REPORT] (describing the deficiencies of climate-related risk disclosures and reporting frameworks). The Financial Stability Board is an agency of the G20 created after the 2007 recession to help coordinate monetary policy between G20 members to reduce the likelihood of another global financial crisis. *ABOUT THE FSB*, FINANCIAL STABILITY BD., https://www.fsb.org/about/ (last visited December 2, 2019).

[96] TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, IMPLEMENTING THE RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 1 (June 2017) https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Annex-062817.pdf [hereinafter TCFD IMPLEMENTING THE RECOMMENDATIONS].

[97] *Id*.

[98] *Id*.

[99] *Id*.

The SEC has the ability to mandate some of these recommendations within its existing climate disclosure regulations.[100] However, embedding many of these recommendations into law will require new legislation from Congress. That legislation should mandate climate stress testing and instruct the SEC and Environment Protection Agency to jointly develop a series of scenarios including, at minimum, a high emission (business as usual) scenario as well as a low emission (1.5°C) scenario against which publicly traded companies test their businesses.[101]

Mandating this type of public disclosure will force companies, and the investors who own them, to take a hard look at the long-term viability of their business models. The goal of such an examination process is the adoption of climate friendly business practices, as well as the facilitation of a just transition to a sustainable economy.[102]

C. Favoring long-term investors

As illustrated in the NRG case study, investor pressure is often a significant impediment to corporations making the investment necessary to build more sustainable businesses.[103] However, not all investors are created equal.[104] While adopting policies such as those identified previously ensures better long-term decision making, by increasing access to information and mandating businesses

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[100] *See* SECURITIES AND EXCHANGE COMMISSION, EXCHANGE ACT RELEASE NOS. 33-9106, 34-61469, FR-82, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE (2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf (identifying climate-related risk as a materially relevant risk under the federal securities laws). If the 2010 Guidance were fully implemented and enforced, one could argue that some of the TCFD's recommended disclosures are already required by the SEC. After all, to fully comply with a robust interpretation of guidance a business needs to disclose (1) a general description of the business; (2) material changes that could arise in response to climate related events such as storms, droughts, etc.; (3) the material financial effects of complying with climate regulations; (4) litigation risk related to the company's contribution to climate change; and (5) a narrative discussion of "any known future trends or uncertainties" that is likely to affect the company's financial performance; any climate risk factors that would make an offering of securities "speculative" or "risky." 17 C.F.R. § 229 (2011).

[101] While the SEC is a logical entity to manage the TCFD disclosure regime because, with congressional approval, it would be able to impose these disclosures on all publicly traded companies, some commentators have argued that the Federal Reserve Board already administers a sophisticated risk disclosure regime for financial institutions and would therefore be better suited to implement the TCFD. Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 Am. Bus. L. J. 407, 459 (2018).

[102] Light, *supra* note 1, at 166–69 (discussing how disclosure statutes incentivize behavior change by providing cover for corporate officers looking to do the right thing and encouraging public monitoring).

[103] *See supra* notes 62–82 and accompanying text.

[104] *See* Matheson, *supra* note 57 and accompanying text. *See also,* Quimby, *supra* note 58, at 395–96 ("When shareholders have short-term goals, they elect directors with similar interests and apply subsequent pressure to ensure these goals are met. This results in managers engaging in short-term tactics at the expense of long-term strategies").

consider the needs of non-shareholders when making decisions, they will do nothing to encourage the patient, long-term holding of corporate stock.

The time has come to create preferred shares for investors who are willing to stay with a company for the long term.[105] Investors who have held a company for a set amount of time—for example three to five years—should have their stocks automatically transitioned to a preferred class. There are a number of ways to structure this preferred class of shares to incentivize long-term investments, but most proposals focus on granting increased voting rights and value to long-term shareholders.[106]

Granting increased voting rights to long-term shareholders empowers these investors in proxy fights and board of directors' elections.[107] Critics of this strategy raise legitimate concerns about the concentration of voting power; however, empowering long-term owners has the potential to reduce myopia among the company's executives and better position a company to fend off activist investors seeking to derail the company's strategy in the interest of short-term gains.[108]

Based on the limited empirical evidence available, it does appear that increased voting rights alone are inadequate to incentivize long-term shareholding; therefore, voting rights should be combined with increased monetary value for long-term investors.[109] Intuitively, this makes sense; in order to overcome the immediate monetary benefits of short-termism, loyalty share programs need to provide nearly equivalent benefits.[110]

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[105] *See supra* note 59 and accompanying text.

[106] *See* Duruigbo, *supra* note 8, at 567–68 (proposing loyalty dividends which are awarded over and above normal dividends); Quimby, *supra* note 58, at 401 (arguing increasing voting rights the longer a share is held combined with loyalty share rule where amount of capital gains tax paid would decrease the longer a share is held).

[107] Dallas, *supra* note 59, at 564–565 ("Most U.S. corporations employ a one-share-one-vote voting structure. Time-Phased Voting ("TPV"), in contrast, entails giving longer-term shareholders more votes per share than shorter-term shareholders. For example, shareholders who own their shares for more than three years may get five votes for each share they own, while other shareholders would have only one vote per share. Many other TPV arrangements are possible, but the common theme among them is that they all accord increased voting power to shareholders who have owned their shares for longer periods of time.").

[108] *Id.* at 565–571 (discussing the arguments for and against time-phased voting). Opponents of time-phased voting argue that it will weaken management accountability and inhibit the ability to chasten poor management via hostile takeovers. *Id.* at 565–67. Proponents, on the other hand, argue that time-phased voting correctly protects management from hostile takeovers that are not motivated by poor performance, while incentivizing the board and management to reorient away from quarterly earnings to long-term success. *Id.* at 570–71.

[109] *See id.* at 629–31 (studying the number of long-term shares owned at companies that adopted increased voting rights for long-term owners and finding that even after increased voting rights were adopted these companies experienced a net decrease in the number of long-term shareholders).

[110] *See* Duruigbo, *supra* note 8, at 568 ("For an investor, the incentive that loyalty dividends present has to match the opportunities foregone both from financial and non-financial angles. If short-termists feel more empowered by not tying themselves down to any particular investment, and thereby giving themselves leverage with corporate managers, an acceptable alternative would have to replace that sense or reality of empowerment.").

IV. Conclusion

Short-termism within corporations serves only the myopic interests of near-term profit seekers. This obsession with the quarterly return has produced extensive environmental, social, and long-term economic harms. As our society considers how to address issues such as climate change, a corporate culture of short-termism constrains the private sector's ability to mobilize and effectively innovate to meet these challenges. In order to build a sustainable, long-term focused economy, legal reforms must be implemented that require all businesses to adopt social benefit corporation principles, mandate climate stress testing, and allow for new classes of shares that reward long-term investors.