B. Business Impact

Managing the challenge of short-termist activist investors: law-based tools and strategies

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Abstract

The law in some countries now reinforces the ability of companies to pursue specific voluntary ESG initiatives. This impact paper will present seven law-based tools and strategies that publicly traded companies with a strong ESG commitment can use to manage the challenge of short-termist activist investors more interested in financial performance than social and environmental performance.

Keywords: benefit corporation, activist shareholder, company law, securities law

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Introduction

In reaction to a widespread, but increasingly unpopular, corporate emphasis on maximising shareholder value, the law in some countries has recently evolved in two ways. First, the law in some countries now imposes specific ESG requirements on companies. Such mandates are not the concern of this impact paper.

Second, the law in certain countries now reinforces the ability of companies to pursue specific voluntary ESG initiatives. In the United States, for example, many states have authorised business corporations to organise or reorganise as a public benefit corporation and/or a flexible benefit corporation[1]. Similarly, in France the PACTE law—the acronym translates as Action Plan for Business Growth and Transformation[2]—has authorised business corporations to declare a purpose beyond the financial well-being of shareholders[3].

Most of the companies pursuing such voluntary ESG initiatives are privately held, masking from the public the possible tension between financial objectives on the one hand, and social and environmental objectives on the other. However, a few publicly traded exceptions—Etsy and Danone – have experienced media-covered activist challenges that reveal some of the contours of this tension. In both cases, there was a publicly communicated commitment to social and environmental objectives as well as financial ones, and the company took concrete steps in furtherance of that commitment. In both cases, activist investors complained about financial performance. And in both cases, the board made significant changes in apparent reaction to the demands of the activist investors.[4]

Many people argue that "it is possible to simultaneously boost both financial and ESG performance if you focus strategically on issues that are the most 'material' to shareholder value, and you develop major innovations in products, processes, and business models that prioritize those concerns."[5] However, the Etsy case is sometimes cited as a cautionary tale for the proposition that a company's ESG performance comes at the expense of its financial

[1] For a description of these American company laws, see footnote 10 below.

[2] Law n° 2019-486, 22 May 2019.

[3] Art. 1835 (2) of the French Civil Code.

[4] "Activist investor" is a term widely used for a minority shareholder in a publicly traded company who uses rights granted to minority shareholders, together with public statements, to influence the company's strategy, financial position, or governance. Numerous laws affect activist investors, but the term is paradoxically not defined by the law.

[5] Robert Eccles & George Serafeim, *The Performance Frontier: Innovating for a Sustainable Strategy* in Harvard Business Review May 2013 (https://hbr.org/2013/05/the-performance-frontier-innovating-for-a-sustainable-strategy).

performance (whether or not this is a fair interpretation of what happened at Etsy).[6] The Danone case is starting (rightly or wrongly) to be cited for the same proposition.[7]

Prompted by the Etsy and Danone cases, this impact paper will present seven law-based tools and strategies that companies can use to manage the challenge of short-termist activist investors more interested in financial performance than social and environmental performance.[8]

First, however, this impact paper will set the context by providing details of the Etsy and Danone cases while explaining relevant legal terms.

Etsy, a privately held Delaware corporation, received a "B Corporation" label from the nonprofit organisation B Lab.[9] Delaware company law was then amended to enable a corporation to organise or reorganise itself as a "public benefit corporation,"[10] and Etsy was widely expected to reorganise itself as a public benefit corporation, because doing so within four years of the Delaware law reform was a B Lab condition to keeping the B Corporation label. Etsy then became a publicly traded company through an initial public offering. The IPO was followed by a steady decline in the share price, partly because the company was unprofitable, and partly because insiders, newly freed to liquidate their shares, were selling into a market that wasn't buying, inadvertently forcing the share price down.

In early 2017, short-termist activist investor Black-and-White Capital, citing financial performance challenges, publicly called for the sale of the company, and in May 2017, the Etsy board replaced the CEO, naming a new CEO.[11] The new CEO immediately laid off 80 people, and shortly thereafter another 140 people. In late 2017, because Etsy had not reincorporated as public benefit corporation, its B Corporation label was withdrawn by B

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[6] See, for instance, David Gelles, *Inside The Revolution At Etsy* in The New York Times November 25, 2017 (https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html): "Once a beacon of socially responsible business practices with a starry-eyed work force that believed it could fundamentally reimagine commerce, Etsy has over the past year become a case study in how the short-term pressures of the stock market can transform even the most idealistic of companies."

[7] See for instance Francis Vailles, *Faire du « cash », pas du capitalisme social* in La Presse, April 3, 2021 (https://www.lapresse.ca/affaires/2021-04-03/chronique/faire-du-cash-pas-du-capitalisme-social.php).

[8] This impact paper accepts the view that short-termism is an obstacle to long-term ESG goals, but acknowledges that short-termism is not the root of all problems in the business world. See, for instance, Mark Roe, *Stock Market Short Termism's Impact* in University of Pennsylvania Law Review, Volume 167 pages 71 et seq. (2018).

[9] B Lab is a US-based nonprofit association that awards the "B Corporation" certification label to profit-motivated organisations, in the US and elsewhere, meeting B Lab's standards of transparency, accountability, sustainability, and performance. The privately issued B Corporation label does not reflect a company's legal status under company law. The B Lab website is https://bcorporation.net/.

[10] In 2013, Delaware's general corporation law added Subchapter 15 to provide for public benefit corporations. A public benefit corporation's board must manage or direct the company's business and affairs in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the company's conduct, and the public benefit identified in the company's certificate of incorporation. See Delaware General Corporation Law Section 365(a). Approximately two thirds of the US states have amended company law to provide for public benefit corporations under substantially similar terms as Delaware, in many cases labelled "benefit corporation" and not "public benefit corporation." This impact paper refers to such entities as "benefit corporation." A few states—California, Florida, and Washington—have provided for additional non-traditional corporation forms with different rules for balancing the stakeholders' interests: the "flexible purpose corporation" in California, and the "social purpose corporation" in California, Florida, and Washington.

[11] The new CEO, Josh Silverman, was a former Skype CEO who had joined the Etsy board in the fall of 2016. His outsider perspective and tough questions about profitability reportedly challenged the board to reevaluate how the company was being operated.

Lab. Etsy continued to publicly communicate its commitment to social and ecological as well as economic goals, but it was no longer a B Corporation.[12]

As of early 2021, Black-and-White Capital was no longer an Etsy shareholder, confirming its short-termism as an investor in Etsy.[13] Meanwhile, Etsy, neither a public benefit corporation under Delaware company law nor a labelled B Corporation certified by B Labs, continues to publicly communicate its commitment to social and ecological as well as economic goals.[14]

Danone, a French corporation (*société anonyme*), in 2015 formally began the process of seeking the B Corporation label for every part of its business worldwide.[15] Interestingly, the Danone US subsidiary's process was both similar to and different from Etsy's: Danone's US subsidiary first reorganised itself as a Delaware public benefit corporation, then obtained a B Corporation label.

In 2019, French company law was amended to enable a corporation to declare itself to be a "mission-driven company" (*entreprise à mission*). [16]

In 2020, Danone's shareholders approved the transformation of the parent company into a mission-driven company with an explicit commitment not only to economic performance for shareholders but also to social and environmental performance for other stakeholders such as workers, the community, the environment, and customers. At that point, 30% of the parent company's worldwide revenues were generated by subsidiaries with a B Corporation label.

In early 2021, activist investor Bluebell Capital, citing financial performance challenges, publicly called for both the replacement of Danone's CEO and the separation of the roles of CEO and board chair. [17] In March 2021, the Danone board both replaced the CEO, and separated the roles of CEO and board chair.

As of April 2021, Bluebell Capital is still a Danone shareholder, leaving open the question whether its interest in Danone has been short-termist or long-termist.

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[12] It should be no surprise that Etsy replaced its CEO, because a CEO running a company with higher commitments to ESG is nearly twice as likely to be dismissed when financial performance is poor, compared with counterparts at firms with lower commitments to ESG. See Tim Hubbard, Dane Christensen, and Scott Graffin, *Higher Highs and Lower Lows: The Role of Corporate Social Responsibility in CEO Dismissal*, in Strategic Management Journal (November 2017).

[13] Many shareholder loyalty programs, discussed below at footnote 36, would reward an investor for a holding period of two years, and the Black-and-White Capital holding period exceeded this 2-year threshold. This could superficially be interpreted to mean that Black-and-White Capital was long-termist, but the better view is that a 2-year holding period, while long enough to qualify the holder for a loyalty program award, is not long enough to characterise the holder as long-termist.

[14] See Etsy's website page "Guiding Principles" at https://www.etsy.com/mission.

[15] For an explanation of the B Corporation label, see footnote 9 above.

[16] As mentioned above at footnote 2, France's 2019 PACTE law added an Article 1835 (2) to the French Civil Code, not only allowing business corporations to set out their *raison d'être* in their bylaws, but also encouraging socially responsible business by enabling "mission-driven companies" (*entreprises à mission*) that declare their *raison d'être* to include the pursuit of social and environmental objectives beyond the financial well-being of shareholders.

[17] See for instance https://www.lesechos.fr/industrie-services/conso-distribution/lactiviste-bluebell-demande-a-danone-le-depart-de-son-pdg-emmanuel-faber-1282158 and https://investir.lesechos.fr/actions/actualites/danone-le-fonds-bluebell-critique-le-maintien-d-emmanuel-faber-a-la-tete-du-conseil-1951691.php.

Seven law-based tools and strategies that companies can use to manage the challenge of short-termist activist investors

All publicly traded companies, and not just benefit corporations and mission-driven businesses, need to anticipate the challenge of activist investors.[18] Nonetheless, the challenge for benefit corporations and mission-driven businesses is even greater, because of the additional concern of activist investors in such companies that financial performance is being sacrificed to social and environmental performance.[19] Prompted by the Etsy and Danone cases, this impact paper will now present seven law-based tools and strategies[20] that companies can use to manage the challenge of short-termist activist investors more interested in financial performance than social and environmental performance.

1. Prevent an activist investor's ESG-incompatible shareholder ballot proposal from reaching the ballot

A financially motivated short-termist activist investor might propose a shareholder ballot measure[21] that if adopted would place financial performance at a higher level than the company's social and environmental commitments. Where those commitments are rooted in the company's governing documents[22] (which is the case for benefit corporations and at least some mission-driven businesses), the company's board can prevent the ballot proposal from reaching the ballot.[23] This is a specific application of the general legal principle that the board need not place on the ballot a proposed measure that would have no legal effect (or would be subject to invalidation by a court) because it is "not a proper subject for action

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[18] See for instance the 2020 report on shareholder activism by the French public market regulator Autorité des Marchés Financiers (https://www.amf-france.org/sites/default/files/2020-04/report-by-the-autorite-des-marches-financiers-on-shareholder-activism_5.pdf), as well as the earlier 2019 French National Assembly committee report informally known as the « Woerth Report » and formally known as le rapport d'information de la commission des finances, de l'économie générale et du contrôle budgétaire de l'Assemblée nationale en date du 2 octobre 2019 (https://www.assemblee-nationale.fr/dyn/15/rapports/cion_fin/l15b2287_rapport-information). See also the 2020 comments by the chairperson of the American public market regulator Securities and Exchange Commission upon the adoption of a new rule raising the threshold on the amount of stock that investors must hold in order to place a measure on a shareholder ballot (https://www.sec.gov/news/public-statement/clayton-shareholder-proposal-2020-09-23).

[19] As noted above at footnote 12, a CEO running a company with higher commitments to ESG is nearly twice as likely to be dismissed by the board when financial performance is poor, compared with counterparts at firms with lower commitments to ESG. The implication is that company boards perceive financial performance to be compromised by attention to ESG objectives. It would be reasonable to conclude that activist investors also perceive this.

[20] Space constraints do not permit a fuller examination of law-based tools and strategies.

[21] French law allows shareholders to propose such measures if they own at least 5% of the share capital, with this percentage declining according to the size of the share capital. See Art. L225-105 and R225-71 of the French Commercial Code. In the US, there is now a 3-tiered system: a $2,000 threshold for a shareholder having maintained that level of holdings for at least three years; a $15,000 threshold for holdings of at least two years; and a a $25,000 threshold for holdings of at least one year. See Rule 14a-8 of the Securities Exchange Act of 1934.

[22] A company's governing documents are alternately known as foundational, formation, organic, or governance documents. They consist of the corporate charter (or articles of organization, articles of incorporation, or whatever other label may be used under the laws of a given place), analogous to a country's declaration of independence, plus the bylaws or similar statement of structures and processes for making decisions, analogous to a country's constitution. In some countries, these two types of document can be consolidated into a single document, as is the case in France with a corporation's *statuts*.

[23] Under French law, the board of directors of a corporation must at all times act within the limits and respect the corporate interest, and must respect the statutory clauses. French Commercial Code art. L. 225-35 al. 1er.

by shareholders" under company law.[24] An action contrary to the company's governing documents would by definition have no legal effect or be subject to invalidation by a court, so an ESG-incompatible shareholder ballot proposal would have no legal effect in the context of a benefit corporation (as well as a mission-driven business with ESG commitments in its governing documents).

For example, suppose that an activist investor proposes a merger of the company with another company for the sake of short-term shareholder value, and that such a merger would reasonably be expected to lead to the termination of a significant number of company employees (which could well be the source of short-term shareholder value). Suppose too that the activist investor proposes a ballot measure that if approved would require the company to pursue the merger. If the company's formal mission as articulated in its highest-level organic governing documents includes a commitment to employees, then the board could prevent the merger proposal from being placed on the ballot because the reasonably expected impact on employees would render the merger invalid under company law.[25]

A distinction needs to be made between a binding shareholder measure, which could be blocked from reaching the ballot for the reasons described above, and a non-binding advisory shareholder measure in which shareholders could express a desire for the proposed course of action while discretion remains with the board to decide what to do. Such non-binding measures (sometimes called "precatory" measures), while rare in Europe, are common in the United States, sometimes for strategy in general, and sometimes for specific policies (such as climate change transition plans, colloquially called "say on climate"). Under American law, a non-binding measure expressing a desire for the proposed ESG-incompatible merger would probably need to be placed on the shareholder ballot if the proposing activist investor meets the eligibility criteria for placing a measure on the ballot. Under the company law of most European countries, such precatory ballot measures proposed by activist investors could be kept off the ballot by the board.

Of course, every action has a reaction, and an activist investor who anticipates a board's rejection of a proposed ballot measure as incompatible with governing document commitments will predictably react with a 2-measure proposal. Measure 2 would be the desired action, such as the merger described above. First, though, would come measure 1 to amend the governing documents to permit the course of action in measure 2. Boards can take comfort in the fact that shareholder-approved governing document amendments are often subject to especially stringent requirements, such as supermajority thresholds for approval at specially called shareholder meetings with supermajority quorums.[26] Moreover, in the United States at least, company laws generally do not permit shareholders to propose a corporate charter amendment in particular—only the board of directors can propose a corporate charter amendment.[27]

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[24] For the relevant American securities law rule, see 17 CFR Section 240.14a-8. For the relevant French company law rule, see art. 1844-10 al. 3 combined with articles 1835 of the Civil Code and L.225-34 et L225-65 of the Commercial Code (never explicitly addressing the nullity of a resolution in conflict with a company's raison d'être or mission, but permitting such an interpretation).

[25] Even such a company could resort to layoffs under certain circumstances. The clearest example is where all employees are reasonably expected to lose their job unless at least some employees are laid off.

[26] Under French law there can be no modification of the *statuts* outside an extraordinary General Meeting of which the quorum is one quarter of the voting shares and the decision requires a majority of two thirds of the votes for shares present or represented. See French Commercial Code art. L.225-96.

[27] "Only the board of directors has the power to propose how to amend charters." Geeyoung Min, *Shareholder Voice In Corporate Charter Amendments*, in The Journal of Corporation Law Volume 43:2, page 289 (2018).

Companies with a strong ESG commitment not yet rooted in the company's governing documents may wish to amend the governing documents to become a benefit corporation or a mission-driven business specifically to be in a position to use the strategy described here. The strategy works only inasmuch as the activist investor's proposal would place financial performance at a higher level than the company's social and environmental commitments rooted in governing documents.

2. Prevent an activist investor's board-subordinating shareholder ballot proposal from reaching the ballot

Any activist investor, whether or not short-termist, and whether or not seeking to place financial performance at a higher level than the company's social and environmental commitments, might seek a binding shareholder ballot measure that would compel the company board to act in a certain way. In some cases, this is perfectly appropriate. However, in other cases such a binding measure would usurp the discretion reserved to the board under the company's governing documents and/or company law.[28] In such a board-subordinating situation, the board can prevent the ballot proposal from reaching the ballot. This is another specific application of the general legal principle that the board need not place on the ballot a proposed measure that would have no legal effect (or would be subject to invalidation by a court) because it is "not a proper subject for action by shareholders" under company law.

Suppose two examples. First, suppose the merger example given above. Where company law gives the board discretion to decide whether to pursue a merger, a binding shareholder measure directing the board to pursue the merger would usurp the board's discretion under company law.

Suppose an alternate example where an activist investor seeks to place a measure on a shareholder ballot directing the board to terminate the employment of the CEO. The governance system of most companies provides for the board, and the board alone, to make CEO recruitment, retention, and replacement decisions. In such a company, the proposed CEO-termination measure would rightly be seen as a usurpation of the discretion reserved to the board, and the board could justifiably refuse to place the measure on a shareholder ballot.[29]

3. Raise the threshold for pursuing activist investor methods

Certain activist investor methods, such as placing a measure on a shareholder ballot, require power rooted in the company's governing documents, applicable law, or a combination of the two. These sources of power typically grant such power only to shareholders holding a minimum threshold of outstanding shares. The higher the threshold is, the fewer the shareholders empowered to pursue the activist investor step.

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[28] Under Article L225-35 of the French Commercial Code, only the board of directors (or the supervisory board) can determine the orientations of the company's activity and oversees their implementation. Shareholder power is limited, and « "it is not for the general meeting to encroach on the prerogatives of the board. » See the founding ruling, Cass. civ., 4 June 1946, JCP 1947, II, 3518, with the observations of Bastian.

[29] "Say on pay" shareholder votes in France, with both binding and non-binding elements, are an exception rooted in specific legal authority: the decree of March 16, 2017 introducing two new articles in the Commercial Code (Art R. 225-29-1 and R. 225-56-1) in order to implement an EU directive. In the US, the Dodd-Frank Act provides for non-binding say on pay shareholder votes.

A company does not need to empower shareholders to become activists to a greater extent than the law requires. If the company's governing documents make very small shareholders eligible to place a measure on a shareholder ballot, even though the law would not require it, then the board can seek to raise the threshold as high as is permitted by law. This is especially relevant in the United States, where the SEC recently raised the threshold on the amount of stock that investors must hold in order to place a measure on a shareholder ballot.[30] If a company's governing documents continue to apply the superseded threshold, then that company is empowering shareholders to become activists to a greater extent than the law requires.

4. Strengthen dialogue with shareholders

Dialogue with shareholders is widely viewed as a key component to both corporate governance in general and the prevention of activist campaigns.[31] Under this view, a failed shareholder dialogue lies behind every activist campaign. Strengthening dialogue with shareholders would therefore be a worthwhile investment for all companies, whether the prevented activism concerns financial performance or social and environmental performance.

Strengthening dialogue is not, alone, a law-based tool or strategy. However, it is highly circumscribed by the law. Securities laws generally prevent companies from sharing material nonpublic information with anyone, especially selected shareholders, without simultaneously disclosing the information to the entire world (for instance through a filing with a public agency).[32] Companies have competing priorities, then: comply with the law by not sharing material nonpublic information with shareholders with whom they seek to strengthen dialogue; and strengthen the dialogue through meaningful communication.[33]

5. Monitor who is becoming a major shareholder

Strengthening dialogue is possible only when one's dialogue interlocutor is identifiable. However, activist investors sometimes seek to accumulate shares anonymously, revealing themselves to be significant shareholders only when they decide that the time is right. Companies wishing to know who might become an activist, in order to have a dialogue with them, can monitor the reality in two ways.[34]

First, the board can choose to issue shares that are registered with the company (an approach long used in the United States).[35] Alternately, if the company issues bearer shares

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[30] See footnote 18 above.

[31] "The Commission noted the unanimous view among the people it interviewed that shareholder dialogue is the best way to prevent activist campaigns." Club des Juristes working group chaired by Michel Prada, *Shareholder Activism*, page 13 (November 2019) (https://www.leclubdesjuristes.com/wp-content/uploads/2019/11/Shareholder-Activism-Le-Club-des-juristes-nov.2019.pdf).

[32] See, for example, Regulation Fair Disclosure (Reg FD), an SEC rule intended to prevent selective disclosure of material information by public companies.

[33] Recent research suggests that portfolio managers find meetings with companies to be useful, judging by trading activity shortly after such meetings. See Marco Becht, Julian Franks, and Hannes Wagner, *The Benefits of Access: Evidence From Private Meetings With Portfolio Firms*, a European Corporate Governance Institute Finance Working Paper posted April 21, 2021 (https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3813948).

[34] A company might also choose to know the identity of its larger shareholders simply to avoid surprises.

[35] The US also requires quarterly disclosure filings with the SEC by institutional investment managers with at least $100 million in assets under management, to provide broader transparency on the holdings of the nation's biggest investors. See SEC Rule 13-f.

(an approach still common in Europe), then the company can periodically ask the central securities depository Euroclear to make and provide a list of shareholders.

6. Induce shareholder longer-termism

Companies can award additional voting and/or financial rights in exchange for a defined shareholding period.[36] Such shareholder loyalty programs are increasingly common, [37] typically with a 2-year holding period to qualify for a loyalty program award. This may be longer than the holding period for some short-termist investors, but it is still too short for the investor to be considered long-termist. This impact paper therefore uses the relative term *longer*-termist: shareholder loyalty programs induce *longer*-termism, but not necessarily *long*-termism.

7. Invite the activist investor to join the board

A company board can propose an activist investor as a candidate to join the board.[38] At first glance, this may seem surprising: why would a board try to give power to an activist investor who is publicly calling for decisions that the board has been unwilling to make? And why would a board, committed to ESG objectives, try to give power to an activist investor apparently motivated by financial considerations above all others?

The answer is based on the duties that go along with the powers of a company director. An activist investor, as an investor, has the freedom to be self-centered, with extremely limited duties to the company and its various stakeholders. In contrast, the activist investor, upon joining the board of directors, acquires duties to the company and at least some of its stakeholders that can be fulfilled only by abandoning the activist role. Importantly, where the company's ESG commitments are rooted in governing documents (as will be the case in a benefit corporation or mission-driven business), the board has a duty to uphold such ESG commitments. Board member duties will thus transform a short-termist financially motivated activist investor who joins the board of any corporation, and especially the board of a benefit corporation.

An investor on the board can still hold opinions that run counter to the board majority, and can still seek to persuade the board majority to change its views. However, ongoing activist investor activities would be a violation of various director duties and norms, starting with the duties of confidentiality and collegiality as well as the fiduciary duty.

Whether the activist investor would be a good addition to the board is a separate question. At least some corporate leaders view activist investors as a highly motivated source of potentially good ideas.[39]

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[36] For such preferential shares in French corporations, see articles L.225-122 and L.225-123 of the French Commercial Code.

[37] See A. Couret, *Le droit de vote double* in Bulletin Joly Bourse, October 2014, p. 488.

[38] The process by which publicly traded company board members are nominated and elected varies with custom, applicable company law, and applicable securities law. The existing board typically plays a crucial role in determining the candidate slate.

[39] Former PepsiCo CEO Indra Nooyi, a board member of US-based Amazon, and as of the writing of this impact paper a soon-to-be board member of Netherlands-based Phillips, has described working with an activist investor at PepsiCo as 'free consulting." See Freakonomics podcast interview with Indra Nooyi (https://freakonomics.com/podcast/indra-nooyi/).

Another question is whether the activist investor would agree to join the board and abide by the constraints on activism. There would be few better ways for an activist investor to demonstrate commitment to the creation of long-term value than by joining the board.

Conclusion

The goal of this impact paper is to help publicly traded benefit corporation leaders manage the challenge of short-termist activist investors more interested in financial performance than social and environmental performance. To that end, this impact paper proposes seven selected law-based tools and strategies. Some of the tools and strategies limit activist investors, potentially giving the impression that limiting activist investors is pro-ESG. However, this is not necessarily so. After all, some activist investors are decidedly pro-ESG.[40]

Moreover, insulating a company board from activist investors is not necessarily desirable. Under certain circumstances, activist investors play an important role that most people would praise, whether for financial reasons or social and environmental reasons. For that reason, this impact paper does not call for overly stringent limitations on the power of investors to take activist investor steps such as placing a measure on a shareholder ballot. Reasonable people have long disagreed over where the line is drawn separating "overly stringent" from "appropriate." The policy debate will continue, and legal reforms will follow.

A follow-up paper can examine possible reforms in both hard law and soft law.

[40] Consider, for instance, US-based investment fund Engine No. 1, "pressing energy giant Exxon Mobil Corp to overhaul itself by focusing more on clean energy to improve its financial performance." Svea Herbst-Bayliss and Gary McWilliams, *Exxon faces proxy fight launched by new activist firm Engine No. 1*, Reuters, December 17, 2020 (https://www.reuters.com/article/exxon-shareholders-engine-no-1-idUSKBN28H1IO).