THE INCLUSIVE CAPITALISM SHAREHOLDER PROPOSAL

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ABSTRACT

When it comes to the long-term well being of our society, it is difficult to overstate the importance of addressing poverty and economic inequality. In *Capital in the Twenty-First Century*, Thomas Piketty famously argued that growing economic inequality is inherent in capitalist systems because the return to capital inevitably exceeds the national growth rate. Proponents of "Inclusive Capitalism" can be understood to respond to this issue by advocating for broadening the distribution of the acquisition of capital with the earnings of capital. This paper advances the relevant discussion by explaining how shareholder proposals may be used to increase understanding of Inclusive Capitalism, and thereby further the likelihood that Inclusive Capitalism will be implemented. In addition, even if the suggested proposals are rejected, the shareholder proposal process can be expected to facilitate a better understanding of the strengths and weaknesses of Inclusive Capitalism, as well as foster useful new lines of communication for addressing both poverty and economic inequality.

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I. INTRODUCTION

When it comes to the long-term well being of our society, it is difficult to overstate the importance of addressing poverty and economic inequality.[1] In *Capital in the Twenty-First Century*, Thomas Piketty famously argued that growing economic inequality is inherent in capitalist systems because the return to capital inevitably exceeds the national growth rate.[2] Proponents of "Inclusive Capitalism" can be understood to respond to this issue by advocating for broadening the distribution of the acquisition of capital with the earnings of capital.[3] Obviously, distributing capital more widely should, all else being equal, help alleviate at least some poverty and close at least some of the economic inequality gap by providing poor-to-middle-class consumers capital (paid for by the earnings of that capital) that they did not have before. But why should corporations distribute the ownership of their capital more broadly? The answer is because broadening the distribution of capital should promote greater growth because low-to-middle-income consumers are understood by many to spend more than wealthy consumers. This increased demand may then be expected to produce gains sufficient to offset the costs incurred in the process of instituting the Inclusive Capitalism proposal presented herein.

This paper advances the relevant discussion by explaining how shareholder proposals may be used to increase understanding of Inclusive Capitalism, and thereby further the likelihood of its implementation. Even if the suggested proposals are rejected, the proposal process can be expected to facilitate a better understanding of the strengths and weaknesses of Inclusive Capitalism. The dialogue created by the proposal process would foster useful new

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[1] *See, e.g.*, Sylvia Ostry, *When You Come to A Fork in the Road, Take It Reflections on North American Integration: Regional and Multilateral*, 1 J. INT'L L. & INT'L REL. 239, 245 (2005) ("most experts agree that inequality and poverty…pose a serious threat to the sustainability of democracy.").

[2] THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Harvard Univ. Press 2014).

[3] *See generally* Robert Ashford et al., *Broadening Capital Acquisition with the Earnings of Capital as a Means of Sustainable Growth and Environmental Sustainability*, EUR. FIN. REV. 70 (Oct. – Nov. 2012) (hereinafter *Broadening Capital Acquisition*). *Cf.* Robert Ashford, *Why Working But Poor? The Need for Inclusive Capitalism*, 49 AKRON L. REV. 507, 508 (2016) ("[W]e must establish a more inclusive capitalism by democratizing capital acquisition with the earnings of capital based on the principles of binary economics.") (internal quotation marks and citations omitted).

lines of communication for addressing both poverty and economic inequality. Following this Introduction, Part II of this paper will provide more details about Inclusive Capitalism. Part III will then explain the shareholder proposal process, followed by a draft of an Inclusive Capitalism shareholder proposal in Part IV. Part V will then address some potential criticisms and challenges, including: regulatory compliance costs, theoretical challenges from mainstream economists, and application of the corporate right to exclude certain types of shareholder proposals. Finally, Part VI will provide concluding remarks, followed by a discussion of the intersection of Inclusive Capitalism and the shareholder wealth maximization norm in corporate law, which will be set forth as an Appendix.

II. INCLUSIVE CAPITALISM

In *Capital in the Twenty-First Century*,[4] Thomas Piketty explains the rising high-end wealth concentration that is, as Joseph Bankman and Daniel Shaviro put it, "one of the central issues of our time."[5] Piketty does this by way of the formula "r > g." Bankman and Shaviro describe this formula as positing that "the return to capital, r, will (at least for a very long time) exceed g, the national growth rate, leading to accelerating increases in high-end wealth concentration for an indefinite period."[6] Thus, in the "age-old conflict (predating even the Industrial Revolution) between capital and labor,"[7] capital is seemingly destined to win absent some type of redistributive intervention.[8]

In their article, *Broadening Capital Acquisition with the Earnings of Capital as a Means of Sustainable Growth and Environmental Sustainability*,[9]

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[4] PIKETTY, *supra* note 2.

[5] Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453 (2015).

[6] *Id.* at 454 ("[I]f Piketty is correct about the causal significance of $r > g$ (which remains unclear), then the literature has erred in so strongly emphasizing a framework based on 'ability' or human capital to explain rising high-end wealth concentration.") (internal citation omitted).

[7] *Id.*

[8] *Broadening Capital Acquisition*, *supra* note 4, at n.1 (explaining it is important to note here that "capital" can have various meanings. For example, "real capital" may be understood to include "land, animals, structures, and machines – anything capable of being owned and employed in production." Meanwhile, "financial capital" may be understood to include "a claim on, or ownership interest in, real capital," such as shares of stock); Bankman & Shaviro, *supra* note 5 (explaining that finally, "capital" may be synonymous with "savings," denoting "the assets one possesses"). As used herein, "capital" will refer primarily to real and financial capital. *Cf.* Unlearning Economics, *Capital in Piketty's 'Capital'*, PIERIA (June 18, 2014), http://www.pieria .co.uk/articles/capital_in_pikettys_capital_2 ("We should . . . be clear about Piketty's definition of capital. He provides this at the beginning of the book, defining (non-human) capital as 'all forms of wealth that individuals (or groups of individuals) can own and that can be transferred or traded through the market on a permanent basis.'").

[9] *Broadening Capital Acquisition*, *supra* note 4, at 70.

Robert Ashford, Ralph P. Hall, and Nicholas A. Ashford describe the process by which capital is acquired with the earnings of capital:

> Given synergistic potential between a corporation and would-be shareholders, it might be in the corporation's interest to forego the use of retained earnings and borrowed funds, and instead raise the necessary funds for capital acquisition by selling shares to the wealthy, for example, to Warren Buffet or Bill Gates. To purchase such shares, if Warren and Bill prefer not to liquidate existing holdings, they might borrow the money to purchase the shares. The share-selling corporation would not care if the source of cash is borrowed money rather than the purchaser's own assets. The lender would normally insist that the shares be pledged as security until the loan is repaid and would normally insist on additional security from the borrower, usually in the form of the borrower's assets. But the additional security need not be assets of the wealthy borrower, but rather could be supplied in the form of capital credit insurance with insurance premiums paid either by the borrower or by the lender with the cost passed to the borrower via a higher interest rate.[10]

For our purposes, it is important to note in addition that the repayment of the loans used to purchase the shares can be expected to be funded by the earnings of the very capital acquired by way of the loans.[11] In light of the foregoing, Ashford et al. note that mainstream approaches to economic recovery essentially set the labor class up to fall on the wrong side of our growing economic inequality divide:

> The mainstream strategy for promoting economic recovery is a composite mainstream left- and right-wing mix of government policies to promote (1) capital acquisition with the earnings of capital primarily for corporations and well-capitalized persons (generally in proportion to their existing wealth), and (2) primarily jobs (but by no means the best or highest paying jobs) and various forms of welfare redistribution for poor and middle-class people.[12]

On the other hand, by broadening the acquisition of capital with the earnings of capital we could:

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[10] *Id.* at 72.

[11] *Cf. id.* at 70 ("Profitable business planning requires investing in capital that competitively 'pays for itself' (i.e., earns a competitive return for the financial investment needed to acquire it).").

[12] *Id.* at 71.

> 1. enhance the earning capacity of the participating companies, their shareholders, their employees and their customers;
> 2. promote more sustainable, environmentally-friendly, and more broadly-shared growth and prosperity;
> 3. reduce poverty, welfare dependence and the need for government expenditures, taxes, and other transfer payments;
> 4. enhance the value of equity investments and reduce the risk of borrowing; and
> 5. enhance the credit worthiness of national governments, and their ability to raise revenue.[13]

A broader distribution of capital would generate these benefits because the middle- and lower-class individuals and families receiving it would use their new-found wealth to satisfy their unmet needs and desires, thus driving demand for consumer and other products in a way the current concentration of capital and wealth does not.[14] According to Ashford et al., the main obstacle to implementing this approach is a lack of understanding, primarily on the part of corporate management. Specifically, "most people believe that the primary role of capital in contributing to per-capita economic growth is to increase labor productivity,"[15] and thus the gains of that increased productivity are already being distributed to labor optimally. However, "there is another (binary) way to understand the primary role of capital: to do an increasing portion of the total work done,"[16] which suggests labor gets squeezed out of the productivity gains in a way that will lead to an unnecessary drop in consumer demand if left unaddressed.

Before proceeding, we should take a moment to clarify what is meant by the "binary way" just mentioned. "The approach that came to be known as binary

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[13] *Id.* at 70.

[14] *Cf.* Henry Blodget, *Sorry, Folks, Rich People Actually Don't 'Create the Jobs'*, BUS. INSIDER (Nov. 29, 2013, 9:39 AM), http://www.businessinsider.com/rich-people-create-jobs-2013-11 ("America's richest entrepreneurs, investors, and companies now have so much money that they can't possibly spend it all. So instead of getting pumped back into the economy, thus creating revenue and wages, this cash just remains in investment accounts."); Nick Hanauer, *The Pitchforks Are Coming…For Us Plutocrats*, POLITICO MAG. (July/Aug. 2014), http://www.politico.com/magazine/story/2014/06/the-pitchforks-are-coming-for-us-plutocrats-108014?o=3 ("If workers have more money, businesses have more customers… [w]hich makes middle-class consumers, not rich businesspeople…the true job creators."); David Madland, *Growth and the Middle Class*, DEMOCRACY (2011), http://democracyjournal.org/magazine/20/growth-and-the-middle-class/ ("The wealthy…simply do not consume enough to drive a modern economy. The wealthy save more than the middle class and they consume less. This means that when incomes are stagnant or declining for most people, there isn't enough demand in the economy to encourage productive investment…").

[15] *Broadening Capital Acquisition*, supra note 3, at 70.

[16] *Id.* at 71.

economics was first advanced in the writings of Louis Kelso in a number of books and articles."[17] Louis Kelso is primarily known for his work advancing the cause of Employee Stock Option Plans (ESOPs). As Andrew Stumpff explains:

> One unusual thing about ESOPs is that they are almost entirely, from the original idea for the plans themselves to the array of enabling legislation, a product of the self-developed economic theories and vigorous lobbying of a single, now semi-obscure, private individual. In the middle of the last century, Louis O. Kelso, a lawyer in San Francisco, became convinced that (1) in general, the economic value of any given worker's labor would be insufficient to support a living wage for that worker; (2) as a result, it was essential to encourage more widespread ownership of capital among laborers as a means of providing them with supplementary income; and (3) a good way to accomplish that goal was by encouraging investment by employee retirement plans in stock of the participants' employers.[18]

As for Kelso's work on binary economics, Stumpff continues:

> The dominant feature of Kelso's worldview was what he came to call "binary economics," the notion that labor and capital are the two and only two potential sources of personal wealth. For example, if a steam shovel is at work digging a foundation for a new building, the owner of the shovel is responsible for providing and entitled to get paid for the "capital" portion of the project, and the workers who operate the shovel, the "labor" portion. Kelso regarded the workers, who owned labor but no capital, as on a road to nowhere. Technology meant that things would get worse. As shovels, for example, became more efficient, fewer workers would be needed for foundation digging, and labor's share in the production of wealth, relative to capital's, would continue to shrink. It was thus imperative to get a portion of ownership of the shovel into the hands of the workers.

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[17] *Id.* at 74 n.4. *See, e.g.*, LOUIS O. KELSO & PATRICIA HETTER KELSO, DEMOCRACY AND ECONOMIC POWER: EXTENDING THE ESOP REVOLUTION THROUGH BINARY ECONOMICS (Ballinger Publishing Co. 1986).

[18] Andrew W. Stumpff, *Fifty Years of Utopia: A Half-Century After Louis Kelso's The Capitalist Manifesto, a Look Back at the Weird History of the ESOP*, 62 TAX LAW. 419 (2009) (citing LOUIS O. KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO (1958)). *Cf. id.* at 420 ("In *The Communist Manifesto*, Marx had demanded an end to capitalism, whereas in *The Capitalist Manifesto*, Kelso demanded more of it.").

> By his own account, these ideas first came to Kelso while he was a teenager growing up outside Denver during the Great Depression, when his father lost his job and his mother struggled to support the family on the income from a small grocery store. Kelso mused about the idle, desperate laborers visible everywhere, and the very troubling thought occurred to him that there was no necessary reason the economic value a given person could command, based on his or her capacity for work, would bear any relationship to that which he or she needed to live. Considering this further led him to binary economics and the search for ways to give people a basis for economic participation other than the labor they could produce with their own hands.[19]

Thus, returning to the topic at hand, we must consider the possibility that broadening the acquisition of capital with the earnings of capital can both improve the well being of the individual worker and that of the overall economy. In other words,

> If the binary analysis has validity, then in a market economy in which production is becoming ever more capital intensive, sufficient earning capacity to purchase all that can be produced cannot be distributed by jobs and welfare alone. The missing element in these strategies is to broaden distribution of capital acquisition with the earnings of capital.[20]

Having thus laid much of the groundwork for the next sections of this paper, we must address one last definitional point. This paper is titled *The Inclusive Capitalism Shareholder Proposal* and not *The Binary Economics Shareholder Proposal* because it is this author's belief that one may agree with the proposed benefits of broadening the acquisition of capital with the earnings of capital without necessarily agreeing with all the elements of binary economics.[21] Accordingly, as used herein, "Inclusive Capitalism" refers to the act of financing corporate operations via a broader distribution of capital paid for by the future earnings of the distributed capital, while "binary economics" refers to a set of

[19] Stumpff, *supra* note 18, at 421-22.

[20] *Broadening Capital Acquisition*, *supra* note 3, at 71.

[21] *See* Keith Wilde & R.G. Schulte, *Democratic Capitalism vs. Binary Economics*, 30 J. SOCIO-ECON. 99, 100 (2001) ("A brilliant innovation in economic *policy*, backed up by expertise in financial and legal principles, has been side-tracked by promoting it as an innovation in economic *theory*."). *Cf.* Ashford, *supra* note 3, at 508 (2016) ("[W]e must establish a more inclusive capitalism by democratizing capital acquisition with the earnings of capital based on the principles of binary economics.") (internal quotation marks and citations omitted).

propositions regarding the proper allocation of productivity between capital and labor.[22]

While it may be true that corporate managers have a fiduciary duty to implement Inclusive Capitalism financing once they recognize the shareholder wealth implications,[23] that recognition will never occur if those managers never become aware of Inclusive Capitalism. Thus, the next section of this paper will describe shareholder proposals, with the ultimate goal of arguing that they represent an effective and untapped means of educating corporate management on the existence and benefits of Inclusive Capitalism.

III. SHAREHOLDER PROPOSALS

Under Rule 14a-8[24] of the Securities Exchange Act of 1934,[25] a company must under certain circumstances "include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds

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[22] Other definitions of "Inclusive Capitalism" can be found. *See, e.g.*, Cecilia C. Lee, *Reframing Complexity: Hedge Fund Policy Paradigm for the Way Forward*, 9 BROOK. J. CORP. FIN. & COM. L. 478, 531 (2015) ("The proposed paradigm also draws inspiration from the ideals of 'inclusive capitalism' as spearheaded by the Inclusive Capitalism Initiative (ICI). This initiative began as a post-[global financial crisis] response to build a case for capitalism that is inclusive in providing economic opportunities and shared prosperity."); Conference on Inclusive Capitalism: Building Value, Renewing Trust (May 27, 2014), http://www.inc-cap.com/.

[23] *Compare* Robert Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility: Comprehending Corporate Wealth Maximization and Distribution for Stockholders, Stakeholders, and Society*, 76 TUL. L. REV. 1531, 1531 (2002) ("To address competently and faithfully issues related to capital acquisition, wealth maximization, corporate social responsibility, and other aspects of corporate planning, fiduciary duties require a consideration of the binary economic ownership-broadening approach as a means of enhancing corporate wealth for stockholders, stakeholders, and society."), *with* Stephen Byeff, *The Spirit of Blasius: Sandridge as an Antidote to the Poison Put*, 115 COLUM. L. REV. 375, 389 (2015) ("While fiduciary duties legally bind directors to pursue the end of maximizing shareholder value, the business judgment rule gives directors significant discretion with respect to the means employed in pursuit of that end."). The extent to which shareholder wealth maximization constitutes a norm of corporate governance continues to be hotly debated. In light of this, I have included an appendix at the end of this paper setting forth my perspective on the issue.

[24] 17 C.F.R. § 240.14a-8 (West 2011).

[25] *See generally* Gregory M. Matlock, Greenhouse v. Mcg. Capital Corp*.: Is a Senior Manager's Educational Background Material Under Federal Securities Law?* 8 T.M. COOLEY J. PRAC. & CLINICAL L. 229, 232-33 (2006) ("Redressing the stock market crash of 1929, the Securities Act of 1933 initiated a regulatory system to provide structure and guidance to the distribution of securities. One year after the Securities Act of 1933, the Securities Exchange Act of 1934 was enacted to rid fraudulent and manipulative practices in the securities markets.") (internal quotation marks omitted). The Securities Exchange Act, in a section titled "Necessity for regulation," explains that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto." 15 U.S.C.A. § 78b (West 2010).

an annual or special meeting of shareholders."[26] Rule 14a-8 is unusual in that it is written in a question-and-answer format with an imaginary shareholder asking the questions and the SEC responding. Relevant excerpts follow.

> **Question 2:** Who is eligible to submit a proposal…?
>
> (1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting…
>
> **Question 4:** How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words…
>
> **Question 9:** If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?
>
> (1) Improper under state law: If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;
>
> (2) Violation of law: If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;
>
> (3) Violation of proxy rules: If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;…
>
> (5) Relevance: If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;
>
> (6) Absence of power/authority: If the company would lack the power or authority to implement the proposal;
>
> (7) Management functions: If the proposal deals with a matter relating to the company's ordinary business operations;…
>
> (9) Conflicts with company's proposal: If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;
>
> (10) Substantially implemented: If the company has already substantially implemented the proposal;…

[26] 17 C.F.R. § 240.14a-8.

> **Question 10:** What procedures must the company follow if it intends to exclude my proposal?
>
> (1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.
>
> (2) The company must file six paper copies of the following:
>
> (i) The proposal;
>
> (ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and
>
> (iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.
>
> **Question 11:** May I submit my own statement to the Commission responding to the company's arguments? Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.[27]

Shareholder proposals have the potential to significantly impact corporate behavior. For example, "the Harvard Shareholder Rights Project founded by Professor Bebchuk… has helped many pension funds formulate and submit (often successful) shareholder proposals requesting that staggered boards be declassified."[28] We will next examine how a shareholder proposal could be used to advance the goals of Inclusive Capitalism.

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[27] *Id.*

[28] Robert C. Clark, *Harmony or Dissonance? The Good Governance Ideas of Academics and Worldly Players*, 70 BUS. LAW. 321 (2015). A board is staggered if, for example, only a third of the board stands for election each year, thus generally requiring a two-year wait to replace a majority of the board. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 853 (2005) ("Shareholders voting to repeal staggered boards had good reasons to be concerned about them… [t]here is also evidence that staggered boards are correlated with lower firm value."). *But see* Stephen M. Bainbridge, *Director Primacy and Shareholder*

IV. THE INCLUSIVE CAPITALISM SHAREHOLDER PROPOSAL

As noted above, a shareholder proposal may not exceed 500 words.[29] However, the shareholder proposal process provides additional opportunities for what may loosely be termed advocacy.[30] For example, on March 8, 2016, the staff of the Securities and Exchange Commission (SEC) issued a no-action letter to Staples, Inc., in connection with Staples' anticipated exclusion of a shareholder proposal "urg[ing] the Board to adopt principles for minimum wage reform."[31] A no-action letter states in relevant part that the SEC staff "will not recommend enforcement action to the Commission" if the company "omits the proposal from its proxy materials" as set forth in the no-action request.[32] Importantly, the no-action letter does not preclude the Commission itself from taking action, nor does it preclude a court from finding the company improperly excluded the proposal.[33] However, no-action letters provide a great deal of comfort to companies nonetheless, and it is therefore unlikely that a company will exclude a proposal without first receiving a no-action letter from the SEC staff.[34]

In addition to the 500-word proposal, the Staples no-action letter included two correspondences from the shareholder, the Domini Social Equity Fund, responding to arguments Staples made in support of excluding the shareholder proposal. One of the correspondences was 4,641 words, and the other was 3,686 words. Thus, while a shareholder proposal itself may not provide an extensive opportunity to set forth related arguments, the shareholder proposal process does, and this process alone may be beneficial to all parties involved, even when the proposal is ultimately excluded or defeated.[35]

Disempowerment, 119 HARV. L. REV. 1735 (2006) (critiquing Bebchuck's proposal to increase shareholder power).

[29] 17 C.F.R. § 240.14a-8.

[30] *See* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in Sec No-Action Letters: Current Problems and A Proposed Framework*, 83 CORNELL L. REV. 921, 939 (1998) ("The process…takes on many characteristics of an adjudication—the SEC staff reviews 'briefs' submitted by both constituencies and chooses the position with which it most agrees.") [hereinafter *No-Action Letters*].

[31] Letter from Evan S. Jacobson, Special Counsel, Securities and Exchange Commission, to STAPLES, INC., (Mar. 8, 2016) (on file with Securities and Exchange Commission).

[32] *Id.*

[33] *See* Robert C. Art, *Sell A Condominium, Buy A Securities Lawsuit: Unwarranted Liabilities in the Secondary Market*, 53 OHIO ST. L.J. 413, 457 (1992) ("no-action letters are not binding on the five-member governing Commission . . . and certainly not on the courts").

[34] *See No-Action Letters*, *supra* note 30, at 939 ("Although Rule 14a-8 merely prescribes notification and filing requirements, virtually all companies that decide to omit a shareholder proposal seek a no-action letter in support of their decision.").

[35] *Cf.* Jonathan M. Karpoff et al., *Corporate Governance and Shareholder Initiatives: Empirical Evidence*, 42 J. FIN. ECON. 365, 366 (1996) ("A central tenet of shareholder activism holds that shareholder proposals ameliorate the shareholder-manager agency conflict and pressure managers to adopt value-increasing policies.").

A specific proposal a shareholder might submit in furtherance of Inclusive Capitalism may use the proposal at the heart of the famous *Lovenheim v. Iroquois Brands* case as a template. Iroquois Brands, Ltd., shareholder Peter C. Lovenheim sought to raise awareness of "the procedure used to force-feed geese for production of paté de foie gras in France, a type of paté imported by Iroquois."[36] The company tried to exclude the proposal under what is now Rule 14a-8(i)(5):

> Relevance: If the proposal relates to operations, which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business…[37]

However, the court ruled that while "none of the company's net earnings and less than .05 percent of its assets are implicated by plaintiff's proposal,"[38] Lovenheim would nonetheless be granted an injunction precluding Iroquois from excluding the proposal due to "the ethical and social significance of plaintiff's proposal and the fact that it implicates significant levels of sales."[39]

Lovenheim's proposal reads as follows:

> [F]orm a committee to study the methods by which [Iroquois's] French supplier produces paté de foie gras, and report to the shareholders its findings and opinions, based on expert consultation, on whether this production method causes undue distress, pain or suffering to the animals involved and, if so, whether further distribution of this product should be discontinued until a more humane production method is developed.[40]

Using this as our template, the Inclusive Capitalism shareholder proposal could look like this:

> RESOLVED: [ABC Corp.] shareholders urge the Board to form a committee to study the methods by which [ABC Corp.] raises capital, and report to the shareholders its findings and opinions, based on expert consultation, on whether raising capital on the

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[36] Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 556 (D.D.C. 1985).

[37] 17 C.F.R. § 240.14a-8 (West 2011).

[38] *Lovenheim*, 618 F. Supp. at 559.

[39] *Id.* at 561. *See generally*, D. A. Jeremy Telman, *Is the Quest for Corporate Responsibility a Wild Goose Chase? The Story of* Lovenheim v. Iroquois Brands, Ltd., 45 AKRON L. REV. 291, 292-93 (2012) ("*Lovenheim* is…routinely cited by the Securities and Exchange Commission (SEC) in response to corporations seeking to exclude shareholder proposals from proxy materials on the ground that the proposals are not significantly related to the corporations' businesses.").

[40] *Lovenheim*, 618 F. Supp. at 556.

> basis of binary economics causes increased demand for [ABC Corp.] products either directly or indirectly, and, if so, whether implementation of the binary economics approach to capital raising (also known as Inclusive Capitalism) creates shareholder value worth pursuing.

Relying on the description of Inclusive Capitalism provided earlier, the supporting statement could look like this:

> In their article, *Broadening Capital Acquisition with the Earnings of Capital as a Means of Sustainable Growth and Environmental Sustainability*,[41] Robert Ashford, Ralph P. Hall, and Nicholas A. Ashford argue that by broadening the acquisition of capital with the earnings of capital we could:
>
> 1. enhance the earning capacity of the participating companies, their shareholders, their employees and their customers;
> 2. promote more sustainable, environmentally-friendly, and more broadly-shared growth and prosperity;
> 3. reduce poverty, welfare dependence and the need for government expenditures, taxes, and other transfer payments;
> 4. enhance the value of equity investments and reduce the risk of borrowing; and
> 5. enhance the credit worthiness of national governments, and their ability to raise revenue.[42]
>
> A broader distribution of capital would generate these benefits because the middle- and lower-class individuals and families receiving this capital would use their new-found added wealth to satisfy unmet needs and desires, thus driving demand for consumer and other products in a way the current concentration of capital and wealth does not. According to Ashford et al., the main obstacle to implementing this approach is a lack of understanding, primarily on the part of corporate management. However, "there is another (binary) way to understand the primary role of capital: to do an increasing portion of the total work done,"[43] which suggests labor gets squeezed out of the productivity gains in a way that will lead to an unnecessary drop in consumer demand if left unaddressed.
>
> "The approach that came to be known as binary economics was first advanced in the writings of Louis Kelso in a number of

[41] *Broadening Capital Acquisition*, *supra* note 3, at 70.
[42] *Id.*
[43] *Id.* at 71.

books and articles."[44] Louis Kelso is primarily known for his work advancing the cause of Employee Stock Option Plans (ESOPs). As Andrew Stumpff explains:

> In the middle of the last century, Louis O. Kelso, a lawyer in San Francisco, became convinced that (1) in general, the economic value of any given worker's labor would be insufficient to support a living wage for that worker; (2) as a result, it was essential to encourage more widespread ownership of capital among laborers as a means of providing them with supplementary income; and (3) a good way to accomplish that goal was by encouraging investment by employee retirement plans in stock of the participants' employers.[45]

In light of continuing stagnant growth and growing concerns about the impacts of widening economic inequality, [ABC Corp.] should be most interested to learn whether Inclusive Capitalism might offer a better means of capital raising.

V. CRITICISMS / CHALLENGES

At least some of the criticisms of the foregoing proposal can be placed broadly into three categories. First, complying with applicable securities laws may make implementing the proposal too costly even if one assumes all the proffered benefits can be deemed forthcoming. Second, economic advisors of the board of directors may undermine the theoretical basis for the proposal so vigorously that successful adoption of the proposal is too unlikely to justify pursuing. Third, the likelihood that the board will be able to exclude the proposal under the applicable rules is so likely that, again, successful adoption of the proposal is too unlikely to justify pursuing. We will examine each of these concerns in turn.

A. Securities Laws

One of the reasons a company may decide not to implement the Inclusive Capitalism proposal is that regulatory costs might be too great to make the program profitable even if all the other asserted benefits of Inclusive Capitalism are assumed. Specifically, the Securities Act requires all securities sold to be

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[44] *Id.* at n.4.
[45] Stumpff, *supra* note 18.

registered unless an exemption applies.[46] Registration is costly, and many of the exemptions turn on investor sophistication.[47] Thus, to the extent a company seeks to raise capital via a sale of securities, there exists a financial incentive to sell to wealthy individuals or institutions as opposed to middle-class or low-income individuals.

B. Views of Mainstream Economists

In assessing the viability of Inclusive Capitalism, corporate boards are likely to seek input from mainstream economists. Some of these economists are likely to reject the proposition that broader distribution of capital, to be financed with the earnings of that capital, will generate greater growth than the current approaches.[48] This could be, among other things, a result of distribution not being a factor in typical growth functions (i.e., distribution is considered

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[46] *See* Merritt B. Fox, *Securities Disclosure in A Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2610 (1997) ("Section 5 of the Securities Act prohibits the offer or sale of any security by any person unless the security is registered under the Act or the security or transaction is subject to an exemption.").

[47] See Greg Oguss, *Should Size or Wealth Equal Sophistication in Federal Securities Laws?*, 107 NW. U. L. REV. 285, 286-87 (2012) ("[I]ssuers and underwriters can sell securities to certain wealthy investors without enduring the legal and accounting costs of preparing a registration statement").

[48] *See, e.g.*, BINARY ECONOMICS, https://en.wikipedia.org/wiki/Binary_economics (last visited April 15, 2017) ("Milton Friedman said of *The Capitalist Manifesto* 'the book's economics was bad. . .the interpretation of history, ludicrous; and the policy recommended, dangerous'…Paul Samuelson, another Nobel Memorial Prize in Economic Sciences winner, told the U.S. Congress that Kelso's theories were a 'cranky fad' not accepted by mainstream economists…") (citing MILTON FRIEDMAN & ROSE D. FRIEDMAN, TWO LUCKY PEOPLE: MEMOIRS 275 (University of Chicago Press 1999); DARRYL D'ART, ECONOMIC DEMOCRACY AND FINANCIAL PARTICIPATION: A COMPARATIVE STUDY 96 (Routledge 1992)). *See also* Timothy D. Terrell, *Binary Economics: Paradigm Shift Or Cluster of Errors?*, 8 QUARTERLY J. AUSTRIAN ECON. 31, 32 ("This paper examines the basic assertions of binary economics, and suggests that the proposed paradigm shift is plagued with theoretical difficulties."). *But see* Robert H.A. Ashford, *The Binary Economics of Louis Kelso: The Promise of Universal Capitalism*, 22 RUTGERS L.J. 3, 75 (1990) ("Later more substantive economic analyses . . . suggest[s] that Samuelson's objections lack theoretical and empirical foundation."); Gary Reber, *A Critique Of Binary Economics: Paradigm Shift Or Cluster Of Errors?*, FOR ECONOMIC JUSTICE (Dec. 5, 2012), http://www.foreconomicjustice.org/?p=5156 ("A detailed examination [of Terrell's article] shows that although a few [points] are valid, most are based on misconceptions.").

endogenous).[49] In addition, and relatedly, it could be a result of mainstream skepticism of theories based on distinctions between labor and capital.[50]

C. Regulatory Exclusions

As noted above, a company faced with an Inclusive Capitalism shareholder proposal may be able to exclude the proposal on the basis of one or more of the grounds set forth in Rule 14a-8. For example, the company may argue that the proposal is excludable because it "deals with a matter relating to the company's ordinary business operations."[51] Specifically, the decision of how, from whom, and on what terms to raise capital is a business decision that arguably should be left to the management team.[52]

For all three of these criticisms and challenges, the response is essentially the same: The shareholder proposal process is a perfectly suitable means to advance the debate in all these areas. To the extent that the proponents of Inclusive Capitalism have made a compelling case for at least learning more about the potential benefits of Inclusive Capitalism, motivated shareholders with

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[49] *See* GIUSEPPE BERTOLA ET AL., INCOME DISTRIBUTION IN MACROECONOMIC MODELS, at ix (Princeton University Press 2014) ("'[N]ew classical' theoretical developments removed distribution from the set of macroeconomic issues of interest."). *But see id.* (noting "[r]enewed interest in issues of whether and how income and wealth inequality interact with production and growth"). *Cf.* Alberto Alesina & Dani Rodrik, *Distributive Politics and Economic Growth*, 109 QUARTERLY J. ECON. 465 ("A crude distinction between economics and politics would be that economics is concerned with expanding the pie while politics is about distributing it.").

[50] *Cf.* James K. Galbraith, *Kapital for the Twenty-First Century?*, DISSENT 674 (Spring 2014) ("[T]the effort to build a theory of physical capital with a technological rate-of-return collapsed long ago, under a withering challenge from critics based in Cambridge, England in the 1950s and 1960s, notably Joan Robinson, Piero Sraffa, and Luigi Pasinetti.").

[51] 17 C.F.R. § 240.14a-8 (West 2011). *But see* Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exemption: Preventing Shareholder Micromanagement by Proposal* (Mar. 29, 2016), https://ssrn.com/abstract=2750153 ("corporate decisions involving 'matters which have significant policy, economic or other implications inherent in them' may not be excluded as ordinary business matters") (quoting Austin v. Consol. Edison Co. of N.Y., 788 F. Supp. 192, 194 (S.D.N.Y. 1992)).

[52] *Cf.* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 330 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 499(2015) (allowing Wal-Mart to exclude shareholder proposal related to "whether or not the company should sell guns equipped with magazines holding more than ten rounds of ammunition").

> We employ a two-part analysis to determine whether Trinity's proposal "deals with a matter relating to the company's ordinary business operations [.]" Under the first step, we discern the "subject matter" of the proposal. Under the second, we ask whether that subject matter relates to Wal–Mart's ordinary business operations. If the answer to the second question is yes, Wal–Mart must still convince us that Trinity's proposal does not raise a significant policy issue that transcends the nuts and bolts of the retailer's business.

Id. at 341 (internal citations omitted).

standing have the right to engage company management and fellow shareholders on this topic via the shareholder proposal process.

D. Collective Action Problems

In *Broadening Capital Acquisition*, Ashford et al. note that "a first-actor-collective-action problem . . . would inhibit ownership-broadening binary financing because there is no guarantee that . . . projected aggregate benefits from ownership-broadening capital acquisition would be enjoyed proportionally by participating corporations."[53] However, the authors note a number of ways of addressing this problem, including "encapitalization of customers in proportion to their patronage of the goods and services produced by the participating corporation," as well as "tax benefits given to participating corporations whose dividends on binary shares yield increased government tax revenues and reduced welfare payments."[54]

The authors also note some additional government actions that could be taken to advance the cause of Inclusive Capitalism. These include actions whereby "the government could take an active role with respect to the collective action and environmental sustainability issues,"[55] such as: (1) "eliminating the corporate tax on corporate income paid as dividends (at least to the ownership-broadening trusts in order to enable them to repay the lender and to pay dividends to binary beneficiaries)";[56] (2) "eligibility and anti-discrimination rules for determining beneficiary participation and rules governing the qualification and duties of binary trustees and capital credit insurers would be needed as they are for other special types of fiduciaries and insurance providers";[57] (3) "the qualified binary financing might be promoted for and restricted to basic economic needs, such as food, clothing, shelter, health care, education, communication, mobility and energy";[58] (4) "the government might promote and condition producer eligibility based on environmental standards more stringent than mandatory standards imposed on all producers";[59] (5) "dividends might be paid in the form of special script usable only for the goods and services of qualified producers";[60] (6) "establish a national ownership broadening capital credit reinsurance entity modeled after the FHA home loan reinsurance program";[61] and (7) "a nation's

[53] *Broadening Capital Acquisition*, supra note 3, at 73.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 73-74.
[61] *Id.* at 74.

central bank might apply its quantitative easing program to monetize ownership-broadening loans until they are retired."[62]

VI. CONCLUSION

In this paper, we explored how Inclusive Capitalism might comprise part of the solution to current problems involving poverty and economic inequality. After an explanation of Inclusive Capitalism and how it may improve current economic conditions, we considered the novel possibility of using the shareholder proposal mechanism to further the goals of Inclusive Capitalism. Even after considering various criticisms and challenges, it was suggested that the potential benefits of utilizing the shareholder proposal process in order to advance the cause makes pursuit of this strategy worthwhile.

An open mind and a willingness to challenge conventional thinking are necessary to ensure that the best approaches to improve the lives of those living in poverty and struggling with economic inequality are implemented. The discussion and education that an Inclusive Capitalism shareholder proposal can generate, not to mention the potential benefits of any resulting implementation of Inclusive Capitalism, make pursuing this proposal a worthwhile endeavor. As the authors of *Broadening Capital Acquisition* emphasize: "If widely understood and implemented, the ownership broadening binary approach to corporate finance offers promise to transform the present economic and environmental crisis into a sustainable future of greater and more broadly shared prosperity, ecological harmony, distributive justice, and reduced strife."[63]

VII. APPENDIX: INCLUSIVE CAPITALISM AND THE CORPORATE DUTY TO MAXIMIZE SHAREHOLDER WEALTH

As noted earlier in this paper, Robert Ashford has previously suggested that "fiduciary duties <u>require</u> a consideration of the binary economic ownership-broadening approach as a means of enhancing corporate wealth for stockholders, stakeholders, and society."[64] This statement can be read to contain a number of contestable propositions. For example, while it is relatively uncontroversial to assert that corporate fiduciaries are obligated to become fully informed of relevant costs and benefits when considering alternative courses of action,[65] it is

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[62] *Id.*
[63] *Id.*
[64] Ashford, *supra* note 23.
[65] *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("A director's duty to inform himself in preparation for a decision derives from the fiduciary capacity in which he serves the corporation and its stockholders."), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

less clear where the line should be drawn in terms of sources for information. Particularly in light of the protections of the business judgment rule, it would be highly unlikely that a court would conclude a board failed to fully inform itself by ignoring binary economics in the context of financing the business, so long as the more traditional and accepted issues were addressed.[66] As also noted above, this is one of the reasons why using a shareholder proposal to put the issue of Inclusive Capitalism and binary economics before a company's board and shareholders is so attractive – it essentially forces the board to become informed about the topic when otherwise they likely would not.

In addition, Ashford's quote raises the issue of the proper ends of corporate governance. In other words, even assuming that a board concludes it should consider the Inclusive Capitalism / binary economics approach to financing, should the yardstick for selecting among competing financing alternatives be solely shareholder wealth maximization? Ashford suggests that the board should be taking into account "stockholders, stakeholders, and society," but this proposition is hotly debated. While it would arguably be reasonable to assume that the law is clear on such a basic point of corporate governance, current commentary suggests otherwise.

It is worth noting here that corporate governance debates are complex and multi-layered. They can be understood on one level as normative and positive debates about who the ultimate decision-maker is or should be with regard to business decisions. Additionally, there are debates about what the end goal of that decision-making is or should be.[67]

Three of the primary corporate governance theories to address these questions are (1) director primacy, (2) shareholder primacy, and (2) team production theory. Director primacy views the locus of corporate control as the board of directors, which is consistent with statutory pronouncements, but identifies the end of corporate governance as shareholder wealth maximization.[68] Shareholder primacy, meanwhile, does not dispute the statutory centrality of board decision-making, but posits that more decision-making power should be shifted to shareholders.[69] Not surprisingly, shareholder primacy theorists agree with director primacy theorists when it comes to shareholder wealth

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[66] *Cf. id.* at 873 ("Here, there were no allegations of fraud, bad faith, or self-dealing, or proof thereof. Hence, it is presumed that the directors reached their business judgment in good faith …").

[67] *See generally* Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1, 6 (2015).

[68] *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003).

[69] *See generally* Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1637 (2013) ("[T]he available empirical evidence provides no support for the claim that board insulation increases overall value in the long term. To the contrary, the evidence favors the view that board insulation at current or higher levels does not serve the long-term interests of companies and their shareholders.").

maximization being the goal of corporate governance. Finally, team production theory aligns with director primacy in placing the locus of corporate control squarely within the board, but views the end of that power to be a mediation of the often competing interests of the various stakeholders and constituents of the corporation in such a way as to generate efficient team production via the corporate form.[70]

The ongoing nature of the debate about the existence of a shareholder wealth maximization norm in corporate law can be seen in the contrast between two documents that were posted on the Social Science Research Network (SSRN)[71] within the past two years: (1) *The Modern Corporation Statement on Company Law*;[72] and (2) *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*.[73] In *The Modern Corporation Statement on Company Law*, Lynn Stout, Distinguished Professor of Corporate & Business Law at Cornell Law School, along with fifty-five other similarly distinguished academics and practitioners, asserts that, among other things, "corporate directors generally are not under a legal obligation to maximize profits for their shareholders."[74] Meanwhile, in *The Dangers of Denial*, the Honorable Leo E. Strine, Jr., Chief Justice of the Delaware Supreme Court (generally considered the preeminent corporate law jurisdiction), [75] writes that:

> Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.[76]

Chief Justice Strine goes on to state that:

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70 *See generally* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

71 Frequently Asked Questions, SSRN, https://www.ssrn.com/en/index.cfm/ssrn-faq/#what_is (last visited April 15, 2017) ("SSRN is a worldwide collaborative of over 314,100 authors and more than 2.2 million users that is devoted to the rapid worldwide dissemination of social science research").

72 Lynn A. Stout et al., *The Modern Corporation Statement on Company Law* (October 6, 2016), https://ssrn.com/abstract=2848833 [hereinafter *The Modern Corporation Statement*].

73 Leo E. Strine Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015) [hereinafter *The Dangers of Denial*].

74 *The Modern Corporation Statement*, *supra* note 72, at 2.

75 *See* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1447 (1993) (noting "Delaware's unchallenged position as the preeminent corporate law jurisdiction").

76 *The Dangers of Denial*, *supra* note 73, at 768.

> In current corporate law scholarship, there is a tendency among those who believe that corporations should be more socially responsible to avoid the more difficult and important task of advocating for externality regulation of corporations in a globalizing economy and encouraging institutional investors to exercise their power as stockholders responsibly. Instead, these advocates for corporate social responsibility pretend that directors do not have to make stockholder welfare the sole end of corporate governance, within the limits of their legal discretion, under the law of the most important American jurisdiction—Delaware.[77]

What could possibly explain such a seemingly drastic divide between widely recognized experts on what is absolutely a fundamental point of corporate law? One explanation is that Strine is correct on the law[78] while Stout et al. are correct in terms of the practical reality,[79] and it is to at least some degree defensible to argue that practical reality is in fact the law we should be talking about. Nonetheless, no competent attorney would advise a client board of directors of a for-profit corporation to admit to having essentially set shareholder value on fire, regardless of how admirable the cause or how cynical the lawyer is about the force of any asserted shareholder wealth maximization norm in the face of the business judgment rule.[80] In fact, this is arguably precisely what Henry Ford did wrong in the famous case of *Dodge v. Ford*, wherein the court admonished:

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[77] *Id.* at 763. *See also*, Stephen M. Bainbridge, *"The Modern Corporation Statement on Company Law" Pretends it Knows What it is Talking About*, PROFESSORBAINBRIDGE.COM (Nov. 1, 2016), http://www.professorbainbridge.com/professorbainbridgecom/2016/11/the-modern-corporation-statement-on-company-law-pretends-it-knows-what-it-is-talking-about.html ("'PRETEND.' Let's savor that word just for a minute.").

[78] *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (refusing to "accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders") (emphasis in original).

[79] *See* Douglas K. Moll, *Shareholder Oppression and the New Louisiana Business Corporation Act*, 60 LOY. L. REV. 461, 485 (2014) ("The business judgment rule is an especially deferential standard of review that insulates directors and officers from liability for a poor decision so long as the decision can be attributed to a rational business purpose.").

[80] It is fair to say that the whole purpose of the relatively recent "benefit corporation" business entity innovation is precisely to allow managers to reduce shareholder value somewhat in order to further other socially beneficial ends. If shareholder wealth maximization was not the norm, then these entities would be unnecessary; See Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1053 (2013) ("the benefit corporation statutes are broadly intended to disrupt the shareholder wealth maximization norm").

> 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 nondistribution of profits among stockholders in order to devote them to other purposes.[81]

While it is certainly true that "absent a limited set of circumstances as defined under *Revlon*,[82] a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term,"[83] there is a meaningful difference between acknowledging flexibility under the law in terms of the time horizon for maximizing shareholder value, and pursuing some other goal at the expense of shareholder value. The authors of *The Modern Corporation Statement* unfortunately do not acknowledge this distinction when they assert that:

> Contrary to widespread belief, corporate directors generally are not under a legal obligation to maximize profits for their shareholders. This is reflected in the acceptance in nearly all jurisdictions of some version of the business judgment rule, under which disinterested and informed directors have the discretion to act in what they believe to be in the best long-term interests of the company as a separate entity, even if this does not entail seeking to maximise short-term shareholder value.[84]

One would be forgiven for calling this a *non sequitur*.

Hopefully, the foregoing has sufficiently highlighted the broad contours of some of the fiduciary obligations of corporate decision-makers in order to allow us to better understand the extent to which we can expect fiduciary duties to serve as a driver for management's consideration of Inclusive Capitalism. It is arguably correct to assert that the board of directors of a for-profit corporation would be obligated to implement the plan of Inclusive Capitalism described herein if the board was convinced that this would, *ceteris paribus*, yield greater shareholder value than more conventional alternatives. It is quite another matter,

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[81] Dodge v. Ford Motor Co., 204 Mich. 459, 507 (1919).

[82] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("[W]hen Pantry Pride increased its offer . . . it became apparent to all that the break-up of the company was inevitable . . . . The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

[83] Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989).

[84] *The Modern Corporation Statement*, *supra* note 72, at 2.

however, to assert that such a board is obligated to consider Inclusive Capitalism in the first place. This is precisely what makes the shareholder proposal approach described herein so attractive to advocates of Inclusive Capitalism. Once confronted with the shareholder proposal, the board will need to become better informed about the merits of the approach. Only then can advocates of Inclusive Capitalism hope to leverage the board's duties in favor of their cause – and even then, only if the advantages in terms of shareholder value are clear. Of course, once informed of the merits of Inclusive Capitalism, a board could always choose to implement the approach even if there was some meaningful doubt about the extent of the shareholder wealth advantages because the business judgment rule would protect the board's decision unless it was utterly unreasonable.[85]

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[85] *Cf.* James D. Cox, *Searching for the Corporation's Voice in Derivative Suit Litigation: A Critique of* Zapata *and the ALI Project*, 1982 DUKE L.J. 959, 981 n.87 (1982) ("Although the reasonable basis standard has been involved in several business judgment rule cases, courts generally have contented themselves with examining the facts for fraud, oppression, or self-dealing on the part of the directors.").