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State Law Implementation of *The New Paradigm*

With the (1) embrace of corporate purpose, ESG, and long-term investment strategy by BlackRock, State Street and Vanguard, (2) adoption and promotion by the World Economic Forum of *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, (3) enactment of a benefit corporation law by Delaware and some thirty states, (4) introduction of legislation by Senator Warren to achieve stakeholder corporate governance by way of mandatory federal incorporation, and (5) formation of Focusing Capital on the Long Term, Coalition for Inclusive Capitalism and Investors Stewardship Group, it is clear that we are at a new inflexion point in the development of corporate governance. We are ready to abandon Milton Friedman's 1970 dictum that the sole purpose of the corporation is to maximize profits for the shareholders—a dictum that ruled thinking in business schools, law schools, on Wall Street, and in boardrooms until proven invalid by the 2008 fiscal crisis and recent studies discrediting so-called empirical "evidence" used to justify attacks by activist hedge funds designed to force companies to engage in financial engineering to create short-term profits. We can achieve the objectives of *The New Paradigm* and the objectives of corporate managers who want to be able to operate free of Wall Street's focus on short-termism and free of attacks, and threats of attacks, by activist hedge funds. And we can do it without mandatory federal incorporation infringing on state corporation law or state corporate governance jurisprudence. It can, and should, be done by states, and especially Delaware, by doing the following:

- Finish the work started by the Delaware Supreme Court in the 1985 *Unocal* case and expressly empower boards of directors to consider corporate stakeholders when making decisions by adopting a constituency statute akin to Section 1715 of the Pennsylvania Business Corporation Law and Section 5(c) of the Warren bill;

- Adopt a mandatory, retroactive staggered board statute akin to Section 8.06 of the Massachusetts Business Corporation Law in order to restore

the breathing room that assisted boards in resisting pressure from activist hedge funds—breathing room that was taken away in a misguided campaign by a cabal of law school academics, ISS, and some public pension funds based on now thoroughly discredited statistics. See Neil Whoriskey, Long-Term Investors Have a Duty to Bring Back the Staggered Board (and Proxy Advisors Should Get on Board); and

- Place public accountability on large investors by amending state corporation law (such as Section 212 of the Delaware General Corporation Law) to condition the voting rights of any stockholders owning shares with a market value of $1 million or more on mandatory disclosure of their policies and views on critical elements of corporate purpose, such as ESG, long-term investment, engagement with companies, diversity, age and tenure of directors, expertise of directors, and the percentage of the board that should be "independent" in order to ensure room for experienced directors familiar with corporate operations. This would make universal the disclosure and engagement policies of the type already embraced by the index funds and many other major investors.

Such steps are well within the authority of the Delaware legislature (as well as the legislatures of the other states) and would demonstrate a state's commitment to thoughtful governance and stewardship and preserving flexibility that is critical in this era of rapid technological disruption.

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