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Hedge Fund Activism, Short-Termism, and a New Paradigm of Corporate Governance

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INTRODUCTION

Chief Justice Strine's important article, *Who Bleeds When the Wolves Bite?*,[1] brings a much-needed perspective to the modern corporate governance debate. Chief Justice Strine looks at the corporate governance world through the lens of what he calls the "human investors," i.e., the ordinary individuals who are the ultimate beneficiaries of the mutual funds, pension funds, and other aggregators of investment capital that control a sizable portion of today's public company equity securities. As the Feature emphasizes, human investors have an overriding interest in the long-term health of business enterprises, both as equity and debt investors and as wage earners. Through their lens, Chief Justice Strine raises a number of significant issues. These include the disconnect between the money managers focused on short-term performance and the long-term horizons of the human investors whose funds they manage, as well as the opportunism of activist hedge funds that seek to make quick profits through financial engineering rather than long-term investment. He also focuses on the growing evidence that equity gains realized by financial engineering pushed by activist hedge funds, to the extent those gains exist, are likely the result of diverting value from debt holders, workers or other constituencies. Short-term

* The author gratefully acknowledges the assistance of his colleague, Monica M. Heinze, in the preparation of this Essay.

1. Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 Yale L.J. 1870 (2017).

pressures that suppress investment in research and development, productive assets and future business opportunities are hurting our corporations and our broader economy. Chief Justice Strine is right to raise these issues, and addressing them is vital.

However, the specific solutions Chief Justice Strine proposes in the Feature, while reasonable and laudable, may be inadequate to address the issues fully. Among the proposals he advances are increasing hedge fund disclosure; requiring more timely and complete disclosure of shareholdings; and reforming the tax code to tax hedge fund earnings as income rather than capital gains, to implement a trading tax, and to incentivize investment in human capital.[2] He also suggests limiting the voting obligations of institutions and the ability of shareholders to submit proposals under the federal proxy rules; regulating proxy advisory firms; and making it easier for individuals to make private equity investments.[3] I cannot take issue with any of these proposals in theory. Unfortunately, most, if not all, of them would require legislation and/or regulation that could be difficult to pass or be subject to delays and distortions introduced in the legislative or regulatory process. Chief Justice Strine also observes that "the most important changes" would include encouraging institutional shareholders and money managers "to adopt the long-term horizon held by their principals, *i.e.*, human investors."[4] But despite this insight and the reference to a potential "new paradigm" for money managers,[5] the Feature does not develop this theme to flesh out how a new paradigm would be conceived and implemented.

The broader solution to the problem of short-termism necessarily rests in the hands of the institutional investors who control most of our public companies, and the relationships that companies are able to forge with their major investors. Institutional investors need to provide support for the efforts of the companies in which they invest to build sustainable, long-term, and successful businesses, while companies need to develop relationships of trust with their shareholders that give the shareholders the comfort to provide this support. And as a private ordering model, this solution negates the need for and risks of new legislation and regulation. Using Chief Justice Strine's Feature as a base, this Essay discusses both the problem of short-termism and the work that Mar-

2. *Id.* at 1957-65.

3. *Id. at* 1966-69.

4. *Id. at* 1964.

5. *Id. at* 1965.

tin Lipton, I, and others at our firm have done, in conjunction with the World Economic Forum, to develop a "New Paradigm of Corporate Governance."[6]

I. THE PROBLEM OF SHORT-TERMISM

The problem of short-termism in the modern public company is an outgrowth of the evolution of the structure and nature of equity ownership. In the early historical development of the corporate form, corporate ownership was direct. Corporations were owned by individuals, generally by the same individuals who managed the corporation or exercised active oversight with respect to its operations.[7] These individuals were long-term, if not permanent, owners, devoting their careers to running the businesses they owned. Consequently, there was no need to incentivize long-term investment, as that investment was fully consistent with the owners' interest in the sustainable success and growth of the company's business operations over the long term.[8]

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."[9] 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.[10]

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6. *See* Martin Lipton et al., *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporation and Investors To Achieve Sustainable Long-Term Investment and Growth*, WORLD ECON. F. 6 (Sept. 2, 2016), http://www.wlrk.com/docs/2828548_1.pdf [http://perma.cc/78PW-E2FC].

7. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4 (Transaction Publishers 1991) (1932) (noting that "[t]he typical business unit of the 19th century was owned by individuals or small groups [and] was managed by them or their appointees").

8. For example, John D. Rockefeller, founder of Standard Oil Co., was for years the largest shareholder of the company and maintained an active role in running the business. In fact, even after the forced dissolution of Standard Oil into thirty-four separate companies, the Rockefeller family maintained direct or indirect minority interests in many of the companies. *See* BERLE & MEANS, *supra* note 7, at 6, 76-77.

9. 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 2:7 (3d ed. 2010); *see also* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 9-10 (1977) (noting that before corporations expanded in size and professionalism, "owners managed and managers owned," but that eventually that structure gave way to the separation of ownership from management that we see in the modern corporate world).

10. *See* BERLE & MEANS, *supra* note 7, at ix ("Without using the term, Berle and Means show a keen awareness of the concern of modern 'agency' theory: the interests of the directors and managers can diverge from those of the owners of the firm, and they often do so."); Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 740-41 (1997).

This model subsequently 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.[11] To be sure, the issues raised by the separation of ownership from management are real. The increased engagement of major shareholders and the increased focus on the composition and oversight function of boards of directors have brought about many improvements in the governance structures of modern public corporations.[12] However, the embrace of shareholder power as the cure for the agency problem has raised equally important issues and problems of its own.

In its focus on the separation of ownership from management, the academic literature largely ignored, until recently, the parallel phenomenon that Chief Justice Strine identifies as the "separation of ownership from ownership."[13] Early on, even as professional management came to replace owner-managers in larger companies, shares were still often held primarily by wealthy individuals or families, who viewed their shares as long-term investments.[14] But a number of developments over the past several decades—including the significant

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11. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169 (1981) ("The tender bidding process polices managers whether or not a tender offer occurs . . . ."); Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director*: *An Agenda for Institutional Investors,* 43 STAN. L. REV. 863, 869 (1991) (noting that the mere threat of a hostile offer is likely to improve target management). *See generally* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) (arguing for an increase in shareholder power through which shareholders would be permitted to "adopt rules-of-the-game decisions to change the company's charter or state of incorporation" and to "adopt provisions that would give them subsequently a specified power to intervene in additional corporate decisions").

12. For example, boards today are more independent than they were decades ago, they tend to spend more time on board activities, and they engage more actively with shareholders. *See* EY Ctr. Bd. Matters, *Let's Talk: Governance: Trends in Independent Board Leadership Structures*, ERNST & YOUNG LLP 1-2 (Oct. 2014), http://www.ey.com/Publication/vwLUAssets/EY-lets-talk-governance-trends-in-independent-board-leadership-structures/$FILE/EY-ind-board-leadership-october-2014.pdf [http://perma.cc/5C4K-YWCQ] (providing statistics on the growing independence of directors at S&P 1500 companies); Conor Kehoe et al., *Toward a Value-Creating Board*, MCKINSEY & CO. (Feb. 2016), http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/toward-a-value-creating-board [http://perma.cc/2U6E-E7X6] (providing evidence that directors are spending more time on board activities than they once did); Governance Insights Ctr., *Director-Shareholder Engagement: The New Imperatives*, PRICEWATERHOUSECOOOPERS LLP 2 (June 2016), http://www.pwc.com/us/en/governance-insights-center/publications/assets/pwc-director-shareholder-engagement-the-new-imperative.pdf [http://perma.cc/SF6D-P3TS] (discussing the increasing level of board-shareholder engagement).

13. *See* Strine, *supra* note 1, at 1873.

14. *See supra* note 7 and accompanying text.

growth of the mutual fund industry,[15] the advent of IRAs and 401(k) accounts,[16] and the diversification of investments by public and private pension funds[17]—have led to the current environment that the Chief Justice highlights. Institutional rather than individual ownership now accounts for a majority of the direct shareholdings in most public companies and, in many cases, a vast majority.[18] And the investment and voting decisions with respect to these shares are in the hands of a different kind of professional management, namely the investment managers.[19]

Using the lens of the human investor, Chief Justice Strine effectively identifies and draws into focus the principal-agent issues that result from inserting investment managers between public companies and the individuals who are the ultimate beneficial equity-holders. As long-term equity and debt investors and as wage earners, most human investors' welfare is tied to the long-term success of the public companies in which they indirectly invest.[20] This long-term interest, however, conflicts with the goals of the money managers to whom human investors entrust their capital.[21] Money managers are often evaluated and compensated based on short-term performance and, consequently,

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15. In 1970, there were approximately 360 mutual funds with $48 billion in total net assets. By the end of 2015, there were over 8,000 mutual funds in the United States with $15.7 trillion in total net assets. *See* INV. CO. INST., 2016 INVESTMENT COMPANY FACT BOOK 172 (56th ed. 2016), http://www.ici.org/pdf/2016_factbook.pdf [http://perma.cc/PDG8-QSMC].

16. *See* Peter Brady et al., *The Success of the U.S. Retirement System*, INV. COMPANY INST. 29-30 (2012), http://www.ici.org/pdf/ppr_12_success_retirement.pdf [http://perma.cc/2BG6-82LP] (describing an increase in the number of active participants in 401(k) plans from 17 million in 1989 to 51 million in 2010).

17. *See* Press Release, Willis Towers Watson, Global Pension Fund Assets Edge Upwards in 2016 (Jan. 30, 2017), http://www.willistowerswatson.com/en-US/press/2017/01/global-pension-fund-assets-edge-upwards-in-2016 [http://perma.cc/CN6G-4D82] ("Increased diversification has been the principal strategy for managing pension fund risk around the world . . . .").

18. *See* Marshall E. Blume & Donald B. Keim, The Changing Nature of Institutional Stock Investing 4 (Nov. 12, 2014) (unpublished manuscript), http://faculty.wharton.upenn.edu/wp-content/uploads/2015/06/ChangingInstitutionPreferences_12Nov2014_CFR.pdf [http://perma.cc/XD2U-JPND] (finding that the proportion of equities managed by institutional investors hovered around five percent from 1900 to 1945, but that by 2010, some measures put institutional ownership of equities at sixty-seven percent).

19. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 865 (2013) (This shift from the Berle-Means archetype of widely distributed ownership to concentrated institutional ownership gives rise to what we call "agency capitalism," an ownership structure in which agents hold shares for beneficial owners. The consequence is a double set of agency relationships: between shareholders and managers and between beneficial owners and record holders.").

20. *See* Strine, *supra* note **Error! Bookmark not defined.**, at 1876-85.

21. *See id.* at 1912-17.

have incentives to invest with a short-term time horizon.[22] Companies feel this short-term bias through the pressure to meet quarterly earnings expectations and produce immediate results, knowing that if they do not, the market will punish them.[23]

This short-term bias preceded the rise of hedge fund activism but, together with the push for ever-increasing shareholder power, created fertile ground for activism's growth. 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.[24] These steps generally do nothing to enhance the long-term business operations of a company. Indeed, they tend to undermine long-term investment in research and development, productive assets, and future business enterprises.[25] 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. The strategies that hedge fund activists use thus come at the expense of human investors when those strategies weaken the long-term sustainability of public corporations and the broader economy.

II. THE NEW PARADIGM

To address these vital issues, Chief Justice Strine advances several proposals.[26] Yet, because Chief Justice Strine's Feature focuses primarily on the issues raised by hedge fund activism, many of his proposals focus on measures that would apply to hedge funds and their investors. To the extent his proposals relate to institutional investors more generally, they focus on these investors in isolation, rather than on their relationships with the companies whose shares they hold. For example, imposing a new trading tax, increasing required disclosures on voting policies, and reducing the number of 14a-8 proposals and say-on-pay votes could, over time, help in adjusting the mindsets of

22. *See id.*

23. *See id.* at 1938.

24. Dennis K. Berman, *A Radical Idea for Activist Investors*, WALL ST. J. (Jan. 27, 2015), http://www.wsj.com/articles/a-radical-idea-for-activist-investors-1422370260 [http://perma.cc/W6AT-S99J] ("The vast majority [of activist investors] are making similar demands of their targets, delivered with what now feels like a dull percussion: Raise the dividend, buy back shares, cut these costs, spin off that division, sell the company.").

25. *See* Strine, *supra* note 1, at 1942-43.

26. *See id.* at 1956-70.

institutional investors, but these measures do not focus directly on the interaction between the institutional investors and public companies. In addition, most of the proposals would require new legislation or regulation.

The proposals Chief Justice Strine advances, if adopted as proposed, would likely be beneficial. However, a more comprehensive reorientation of the relationship between institutional investors and the companies in which they invest may be a better solution. This reorientation could be done through private ordering efforts rather than depending on legislation and regulation. Legislative and regulatory efforts can be time-consuming to enact and are subject to being hijacked by political forces, compromising their effectiveness. Corporate law in the United States has generally taken an enabling approach, creating a framework under which corporations can adopt governance provisions suited to each individual company.[27] Private ordering has informed the evolution of governance principles over time in a wide range of areas, such as board composition, tenure and declassification, compensation, and, more recently, proxy access.[28] Meanwhile, legislative and regulatory initiatives have created one-size-fits-all approaches, such as Rule 14a-8 and say-on-pay voting that Chief Justice Strine appropriately seeks to roll back.[29]

More importantly, no matter how many laws and regulations are enacted, unless institutional investors fully buy into a long-term investment mindset and companies develop a relationship of trust with their major investors, the problem of short-termism is likely to remain. Laws and regulations may be able to modify actions in a few specific areas. Yet, if the institutional investors continue to focus on short-term results, they will find a way to continue to exert pressure on companies to prioritize short-term measures over long-term investment. If a law or regulation ameliorates some forms of this pressure, short-term minded investors will simply find a different path to apply the same pressure.

Fortunately, in the last several years, there have been some promising signs that a reorientation of the relationship between public companies and institutional investors is possible. Engagement initiatives and stewardship principles have come from both the corporate community and the institutional investor

27. *See, e.g.*, Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 743 ("[I]nnovation in corporate law has largely relied on private ordering—issuer-specific tailoring of a firm's governance structures through charter and bylaw provisions."); Robert B. Thompson, *Corporate Law Criteria: Law's Relation to Private Ordering*, 2 BERKELEY BUS. L.J. 95, 98 (2005) (noting that in corporate law, private ordering precedes law).

28. *See, e.g.*, Fisch, *supra* note 27 (arguing that private ordering between institutional investors and public companies has led to various changes in corporate governance practices, including with respect to board composition, declassification, compensation, and proxy access).

29. *See* Strine, *supra* note 1, at 1968.

community.[30] Dialogues between companies and their major investors are growing.[31] Some prominent institutional investor firms have gone on record stating their desire that companies resist activist pressures to leverage and buy back stock or pay special dividends and, instead, that companies should invest for the future.[32]

Drawing on these promising signs, Martin Lipton, I, and others at our firm, working together with the International Business Council of the World Economic Forum, have created a roadmap for a New Paradigm that would facilitate the cooperation between public companies and institutional investors towards the common goal of long-term investment and growth.[33] The premise of the New Paradigm is that corporations and major shareholders can work together to combat short-term pressures and provide support for well conceived long-term strategies and investments that can produce sustainable business success and growth. It is a private ordering construct that, if successful, would effectively address the problem of short-termism and obviate the need for legislation or regulation. The World Economic Forum is now seeking support for the principles and practices of the New Paradigm through formal endorsement

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30. A recent study found that the level of engagement between U.S. public corporations and investors has increased significantly in the past few years, and that both corporate officials and investors believe this increased level of engagement has been successful. Marc Goldstein, *Defining Engagement: An Update on the Evolving Relationship Between Shareholders, Directors and Executives*, INV'R RESP. RES. INST. 5-6 (Apr. 10, 2014), http://irrcinstitute.org/wp-content/uploads/2015/09/engagement-between-corporations-and-investors-at-all-time-high1.pdf [http://perma.cc/4QAX-3BG4]; *see also* Tim Armour et al., Commonsense Corporate Governance Principles, COMMONSENSE CORP. GOVERNANCE PRINCIPLES, http://www.governanceprinciples.org/ [https://perma.cc/6D6L-BF97] (setting forth a set of corporate governance principles supported by a selected group of large corporations and major institutional investors).

31. *See* Goldstein, *supra* note 30, at 14-15.

32. For example, in 2015, Larry Fink, Chairman and CEO of BlackRock, sent letters to CEOs of large companies urging them not to take short-term actions, such as buybacks and increased dividends, that might satisfy the demands of short-term activists, but that impair long-term value. Larry Fink, *BlackRock CEO Larry Fink Tells the World's Biggest Business Leaders To Stop Worrying About Short-Term Results*, BUS. INSIDER (Apr. 14, 2015, 11:18 AM), http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4 [http://perma.cc/8L6F-J6ZA]. In addition, William McNabb, Chairman and CEO of Vanguard, sent letters to companies emphasizing the importance of engaging with long-term investors. Letter from William McNabb, Chairman & CEO, Vanguard, to the Bds. of Dirs. (Feb. 27, 2015), http://about.vanguard.com/vanguard-proxy-voting/CEO_Letter_03_02_ext.pdf [http://perma.cc/TW6W-PJD4].

33. *See* Lipton et al., *supra* note 6.

by major corporations and investors of a compact embodying those principles.[34]

Under the New Paradigm, the corporation and its board and management would commit to: (1) thoughtful development of its long-term strategy and clarity in communicating that strategy to investors;[35] (2) meaningful engagement with investors on an ongoing basis, not just in times of trouble;[36] (3) appropriate consideration of social responsibility and sustainability as part of the corporation's strategy;[37] (4) prudent risk management and compliance programs;[38] (5) active board oversight both in monitoring management and in partnering with management on the corporation's strategy and its implementation;[39] (6) establishment of a "tone at the top" that promotes integrity, compliance and long-term sustainable value creation;[40] and (7) maintenance of other good governance practices, including with respect to board composition and refreshment, board and executive compensation, board committee structures, and governance and committee charters and guidelines.[41]

In return, the corporation's major investors would commit to: (1) support for the corporation's long-term strategy and opposition to proposals that would undermine the corporation's ability to pursue its long-term strategy;[42] (2) meaningful ongoing engagement with the corporation, including raising concerns privately and directly with the corporation rather than making public statements or encouraging activist involvement;[43] (3) development of an investing culture that focuses on long-term investing horizons, including compensation structures that incentivize long-term thinking,[44] (4) making voting decisions on an informed basis and consistent with long-term investment goals,[45] and (5) providing guidance to corporations, whether through public

34. *See* THE COMPACT FOR RESPONSIVE AND RESPONSIBLE LEADERSHIP: A ROADMAP FOR SUSTAINABLE LONG-TERM GROWTH AND OPPORTUNITY, WORLD ECON. F. (Nov. 30, 2016), http://www3.weforum.org/docs/Media/AM17/The_Compact_for_Responsive_and_Responsible_Leadership_09.01.2017.pdf [http://perma.cc/PVW2-4SP2].

35. Lipton et al., *supra* note 6, at 8.

36. *Id.* at 9.

37. *Id.* at 8.

38. *Id.* at 12.

39. *Id.*

40. *Id.* at 11.

41. *Id.* at 14-16.

42. *Id.* at 17-18.

43. *Id.* at 17.

44. *Id.* at 18.

45. *Id.* at 17.

policy statements or private communications, with respect to the investor's policies and preferences.[46]

The New Paradigm recognizes that the relationship between public companies and institutional investors must be a two-way street. There is no reason for the goals of each not to be aligned. If companies are responsible in developing long-term strategies for sustainable business success, this will create real value to the benefit of both institutional investors and the human investors whose capital they are responsible for investing. But company boards and management need to earn the trust of their major investors by demonstrating that their strategies are credible and that their investment in the future is prudent. This requires engagement and clear communication. It also requires receptivity on the part of the major investors. The New Paradigm encourages company boards and management, on the one hand, and institutional investors, on the other hand, to recognize that they each have key roles and responsibilities in creating a climate in which companies can invest for the long term and be protected against the short-term pressures that distort corporate decision-making. The de facto control of our public companies by institutional investors is not likely to go away anytime soon. Thus, the solution to the problem of short-termism depends on the ability of companies and their major investors to work together. If they are able to find effective ways to do so, new legislation and regulation will not be necessary. And if they cannot, it will be difficult for new legislation and regulation to overcome that failure.

The New Paradigm is a framework, and the exact manner in which the framework is adopted and implemented will need to be tailored to each specific situation. But the concepts and principles of the New Paradigm have already received support from the International Business Council of the World Economic Forum and a number of companies who have signed the World Economic Forum's compact.[47] And a group of major U.S. institutional investors and global asset managers recently launched the Investor Stewardship Group and the associated Framework for U.S. Stewardship and Governance, incorporating many of the same concepts and principles as are reflected in the New Paradigm.[48] Hopefully these principles will continue to gain traction.

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46. *Id.* at 19.

47. The International Business Council of the World Economic Forum approved the New Paradigm at its meeting in August 2016. To date, over one hundred companies have signed the compact. *See* Martin Lipton & Sabastian V. Niles, *The Spotlight on Boards 2017*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Jan. 29, 2017), http://corpgov.law.harvard.edu/2017/01/29/the-spotlight-on-boards-2017-2 [http://perma.cc/39NS-528Z].

48. *See* INV. STEWARDSHIP GROUP, http://www.isgframework.org [http://perma.cc/V288-96HQ].

Finally, it is worth noting that the New Paradigm and some of the proposals that Chief Justice Strine suggests are not mutually exclusive. Certainly, it would be useful to develop compensation programs for money managers that provide greater incentives for them to focus on long-term results.[49] Similarly, requiring index funds and other funds that accept long-term investments from human investors to provide more disclosure on how their voting policies serve the human investors could encourage these institutions to give more thought to the long-term implications of their votes.[50] But these proposals will make a real difference only if they ultimately contribute to the reordering of the relationship between corporations and their major shareholders in a manner that allows them to work together towards the goal of long-term business success.

CONCLUSION

Over twenty-five years ago, Martin Lipton and I wrote that "the ultimate goal of corporate governance is the creation of a healthy economy through the development of business operations that operate for the long term and compete successfully in the world economy."[51] This is as true now as it was then. Chief Justice Strine's Feature effectively demonstrates how our current governance environment has often lost sight of that goal, to the detriment of the human investors whom the corporate governance system should be designed to serve. But it is encouraging to see the growing recognition among practitioners, executives, investors, judges and even some in the academic community that we need to find a path to a corporate governance world that will restore the ability of corporations to invest in the future and to focus on the long-term sustainable success of their business operations.

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49. Strine, *supra* note **Error! Bookmark not defined.**, at 1968-69.

50. *Id.* at 1966.

51. Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 189 (1991).