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Corporate Governance

To "B" or Not to "B": The Power of Corporate Form

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Corporate form has the power to effect significant and desperately needed change. The magnitude of the crises impacting our world, and particularly our country, is certainly not disputed — by liberals or conservatives, men or women, African Americans or White Anglo-Saxon Protestants, members of the 1% or the working poor. The ***nature*** of such crises is also not in doubt — the fact that the climate is changing and negatively impacting the environment, the fact that there is a wider gap between rich and poor in this country than at any time since 1929, the fact that there is a sweeping tide of gun violence and the fact that recurring overt and covert discrimination necessitates the "Black Lives Matter" movement and catalyzed the bathroom laws of my home state of North Carolina.

But I believe the contrived or real debate over the ***causes*** (e.g., is climate change man made? Does current tax policy exacerbate income disparity? Does increased violence argue for more or less access to fire arms? Is safety for children greater with birth-gender-imposed restroom legislation?) and ***potential solutions*** has stymied action. Our government is currently too divided and therefore ineffective at addressing the problems. And even if our government was more functional, the private sector can arguably be much more successful in effecting needed change.

Because I have been a corporate lawyer for 23 years, I turn to the ***corporate form***. Sure, the term does not sound sexy or even remotely interesting to anyone outside of the world of lawyers, bankers and a few enlightened business people. But corporate form serves as the very backbone of our society, shaping the actions of the most powerful institutions of our time (corporations) and providing the functional framework for the behavior of virtually all men and women who work around the world. Therefore, I believe that corporate form can be a very effective extra-governmental tool for solving the crises.

In describing the power of corporate form, let me start by debunking three myths from the world of corporate form perpetuated in the popular press (and even by

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reporters who typically check their facts at *The Economist* and *New York Times*).

- The existing primary corporate form — the corporation — is not "broken." The corporation can serve in its current form as tool for change.
- The "B Corporation" is not a new corporate form. "B Corp" is a certification mark – and there are many others.
- The new corporate forms come in many shapes and sizes. There is no one form of "benefit corporation," and advocates of other forms are really crap at marketing and promotion.

The Corporation Is Not "Broken"

From someone who has spent years studying and drafting new corporate forms, this smacks of sacrilege. But it is true. The current debate about form features Lynn Stout and others on one side claiming that shareholder primacy is a myth, with Adolph Berle, Merrick Dodd and others on the other side citing Milton Friedman and opining that corporations must consider shareholders' primacy to the exclusion of almost all else. There are, of course, elements of truth to both arguments. Most corporate lawyers agree that the drive to maximize shareholder value is as much a reaction to legal and economic factors (e.g., quarterly reporting and heavy utilization of stock options in compensation for management) as it is a result of the corporate form itself. In normal operations (outside of sales, mergers or changes of control), boards and management can look to the long-term best interests of the corporation and its shareholders without enhanced risk. In general, their decisions are protected by the business judgment rules that provide an added layer of defense against liability (shifting the burden of proof in litigation) so long as they do not breach their fiduciary duties of care and loyalty.

However, I agree that the “extra-form” forces are powerful and entrenched. In fact, we all look to share price as the primary, if not sole, measure of a corporation’s worth and success. Every manager wants to “beat the Street,” and their compensation usually, in large part, depends on winning that battle. Further, board members are often correctly counseled that actions which do not yield stronger short-term profits or which are out of step with others in their industry can yield greater liability. While more corporations are at least considering environmental, social and governance (ESG) factors in decision-making, only events like the Enron debacle or the BP oil spill prompt significant shifts in corporate action.

Constituency Statutes

In response to the focus on short-term profitability, prior to the advent of new corporate forms, proponents of “impact” or “double/triple/quadruple” bottom line approaches, including B Labs, advocated the use of constituency statutes for social enterprises. Many states adopted constituency statutes in the wake of the hostile takeovers in the 1980s. Such statutes stipulate that boards and management “may” or “shall” consider a laundry list of factors other than shareholder value when considering an offer by a third party to purchase the company.

While not designed for use by social enterprises, starting in the early 2000s, companies that wanted to promote mission relied on these statutes to include social and/or environmental purposes in their charters and to craft fiduciary duties of boards and management in favor of such purposes.

There are numerous flaws in this approach — but I believe that the primary concern is one of accountability. Constituency statutes provide no means of protecting shareholders from misuse by management of resources devoted to the articulated purposes. For example, I could form a corporation for the purpose of combating climate change and improving employee relations, raise money by selling shares to the students in my class at Berkeley Law, and hire Erika Karp as my CEO. If I took all of the profits and used them to pay for vacations for Erika and her team on Tahiti on an annual basis, leaving the company almost destitute, shareholders would have little way of learning about my actions until after the fact — and limited grounds to bring a claim to halt my actions or seek a refund for their investment.

Suffice it to say that the use of constituency statutes alone is a bad idea — they will not be effective in either improving shareholder profits or advancing social and environmental goals. But before examining the *new* corporate forms that are available, it is important to recognize and, for some companies, to adopt the low- (or no-) risk tools that traditional corporations have been employing for years to ensure a mission focus.

Tools for Impact with Traditional Forms

Both budding entrepreneurs and established enterprises can develop and retain an emphasis on positive social and environmental impact using the existing corporate forms, particularly corporations, limited liability companies and limited partnerships. For corporations in states without constituency statutes (e.g., Delaware and California), you would be ill-advised to draft social and/or environmental purposes into the charter itself given the established fiduciary duties. However, shareholders can execute agreements with management whereby the company will be contractually obligated to emphasize an agreed mission or public purpose. Classes of shareholders can require protective provisions in the charter to ensure that certain corporate actions, including change of business plan, change of mission and change of control, can’t be approved without the affirmative vote of a mission-focused class. Further, operating and partnership agreements for LLCs and LPs can include such contractual provisions in addition to waterfall rights (payouts for distributions and liquidation) that favor identified non-profits or mission-focused recipients. In fact, Delaware's limited liability company statute allows for the possibility of an LLC where duties of the managers to contractually agreed social and/or environmental purposes are equal to — or trump — duties to generate economic returns.

It is also possible to draft limited partnership agreements where limited partners agree with fund managers to donate 1% of profits to a designated charity and/or to accept a lower financial ROI in favor of an "impact" ROI. I am encouraged by a growing trend in the fund world for carry or bonus payments to managers to be structured to pay out based on social/environmental as well as financial performance.

Tools for Impact in Change of Control

Notwithstanding these tools, there is an argument, supported by much precedent, that as enterprises scale and increase their intake of outside capital, they often, if not usually, lose their impact focus. First, this is not true for companies whose financial success is directly linked to its mission (e.g., Etsy, Revolution Foods, Sungevity or Bloom). For example, the more that Etsy provides training and support to its Etsy communities, the more members of those communities sell goods via their online platform and the greater the selection and sales to consumers. The more RevFoods educates children on the virtues of nutrition, the greater their sales of healthy, nutritious and delicious school lunches.

Second, for decades many corporations have established non-profits or ".orgs" to house their "impact first" programs and/or facilitate donations from the entity itself and its employees or partners to worthy causes. In recent years, corporations have donated or housed valuable intellectual property, not enough to impact valuation but critical for the business (e.g., a trademark, portion of software or code), in the related non-profit and then licensed the same back to the for-profit operating entity. The license agreement contains a "mission lock" such that if there is a material deviation from mission by the for-profit, the license resets with a higher royalty rate or eventually terminates. Including a mechanism to determine when there has been such a material deviation (usually involving a third-party mediator) is critical. Professor Eric Talley (formerly at Berkeley and now at Columbia Law School) refers to this as my "spurn-out" provision; however, I would argue that if there is financial value in the mission and the relationship with the ".org," the license may not reduce valuation through sale.

The bottom line is that there are a number of mechanisms available to both public companies and private enterprises that can enable them to focus on long-term objectives as well as environmental, social and governance goals. Therefore, the need for new corporate forms arises because most of these tools are ***permissive*** for boards and management instead of ***mandatory***. And it is not possible to underestimate the market forces which encourage, if not demand, short-term profit maximization.

A "B Corporation" Is Not a New Corporate Form

A "B Corporation" or "B Corp" is a certification mark — like a "Good Housekeeping" seal of approval or "LEED" certification. B Labs has done a very good job of creating a framework for companies to evaluate their business and operations on ESG factors and to then receive a score or ranking. To become a "B Corp," such companies then enter into a license agreement with B Labs and pay a licensing fee of between $500 and more than $50,000 depending on the structure of the applicant.

B Labs does review the evaluations and often schedules calls for follow-up questions — but such reviews fall short of a full audit to ensure accuracy and completeness. This means that there have been — and will continue to be — companies that license the "B Corp" mark and are promoted as part of the B Corp community but whose operations do not live up to the standards espoused by B Labs. I believe that this is one of the reasons for the change in licensing requirements that I describe below.

When Should a Company Become B Certified?

Let me offer a few recommendations for companies that are deciding whether or not to become "B Corp" certified. First, you don't need to hire a consultant or lawyer to help you fill out the questionnaire and become certified. The fact that there is now a cottage industry of "experts" willing to charge high fees to provide such assistance is a sign that B Corps are here to stay. But the B Labs folks have done a good job at making the certification process user-friendly.

The survey can be downloaded, you can use it to determine areas of improvement before submission, and their staff is available to help if and when questions arise.

Second, I strongly advise that management take and score the survey before deciding whether to pursue certification. While years of good work have gone into developing the survey and standards, one area of weakness is that the survey does not divide respondents by industry. This can yield unhelpful results — like a recycling company whose mission is to reduce waste having a lower score (because of carbon emissions among other factors associated with heavy manufacturing) than a developer of social media applications in SoMa, San Francisco (with little output of social value).

Also, the survey was not designed for public companies — so when Etsy went public, quite a bit of work had to be done (and improvements continue to be made) so that publicly listed companies can accurately respond to the questions. Further, acquired companies are not able to retain B Corp status post sale or merger unless the target remains a stand-alone subsidiary (e.g., Plum, New Chapter Vitamins, Ben & Jerry's) or the acquiring company itself becomes B certified (e.g., Danone/WhiteWave). The issue with the former is obviously that both the survey process and compliance are in the hands of a corporate entity (e.g., Campbell's, Procter & Gamble, Unilever) that does not have any legal requirement to retain the mission alignment associated with B certification.

Finally, as with any marketing campaign, it is very important to test with all constituents in your market to determine whether and how the B Corp brand will benefit your company.

The vast majority of B Corps are normal C Corporations or LLCs and are not legally required to advance their social and environmental goals. However, I believe that many of these companies (e.g., Etsy, Plum, RevFoods) are at least as mission-aligned as those that employ the new corporate forms (see below). Further, B Labs has, over time, changed the provisions of its license agreement and is now requiring B Corps to change (within a reasonable period of time) their underlying corporate form to the benefit corporation. Unfortunately, there appears to be a failure to recognize that there are effective mechanisms that can require corporations and LLCs to stay true to their impact goals — with enforcement measures that are just as (or more) effective as those afforded to the new corporate forms, including the benefit corporation.

Other Performance Metrics

In addition to B certification, there are many other methods for rating a company's performance based on ESG factors. According to SustainAbility, there are over 110 such rating systems and many include both a description of the ESG factors that should be measured and data to provide a benchmark for measurement. In addition to B Corps, the Global Reporting Initiative (GRI), Sustainalytics and MSCI provide evaluations across the full environmental, social and governance spectrum, while CDP[1] and CarbonTracker focus on measuring carbon emissions and risk.

Most public companies are suffering from disclosure "overload" related to ESG as they are continuously approached by new organizations asking them to complete surveys, provide data and help rate their performance on various social and environmental metrics. Fortunately, the rise of integrated reporting with public companies should, over time, bring needed standardization and rigor to the sector. Key leaders such as the Sustainable Accounting Standards Board, GRI and the International Integrated Reporting Council are identifying the ESG factors by industry that are material to operations and should therefore be disclosed in required reporting for public companies.

[1] Formerly named the Carbon Disclosure Project.

The Bloomberg-Carney Task Force on Climate-Related Financial Disclosures is working to harmonize standards related to climate risk. All of the standard-setters are engaged with the Big 4 accounting firms to provide a framework for disclosure that can be audited or verified. In the United States, the Nasdaq and NYSE have indicated a willingness to follow other stock exchanges from around the world whose listing standards already include — or soon will — certain ESG factors.

The movement toward reporting on material social and environmental factors in a way that can be audited and included with financial reporting to shareholders will certainly represent a big step toward improving accountability for companies around the major environmental and social issues that we face today. Such reporting is also necessary for there to be a shift of the fiduciary duties of boards and management to include ESG goals, as contemplated by the new corporate forms.

The New Corporate Forms Come in *Many* Shapes and Sizes

The branding genius of B Labs has most people, including ESG practitioners and press, believing that there is only one new corporate form — the benefit corporation. However, in fact, there are several different forms that have been conceived to chart a new path between non-profits (focused exclusively on mission) and for-profits (focused primarily on shareholder value). Further, the benefit corporation form itself varies greatly from state to state; only a few states follow the "model" initially developed by B Labs, and that model itself has been modified substantially and improved over time.

There are two primary elements that are universal to the new forms. First, they all require boards and management to consider social and/or environmental goals in addition to financial returns. Second, at least as of this writing, none of the new forms receive special tax treatment; investments and/or donations to the new corporate forms are not deductible, and revenue earned by the entities is taxed at normal rates.

The Low-Profit Limited Liability Company (L3C)

The first new form to arrive on the scene — the Low-Profit Limited Liability Company or L3C — was written into law in Vermont in 2008. Since the Tax Reform Act of 1969, foundations have been permitted to make program-related investments (PRIs), which are investments in for-profit entities, so long as those investments are for the primary purpose of advancing the foundation's charitable purpose and not generating financial returns. However, the originators of the L3C noticed that utilization rates for PRIs had remained very low over the four decades since their introduction. The L3C was conceived to address this failure and help non-profits, particularly foundations, deploy greater capital and have greater impact through investment in for-profit entities as an alternative to donations. Specifically, the L3C is a form of limited liability company that requires managers and owners to articulate social and environmental goals and then prioritize such goals over financial returns.

Unfortunately, L3Cs have not garnered widespread support from entrepreneurs or funding from foundations. This is in part because more significant IRS rule changes (anticipated at the time of original conception) have not come to pass to afford special tax treatment for the L3Cs or obviate the need for tax opinion letters. However, new regulations and guidance from the IRS as recently as 2016 have served to further de-risk PRIs (if they were ever in fact risky) and may spur further adoption of PRI investments if not L3Cs. In addition, the L3C form does provide a viable alternative to "mission first" enterprises in the eight states (and two Native American tribes) with L3C legislation. Further, for those of us who practice in states without L3C legislation (particularly California and Delaware), the forms offer good exemplars and ideas for incorporating social and environmental purpose into traditional LLCs.

Social Purpose and Public Benefit Corporations

Whereas the L3C can be viewed as an extension of the non-profit corporation, social benefit and public benefit corporations (SPCs/PBCs) were intended to introduce social and environmental focus to the traditional for-profit corporation. The Flexible Purpose Corporation (renamed Social Purpose Corporation in 2015) was drafted over a two-and-a-half-year period by a non-partisan group of corporate lawyers (of which I was a member) and was first introduced in 2009 in California. In general, the SPC provides a safe harbor — in addition to the business judgement rule — that ***requires*** boards and management to emphasize shareholder-agreed social and/or environmental purposes in the charter. In addition, the SPC differs from a traditional corporation because of the fiduciary duty to the mission (and additional protection to the board and management in promoting the entity's social and environmental goals), mission protection (two-thirds class vote to change the agreed purpose), increased accountability via reporting, and detailed provisions for conversion, merger, sale and consolidation.

The Social Purpose Corporation, introduced in 2013 and adopted in Delaware in 2015, is substantially similar to the Public Benefit Corporation with only two material exceptions. The PBC requires a broad public purpose in addition to the specified social and/or environmental goals, while the SPC only requires at least one shareholder-agreed social or environmental goal. And the SPC requires greater accountability and reporting than the PBC. B Labs initially supported the SPC before deciding to introduce a second form in California in 2011. Ironically, when B Labs rejected the SPC in favor of the California benefit corporation, it provided an open letter with objections to five provisions of the SPC — *and all five provisions are now incorporated into the Delaware PBC*. Specifically, the Social Purpose Corporation and the Public Benefit Corporation:

- both have shareholder-agreed social and environmental goals that must be articulated in the charter of the corporation (instead of itemizing all goals in the state statute itself);

- do not require external validation or audit of the reporting to shareholders on the public benefit (the SPC requires that such reporting be in accordance with "best practices" while the PBC allows the board/management to simply describe the standards that have been used for reporting);

- do not have an identified "benefit director" (a feature of benefit corporations in other states) with fiduciary duties that arguably conflict with pre-existing fiduciary duties;

- do not have a "special proceeding" to enforce the social/environmental mission (both provide additional protection from liability for boards and management and rely on traditional corporate enforcement mechanisms, specifically the right of shareholder action for breach of duties and the right to remove directors); and

- both offer dissenters rights on conversion from an existing corporate entity to the new form (allowing shareholders the right to object to the conversion and take action to have their shares redeemed).

Ironically, given that the SPC is often referred to as the "benefit corporation light," the SPC has more robust reporting requirements than the PBC — with annual reporting for the SPC (as opposed to biannual for the PBC), required reporting to the public as well as shareholders for the SPC (no public reporting for the PBC) and 8-K type reporting for the SPC if there are material changes in between annual reports (no reporting other than biannual for PBC).

Both the SPC and PBC have been designed for use by both small social enterprises and by larger public companies. The first PBC (Laureate Education) filed an S-1 with the SEC to go public in October 2015 (but has yet to list its shares and start trading). A second PBC will result from the closing of the $10.4 billion merger of Danone and WhiteWave Foods.

Finally, both the SPC and the PBC can garner support from liberals and conservatives as an "extra-governmental" solution to the current crises. They can be vehicles for economic growth and job creation in addition to advancing social and environmental goals that are approved by shareholders (as opposed to legislators) and can be in the best interests of the corporation's long-term financial well-being. When introduced in California, the SPC was the only bill that year that received 100% support from both Democrats and Republicans in the Senate.

The Benefit Corporation

The first benefit corporation was written into the Maryland statute in 2010. Since that time, various versions of benefit corporation legislation have been adopted by 30 states plus the District of Columbia (according to B Labs as of August 2016). Note that many states use different names for the new form – including Benefit Corporation, Public Benefit Corporation (e.g. CO), Social Purpose Corporation (e.g. WA, FL) and Sustainable Business Corporation (e.g. HI). Further confusing the issue is that in some states, the benefit or public benefit corporation is a form of ***non-profit corporation*** while in others it is a form of ***for-profit corporation*** (and we are obviously discussing the latter in this article).

It is also important to note that benefit corporations vary greatly state by state and have evolved significantly since first introduced and advocated by B Labs in Maryland and Vermont six years ago. In fact, many are much more similar to the SPC and PBC than to either the first legislation or to the “model” statute promoted by B Labs. However, in general, unlike the PBC and SPC, these statutes bake “goodness” into the legislation — as a benefit corporation, a company’s board and management have a fiduciary duty to a long list of social, environmental and governance goals (borrowed from the “B Corp” certification survey) in addition to financial goals. The successful lobbying efforts of B Labs have made the benefit corporation approach far more prevalent when measured by state adoption (not by company incorporation) — although not in Delaware (or CO, WA, FL). However, it remains to be seen which policy approach will have greater positive impact on the world — companies that have affirmative fiduciary duties to selected social and environmental goals or those that are required to focus on a laundry list of objectives.

In most states, the benefit corporation provisions are an “add on” to the corporations code — not creating a new and distinct legal entity but fashioning a new designation for “normal” corporations. For many states, this has resulted in unintended conflicts between corporate law and benefit corporate law that apply to the same entity. For example, most state benefit corporations have a “benefit director” responsible for oversight and accountability with respect to the public purpose and a requirement of independent verification (which either by design or by default comes courtesy of B Labs for a fee). Corporate law experts often cite a recurring issue state-by-state between the conflicting duties of a benefit director whose new duties must be viewed in light of his or her pre-existing fiduciary duties of care and loyalty to the shareholders. They also point to issues with the “enforcement proceeding,” a feature of most benefit corporation laws, which can yield increased risk and liability for boards and management. It is therefore not a surprise that many benefit corporations have difficulty securing director and officer insurance.

Provided that you have waded through the detail on corporate form above — which is likely at odds with the articles and press releases written by biased advocates of one form or another (many of whom benefit financially from promotion of a certain form) — what does all of this mean for both private social enterprises and for public companies? Should boards and management consider either incorporating as — or converting into — one of the new corporate forms?

Let me stress that I believe requiring all corporations to change form — imposing fiduciary duties on boards and management in favor of shareholder-agreed social and environmental goals — is critical as a tool to address issues ranging from social inequality to climate change. However, we do not yet have an agreed form (much less an agreed name) for the new corporate form — although most experts (myself included) agree that the Delaware Public Benefit Corporation is currently the best model. Further, the weighting of fiduciary duties has not yet been tested in court. In other words, if a company is increasingly profitable in its operations and successful in emphasizing the agreed social or environmental goals, there is little risk of litigation. If, on the other hand, a company becomes unprofitable and therefore must make choices between adherence to the public purpose and financial stability, risks will increase.

So, some concrete advice on whether to adopt a new corporate form (to “B” or not to “B”):

- If the good or service that your company produces has a positive social or environmental impact in and of itself (e.g. solar, education, healthy school lunches), there is much less risk associated with the “weighting” issue above and therefore incorporation/conversion into a new form. For these companies, there is often no trade-off between high profits and high positive social/environmental impact.

- If the good or service that you produce is output-agnostic (e.g. social media application, coffee tables, baseball bats), then you must consider the interplay between the public purpose and your profitability before you convert. This does not necessarily mean there is a trade-off. Positive focus on ESG goals could increase profitability for the maker of baseball bats that emphasizes employee relations and contributes financially to the building of little league parks in underserved communities.

- If you are a start-up and introducing an innovative new product with a new management team, the new corporate form may be one "new" too many. If you and your board really want to try one of the new forms, I suggest waiting 6-18 months after incorporation, possibly asking your investors to agree to convert to a new form (conversion is easy) after certain milestones are met.

- In all of the cases above, it is critical that you not only get your board to embrace the new form, fully understanding the risks and rewards (not just the latest PR spin), but that your investors are fully comfortable as well. In the early stages, commitment to convert ahead of investor support can significantly increase the likelihood that your venture will fail.

- Your board and investors will need to understand not only the impact of the new fiduciary duties on daily operations but also exits — IPOs and sale transactions (although there are more alternative forms of exits being utilized by social enterprises). We do not yet know how the market will price these new entities (although we are waiting for two concrete examples — Laureate Education and Danone/WhiteWave). There is some evidence that the market will view the public purpose as a net positive, specifically for companies where the product or service produced is good for the environment, community or society. However, this belief faces strong headwinds from mainstream capital markets that have long held that "impact" or focus on social/environmental purpose will necessarily generate lower returns.

- Finally, if your company — with board and shareholder support — is serious about embracing a public purpose and having a positive impact, there are many very effective tools to implement such goals for traditional corporations.

The Power of the Corporate Form

So how can corporate form be such an effective tool for change? And why do we need the new forms? If you believe the statements that I made at the start of this article, then why can't we just rely on existing forms of corporation, limited partnership and limited liability companies to solve the world's problems? The short answer is that we can and should. Arguing that all corporations have to convert into new corporate forms in the short-term is essentially letting Corporate America off the hook. If we continue to stress that boards and management have a fiduciary duty solely to maximize short-term shareholder profits, we will miss out on enlisting the most powerful force (multinational corporations) to address the crises that are crippling our country and world. More importantly, we will be doing them a disservice. The combination of climate change, challenges with energy, water and other natural resources and population growth is leading to a world that in 10 or 20 years will be vastly different than it is today. Corporations will have to transform their operations to remain competitive. Ignoring these ESG factors — particularly the risks associated with climate change — is just plain bad business.

I often cite Bob Litterman, formerly of Goldman Sachs and now of Kepos Capital (who does not know that I am a groupie), in describing the intersection between climate risk and business. He explains that we are all in a car headed for a cliff. Most people recognize that the (or "a") cliff is coming, but no one can confirm with certainty exactly when we will reach it or how precipitous the drop will be. The economic models underlying the operations of all of our corporations (and government policy) are premised on the theory that, if such cliff exists, we will be able to gradually apply the brakes before we commit suicide. However, in fact, because of the unknown variables, it is probable (if not a certainty) that we will need to slam on the brakes. The companies that start modeling the risk associated with the cliff will have a much better chance of avoiding or surviving the fall and thriving through the next several decades.

Unfortunately, for many reasons — including the difficulties associated with assessing the risk, the desire to maintain the status quo, compensation and tax structures — it is taking longer for corporations to appreciate how ESG factors will impact operations. And some of the issues that we are facing today, particularly those borne of climate change and social inequality, require solutions that can generate more immediate results.

We need the new corporate forms (and particularly agreement and promotion of one preferred form) so that we can ***require*** the major multinational corporations to identify and actively pursue social and environmental goals instead of merely ***considering*** material non-financial factors. We need the new forms so that the next BP oil spill is not just around the corner. We need the new forms so that shareholders can bring actions against large drug companies if they raise the prices of EpiPens, denying access to the general population.

We need the new forms so that “Black Lives Matter” can translate into educational opportunities for the underserved in our society. We need the new forms so that we can increase the number of women and minorities on boards and in management — and thereby improve productivity — of corporations (and law firms). We need the new forms so that we can hold the managers of privately owned prisons accountable for recidivism rates.And most of all, we need the new forms so that the managers of our corporations are required to look further into the future and take actions to plan for climate change and cybersecurity breaches and artificial intelligence and changes in the labor force — even if such actions are at the expense of short-term shareholder profitability.

Corporate form rocks. And, more importantly, it has the power to effect the change that we desperately need.

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